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BRADY “EPIDEMIC” MISDIAGNOSIS:
A Careful Analysis of Prosecutorial Misconduct Claims and the Appropriate Sanctions Available to Punish and Deter

A California District Attorneys Association Foundation White Paper

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by

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INTRODUCTION

The media, professors of law, pundits, and a presiding federal circuit court judge all rage loudly against a perceived excess of prosecutorial misconduct across the land, chiefly due to violations of *Brady v. Maryland*.

Prosecutors—the vast majority of whom embrace the obligation to provide favorable evidence to the defense—cringe. A January 4, 2014, Sunday editorial in the *New York Times* screams: “Rampant Prosecutorial Misconduct,” and heightening the outcry are recent, spectacular examples of failed prosecutions (e.g., the botched 2008 federal corruption trial of former Alaska Senator Ted Stevens) and unethical prosecutors in high-profile cases (Mike Nifong, disbarred in 2007 after the Duke University lacrosse rape scandal prosecution). This drumbeat of constant criticism—some warranted, some not—has produced a public perception of prosecutorial excess and created a clamor to clamp down on the zeal exhibited by our public safety officials. But is the perception entirely accurate? Is the clamor completely warranted? Is there truly an epidemic of prosecutorial *Brady* violations in the criminal justice system?

This white paper closely examines the duty of the prosecutor and the police to disclose favorable evidence to a criminal defendant—an obligation known as the *Brady* duty. It analyzes all 29 cases federal Judge Alex Kozinski cited in *United States v. Olsen* to support his damning claims of rampant misconduct—exposing the layers of many of those cases to reveal a more nuanced truth: Integrity in the prosecution of our nation’s crimes is largely intact.

The majority of prosecutors are ethical and understand that any *Brady* violation creates an injustice. That overwhelming majority deems intentional withholding of favorable evidence from the defense as unconscionable—but it happens. There is error, and there are some individuals unworthy of the high calling of prosecutor. For this reason, the most egregious examples noted in *Olsen* are exposed in this paper to highlight the difference between simple error and true intentional misconduct.

“There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it.”

—Chief Judge Alex Kozinski of the Ninth Circuit U.S. Court of Appeals in his dissent in *United States v. Olsen*
Finally, this paper explores the available and appropriate sanctions such as case reversal, bar discipline, and even criminal prosecution for the few outliers whose misconduct truly deserves opprobrium. We will also look at ideas for out-of-the-box sanctions such as jury instruction, trial judge-prosecutor Brady colloquy, and “shaming by naming” as remedies to prevent error or misconduct before trial. Unfortunately, sanctions function only after a prosecutor is charged with misconduct or error, so while punishment sometimes is necessary, prevention must be our true goal. To that end, vigorous ethical training and the universal adoption of best practices is the best way to prevent violations and restore the good name of a noble profession.

**Brady Duties and Professional Ethical Standards for Prosecutors and Law Enforcement**

More than 50 years ago, United States Supreme Court Justice William O. Douglas penned a five-page decision that would alter the course of criminal prosecutions. The case involved John L. Brady and his co-defendant Charles Donald Boblit, who were tried, convicted, and sentenced to death by the State of Maryland for a murder committed during a robbery. Defendant Brady testified, claiming Boblit did the actual killing; his counsel conceded guilt, but sought a life verdict from the jury, requesting the opportunity to examine any extrajudicial statements of Boblit in the possession of the prosecution. Several statements were indeed provided, but one was withheld until after trial. In the single withheld statement, Boblit admitted the actual homicide.

The Maryland Court of Appeals affirmed Brady’s conviction, but remanded for a re-trial solely on the question of punishment, finding the prosecution’s suppression of Boblit’s statement denied Brady due process of law. With no wasted ink, the United States Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”

Brady’s relatively narrow ruling has expanded considerably over the years, increasing the prosecution’s burden to ensure a fair trial for the defendant. For example, prosecutors must now not only disclose evidence that directly exonerates a defendant, but also must disclose evidence that can be used to impeach a witness. Note: A prosecutor’s obligation to disclose is self-executing and does not require a defense request—meaning prosecutors must sometimes guess whether evidence they consider tangential might nonetheless be considered favorable by the defendant.

Most significantly, “the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government’s behalf in the case, including the police.” This final rule, expanding the prosecutor’s Brady duty to information possessed by any member of the “prosecution team,” significantly increases a prosecutor’s duties. Therefore, a prosecutor who does not diligently examine police investigative files, or vigorously question police or other official witnesses to ensure they have provided all materials favorable to the defense, is at great risk of a Brady violation. The prosecutor was personally unaware of the contested evidence (except through the constructive duty to know established by Kyles ) in nearly 25 percent of the case reversals cited by Judge Kozinski in his Olsen dissent as a Brady “epidemic.”

Regardless of the type or source of evidence, the basic elements of a Brady claim are well established:

“The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.”

The final element, prejudice, is most often discussed in terms of the materiality of the suppressed evidence, or as noted by the California Supreme Court: “The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” Put another way, it is a probability sufficient to “undermine[] confidence in the outcome.” Cases where the defense alleges Brady error, but where the courts find none, often turn on the lack of materiality. This was the case in Olsen: The three-judge panel’s opinion that Judge Kozinski wished to rehear found the suppressed evidence was not material, and thus affirmed the defendant’s conviction.

However, it is not an acceptable prosecution strategy to hope to argue on appeal that negligently (or worse, intentionally) suppressed evidence was not material. Instead, ethical prosecutors must search diligently for favorable evidence and disclose it before trial, thus avoiding the violation and appellate issue entirely. It is
also consistent with the United States Supreme Court’s ultimate advice on the issue: While there is no Brady obligation to “communicate preliminary, challenged, or speculative information,”13 “the prudent prosecutor will resolve doubtful questions in favor of disclosure.”14 “The best strategy is to take to heart and consistently practice under the maxim noted by the Supreme Court in Berger v. United States:

[The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he [or she] is … the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He [or she] may prosecute with earnestness and vigor—indeed, he [or she] should do so. But, while he [or she] may strike hard blows, he [or she] is not at liberty to strike foul ones.”15

Brady is not the only source of a prosecutor’s duty to disclose information to the defendant. California prosecutors also have a statutory discovery obligation, codified in Penal Code section 1054.1, which sets forth six categories of information that must be disclosed to a defendant:

(a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.
(b) Statements of all defendants.
(c) All relevant real evidence seized or obtained as part of the investigation of the offenses charged.
(d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.
(e) Any exculpatory evidence.
(f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses who the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.

These disclosures must be made no later than 30 days before trial. The key element relevant to this discussion is item (e) “Any exculpatory evidence,” which is broader than the Brady mandate of material exculpatory evidence.16

If the 29 state and federal cases Judge Kozinski string-cites in Olsen as his Brady “epidemic” material, the trial prosecutor was personally unaware of the contested evidence—except through the constructive duty to know established by Kyles—which accounted for nearly 25 percent of the case reversals.

The third source of a prosecutor’s discovery duties, beyond Brady’s constitutional mandate and our state criminal discovery statutory duty, is the ethical duty imposed by the Rules of Professional Conduct upon all California attorneys. Rule 5-220 [Suppression of Evidence] requires that “A member shall not suppress any evidence that the member or the member’s client has a legal obligation to reveal or to produce.” In disciplinary proceedings, the State Bar of California often avoids making a determination about constitutional violations if an identical ethical violation can serve as the basis for discipline.17 The Rules of Professional Conduct also counsel against misleading a jury, trial judge, or appellate court, which includes misleading information with respect to information that is subject to discovery. Rule 5-200 mandates that in presenting matters to any tribunal, an attorney:

(A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth; [and]
(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law.
State law imposes other ethical duties as well, including the obligation found in Business and Professions Code section 6068(a) “[t]o support the Constitution and laws of the United States and of this state.” When a court reverses any judgment based even in part on misconduct, such as a willful misrepresentation by an attorney (including a prosecutor), the court must notify the State Bar. In addition, the attorney whose conduct caused that reversal has an independent duty to self-report the misconduct to the State Bar within 30 days.

Other ethical standards in our profession, although advisory, reinforce these obligations. For example, the National District Attorneys Association (NDAA) created the National Prosecution Standards as a guide for prosecutors when performing their day-to-day duties. Standard 2-8.4 [Disclosure of Exculpatory Evidence] advises prosecutors to “make timely disclosure of exculpatory or mitigating evidence, as required by law and/or applicable rules of ethical conduct.” Standard 4-9.1 [Prosecutorial Responsibility] further encourages each prosecutor to,

at all times, carry out his or her discovery obligations in good faith and in a manner that furthers the goals of discovery, namely, to minimize surprise, afford the opportunity for effective cross-examination, expedite trials, and meet the requirements of due process. To further these objectives, the prosecutor should pursue the discovery of material information, and fully and promptly comply with lawful discovery requests from defense counsel.

The American Bar Association (ABA) also developed its Model Rules of Professional Conduct. Although these rules have not been adopted in California, they are of advisory value. Rule 3.8 [Special Responsibilities of a Prosecutor] requires prosecutors in criminal cases to “(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense….”

To assist prosecutors in knowing and understanding each of these rules and their nuances, the California District Attorneys Association (CDAA) publishes its Professionalism manual. Chapter V: “Discovery Rules for Prosecutors,” was authored by L. Douglas Pipes, Senior Deputy District Attorney (Retired) from Contra Costa County. This discovery chapter alone is 40 pages long, and contains a recitation of prosecutors’ obligations and the statutory and case authorities to rely on in criminal prosecutions, including an extensive discussion of obligations under Brady.

In short, prosecutors are well aware of their discovery obligations under Brady, and if sidestepped—negligently or intentionally—significant sanctions for failing to meet those obligations can be imposed.

Epidemic or Exaggeration: Analyzing the “Kozinski 29” as Proof of an “Epidemic” and Placing the Numbers in Broader Context

The Olsen Dissent

In United States v. Olsen, the Government failed to discover prior incidents of professional incompetence by a forensic scientist. The court found that the evidence was favorable to the defense, but was not material because it was not reasonably probable that it would have affected the outcome.

The defendant filed a petition for rehearing en banc, which was denied. Chief Judge Alex Kozinski, joined by four other judges, filed a dissent from the denial of rehearing en banc. In the dissent, Kozinski wrote:

There is an epidemic of Brady violations abroad in the land. Only judges can put a stop to it.

I wish I could say that the prosecutor’s unprofessionalism here is the exception, that his propensity for shortcuts and indifference to his ethical and legal responsibilities is a rare blemish and source of embarrassment to an otherwise diligent and scrupulous corps of attorneys staffing prosecutors’ offices across the country. But it wouldn’t be true. Brady violations have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend.

In support of his assertion, Kozinski provided a string-cite of 29 state and federal cases (the “Kozinski 29”) between 1998 and 2013. See Appendix A for a complete list of the Kozinski 29.
The New York Times Editorial

The January 4, 2014, Sunday editorial in the New York Times by the paper’s editorial board was angry. Its title alone, “Rampant Prosecutorial Misconduct,” suggests that unethical prosecutors are the norm in courtrooms. Its first paragraph noted the 1963 Brady opinion and urged prosecutors to “play fair, not just to win.” The rest of the editorial quoted extensively from Judge Kozinski’s month-old dissent in Olsen. The Times cited studies showing courts punish misconduct in less than two percent of cases where it has occurred, and then only with “a slap on the wrist, such as making the prosecutor pay for the cost of the disciplinary hearing.” Exoneration statistics were trotted out to claim 43 percent of wrongful convictions resulted from official misconduct. It was also claimed that with prosecutors so focused on defendant guilt, they have little incentive to turn over exculpatory evidence, especially since there are few consequences for any breach of their discovery duties. The editorial ended exhorting the fight against prosecutorial misconduct, as “the foundation of the rule of law.”

It is a bit daunting to take on the nation’s newspaper of record in all its collective righteousness, especially when it appears backed by the courts and serious studies. However, there are as many structural problems in the editorial as the editorial itself claims for the structural nature of the Brady problem. It conflates court treatment of misconduct with state bar association disciplinary hearings, and cites only favorable statistics supporting its cause, and then incompletely. The editorial proceeds from the assumption that such Brady violations are indeed “epidemic,” “rampant,” and “surely the tip of the iceberg.” As will be further discussed, other exoneration studies show the numbers to be infinitesimally small, when properly compared to all convictions during the period of exonervations studied.

The Kozinski 29: Analysis

The Kozinski 29 can be analyzed in a number of useful contexts. At the macro level, we can note that 20 of the cases (69%) are state prosecutions, three of which (10%) are from California. These state cases were often resolved in federal court on writs of habeas corpus after state appeals had run their course; but it is useful to note their state origin, as they involve county prosecutors. The remaining nine cases (31%) originated in federal court and involved Assistant United States Attorneys (AUSAs) as the prosecutor(s) facing a Brady claim.

Exhibit 1 highlights a more significant breakdown of the cases and looks at the categories of evidence the

Exhibit 1: Categories of evidence suppressed in the Kozinski 29.
The most telling analysis of the 29 cases distinguishes the manner of (or cause behind) the suppression. Any evidence suppressed by the government—if favorable to the defense and material to the outcome—constitutes a *Brady* violation. However, whether the suppression was done intentionally, recklessly, or negligently makes a moral, or at least analytical, distinction. The manner of suppression informs both the opprobrium to which an honest researcher can attach to the prosecution, and the sorts of remedies to correct against future abuse.\(^2^9\) The manner of suppression also draws a line between prosecutorial “misconduct,” as is universally decried, and mere “error.” Looked at through this final lens, we can discern five *manner of suppression* categories and their statistical presence among the 29 sample cases:

- **Intentional**—where the prosecution was aware of exculpatory or impeaching evidence, yet willfully withheld it from the defense [13 cases or 45%].
- **Reckless**—where the trial prosecutor was not personally aware of the favorable evidence, but willfully ignored his or her duty to search out such evidence in the files of his or her own office or partner investigative agencies [4 cases or 14%].
- **Negligent**—where the prosecution was unaware of the favorable evidence because it was either actively withheld from it by a law enforcement partner or the evidence was hidden in an unrelated investigation [7 cases or 24%].
- **Prosecutor Knowledge Uncertain**—no definitive conclusion as to the manner of suppression [4 cases or 14%].
- **None**—where the final decision was reversed on appeal post-*Olsen*, thus finding no *Brady* violation [1 case or 3%].

A discussion of a representative sampling of each of these categories follows.

### Intentional Suppression—The Most Egregious


The *Brady* violations in *Dollar* demonstrate contempt not only to the defense and to the court, but also to the concept of fair play itself. The defendants were federally licensed firearms dealers who were charged with conspiracy to defraud the government by concealing the identity of firearms buyers (i.e., that they facilitated illegal straw purchases). The defense filed pre-trial discovery motions that resulted in a court order for discovery. Although the Government disclosed—in response to the court order—impeachment material (e.g., conviction records) for 12 of its witnesses, it failed to disclose that any of the witnesses had given statements inconsistent with their anticipated trial testimony. Two days before the trial, the Government provided voluminous new discovery. The defense asked for a trial continuance and an evidentiary hearing on discovery, which the court granted. At that hearing, the Government conceded that one of its late reports supported the inference that one of the defendants may not have even been aware of the straw purchases. The AUSA also conceded that he was not certain if all *Brady* material had been turned over to the defense, but promised the court that all *Brady* material would be turned over by close of business within two days.
Though the trial began four months later, many of the inconsistent, pre-indictment statements had still not been provided to the defense. During trial, two Government witnesses admitted on cross-examination that they had given statements to an ATF special agent. This admission finally prompted the Government to produce the agent’s notes, which largely exonerated the defendants. The witnesses, however, denied making the inconsistent statements, and the agent was unavailable to testify.

At the conclusion of the Government’s case, and before submission of the case to the jury, the federal district court dismissed the indictment with prejudice. The court’s holding was that the Government failed to establish a prima facie case of conspiracy, or to produce sufficient evidence that the defendants had a duty to disclose the matters alleged to have been concealed. Moreover, the Government “flagrantly, breached its unquestioned obligation to produce exculpatory and impeachment materials imposed by Brady.”

The district court’s opinion minced no words. The court accused the Government of having “trampled on (the defendant’s) constitutional right to Brady materials,” and of having “breached the duty of professionalism and candor owed to the court.” If not for the fact that the prosecutor’s office had recently implemented new discovery policies, even harsher sanctions may have been implemented.

**United States v. Lyons** (M.D. Fla. 2004) 352 F.Supp.2d 1231

The U.S. District Court called Lyons, “a prosecution run amuck.” The defendant, a respected businessman in his mid-40s with no criminal history, was targeted by federal authorities as a drug kingpin in Orlando, Florida. Although pen registers, wiretaps, and a house search turned up no drug evidence, the Government secured an indictment by presenting the grand jury with the statements of 13 prison informants. The Government was also able to convince a district court judge to order a pre-trial incarceration for the defendant that lasted 33 months.

The Government’s trial case was primarily built on the testimony of 29 witnesses—all of whom were in custody for drug felonies. Although half of the witnesses had received sentencing reductions as a result of their previous cooperation, this fact was not disclosed to the defense, and the witnesses each denied that they had received or had been promised any favorable treatment.

After his conviction, Lyons secured a new trial by proving to the district court that the Government violated its *Brady* obligation by failing to disclose evidence about one of its key witnesses, David Mercer. By suppressing that evidence, Lyons was deprived of an effective means to undermine Mercer’s testimony, which linked Lyons to approximately 70 drug transactions and 340 kilograms of crack cocaine. The court also found that the Government violated *Giglio* by knowingly allowing Mercer to testify falsely, and by going so far as to cover up evidence that would have revealed some of his testimony as false. Ultimately, the original prosecutor was removed from the case, and the Government conceded that it had failed to disclose *Brady* material on a number of its witnesses. The Government moved to dismiss the jury’s verdict on the drug conspiracy count, but argued that the remaining convictions were untainted.

Upon review of the entire record, the district court found that the Government’s misconduct pervaded the remainder of the case. “[M]yriad violations that collectively reveal a prosecution run amuck,” included:

1. Suppression of evidence suggesting two key witnesses had not purchased drugs from the defendant.
2. Evidence that the defendant’s alleged highest volume drug supplier had been arrested in connection with another investigation that did not involve the defendant.
3. Evidence that contradicted witnesses who testified falsely.
4. Evidence that another key witness—who denied receiving any benefit—was the subject of a motion filed to reduce his sentence by 50 percent.

The district court’s holding was succinct: “The Government cannot now change the fact that, through aggravated violations of its prosecutorial duties, it destroyed [the defendant’s] character and credibility.” The Government’s *Brady* and *Giglio* violations tainted all remaining counts, destroying any confidence in the jury’s verdicts. Finding egregious prosecutorial misconduct, the court dismissed all remaining counts with prejudice.

**Douglas v. Workman** (10th Cir. 2009) 560 F.3d 1156

Of the state cases cited by Judge Kozinski, *Douglas* is the most egregious. Oklahoma defendants Douglas and Powell were tried separately, convicted of first-degree murder, and sentenced to death. Derrick Smith was the key witness at both gang-related trials in the mid-1990s. Years later, Smith recanted his identification of both defendants, alleging that the state prosecutor, Assistant District Attorney Brad Miller, had induced perjured testimony from him in
exchange for favorable treatment that Smith had previously denied during his testimony.

The Tenth Circuit noted numerous problems with Smith's testimony and treatment. In addition to making several inconsistent and confusing statements to the police, Smith was a repeat criminal offender who had, prior to trial, received favorable treatment in at least two cases. Smith denied this favorable treatment at trial and denied that he expected Miller to support his application for parole. At trial, Miller emphasized the lack of any quid pro quo for Smith as evidence that his testimony was trustworthy. But just one day after Douglas's trial, Miller sent a letter to the parole board supporting Smith's parole application. After Powell's conviction, Miller contacted the warden about lost credits, and Smith had 400 days of credit restored, effectively discharging his prison sentence. During the Douglas and Powell appeals process, Smith continued to receive favorable treatment from Miller: dismissal of two shooting cases and an unusually lenient deal in a subsequent Texas murder case.

In his recantation affidavit, Smith alleged that he told Miller he could not identify any of the shooters, and would not testify against either of them unless he received help with his pending charges.

The Tenth Circuit found numerous violations of Brady and Giglio, and noted the inference of a quid pro quo was inescapable and infected both cases—thus, both defendants were entitled to relief. Douglas and Powell were freed 16 years after the crime, and the State of Oklahoma declined to retry either defendant.

The Tenth Circuit Court of Appeals censured the willful and “egregious” prosecutorial misconduct and fraud perpetrated on the defendants and the courts. In June 2013, the Oklahoma Supreme Court suspended Miller from the practice of law for 180 days and assessed a $12,834 fine for his “reprehensible” conduct. The supreme court's opinion imposing discipline was a 5-2 decision, with the two dissenters wanting to disbar Miller, noting that his actions “take us into the dark, unseen, ugly, shocking nightmare vision of a prosecutor who loves victory more than he loves justice.”

Reckless Suppression—The High Price of Indifference

Aguilar v. Woodford (9th Cir. 2013) 725 F.3d 970

Aguilar’s Los Angeles conviction for murder was based almost entirely on identification by a scent-tracking dog named “Reilly.” The case represents a curious anomaly that would be somewhat humorous were it not so shockingly sad and consequential.

Reilly’s alert was the only evidence connecting Aguilar to the car from which the fatal shot was fired. There was no physical evidence tying Aguilar to the crime, and the eyewitness identifications were questionable. Moreover, there was substantial evidence pointing to another person as the shooter—evidence the prosecutor instructed police not to pursue. Instead, the prosecutor relied on Reilly, eliciting from the dog’s deputy sheriff handler simply that the deputy was aware of Reilly’s performance in earlier gang-related homicides. However, in prior cases, Reilly had identified two different men as the source of a scent on a murder suspect’s shirt; a year earlier Reilly identified the crime perpetrator as a man who had been in prison at the time of that crime.

The trial judge in the prior homicide case ruled that the dog-scent lineup was inadmissible because the procedures Reilly’s handler had used were flawed. Following that case—and before Aguilar—the Los Angeles County Public Defender wrote the then-Los Angeles County District Attorney that such a court ruling constituted Brady discovery and should be available to every defense attorney who represents a defendant in a case where Reilly’s handler presents evidence regarding Reilly’s scent detections. The prosecutor in the case also stipulated to the mistaken scent identification by Reilly.

Defense counsel in Aguilar learned of Reilly’s poor performance post-trial and argued it on appeal, but the California Court of Appeal affirmed the conviction, finding no Brady violation. The California Supreme Court denied review, and a subsequent defense habeas corpus petition was denied in the United States District Court.

Eleven and a half years later, the Ninth Circuit disagreed, finding that the prosecution’s failure to disclose the evidence of past mistaken identification by the dog was unmistakable Brady error. Reilly’s erroneous scent identifications were exculpatory evidence, and the prosecution had imputed knowledge of such evidence based on the prior court proceedings, a letter from the Los Angeles County Public Defender to the then-Los Angeles County District Attorney about the issue, and the fact that Reilly’s handler was the same deputy in each instance, so he was unquestionably aware of Reilly’s past mistakes. While the current trial prosecutor may have been unaware of the information personally, any such lack of knowledge was due either to insufficient questioning of the handler or to a deliberate scheme on the part of the
handler to conceal the information. Either way, the trial prosecutor had a duty to learn of exculpatory evidence, both in his office’s files generally and in those of his sheriff partner.

The Ninth Circuit determined that the suppressed evidence about Reilly undermined the court’s confidence in the murder verdict as it was “virtually certain that the trial judge would have ruled as the trial judge [in White] by excluding the evidence of Reilly’s scent identification.”

Reilly’s previous incorrect scent identifications as evidence would have been a strong impeachment component had it been ruled admissible at trial, since the jury was instructed to weigh the proven ability of the dog, yet had no reason to question the accuracy of his identification of the defendant, based on current testimony.

**Negligent Suppression—Unknowing but Still Undone**


Pena was arrested in Waco after a routine traffic stop uncovered more than five but less than 50 pounds of marijuana. The vehicle stop, detention, and ride to the police station were all recorded by the patrol car’s dashboard camera. The defense’s copy of the video had no sound, and the officer said the missing sound was due to a malfunction; the prosecution also told the defense there was no sound available. The defense requested an opportunity to conduct its own analysis of the plant material. However, the crime lab insisted it had received an order of destruction and destroyed the material about a year earlier. Unfortunately, the order of destruction as well the file containing the case notes was also destroyed. The defense argued that the plant material was actually hemp, not marijuana. Prosecution experts refuted the point and argued that the defense did not even seek to test the substance for a year and a half.

After closing arguments, as both the case prosecutor and defense attorney were cleaning up in court, someone hit the “play” button on the dash-cam video shown in court. To everyone’s surprise, the video had sound from the time Pena had been placed in the patrol car until his arrival at the station. This audio was significant because the defendant had repeatedly asserted at the time of his arrest that the plant material was not marijuana and asked the trooper to have it tested. At a new trial motion—which was denied—the prosecutor testified that he did not know the audio portion of the videotape existed until he discovered it with defense counsel after closing argument.

The Texas Court of Criminal Appeals reversed the defendant’s conviction and remanded for a new trial. The prosecutor’s lack of knowledge did not excuse the duty to provide the audio portion of the tape to the defendant, but as the violation was unintentional, there was no further sanction.

*Harris v. Lafler* (6th Cir. 2009) 553 F.3d 1028

Harris was convicted in Michigan of two counts of second-degree murder and sentenced to 52–77 years in prison. At Harris’s trial, his friend Ward, who had also been involved in the fight that prompted the shooting, was the prosecution’s key witness and the only eyewitness to the shooting. At trial, Ward testified that Harris was the shooter.

After trial, the defense learned that the police had secured false testimony from Ward in exchange for favorable treatment for Ward and his girlfriend. After his arrest, police told Ward they would release his girlfriend—who had also been arrested—if Ward gave a statement about the shooting. On the day of Harris’s preliminary examination, police told Ward that if he testified consistently with his statement implicating Harris, he would be released; he should also deny having been promised anything in exchange for his testimony.

The Sixth Circuit Court of Appeals held that the prosecution’s failure to produce these police statements to Ward left the defendant’s counsel with nothing to challenge Ward’s credibility. The court stated, “it makes no difference that the prosecutors did not know about the police officers’ statements. ... [P]rosecutors [have] a duty to learn of favorable evidence known to others acting on the government’s behalf.”

*State v. Youngblood* (W.Va. 2007) 221 W.Va. 20

Youngblood was convicted in West Virginia of sexual assault and weapons charges involving another male, Pitner, and a 16-year-old victim. After his conviction, which resulted in a sentence of 26–60 years in prison, the defense discovered a note left at Pitner’s house on the night of the assault. The note suggested that the victim had engaged in consensual sex and wished to thank Youngblood for the experience. The note had been found by the owner of the house, who gave it to a state trooper serving a warrant on the house. The trooper read the note, then instructed the homeowner to destroy it.
The Supreme Court of Appeals of West Virginia reversed the conviction and remanded for a new trial, holding that the *Brady* obligation covers information in the possession of the police even if the prosecutor is unaware of it. Police knowledge of impeachment evidence is imputed to the prosecutor, even here in the troubling circumstances of when a state trooper actively sought to hide the evidence.

**Duley v. State** (Mo.Ct.App. 2009) 304 S.W.3d 158

Duley was convicted of second-degree murder for a 2003 Kansas City banquet hall shooting where a 17-year-old girl was killed. He received a prison sentence of life plus 186 years. Two sets of shell casings were found at the scene. The set found outside the dance hall matched a set of casings found at Duley’s home. No weapons were ever recovered. Initially, six witnesses identified Duley as the shooter, but before trial, all six had recanted. Their inconsistent statements were presented to the jury. Duley presented witnesses on his behalf who all testified that Duley had not been the shooter.

After trial and appeal, a police report was discovered in which a witness identified another person as the shooter and stated Duley had not been the shooter. Though this witness had been identified as having been present at the scene, he had not otherwise been interviewed in connection with Duley’s case. The interview was part of an investigation into an unrelated crime and was taken by a Detective Babcock who was not part of the team investigating Duley’s case. Detective Babcock had, however, provided a highlighted copy of his interview report to the detectives who were working Duley’s case—five months before Duley’s trial.

The prosecutor testified at a post-trial evidentiary hearing that he had not seen the report until it surfaced in Duley’s post-conviction petition. However, the report was material to the trial’s outcome, and its suppression violated *Brady*, notwithstanding the inadvertent failure by the state to disclose it. The trial court vacated the conviction and granted a new trial, which the Missouri Court of Appeals affirmed.

**Prosecutor’s Knowledge Uncertain—The Jury Is Still Out**

**United States v. Sedaghaty** (9th Cir. 2013) 728 F.3d 885

Sedaghaty was convicted at jury trial (in Oregon federal court) of tax fraud for allegedly declaring that charitable donations had been used to purchase a mosque, when in fact the money had been sent to aid terrorists in Chechnya. The prosecution relied extensively on the testimony of Barbara and Richard Cabral, two former members of a prayer house founded by the defendant. Barbara Cabral was crucial to establishing the element of willfulness and supplying the only direct evidence of the defendant’s alleged desire to fund the Chechen mujahideen.

After trial, but before sentencing, the prosecution voluntarily disclosed that they had failed to produce 12 interviews between FBI agents and the Cabrals that revealed the FBI had paid Richard Cabral a total of $14,500 over the course of the investigation; that Barbara Cabral had been present for at least one of those payments; and that the FBI had made an offer of payment to Barbara Cabral before trial when she was experiencing financial difficulty. The case agent was aware of these payments and offers prior to trial, but the record does not establish when the prosecutor became aware of the evidence. Thus, the Ninth Circuit acknowledged, “there [was] no convincing evidence of bad faith on the part of the prosecution.”

Regardless of the prosecutor’s personal knowledge, the withheld reports were material for *Brady* purposes and could have been used to impeach Barbara Cabral on cross-examination to establish a potential bias and flawed memory on her part (or, at worst, a deliberate false story to obtain money). For this reason, the conviction was reversed, and the case remanded for a new trial.

**No Suppression—No *Brady* Violation**


Garrett was convicted of the depraved indifference murder of a 13-year-old girl based largely on his confession, along with significant circumstantial evidence of his access to the crime scene and being the last person seen with the victim. He alleged his confession was false and that he had been coerced by brute force (being cuffed to a chair and shocked with a stun gun on his back) by police detective Vincent O’Leary. O’Leary denied any abuse occurred. The defendant was sentenced to two concurrent 25-years-to-life terms in June 2000.

In 2001, the prosecutor became aware that Detective O’Leary had been civilly sued in federal court in an unrelated case for using force to extract a false confession (hitting that defendant in the head with a phonebook). This case was pending throughout Garrett’s trial but did not settle until March 2001. The prosecutor submitted a sworn
declaration that he did not know about the civil suit until 2001.

The Appellate Division of the New York Supreme Court found the O'Leary civil suit information favorable to the defense and material, but remanded for a further hearing on the issue of constructive possession by the prosecution, which was the status of the Garrett case at the time Judge Kozinski listed it among his 29 cases in Olsen as an example of a Brady epidemic.

In 2014, however, after Olsen was published, the Court of Appeals of New York (the state's highest court) reversed the lower appellate court, holding that because the alleged misconduct occurred in a case not connected to Garrett's murder trial in any way, knowledge of the allegations was not imputed to the prosecution. Even O'Leary's own knowledge about the civil suit did not trigger a duty by the prosecutor to discover the information.\(^{51}\)

**Statistical Considerations Reconsidered**

Judge Kozinski cited 29 cases from the state and federal system from 1998 to 2013 (a period of 15 years). According to the National Registry of Exonerations (NRE) as quoted by NDAA, there were approximately 24 million felony convictions in the United States between 1989 and 2012,\(^{52}\) compared to 1,010 exonerations during the same period.\(^{53}\) Those figures work out to be a .00004 percent exonation rate or one out of every 25,000 felony convictions. If you consider further that only a portion of those exonerations were a result of prosecutorial misconduct or Brady error, the percentage is even smaller.\(^{54}\)

Even small fractions, however, do not justify prosecutorial misconduct. Any misconduct by a prosecutor in withholding evidence that denies a defendant the due process of a fair trial, potentially burdening the state and witnesses with a re-trial of untold financial and human costs, is a serious wrong that must be understood and avoided. Worse yet, re-trial may be legally or practically impossible in some cases, allowing potentially guilty criminals to go free. Still, the numbers highlight the truth—misconduct is neither the rule nor an epidemic. Despite Judge Kozinski's hasty conclusion and recent headlines, defense, academic, and neutral commentators consistently note that such misconduct is relatively rare when compared to the number of cases tried.

What is rarely reported in the media are examples of prosecutorial organizations and associations committed to making the trial process more fair. In California, for example, the California Commission on the Fair Administration of Justice (CCFAJ) was created in 2004:

1. To study and review the administration of criminal justice in California to determine the extent to which that process has failed in the past, resulting in wrongful executions or the wrongful conviction of innocent persons.
2. To examine ways of providing safeguards and making improvements in the way the criminal justice system functions.
3. To make any recommendations and proposals designed to further ensure that the application and administration of criminal justice in California is just, fair, and accurate; ...\(^{55}\)

To complete its mission, CCFAJ proposed questions to prosecutors, defense, and academic experts over the course of three years, as part of its thorough investigations, which analyzed the seven most common areas that result in wrongful convictions. In its reports section on Professional Responsibility and Accountability, the Commission begins:

> There is every indication that, overall, District Attorneys and their staffs, Public Defenders and their staffs, and private criminal defense lawyers in California provide competent and highly professional service, meeting the highest ethical standards.\(^{56}\)

In response to the Commission's focus questions, the California Public Defenders Association cited a report studying prosecutorial misconduct called “Harmful Error,” written by the Center for Public Integrity. That report studied 590 California cases from 1970 to 2003 in which defendants alleged prosecutorial misconduct, noting 75 cases (13%) in which a judge ruled a prosecutor's conduct prejudiced the defendant resulting in a reversal—but only 11 cases (.018%) that involved withholding evidence from the defense.\(^{57}\)

Also part of the Commission's review was a study conducted by Professor Laurie Levenson of Loyola Law...
School that surveyed the district attorney offices in each California county. Of the counties that responded, misconduct claims were present in less than one percent (averaging from .028% to .008%) of all cases.58

The numbers, however, tell only part of a more important story. This is because the label “misconduct” is often misapplied across the board, not only to prosecution actions that are intentional and malicious, but also to simple errors and mistakes. Most serious commentators accept that the correct terminology, in instances where neither bad faith nor deceptive conduct is involved, is “error,” not “misconduct.” Noting a need for the distinction, the House of Delegates of the ABA adopted the following resolution:

RESOLVED, That the American Bar Association urges trial and appellate courts, in criminal cases, when reviewing the conduct of prosecutors to differentiate between ‘error’ and ‘prosecutorial misconduct.’59

While Brady error can arise irrespective of the prosecution’s good or bad faith,60 one could fairly note that less than half of the cases cited by Judge Kozinski as evidence of an epidemic of misconduct involved intentional misconduct, while the others (albeit Brady error constituting reversal) involved only error.61

To combat the scourge of menacing headlines and alarming media reporting, it falls on the shoulders of hardworking prosecutors across the nation to address misconduct—or error—seriously, and not approach the issue with a defensive edge. Thus, it is time to put boots to the ground and move from exaggerated rhetoric to an open discussion of how to improve prosecutors’ performance.

Sanctions for Prosecutorial Misconduct—Existing and Proposed

Case Reversals

The most common sanction for Brady error is reversal of the conviction and remand for a new trial. In the most egregious cases, e.g., Dollar, Lyons, and Douglas (discussed previously as examples of intentional suppression), the case is dismissed with prejudice due to “egregious” misconduct.62

Reversal can restore some measure of justice to a defendant and act as a deterrent to future misconduct—but it is far from the only effective tool for addressing prosecutorial misconduct or error.

Professional Discipline by Employer

If a prosecutor’s actions are discovered by his or her superiors, that prosecutor can be removed from a case before the misconduct manifests into a tainted conviction. As noted in the discussion involving United States v. Lyons, the recalcitrant AUSA was removed midway through the post-trial discovery proceedings. His replacement then conceded error.63

At the federal level, the United States Department of Justice Office of Professional Responsibility (OPR) investigates and penalizes misconduct complaints against federal prosecutors. Discipline can include removal, suspension, or firing, but the Justice Department generally does not publicize either the names of the attorneys disciplined, or the defendants whose cases were affected. However, at least one recent case provides a glimpse behind the federal veil: the 2008 botched corruption trial of United States Senator Ted Stevens. This case began to fall apart after it emerged that prosecutors failed to turn over exculpatory information, such as conflicting statements by witnesses that might have helped the defense at trial.

Newly appointed United States Attorney General Eric Holder later asked the judge to throw out Senator Stevens’ conviction, and both the court and Justice Department began internal investigations. Both reports portrayed a rushed and poorly supervised trial preparation. The Justice Department’s report found “reckless professional misconduct” by two federal prosecutors, but stopped short of firing the men, concluding their mistakes to be unintentional, and only suspending them for 15 and 40 days without pay. (A third prosecutor was not criticized as he had by then committed suicide.)

The court-appointed special prosecutor investigating the case, however, found that the prosecutors had intentionally withheld evidence.64 In a curious twist to the matter, the 15- and 40-day suspensions were later voided by an administrative law judge and the federal Merit Systems Protection Board, who both found that Justice Department officials violated internal policies during the disciplinary process.65

Despite the ultimate result in the Stevens trial, and notwithstanding the normal secrecy protecting OPR investigations, the fact remains that federal prosecutors face internal sanctions ranging from loss of pay to loss of
employment for breaches of their prosecutorial duty to provide fair trials and full discovery to the defense.

Bar Discipline

In its research and analysis, CCFAJ could not locate definitive statistics regarding prosecutorial discipline for *Brady* errors or misconduct. However, in a footnote in its *Professional Responsibility and Accountability* report, it noted a February 2006 *San Jose Mercury News* study of 1,464 lawyer discipline cases published in the *California Bar Journal* between 2001 and 2005, finding only one case in which disciplinary action was taken against a prosecutor for misconduct. In response, Scott Drexel, Chief Trial Counsel for the State Bar of California at the time, cited three 2005 cases disciplining prosecutors and a fourth pending (three of the cases involving alleged failure to disclose potentially exculpatory evidence to the defense).68

Four notable bar discipline cases concern, or at least touch upon, *Brady* violations. While a very small sample, they demonstrate how bar discipline can vary depending on the moral culpability of the prosecutor involved. They also portray a varied cross-section of factual scenarios, variances in misconduct history (single failings versus long patterns of behavior), and the rank of the offending prosecutor (e.g., line deputy versus elected district attorney).

A Tale of Two Colleagues

Benjamin Thomas Field and Troy Alexander Benson were both Santa Clara County career prosecutors who received public discipline by the State Bar of California for their conduct in 2010.67 The similarity ends there as their cases and the nature of their discipline take very different paths.

Benjamin Field

According to the State Bar Review Department opinion, Field “disregarded prosecutorial accountability in favor of winning cases,” and after four separate incidents of misconduct (two of which involved withholding evidence from the defense), received a four-year actual suspension from the practice of law (his five-year suspension was stayed with a five-year probation and the suspension)—the longest period possible short of disbarment.68 The worst of his four incidents is illustrative of his *Brady* failings: Two defendants had filed a petition for writ of habeas corpus after their convictions for sexually assaulting a 15-year-old girl named Monique. In their support, they provided a declaration by Stephen Smith stating that Monique had admitted to Smith that she made up her sexual assault allegations (thus totally exonerating the criminal defendants). Field had originally convicted both defendants and was then assigned to their habeas proceedings, including an evidentiary hearing.69

Critical defense witness Smith could not initially be found, so Field obtained a search warrant for Smith's girlfriend's telephone records. Field's investigator located Smith and recorded an interview with him, in which he confirmed his statement that Monique had made up the sexual assault, among other new exculpatory details. After this interview, Field received a discovery request from one of the defense attorneys seeking all witness reports. Not only did Field refuse to disclose Smith's location and interview, he instructed his investigator to do the same, advising the investigator to prepare a misleading declaration: “I don't want you to include anything about your attempts to locate him [Smith] except that you found out he is no longer with the Army and that he hasn't been for a long time.”70

Field then filed the misleading investigator declaration with the court, outlining his team’s inability to locate Smith at the address provided by the defense. He added in his own court statement that Smith was the only defense witness who could impeach the victim, but if the defense counsel did not know of Smith's whereabouts, the prosecution would have little to rebut. At a status conference on the habeas petition, the defense asked for a continuance, as they had lost touch with Smith. Field, rather than disclosing Smith’s known whereabouts or his interview, emphatically urged the court to proceed to hearing, which they did.

Eventually a defense investigator located Smith, who revealed that Field’s own investigator had interviewed him five months earlier. The defense filed a motion to suppress evidence and sought sanctions for prosecutorial misconduct. The trial court judge concluded Field had committed a discovery violation and suppressed some evidence, but denied the request for sanctions due to lack of apparent prejudice. During State Bar proceedings, Field testified that he had withheld the Smith discovery because (1) he did not believe he had any duty to provide discovery in habeas proceedings, and (2) he felt the defense was also withholding discovery, so that “if they were going to hold back … I was entitled to do the same.”71

The Review Department of the State Bar Court imposed discipline on the basis of a Rules of Professional Conduct, rule 5-220 violation [Suppression of Evidence], which was an act of moral turpitude. The opinion avoided deciding
the case outright on a *Brady* violation, but noted that independent of any duty under *Brady*, prosecutors must disclose exculpatory materials after trial, including in habeas proceedings. Field’s intentional concealment of the material evidence of Smith’s statement impeaching Monique was an act of moral turpitude and dishonesty. His misconduct also “escalated over time,” from instructing his investigator to prepare a misleading declaration, knowingly filing it with the court, and finally urging the court to proceed to hearing without witness Smith. Field only escaped disbarment by the mitigating evidence provided by his 36 character witnesses.

**Troy Alexander Benson**

Contrast the bar discipline case of Troy Alexander Benson, a colleague of Field’s from the same office at around the same time. Benson’s misconduct concerned a discovery failure as well, but not of the intentional variety. After nearly 10 years in the Santa Clara County District Attorney’s Office, Benson was assigned to handle sexual assault cases for the first time and handed a serious caseload of 20–30 files. Two of those cases were *People v. Zeledon* and *People v. Uribe*.74

Zeledon was a child sexual assault matter where the child victim had been examined by the local Valley Medical Center’s Pediatric Sexual Assault Response Team (SART). In response to a defense discovery request, Benson became aware of a videotape of the SART exam produced by Valley Medical in addition to its report and still photographs, so he had his paralegal forward the material to the defense. *Note:* Up until 2006, SART had not customarily turned such videotapes over to either the prosecution or defense.

Around the same time, Benson was also assigned to prosecute defendant Uribe for child sexual assault, which again involved Valley Medical Center’s SART. However, even though Benson was now aware of SART exam videotapes in sexual assault cases, he never asked Valley Medical if there were any videotapes in the *Uribe* case. Therefore, none were discovered, even though one existed.

Uribe was eventually convicted, but the Sixth District Court of Appeal reversed and remanded, finding that the SART video was favorable to the defense. It held, in a matter of first impression, that the SART personnel of a private hospital were part of the prosecution team for *Brady* purposes because the SART exam was instigated by the police and its forensic findings reported to the police.

In its discipline opinion, the Bar Court found that Benson had an obligation to disclose the *Uribe* videotape. Indeed, when he learned of the tape in the *Zeledon* matter, he should have inquired of Valley Medical if there was also a tape in *Uribe*. Therefore, his failure to do so was negligent and ignored his prosecutorial duty. Thus, the isolated incident—though reasonable—still violated Penal Code section 1054.1(c) and (e), and constituted a violation of law, subjecting Benson to discipline under Business and Professions Code section 6068(a).

However, unlike Field, the Bar Court did not find evidence demonstrating Benson had engaged in acts of moral turpitude or dishonesty. In fact, once Benson actually learned about the videotape in the *Uribe* matter (after the trial conviction), he notified the court and opposing counsel. The Benson opinion explicitly distinguished the Field case, finding the conduct here far less serious, involving no dishonesty, and an attempt to remedy his *Brady* mistake, “albeit too late.” Benson, though negligent, understood his special duty as a prosecutor to promote justice and seek the truth, and exhibited such in his candid dealings with the court and opposing counsel.

This clear contrast between the Field and Benson discipline cases reflects that the manner of *Brady* violation—intentional or merely negligent (“unknowingly” was the term the Benson court used)—makes an important difference in how a violation is judged and how a violator should be treated. Rather than counting all *Brady* errors together and proclaiming an epidemic, commentators should take note of the moral culpability of the prosecutors involved. Doing so better informs the level of indignation and leads to more productive discussions of sanctions and reform.

**When the High and Mighty Are Felled**

Elected District Attorneys Jon Alexander (Del Norte County, California) and Mike Nifong (Durham County, North Carolina) each received the ultimate sanction of disbarment for misconduct that touched, at least in part, on *Brady* issues.

**Jon Alexander**

In 2014, the State Bar Review Department affirmed a hearing judge’s recommendation of disbarment for Jon Alexander, based on acts of moral turpitude in violation of Business and Professions Code section 6106. While the gravamen of his misconduct was an improper and surreptitious meeting with a defendant already represented by defense counsel, the *Brady* component was Alexander not advising either court or counsel that the defendant he had spoken with ex parte had exculpated her co-defendant.
The Bar Court noted that Alexander's failure to disclose the exculpatory evidence at the preliminary hearing involved moral turpitude. Alexander's case was aggravated by an extensive prior disciplinary record (he committed these acts while still on disciplinary probation for similar wrongdoing) and lack of remorse. The opinion began:

[T]he high standard of conduct expected of prosecutors, who act as the gatekeepers to the fair administration of justice, was lacking in this case. Accordingly, in light of Alexander's extensive prior discipline record, we conclude that a disbarment recommendation is necessary to protect the public, the courts, and the legal profession.

Mike Nifong

Mike Nifong was the district attorney in the notorious Duke lacrosse team rape scandal of 2006. When a woman who had been hired to strip at a campus party accused members of the lacrosse team of sexual assault, Nifong rushed to charge three student athletes with incomplete evidence and made numerous statements to the press about the case. Key among Nifong's violations was his misleading the court and defense about critical DNA findings from a private laboratory. The report Nifong provided to the defense—which he knew was incomplete—omitted results proving that none of the charged players contributed to the DNA sample obtained from the alleged victim.

Nifong was forced to recuse himself from the case after being charged with ethics violations. The state's Attorney General who took on the case dropped all charges, declaring that all three defendants were in fact innocent.

In June 2007, a Disciplinary Hearing Commission of the North Carolina State Bar disbarred Nifong, notwithstanding his offer to resign voluntarily. The chairman of the ethics panel issued a public statement noting:

[T]he fact that we have found dishonesty and deceitful conduct requires us in the interest of protection of the public to enter the most severe sanction that we can enter, which is disbarment. I want to say something about who the victims are here. The victims are the three young men to start with, their families, the entire lacrosse team and their coach, Duke University, the justice system in North Carolina and elsewhere. And indeed prosecutors—honest, ethical, hard-working

prosecutors throughout the nation—as we're heard through anecdotal evidence are victims of this conduct.

A few months after his disbarment, Nifong was sentenced to one day in jail for criminal contempt for lying to the court during the case by insisting he gave the defense all of the DNA test results when he knew them to be incomplete.

Criminal Prosecution

Mike Nifong's one-day jail sentence for contempt was a precursor to the unprecedented criminal prosecution of a prosecutor for evidence tampering. Former Williamson County, Texas, District Attorney Ken Anderson, who later became a state judge, was disbarred, fined, and ordered to serve 10 days in jail as part of a settlement of criminal charges against him for withholding exonerating evidence that resulted in an innocent man's 25-year imprisonment for the murder of the man's wife.

In 1987, Michael Morton was charged with the murder of his wife, Christine Morton. At trial, Anderson, then district attorney of Williamson County, Texas, put on an emotional show for the jury, painting the graphic picture of a rage-filled Morton beating his wife to death in their bed and then contriving a scene to mimic a burglary gone awry. The prosecution's case relied primarily on the testimony of a medical examiner, who determined that Christine's time of death was no later than 1:15 a.m., which suggested that Morton was the only possible suspect. In less than two hours, the jury decided Morton's fate, finding him guilty and sentencing him to spend the rest of his life in prison. Anderson went on to continue his career as district attorney and was eventually appointed as a state district judge in 2002.

Before Morton's criminal trial began, when prompted to disclose any favorable evidence to the defense, Anderson answered that there was no evidence to disclose. Following Morton's conviction, Morton's lawyers, along with lawyers from the Innocence Project, would ultimately uncover the suppression of critical exonerating evidence, including DNA testing of a bandana that had been discovered outside of Morton's home shortly after the crime. The bandana's existence was known to the defense at the time of trial, but the bandana's potential value was not realized because other evidence was withheld by Anderson. The DNA on the bandana belonged to Mark Alan Norwood who was shown to have been the actual culprit. Michael Morton was therefore, an innocent man, and after spending
25 years in prison, was exonerated and released. Norwood has since been convicted of Christine’s murder, and has been indicted for a similar murder he committed two and a half years later while authorities focused their attention on Morton.

Following Morton’s exoneration, a Texas Court of Inquiry investigated Anderson to determine whether his failure to turn over favorable evidence to the trial court amounted to criminal conduct. Through a series of depositions of key witnesses, the Innocence Project and their team revealed that Anderson deliberately avoided calling police officers as witnesses, particularly the lead investigator in the case, in order to avoid releasing their notes and files related to the case. By doing so, Anderson avoided revealing two critical pieces of evidence.

Specifically, Anderson failed to disclose a typewritten transcript of a police interview with Christine’s mother. In this interview, Christine’s mother revealed that the Morton’s three-year-old son had witnessed the murder and described that a “monster”—not his father—had attacked his mother. Anderson also withheld a police report about the suspicious activity of an unidentified man who, on several occasions, had parked a green van nearby and walked into the wooded area behind the Morton home. Both pieces of evidence revealed facts consistent with the defense’s argument that Morton was not actually home at the time of his wife’s murder—his wife was attacked by a third-party assailant.

Judge Louis Sturns presided over the Court of Inquiry, ultimately determining that there was probable cause to believe that Anderson was guilty of criminal contempt and concealment of official records by intentionally disobeying the trial judge’s order to disclose exculpatory evidence. Judge Sturns apologized to Morton on behalf of the state’s judges and condemned Anderson’s actions, stating,

“This court cannot think of a more intentionally harmful act than a prosecutor’s conscious choice to hide mitigating evidence so as to create an uneven playing field for a defendant facing a murder charge and a life sentence.”

After issuing his ruling, Judge Sturns ordered Anderson’s arrest inside the courtroom. In a virtually unprecedented action, a prosecutor was being held to answer on criminal charges for blatant unethical behavior and misconduct.

Anderson resigned in the face of public scrutiny and both civil and criminal charges. Based on the Court of Inquiry’s findings, Anderson faced up to 10 years in prison if found guilty of tampering with evidence during Morton’s criminal trial. After a lengthy investigation, the Texas State Bar filed a grievance against Anderson alleging professional misconduct and violations of state ethics rules during his prosecution of the Morton case. In 2013, Anderson accepted an unusual plea deal that simultaneously resolved all cases against him. In addition to disbarment and a $500 fine, he also agreed to serve 10 days in jail and complete 500 hours of community service. He would go on to serve only half of that, earning credit for good behavior while in jail.

To combat the scourge of menacing headlines and alarming media reporting, it falls on the shoulders of hardworking prosecutors across the nation to address misconduct—or error—seriously, and not approach the issue with a defensive edge.

Meanwhile, an independent review was conducted on all of the cases that Anderson worked on while he served as district attorney. Anderson’s successor, District Attorney John Bradley, was also placed under the microscope due to his strong opposition to the DNA testing that eventually exonerated Morton, though the review of Bradley’s cases was limited to those in which he opposed DNA testing. Based largely upon the Morton case, Bradley lost re-election and moved to the island of Palau.

Not only were the effects of Anderson’s misconduct being acknowledged through the administration of justice, but also through the creation of law. In 2013, the Texas Legislature passed the Michael Morton Act, which requires prosecutors to open their files to defense lawyers before trial and after it begins. Anderson’s transgressions against Morton and the court became catalysts for change in the Texas legal system.

The inequity of Anderson’s 10-day jail punishment when compared to that which he brought upon Morton is apparent—an innocent man spent 25 years of his life in prison and the man truly responsible was free to commit another murder. Anderson’s punishment, fair or not, is still worth noting here. Though criminal action like that brought against Anderson was previously unheard of, it shows that criminal sanctions do exist to address and deter the most severe prosecutorial misconduct.
Additional Sanctions Being Proposed by Academic Commentators and State Legislators

The list of existing sanctions just discussed already provides flexibility for dealing with both unintentional Brady violations and the rare instances of intentional prosecutorial misconduct. But academic commentators, judges, pundits, and state legislators have also proposed novel sanctions for Brady violations and proposals to prevent them before the trial is even over. These new ideas deserve mention, even if some of them are legally impractical or unworkable.

Mandatory Jury Instruction That Failure to Disclose Raises Reasonable Doubt

In the 2014 session of the California State Legislature, Assemblyman Tom Ammiano proposed AB 885, which gave trial courts discretion—if it was found that a prosecutor intentionally failed to disclose information required under Penal Code section 1054.1 or Brady—to instruct the jury that such a failure to disclose occurred and that the jury shall consider such failure in determining whether reasonable doubt existed. The bill passed both houses of the Legislature by ample margins; however, on September 28, 2014, it was vetoed by Governor Brown. The Governor’s veto message noted that while “prosecutorial misconduct should never be tolerated [,] [t]his bill, however would be a sharp departure from current practice that looks to the judiciary [not the Legislature] to decide how juries should be instructed. Under current law, judges have an array of remedies at their disposal if a discovery violation comes to light during trial.”

The Governor’s words echoed arguments made by the Judicial Council and CDAA, both of whom opposed AB 885. One argument against the bill was that a similar instruction already existed, namely CALCRIM 306 [Untimely Disclosure of Evidence], which can be used to address discovery failures by both the prosecution and defense. It instructs the jury that “in evaluating the weight and sufficiency of that evidence, you may consider the effect, if any, of that late disclosure.” This judicially drafted and approved language leaves proper discretion to the jury to decide how to weigh the discovery failure rather than dictating the illogical conclusion that the discovery violation is necessarily linked to reasonable doubt. It is also important to note that by definition, Brady is not violated unless the material exculpatory evidence was not disclosed until after the trial is complete. Thus, the most any such instruction could cover is the statutory violation of failing to disclose 30 days prior to trial.

Notwithstanding the Governor’s veto of AB 885 in 2014, the Legislature, initially proposed an identical bill (AB 1328) in 2015; however, fearful of another veto, it gutted and amended the language late in the session to take out any mention of a Brady jury instruction. The final version of AB 1328, which passed and was signed into law, allows a court to notify the State Bar of a Brady violation, and to disqualify an individual prosecutor (or if bad faith among prosecution office employees, an entire prosecutor’s office) from handling a case with intentional Brady misconduct. It should be noted, however, that this statute did not create any rights California courts did not already have.

Mandatory Court-Prosecution Brady Colloquy

In 2014, Jason Kreag, a visiting assistant professor at the University of Arizona College of Law, penned “The Brady Colloquy,” in which he proposes his own Brady sanctions. Fueled by the notion that Brady violations have become “rampant,” Kreag proposed a short discussion where the judge would question the prosecutor on the record about the prosecutor’s disclosure obligations before commencing trial or taking a plea of guilty. Kreag writes that a prosecutor’s answers during a Brady colloquy could increase the chance of both detection and punishment. Depending on the nature of the prosecutor’s answers, such punishment could take the form of prosecution for perjury, judicial sanctions, or discipline from state bar associations.

The problems with the Brady colloquy are similar to the proposed mandatory reasonable doubt jury instruction. Judges, a notoriously independent lot and protective of their prerogatives, are unlikely to uniformly adopt such a discussion nationwide. The idea of a one-sided conversation is inherently unfair, especially when the court could have a colloquy with defense counsel about trial issues that could avoid defense misconduct grounded in ineffective assistance of counsel, and when the defense often commits its own discovery violations. Moreover, a colloquy could not possibly deter violations in cases where the prosecutor is unaware that additional evidence exists. Nor is such a colloquy likely to deter the most egregious
If there is an epidemic, it is one of public perception—one that mistakenly believes prosecutors must choose either ethics or victory. The true paradigm, however, is that of an ethical prosecutor aggressively pursuing justice for victims and defendants through fair trial and pre-trial practices.

offenders discussed in this paper, several of whom did represent to the court that there was no additional evidence to disclose.

Finally, the Kreag article proposes the judge “remind prosecutors throughout the proceedings that [he or] she is prepared to conduct an in camera review of any information that the prosecutor is on the fence about disclosing.” While judicial review of questioned information is a reasonable step for prosecutors and courts to take, many California courts maintain that Brady is solely the prosecution’s burden. For this reason, courts often refuse to do in camera hearings even when the potential Brady matter is presented to them by the prosecution. It is unreasonable to think those same courts would adopt a practice of encouraging in camera submissions.

CONCLUSION

There is a Brady problem in the land, but it is not an epidemic. As demonstrated by the national slice of errata noted by Judge Kozinski in his Olsen dissent, Brady error is often committed by mere negligence, sometimes by prosecutors who themselves have been denied access to the information at issue. Nor do the sample cases give any reason to believe that such violations are currently on the rise. Several cases reviewed involve omissions that occurred many years ago before states and prosecutors adopted training and policies aimed at improving the exchange of important information.

The current forms of professional and public sanction exist to punish the true violators while deterring the vast majority of ethical prosecutors. Many of the newly proposed solutions are too one-sided to be fair and start from the false assumption that the problem is greater than it is. Sanctions are a sufficient stick, but there is a significant carrot that exists as well: proper prosecutorial training on our discovery obligations and the widespread adoption of statewide best practices.

If there is an epidemic, it is one of public perception—one that mistakenly believes prosecutors must choose either ethics or victory. The true paradigm, however, is that of an ethical prosecutor aggressively pursuing justice for victims and defendants through fair trial and pre-trial practices.

Prosecutors who are better informed by police about all the evidence in a case are able to both more fully inform the court and defense counsel, and to be better prepared themselves. Successful prosecutions will not be hampered because a conviction wrought by misconduct can never be considered a victory. The consequences for withholding evidence or careless case preparation are serious and clear; the consequences for being aggressively ethical should become equally clear and should light our path forward.

Shaming by Naming

Another idea is to shame wrongdoers by including the names of the offending prosecutors in the judicial opinions reversing their convictions. Professor Kreag mentions this idea, as does another law review article by Adam M. Gershowitz: “Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct.” Even Judge Kozinski has jumped on the shaming-by-naming bandwagon, threatening in a recent oral argument that his circuit would aggressively pursue this remedy.

As a general deterrent towards future violations of Brady by the minority of prosecutors who do so, such a proposal has some value. If the opinion is informed by adequate findings, and the prosecutor received due process in any such fact-finding hearing, then the transparency of calling the prosecutor’s error or misconduct properly what it is, may well further transparency in our criminal justice system and foster more public respect for the administration of justice.
Notes

3. United States v. Olsen (9th Cir. 2013) 704 F.3d 1172; rehg. en banc denied, 737 F.3d 625. Chief Judge Kozinski dissented from his colleagues’ denial to reconsider the original opinion en banc.
5. Brady, supra, at 87 [emphasis added].
12. Olsen, supra, 704 F.3d 1172.
14. Id. at 108. See also Kyles, supra, at 439, which warns prosecutors against “tacking too close to the wind” in withholding evidence.
15. United States v. Berger (1935) 295 U.S. 78, 88. In addition to being cited by law school Innocence Project commentators, this quote is often cited by courts reversing prosecutions for Brady violations. It feels far better as a cloak to embrace and protect us and our convictions (both ethically and in the courtroom), than as a sword wielded by defense and courts to cut our convictions down.
17. See In the Matter of Benjamin Thomas Field (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 171, 15: “For purposes of analyzing Field’s culpability in this count, we do not decide whether the Brady rule applies because we find Field culpable for a statutory violation in Count Seven, below, based on the same facts—that Field intentionally withheld Smith’s statement. (See Sanchez v. City of Modesto (2006) 145 Cal.App.4th 660, 671 [principles of judicial restraint require [the] court to avoid deciding case on constitutional grounds unless absolutely necessary and non-constitutional grounds must be relied on if available].)”
21. See also Cone v. Bell (2009) 556 U.S. 449, 470, fn. 15. The State Bar is currently considering modifications and adoption of ABA MRPC 3.8 for California. However, any changes to the current rule structure would still require approval by the California Supreme Court.
22. Mr. Pipes is regarded by many as the “dean” of discovery rules for prosecutors and is the co-author of a published legal text book on the topic: Pipes & Gagen, California Criminal Discovery (4th Ed.), Lexis Nexis.
23. A rehearing en banc requires the affirmative vote of a majority of the non-recused, active judges of the court. (Fed. Rules App.Proc., rule 35, 28 U.S.C.) In the Ninth Circuit, if rehearing en banc is granted, it is generally heard by a limited en banc court consisting of the Chief Judge and 10 additional judges, selected by lot. (Ninth Circuit, rule 35-3.)
24. Judge Kozinski’s term as Chief Judge ended December 1, 2014.
25. Olsen, supra, 737 F.3d 625.
26. Id. at 626.
27. Id. at 631.
29. Intentional violations clearly call for discipline and other strict sanctions; negligent violations, while still Brady error resulting in reversal, suggest better understanding of the “prosecution team” concept through joint trainings and imposition of strict police-prosecution case file protocols.
31. Id. at 1332.
32. Id.
34. Giglio, supra.
35. Lyons, supra, at 1243.
36. Id. at 1246.
37. Id. at 1251.
40. Id.
41. Aguilar v. Woodford (9th Cir. 2013) 725 F.3d 970, 971.
42. Id. at 982.
44. Aguilar, supra, at 980–981.
45. See People v. Garcia (1993) 17 Cal.App.4th 1179, 1189 [evidence undermining an expert witness’s expertise can constitute Brady material].
46. One wonders if that office’s institutional failure to alert its entire prosecution staff to such known problems in a particular law enforcement expert witness, especially in light of that office maintaining a robust Brady alert list, might be due to the fact
that it was not a human witness, but rather a scent-identification canine.

47. Aguilar, supra, at 982. [Although not the case holding, it was noted by the federal appellate opinion that the trial prosecutor appeared to apply case blinders by not pursuing an investigation of other suspects when evidence pointing to the trial suspect was so arguably weak.]

48. Id. at 983.

49. Harris v. Lafler (6th Cir. 2009) 553 F.3d 1028, 1033.

50. United States v. Sedaghaty (9th Cir. 2013) 728 F.3d 885, 899.


54. NDAA, Exonerations, supra, 1.


60. See footnote 4, supra, citing Brady itself, 373 U.S. at 87.

61. Recall that one case involved, ultimately, no error at all, as that finding was reversed a year after an intermediate appellate court's ruling was cited in Olsen.

62. See Douglas, supra, 560 F.3d 1156 where the trial prosecutor was ultimately disciplined by the Oklahoma state bar and supreme court.

63. The opinion does not mention any sanction beyond removal from handling the case.


68. Field, supra.

69. Id. at 11.

70. Id. at 12.

71. Id. at 14.

72. Id. at 15.

73. See In re Lawley (2008) 42 Cal.4th 1231, 1246.


75. Section 6068(a) imposes a duty on attorneys to support the Constitution and laws of the United States and California.

76. Not officially reported, but available at 2014 WL 1778656.


78. Nifong was in the midst of a heated primary re-election campaign at the time of the case charging—one he just barely won.


80. Aaron Beard, “Judge Finds Duke Prosecutor in Contempt,” Briebart.com (Aug. 31, 2007) <https://web.archive.org/web/20071013074021/http://breitbart.com/article.html?title=Judge+Finds+Duke+Prosecutor+in+Contempt&publication=National+Law+Journal&x=14&y=11> 81. This white paper does not discuss civil suits against prosecutors for alleged trial misconduct, because prosecutors in that context are absolutely immune; see Imbler v. Pachtman (1976) 424 U.S. 409. Immunity, however, will not prevent a prosecutor from being sued for an alleged civil rights violation by a defendant denied his or her Brady rights; see Tennison and Goff v. City and County of San Francisco (9th Cir. 2009) 570 F.3d 1078, where two murder defendants who served nearly 13 years in prison were exonerated because of major Brady violations by two San Francisco police inspectors, involving multiple situations where the inspectors actively hid exculpatory evidence from the case prosecutor. After being declared factually innocent, the defendants sued the City, the police department, the two inspectors, and the prosecutor. Although the prosecutor was dismissed from the case, the case survived summary judgment
against the inspectors, and the City ultimately settled with the former defendants-turned-civil-rights plaintiffs for more than $7 million dollars. Given its Ninth Circuit provenance and bad Brady facts (at least for the police, the prosecutor hardly being negligent given how much he was purposely left in the dark), it is surprising that Tennison did not make it onto the Kozinski 29’s baddest Brady hits list in Olsen.

82. The Innocence Project is a national litigation and public policy organization dedicated to exonerating wrongfully convicted people through DNA testing and reforming the criminal justice system to prevent future injustice. Founded at Benjamin N. Cardozo School of Law at Yeshiva University in 1992, it became an independent non-profit organization in 2004, (though it is still closely affiliated with Cardozo).


84. Elizabeth Napier Dewar, "A Fair Trial Remedy for Brady Violations," Yale Law Journal 115:1450 (2006) <http://www.yalelawjournal.org/note/a-fair-trial-remedy-for-ligbradylig-violations> (accessed Sep. 29, 2015). This article provided the beginning language for the bill. Ironically, even Dewar professed doubts as to whether her proposed remedy would actually deter future Brady violations. She also noted that "prosecutors suppress favorable evidence in only a fraction of the cases that do go to trial, and only another smaller fraction of these suppressions is discovered before the jury's verdict." (Id. at 1464.)

85. California's Criminal Discovery Statute, Penal Code section 1054.5(b) provides sanctions for statutory discovery violations: immediate disclosure of evidence, contempt, delaying or prohibiting witness testimony or evidence presentation, continuance, or jury advisement; prohibiting witness testimony is only available as a last resort, and case dismissal is only to be done if required by the United States Constitution.


88. See, e.g., People v. Verdugo (2010) 50 Cal.4th 279, 281 [no Brady violation if evidence is still available for trial, even if withheld during pre-trial discovery].

89. See Pen. Code § 1424.


92. Kreag, supra, "Brady Colloquy."


94. Kreag, supra, "Brady Colloquy."

95. See, e.g., J.E. v. Superior Court of San Diego County (2014) 223 Cal.App.4th 1329 [A juvenile court was required to hold an in camera review of a sealed juvenile file for Brady material per Welfare and Institutions Code section 832.7]. J.E., supra, provided the precedence for People v. Superior Court of San Francisco County (Johnson) (2015) 61 Cal.4th 696, a recent case requiring a California Supreme Court order to compel an unwilling superior court judge to review evidence in camera, even though the review was mandated by Pitchess statutes. (Johnson was a major test case for the entire state, brought and briefed by this author.) In Johnson, the California Supreme Court, held that the superior court must hold in camera Brady hearings upon motion of the prosecution or the defense, upon a proper showing of good cause. Johnson presented a situation (common to 25 percent of California counties) where local law enforcement (police and sheriffs) give their local prosecutors a Brady alert about officers needed as witnesses in upcoming cases, such that the prosecutor can move the court to examine the potential Brady evidence in camera and balance the officer's privacy privilege (Pen. Code § 832.7; Evid. Code § 1043) with the defendant's right to due process at trial. As the Johnson opinion notes, the San Francisco Superior Court felt such routine Brady hearings were too onerous, but the unanimous supreme court simply told the local court that such a burden "cannot be avoided" (Johnson, supra, at 722).

More significantly, the Johnson opinion, and the entire two-year struggle to bring the case, showcases the laudable model of local prosecutors at an institutional level working together with police and the defense to implement a proactive system to collect and disclose Brady evidence. When the San Francisco courts refused to play their traditional rights-balancing roles, it was the prosecutor's office and a police department that took its local court all the way to the California Supreme Court to force it into helping discover hidden Brady material.


98. But see Peninger v. State of Oklahoma (Ok.Crim.App. 1991) 811 P.2d 609, where Judge Parks's concurring opinion respectfully disagrees with naming trial counsel in a review of conduct as "tantamount to a public censure wherein trial counsel is denied the basic rights of due process," as well as being outside
the scope of appellate review, as attorney discipline is vested elsewhere. (Id. at 613, fn. 1).

Appendix A – The Kozinski 29

**Intentional**

  - motive of witness to lie
- DeSimone v. State (Iowa 2011) 803 N.W. 2d 97
  - false trial testimony
- Douglas v. Workman (10th Cir. 2009) 560 F. 3d 1156
  - benefits given to witnesses
  - inconsistent prior failed ID
- Miller v. United States (D.C. 2011) 14 A. 3d 1094
  - direct evidence exonerating the defendant
- Monroe v. Angelone (4th Cir. 2003) 323 F. 3d 286
  - inconsistent prior statements
  - benefits given to witnesses
  - prior criminal or police informant history by a witness
- Simmons v. Beard (3d Cir. 2009) 590 F. 3d 223
  - benefits given to witnesses
  - inconsistent or prior failed ID
  - prior criminal or police informant history by a witness
- Walker v. Johnson (Ga. 2007) 646 S.E. 2d 44
  - inconsistent prior statements
  - inconsistent prior statements
  - direct evidence exonerating the defendant
- United States v. Kohring (9th Cir. 2010) 637 F. 3d 895
  - inconsistent prior statements
  - prior criminal or police informant history by a witness
- United States v. Lyons (M.D. Fla. 2004) 352 F. Supp. 2d 1231
  - benefits given to witnesses
  - direct evidence exonerating the defendant
  - false trial testimony
- United States v. Sipe (5th Cir. 2004) 388 F. 3d 471
  - benefits given to witnesses
  - prior criminal or police informant history by a witness
  - bias against defendant by witness
- United States v. Triumph Capital Grp., Inc. (2d Cir. 2008) 544 F. 3d 149
  - inconsistent prior statements
- United States v. Zomber (3d Cir. 2008) 299 F. Appx. 130
  - inconsistent prior statements

**Reckless**

- Aguilar v. Woodford (9th Cir. 2013) 725 F. 3d 970
  - impeachment of expert witness
  - inconsistent forensic evidence
- Aguilera v. State (Iowa 2011) 807 N.W. 2d 249
  - inconsistent prior statements
- Smith v. Cain (2012) 132 S. Ct. 627
  - inconsistent or prior failed ID
  - direct evidence exonerating the defendant
  - false trial testimony

**Negligent**

- Commonwealth v. Bussell (Ky. 2007) 226 S.W. 3d 96
  - direct evidence exonerating the defendant
  - inconsistent or prior failed ID
- Harris v. Lafler (6th Cir. 2009) 553 F. 3d 1028
  - benefits given to witnesses
- In re Stenson (Wash. 2012) 276 P. 3d 286
  - impeachment of expert witness
  - direct evidence exonerating the defendant
  - inconsistent forensic evidence
- State v. Youngblood (W.Va. 2007) 650 S.E. 2d 119
  - direct evidence exonerating the defendant

**Prosecutor Knowledge Uncertain**

- Horton v. Mayle (9th Cir. 2004) 408 F. 3d 570
  - benefits given to witnesses
- State ex rel. Engel v. Dormire (Mo. 2010) 304 S. W. 3d 120
- United States v. Aviles-Colon (1st Cir. 2008) 536 F. 3d 1
- United States v. Sedaghaty (9th Cir. 2013) 728 F. 3d 885
  - motive of witness to lie

**None**

  - police extracting false confession