

PROSECUTOR MISCONDUCT AND GOOD FAITH ERROR: A REANALYSIS OF
TWO STUDIES IN CALIFORNIA AND TEXAS

by

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ABSTRACT

Peer-reviewed articles and media reports reference only a few available studies to support the conclusion that prosecutors often commit misconduct but are rarely disciplined, although the validity of these studies has rarely been questioned. It is imperative to examine the reliability and validity of these studies, and how far their conclusions can be generalized. This research reexamined the data from two frequently cited studies conducted by Innocence Project groups, and corresponding response reports written by the state's prosecutors' associations who disputed the original findings. Because the majority of available research has been done by interest groups who have a vested stake in outcomes, this dissertation presents a re-analysis done by an objective reviewer using standard social science methodology.

Specifically, this study examines of 99 California and 91 Texas appellate court cases included in two studies conducted by the Northern California Innocence Project and the Innocence Project Texas, as well as two response reports conducted by the California District Attorneys Association and the Texas District and County Attorneys Association, respectively. This research used three qualitative methodologies to examine the validity and reliability of the aforementioned studies, as well as to explore the phenomena of prosecutor misconduct and good faith error: ethnographic content analysis on 190 appellate cases, in-depth case studies of five specific Texas appellate cases, and interviews with 10 current and former prosecutors.

Findings from the study reveal that the range and prevalence of prosecutor misconduct identified from the re-analysis of 190 cases was similar to the findings in the Northern California Innocence Project and Innocence Project Texas studies. Similarities included the rates of types of misconduct claims, the existence of more than one misconduct claim in many of the cases, and the rates of harmful error rulings. The types of prosecutorial misconduct or errors which were most commonly noted in the re-analysis of the 190 appellate cases included improper comments during closing arguments, eliciting improper testimony from a witness, and prejudicial statements made to the jury. *Brady* violations accounted for very few of the instance of misconduct (less than 6%), even though prosecutors identified *Brady* violations as the most common type of misconduct during the interviews.

In the present study, judges overwhelmingly cited case law in reaching a decision regarding whether or not prosecutor misconduct had occurred. Only 20% of misconduct findings resulted in a conviction or sentence being overturned. Judges did not directly sanction prosecutors who were found to have committed misconduct, nor did they recommend in their written decisions that prosecutors should be sanctioned by an outside authority. Judges did admonish prosecutors in their written decision in 10% of the cases.

Significant themes which emerged across the three studies included the lack of consistent language used by judges to identify misconduct and error, the lack of judicial concern with the intent of the prosecutor when assessing claims of misconduct, the significance of harmless error analysis in determining the legal consequences of

misconduct, the role that lack of prosecutor training and experience plays in the occurrence misconduct, and the lack of agreement between appellate cases and prosecutors themselves regarding the prevalence of *Brady* violations.

This study shows that appellate decisions, in and of themselves, are not suitable sources of data for identifying and policing prosecutor misconduct. It is difficult to identify the extent of misconduct from appellate cases for the purpose of sanctioning prosecutors because judges are often unclear regarding their findings of misconduct or error, or may not reach a decision regarding misconduct at all. Additionally, because harmless error analysis is used by judges to determine the outcome of prosecutor misconduct claims on appeal, the intent of the prosecutor is less important than the strength of the State's case against a defendant in determining the consequences of misconduct. Consequently, distinguishing malicious misconduct from unintentional error is not often possible when using appellate decisions as the source of data.

This study also highlighted the need for prosecutors to receive better training on the law and trial practice before being assigned felony or complex cases. The prosecutor culture may also contribute to the amount of misconduct and error occurring in a prosecutor agency. Finally, although prosecutors considered *Brady* violations to be the most common types of misconduct, they appeared in less than 10% of the appellate case decisions in the study. Additional research in this area is needed in light of recent open file laws, and in order to inform future training for prosecutors.

I. INTRODUCTION

Background of the Problem

The first post-conviction DNA test was used in 1989 to establish the innocence of a man convicted of murder (Innocence Project, 2014). By 2012, 317 murder and rape cases were overturned and a growing number of additional prisoners have established their innocence (Gross & Shaffer, 2012). Consequently, journalists, Innocence Project advocates, researchers, legal professionals, and state and national legislators have turned their attention to identifying and addressing the causes of wrongful convictions (Gould, Carrano, Leo, & Hail-Jares, 2014). Innocence Project advocates and legal scholars claim that one of the leading causes of wrongful conviction is prosecutor misconduct (Garrett, 2011; Acker & Redlich, 2011).

As the “first line of defense” against wrongful conviction, prosecutors are in a unique position to evaluate evidence against the defendant, as well as ensure procedural safeguards are followed (Joy, 2006, p. 4). However, not all prosecutors are able or willing to fulfill these obligations as ministers of justice. A prosecutor who intentionally misstates the law during closing argument, knowingly uses perjured testimony, or suppresses evidence that is favorable to the defendant commits misconduct (Joy, 2006).

In addition to intentional misconduct, errors made in good faith also result in wrongful convictions (Texas District and County Attorneys Association, 2012). There are many explanations for good faith error, but the following are frequently cited by both prosecutors and judges: unintentional *Brady* violations, such as failure to disclose exculpatory evidence in the possession of the police, but unknown to the prosecutor, or misjudging material exculpatory evidence to be nonmaterial; cognitive bias; and the

negative impact of large caseloads and significant pressure to resolve cases quickly (Texas District and County Attorneys Association, 2012; California District Attorneys Association, 2012).

While understanding the role of prosecutorial misconduct and good faith error is essential to reducing wrongful convictions, there exists very little research on prosecutors generally and prosecutorial misconduct specifically. More research is needed in order to understand how and why prosecutors engage in intentional misconduct and good faith error leading to misconduct. This knowledge will inform good public policy, be helpful in creating more effective prosecutor training, and encourage the implementation of meaningful prosecutor disciplinary systems that contribute to reducing wrongful convictions.

Goals of the Study

Articles published in criminal justice journals and law reviews cite a handful of studies to support the conclusion that prosecutors often commit misconduct but are rarely disciplined. The validity of these studies, however, has rarely been questioned. It is imperative to examine the reliability and validity of these studies. The objective of this research is to reexamine the data in two frequently cited studies. The initial studies, conducted by interest groups affiliated with the Innocence Project, reviewed appellate cases in two states. In response to each study, the data were re-analyzed by the state's prosecutors' association who disputed the original findings. The difficulty in understanding the prevalence or types of prosecutorial misconduct is that the majority of available research has been done by interest groups who have a vested stake in outcomes.

This dissertation presents a re-analysis done by an objective reviewer using standard social science methodology.

This study seeks to describe the phenomena of prosecutor misconduct through the examination of 99 California and 91 Texas appellate court cases in which claims of prosecutor conduct were considered. The set of 99 California cases were randomly pulled from the total data set of 707 cases in a study by Kathleen Ridolfi and Maurice Possley for the Northern California Innocence Project. The original data set was reanalyzed by the California District Attorneys Association (CDAA). The set of 91 Texas cases is the total data set analyzed by Emily West for the Innocence Project, and reanalyzed by the Texas County and District Attorney's Association (TCDA). This research used ethnographic content analysis on the 190 cases, as well as in-depth case studies of 5 specific Texas cases, and interviews with 10 current and former prosecutors to examine the phenomena of misconduct and error. The research begins with the following specific research questions but, as this research is exploratory, the study shifted to address additional questions as the analysis proceeded.

Research Questions

The research in this study begins with the following research questions:

1: What is the range and prevalence of prosecutor misconduct identified by appellate judges in the sample cases? How do findings compare with the previous studies?

2: What types of prosecutorial misconduct or errors most commonly occur? Are there significant themes regarding prosecutor behaviors that arise from the appellate cases?

3: What do judges rely upon to make this decision (prior case law / policy / statutes)? Are there significant themes regarding judicial decisions that arise from the appellate cases?

4: Are there any sanctions directed to prosecutors if a determination of misconduct is made? If so, what sanctions do the judges apply?

Summary and Organization of the Dissertation

This dissertation is divided into seven chapters and an appendix. Chapter One briefly introduces the topic, presents the goals of the study, and presents the research questions. Chapter Two presents a comprehensive review of the relevant literature addressing prosecutors, wrongful convictions, and prosecutor misconduct. Chapter Three describes and provides the rationale for the research methodology. Chapter Four presents the findings of the qualitative content analysis of 190 cases sampled from two previous studies of prosecutor misconduct. Chapter Five presents the findings of the case studies of five court cases in which prosecutor misconduct is at issue. Chapter Six presents the findings of the phenomenological inquiry using semi-standardized interviews with current and former prosecutors. The seventh chapter discusses the themes within these findings in the context of prosecutor misconduct generally and the research questions specifically. The appendix includes copies of all coding used, the interview protocol, informed consent forms, examples of various types of misconduct identified from the appellate cases in the combined sample, and copies of the internal review board approval from Texas State University.

II. REVIEW OF THE LITERATURE

This chapter is divided into six sections. The first section begins with the history of the American prosecutor. The second section introduces the current organization and duties within prosecuting agencies across the country. The third section discusses the current literature on prosecutorial decision-making and discretion. The fourth section discusses wrongful convictions and its leading causes, including prosecutor misconduct and good faith error. The fifth section introduces prosecutor misconduct and the legal and practical circumstances that contribute to misconduct and good faith error. The sixth section discusses the prevalence of prosecutor misconduct. The concluding section introduces the proposed research in light of the current literature.

History of the American Prosecutor

The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. ... While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst. – Attorney General Robert H. Jackson, from his speech to the Second Annual Conference of United States Attorneys, Washington D.C. (April 1, 1940).

The American prosecutor is unique among criminal justice professionals, in that she is a public servant in an elected office exercising nearly limitless authority and discretion (Steinberg, 1984; Worrall & Nugent-Borakove, 2008). Although initially a relatively weak player in the criminal justice system, over time the prosecutor has evolved from one of little influence to the most powerful law enforcement official in the country (Medwed, 2012). It is not clear from which country's legal system the American prosecutor developed, although there is evidence that the current system of

public prosecution has roots in the English, French, and Dutch legal systems, in addition to characteristics that are entirely its own (Kress, 1976; Jacoby, 1997a). Although the American legal system as a whole has its roots in the English common law, the role of the prosecutor developed to be distinctly different from his English counterpart's in several ways (Steinberg, 1984; Worrall & Nugent-Borakove, 2008).

First, prosecutors act on behalf of the state instead of individual private citizens (Jacoby, 1997a). In the 1600s, in many colonies, citizens with complaints brought them directly to the attention of governors or justices of the peace (Steinberg, 1984). Other colonies modeled the Dutch system by appointing a *schout*, who served in a similar capacity as a modern constable and officer of the court, notifying defendants of charges and presenting a case against them in court, as well as having limited power to arrest (Jacoby, 1997b). These officials served in a judiciary capacity and were primarily paid through fees paid by the complaining citizens (Steinberg, 1984). Between 1650 and 1750, the position of local prosecutor began to emerge, although it was still a relatively minor position in the courts (Steinberg, 1984). Pennsylvania appointed a prosecuting attorney in 1686, the Connecticut Assembly created the first office of public prosecutor in 1704, Virginia commissioned its county attorneys in 1711, and New Jersey had district attorneys by 1747 (Kress, 1976). In 1789, the Judiciary Act created federal district attorneys (Judiciary Act of 1789). Very little was expected of these early prosecutors, however, and many jurisdictions retained private prosecutors who often took on greater responsibilities than the appointed district attorneys (Steinberg, 1984).

The second major difference between British and American prosecutors is that American prosecutors are generally elected, not appointed (Jacoby, 1997d). Although

prosecutors during the colonial period were appointed, including the first attorney general and U.S. attorneys, the selection of prosecutors through popular election became common in the early 19th Century (Ellis, 2012; Mayers, 1964). Until the 1820s, prosecutors were appointed by governors, judges, and local courts (Jacoby, 1997c). Voters became frustrated with this process, however, as governors gained power and political parties used the appointments to reward those loyal to the party and punish those who were not (Ellis, 2012). During the presidency of Andrew Jackson, local elections increased and a greater number of public prosecutors were popularly elected; by the 1860s, states across the country had enacted provisions for the election of judges, and subsequently, prosecutors (Ellis, 2012). Additionally, states began to include prosecutors in their executive branches, giving them a distinct identity apart from the courts (Jacoby, 1997c).

Originally intended to give voters more control over their government, reduce political favors, and increase responsiveness to their constituencies, the election of prosecutors may have resulted in unintended consequences to the criminal justice system (Ellis, 2014). Today's prosecutors are still influenced by the public and consequently experience pressure to resolve high profile cases and increase conviction rates. They may also be susceptible to the corruptible influence of campaign contributions (Ellis, 2014; see also Kennedy, 1997; Rasmusen, Raghav, & Ramseyer, 2009).

Prosecutors in the United States enjoy vast power today that they did not have until the early 20th Century (Jacoby, 1980). As noted above, until prosecutors were selected through elections, their tenure was dependent upon appointments by individuals in the political process (Jacoby, 1997c). Additionally, in contrast to the sheriff and coroner who had gained power, they were seen as relatively minor court staff. With the

expansion of popular elections, local officials gained more independence and discretion (Jacoby, 1997c). States also enacted legislation that required their district attorneys to sign bills of indictment and conduct all criminal prosecutions, responsibilities that had previously been shared with private prosecutors (Steinberg, 1984). In 1883, courts began affirming the authority of district attorneys, most specifically by upholding their nearly unrestrained discretion to decide whether or not to file charges (Steinberg, 1984; Jacoby, 1980). By the 1920s, the American prosecutor had obtained considerable discretionary power (Worrall & Nugent-Borakove, 2008). Only a prosecutor has the power to bring charges against the accused, the prosecutor alone decides what those charges will be, and the prosecutor determines whether or not to terminate prosecution once charges are filed (Jacoby, 1997d; Steinberg, 1984).

Current Organization and Duties

The modern prosecutor works within a formal government agency, and accomplishes duties set out by law (Levine, 2012). The size and organization of each agency, as well as the duties of individual prosecutors, vary depending on the characteristics of the jurisdiction in which the agency is located, such as crime rates, population size, and the type of criminal laws being enforced. The following section explains the basic organizational structure for prosecuting agencies, and prosecutors' duties for both Federal and state district attorneys.

Organization

In 2007, the Bureau of Justice Statistics reported 2,330 prosecutors' offices across the United States that handle felony cases (Bureau of Justice Statistics, 2011). These do not include federal prosecutors, or city and county offices that handle only misdemeanor

cases. Each of the offices has a chief prosecutor, commonly known as the district attorney, who is usually selected in a county-wide election, paid through county funds, and who manages the office autonomously from the control of state politicians such as the governor or attorney general (Kress, 1976). On average, the chief prosecutor retains his or her seat about nine years, and earns \$98,000/year (Bureau of Justice Statistics, 2011). Although the chief prosecutor can handle criminal cases, particularly in small offices with only one or two assistant prosecutors, district attorneys are also responsible for setting the priorities of the office, securing funding, and managing personnel (Worrell & Nugent-Borakove, 2008).

Although there are large district attorneys' offices in metropolitan counties with several hundred attorneys, almost 75% of district attorney offices serve a population of less than 100,000 people, with 15% of all offices having only a part-time chief prosecutor (Bureau of Justice Statistics, 2011). In the offices serving less than 100,000 people, the staff usually consists of the district attorney, three assistant district attorneys, a victim's advocate, one investigator and a few support staff members. The average salary for a full-time assistant district attorney ranges from \$47,580 for an entry-level prosecutor to over \$100,000 for those with over six years of experience in offices serving over one million people. The average caseload of assistant district attorneys across all full-time offices is just under 100 cases. The vast majority of cases across all offices are resolved through plea negotiations, with only 3% of felony case dispositions adjudicated through jury verdicts. Although almost all (85%) offices have jurisdictions that correspond to the county boundaries in which they are located, four states have a single chief prosecutor in office for the state (Alaska, Connecticut, Delaware, and Rhode Island).

At the federal level, the chief prosecutor is the Attorney General who heads the Department of Justice. This is one of the only remaining appointed prosecutor positions. There are 93 U.S. Attorneys who serve under the Attorney General, each representing a Federal district, with a total of 94 headquartered offices and 138 branch offices (Bureau of Justice Statistics, 2013). Each U.S. Attorney office employs Assistant U.S. Attorneys (known as AUSAs) who handle the daily case load of the office, similar in most respects to the assistant district attorney at the state level. In 2010, there were 6,075 AUSAs handling case referrals from federal and state law enforcement agencies. In 2010, the priorities of the Department of Justice for U.S. Attorney offices included terrorism, drug trafficking, civil rights violations, and corporate fraud (Bureau of Justice Statistics, 2013).

Duties

The basic duties of both federal prosecutors and district attorneys are similar, while state and city prosecutors are somewhat different. Federal prosecutors enforce federal criminal laws such as counterfeiting, money laundering, murder, or extortion (Williams, 2010). The Department of Justice also assigns AUSAs to file civil lawsuits addressing issues such as health care fraud or employment discrimination. District attorneys handle the bulk of criminal prosecutions across each state, from low-level shoplifting and assault charges to the most serious felonies such as rape and murder. Some states, such as Texas, have both district and county attorneys representing large counties, wherein district attorneys handle felony cases and county attorneys resolve misdemeanor cases (Texas Association of Counties, 2014). Attorneys working for the state attorney general are primarily involved in prosecuting white-collar crimes,

addressing civil law violations, and taking referrals that may cause a conflict of interest for a district attorney; they do not handle the bulk of the criminal prosecutions (Williams, 2010). City prosecutors are similar to district attorneys, but handle only misdemeanor cases and violations of city ordinances.

All prosecutions follow this general process: Federal, state, and local law enforcement agencies submit referrals to prosecuting agencies, usually in the form of a police report. Prosecutors evaluate whether or not to file charges in court based on several factors such as the quality of the evidence, priorities of the prosecuting agency, and available resources (Bureau of Justice Statistics, 2013). Once the decision to file charges is made, the prosecutor represents the government in criminal proceedings both in and out of court, including pre-trial hearings addressing bail and evidentiary motions, plea negotiations, trial and sentencing hearings, and post-sentencing hearings addressing topics such as violations of parole (Worrall & Nugent-Borakove, 2008). In all of these duties, the prosecutor is expected to be a zealous advocate for the people (Medwed, 2012; Joy, 2006).

However, the prosecutor's power and unrivaled resources are tempered by a second role as a "minister of justice" (Medwed, 2012, p. 2). As a minister of justice, the prosecutor is held to the highest ethical standards for attorneys and is directed to "seek justice" rather than solely win convictions (Green, 1999; see also Model Rules, 2002; Model Code, 1969; ABA Standards for Criminal Justice, 1993). In *Berger v. United States*, the Supreme Court articulated this dichotomy when Justice Sutherland wrote that the prosecutor is "the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer" (1935, p. 88). In order to prevent innocents from suffering,

the prosecutor must scrutinize how the government's resources are used, overseeing the police investigation, the veracity of evidence, and the credibility of witnesses and informants (Joy, 2006).

Not all prosecutors fulfill these obligations zealously, however. Individual circumstances, such as pressure to gain convictions for professional advancement, tunnel vision, and overwhelming caseloads can lead to misconduct and errors that contribute to wrongful convictions (Acker & Redlich, 2011; Garrett, 2011; Medwed, 2012). Legal scholars also argue that prosecutor misconduct is the result of institutional conditions that create a lack of accountability, including increasing discretion without transparency, ambiguous ethical rules, and insufficient disciplinary remedies (Joy, 2006; Green, 1999). Prosecutor misconduct, whether the result of individual decisions or institutional processes, is one of the leading causes of wrongful convictions (Acker & Redlich, 2011; Medwed, 2012).

Current Research on Prosecutors

Social scientists have done relatively little research on prosecutors, particularly compared to the wealth of research available on policing, because researchers have found prosecuting agencies to be closed systems that do not readily share information (Worrall & Nugent-Borakove, 2008). In fact, prosecutors are often reluctant to open their agencies for empirical study because they have little to gain but arguably much to lose in the process (Johnson, 2014). Extant studies generally involve small datasets, collected independently by researchers, which focus on a few crime types from a single jurisdiction (Johnson, 2014).

Early research of the criminal justice system during the “progressive era”, roughly 1890 through the 1920s, focused on investigating how the criminal justice process operated, with particular focus on identifying and removing corruption and undue political influence (Worrall & Nugent-Borakove, 2008, p. 11; see also Survey of Criminal Justice in Cleveland, 1922; Committee on the Judiciary, 1931; and Missouri Crime Survey, 1968). Specific studies of prosecutors examined only official data reported by prosecutors, but did not include direct observation of the day-to-day operations in a district attorney’s office (Worrall & Nugent-Borakove, 2008). Consequently, researchers did not account for the pressures and office politics that influence prosecutors, such as heavy caseloads, pressure from supervisors and the public, and personal interests. It wasn’t until 1956, when the American Bar Foundation conducted its Survey of the Administration of Criminal Justice, that observations of criminal justice professionals in their daily duties were included in studies of the criminal justice system (Remington, 1956; see also Walker, 1992). Arguably for the first time, the criminal justice process was seen as a “series of important decisions from the time a crime is committed until the offender is finally released from supervision” (Walker, 1992, p. 47).

Under the earlier paradigm, low conviction rates were seen as a failure by police and prosecutors to punish guilty people, in part due to political interference or unqualified personnel, rather than discretionary decision-making influenced by factors such as burdensome caseloads and self-serving interests (Walker, 1992). Researchers began to discern that prosecutors were not simply following the law without reflection, but were considering the consequences of filing charges and alternate approaches to resolving

cases such as plea bargains (Worrall & Nugent-Borakove, 2008). From this point forward, research on prosecutors focused substantially on discretion and decision-making (Walker, 1992).

Prosecutor Discretion and Decision-Making

Research of decision-making by prosecutors often occurs in studies involving how members of the courtroom workgroup influence one another. For example, Ulmer and Kramer (1998) studied how prosecutors, judges, and defense attorneys approached the application of sentencing guidelines in light of the characteristics of their individual and inter-organizational relationships. They found that prosecutors used sentencing guidelines to reduce uncertainty in case outcomes, as well as a tool for leaders in district attorneys' offices to supervise the decisions of less-experienced prosecutors. Second, prosecutors had less discretion over sentencing decisions when judges and defense attorneys aligned to limit the severity of their sentencing recommendations. Ultimately, the decision-making process for prosecutors was influenced both by formal structure of the sentencing guidelines, and through various relationships within their own offices and with outside members of the courtroom workgroup.

Additional research on how the prosecutor's work environment affects decision making suggested that in addition to laws and personal consciences, the organization and culture of the office affects a prosecutor's behavior (Mellon, Jacoby, & Brewer, 1981; Levine & Wright, 2012). Levine and Wright (2012) found that the organizational style and hiring preferences of the office in which a prosecutor works may influence her decisions. For example, attorneys who work in an office with formal hierarchies and a preference for hiring inexperienced attorneys tend to embrace group values to a larger

degree than attorneys in an office with fewer supervisors and more experienced attorneys. As a result, the prosecutors in the former category are more likely to make decisions consistently in line with their peers in the organization than prosecutors in the latter category who value autonomy in their decision making (Levin & Wright, 2012).

In a study of two moderately large county prosecutors' offices, Stemen and Frederik (2013) examined prosecutor decision-making throughout case processing. Selecting several decision points, including charging, plea offers, and sentencing recommendations, they examined the impact of legal, extra-legal, and quasi-legal factors on case outcomes, and particularly how prosecutors evaluated these factors when making their decisions. The researchers found that prosecutors were guided by (1) whether they *could* prove the case, and (2) whether they *should* prove the case. When addressing the first question, prosecutors relied primarily on an objective assessment of the evidence. Later, prosecutors looked to other factors, such as the severity of the offense, the defendant's prior history, and other characteristics of the defendant and the victim, to evaluate whether or not a case should go forward. Moreover, three additional sets of constraints weighed on prosecutors' decision-making: rules, resources, and relationships. For example, internal office policies may dictate a plea offer (rules), the prosecutor's individual case load may limit the time he or she has to take a case to trial (resources), and relationships between the prosecutor and other criminal justice professionals, such as police officers, judges and defense attorneys, may influence how a case is managed (relationships) (see also Frederick & Stemen, 2012).

Research on Charging Decisions

Most research concerning prosecutorial decision-making focuses specifically on charging decisions (Ulmer, Kurlychek, & Kramer, 2007). In fact, the charging decision is arguably the most critical decision that prosecutors make, and one in which they have absolute discretion (Spears & Spohn, 1997). One of the central concerns underlying decision making for prosecutors is avoiding uncertainty (Albonetti, 1986). Earlier research on avoidance of uncertainty claims that decision makers develop structured processes that, when followed over time, create bounded systems that “absorb uncertainty” (Albonetti, 1986, p. 625; see also March & Simon, 1958; Cyert & March, 1963; Thompson, 1976). When considering whether or not to file charges, prosecutors reduce uncertainty by proceeding with cases in which the likelihood of a conviction at trial is high (Albonetti, 1986). Although the vast majority of cases are resolved through a plea bargain, rather than a jury trial, prosecutors use the jury trial as their benchmark even though concerns regarding uncertainty are not necessarily the same for both dispositions (Albonetti, 1986).

Prosecutors have been shown to rely on various factors to make this determination, such as the strength of the evidence, the seriousness of the offense, and the defendant’s criminal record (Albonetti, 1987; see also Jacoby, Mellon, Ratledge, & Turner, 1982; Miller & Remington, 1969; Myers, 1982; Neubauer, 1974; Schmidt & Steury, 1989). Additionally, prosecutors also considered victim and witness credibility in assessing uncertainty since the behavior of victims and witnesses during trial (and the jury’s assessment of each) is generally outside of the prosecutor’s control and therefore can undermine attempts to manage risk throughout the prosecution (Albonetti, 1986).

Credibility was ascertained by judging character, appearance, and prior criminal history (Stanko, 1982). Prosecutors also rely on stereotypes of the types of people that society deems to be credible, such as “older, white, male, employed” (Stanko, 1982, p. 229; see also Albonetti, 1987; Frohmann, 1991; Kerstetter, 1990). At least a few studies showed that prosecutors may be influenced by the socioeconomic status of the defendant, but most likely not by race alone (Wooldredge & Thistlethwaite, 2004; Ulmer, et al., 2007).

In charging sexual assault crimes, specifically, researchers have found that prosecutors in fact relied upon victim credibility, moral character, and behavior during the assault (did the victim resist the attacker, for example) in making charging decisions (Alderden & Ullman, 2012; see also Spohn, Beichner, & Davis-Frenzel, 2001; Beichner & Spohn, 2005; Spohn & Spears, 1996). Decisions in sexual assault cases were also impacted by availability of witnesses and the delay between the alleged assault and reporting by the victim (Alderden & Ullman, 2012). In this research, race of the victim and offender influenced prosecutor charging decisions, specifically when the victim was white and the offender was a minority (Chandler & Torney, 1981; LaFree, 1989).

Prosecutor discretion in making charging decisions also directly affects sentencing outcomes (Alschuler, 1978; Coffee & Tonry, 1983). In jurisdictions with presumptive sentencing schemes, in which judges are allowed some discretion to deviate from the statutory penalty, prosecutors leverage their power by “charge-bargaining” in which they charge a defendant with a plea offer in mind, enticing a defendant to take a plea to a lesser charge, and hope the judge follows the recommended commensurate lower sentence (Alschuler, 1978). However, in jurisdictions with fixed sentencing schemes, in which judges cannot deviate from the statutory sentence, charge bargaining is

sentence bargaining: the prosecutor effectively controls the outcome of every guilty plea (Alschuler, 1978).

Discretion in charging that directly affects sentencing is also evident in cases where the defendant is eligible to be charged under mandatory minimum policies such as “three strikes” offenders (Ulmer, Kurlychek, & Kramer, 2007; Chen, 2014). Under this type of sentencing scheme, sentence enhancements are applied to offenders who commit specific crimes, such as certain drug crimes, and to repeat offenders. The decision whether or not to charge a defendant under this statutory provision is solely the prosecutor’s, thereby conferring him with control over the sentence (Chen, 2014).

Ulmer and colleagues (2007) found that although prosecutors do not choose to charge offenders with mandatory sentences in most cases (less than 20% in their study), in the cases that they do select, they are influenced by the severity of the offense and the prior record of the offender. They may also be influenced by the social status of the offender, to the extent that the race, gender, or age of the offender affects a prosecutor’s perception of the culpability of the offender and the risk to community safety. On the other hand, researchers in this study point out that a defendant’s willingness to accept plea offers under the general sentencing guidelines may have a strong influence on prosecutors’ final charging decision to drop the threat of a mandatory minimum eligible charge. In the majority of cases eligible for mandatory minimum sentencing, prosecutors are influenced by the disparity between the mandatory minimum and the general sentencing guidelines, so that the greater the disparity, the less likely a prosecutor will be to seek the mandatory minimum which may be seen as excessive (Ulmer, et al., 2007).

For federal prosecutors specifically, Johnson (2014) found that charging decisions are primarily influenced by the quality of the evidence and prosecution priorities of the Department of Justice. Overall, there was substantial variation across federal court districts for declining to charge cases and charge reductions, but none of the variation was explained by district-level characteristics such as size, case load, race and socioeconomic status of people living within the district, or crime rate.

Wrongful Convictions

Prosecutors can cause or contribute to wrongful convictions in several ways. In order to understand the role they may play, this section provides background information on wrongful convictions, highlighting the five most common contributing factors: false or misleading eyewitness identification, faulty forensics, false confessions, jailhouse snitches, and prosecutor misconduct.

Over three hundred murder and rape cases have been overturned since the first post-conviction DNA test was used to establish the innocence of a man convicted of murder (Innocence Project, 2014). Prisoners have also increasingly established their innocence through post-conviction review using means other than DNA testing (Gross & Shaffer, 2012). Consequently, policy makers and the media have turned their attention to identifying and addressing the causes of wrongful convictions (Gould, Carrano, Leo, & Hail-Jares, 2014). Wrongful convictions are generally defined as those that result in the conviction of a defendant who is factually innocent (Acker & Redlich, 2011). It is important to note, however, that criminal convictions are overturned for many reasons, not only due to the factual innocence of the defendant. For example, a court will overturn a conviction if procedural error resulted in a violation of the defendant's constitutional

rights (Acker & Redlich, 2011). This distinction will be significant in the examination of prosecutor misconduct.

There are many causes of wrongful convictions, but recent research focuses on the following common contributing factors: false or misleading eyewitness identification, faulty forensics, false confessions, jailhouse snitches, and prosecutor misconduct (Acker & Redlich, 2011; Garrett, 2011). Several scholars point out that what some believe to be causes of wrongful convictions may only be spurious correlates, and that some of the above noted variables are present across all cases including those in which factually guilty defendants are convicted (Gould, Carrano, Leo, & Hail-Jares, 2014).

In a study comparing wrongful convictions with “near misses,” cases where a factually innocent defendant was indicted but released before conviction on the basis of his innocence, researchers found that state punitiveness, a weak case, error during forensic testimony, age and prior criminal history of the defendant, honest mistaken identity by an eyewitness, and poor representation by a defense attorney contribute to wrongful convictions (Gould, et al, 2014, p. xiv; see also Gould, Carrano, Leo, & Young, 2012).

Most notably, however, researchers concluded that tunnel vision and systematic failure contribute most, noting “what separates erroneous convictions from near misses is not just a list of individual factors, but more importantly the process by which initial errors remain undetected or uncorrected... (T)he erroneously convicted are truly cases of systemic failure” (Gould, et al, 2014, p. xxi). Nevertheless, the following five most common causes of wrongful convictions are worth discussing in more detail.

The Innocence Project's list of DNA-based exonerations reveals that eyewitness misidentification played a role in more than 75% of convictions overturned through DNA testing (Innocence Project, 2014). In an examination of exonerations from 1989 to 2012, Gross & Shaffer (2012) also found that eyewitness misidentification, both mistaken and intentionally false, is the most common cause of wrongful convictions. The fallibility of human memory, suggestiveness of police investigations, the presence of multiple eyewitnesses, and intentional lies for a variety of reasons, all contribute to this large percentage of cases in which eyewitness testimony leads to the conviction of the wrong person (Gross & Shaffer, 2012).

Faulty forensics is also a common cause of wrongful convictions. In over 50% of the DNA-based exonerations identified by the Innocent Project, non-validated or improper forensic evidence was a contributing factor to wrongful convictions (Innocence Project, 2014). Gross & Shaffer (2012) found that bad forensics contributed to roughly one quarter of the wrongful convictions they studied. Examples of faulty forensics include invalid testimony concerning comparisons of blood, hair and fingerprints, as well as bite marks, shoe prints, and fibers (Garrett & Neufeld, 2009). Expert witnesses have presented conclusions that either misstated empirical data or were entirely unsupported by empirical data (Garrett & Neufeld, 2012).

In roughly one quarter of the DNA-based exonerations compiled by the Innocence Project, an innocent defendant falsely confessed, gave incriminating statements or pleaded guilty (Innocence Project, 2014). Gross and Shaffer (2012) noted that innocent defendants falsely confessed after being tricked, coerced, or became exhausted from long interrogations, particularly if they were young or mentally disabled.

Jailhouse informants were identified in 15% of wrongful convictions in the DNA-based exonerations compiled by the Innocence Project (Innocence Project, 2014). As a source of credible evidence, these informants are highly questionable as they generally have no first-hand knowledge of the crime but do have a “nearly irresistible incentive to fabricate statements against other criminal defendants” such as leniency on pending charges and other favors from the state (Medwed, 2012, p. 85).

Whether due to intentional misbehavior or systematic failure, prosecutor misconduct is a common contributor to wrongful convictions. The Innocence Project found that prosecutor misconduct occurred in 33 of the first 74 DNA-based exonerations, roughly 45% of those cases. Misconduct in these cases included withholding evidence, participation in the coercion of false confessions, use of unreliable informants or jailhouse snitches, and deliberative suggestiveness during identification procedures (Innocence Project, 2014). The following discussion will examine prosecutor misconduct in far more detail.

Prosecutor Misconduct

Prosecutors are in a unique position to evaluate evidence against the defendant, as well as ensure procedural safeguards are followed (Joy, 2006, p. 4). Not all prosecutors are able or willing to fulfill these obligations, however. Whether due to individual pressure to succeed professionally, the human tendency to overlook evidence that may change the direction of a case, ambiguous evidentiary rules, or insufficient training and supervision, prosecutors do cross ethical and legal boundaries.

Supreme Court Justice Sutherland defined misconduct as “overstepp[ing] the bound of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense” (*Berger v. United States*, 1935, p. 84). Henning (1999) suggests that prosecutor misconduct occurs when a prosecutor’s conduct is “outside the bounds of acceptable advocacy” (p. 720). Morrow and Larson (2008) argue that using the term “‘prosecutor misconduct’ as a legal term-of-art seems to overstate the case” (p. 396). Instead, they suggested using the term only when the prosecutor’s behavior was a “deliberate or wanton violation” of the rules, leaving “prosecutor error” for situations where the conduct was “harmless or an honest mistake” (p. 396). To this end, Corn and Gershowitz (2009) advise that “(m)isconduct does not usually occur because prosecutors are evil, overly results-oriented, or intentionally seeking to cheat. Misconduct often happens inadvertently because there is too much for prosecutors to know and insufficient ethics training to avoid misconduct” (p. 403-04).

Examples of misconduct include intentionally misstating the law during closing argument, knowingly using perjured testimony, threatening witnesses with loss of immunity if they do not testify favorably to the government, and suppressing evidence that is favorable to the defendant (Joy, 2006). Errors made in good faith can also result in wrongful convictions (Texas District and County Attorneys Association, 2012). Examples of good faith error frequently cited by both prosecutors and judges include unintentional *Brady* violations, misjudging material exculpatory evidence to be nonmaterial, and misstatements made during trial (Texas District and County Attorneys Association, 2012; California District Attorneys Association, 2012). The following sections examine several causes of, or contributors to, prosecutor misconduct and good

faith error, including the prosecutor culture, the law surrounding the *Brady* doctrine, cognitive bias and tunnel vision, lack of accountability, and lack of training, experience, and resources.

Prosecutor Culture

One of the contributing factors to prosecutor misconduct is thought to be a pervasive institutional culture that operates on a “tough on crime” and “win-at-all-costs” mentality. Research has shown that as prosecutors gain experience, their conviction mentality increases; an idealistic concern for justice is replaced by a focus on winning convictions (Medwed, 2004). Consequently, this shift in focus as prosecutors gain experience suggests that felony cases with the most severe punishments will be handled by the prosecutors in the office who are most driven to convict. This institutional culture may also place pressure on prosecutors to charge multiple offenses in each case, seek severe sentences, and push questionable cases forward, instead of charging fewer counts per indictment, agreeing to lower sentences, and dismissing weak cases (Fisher, 1988).

Additionally, conviction rates are one of the only quantifiable measures of success for individual prosecutors, justifying promotion and advancement into desired departments within the office. Individual prosecutors with the highest conviction rates may be given favored status, are promoted more quickly within the office, and have a choice of types of cases they wish to prosecute (Medwed, 2009). High profile cases present additional pressure to win, perhaps, at any cost (Ferguson-Gilbert, 2001). District attorneys cite conviction rates in their offices as means to negotiate with city and county officials for greater resources, as well as a personal platform upon which to run for re-election. Overturned convictions are considered to be “losses” and may be perceived as

undermining the overall credibility of both the office and the individual prosecutor who tried the case (Medwed, 2009). Under this pressure, it is not difficult to see why prosecutors choose to focus on their role as zealous advocates who pursue “wins” over ministers of justice who ensure due process.

Vagueness in *Brady* Disclosure Requirements

Failure to disclose exculpatory evidence is one of the most common causes of wrongful convictions, and might be the result of either prosecutor misconduct or good faith error (Garrett, 2011; Acker & Redlich, 2011; Yaroshefsky, 2010; Weeks, 1997). Prosecutors are required to turn over exculpatory evidence to the defense, including information that may reduce the culpability of the defendant or aid in impeaching a prosecution witness (Moore, 2012). In *Brady v Maryland*, the Court held that prosecutors are required to turn over evidence that is favorable to a defendant if it is “material to guilt or punishment” (1963, p. 87). Evidence is material if there is a “reasonable probability” that a different outcome would have occurred if the defense had access to the undisclosed evidence (*United States v. Bagley*, 1985, p. 682-83). A *Brady* violation is not dependent on prosecutor intent, meaning that a court will find a violation of the defendant’s due process rights regardless of whether the prosecutor knew that the evidence existed, or whether she purposefully or unintentionally withheld the evidence (*Brady v. Maryland*, 1963).

Law scholars argue that the jurisprudence surrounding *Brady* requirements creates a tricky environment for well-meaning prosecutors to navigate (Burke, 2007). *Brady v. Maryland* and its progeny require prosecutors to disclose exculpatory evidence if the net effect of the undisclosed evidence raises a reasonable probability that a different result at

trial would have occurred had the evidence been disclosed (Burke, 2007; see also *Kyles v. Whitley*, 1995; *United States v. Bagley*, 1985; *United States v. Agurs*, 1976). Writing for a majority of the Court, Justice Souter explained the prosecutor's burden in this way: "...the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached" (*Kyles v. Whitley*, 1995, p. 437). Consequently, the prosecutor, as she decides which evidence to disclose, must first imagine all of the evidence as it might be used during a trial, and then ask whether that evidence is "sufficient to undermine (her) confidence in a guilty verdict (not) yet achieved based on the rest of the evidence" (Burke, 2007, p. 576). Evidence known only to the defense attorney that may corroborate potentially exculpatory evidence is not included in this calculation.

It is important to note that, although over 90% of all criminal convictions are the result of plea negotiations, *Brady* disclosure requirements currently do not apply to cases in which a defendant is convicted through a guilty plea agreement (*United States v. Ruiz*, 2002). However, exculpatory evidence is just as crucial to defendants considering admitting to criminal behavior because (1) they may not have an accurate understanding of the facts surrounding the crimes, or (2) they may have been offered convincing incentives to admit to a crime they did not commit (McMunigal, 2007). For example, in *State v. Garner* (1994), the defendant admitted to falling asleep while driving, causing a fatal accident. The prosecutor did not disclose a witness report that the defendant's vehicle tire blew out, causing him to swerve into oncoming traffic. The defendant, who could not remember what had happened immediately before the accident, assumed his

sleep deprivation and earlier marijuana use was the cause of the accident, not the faulty tire. Had the prosecutor disclosed the witness report, the defendant would not have entered into the guilty plea with a ten-year sentence. The Court of Appeals of Idaho allowed Garner to withdraw his guilty plea and remanded the case to the trial court for further proceedings.

In *State v. Johnson* (1989), a defendant entered into a plea to selling drugs in exchange for the state dropping a second drug charge, and not pursuing perjury charges against his mother and girlfriend. Later evidence revealed that Johnson had been in state custody during the first crime, and almost certainly did not commit the second crime. The incentives of significantly reduced prison time, and protection of his mother and girlfriend, led this defendant to falsely admit to a crime he did not commit. The Louisiana Court of Appeals set aside his conviction (McMunigal, 2007). With over 90% of all criminal convictions resolved through plea agreements, which are rarely challenged on appeal, it is difficult to determine the effect that lack of disclosure has on these cases and how they may have been resolved differently if the defendant had been provided with *Brady* material (Yaroshefsky, 2010).

In trial practice and plea negotiations, decisions regarding when to disclose exculpatory evidence can be difficult for the most well-meaning prosecutor. The jurisprudence surrounding the *Brady* doctrine has made rules for disclosure unclear (Yaroshefsky, 2010). Even if the rules clearly dictate disclosure, some prosecutors may deliberately withhold evidence in order to win a case (Garrett, 2011). Both the intentional withholding of evidence and good faith errors can result in wrongful convictions.

Cognitive Bias and Tunnel Vision

Prosecutors, like all human beings, are subject to cognitive biases such as confirmation bias and selective information processing (Burke, 2007). Confirmation bias causes people to consider new information through the lens of their current beliefs, assigning validity to only that information that is consistent with those beliefs (Rossmo, 2009; see also Jonas, Schulz-Hardt, Frey, & Thelen, 2001; Lord, Ross, & Lepper, 1979). Confirmation bias can also cause selective memory, so that details and information are recalled more easily when they confirm previous beliefs (Findley & Scott, 2006). This phenomenon can result in “tunnel vision” for law enforcement officers and prosecutors. For police officers, tunnel vision involves identifying a primary suspect, collecting evidence about that suspect, and then ignoring evidence that might conflict with their theory of the case or lead to a different suspect (Rossmo, 2009). Tunnel vision has been identified as commonly having played a role in wrongful convictions (Findley & Scott, 2006). Writing about tunnel vision and prosecutors, Raeder (2003) notes, “prosecutors either don’t realize the significance or accuracy of exculpatory evidence or on occasion affirmatively conceal it because they are convinced of the suspect’s guilt” (p. 1327). Moreover, the adversarial nature of the criminal justice system reinforces tunnel vision as prosecutors seek, present, and defend evidence that will help win their case (Bandes, 2006). Prosecutors are also under pressure to maintain productive working relationships with police, and may jeopardize those relationships if they regularly question the police investigation (Medwed, 2012).

Some researchers, however, question the sufficiency of the current research on how tunnel vision affects professionals in the criminal justice field (Rossmo, 2009). Instead

of vilifying tunnel vision, researchers suggest that it might be a beneficial cognitive strategy for investigating crime because it allows police and prosecutors to systematically narrow information in a way that is persistent and focused in an environment that is fraught with pressures such as inadequate information, time pressure, interruptions, and other stresses. More research is needed in this area, particularly comparisons of investigative failures and successes using a tunnel vision strategy in order to identify the psychological biases that impede, rather than support, a criminal investigation and prosecution (Rossmo, 2009).

Lack of Accountability

Legal scholars and journalists have long opined that lack of accountability is a substantial contributor to prosecutor misconduct. Civil and criminal laws, as well as professional standards of ethics, have been cited in attempts to hold prosecutors accountable for misconduct, but to limited degrees of success. As a result, the prosecutor's vast amount of discretion, coupled with pressure to amass convictions and a lack of accountability, is said to create an environment in which the tendency is to push the limits of legal and ethical behavior. This is true particularly when professional success depends on winning convictions (Rosen, 1987; Weeks, 1997). Five areas of the law have been employed as possible measures to hold prosecutors accountable for misconduct: personal tort liability under the common law and 42 U.S.C. § 1983, municipal liability under 42 U.S.C. § 1983, criminal liability under state law, and sanctions under rules of professional responsibility (Keenan, Cooper, Lebowitz, & Lerer, 2011). Of these five, the U.S. Supreme Court has rejected or significantly narrowed the three avenues of civil liability (Keenan, et al, 2011).

Absolute and qualified immunity.

In general, civil liability for deliberate misconduct is limited only to circumstances in which prosecutors are not protected by absolute or qualified immunity (Henning, 2012). Absolute immunity shields government officials who play a judicial or quasi-judicial role from civil lawsuits, even Section 1983 suits which stem from allegations of violations of Constitutional rights (Henning, 2012). Qualified immunity also shields governmental officials from a personal lawsuit for unintentional violations of constitutional rights, as well as intentional conduct up to a point that is considered so egregious that it violates a constitutional right; police officers are protected by qualified immunity (Henning, 2012, citing *Harlow v. Fitzgerald*, 1982).

In 1976, the Supreme Court unanimously recognized absolute immunity from civil liability under Section 1983 for prosecutors engaged in gross misconduct resulting in wrongful convictions, as long as their conduct was “intimately associated with the judicial phase of the criminal justice process” (*Imbler v. Pachtman*, 1976, p. 430). Since 1976, the Supreme Court has used this functional analysis test to determine that absolute immunity applies to prosecutors when they are engaged in judicial functions, but not administrative or investigative functions. For example, judicial functions include presenting evidence to a jury, whereas administrative and investigative functions include speaking at press conferences or certifying facts necessary for a search warrant (*Imbler v. Pachtman*, 1976; *Buckley v. Fitzsimmons*, 1993; *Kalina v. Fletcher*, 1997).

Writing for the Court, Justice Powell argued that granting absolute immunity was appropriate and necessary to protect honest prosecutors from the constant fear of being

sued, which would be a “disservice to the broader public interest,” and because there are other avenues available for those wrongfully convicted, namely disciplinary sanctions by state bar associations and criminal laws (*Imbler v. Pachtman*, 1976, p. 427). Justices White, Brennan, and Marshall, disagreed with Powell regarding the extent to which absolute immunity should apply, writing in a concurring opinion that it should not extend to civil liability based on unconstitutional suppression of exculpatory evidence as a threat to the judicial process (*Imbler v. Pachtman*, 1976, concurring opinion).

The functional test outlined in *Imbler* was applied in a series of cases starting in 1991 that limited situations in which a prosecutor is protected by absolute immunity (Henning, 2012). For example, prosecutors are not protected by absolute immunity when giving legal advice to police officers (*Burns v Reed*, 1991); during investigative functions occurring before there is probable cause to arrest a suspect (*Buckley v. Fitzsimmons*, 1993); and when a prosecutor includes inaccurate statements of fact in an affidavit for an arrest warrant (*Kalina v. Fletcher*, 1997). In 2009, the Court considered the case of a prosecutor who did not disclose the history of a jailhouse informant who routinely received reduced sentences in exchange for his testimony (*Van de Kamp v. Goldstein*, 2009). The Court concluded that a prosecutor’s decision to withhold information about the informant requires legal knowledge, is not an administrative function, and is therefore covered by absolute immunity. This particular case is significant given the degree to which testimony from jailhouse informants has been found to contribute to wrongful convictions. In *Pottawattamie County, Iowa v. McGhee* (2010), the Court heard oral argument surrounding the question of whether a prosecutor enjoys absolute immunity

when he fabricates evidence and presents it against a defendant at trial; however, the case was settled out of court before the Court rendered a decision.

Municipal liability.

The Supreme Court has also considered a claim of municipal liability for prosecutor misconduct. In the case of *Connick v. Thompson* (2011), the prosecutor deliberately withheld exculpatory evidence from the defendant, John Thompson, who was convicted in two separate trials of robbery and murder and sentenced to death row. An investigator later uncovered the exculpatory evidence, and Thompson was ultimately acquitted only one month before his scheduled execution. Thompson brought a civil suit against the Orleans Parish District Attorney's office, claiming that its failure to train prosecutors on identifying and avoiding *Brady* violations amounted to "deliberate indifference" on the part of the District Attorney (*Connick v. Thompson*, 2011, p. 57). Although a federal jury awarded, and the Louisiana Court of Appeals upheld, a \$14 million verdict to Thompson, the U.S. Supreme Court vacated the award finding that the level of malfeasance exhibited by the Orleans Parish District Attorney's office in neglecting to train prosecutors on *Brady* violations did not rise to a level that would overcome absolute immunity for the District Attorney or the municipality (*Connick v. Thompson*, 2011). Consequently, the Court extended absolute immunity from individual prosecutors to their bosses and the municipalities who employ them, as long as a plaintiff's claims do not show that the office showed a consistent pattern of neglect or "failure-to-train" its prosecutors (Moore, 2012).

Given the facts of the *Connick* case, future successful lawsuits in which plaintiffs can prove a pattern of misconduct that meets the Court's "failure-to-train" standard is

highly unlikely. This is so even though District Attorney Henry Connick, Sr. admitted that he did not provide training to his prosecutors, nor was he personally aware of recent case law covering *Brady* violations, and numerous cases involving *Brady* violations had been brought against the District Attorney's office with at least 17 requiring new trials (Keenan, 2011; Yaroshefsky, 2012). In light of *Imbler v. Pachtman* and its progeny, and *Connick v. Thompson*, the likelihood of bringing a successful civil lawsuit against an individual prosecutor or municipality for deliberate misconduct is extremely low (Henning, 2012; Moore, 2012). This conclusion was underscored recently when the U.S. Supreme Court denied the petition for a writ of certiorari in *Truvia v. Connick* (2014). In that case, Earl Truvia and Gregory Bright, each released from custody after having spent 28 years in prison for a murder they did not commit, sued Harry Connick Sr., the District Attorney for the Parish of Orleans, a detective in the New Orleans Police Department, and the City of New Orleans, for numerous *Brady* violations during their late-1970s trial. In this case, as in *Connick v. Thompson*, the petitioners asked the Court to find there was policy and custom of withholding exculpatory evidence by the Orleans Parish District Attorney in this and many additional cases, as well as deliberate indifference in failing to train prosecutors, sufficient to create liability under 42 U.S.C. § 1983 (*Truvia v. Connick*, 2014).

Truvia and Bright presented evidence that 44 prosecutors had committed over 90 *Brady* violations between 1974 and 1976, testimony from a former Assistant District Attorney that there was a custom of "when in doubt, don't give it up" toward exculpatory evidence at the time of Truvia and Bright's case, and twelve additional cases of people exonerated as a result of *Brady* violations by prosecutors in Connick's office since 1990.

Nevertheless, the Fifth Circuit Court of Appeals held that this evidence was not sufficient to prove that the Orleans Parish District Attorney's office had a custom or policy of withholding exculpatory evidence from criminal defendants, nor did it show that Connick's office was deliberately indifferent to a need to train its prosecutors on *Brady* requirements (*Truvia v. Connick*, 2014).

Criminal sanctions.

The remaining two legal sources for sanctions, criminal laws and rules of professional conduct, have been used only rarely to hold prosecutors accountable for deliberate misconduct (Henning, 2012; Keenan, 2011). Federal law prohibits intentional violations of constitutional rights (Weiss, 2011; see also 18 U.S.C. § 242). Although federal criminal sanctions could be applied in local and state cases of prosecutorial misconduct that violates constitutional rights, they are rarely used, in part because the law requires proof that the prosecutor engaged in willful misconduct (Weiss, 2011). A slightly more common approach is to hold prosecutors in criminal contempt of court for disobeying court rules, as was used against District Attorney Michael Nifong after he deliberately withheld exculpatory evidence in a rape case involving Duke University lacrosse players, as well as Ken Anderson, the Williamson County District Attorney who withheld exculpatory evidence and obtained a wrongful conviction of Michael Morton (Weiss, 2011; Smith; 2013). However, scholars and practitioners are dubious about the likelihood of criminal prosecutions becoming an effective deterrent against intentional misconduct since prosecutors themselves would be initiating charges against their colleagues (Weiss, 2011).

Standards for professional behavior.

A final avenue for holding prosecutors accountable for misconduct is derived from the sanctions available under each state's standards for professional behavior, including the loss or suspension of a law license, fines, private and public reprimands, or mandated professional education (Levin, 1998). The prosecutor's dual role as zealous advocate and minister of justice has been reflected in professional standards for ethical behavior as early as 1908 (Joy, 2006). The American Bar Association's (ABA) Canons of Professional Ethics tempered the prosecutor's duty for zealous representation with the standard that his principal duty is "not to convict, but to see that justice is done" (Canons of Professional Ethics, 1908).

In an effort to provide more concrete guidance to attorneys, the ABA adopted the Model Code of Professional Responsibility in 1969, and included a new disciplinary rule for prosecutors (Model Code, 1969). Under this rule, in addition to the duty to seek justice, the prosecutor is instructed that her duty is not to bring criminal charges unless supported with probable cause, and the duty to disclose evidence to the defendant if that evidence would tend to negate or mitigate the guilt or punishment. In 1983, the ABA adopted the Model Rules of Professional Conduct (Model Rules), reiterating the two existing responsibilities, and adding three more in Rule 3.8 (Joy, 2006).

Under Rule 3.8, prosecutors must not bring charges without probable cause (the same as in the 1969 Model Code). Second, prosecutors are obligated to disclose *information* (broadened from evidence) that tends to negate or mitigate the guilt or punishment of the defendant (Model Rules, 1983). Third, the prosecutor must make "reasonable efforts to assure" that the defendant has been informed of his rights to be

represented by counsel and, in fact, has a reasonable opportunity to obtain counsel (Model Rules, 1983). Fourth, the prosecutor must not solicit a waiver of pretrial rights from a defendant who is not represented by counsel; and finally, the prosecutor must “exercise reasonable care to prevent” law enforcement and other government agents from making statements that the prosecutor himself is prohibited from making (Model Rules, 1983).

Between 1990 and 2008, the ABA added several sections to Rule 3.8, including the most recent, and most controversial, two sections that address post-conviction duties. Added is a requirement that prosecutors must investigate and disclose any information regarding new, credible, and material evidence that a conviction may be in error, and to remedy such a conviction when there is clear and convincing evidence (Model Rules, 1983 R. 3.8(g) & (h)).

The ABA’s Standards for Criminal Justice Prosecution Function (ABA Standards) also serve as a source for professional conduct (ABA, 1993). For example, a prosecutor is directed to disclose to a grand jury any evidence that may negate or mitigate guilt, and must have “sufficient admissible evidence to support a conviction,” not just probable cause, before charging a criminal case (ABA, 1993, Standard 3-3.9(a)). The ABA Standards also heighten the requirements of disclosure to the “earliest feasible opportunity,” and prohibit prosecutors from ignoring evidence or failing to follow leads that may be damaging to her case (ABA, 1993, Standards 3-3.11(a) and (c)).¹

¹ Differences between standards in the Model Rules and the ABA Standards can be an additional source of confusion for prosecutors. For a discussion of different standards relating to trial summation between the Model Rules and the ABA Standards, and between guidelines for prosecutors and defense attorneys in the ABA Standards, see Medwed (2010).

Implicit in these ethical rules and standards is the assumption that prosecutors will follow them, as long as they know and understand them (Joy, 2006). Consequently, many view prosecutor misconduct to be the result of unclear or weak ethical rules. Both the American Bar Association and the National District Attorneys Association recommend that prosecuting agencies create a handbook that includes ethical guidelines that each attorney will follow, and that it should be made available to the public (Joy, 2006). The U.S. Department of Justice has created the U.S. Attorney's Manual (USAM) for federal prosecutors, and has made it available to the public (Joy, 2006; see also U.S. Department of Justice, 2003).

However, prosecutors may not be as "amenable to professional discipline" as Justice Powell proposed in his opinion in *Imbler* (Grometstein & Balboni, 2012, quoting *Imbler v. Pachtman*, 1976, p. 429). Similar to the understandable resistance to employ criminal sanctions against colleagues, peers in state bar association disciplinary bodies may be unwilling to levy significant sanctions against fellow attorneys (Weiss, 2011; Zacharias, 2001). When prosecutors are found to have committed misconduct, whether it led to a wrongful conviction or was found to be harmless error, they are rarely disciplined (Joy, 2006; Rosen, 1987; Weeks, 1997).

Harmless error is a legal finding under which an appellate court will uphold a conviction or sentence. The harmless error doctrine developed following a 1919 federal law responding to public concern that appellate courts were reversing too many convictions due to legal technicalities (Chapel, 1998; see also Winkelman, Yokum, Cole, Thompson, & Robertson, 2015). Under the law, Congress declared that convictions should not be overturned for "errors or defects which do not affect the substantial rights

of the parties” (28 U.S.C. § 2111 (1994)). State courts subsequently created legal tests to determine whether or not trial errors affected the substantial rights of defendants, over time developing the harmless error doctrine (also called the “harmless error rule”) (Chapel, 1998). The U.S. Supreme Court later made the doctrine federal law, creating a standard in which courts determined whether or not the error contributed to the guilty verdict, and in which the State had the burden of proving that an error was harmless beyond a reasonable doubt (*Chapman v. California*, 1966).

The harmless error doctrine has evolved since *Chapman*, however, to shift the burden of proof away from the State by focusing on whether the error was overcome by other evidence of the defendant’s guilt, rather than asking if the error contributed to the verdict, effectively asking if “a hypothetical jury may have still found the defendant guilty by imagining the constitutional violation never happened” (Garrett, 2005, p. 59). Critics of the harmless error doctrine claim that it is based on two faulty premises: (1) errors are harmless *unless* they affect the guilty verdict, and (2) “evidence of guilt is relevant to a determination of the effect of an error on the verdict” (Chapel, 1998, p. 507). To the contrary, critics note, the original statute did not direct judges to assess whether the error affected the judgement, but whether the error affected a defendant’s substantial rights (Chapel, 1998). Moreover, as applied in practice, the harmless error doctrine has made it extremely difficult for a defendant to gain an acquittal even if their constitutional rights have been violated, with the message to prosecutors being “if there is some other reliable evidence of guilt, even a constitutional violation may be excused” (Garrett, 2005, p. 61). Even egregious instances of misconduct may not result in an overturned conviction if the evidence against the defendant is significant and credible, consequently

increasing reliance on ethical rules and standards for identifying and sanctioning misconduct.

Although the ABA guidelines provide standards for prosecutor behavior, they offer little guidance for sanctioning errant prosecutors (Sherikar, 2012). Prosecutors and defense attorneys rarely bring complaints against colleagues, worried that they may be undermining relationships that they depend on for their daily work and careers (Gier, 2006). Even judges who issue findings of prosecutor misconduct do not follow up with state disciplinary complaints (Gier, 2006). State disciplinary bodies infrequently initiate investigations, even when courts have explicitly found prosecutor misconduct (Keenen, et al, 2011; Zacharias & Green, 2009). Moreover, some states make reporting misconduct procedurally daunting, such as requiring complaints to be notarized, or for the complaining party to go through mediation before filing. (Keenen, et al, 2011). Other states warn people considering a complaint that serious consequences will befall the attorney against whom the complaint is filed, even if no misconduct is uncovered (Keenen, et al, 2011). Finally, even if a prosecutor is found to have committed misconduct and is sanctioned, it may not be reported publically.

A recent exception is the case of former Burleson County District Attorney Charles Sebesta, who was disbarred by the State Bar of Texas for withholding evidence and using false testimony during the murder trial of Anthony Graves (Colloff, 2015). In 1994, Graves was convicted of murder and sentenced to death row for the 1992 killings of six people in Somerville, Texas. His conviction was overturned in 2006 after the Fifth Circuit Court of Appeals found that Sebesta withheld statements by the State's key witness that Graves was not involved in the murders (*Graves v. Dretke*, 2006). Graves,

who was released in 2010 when the State ultimately dropped all charges against him, considered filing a grievance with the State Bar for Sebesta's misconduct, but under Texas law at the time he was barred by the statute of limitations which allowed only four years from when the misconduct was first discovered (Colloff, 2015).

However, in January, 2014, the Texas Legislature enacted Senate Bill 825, extending the window for filing grievances with the state bar for prosecutorial misconduct for four years from the day of an exoneree's release from prison, not when the misconduct is first discovered (Tex. Gov't. Code § 81.072, 2014). Graves subsequently filed a grievance in January, 2014. After an investigation, the Texas State Bar's chief disciplinary counsel determined that there was "just cause" to support a finding that Sebesta had engaged in misconduct in Graves' case. Following a subsequent four-day evidentiary hearing, the State Bar concluded that Sebesta had violated five tenets of the Texas Disciplinary Rules of Professional Conduct:

- 3.03(a)(1): A lawyer shall not knowingly make a false statement of material fact or law to a tribunal.
- 3.03(a)(5): A lawyer shall not knowingly offer or use evidence that the lawyer knows to be false.
- 3.09(d): A prosecutor in a criminal case shall 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...
- 8.04(a)(1): A lawyer shall not violate these rules, knowingly assist or induce another to do so, or do so through the acts of another...

- 8.04(a)(3): A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation (Tex. Disciplinary R. Prof. Conduct, 1989).

The State Bar sanctioned Sebesta for these violations by revoking his law license in 2015. Sebesta lost his final appeal to have his law license reinstated in February, 2016 (Grissom, 2016).

Lack of Training, Experience, and Resources

In addition to prosecutor culture, unclear law surrounding the *Brady* doctrine, cognitive bias, and lack of accountability described in the previous section, the final cause of prosecutor misconduct or good faith error may be the lack of training or experience combined with unmanageable caseloads. Lack of both time and resources needed to adequately review and process cases can lead to inadvertent error for both experienced prosecutors and for new attorneys who do not receive proper guidance from the more experienced prosecutors who are too busy to oversee their work (Gershowitz & Killinger, 2011).

The type and amount of training for new prosecutors varies widely across offices (Williams, 2010). Although some offices will require new attorneys to complete several weeks of training before handling their own cases, other offices assign cases immediately, using a “sink or swim approach” (Williams, 2010, p. 8). Compared with junior attorneys in a private law firm of similar size, inexperienced prosecutors manage larger caseloads with relatively little supervision (Levine & Wright, 2012). Additionally, their decisions and work product are not scrutinized to the high degree of their private firm contemporaries (Levin & Wright, 2012).

In a study of caseloads and workload in 56 prosecutors' offices across the country, the American Prosecutors Research Institute (APRI) (2002) found that the experience level of prosecutors affected decisions to accept cases, offer plea bargains, and the time needed to bring cases to resolution. For example, prosecutors with less than five years' experience took twice as long as their experienced colleagues to resolve cases. Researchers concluded that experienced prosecutors invest their time in screening cases, accepting only the stronger cases, and are therefore able to dispose of cases more quickly. Experienced prosecutors also resolve more cases using plea bargains than their inexperienced colleagues. Conversely, inexperienced prosecutors spend less time screening cases and consequently more time preparing weaker cases for trial, draining their resources compared to more experienced prosecutors (APRI, 2002).

Furthermore, the U.S. Supreme Court has increased the prosecutor's workload indirectly through a series of decisions granting rights to criminal defendants (Worrall & Nugent-Borakove, 2008). In *Powell v. Alabama* (1932) and *Gideon v. Wainwright* (1963), the Court established the right to counsel for all felony defendants, and then extended that right to be available during police interrogations in *Miranda v. Arizona* (1966). As the Court continued to extend defense attorney presence to all critical stages of the criminal process, prosecutors likewise felt obligated to be present (Worrall & Nugent-Borakove, 2008). Moreover, with the Court's decisions regarding the right to a speedy trial, prosecutors face additional pressure to resolve cases under shorter deadlines or face charges being dismissed without possibility of a retrial (*Klopfer v. North Carolina*, 1967; *Strunk v. United States*, 1973). Consequently, prosecutors now do more work with defense attorneys, starting very early in the process through the appeals stage,

in addition to having less time to resolve cases under speedy trial requirements (Worrall & Nugent-Borakove, 2008).

In a response to claims of widespread prosecutor misconduct in Texas, the Texas District and County Attorneys Association (TDCAA) pointed to the inadequate training for new prosecutors, and insufficient resources to adequately handle large caseloads, as underlying causes of misconduct and error leading to wrongful convictions (2012). As an example, the TDCAA report cited the Dallas County Criminal District Attorney's office during the 1980s and 1990s as having overwhelming caseloads due to rising crime and insufficient resources for investigation and prosecution (TDCAA, 2012; see also Reynolds, 2000).

Similar concerns were voiced in a report by the Florida Innocence Commission, which was directed by the Supreme Court of Florida to offer "solutions to eliminate or significantly reduce the causes for wrongful convictions" (Florida Innocence Commission, 2012, p. 2). The Commission concluded that inadequate funding by the state led to unmanageable caseloads, as well as the inability to hire and train not only experienced prosecutors, but also public defenders, and laboratory technicians (Florida Innocence Commission, 2012). The Chairman of the Committee summarized these concerns by stating,

We cannot avoid the reality that a number of the problems in our system of justice deal with the issue of adequate funding. Prosecutors, public defenders, and the courts are overburdened and do not have adequate tools and resources to keep pace with the volume and complexity of the cases before them. ... If we are to uphold what I consider to be the goal of the justice system, that is to protect the innocent and punish the guilty according to the law, then we must be vigilant in ensuring that our system of justice is appropriately funded. (Florida Innocence Commission, 2012, p. 11)

Finally, law professors have also identified inexperience and lack of training as a cause of prosecutor misconduct, calling for training in law schools to prevent misconduct in criminal law practice. Bazelon (2011) suggests training both prospective prosecutors and defense attorneys in context-based clinics in both the law and ethics surrounding misconduct. For example, she suggests clinical law professors should teach the substantive law surrounding misconduct, including the requirements to disclose exculpatory evidence under *Brady* and its progeny, prohibitions against the use of false evidence, and the law limiting improper arguments. Bazelon also suggests covering the legal and ethical duties of defense attorneys, including the duty to report misconduct, as well as a more nuanced discussion of the normative and practical arguments both for and against disclosing misconduct.

Prevalence of Misconduct

Although there is overwhelming agreement that prosecutor misconduct is unacceptable, the extent to which prosecutors engage in misconduct is not clear. There are no national statistics on prosecutorial misconduct or resulting disciplinary measures, and it is impossible to ascertain how often it occurs. Moreover, very few district attorneys' offices have formal audit procedures for collecting and tracking data on misconduct or error (Scheck, 2010). Of all of contributors to wrongful convictions, prosecutor behavior is the least studied by social scientists. Presumably, this is because prosecutors, both individually and within their agencies, are difficult to study; they intentionally isolate themselves from those wishing to study their day-to-day activity, and much of their activity takes place out of the public eye, unlike police officers and judges (Worrall & Nugent-Borakove, 2008).

Investigative journalists and Innocence Project researchers have done studies in recent years in an attempt to determine the prevalence of prosecutor misconduct across the nation. In one of the earliest studies, reporters Ken Armstrong and Maurice Possley of the Chicago Tribune found 381 homicide convictions that were overturned between 1963 and 1999 because prosecutors withheld exculpatory evidence or knowingly used false evidence (Armstrong & Possley, 1999). Of these cases, only three prosecutors received any punishment: one was fired but later rehired after an appeal, one was suspended from work for 30 days, and the third had his law license suspended for 59 days; none of the three received public reprimands.

In 2003, the Center for Public Integrity released a report of their extensive national study into the frequency of prosecutor misconduct, including cases with both intentional misconduct and inadvertent error (2003). Over a three-year period, researchers searched in the Westlaw and Lexis databases for state appeals court decisions, trial court rulings, or state bar disciplinary reports between 1970 and 2003 that included prosecutor misconduct as an issue. Out of 11,452 cases, courts lowered sentences, dismissed charges against a defendant, and reversed or remanded decisions in 2,012 (1.7%) of the cases due at least in part to prosecutor misconduct. *Brady* violations were the most common, comprising about a quarter of the misconduct cases. In an accompanying study, the Center for Public Integrity reviewed disciplinary reports from state bar associations during the same time period (1970 – 2003) (2003). The study reported 44 disciplinary cases involving prosecutor misconduct. In seven of the 44 attorney disciplinary cases, the court dismissed the complaint or did not impose a punishment; 20 received a public or private reprimand or censure; 12 had their license to

practice law suspended; 2 were disbarred; 1 received probation; and 24 had to pay for the costs of the proceedings. Suspensions ranged from thirty days to six months.

In 2013, journalists from the *Arizona Republic* conducted a comprehensive review of allegations of prosecutorial misconduct in Arizona death penalty cases since 2003 (Kieffer, 2013). In 42 cases in which misconduct was alleged by the defense, courts found prosecutorial misconduct or impropriety in 18 of them. Only two prosecutors were punished for their actions from these 18 cases. Ken Peasley became the first prosecutor in Arizona to be disbarred for prosecutorial misconduct, and former deputy county attorney Ted Duffy had his license to practice law suspended for thirty days along with one year of professional probation for mentioning inadmissible evidence and making inaccurate statements regarding the strength of physical evidence during the murder trial of Edwin Martin Jones (Kieffer, 2013). The Arizona Bar has also taken action against prosecutors in cases other than capital murder, including former deputy county attorney Andrew Thomas, and his former deputy, Lisa Aubuchon, who were disbarred for having brought unfounded criminal and civil charges against the state attorney general and four state judges in an effort to bolster Thomas' political career (Kieffer, 2013).

One of the most frequently cited studies in the current literature on prosecutor misconduct is a 2010 report by the Veritas Initiative, the self-described “investigative watchdog” of the Northern California Innocence Project (NCIP) (Ridolf, & Possley, 2010). Researchers at the NCIP reviewed 4,000 California state and federal appellate cases, media reports and trial court decisions from 1997 – 2009 that were obtained from a Westlaw search for cases raising prosecutorial misconduct as an issue. Of these 4000 cases, courts made specific findings of misconduct in 707 cases. In 548 of the cases with

misconduct, courts found harmless error and upheld convictions. In the remaining 159 cases, courts found harmful error resulting in overturned convictions, declared mistrials or barred evidence. Researchers then reviewed the 4,741 disciplinary actions reported by the California State Bar Journal during the same ten year time period and found only six prosecutors publically disciplined for improper handling of a criminal case.

Finally, four state studies were conducted by the Innocence Project, working with the Veritas Initiative, as part of the Prosecutorial Oversight Tour (Innocence Project & Veritas Initiative, 2014). The methodology for each of these four studies was the same: researchers searched through the Westlaw data base and reviewed trial and appeals court decisions “addressing allegations of prosecutor misconduct” between the years 2004 – 2008 in New York, Texas, Arizona, and Pennsylvania. Researchers then reviewed online state bar disciplinary decisions between 2004 and 2011 to identify how many prosecutors had been disciplined publically. The findings are as follows:

- New York: 151 findings of prosecutor misconduct with 3 prosecutors disciplined;
- Texas: 91 findings of prosecutor misconduct with 1 prosecutor disciplined;
- Arizona: 20 findings of prosecutor misconduct with 3 prosecutors disciplined; and
- Pennsylvania: 46 findings of prosecutor misconduct with 2 prosecutors disciplined.

Although each of the four reports draws distinctions between harmless and harmful error, the studies also note that this “distinction is not based on seriousness or type of misconduct, but whether or not the misconduct influenced the outcome of the case. Thus,

many harmless error cases include serious misconduct” (Innocence Project & Veritas Initiative, 2014, final slide).

In response to two of these studies, the California District Attorneys Association (CDAA) (2012) and the Texas District & County Attorneys Association (TDCAA) (2012), published reports in which each reviewed the data presented by the Northern California Innocence Project and the Innocence Project Texas study, respectively, challenging the methodology of each study and the corresponding results. Both the CDAA and TDCAA conclude that (1) intentional misconduct is exceptionally rare, and that (2) most errors are minor and not necessarily worthy of discipline or sanctions. Additionally, both reports reveal weaknesses in the methodology of the above studies, including counting cases in which there was no finding of prosecutor misconduct or cases in which initial findings of misconduct were overturned in subsequent appellate review. Importantly, a primary concern highlighted in both reports is the lack of a consistent differentiation between intentional misconduct and inadvertent human error.

For example, the TDCAA study defines misconduct occurring when “a prosecutor deliberately engages in dishonest or fraudulent conduct calculated to produce an unjust result” (2012, p. 8). This definition excludes minor errors that are made in good faith. Prosecutor groups in both California and Texas are concerned that the existing studies by advocacy groups such as the Innocence Project are misleading and lead readers to the incorrect conclusion that intentional misconduct is prevalent and not being appropriately addressed by courts and state bar associations. One might also observe, however, that the District and County Attorneys Associations are not unbiased researchers either. Authors

of all studies acknowledge that intentional misconduct and error do occur, may result in wrongful convictions, and must be prevented.

Literature's Relevance to Proposed Research

The previous sections have presented the literature on prosecutors, wrongful convictions, and prosecutor misconduct in the United States, to include the history of the American prosecutor, current organization and duties within prosecuting agencies across the country, the focus of extant literature on prosecutors, leading causes of wrongful convictions, and finally, the legal and practical circumstances that contribute to misconduct and good faith error.

Understanding the role of prosecutorial misconduct and good faith error is essential to reducing wrongful convictions, yet there exists very little research on prosecutors generally and prosecutorial misconduct specifically. More research is needed in order to inform good public policy, to create effective training in both law schools and in prosecutor agencies, and to design and use meaningful prosecutor disciplinary systems that reduce wrongful convictions.

Moreover, it is possible that the Supreme Court may reconsider prosecutor immunity from civil lawsuits as more and more wrongful convictions come to light. If the justices are concerned that prosecutor misconduct is extensive, and that the current measures to prevent misconduct are ineffective, absolute and qualified immunity may be retracted in future cases. Therefore, it is important to understand the prevalence and types of prosecutor misconduct.

This study seeks to contribute to current research by reexamining two studies by the Innocence Project organizations that have been reanalyzed by the district attorneys'

associations. The difference of this reexamination will be that it is done by an objective reviewer using a qualitative social science methodology rather than traditional legal methodologies.

After reviewing the extant literature, little remains known about the range and prevalence of prosecutor misconduct. The proposed study looks to fill this void by analyzing appellate cases in California and Texas, and comparing findings with previous studies conducted by prosecutor advocacy groups. Additionally, this study seeks add to the understanding of prosecutor misconduct by investigating what types of prosecutorial misconduct or errors most commonly occur, and if there are significant themes regarding prosecutor behaviors that arise from California and Texas appellate cases. This study also seeks to determine what judges rely upon to reach their decisions regarding prosecutor misconduct, such as prior case law, policy, or statutes, and whether there are significant themes regarding judicial decisions that arise from the California and Texas appellate cases. Finally, this study seeks to determine if there are any sanctions directed to prosecutors once a determination of misconduct is made, and if so, what sanctions the judges apply.

III. METHODOLOGY

This project consists of three related studies. While each study is discrete, they are designed to complement one another in order to answer the following research questions: What is the range and prevalence of prosecutor misconduct identified by appellate judges in the sample cases, and how do findings compare with previous studies by Innocence Project and prosecutor advocacy groups? What types of prosecutorial misconduct or errors most commonly occur, and are there significant themes regarding prosecutor behaviors that arise from the appellate cases? What do judges rely upon to make this decision (prior case law / policy / statutes), and are there significant themes regarding judicial decisions that arise from the appellate cases? Finally, are there any sanctions directed to prosecutors if a determination of misconduct is made, and if so, what sanctions do the judges apply?

This chapter introduces the three separate qualitative methodologies that were used in the study (ethnographic content analysis, case studies, and interviews), and explains why these methodologies are well suited to study appellate cases and prosecutors. It also discusses the methodological limitations in the study, and references the appendices that include the protocols for each of the three studies.

Qualitative Research Methodologies

In order to examine a sample of 99 California appellate cases enumerated in the Northern California Innocence Project and CDAA reports and 91 Texas appellate cases enumerated in the Innocence Project and the TDCAA reports, this study used a qualitative social science methodology instead of the classic legal analysis. Traditional legal analysis of court cases involves careful reading of one or a few cases to identify

themes, compare and contrast legal precedent, and develop arguments regarding the significance of those themes and precedent in regard to predicting future decisions. The validity of these arguments more often depends on the credentials of the legal scholar making the argument, rather than the methodology he or she uses. Alternatively, applying an empirical method to case analysis allows for an examination of court decisions in a way that is reliable. It places the focus on the results of a study, rather than the authority of the researcher (Hall and Wright, 2009). Specifically, social science methodology complements traditional legal analysis by testing assumptions about court decisions that are primarily anecdotal, and by identifying themes or patterns that are not readily apparent from the study of one or a handful of cases (Hall and Wright, 2009).

Within social science methodologies, a researcher can choose a quantitative, qualitative, or mixed-methods approach. The qualitative approach offers descriptive detail within specific contexts (Bryman, 2012; Patton, 2002). It can provide “meanings, concepts, definitions, characteristics, metaphors, symbols, and descriptions of things.” (Berg, 2007, p. 3). Qualitative research is often exploratory, and the interpretation of qualitative data can provide understandings of very specific individuals, events, and processes (Tewksbury, 2009).

Evaluating Qualitative Data

Social research is most commonly evaluated by the following criteria: reliability and validity (Bryman, 2012). Reliability refers to whether or not an experiment or measure will yield the same data if repeated (Bryman, 2012). Measurements should be consistent across independent observations of the same phenomena or circumstances. Validity is a measure of data, results and procedure (Bauer and Gaskell, 2000; see also,

Krippendorff, 2004). It refers to confidence in the accuracy of the measured outcomes, both within the experiment or study, and as generalizable to a greater population (Bryman, 2012). The choice of research methods guides the gathering of data that helps to rule out threats to validity (Maxwell, 2005).

Qualitative researchers have offered a different set of criteria to evaluate qualitative research rooted in the differences between qualitative and quantitative approaches and goals. For example, it is unlikely that an ethnographer would be able to evaluate social interaction repeatedly with the same results. However, there are measures of reliability that can be employed under these circumstances, such as using more than one observer and comparing results for consistency (Bryman, 2012; see also LeCompte and Goetz, 1982; Holsti, 1969). Lincoln and Guba (1985) suggest, instead, that the concept of reliability is better understood in qualitative research as dependability, in establishing an approach to data collection and record keeping that allows for accessibility and auditing by peer researchers (see also Schreier, 2012; Flick, Kardorff, & Steinke, 2004). Validity may be better evaluated in qualitative studies by looking at credibility (How believable are the conclusions? Would members of the group studied confirm that the researcher has a correct understanding of their social circumstances?) and transferability (Are these findings rich and detailed so that others can decide whether conclusions can be applied in other contexts?) (Bryman, 2012; see also Lincoln and Guba (1998).

Bauer and Gaskell (2000) suggest that coherence and transparency are appropriate criteria for evaluating the quality of the methodology and findings. Transparency can be achieved through documentation (Bauer and Gaskell, 2000). The codebook, for example,

should be available for examination and will ensure public accountability. It should document coder reliability as well as the entire coding process so that it can be replicated in future research (Bauer and Gaskell, 2000). Codes should directly relate to words or ideas in the examined text (semantic validity). The coding scheme should reflect the theory underlying the research questions (construct validity). Regarding coherence, one of the potential weaknesses of content analysis is the possibility of studying words or phrases out of context (Bauer and Gaskell, 2000). This can be overcome in the present study by making an entire document the unit of analysis, rather than phrases, sentences, or individual words.

Finally, triangulation, the use of at least three different methods, helps in overcoming the weaknesses in each individual method by providing validity checks, comparing findings and themes, across three data sources (Patton, 2002). All three methods need not produce identical results; rather, some dissimilarity in results can illuminate the relationship between each specific methods and the concept or phenomena being studied (Patton, 2002). Some researchers have been critical of triangulation as a method to validate findings, cautioning that data from one method does not necessarily correct problem areas in data collected using another method, and that each must be analyzed in its own terms (Fielding & Fielding, 1986). However, triangulation does allow a researcher to view the phenomenon being studied from several different perspectives, adding breadth and depth to the findings (Flick, Kardorff, & Steinke, 2004).

Methodologies Chosen For This Study

One of the challenges of applying qualitative methods is that there is no single correct way to approach qualitative research. Instead, researchers must choose a method

based on generally accepted guidelines, as well as their own innovative ideas on how to collect, analyze, and interpret the data (Patton, 2002). The present study applies three different methods in order to direct several different “lines of sight” toward the phenomenon of prosecutor misconduct (Berg, 2007, p. 5). This triangulation approach allows for a richer and more complete view than relying on a single method (Berg, 2007; Patton, 2002). Moreover, triangulation aids in strengthening a study by “playing each method off against the other”, possibly to counter threats to validity inherent in each individual method, but also adding depth and breadth in the analysis of a phenomenon (Denzin, 1978, p. 304; see also Berg, 2007; Patton, 2002).

The first method is qualitative content analysis, also known as ethnographic content analysis (ECA). An emerging approach to bridging the gap between traditional legal analysis and social science methodologies, it is well suited to verify the conclusions reached in the Northern California Innocence Project and CDAA reports and in the Innocence Project and TDCAA reports. Moreover, it allows for an exploratory study of the themes surrounding intentional misconduct and unintentional prosecutor error.

The second method is a collective case study. Case studies allow a researcher to explore a bounded system by evaluating many different sources of data in order to arrive at an in depth understanding of the case or the issues represented within the case. In this research, the units of analysis being studied are actual court cases in which prosecutor misconduct is at issue. Five cases were chosen from those enumerated in the Innocence Project and TDCAA studies in order to examine the circumstances surrounding prosecutor misconduct at a much deeper level than would be reasonable with a sample of 190 appellate decisions. The several different sources of data for each case included the

trial transcripts, motions and memorandum filed with the court during pre-trial hearings, appellate briefs, appellate decisions, blog entries, and media reports. Texas cases were chosen due to the availability of court documents to the researcher.

The third method is a phenomenological inquiry using semi-standardized interviews with 10 prosecutors and former prosecutors in order to illuminate and describe the problem of prosecutor misconduct from their unique perspective. This phenomenological approach allows for the examination of lived experiences that are common to prosecutors (Creswell, 2013). By interviewing 10 current and former prosecutors, the researcher looked for common themes that describe the “very nature” of the prosecutor’s daily work experiences in defining, recognizing, and avoiding misconduct and error (van Manen, 1990, p. 177). These themes were then compared with the themes that arose out of content analysis and the in-depth case studies of appellate decisions concerning misconduct and error, enabling a comparison of prosecutors’ perspectives with those of the judges and other practitioners expressed in case law.

Ethnographic Content Analysis

Content analysis is a structured, systematic examination of media, documents or texts in order to detect themes or patterns (Bryman, 2012). It is the only method of text analysis within empirical social science research (Bauer and Gaskell, 2000). Strengths of content analysis include the public nature of the data and the systematic, well-documented approach to its analysis (Bauer and Gaskell, 2000). Documents are non-reactive, meaning that examination by researchers will not create a reactive effect that may be a threat to validity (Bryman, 2012). Documents examined should be authentic, credible, representative, and have discernable meaning (Bryman, 2012; see also Scott,

1990). Authentic texts are genuine and their origin is not in question; credible texts are free of error that might distort the reading or meaning; representative texts are typical of the kind they characterize; and meaning of the text(s) must be understandable to the reader (Scott, 1990; see also Krippendorff, 2004).

Content analysis can be approached quantitatively when a researcher wants measure the frequency or variation of content, or to test hypothesized relationships (Altheide, 1987). By contrast, researchers can follow a qualitative approach if flexibility is important because it allows for revision of the study as new themes become apparent (Bryman, 2012; Schreier, 2012). Altheide (1987) applies this second approach to content analysis (calling it ethnographic content analysis, or ECA), allowing for the collection of both numeric and narrative data and a “reflexive analysis of documents” (p. 65; see also Schreier, 2012). Unlike quantitative content analysis in which the researcher starts with predefined themes or categories for the sources examined, qualitative content analysis enables the researcher to move back and forth between initial conceptualization, data collection, and analysis in order to refine initial themes and uncover new ones (Bryman, 2012; Krippendorff, 2004).

Content analysis of published court decisions.

Hall and Wright (2009) suggest that both legal scholars and social scientists can use content analysis to bridge a gap between traditional legal analysis and empirical methodology. Content analysis of legal texts best addresses research questions that inquire about the interaction between the facts and legal arguments in a court’s decision (Hall and Wright, 2009). Moreover, unlike traditional legal analysis examining a single or small group of exemplar cases, content analysis is best applied to a larger number of

equally weighted cases in which patterns across cases are more valuable than understanding a single case in depth. In this way, content analysis complements traditional case analysis and interpretation.

The earliest studies applying content analysis to court decisions were quantitative (Hall and Wright, 2008; see also Kort, 1957; Ulmer, 1960; Grunbaum and Newhouse, 1965; Nagel, 1965; Schubert, 1965). With the advent of online legal databases such as Westlaw and LEXIS-NEXIS, legal scholars were able to expand the content analysis of court cases to a wide variety of legal issues, statutory interpretation, and judicial decisions, using very large sample sizes (Hall and Wright, 2008). Some researchers have varied this approach by using a mixed-method in which large numbers of cases are coded and analyzed using bivariate and regression analysis, and then a few exemplar cases are selected for in depth qualitative study (see Brudney and Ditslear, 2005; Jacobson, Selvin, & Pomfret, 2001). Only a few researchers, however, have been using qualitative ethnographic content analysis to study court cases. For example, Fradella (2003) examined 73 federal court cases covering ten years in which psychological or psychiatric expert testimony had been offered under the *Daubert* standards of admissibility for scientific evidence (see *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*, 1993). Noticing that there had been little research on the impact of *Daubert* standards, Fradella and colleagues set out to conduct a qualitative content analysis of the cases decided since *Daubert* became law in 1993 (2003). They chose this approach in order to “discover emergent patterns and differing emphases among and between the cases reviewed ... (and to) focus on narrative data in which both categorical and unique data were obtained from each case studied” (Fradella, 2003, p. 5-6). Ultimately, the researchers uncovered ten

categories of substantive issues across the cases, and were able to compare and contrast cases within each of these categories in order to explain inconsistencies in judicial decisions (Fradella, 2003).

As is illustrated in the Fradella study, qualitative content analysis can be used to describe the facts and outcomes of legal cases, the underlying themes or principles that support the outcomes, and the rationale used by judges come to their decisions, as well as important themes that occur across cases (Hall and Wright, 2008). Hall and Wright (2008) also point out that this method has been particularly successful for explaining bodies of case law that remain unruly or jumbled using traditional legal analysis. (See also Beebe, 2006 for trademark infringement; Cummings, Haar, & Sawyer, 1977 for zoning variances; Hagle, 1991 for obscenity; Kort, 1957 for right to counsel; and Segal, 1984 for search and seizure).

Just as Fradella and colleagues faced a lack of social science-based research when starting the *Daubert* study, there is very little systematic, empirical research evaluating prosecutor intentional misconduct and themes that run throughout judicial decisions addressing this topic. The present study, therefore, is exploratory and sought to evaluate the descriptive accuracy of previous studies and uncover significant themes regarding prosecutor behavior and judicial decisions from the review of appellate cases. In order to accomplish this, the present study followed the approach to ethnographic content analysis suggested by Altheide and Schneider (2013) in five stages: (1) finding documents, (2) developing the protocol and collecting data, (3) coding and organizing data, (4) analyzing data, and (5) reporting. These steps were not followed rigidly, however, but allowed for back and forth between the initial protocol, coding and analysis.

Content analysis data source.

The cases for the content analysis were chosen using random and purposeful sampling. In qualitative research, the benefit of purposeful sampling is in choosing cases that are rich in information and can illuminate the phenomenon being studied (Patton, 2002). Criterion sampling is a strategy in purposeful sampling that is used when a researcher wants to study all cases that meet a determined set of criteria that are important to the study (Patton, 2002). In order to examine the range and prevalence of prosecutor misconduct as identified by appellate judges, as well as compare these findings with the previous reports, 99 cases from the Northern California Innocence Project and CDAA study were randomly selected from the original 707 cases studied, as well as all of the cases (91 total) enumerated in the Innocence Project and TDCAA studies. Conducting content analysis on roughly 100 cases from each state, California and Texas, allowed for examination of the themes present in appellate cases addressing prosecutor misconduct, provided a roughly equal number of cases from each state for comparison, and was more manageable, given time limitations on completing dissertation research, than qualitatively examining the nearly 800 cases enumerated within the four studies. All cases are readily accessible through Westlaw.

Protocol development and coding.

A protocol is a list of question, themes, categories or variables that the researcher wants to examine in the documents being studied (Altheide and Schneider, 2013). Unlike in quantitative content analysis, which may have hundreds of variables and are coded before data collection begins, protocols in ethnographic content analysis are developed and revised throughout the data collection process, often contain only a handful of broad

categories, and emphasize meaning, definitions, and processes using narrative and descriptions (Altheide and Schneider, 2013).

Units of analysis for the ethnographic content analysis are the individual case decisions. This approach makes the most sense as judges often write lengthy decisions that build stylistically from broad arguments to specific decisions. Moreover, counter arguments are often presented as background for justifying decisions. Taking counter arguments out of context would distort the overall meaning of a judicial decision. Using a smaller unit of analysis, such as paragraphs, sentences or even individual words, is not consistent with the reality of how conclusions and supporting arguments are expressed within written case decisions and may cause the researcher to miss the nuances of legal arguments within a greater context. In keeping with the flexible format of data collection and analysis in ethnographic content analysis, the coding protocol was designed to allow the researcher to move back and forth between initial conceptualization, data collection, and analysis in order to refine initial themes and uncover new ones.

The initial coding protocol was created with the four research questions in mind, but changed as new themes or categories evolved during the content analysis process.

Initially, each case was coded to record the following:

- the case citation
- the court's holding regarding the conviction and any findings of misconduct or unintentional error
- the rationale for the ruling
- the body of law of public policy supporting the court's conclusions

Validity and reliability in the content analysis.

The present study addresses validity and reliability by establishing an approach to data collection and record keeping that allows for accessibility and auditing by peer researchers. The coding protocol is included in the appendices and all codebooks are available upon request. To check reliability, a second, independent coder reviewed the first 20 cases to assess inter-rater reliability by coding major themes and comparing them with the researcher's results. The coders subsequently met to resolve inconsistencies and make appropriate changes to the protocol.

To check validity, a group of three legally trained readers checked the content analysis code sheet and determined that the researcher and all readers derived the same meaning from the cases. Finally, one specific threat to coherence, the possibility that words or phrases will be examined out of context, were overcome in the present study by identifying the full appellate decision as the unit of analysis, rather than phrases, sentences, or individual words.

Collective Case Study

Case studies enable a researcher to systematically study a single event or process that occurs within a real-life setting (Berg, 2007; Yin, 2009). It is both the object of study (Stake, 1995), as well as a method of inquiry (Denzin & Lincoln, 2000; Yin, 2009), and allows the researcher to examine many different sources of data in order to arrive at an in depth understanding of the case or the issues represented in the case (Creswell, 2013). Collective case studies, involving the intensive review of several instrumental cases, enable a researcher to examine a single issue or phenomenon through the comparison of events in a similar setting or process (Berg, 2007). Case studies are also

the most common method of legal analysis, used by scholars, practitioners, and law schools (Hall & Wright, 2008). Consequently, they are appropriate for an in depth inquiry into prosecutor misconduct since this method is both rooted in traditional legal analysis, and will allow for a comparison with the findings from the content analysis of 91 Texas appellate court decisions.

Moreover, case studies can provide a holistic description of the phenomenon of prosecutor misconduct by examining the interaction between significant players throughout the trial process, including prosecutors, defense attorneys, and judges, as it occurs within the unique circumstances of each case. For efficiency or convenience sake, much of this detailed information is routinely omitted from the language of appellate decisions and therefore cannot be examined in the content analysis portion of this research. Accordingly, case studies may reveal nuances or patterns that cannot be detected through the analysis of a large number of appellate decisions (Berg, 2007).

The units of analysis, the “boundaries” of each case study, are the individual court cases in which prosecutor misconduct is at issue. The several different sources of data for each case study included the trial transcripts, motions and memorandum filed with the court during pre-trial hearings, appellate briefs, appellate decisions, blog entries, and media coverage. Once the data was collected, the researcher conducted a holistic analysis (Creswell, 2013) of each case by first noting the objective details (jurisdiction, procedural history, undisputed facts, court holding on prosecutor misconduct, and the ultimate case disposition). Second, the researcher conducted an analysis of the themes arising out of the case (within-case analysis), as well as common themes across each of the cases (cross-case analysis) (Creswell, 2013).

Case study data source.

As with the ethnographic content analysis, purposeful sampling was used to select cases using a determined set of criteria that are important to this study, namely five cases that allowed for further exploration into the themes which emerged from the ethnographic content analysis: intent of the prosecutor and harmful error analysis. Specifically, the researcher selected cases from the Innocence Project Texas sample which represented each of the following four categories:

- The court found intentional prosecutor misconduct / harmful error
- The court found no intentional misconduct / harmful error,
- The court found intentional prosecutor misconduct / harmless error, and
- The court found no intentional misconduct / harmless error.

The fifth case, *Graves v. Dretke*, was chosen as a comparison case to the other four since it represents the most egregious example of prosecutor misconduct in the Texas sample, one which has received the most media coverage, and is often presented as an example of prosecutor misconduct by the Innocence Project. Cases were chosen from the Texas sample, rather than the California sample, due to the availability of court documents to the researcher.

The sampling process was followed until the documents for five case studies were collected. According to Creswell (2013), the number of cases to be studied should be limited to no more than four or five cases. Choosing a larger number of cases reduces the time available for in depth analysis of each case. Moreover, a large sample of cases is not necessary because generalizability of finding is not the goal of this research.

Case study coding protocol.

A coding protocol for the case studies was developed and revised throughout the data collection process, starting with a handful of broad categories, emphasizing meaning, definitions, and processes using narrative and descriptions (Altheide & Schneider, 2013). The coding protocol was designed to allow the researcher to move back and forth between initial conceptualization, data collection, and analysis in order to refine initial themes and uncover new ones. The initial coding protocol was created with the four research questions in mind, but changed as new themes evolved during the content analysis process. At a minimum, each case was coded to record the following:

- jurisdiction
- procedural history
- court rulings on prosecutor misconduct
- the ultimate case disposition
- broad themes regarding prosecutor behaviors and judicial decisions

Validity and reliability in the case studies.

The case study methodology addressed validity and reliability by ensuring record keeping that allows for accessibility and auditing by peer researchers. The coding protocol is included in the appendices, and all codebooks will be available upon request. To check reliability, a second reviewer reviewed a sample case for major themes. No inconsistencies arose between the themes identified by the reviewer and the researcher. To check validity, a group of three legally trained readers reviewed the code sheet for the first case that had been coded by the researcher, including all of the documents in the case study, and verified that the researcher derived the correct legal meaning from the

case documents. Finally, one specific threat to coherence, the possibility that words or phrases will be examined out of context, were addressed by making the full criminal case the unit of analysis, rather than phrases, sentences, or individual words.

Interviews with Prosecutors

Using a phenomenological approach to studying prosecutor misconduct allows for inquiry into lived experiences that are common to prosecutors (Creswell, 2013). This approach also lends itself well to a systematic analysis of the data, starting with narrow units of data, such as comments or statements from individual prosecutors, and moving forward to a broader understanding of what prosecutors experience in preventing or addressing misconduct amongst their peers (Creswell, 2013). The perceptions of prosecutors as they work and train to address prosecutor misconduct may be markedly different from those of judges; however, that difference will not be reflected in the content analysis findings because judges, not prosecutors, write appellate decisions. In order to gain a deeper understanding of prosecutor misconduct through prosecutors' daily experiences, this study included a third source of data by interviewing 10 current and former prosecutors.

Interviews of people who have experienced the phenomenon being studied are the most common data collection procedure in a phenomenological study (Creswell, 2013). They may be organized anywhere on a continuum from formally structured, in which questions are predetermined and no deviation is allowed, to informally structured, in which the interviewer does not have a fully predetermined questions, allowing the interview to evolve uniquely for each participant (Berg, 2007). In the middle ground, is the semi-structured interview that will be used this this study. In this approach, the

interviewer starts with a predetermined set of interview questions to be asked systematically and consistently across participants; however, there is room for the interviewer and participants to deviate beyond the initial questions (Berg, 2007). This deviation allows the researcher to adjust the interview to better focus on the participant's perspective by asking follow up questions and allowing the participant to guide the interview into new territory not previously anticipated in the initial interview questions.

Interviews data source.

Snowball sampling was used to identify 10 attorneys willing to participate in interviews about their experiences as prosecutors. Snowball sampling allowed the researcher to locate people with certain shared experiences pertinent for the study who were not known by or previously accessible to the researcher (Berg, 2007). As a rule, prosecutors are difficult to interview in large groups because offices in which they work are reticent to grant researchers access. Therefore, the first interview subject in this study was a colleague of the researcher. At the end of each interview, participants were asked if they would recommend other attorneys who would be willing to be interviewed. Every attempt was made to interview attorneys from jurisdictions of various sizes in order to more fully describe the phenomenon of prosecutor misconduct in both large and small district and country attorney's offices. The projected number of interviews should allow the researcher to gather enough data to achieve saturation (Creswell, 2013), a point at which experiences and themes will begin to repeat and additional interviews will not yield markedly new information.

Interview protocol.

The interview protocol involves a semi-structured design, which provided a consistent set of initial interview questions while still allowing for great flexibility to pursue interesting topics mentioned by specific participants. In order to explore the phenomenon of prosecutor misconduct as seen by prosecutors, as well as compare revealed themes with those from the content analysis and case studies, the interview questions were based on the research questions, including the range and prevalence of prosecutor misconduct, and the types of misconduct or error that most commonly occur.

Interviews were audio recorded and later transcribed. If the prosecutor was uncomfortable with audio recording, the researcher took only written notes. Several of the interview participants were not able to conduct the interview in person, so they responded to the interview questions through email. When the researcher had follow up questions, the interview continued through email. All email correspondence was collected and saved by the researcher.

The interview protocol was pretested with a former prosecutor to gauge how the interview would work, how long it would take, if the interview questions elicited the type of information sought, and whether there were any problems with the questions such as poorly worded questions, questions that might have been offensive, or questions that revealed the researcher's own bias (Berg, 2007). During the interviews, every attempt was made to ask each participant all of the initial interview questions in order to compare responses across the entire sample.

Validity and reliability in the interviews.

The present study addresses validity and reliability in the interviews by establishing an approach to data collection and record keeping that allows for accessibility and auditing by peer researchers. A copy of the audiotape for each interview or the email correspondence, along with the interviewer's notes, will be available upon request. The coding protocol has been included in the appendices. All codebooks will be available upon request. To check reliability, a second coder reviewed coding of the first three interviews to assess inter-coder reliability. The second coder and the research met to resolve inconsistencies and made appropriate changes to the protocol.

To check validity, a group of three legally trained readers checked the interview coding sheet for the first interview and verified that the researcher was using language and terms accurately within the commonly understood meaning in the legal community.

Issues Regarding Human Subjects Research

The ethnographic content analysis and case studies qualify under Exempt status for IRB review. Research was conducted using "existing retrospective data" which are publically available (Institutional Review Board, 2016).

Interviews were conducted with volunteers who are current or former prosecutors. Their participation required their informed consent, was free of coercion, and their identities will remain confidential. A consent form was provided to participants including the purpose of the study, the voluntary nature of their participation, their ability to terminate the interview at any time, and the confidentiality of their identity. Confidentiality means that only the researcher will know their identities, and no identifying information will be published in the research. All interviews and notes will

remain in a locked cabinet in the researcher's office. Identifying information will be released only upon written consent by individual interviewees.

Methodological Limitations

Qualitative research methods have been criticized for being less scientific than quantitative methods (Berg, 2007). Quantitative research is designed to measure, compare and aggregate sizeable samples of data to create a generalizable set of findings to the larger population (Patton, 2002). Consequently, the reliability and validity of measurement instruments and process is critical establishing and assessing the accuracy and quality of the findings (Bryman, 2012). Qualitative methodologies do not incorporate similar measurement processes, and therefore cannot be assessed using reliability and validity, nor are they generalizable to larger populations. Other criticisms of qualitative study include the claim that qualitative research is too subjective and difficult to replicate (Bryman, 2012). Regarding subjectivity, the inductive nature of qualitative research may lend itself to a subjective choice of research focus, rather than starting with an established theory. Also, the researcher's findings may include bias due to her close relationship with the research subjects. Qualitative studies are nearly impossible to replicate, and the unstructured format of qualitative data and research designs and analysis of the data may be subjectively influenced by the researcher (Bryman, 2012). Finally, critics of qualitative research designs caution that there is a lack of transparency, both in the research process and the analysis of data.

The present study has several methodological limitations. First, the researcher has no control over the initial sample of 798 cases (707 from the Northern California Innocence Project and CDAA studies, and 91 from the Innocence Project and TDCAA

studies) from which the 190 cases were selected for content analysis, and the smaller number of cases will be selected for the case studies. By relying on the cases identified by researchers in the four previous studies, any error or bias that was introduced by their selection of cases will carry forward into this research.

Second, the present study cannot account for cases of misconduct that are not recognized, either because the case disposition (either through a plea agreement or trial) was not appealed, or because misconduct was not brought up on appeal. However, it is important to point out that even though a relatively small number of cases result in published appellate decisions, these cases exert a disproportionate influence on the legal community since they inform expectations for future case outcomes and decisions whether or not to proceed to trial or appeal (Heise, 2002).

Third, findings will not be generalizable to a larger population of prosecutor misconduct cases. Purposeful sampling is not useful for making generalizations from the sample to the population (Patton, 2002). Instead, this study uses a unique set of social science methodologies to reexamine data from earlier research and to identify themes surrounding prosecutor misconduct in order to provide direction for future research.

IV. FINDINGS AND ANALYSIS OF CALIFORNIA AND TEXAS APPELLATE CASES

This chapter presents the findings of the first of the three qualitative studies exploring the phenomenon of prosecutor misconduct. This first study re-analyzes cases from prior research and addresses the following four research questions:

R1: What is the range and prevalence of prosecutor misconduct identified by appellate judges in the sample cases? How do findings compare with the NCIP and Innocence Project Texas studies, and the response reports by the CDAA and TDCAA?

R2: What types of prosecutorial misconduct or errors most commonly occur? Are there significant themes regarding prosecutor behaviors that arise from the appellate cases?

R3: What do judges rely upon to make this decision (prior case law / policy / statutes)? Are there significant themes regarding judicial decisions that arise from the appellate cases?

R4: Are there any sanctions directed to prosecutors if a determination of misconduct is made? If so, what sanctions do the judges apply?

Ethnographic Content Analysis was conducted on 99 appellate cases which were randomly selected from the 707 cases analyzed in the Northern California Innocence Project study (NCIP), and the 91 cases analyzed in the Innocence Project Texas study. Although these studies have been cited frequently to support the conclusion that prosecutors often commit misconduct but are rarely disciplined, the validity of their

findings has been questioned by two prosecutor advocacy organizations. The California District Attorneys Association (CDAA) and the Texas District and County Attorneys Association (TDCAA) have published responses to the NCIP and Innocence Project Texas studies, respectively, in which they review and dispute the accuracy of the findings, make a case for prosecutor immunity, and offer recommendations for preventing prosecutorial misconduct without the need for sanctioning in most cases. However, both the Innocence Project groups and prosecutor advocacy organizations have a vested stake in outcomes. Therefore, this re-analysis was done by an objective reviewer using standard social science methodology to avoid potential bias in the methodology or findings.

The cases were accessed from the Westlaw database and coded individually. The initial coding protocol was created with the four research questions in mind and expanded as new themes or categories evolved during the content analysis process. Initially, each case was coded to record:

- the case citation,
- the court's holding regarding findings of misconduct or unintentional error,
- the rationale for the ruling, and
- the body of law of public policy supporting the court's conclusions.

After coding the first twenty cases, the following coding categories were added as themes began to emerge:

- specific types of misconduct claimed on appeal,
- judicial comments on the weight of the state's evidence, and

- the court’s ruling on harmless error analysis.

The first 20 cases were re-coded, then the coding sheet and an example of a coded case was reviewed by three legally-trained, criminal justice scholars to check for consistency in legal language and meaning. All three reviewers confirmed that the legal language and meaning in the code sheet matched the coding in the case.

Cases were coded “misconduct,” “error,” or “other” based on the court’s ruling on each misconduct claim instead of the particular language used throughout the cases, since it became apparent after coding the first 20 cases that judges use the terms “misconduct” and “error” interchangeably. Coding for the court’s ruling on the misconduct claim allowed for identification of the language used for findings of misconduct or error, and comparison of overlapping use of terms even as courts may have been distinguishing between misconduct and error in their rulings. The category of “other” was coded when a court ruled that no misconduct occurred, or when a court did not reach a decision regarding the misconduct but instead simply analyzed whether or not it was harmless error.

It is important to clarify that the California and Texas cases in the sample are considered separately in the section addressing the first research question regarding the range and prevalence of prosecutor misconduct identified by appellate judges in the sample cases. The two sets of cases were compared directly to the NCIP study and CDAA response report, and the Innocence Project Texas study and TDCAA response report, respectively, to examine the extent of bias in the results of these two advocacy groups’ findings. The two sets of cases are referred to as the California Sample and the Texas Cases. In the general description of the cases, as well as in sections in which the

research questions focus on themes running across all cases, the California and Texas cases will be considered as a Combined Sample.

It is also important to clarify the differences in how misconduct is defined across the NCIP and Innocence Project studies, in the CDAA and TDCAA rebuttal studies, as well as in the present study. As noted above, the cases were coded according to the judicial ruling on the misconduct claim, rather than the use of specific terms of “misconduct” or “error” or other commonly used terms such as “improper” or “inappropriate” to describe a prosecutor’s behavior. If a judge found a prosecutor’s action to be improper and consequently conducted the harmful error analysis, the case was coded as misconduct. If a judge explicitly found conduct to be an unintentional misstep, then the case was coded as “error.” If a judge found the conduct to be proper, or failed to address the misconduct claim specifically, the case was coded as “other.”

The NCIP study offers three possible definitions for prosecutor misconduct, but does not specify which one was used in their review of the California cases. Presumably, all were used. First, prosecutor misconduct “implies a deceptive or reprehensible method of persuading the court or jury” (NCIP, 2012, p. 24, quoting *People v. Price*, 1991, p. 448). Second, it is “any behavior that deliberately seeks an unfair advantage over the accused or a third person, or otherwise seeks to prejudice these persons’ rights” (p. 24). Finally, misconduct is an “improper or illegal act (or failure to act), esp. involving an attempt to avoid required disclosure or persuade the jury to wrongly convict a defendant” (p. 24). The NCIP study does not explicitly define “error.”

The CDAA response report defines prosecutor misconduct using the following federal and state legal standards:

Under federal law, a prosecutor commits misconduct when his or her conduct ‘infects the trial with such unfairness as to make the conviction a denial of due process. . . . Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutor misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court of the jury.’ (2012, p. 16, quoting *People v. Hill*, 1998, p. 819)

The CDAA response report does not explicitly define “error,” but refers to it as minor mistakes and other errors made by prosecutors that do not amount to “deceptive or reprehensible methods” (p. 16).

As for the Texas studies, it is unknown how the Innocence Project Texas study specifically defined misconduct or error in its study of the 91 Texas cases. Although the research was presented during a symposium held at the University of Texas School of Law, a final report was not published, nor is the research methodology explained in detail on the Innocence Project’s website. In the TDCAA response report, misconduct is defined as occurring when “a prosecutor engages in dishonest or fraudulent conduct calculated to produce an unjust result” (2012, p. 8). The TCDA report does not explicitly define error, but does note that a definition of misconduct should exclude “common trial errors and minor mistakes made in good faith” (2012, p. 8).

As a result, the discussion of the range and prevalence of misconduct across all of the studies does not allow for a precise comparison of judicial rulings. This lack of a commonly accepted definition of prosecutor misconduct, and the consequences for addressing the issue effectively in public policy, will be discussed in the emergent themes section below.

The following discussion of the research findings first presents a general description of the Combined Sample of California and Texas cases. Next, findings in response to each of the four research questions are presented, including, as part of the

first research question, findings regarding comparisons with the previous four analysis by the advocacy groups. Third, this section will include a discussion of the major themes which emerged out of the California Sample and Texas Cases. Finally, the section ends with a discussion of the limitations of this study, as well as a chapter summary.

Description of the Sample Cases

The 190 appellate cases in the Combined Sample included convictions for homicide crimes (34%), assaults or robberies (23%), sexual assaults (17%), property crimes (7%) and other crimes (19%) such as wire fraud, drug possession and distribution, kidnapping, and driving while intoxicated (see Figure 1). Defendants in the sample cases were overwhelmingly male (179) (see Figure 2). The cases in the sample were considered by both state and federal appellate courts, but state courts accounted for 78% of the sample (see Figure 3). Courts in the sample overwhelmingly upheld convictions and sentences (78%), however some convictions were overturned and remanded for a new trial (16%), a few were overturned and remanded for another reason, such as a new evidentiary hearing or new sentencing hearing (5%). In only two of the cases were convictions were vacated entirely (see Figure 4).

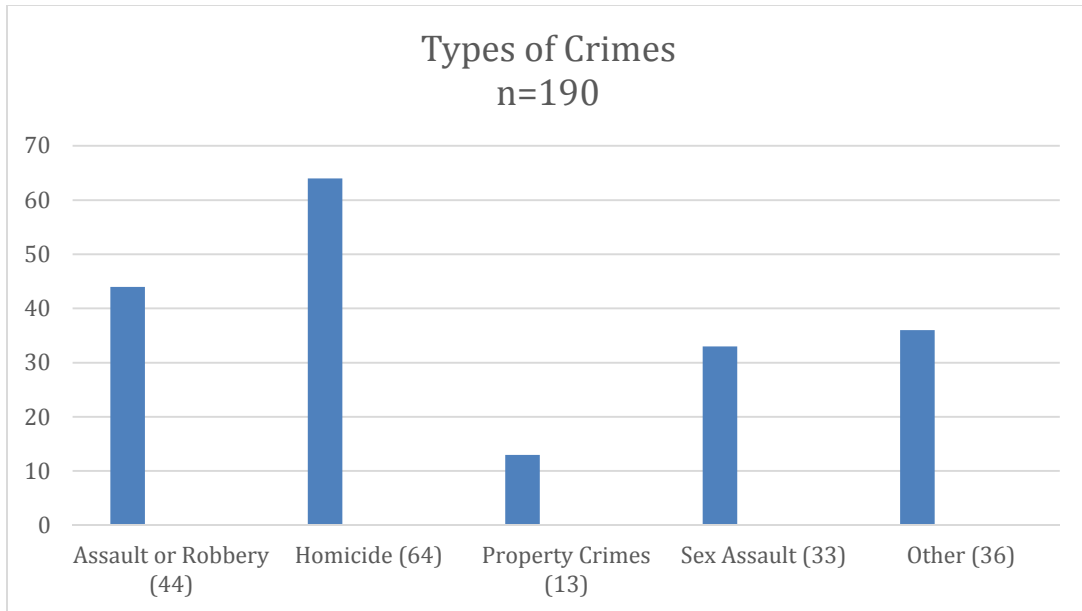


Figure 1. Types of Crimes in Five Broad Categories in Combined Sample

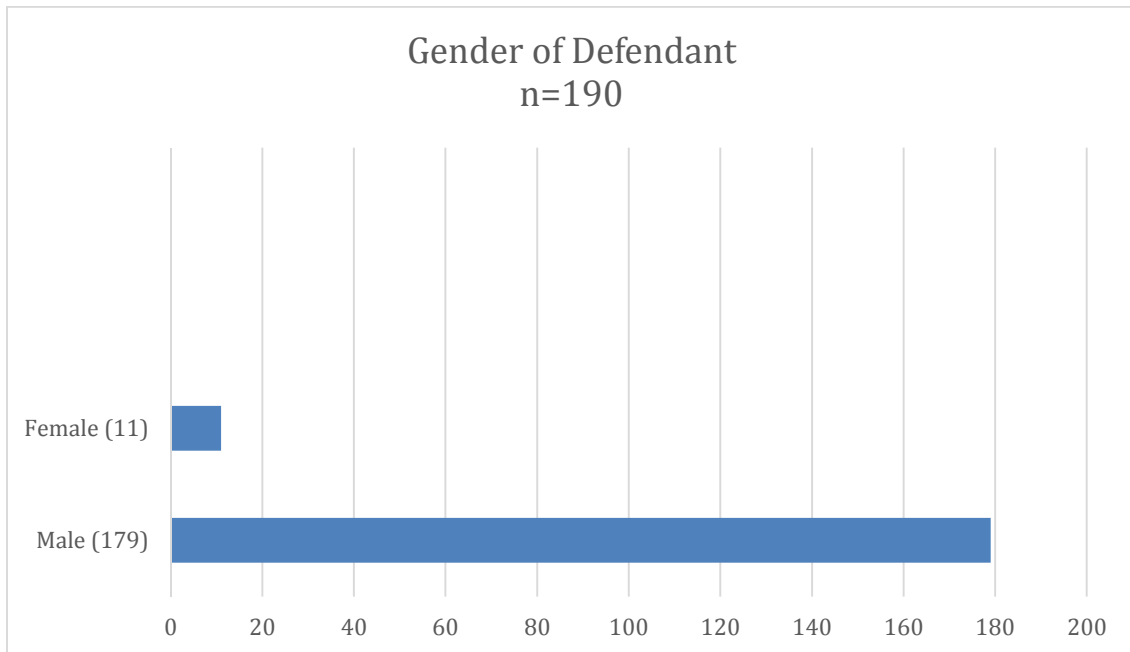


Figure 2. Gender of Defendant in Combined Sample

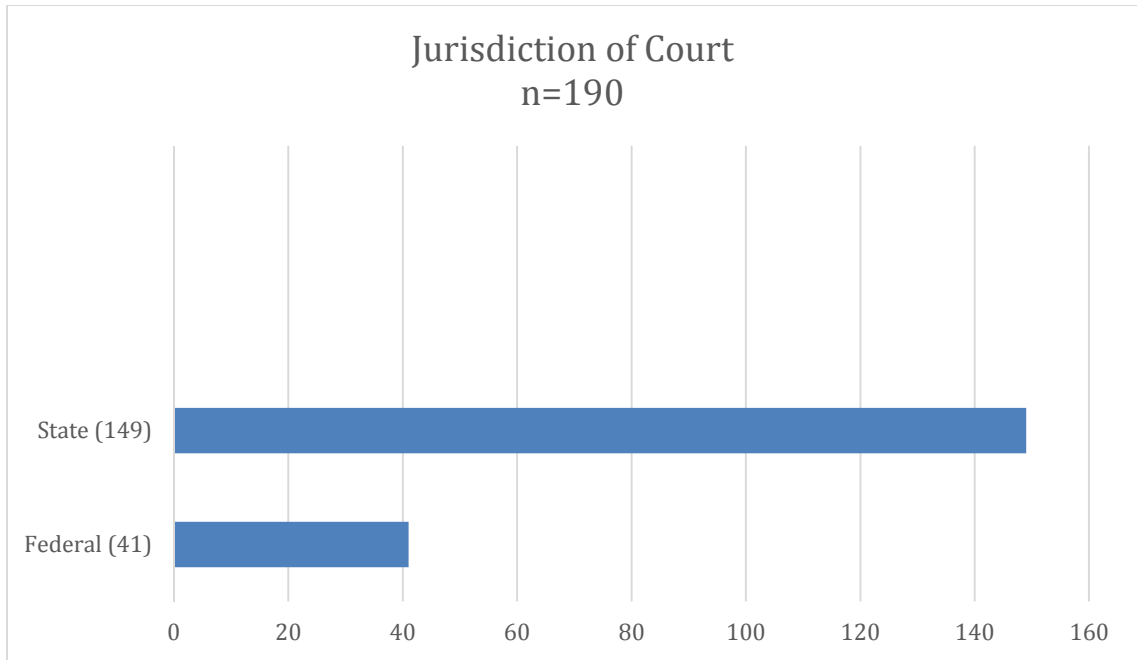


Figure 3. Jurisdiction of Appellate Court in Combined Sample

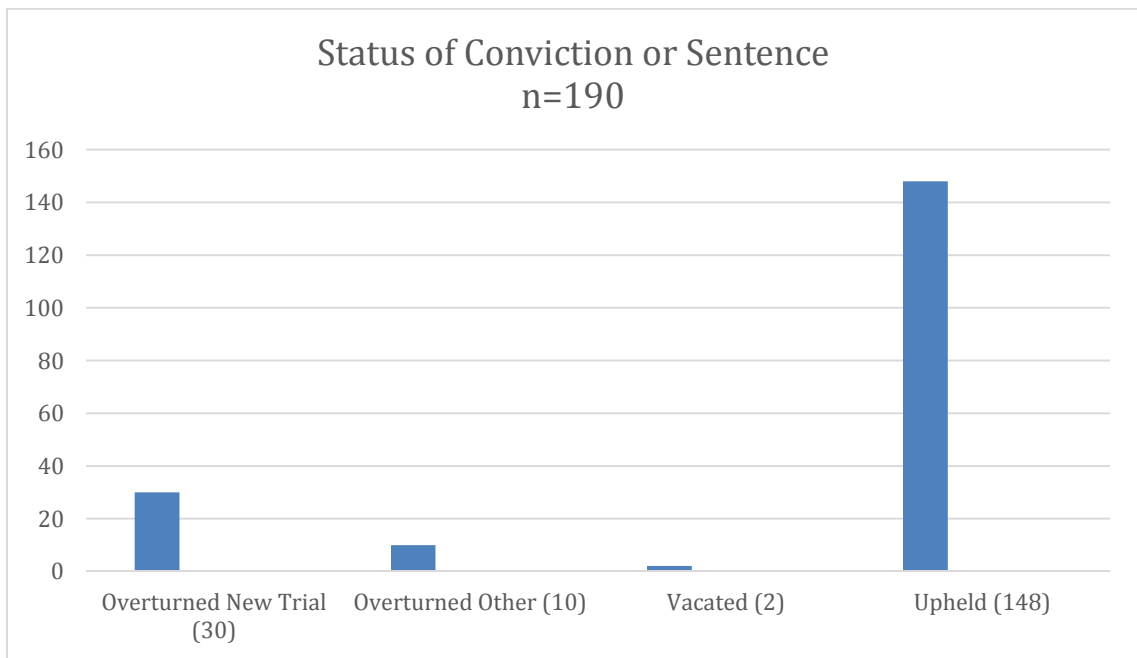


Figure 4. Status of Conviction or Sentence after Appellate Decision in Combined Sample

Research Question 1: Range and Prevalence of Misconduct

The first research question addresses the range and prevalence of prosecutor misconduct in the sample cases, and how findings of the present study compare with the previous studies and response reports. In this analysis, the range and prevalence of prosecutor misconduct in both the California Sample and Texas Cases was similar to the findings in the NCIP and Innocence Project Texas studies. The CDAA and TDCAA response reports did not provide comprehensive descriptive data of how they “counted” misconduct allowing for comparisons. However, claims from the CDAA and TDCAA reports questioning the veracity of findings for specific cases will be addressed below.

Prevalence of Misconduct

The NCIP report concluded that the majority of misconduct in its sample of 707 cases fell into two categories: improper witness examination and improper argument, totaling nearly 78% of the total cases (Ridolfi & Possley, 2010). Improper argument was defined broadly in the NCIP report, including conduct such as misstating the law, arguing facts not in evidence, mischaracterizing evidence, appealing to religious authorities, vouching for a witness’s credibility, impugning the defense, arguing inconsistent theories of prosecution, and shifting the burden of proof.

Applying this broad approach to operationalizing the category of improper argument, the present study’s findings from the California Sample also indicated that nearly 80% of the misconduct fell into these categories, as explained in more detail in the following section. Thus, the current research supports the NCIP report’s findings in this regard.

The Innocence Project Texas also concluded that 80% of its total cases claimed improper examination or argument. Improper argument was also defined broadly in the Innocence Project Texas report, including conduct such as arguing facts not in evidence, misstating the law, vouching for the credibility of the witness, impugning the defense, and misstating the evidence (Innocence Project & Veritas Initiative, 2014). Similarly, the present study's findings after analyzing the Texas Cases identified that nearly 80% of the misconduct fell into these categories, again supporting the Innocence Project Texas report findings.

The NCIP report concluded that there were multiple acts of misconduct in many of the cases, with 782 total findings of misconduct throughout the 707 cases in the study. This is also the case in the present study, with 110 findings of misconduct in the 99 cases in the California Sample, and 223 findings of misconduct in the 91 Texas Cases. The NCIP study noted that 66 of the 707 cases in its sample (roughly 9%) found instances in which material, exculpatory evidence was withheld from defendants (*Brady* violations). The present study identified a similar percentage of *Brady* violations in the California Sample, with six instances equaling 6% of all misconduct claims. The Innocence Project Texas study identified eight instances of *Brady* violations (roughly 9% of the total cases). The present study's reanalysis of the Texas Cases verified that eight *Brady* violation claims existed in the case holdings.

The NCIP found that in 159 of the 707 cases (22%) where misconduct was found, the court ruled harmful error and set aside convictions, declared mistrials, or barred evidence. In the present study of the California Sample, 24 of the 99 rulings (roughly 24%) on misconduct, error, or other resulted in a harmful error ruling. The Innocence

Project Texas study reported harmful error occurred in 19 of the 91 cases, roughly 20%. The present study’s reanalysis of the Texas Cases found only 15 of the 91 rulings (roughly 16%) on misconduct, error, or other resulted in a harmful error ruling (discrepancies noted below). Figure 5 presents a comparison of the main categories of prosecutor misconduct claimed, as well as the instances of harmful error rulings, found across the NCIP study, the Innocence Project Texas study, and the present study’s analysis of the California Sample and the Texas Cases.

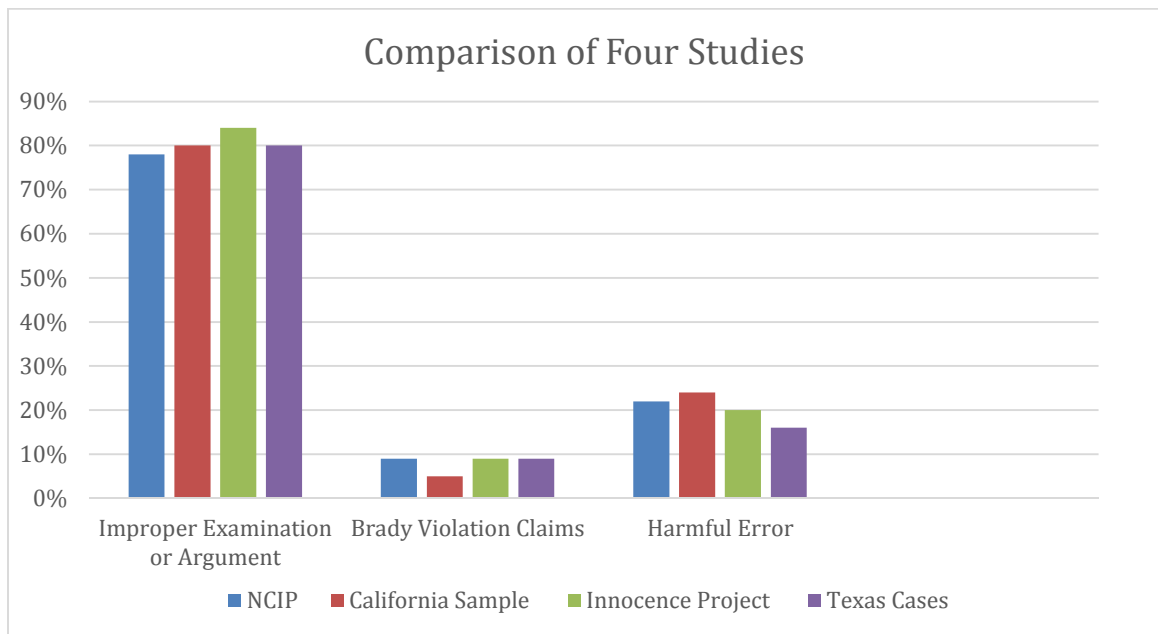


Figure 5. Comparison of Types of Misconduct and Harmful Error Rulings in NCIP, Innocence Project Texas, the California Sample, and the Texas Cases

No discrepancies were noted between the NCIP cases and the California Sample cases in the present study in the harmful / harmless categories. In the analysis done for the present study, all of the cases in the California Sample were found to fall into the

same categories as indicated in the NCIP study. There were discrepancies noted, however, between the list of harmful error rulings in the Innocence Project Texas study list and the reanalysis of Texas Cases.

- The Innocence Project study listed *Ex Parte Lewis* (2005) as having a harmless error finding, but in fact there was a harmful error ruling and the case was dismissed with prejudice (judgment of the Court of Appeals later reversed and remanded for analysis of double jeopardy claim only in *Ex parte Lewis*, 2007)².
- The Innocence Project study listed *Griggs v. State* (2005) as having a harmless error finding, but the court did find harmful error and declared a mistrial based inadmissible testimony offered by two witnesses. The issue of whether the prosecutor intended to elicit the inadmissible testimony was not addressed. In a subsequent hearing, the Court of Criminal Appeals of Texas overruled the mistrial order, not on the issue of prosecutor misconduct, but rather the court held that the defendant's motion for mistrial was untimely and failed to preserve his complaint for appellate review (*Griggs v. State*, 2007).
- The Innocence Project also listed *Hines v. State* (2008) as having a harmless error ruling, but the court found the prosecutor's misstatement of the law during closing argument caused harmful error and remanded the case for a new trial.

² A note regarding court citations: All cases are cited using the Bluebook Uniform System of Citation in accordance with APA guidelines. Where cases were published in official reporters, citations refer to the reporter location. Where cases were not published, citations refer to the Westlaw electronic database citation. All other court documents are cited in accordance with Bluebook (APA) guidelines.

- The Innocence Project listed *Taylor v. State* (2007) as having a harmful error finding, but in fact there was a harmless error ruling and the conviction was upheld.

Additionally, there were discrepancies noted across the findings of misconduct in the Innocence Project Texas study cases, the TDCAA response report, and the present study's reanalysis of the Texas Cases. For example, the TDCAA report claims that in 11 of the 91 cases identified as illustrating prosecutor misconduct in the Innocence Project Texas study, there were in fact "no court finding(s) of prosecutor misconduct *or* error" (emphasis in original) (TDCAA, 2012, p. 9). The present study's review of these cases indicated that the courts clearly ruled no misconduct in only four of the 11³, reached an ambiguous ruling regarding misconduct in five of the cases⁴, and clearly ruled there was misconduct in two cases⁵. Figure 6 presents a comparison of the prosecutor misconduct rulings found in the Innocence Project Texas study, the TDCAA response report, and the Texas Cases.

³ *Wingo v State* (2004); *Griggs v. State* (2007); *Sanchez v. State* (2008); *Ex Parte Munson* (2005).

⁴ *Taylor v. State* (2007); *Corral v. State* (2004); *Perwani v. State* (2005); *Reeders v. State* (2005); *Whitmire v. State* (2006).

⁵ *Polk v. State* (2005); *Carter v. State* (2008).

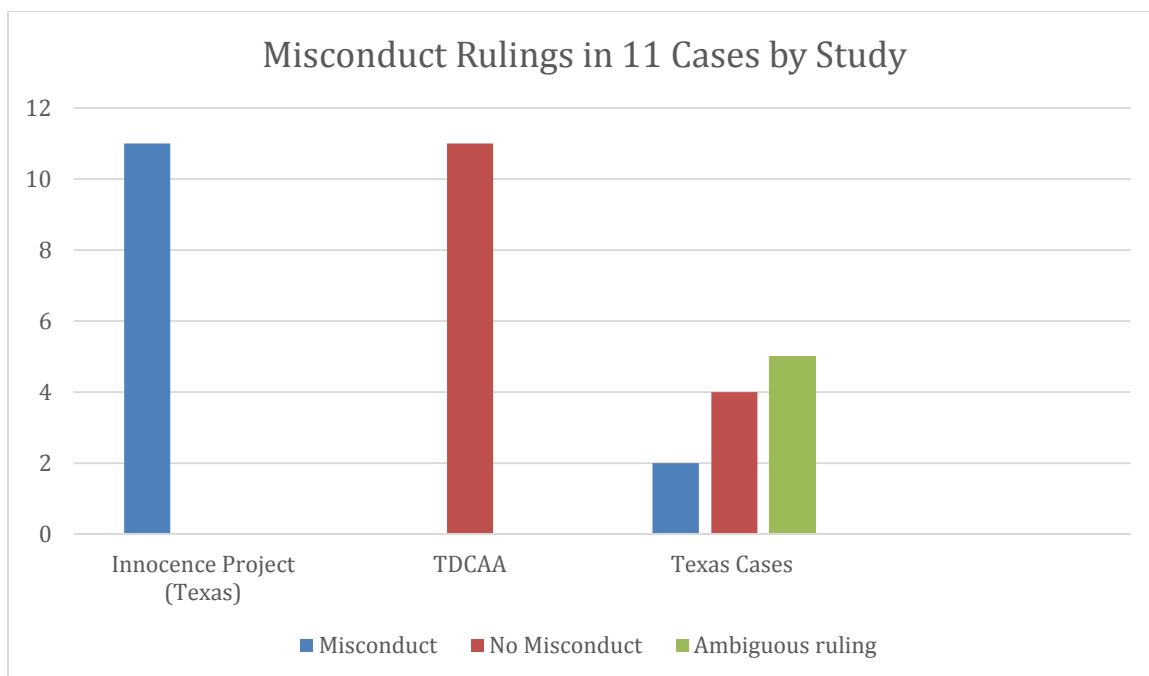


Figure 6. Comparison of Misconduct Rulings in Innocence Project Texas study, the TDCAA study, and the Texas cases

Range of Misconduct

Misconduct reviewed in the present study’s examination of the California Sample and Texas Cases ranged from nominal to egregious within each category of misconduct claimed. In the least serious instances of prejudicial statements made during trial, for example, prosecutors made singular inaccurate or improper statements during the trial. In *People v. Derian* (2003) from the California Sample, the prosecutor’s claim that the defense counsel was persecuting the witnesses was found to be, if misconduct, then harmless error.

They're two smart ladies and they're two heroes, and often movies portray females as the damsel in distress or something, and sometimes you just wish this woman would do something, you know. Well, these two women did, and here they're getting persecuted for it, whereas they couldn't have actually done anything smarter. [Defense counsel]: I'm going to object to the word 'persecuted.' That's an improper impugment [*sic*] on defense counsel. [The court]: The objection's overruled. I expect counsel to be vigorous in their arguments, and I've already told

you their statements aren't evidence. I expect them to be advocates on their side.
(p. 9)

Also from the California Sample, in *People v Rogers* (2003), the prosecutor briefly offered his personal opinion during opening statement. The Court of Appeals, Third District, California, found this to be improper but harmless error, given the court's admonishment in front of the jury.

The incident to which defendant objected arose during the prosecutor's opening argument, when he stated: 'Now Mr. Davis (defense counsel) has made a big issue of the fact (during witness cross-examination) that the police didn't do a thorough investigation here. They didn't go out and look for the real criminal. Perhaps he's on a golf course somewhere. I hardly think so. I think the person that committed this robbery and I know the person who committed this robbers [*sic*] is sitting in the courtroom....' Counsel objected, and the court admonished the prosecutor: 'Mr. Barone (prosecutor), the best way is to suggest to the jury as far as your personal or [defense counsel's] personal views of the evidence. Please avoid those references.' The prosecutor replied, 'I will do that, Your Honor. Thank you.' (p. 3)

In one of the Texas Cases, *U.S. v. Duncan* (2005), the United States Court of Appeals, Fifth Circuit, held the prosecutor's remark regarding the location of the defendant's prior offense to be improper yet non-prejudicial.

In 2002, Duncan was convicted of knowingly aiding and abetting the illegal entry of an alien. The district court limited the admissibility of the facts surrounding that conviction to the facts contained in the judgment, which included the date of the conviction and the number of aliens involved in the offense. *The fact that the 2002 immigration offense occurred near Cotulla, Texas, was not contained in the judgment and was an improper remark* [emphasis added], but it was not material to the conviction, does not cast doubt on it, and does not amount to error. (p. 370)

In other cases, prosecutors made several inaccurate or improper statements throughout a trial, even after being admonished by the judge. From the California

Sample, in *People v Broughton* (2008), the prosecutor repeatedly offered a theory of the crime which was not supported by the evidence. The California Court of Appeals found that the prosecutor's attempts to offer unsupported evidence before the jury, in violation of the court's express admonitions, was prejudicial misconduct that materially influenced the verdict.

In closing argument, the prosecutor referred to the 1989 and 1995 incidents of domestic violence that had been adduced in evidence thusly: 'But throughout this entire history no one sees [the defendant, Broughton] do this. [The victim, Davila] just miraculously shows up with these—with these swollen eyes, with these bruises on her knee, on her shoulder, redness to her neck. How does redness to the neck happen? How does that happen? Probably by choking.'

The prosecutor knew, however, from the police report that Davila told police Broughton had held a knitting needle to her neck and jabbed at her neck with it. The trial court sustained defense counsel's objection, and told the jury, '[y]ou must base your decision only on the evidence in the case. Counsel has crossed the line in that regard.' The prosecutor immediately resumed, saying: 'You be the judges. You be the judges. In your own personal experience, how does redness of the neck happen?' The court later remarked that it thought the objection and its comment to the jury cured any error that was made, 'but it was definitely a significant violation by the People.' At the conclusion of the prosecutor's argument, defense counsel again moved for a mistrial, pointing out that the prosecutor, in the choking claim, 'clearly stated something that she has absolutely no evidence of fact, and, in fact, she has evidence quite to the contrary.' The trial court admonished the prosecutor, who eventually admitted there was evidence contrary to her statement.

While admonishing her (in connection with the choking claim), the court also admonished the prosecutor for improper expressions of personal belief. 'I'm admonishing you for the umpteenth time. I'm also admonishing you in regards to expressions of personal interest in this case. ... None of those expressions are proper. You know it. I know it, and I'm going to ask you not to make personal expressions of belief or opinions in regards to your arguments.' (p. 9)

In the category of improper questioning of witnesses, prosecutor conduct also ranged from minor to severe in both the California Sample and the Texas Cases. In

People v. Cruzata (2003), a case from the California Sample, the prosecutor inadvertently introduced evidence of the defendant's gang affiliation. While questioning a witness, the prosecutor asked him to read from the handwritten notes the witness took during his photographic identification of the suspects.

During trial, the prosecutor asked witness Danny Torrez to read from his handwritten comments regarding his photographic identification of certain suspects. In so doing, he read: 'Card C number four is Shadow from Playboys.'

At this juncture, the court interrupted and asked counsel to approach the bench. The court reprimanded the prosecutor for allowing the witness to mention 'Playboys,' and cautioned him to avoid any further references to gangs. The prosecutor explained the mistake was inadvertent and the reference was to [another witness], not appellant. (p. 7)

The Court of Appeals, Second District, held that gang reference had minimal impact on the jury and was therefore not prejudicial.

From the Texas Cases, in *Koole v. State* (2007), the prosecutor asked an expert witness testifying regarding the defendant's risk of future dangerousness if he would trust the defendant with his own thirteen-year-old son. The Court of Appeals of Texas, Corpus Christi-Edinburg, noted that the question was improper but "not severe" and amounted to harmless error.

In his first issue, appellant complains of prosecutorial misconduct during the punishment phase of trial. Dr. David Moron, a psychiatrist, testified that in his opinion, appellant presented a very 'low risk' of future dangerousness. On cross-examination, the prosecutor asked Dr. Moron, 'And let me ask you this: Do you want him to babysit your son?' Appellant's counsel objected and asked for a limiting instruction. The trial court sustained the objection and instructed the jury to disregard the question. (p. 1)

In another case from Texas, the prosecutor asked a witness if the defendant's "personality is different when he's running around with that gun or is he just always mean?" The appellate court found the question to be improper, but did not warrant a

mistrial because the question was isolated and the trial court immediately instructed the jury to disregard the statement (*Lopez v State*, 2008, p. 11).

In a more serious case from the California Sample, in *People v. Alashanti* (2005) the prosecutor called a police detective as a witness ostensibly to evoke evidence regarding the defendant's status as a parolee. The Court of Appeals for the Fourth District found the prosecutor's behavior to be inexcusable, however ruled the trial judge had cured any prejudice caused by this misconduct in light of the State's overwhelming against the defendant.

The prosecutor called Detective Orlonzo Reyes, a 15-year veteran of the Garden Grove Police Department, to testify concerning the arrest of Burnell and Alashanti. As far as we can discern from the record, Reyes's testimony was almost entirely irrelevant. As to Burnell's arrest, Reyes was asked whether he participated in the arrest, and whether the man he arrested was present in the courtroom. Having established this trivial and cumulative fact, Reyes was asked, 'Now where did this take place?' Reyes answered, 'It was in a parole office in the City of Inglewood.'

To the displeasure expressed by the trial judge, however, we add our own. We conclude the episode with Officer Reyes was an inexcusable trial stunt. We do not understand why the prosecutor called Officer Reyes to testify, except as the means to drop the prejudicial information about the parole status of both defendants into the laps of the jurors. When the prosecutor asked Reyes where he had arrested Burnell, did she really not know the arrest had taken place in a parole office? We are not inclined to believe the prosecutor was so ill-prepared as not to know what answer to expect from the witness. Had the prosecutor not asked the question concerning the location of Burnell's arrest, we might have concluded the question about defendant's arrest was asked innocently. But when we consider the totality of Reyes's testimony, including the location of Burnell's arrest in a parole office, the showing of a 'state parole' photo when defendant falsely identified himself, and the near total irrelevancy of Reyes' testimony, we are compelled to conclude this was a trial stunt planned by the prosecution. (p. 6-7)

A more serious instance of impermissible questioning of a witness came from the Texas case *Ex Parte Wheeler* (2004), in which a prosecutor asked a question of the witness that had been previously deemed inadmissible by the judge. The defendant was

on trial for manslaughter / criminally negligent homicide for hitting and killing the victim with her car. The prosecutor asked the defense accident reconstruction expert witness if he was aware that the defendant's insurance carrier found her at fault. The defense attorney objected, noting that evidence of the insurance reports had been determined to be inadmissible by the judge based on a motion submitted by the State, and moreover, that the question was highly prejudicial to the defendant. (In fact, the motion did not mention insurance or insurance reports, but only that there would be no mention of any civil monetary settlements). The trial judge agreed with the defense and granted a mistrial. Both the Court of Appeals and the Court of Criminal Appeals of Texas agreed that the prosecutor's question was "manifestly improper," had little probative value, was highly prejudicial, and therefore warranted a mistrial (p. 1).

In the most egregious instances of misconduct claims from the California Sample and Texas Cases, prosecutors withheld material, exculpatory evidence from defendants, depriving them of their constitutional rights to due process and a fair trial, and causing convictions to be overturned, remanded for a new trial, or vacated entirely. For instance, in *Singh v. Prunty* (1998), the United States Court of Appeals, Ninth Circuit held the prosecutor committed prejudicial misconduct when he failed to disclose benefits given to an informant in exchange for his testimony against the defendant. The conviction was reversed and remanded for a new trial.

[The informant] Copas received substantial benefits in exchange for his testimony at Singh's trial. Disclosure of an agreement to provide such benefits, as well as evidence of the benefits themselves, could have allowed the jury to reasonably conclude Copas had a motive other than altruism for testifying on behalf of the State. Such a finding could have substantially impeached Copas' credibility as a witness.

We recognize that conflicting arguments can be made regarding the effect the disclosure of the evidence of benefits to Copas may have had on Copas' credibility as a witness. However, our fundamental concern remains whether there exists a reasonable probability that given disclosure of the evidence of benefits to Copas, one or more members of the jury would have viewed Copas' testimony in a different light. Given the importance of Copas' testimony to the prosecution's case, and the impact the disclosure of evidence of the benefits provided to Copas could have had on Copas' credibility, we believe there is a reasonable probability that had the evidence been disclosed to the defense, one or more members of the jury could have viewed Copas' testimony differently.

During the evidentiary hearing on Singh's state habeas petition, Stout conceded it might have been 'the kiss of death' to the State's case if the jury heard Copas was in essence being rewarded for his testimony with some kind of benefits. With all due respect to the state court of appeal, which felt otherwise, we deem Stout's candid concession to be highly significant. In the adversarial process, the prosecutor, more than neutral jurists, can better perceive the weakness of the state's case. After all, it is the prosecutor who has the duty to determine whether the information is material and whether it should be disclosed.

The prosecution's suppression of evidence of the agreement to provide benefits to Copas in exchange for his testimony undermines our confidence in the outcome of Singh's trial. The suppressed evidence was therefore material, and due process required its disclosure. (p. 1163)

In an egregious Texas case, *Graves v Dretke* (2006), analyzed in greater detail as one of the case studies in Chapter Five, the prosecutor failed to disclose to Graves that key prosecution witness, Robert Earl Carter, informed the prosecutor that Graves was not involved in the crime.

[It] is obvious from the record that the state relied on Carter's testimony to achieve Graves' conviction.

District Attorney Sebesta contradicted Graves' counsel and testified at the habeas hearing that he told Graves' defense counsel Garvie of this statement outside the courtroom the morning after Carter made the statement. The district court did not find Sebesta credible on this point.

Because the state suppressed two statements of Carter, its most important witness, that were inconsistent with Carter's trial testimony, and then

presented false, misleading testimony at trial that was inconsistent with the suppressed facts, we have no trouble concluding that the suppressed statements are material. (p. 341)

The previous section focused on the first research question addressing the range and prevalence of prosecutor misconduct identified in the California Sample and Texas Cases and how those findings compared with the NCIP and Innocence Project Texas studies, and the CDAA and TDCAA response reports. This following section addresses the second research question concerning what types of prosecutorial misconduct or errors most commonly occur in the Combined Sample of California and Texas cases.

Research Question 2: Types of Prosecutor Misconduct

The second research question addresses which types of prosecutorial misconduct or errors were most commonly identified in these appellate cases, and if there are significant themes regarding prosecutor behaviors that arise in the Combined Sample. There are 333 distinct claims of prosecutor misconduct in the 190 cases comprising the Combined Sample. Cases were coded to indicate types of misconduct by using the language that each appellate court used when describing the misconduct claim. The most frequently claimed types of misconduct were improper comments during closing statement (19% of misconduct identified), eliciting improper testimony from a witness (18% of misconduct identified), and prejudicial statements made to the jury (not during closing statement) (13% of misconduct identified). The types of misconduct, their frequency, and their respective percentages of the combined sample, is presented in Table 1. Examples of the types of misconduct with excerpts from the appellate cases are included in Appendix F.

Table 1. Claims of Prosecutor Misconduct in Combined Sample of 190 Appellate Cases

Type of Misconduct Claimed	Frequency	Percentage
Improper closing statement	64	19
Eliciting improper testimony from witness	61	18
Prejudicial statement to the jury	44	13
Miscellaneous misconduct	29	8.7
Misstatement of the law at trial	22	6.6
Improper comment on defendant failure to testify	21	6.3
Striking at defendant over shoulders of defense counsel	20	6.0
Vouching curing guilt / innocence phase	16	4.8
Brady violations	14	4.2
Improper opening statement	10	3.0
Improper question	9	2.7
Mischaracterization of the testimony	6	1.8
Misstatement of the law at sentencing	5	1.5
Use of perjured testimony	3	0.9
Bolstering the witness	1	0.3
Coaching a witness	1	0.3
Ex parte communication with judge	1	0.3

Improper comments during closing statement included: stating facts not in evidence, drawing conclusions outside the record, offering a prejudicial mischaracterization of the defendant, and referring to the defendant's demeanor during the trial. In *Sandoval v Calderon* (2000), the Ninth Circuit Court of Appeals held it was prejudicial misconduct for the prosecutor to invoke God as an authority for the jury's sentencing decision in a capital murder case.

I want to respond to some of the things argued by [defense counsel]. He told you that it's absurd to talk about life and death, that the law is absurd, that you are playing God, that it's revenge. ... [Defense counsel] says don't play God. Let every person be in subjection to the governing authorities for there is no authority except from God and those which are established by God. Therefore, he who resists authority has opposed the ordinance of God, and they who have opposed will receive condemnations upon themselves for rulers are not a cause of fear for good behavior, but for evil. Do you want to have no fear of authority? Do what is good and you will have praise for the same for it is a minister of God to you for good. But if you do what is evil, be afraid for it does not bear the sword for

nothing for it is a minister of God an avenger who brings wrath upon one who practices evil. You are not playing God. You are doing what God says. This might be the only opportunity to wake him up. God will destroy the body to save the soul. Make him get himself right. (p. 1150)

Eliciting improper testimony from a witness includes testimony which was previously excluded during pretrial hearing, improper hearsay, and asking hypothetical questions based on facts not in evidence. In *People v. Lee* (2003), the Sixth District Court of Appeal held that the prosecutor elicited irrelevant and highly prejudicial testimony from the defendant on cross-examination when he asked, “Isn't it true that [your father] was a reverend prior to going to prison for molesting a 14-year-old child?” (p. 9). The court ruled that, although prejudicial, the single question was not sufficient to require a reversal of the conviction.

Prejudicial statements made to the jury (not during closing statement) include prejudicial characterizations of the defendant, inflammatory comments, implying the defendants are guilty solely because they are on trial, and vulgar language. An example of a claim of prejudicial characterizations of the defendant is found in *People v. Friend* (2009)

Defendant contends the prosecutor engaged in misconduct by characterizing defendant as an ‘insidious little bastard,’ with ‘no redeeming social value,’ and being ‘without feeling’ and ‘without sensitivity.’ Defendant also contends the prosecutor improperly offered his own opinion when he stated that defendant had ‘an antisocial personality,’ and that he was a ‘sociopath,’ ‘without feeling.’ (p. 579)

The Supreme Court of California found these comments to be either not misconduct or non-prejudicial to the defendant’s case.

Moreover, we do not find the prosecutor's comments about lack of social value, feeling, and sensitivity rise to the level of misconduct given the brutal and violent nature of the stabbing murder here. ... As to the prosecutor's use of an insulting

epithet, even assuming it crossed the line between vigorous argument and unjustified insult, we conclude that it would not have inflamed the jury, given the facts in this case. (p. 579)

In another example, in *People v Lagera* (2002) the prosecutor referred to the defense response to his closing argument as “B.S.” and characterized the crime as a “chicken shit little burglary” (p 3). The Court of Appeal, Fourth District, held “[b]oth comments were crude, vulgar, unlearned and highly unprofessional” but ruled that the misconduct claim was waived because the defense counsel failed to object or request an admonition to the jury to disregard the prosecutor’s statements (p. 3).

The category of “miscellaneous misconduct” includes claims that did not fall readily into any of the other listed categories, such as approaching a defendant in the courtroom bathroom and asking if he would like to testify against co-defendants, *Batson*⁶ violations, and questionable physical demeanor at trial. In *People v. Friend* (2009), the case mentioned earlier in which the defendant claimed that the prosecutor made prejudicial characterizations of him during the trial, the prosecutor’s demeanor at trial was also claimed as potentially prejudicial.

During a break in the proceedings, defense counsel objected to the prosecutor's conduct during defendant's testimony, asserting he had ‘been kind of sitting there laughing.’ The court overruled the objection, noting that it was ‘not going to tell people they can't laugh or smile.’ Later, during her closing argument, defense counsel stated, ‘[d]uring Mr. Friend's testimony on the stand, Mr. Landswick was laughing, rolling his eyes, waving his hands, did a lot of things to give the impression that this testimony was absolutely not worthy of belief.’ During his rebuttal argument, the prosecutor referred to his ‘chortling during the examination of the defendant,’ explaining that ‘what caused [him] to chuckle’ was that defense counsel engaged in leading questions to get the testimony she wanted from defendant.’ (p. 544)

⁶ Under *Batson v. Kentucky* (1986), the State violates a defendant’s equal protection rights under the 5th and 14th Amendments if it uses its peremptory challenges to exclude people of a particular race during jury selection.

The Supreme Court of California court held that “even assuming the prosecutor's behavior was misconduct, we conclude it was harmless” (p. 544).

The most frequent claims of misconduct in the Combined Sample arose from instances in which prosecutors were speaking to the jury or questioning witnesses during trial. Although media coverage of misconduct often centers on *Brady* violations or improper use of jailhouse informants, most of which occur outside of the courtroom, the majority of misconduct claims in the cases identified by the NCIP and Texas Innocence Project and used in this study stemmed from statements made and questions asked by prosecutors during trial. As noted in Table 1, over 80% of the claims of misconduct stemmed from points in which a prosecutor was speaking in the courtroom. It is important to note that, unlike undisclosed evidence or discussions with jailhouse informants, the words spoken during a trial are recorded and available to defense attorneys to review when writing appeals. This may account, at least in part, for the frequency of these types of misconduct claims in the Combined Sample.

The next most commonly claimed types of misconduct in the Combined Sample also arose from statements made by prosecutors during trial: misstatements of the law at trial and improper comments on the defendant's failure to testify, together totaling almost 13% of the claims. Misstatements of the law include incorrect statements regarding the presumption of innocence, misstatements of the elements of a charged crime, and encouraging the jury to reach a non-unanimous verdict. In *Hines v. State* (2008), the Court of Appeals, Texarkana, held that during a trial for the charge of indecency with a child, the prosecutor improperly encouraged the jury to reach a non-unanimous verdict in closing argument:

Let me tell you, if the twelve of you, based upon the evidence, decide that he never touched her anus, that's fine. All that matters is, is that you believe, by the credible evidence, if he touched the genitals or the breasts, which means twelve of y'all can say 'no' to anus; twelve of y'all can say 'yes' to the genitals being touched it [*sic*]; six of y'all can say 'yes' to the genitals being touched; or six to the breast being touched; twelve to the breast being touched. I think you get the point. It's any combination. Six of you can think one manner; six of you can think the other; eight, two, whatever. You can be unanimous on all of them, all right? So when you go back there, don't get hung up on that. (p. 221)

On rebuttal, a different prosecutor stated the following to the jury,

And I'm going to start off with the charge, because I think the charge is important. You're going to go back there, and you're going to look at it.

When you look at Paragraph 4, that's the application paragraph, y'all can just get rid of anus. There's no evidence in the case that he touched her anus.... So y'all get rid of anus.

And the only thing you're left with is genitals or breasts. And like Mr. Vance said earlier, ten of you can say, 'I believe beyond a reasonable doubt that he touched her genitals.' Two of you can say, 'I believe beyond a reasonable doubt that he touched her breasts.' And it doesn't matter. We just need one.

All twelve of you could believe beyond a reasonable doubt, with the credible evidence in this case, that he touched her genitals and that he touched her breasts, that's fine, too. (p. 221)

The court concluded that the prosecutors committed prejudicial misconduct by asking the jury to arrive at a non-unanimous verdict and reversed the conviction, remanding the case for a new trial.

The Fifth Amendment protects individuals' rights regarding self-incrimination. This has been the basis of court cases that have ruled prosecutors cannot bring up a defendant's choice not to speak with police or testify. In *Griffin v. California* (1965), the U.S. Supreme Court ruled that a prosecutor violates the Self-Incrimination Clause of the Fifth and Fourteenth Amendments of the U.S. Constitution if he or she comments about the defendant's failure to testify. Improper comments on the defendant's failure to testify

include decisions not to speak with the police, speculating about defendant's motive that would only have been available if the defendant testified, and comments on a defendant's demeanor. An example of this type of misconduct occurred in *Beardslee v Woodford* (2002), a California case, in which the Ninth Circuit Court of Appeals ruled that the "prosecutor's choice of language went beyond mere demeanor and implicated his refusal to testify. . . . These comments were impermissible [yet] clearly not extensive" and did not require reversal of the conviction (p. 587).

The prosecutor called attention to the absence of any demonstration of emotion by Beardslee, arguing that he was incapable of showing emotion because he had no remorse. The prosecutor then continued: 'Since you only heard the defendant through the tape recorder and his previous testimony, you were not able to observe his demeanor and sincerity at the time he testified so you, too, could judge if there was any feeling in the man.' The court overruled a defense objection, and the prosecutor continued: 'Wouldn't you expect a man on trial for his life would, through his statements, cry out for forgiveness, cry out for pity? He did not. Never heard any in the statements.' (p. 586)

Under *Brady v. Maryland* (1963), the U.S. Supreme Court ruled that a constitutional violation occurs if the State withholds evidence which is favorable to a defendant's case, is material to either guilt or punishment, and that the discovery of the suppressed evidence did not result from lack of due diligence on behalf of the defendant's attorneys. Although *Brady* violations play a prominent role in the literature concerning wrongful conviction, *Brady* violations accounted for only 5% of the misconduct claims in the Combined Sample. Examples include not disclosing a non-testifying potential witness and co-defendant, failure to turn over drug test results before a trial, and failure to disclose that a key witness was a paid informant for the state. Under *Brady v. Maryland* (1963), a court will find misconduct to have occurred even if the prosecutor is unaware of the existence of the non-disclosed exculpatory evidence. In a California case, one *Brady*

claim resulted from evidence not in possession of the prosecutor. In *People v Calderon* (2006), police had failed to disclose a videotape recording taken from a dash-mounted video recorder. All parties in the case learned of the videotape during the police officer's testimony and, subsequently, the video was played for the jury. The court ruled that the late disclosure did not prejudice the case, and that the trial properly denied the defendant's request for a mistrial.

Research Question 3: Judicial Decision Making

The third research question asked what are the legal standards that judges apply in their decisions, and whether there are significant themes regarding judicial decisions that arise in the appellate cases. In the Combined Sample, judges overwhelmingly cited case law, rather than statutes or policy rationales, as the basis for their decisions regarding prosecutor misconduct. In California, judges most often cited *People v Hill* (1998), a California case, when evaluating whether prosecutor conduct resulted in a denial of due process. In *People v. Hill*, the court applies the following legal standard: "The United States Constitution is violated when a prosecutor's intemperate behavior comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process" (p. 819). If the judge finds that the prosecutor's conduct does not rise to the level of violating the Constitutional standard, there still may be a violation of California law if the prosecutor's behavior "involves the use of deceptive or reprehensible methods to persuade either the court or the jury" (p. 819.) Judges in California also apply rules of evidence to determine if a prosecutor has committed an error.

In Texas, judges most frequently cited case law addressing specific types of misconduct, rather than a single case assessing whether prosecutorial conduct violated a standard of due process. For example, judges in Texas evaluated claims of improper jury argument,⁷ commenting on a defendant's failure to testify,⁸ striking at the accused over counsel's shoulders,⁹ and knowing use of perjured testimony¹⁰ using applicable case law addressing these specific types of misconduct. However, there was at least one case cited several times in the Texas cases for general misconduct analysis. Under *Landry v. State* (1985), misconduct is defined as a deliberate violation of a court order coupled with "misconduct so blatant as to border on being contumacious" (p. 111). Texas judges also look to applicable rules under the Texas Rules of Appellate Procedure and the Texas Rules of Evidence to determine if a prosecutor's conduct was improper, to include what types of evidence may be introduced during sentencing, and when a defendant may be cross-examined regarding prior juvenile adjudications (see also TEX. CODE CRIM. PROC. ANN. 37.07 § 3, 2006).

In federal courts, judges cited case decisions which addressed specific types of alleged misconduct. For example, judges addressed comments on the defendant's Fifth Amendment right not to testify, improper remarks, comments on the defendant's courtroom demeanor, and forcing a defendant to call the state's witness a liar (*Griffin v. California*, 1965; *Darden v. Wainwright*, 1986; *Bishop v. Wainwright*, 1975; and *United States v. Sanchez*, 1999). They also cited general cases allowing for multi-step analyses for review of a claim of misconduct (*United States v. Insaugarat*, 2004).

⁷ *Abbott v. State* (2006)

⁸ *Ex parte Lewis* (2005)

⁹ *Fuentes v. State* (1984)

¹⁰ *Johnson v. State* (2008)

All courts, both state and federal, used the benchmark cases of *Brady v. Maryland* (1963) and *Batson v Kentucky* (1986) and their progeny to address withholding of exculpatory evidence and peremptory challenges during jury selection, respectively.

Harmless Error Analysis

Recall that in both state and federal courts, a finding of prosecutor misconduct triggers harmless error analysis, a determination of whether or not the misconduct led to unfairness requiring a new trial, a new sentencing hearing, or vacating the conviction entirely. Judges rely on state case law standards and precedents in conducting harmless error analysis in their own jurisdictions. The standards for harmless error analysis in both state and federal courts will be discussed below with examples from the Combined Sample.

Most findings of misconduct in the cases studied did not result in the conviction or sentence being overturned (see Figure 4). Of the 333 claims of misconduct, courts found justification to conduct harmless error analysis just over 200 times, either because there existed prosecutor misconduct (188 instances), other prosecutor mistakes (11 instances), or courts proceeded straight to the harmless error analysis without ruling on the alleged misconduct (12 instances). Among all of these cases, courts reached a ruling of harmful error 42 times (20% of the cases). The instances of harmless error findings compared to harmful error findings for rulings of misconduct, error, or when a judge did not rule on misconduct or error, are presented in Figure 5.

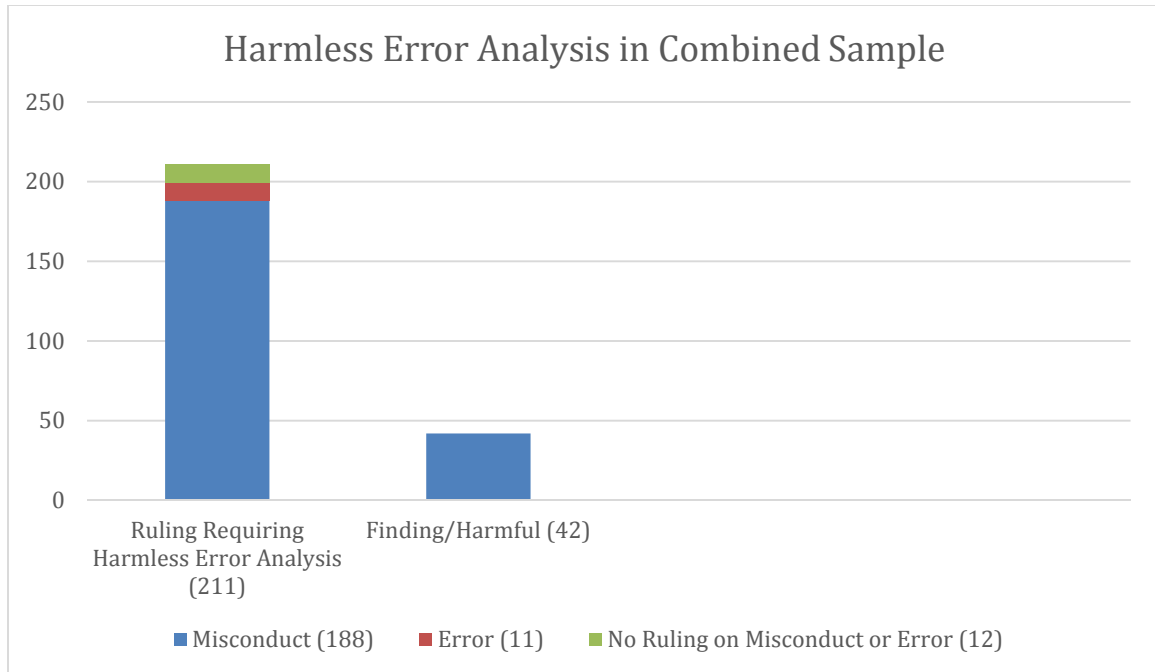


Figure 7. Cases with Harmless Error Analysis

Under harmless error analysis, a reversal is required where it violates a defendant’s constitutional rights unless a court determines, beyond a reasonable doubt, that the misconduct did not affect the jury’s decision (*People v. Harris*, 1989). Addressing this concept from a different angle, the United States Supreme Court held that “there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring an automatic reversal of the conviction” (*Chapman v. California*, 1967). Under California state law, a finding of misconduct will not result in overturning a conviction or sentence unless “it is reasonably probable that a result more favorable to the defendant would have been reached” had the misconduct not occurred (*People v. Crew*, 2003, p. 839; see also *People v. Watson*, 1956). Moreover, courts will not consider claims of misconduct in an appeal unless a timely objection was made

during the trial with a request to admonish the jury on the specific account of misconduct (*People v. Cunningham*, 2001; *People v. Brown*, 2003), if an admonition would not have “cured the harm caused by the misconduct” (*People v. Gutierrez*, 2002, p. 1146), or if an objection would have been futile (*People v. Hill*, 1998). When the alleged misconduct arises from statements made in front of a jury, a judge will determine if there is a “reasonable likelihood that the jury construed ... any of the comments in an objectionable fashion” (*People v. Samayoa*, 1997, p. 841). Finally, a prosecutor’s violation of evidentiary rules may not make a trial fundamentally unfair. In *People v. Hinton* (2006), a California court summarized this dichotomy clearly, concluding

Whatever methods a trial or appellate court might otherwise use to bring to heel a recalcitrant or incorrigible prosecutor, the federal Constitution does not require (and the state Constitution does not permit) the reversal of a criminal conviction unless the misconduct deprived defendant of a fair trial or resulted in a miscarriage of justice (*citation omitted*). Here, as the trial court explained in denying defendant's motion for a mistrial, *the prosecutor's questions were not improper ‘over and above being in violation of the Evidence Code’ (citation omitted)*. (p. 1003)

In Texas, judges follow similar analysis, citing cases and rules of appellate procedure when reviewing specific instances of misconduct and their potential prejudicial effect on the jury. Courts in the Texas Cases use a three step analysis in making this determination, considering (1) the severity of the misconduct; (2) the curative measures taken by the judge; and (3) the likelihood of a conviction absent the misconduct (*Mosley v. State*, 1998). Curative measures usually take the form of a judge’s instruction to the jury to disregard the potentially prejudicial statement. This type of instruction “generally cures error ... (unless it) is so egregious or inflammatory that its prejudicial effect cannot reasonably be removed by such an admonition” (*Wilson v. State*, 1999, p. 148). In several of the Texas cases, appellate courts also considered whether a ruling of harmless

error would encourage the prosecutor to repeat the misconduct with impunity (*Harris v. State*, 1989, p. 585–87).

Federal courts cited a three-prong analysis to determine if the prosecutor's comments "substantially affected the jury's verdict (*United States v. Pando*, 503 F.3D 389, 2007, p. 393). A court looks to the degree of the prejudicial effect of the comments, the effectiveness of any curative instruction to the jury, and the strength of the state's evidence against a defendant (*United States v. Lowenberg*, 1988). In additional cases, federal judges followed *Darden v. Wainwright* (1986), assessing whether the prosecutor's comments infected the trial with unfairness as to make a conviction a denial of due process. The objectionable conduct must make the trial fundamentally unfair.

Research Question 4: Sanctioning Prosecutors

The fourth research question asked whether sanctions were administered to prosecutors if a determination of misconduct is made, and if so, what sanctions did the judges apply. In 190 cases analyzed in the Combined Sample, judges did not directly sanction prosecutors who were found to have committed misconduct, although in 22 cases, prosecutors were admonished either by the trial judge or the appellate court. Examples of admonishment vary according to the appellate courts' respective impressions of the severity of the misconduct or, seemingly, frustration with the attorneys' conduct during the trial.

An example of routine admonishment is found in *Ortega v. State* (2005), in which the court admonished the prosecutor for making improper comments while cross-examining a witness. The prosecutor's comment was found to be misconduct, but

deemed harmless error in light of the weight of the state's evidence against the defendant and the judge's order to the jury to disregard the statement.

[State]: Okay. Now, isn't it true that you're a little bit afraid of these Defendants?

[Witness]: Why would I be afraid of people that I don't know?

[State]: Because they're drug dealers.

[Appellant's Counsel]: I'm gonna object to that, Your Honor. I'm gonna object to that.

The State's comment that appellant was a drug dealer was clearly prejudicial, clearly calculated to inflame the minds of the jury, and was highly improper. Essentially, the State was asserting as fact that appellant was guilty of the crime of which he was accused. The State also improperly commented that the witness had a reason to be fearful of appellant. *We strongly discourage the State from soliciting or making any improper comments of this type in the future* [emphasis added]. (p. 5)

Additional admonitions to prosecutor misconduct include calling the prosecutor's comments "beyond poor taste and shameful," noting that the court is "troubled by the prosecutor's conduct;" and issuing a warning "to start acting like lawyers' and to keep their personal comments to themselves." (*Willis v Cockrell*, 2004, p. 31; *People v Friend*, 2009, p. 567).

An admonishment in response to more egregious prosecutor conduct is found in the California case, *People v Alashanti* (2005), in which the prosecutor was reprimanded by both the trial judge and the appellate court in a case involving a defendant on trial for second degree robbery and receiving stolen property for the benefit of, at the direction of, and in association with a criminal gang. The defendant claimed the prosecutor called a police officer as a witness whose testimony was, at best, irrelevant, and at worst an attempt to offer inadmissible evidence before the jury regarding the defendant's status as a parolee. The appellate court ultimately ruled the misconduct to be harmless error, denying the defendant's motion for a mistrial, because the jury was admonished to ignore

the officer's statements and the state presented overwhelming evidence against the defendant.

The [trial] court was obviously displeased, saying: 'Well, the answer was stricken but he happened to just gratuitously drop it in twice as to each of the defendants so I guess he scored his points that way. It was completely unnecessary. But 90 percent of his testimony was unnecessary, so-I'm not going to grant the mistrial at this point since it was a small point and the answer was stricken.' The court then warned the prosecutor. 'But let me just advise the People. I'm looking at this evidence and I would say about 50 percent of it is just unnecessary fat. And if the People want to go ahead, that's fine. But if any prejudicial material comes in from any other witness for either defendant, I would grant a mistrial because we're doing this for witnesses that really just don't even need to be here at all. And then they have to have gratuitous information dropped in like that is just unnecessary.'

To the displeasure expressed by the trial judge, however, we add our own. We conclude the episode with Officer Reyes was an inexcusable trial stunt. We do not understand why the prosecutor called Officer Reyes to testify, except as the means to drop the prejudicial information about the parole status of *both* defendants into the laps of the jurors. When the prosecutor asked Reyes *where* he had arrested Burnell, did she really not know the arrest had taken place in a parole office? We are not inclined to believe the prosecutor was so ill-prepared as not to know what answer to expect from the witness. Had the prosecutor not asked the question concerning the location of Burnell's arrest, we might have concluded the question about defendant's arrest was asked innocently. But when we consider the totality of Reyes's testimony, including the location of Burnell's arrest in a parole office, the showing of a 'state parole' photo when defendant falsely identified himself, and the near total irrelevancy of Reyes' testimony, we are compelled to conclude this was a trial stunt planned by the prosecution. (p. 7)

The previous sections addressed the focus of three of the research questions: the types of misconduct, the legal standards applied by judges including the harmless error analysis, and sanctions or admonishment by judges in the Combined Sample. The following section addresses the emergent themes that arose during analysis of the Combined Sample.

Emergent Themes

Three prevalent themes emerged during coding of the Combined Sample of appellate cases. Each theme will be explained in the following discussion, and then later compared with emergent themes from the case studies, as well as the interviews with current and former prosecutors. Additionally, since the appellate cases were coded while the interviews were being conducted, and before analysis was conducted on the case studies, these themes also informed the interview follow-up questions and the case study analysis.

- Ad hominem attacks
- Weight of the state's evidence
- No distinction between misconduct and error
- Intent of the prosecutor is generally irrelevant

Ad hominem attacks.

The use of ad hominem attacks during oral argument arose as a prevalent theme in the Combined Sample. This type of logical fallacy is directed at the defendant personally, or the defendant's case through attacks on the defense attorney, also known as "striking at the defendant over the shoulders of defense counsel." In *People v. Friend* (2009), for example, the prosecutor called the defendant a "rat," commented that the defendant had "washed his hands in the toilet bowl," and described him as "living like a mole or the rat that he is" (p. 545). In *People v. Schwerin* (2005), the prosecutor called the defendant "human garbage" (p. 15). In *Willis v Cockrell* (2004), the prosecutor referred to the defendant as an "animal," a "thing," a "satanic demon," a "monster from a horror film," and as someone who had "committed his soul to the devil" (p. 31). In all of

these cases, the courts ruled that although the prosecutors' comments may have been unprofessional, they did not amount to prejudicial misconduct.

Under California law, the use of derogatory epithets will not necessarily result in a finding of harmful misconduct (*People v. Williams*, 1997). In order to be deemed prejudicial, ad hominem attacks must be part of a "pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process" (*People v. Hill*, 1998, p. 819, citing *People v. Samayoa*, 1997, p. 84). There must also be a "reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion" (*People v. Samayoa*, 1997, p. 84).

In Texas, the Fifth Circuit has held that the use of "colorful pejoratives is not improper" so long as it is supported by the evidence (*United States v. Fields*, 2007, 360-61; see also *Drew v. Collins*, 1992). In *Willis v. Cockrell*, mentioned above, the court found the prosecutor's comments to be "beyond poor taste and shameful," however did not reach a decision on whether the comments were harmful to the defendant's case (2004, p. 31).

The judge reached the same conclusion in *People v. Schwerin* (2005), noting [T]here is no excuse for the prosecutor's statement here concerning his personal opinion on the worth of the petitioner (defendant). It is one thing to call the crime 'filth,' and that the jury must feel like sanitation workers; it is quite another to call the defendant 'human garbage.' ... If trials are not simply to degenerate into a name calling contest, the prosecutor's comment should be condemned. (p. 15)

Although the prosecutor's comments were condemned by the court, it concluded that the defendant was not deprived of a fair trial under precedent of *Darden v. Wainwright* (1986). In *Darden*, the prosecutor called the defendant an "animal who should not be let out except on a leash" and commented that he "wished the defendant's face had been blown off with a shotgun" (p. 181). The U.S. Supreme Court held that the defendant was

not denied a fair trial when the evidence supported the verdict and the trial court has instructed the jury that comments made in closing arguments were not evidence.

Striking at the defendant over the shoulders of defense counsel is an impermissible tactic used to degrade the defendant's case or credibility by impugning the defense counsel (*Dinkins v. State*, 1995; *People v. Hill*, 1998). Although courts have not formulated a clear definition of when a prosecutor crosses a line from permissible argument into improper comment, it is generally held that a prosecutor crosses that line when she assails the defense attorney's character (*Mosley v. State*, 1998). In one case, a prosecutor compared the defense theory to a "rubber shark" from the movie *Jaws* ('not scary' but instead threadbare 'once you really look at it,') and referred to the defense attorney as having used "lawyer tricks," "parlor tricks," and "mumble-jumble" (sic: mumbo-jumbo) (*People v Reynard*, 2008, p. 6). The court found no misconduct had occurred.

In *Cole v. State* (2006), the prosecutor accused the defense counsel of using "smoking mirrors" (sic: smoke and mirrors) and a "spaghetti defense. Throw everything up." He also noted that "law enforcement officers with 14 years of combined experience would know far better than a defense attorney when that needs to happen" and called out the defense attorney for using a "trick" in his case (p. 544). In *Cole* (2006), the court held that the defendant abandoned his objection to the prosecutor's language when he failed to object to similar language in the case, and therefor failed to preserve the issue for later appeal.

In *People v Hill* (1998), the judge addressed the complex nature of oral argument, noting "(t)here is no doubt that 'closing argument is an especially critical period of trial.'

Nonetheless, ‘a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom....’” (p. 819).

Weight of the state’s evidence.

A second prevalent theme that emerged from the Combined Sample is that in light of the appellate review practice of conducting harmless error analysis, the quality of the state’s evidence is more consequential (weighted more heavily) in determining the consequences of misconduct rather than any other variable, including prosecutor intent. As noted earlier in this chapter, a court’s finding of prosecutor misconduct is by and large a factor of the weight of the state’s evidence balanced with the prejudicial effect of the misconduct on the jury. In other words, if the impact of misconduct is slight compared with the strength of the state’s case against a defendant, the harmless error analysis will result in a finding that the trial was fair. If the state’s evidence is overwhelming, even egregious misconduct will not change the outcome of the case. The NCIP study emphasized this point as well, comparing nearly identical examples of prosecutor misconduct in cases finding both harmful and harmless error. The “egregiousness of a prosecutor’s misconduct does not determine the harmfulness of the error; the issue for harmless error review is whether despite the misconduct, the defendant received a fair trial” (Ridolfi & Possley, 2010, p. 23). The NCIP study listed several instances of similar prosecutor conduct resulting in both harmful and harmless error rulings; however, it did not include the weight of the state’s evidence or the judge’s attempts to cure the error in the comparisons.

Examples from the sample illustrating how a strong case against the defendant can overcome even the most egregious misconduct by a prosecutor include *People v Lagera*

(2002), *People v Jacques* (2002), and *People v Larsen* (2002). In *People v Lagera* (2002), the prosecutor committed repeated instances of misconduct including making inaccurate statements, comments demeaning to defense counsel, and references to evidence outside the record.

When the officer testified that Lagera came to the front door rubbing his eyes, the prosecutor interjected, 'Like a bad movie?' Again, defense counsel objected, and the court sustained the objection, striking the comment from the record.

During closing argument, the prosecutor attempted to characterize something the defense had done by calling it 'a criminal defense lawyer[']s tricks.' The defense entered an objection that was sustained. The court admonished the jury *sua sponte* to disregard the comments made by counsel which had been stricken. A few minutes later, the prosecutor argued that '[t]his is the quality of the evidence that they are trying to present to you and get you to buy.' A few minutes after that, the prosecutor again referred to a defense question as 'another trick.' In response to the defense objection, the court told the prosecutor to 'proceed in a professional fashion.'

During the prosecutor's final argument, he referred to the defense retort to his closing argument as 'B.S.' The defense failed to object, just as it failed to object to the prosecutor's characterization of the crime as a 'chicken shit little burglary[.]' Both comments were crude, vulgar, unlearned and highly unprofessional; but neither vulgarity referred personally to the defendant nor his attorney.

Lagera also complains of the prosecutor's reference, during final argument, to a hypothetical he raised during jury voir dire. His objection to it, however, was sustained, and nothing was mentioned further. Nonetheless, Lagera argues this reference was improper because the hypothetical was raised before the presentation of evidence at trial. Thus, it was a reference to a matter outside the record, a step that is overtly improper.

Assuming *arguendo* that a timely objection and admonition request were entered, we conclude that the prosecutor's erroneous comments and questions did not deny Lagera a fair trial. Unprofessional as they were, the comments were not reasonably likely to be interpreted by the jury in the damaging way Lagera proposes. In almost each instance, the trial court stepped in before the prosecutor could trip over his own feet in an irreparable way. Several of the comments were in the manner of characterizations of evidence, a permissible sphere of argument. The fact that the characterizations were, at best, clumsy-and at worst, misconduct-does not necessarily render the trial fundamentally unfair.

This was not a close case [emphasis added]. Vander Dussen never wavered in his identification of Lagera. The description of Lagera observed by the arresting officers corroborated that identification, irrespective of Lagera's rather lame

explanations for his sweating and his bleeding finger. Moreover, the jury obviously had no difficulty in according the greater weight to Vander Dussen's testimony over Lagera's: It returned its verdict in 40 minutes. *Even without the prosecutor's childish comments, inarticulate trial technique and argumentative style, it is not reasonably probable that a more favorable outcome would have occurred* [emphasis added]. (p. 2-3)

In *People v Jacques* (2002), the prosecutor allegedly failed to disclose results of a drug test given on the date of arrest to a defendant accused of transporting methamphetamine with intent to sell.

After defense counsel learned the results of the drug test, he requested a sidebar conference. At that conference, the prosecutor stated the drug test result had been turned over to the defense. However, the prosecutor had no documentary proof that the result had been given to the defense. The court granted defense counsel's motion to exclude the drug test result. By granting the defense motion to exclude the evidence, the court imposed appropriate sanctions on the prosecution for its untimely disclosure of the drug test result [citation omitted].

Further, we see no prejudice from the alleged prosecutorial misconduct because the remaining evidence against Jacques was overwhelming. Materials found in the briefcase clearly belonged to Jacques. The telephone book containing the incriminating cash also contained a photograph of a cat with writing stating Jacques owned the cat. Some of the papers within the briefcase had Jacques's name on them and the briefcase included a replica of Jacques's social security card. (p. 3)

In *People v. Larsen* (2002), the court found the prosecutor had improperly characterized the evidence when he commented that the victim knew what the defendant "smells like" despite having no evidentiary foundation to support this conclusion.

On the other hand, we conclude that this brief, solitary reference to appellant's body odor was de minimis when viewed in the context of the overwhelming evidence of appellant's guilt. The sole issue was the identity of the attacker. Christina R.'s positive identification of appellant was based on appellant's physical characteristics, i.e., his almost bald head and his neck and arm tattoos. Additionally, in light of the numerous attacks, which involved the same sexual abuse, over a period of three years, Christina R. had ample opportunity to observe her attacker. Also, appellant was not simply a resident in her same household. Christina R. testified that he 'used to hit us a lot and stuff.' She therefore had a motive for focusing her attention on appellant. Accordingly, whether appellant "smelled" and whether Christina R. was aware of such 'smell' was inconsequential. (p. 4)

Alternatively, *People v Gomez* (2006) is an example in which the state's evidence was not strong enough to overcome prejudice from the prosecutor's misconduct during closing argument (referring to information not in evidence, speaking about his own investigation of the defense expert's credentials, and vouching for the credibility of an uncalled witness).

The primary focus of the trial was the two driving under the influence charges, since defendant admitted possessing the cocaine and driving without a license. *We cannot say the evidence that supported a finding that defendant was under the influence was overwhelming [emphasis added]*. The police officer stopped defendant for vehicle violations, not erratic driving. Defendant did not have watery eyes, bloodshot eyes, or slurred speech. The results of the field sobriety tests were inconclusive; only the nystagmus and PAS testing supported the conclusion that defendant was under the influence. When he was tested at the police station an hour after he was stopped, defendant's blood alcohol level was not much more than the legal limit and the defense expert testified that his blood alcohol level could still have been rising.

For these reasons, the testimony of the defense expert was critical. She testified she was unconvinced by the results of the field sobriety tests. She attacked the validity of the Intoxilyzer test results on the grounds that the officer had not been properly trained, failed to observe defendant for 15 minutes, and did not administer the test properly. The misconduct in this case was directed at the key defense witness and completely undermined her credibility. *For these reasons, we cannot say beyond a reasonable doubt that the misconduct did not affect the verdict on the driving under the influence counts [emphasis added]*. We shall therefore reverse the judgment on counts 3 and 4. (p. 10)

Judges often do not discern misconduct from error or address intent.

The final two themes that emerged from the cases in the Combined Sample are that judges use the terms "misconduct" and "error" interchangeably, and often do not address the prosecutor's intent in making their findings on misconduct. In the combined sample cases, judges do not often distinguish between intentional misconduct and unintentional mistakes when determining whether misconduct occurred or in conducting

harmless error analysis. This is particularly important because the Texas District and County Attorneys Association (TDCAA) report centers its analysis and conclusions on the difference between intentional misconduct and good faith error, particularly in regard to when sanctions are appropriate for prosecutors. The California District Attorneys Association (CDAA) report also highlights this distinction.

In the following cases, judges use the term “error” when referring to intentional misconduct, and “misconduct” when referring to inadvertent error. In *People v. Friend* (2009), the prosecutor referenced the defendant’s prior conviction during closing argument four separate times in violation of the judge’s order, even after having been reminded not to do so by the judge during the closing argument. The appellate court noted, “the prosecutor's comment *constituted error*, but the court's admonition cured any prejudice to defendant” (emphasis added) (p. 30).

In another California case, *People v. Robblee* (2004), the judge concluded the prosecutor had committed misconduct, but the language the court used did not indicate malicious intent.

Although the comment about swinging a cat did *constitute misconduct*, we find it to have been harmless.

This is a type of misconduct particularly amenable to a curative admonishment, since the trial judge could simply have pointed out that there was no evidence supporting the prosecutor's statement. Yet even if an objection had been made, we would not reverse on the basis of this misconduct. This *comment was made in passing* rather than being the focus of a sustained argument. In addition, the *comment was made in an off-hand manner* [emphasis added], subsequent to the prosecutor's discussion of the issue of possession for sale. (p. 6)

In *People v Rodriguez* (2002), the court addressed the prosecutor’s remark about the defendant’s failure to testify by stating, “this *error* was not prejudicial and does not

require reversal,” later adding that it was an improper remark (p. 4) (emphasis added). Similarly, in *People v. Turner* (2003), the court characterized the prosecutor’s statement of facts not in evidence as “unsupported” but concluded “under the circumstances, we cannot find the *error* prejudicial” (p. 12) (emphasis added).

Perhaps of greater consequence is that in many cases in the combined sample a judge did not reach a specific finding of misconduct, but proceeded straight to the harmless error analysis. For example, in *State v. Boyette* (2002), the court held “(i)n this case, the prosecutor's comments were ambiguous. To the extent she was simply urging the jury to disregard defendant's demeanor, there was no misconduct. To the extent she was instead suggesting that the jury should find defendant was duplicitous based on his courtroom demeanor, she committed misconduct” (p. 434). In *People v. Welch* (2006), the judge concluded,

Nevertheless, even assuming the prosecutor's questions constituted misconduct [emphasis added], we may not reverse the judgment if it is not reasonably probable that a result more favorable to appellant would have been reached absent that misconduct. Under this standard, no reversal is warranted. (p. 6)

In *People v. Martin* (2002), the court concluded,

Assuming arguendo the prosecutor committed misconduct [emphasis added] by arguing Martin or her counsel kept Kevin from the trial without evidence to support that argument [citation omitted], we conclude the trial court properly exercised its discretion in denying Martin's motion for a mistrial. The court cured any prejudice from that misconduct by sustaining Martin's objection, striking the prosecutor's argument, and admonishing the jury to disregard that argument because there was no evidence to support it. (p. 11)

Finally, in some cases, it is entirely unclear whether the court has reached a decision on the misconduct. For example, in *People v. Garcia* (2003), the language of

the court's decision was not clear whether the prosecutor committed misconduct or error, but nevertheless concluded with harmless error.

Appellant's claim that the prosecutor engaged in prejudicial misconduct, both by asking the question that resulted in Tamez's testimony that defendant requested an attorney or during argument to the jury, is unavailing. The record indicates the testimony regarding defendant's invocation of his Miranda rights was inadvertently elicited and not the result of 'deceptive or reprehensible methods to persuade either the court or the jury' [citations omitted]. Further, mentioning that defendant had failed to provide the name of his employer was only a brief comment during rebuttal argument that was immediately stopped by the court; and in view of the strength of the prosecution's case was harmless beyond a reasonable doubt. (p. 3)

Not only do judges frequently use the terms misconduct and error interchangeably, they rarely address the prosecutor's intent in their analysis. In fact, judges in many cases in the Combined Sample deliberately avoided a judgment on intent. Judges in some California cases cited the following conclusion regarding intent in prosecutor misconduct cases, "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor (*Smith v. Phillips*, 1982, p. 219).

In the California case, in *People v Lamb* (2005), the court noted that "misconduct need not be intentional in order to constitute reversible error [citation omitted]. ... 'Thus, '[w]hat is crucial to a claim of prosecutorial misconduct is not the good faith *vel non* of the prosecutor, but the potential injury to the defendant' [Citation omitted] (p. 14). In a Texas case, in *Griggs v. State* (2005), the court noted, "(r)egardless of whether the prosecutor's questions were intended to elicit the inadmissible testimony, the focus of our analysis is on the prejudice to the defendant" (p. 79).

Limitations

Several limitations of this study of appellate cases should be noted. First, the researcher had no control over how the initial cases were chosen. Any error or bias that was introduced by their selection was carried forward into this research. Second, the present study cannot account for cases of misconduct that are not recognized, either because the trial court's verdict was not appealed, or because the issue of misconduct was not included in an appeal. Consequently, none of the findings from present study are generalizable beyond the combined sample. However, the present study's reexamination of data from two earlier studies, as well as response reports from prosecutor advocacy groups, did result in identifying themes surrounding prosecutor misconduct which may provide direction for future research.

Chapter Summary

Ethnographic Content Analysis was conducted on ninety nine (99) appellate cases randomly selected from the 707 cases in the Northern California Innocence Project study (NCIP), and all 91 cases used in the Innocence Project Texas study, for a total of 190 cases. The goal of the re-analysis was to check the veracity of the studies' findings and explore emergent themes regarding prosecutor misconduct. Although the Innocence Project studies have been cited frequently to support the conclusion that prosecutors often commit misconduct but are rarely disciplined, the validity of their findings has been questioned by two prosecutor advocacy organizations who re-analyzed the same cases. Since both the Innocence Project groups and prosecutor advocacy organizations have a vested stake in outcomes, this re-analysis was done by an objective reviewer to avoid potential bias in the methodology or findings.

The study was designed to understand the range and prevalence of prosecutor misconduct as identified by appellate judges from the California Sample and the Texas Cases, and how the present analysis findings compare to findings from the previous four studies. The study was also designed to understand what types of prosecutorial misconduct or errors occur most commonly in the Combined Sample, what judges rely upon to make their decisions, and whether prosecutors are sanctioned if a determination of misconduct is made. Finally, this study explores significant themes regarding prosecutor behaviors and judicial decisions in response to claims of misconduct in the sample cases.

The range and prevalence of prosecutor misconduct identified by appellate judges in the California Sample and the Texas Cases was similar to the findings in the NCIP and Innocence Project Texas studies. However, the response reports by the California and Texas district attorneys associations did not provide comprehensive descriptive data allowing for comparisons. Similarities between findings in the NCIP and Innocence Project Texas reports and the findings from the current analysis included the rates of types of misconduct claims (improper witness examination, improper argument, *Brady* violations), the occurrence of multiple acts of misconduct claimed in many of the cases, and the rates of harmful error rulings.

The NCIP report concluded that the majority of misconduct in its sample of 707 cases fell into two categories: improper witness examination and improper argument, totaling nearly 78% of the total cases. Findings from this study mirrored these results with 80% of the misconduct falling into these categories in each sample. The NCIP study noted that judges in roughly 9% of the cases in its sample found *Brady* violations. The

present reanalysis of the California Sample and Texas Cases identified a similar percentage of *Brady* violations with 6% and 9%, respectively.

The NCIP report concluded that there were multiple acts of misconduct throughout its sample of appellate cases, with 782 total findings of misconduct throughout the 707 cases in the sample. This was also the case in this current analysis. In the California Sample, 110 findings of misconduct occurred in the 99 cases, and 223 findings of misconduct occurred in the 91 Texas Cases. The Innocence Project Texas study did not address multiple instances of misconduct.

The NCIP found that in 22% of the cases in which misconduct was found, the court ruled harmful error and set aside convictions, declared mistrials, or barred evidence. In this re-analysis of California Sample, 24% of the rulings on misconduct, error, or other resulted in a harmful error ruling. In the Innocence Project Texas study, 20% of the misconduct rulings resulted in a harmful error ruling, whereas in the re-analysis of the Texas Cases, only 16% included of rulings on misconduct, error, or other events resulted in a harmful error ruling. The difference in findings for harmful error rates between the Innocence Project Texas study and the present analysis of Texas Cases is located in four cases in the Innocence Project Texas study which were incorrectly reported as having harmful error rulings.

Additionally, there were discrepancies noted across the findings of misconduct in the Innocence Project study cases, the TDCAA response report, and the present re-analysis of Texas Cases. Although the TDCAA report claims that there was no misconduct or error in 11 of the 91 cases in the Innocence Project Texas study, the re-analysis of Texas Cases found that the courts clearly ruled no misconduct in four of the

11, reached an ambiguous ruling regarding misconduct in five of the cases, and ruled there was misconduct in two cases.

The range of misconduct in the present study spans from nominal to egregious within each category of misconduct claimed. In the least serious instances of misconduct, prosecutors made a singular inaccurate statement or asked one improper question of a witness during the trial. In more egregious instances of misconduct, prosecutors made several improper statements throughout a trial or asked inadmissible questions, even after being admonished by the judge, or withheld material, exculpatory evidence from defendants, depriving them of their constitutional rights to due process and a fair trial.

The types of prosecutorial misconduct or errors most commonly occurring in the sample included improper comments during closing statement, eliciting improper testimony from a witness, and prejudicial statements made to the jury (not during closing statement), together totaling half of the claims in the sample. Miscellaneous misconduct (including *Batson* violations and questionable physical demeanor at trial), misstatements of the law, and improper comments on the defendant's failure to testify totaled 21% of the overall claims in the Combined Sample. *Brady* violations accounted for 6% of the claims. Over 80% of the claims of misconduct were derived from instances in which a prosecutor was speaking in the courtroom, rather than out-of-court conduct.

Judges overwhelmingly cited case law, rather than statutes or policy rationale, as a basis for their decisions regarding prosecutor misconduct. All courts, both state and federal, relied on the 1963 case of *Brady v. Maryland*, the 1986 case of *Batson v Kentucky*, and the 1965 case of *Griffin v. California* and their progeny to address

withholding of exculpatory evidence, peremptory challenges during jury selection, and commenting on a defendant's failure to testify, respectively.

Most findings of misconduct in the Combined Sample did not result in the conviction or sentence being overturned. Of the 333 claims of misconduct, courts found justification to conduct harmful error analysis, a determination of whether or not prosecutor conduct led to unfairness requiring a new trial, a new sentencing hearing, or vacating the conviction entirely, just over 200 times, reaching a determination of harmful error only 42 times (12% of the misconduct claims).

In the Combined Sample, judges did not directly sanction prosecutors who were found to have committed misconduct. However, prosecutors were admonished either by the trial judge or the appellate court in 22 cases.

Three themes emerged from content analysis of the Combined Sample: use of ad hominem attacks, the importance of the weight of the state's evidence in determining harmful error, and the finding that judges don't distinguish between misconduct and error in their language, nor are they concerned with the intent of the prosecutor when assessing claims of misconduct.

When considering the last two emergent themes together, it appears that appellate decisions alone are not adequate sources for identifying and addressing prosecutor misconduct. Judges often use the terms "misconduct" and "error" interchangeably, making the determination of whether misconduct has occurred a subjective judgment call for the reader. Moreover, in many cases, judges reach an unclear decision regarding the misconduct claim, or do not reach a specific finding of misconduct at all. Additionally, because the quality of the state's evidence is often more consequential in determining the

consequences of misconduct than other variables, including prosecutor intent, the outcome of the case is less dispositive of the prosecutor's wrongdoing as it is of the strength of the State's case against a defendant. Finally, judges often do not consider the prosecutor's intent when determining whether misconduct occurred or in conducting harmless error analysis. This further undermines attempts to determine when a prosecutor should be sanctioned based on the intentional misconduct vs. unintended error dichotomy.

As noted earlier, the findings in this study should not be presumed to be representative of prosecutor misconduct generally. This analysis was conducted primarily to objectively reexamine the data from studies conducted and reanalyzed by interest groups who have a vested stake in outcomes. Additionally, this exploratory study seeks to describe emergent themes from a sample of appellate cases regarding the phenomena of prosecutor misconduct that may serve to direct future research.

V. FINDINGS AND ANALYSIS OF TEXAS CASE STUDIES

This chapter presents the methodology and findings of the second of three qualitative studies exploring the phenomenon of prosecutor misconduct. This second study is a collective case study involving the intensive review of five instrumental cases selected from the 91 Texas appellate court decisions in the Innocence Project Texas study / Texas Cases. The units of analysis are the individual court cases in which prosecutor misconduct is at issue. Purposeful sampling was used to select cases using a determined set of criteria which are important to this study, namely five cases that allowed for further exploration into the themes which emerged from the ethnographic content analysis: intent of the prosecutor and harmful error analysis. Specifically, criterion sampling was used to identify cases from the Texas sample that represented each of the following four categories:

- The court found intentional prosecutor misconduct / harmful error
- The court found no intentional misconduct / harmful error,
- The court found intentional prosecutor misconduct / harmless error, and
- The court found no intentional misconduct / harmless error.

The fifth case, *Graves v. Dretke* (2006), was chosen as a comparison case to the other four since it represents the most egregious example of prosecutor misconduct in the Texas Cases, one which has received the most media coverage, and is often presented as an example of prosecutor misconduct by the Innocence Project. Cases were chosen from the Texas Cases, rather than the California Sample, due to the availability of court documents to the researcher.

The several different sources of data for each case study included the trial transcripts, motions and memorandum filed with the court, appellate briefs, appellate decisions, media coverage, television programming, and blog entries. The cases and supporting court documents were accessed from the Westlaw and Lexis databases, as well as through visits to courthouses in Texas. The media documents and blog entries were accessed through internet searches.

A coding protocol for the case studies was developed and revised throughout the coding process, starting with a handful of broad categories, emphasizing meaning, definitions, and processes. The initial coding protocol was created with the four initial research questions in mind, as well as the themes which emerged from the ethnographic content analysis of the Combined Sample of 190 cases. The researcher conducted a holistic analysis of each case by first coding to record the following:

- jurisdiction
- procedural history
- court rulings on prosecutor misconduct
- the ultimate case disposition
- broad themes regarding prosecutor behaviors and judicial decisions

After the first case study was coded, the coding sheet and case study documents were reviewed by three legally-trained, criminal justice scholars to check for consistency in legal language and meaning. All three reviewers confirmed that the legal language and meaning in the code sheet matched the content and conclusions reached in the case documents.

After coding the first two cases, the following coding categories were added as themes emerged:

- strength of the state's case
- prosecutor intent
- inexperience of prosecutors

Once all five cases were coded, the researcher conducted an analysis of the themes arising out of each case, as well as common themes across the cases.

The following discussion is divided into five main sections, one for each case in the collective case study. Each of these sections includes a description of the case, a discussion of the emergent themes from the case, and a concluding paragraph. Following the five case sections is a discussion of the overall themes from across the collective case study, a discussion of limitations, and the chapter summary.

Case Study One (Comparison Case): *Graves v. Dretke*

Description of the Case

Graves v. Dretke (2006) is correctly listed in the Innocence Project Texas study as a case in which prosecutor misconduct led to harmful error. Of the 91 cases listed in the study, this particular case has received the most public scrutiny, perhaps due to expansive media coverage and the willingness of Anthony Graves to speak publicly about his experience. After having spent 18 years in prison, including 12 years on death row, Graves was fully exonerated from a conviction for capital murder and later awarded \$1.4 million from the State of Texas for his wrongful imprisonment (Colloff, 2013).

On the morning on August 18, 1992, Robert Earl Carter and possible accomplices stabbed, bludgeoned, and shot to death Bobbie Davis, 45; her 16-year-old daughter,

Nicole; and Davis' four grandchildren, ages 4 – 9 years old, in Davis' home in Somerville, Texas (Rogers & George, 2010). One of the grandchildren, Jason Davis, was Carter's son. Bobbie Davis was stabbed 29 times in the head and beaten with a blunt object. Nicole was stabbed and shot five times in the head. The four younger children were each stabbed between seven and 13 times (Texas Execution Information Center, 2016). The perpetrators then used gasoline to burn the house and the victim's bodies (*Graves v. Dretke*, 2006). Carter and alleged accomplice, Anthony Graves, were indicted for capital murder by a grand jury in Burleson County in May, 1994. Both Carter and Graves denied involvement in the crime during their grand jury testimony. Carter was tried first, found guilty of capital murder, and sentenced to death (*Graves v. Dretke*, 2006). Carter then agreed to testify during Graves' trial in exchange for an agreement by Burleson County District Attorney, Charles Sebesta, in which Carter would not be asked to testify about his wife, Theresa (Cookie) Carter, who had also been indicted for the crime.

In addition to Carter's testimony, the State also presented evidence that several Burleson County Jail employees overheard Carter and Graves, who were placed in jail cells opposite one another, talking about the crime. Other evidence included testimony from Graves' former boss, Roy Allen Rueter, who said that he had given Graves a knife that he assembled from a kit, as well as making an identical one for himself. The medical examiner and Texas Ranger Ray Coffman both testified that the blade from Rueter's identical knife matched the wounds found on the victims. The State did not present any physical evidence linking Graves to the crime. In November, 1994, a jury found Graves guilty of capital murder and sentenced him to death.

Graves maintained his innocence throughout the trial and afterwards. At the trial, he presented an alibi defense that he was at home with his girlfriend, Yolanda Mathis, when the crimes occurred. Graves' younger brother, Arthur Curry, testified during the trial that Graves had been home asleep when the murders occurred (Rogers & George, 2010). Mathis, however, did not testify at the trial. During the trial, District Attorney Sebesta argued outside the presence of the jury that Mathis was a suspect in the killings and might be indicted, asking the court to advise Mathis of her rights prior to her testimony, to which the court agreed. Mathis was sufficiently frightened that she left the courthouse visibly upset and did not return to testify.

Between Graves' conviction in 1994 and his exoneration in 2010, his criminal case moved back and forth between state and federal courts as his attorneys appealed his conviction on as many as 36 different grounds. Of these many claims, the two which resulted in his ultimate exoneration were for prosecutor misconduct by the Burleson County District Attorney, Charles Sebesta. Specifically, Graves claimed that Sebesta withheld exculpatory evidence from his attorneys in violation of the 5th and 14th Amendments of the U.S. Constitution.

Several years following Graves' conviction, new evidence had come to light from the State's key witness, Robert Earl Carter, who recanted his earlier claims that Graves had been involved in the murders (*Ex parte Graves*, 2000). Minutes before he was executed, Carter also claimed, "It was me and me alone. Anthony Graves had nothing to do with it. I lied on him in court" (Texas Execution Information Center, 2016, p. 2). Shortly after Carter's execution, District Attorney Sebesta revealed in a media interview that the night before Carter testified at Graves' trial, Carter told Sebesta that he alone

committed the crime. Sebesta also stated that Carter did not incriminate Graves until the State agreed not to ask Carter to testify about Theresa Carter. This was the first time that Graves' defense attorneys became aware of Carter's statement to Sebesta on the night before he testified.

In August, 2003, the United States Court of Appeals for the Fifth Circuit found that the State had withheld the pre-trial statement made by Carter that Graves had not been involved in the murders (*Graves v. Cockrell*, 2003). The court later ruled that a second statement had been withheld, namely that Carter had implicated his wife as an accomplice in the murders following a polygraph examination given by the State the night before Carter testified at Graves' trial (*Graves v. Cockrell*, 2003). The case was then remanded to the U.S. District Court for the Southern District of Texas for an evidentiary hearing to evaluate the statements and their materiality under *Brady*. Under *Brady v. Maryland* (1963) and its progeny, a constitutional violation occurs if the State withholds evidence which is favorable to a defendant's case, is material to either guilt or punishment, and that the discovery of the suppressed evidence did not result from lack of due diligence on behalf of the defendant's attorneys. In order to be material, there must be a reasonable probability that the trial would have ended differently had the suppressed evidence been disclosed (*Kyles v. Whitley*, 1995).

During the subsequent evidentiary hearing on the two statements withheld by Sebesta, the federal magistrate accepted Graves' attorney's statement that he did not know about Carter's claim that he committed the murders alone. Additionally, the magistrate did not believe Sebesta's claim that he told Carter's attorney specifically about Carter's statement on the morning of the trial when he mentioned the polygraph test. The

magistrate, however, concluded that Carter's statement was not material under *Brady* and *Kyles* due to multiple inconsistencies in Carter's testimony over time. The magistrate also found that Carter's statement regarding his wife's involvement in the murders was not exculpatory (*Graves v. Dretke*, 2005). The U.S. District Court agreed, denying relief of Graves' two *Brady* claims.

In March, 2006, the U.S. Court of Appeals for the Fifth Circuit disagreed with these conclusions, noting that the State's evidence was primarily dependent on the credibility of Carter's testimony, and that the circumstantial evidence against Graves was relatively weak. Under the *Kyles* standard, and in light of the character of the State's evidence, the court concluded that both of Carter's statements under review were exculpatory, not discoverable by Graves' defense attorneys using due diligence, and, when considered together, could have changed the outcome of the case by undermining confidence in the verdict (*Graves v. Dretke*, 2006).

Moreover, the court pointed out additional misconduct by Sebesta which had not been raised on appeal by Graves, namely that Sebesta had suborned perjury from Carter and Texas Ranger Coffman when he elicited false testimony regarding Carter's testimony that he had always implicated Graves in the murders. The Court of Appeals consequently reversed the judgment of the District Court, overturning Graves' conviction, and remanding the case with instructions to grant the writ of habeas corpus for Graves' release unless the state initiated a retrial within a reasonable time (*Graves v. Dretke*, 2006). Graves remained in the custody of the Texas Department of Criminal Justice (TDCJ) but was moved off of death row on September 6, 2006 (Colloff, October, 2010).

Following the Fifth Circuit Court of Appeal's ruling, but before the window closed for initiating a new trial against Graves, the State of Texas filed a petition for a writ of certiorari with the United States Supreme Court, challenging the Fifth Circuit court's ruling (*Dretke v. Graves*, 2006). In support of its petition, the State claimed that both statements by Carter were immaterial, and that the combined effect of both statements did not make them material. Further, the State claimed that Graves failed to demonstrate a reasonable probability that the verdict would have been different had the statements been disclosed because the state's evidence on the whole supported a conclusion that Carter's testimony was credible, and the two withheld statements, even when taken together, were not material in light of all of the State's evidence. On October 2, 2006, the U.S. Supreme Court declined to hear the case, effectively upholding the Fifth Circuit's ruling (*Quarterman v. Graves*, 2006).

Charles Sebesta retired from the Burleson County district attorney's office in 2000 (Colloff, October, 2010). Kelly Siegler, a former Harris County assistant district attorney, was assigned as a special prosecutor to handle Graves' second trial. Together with retired Texas Ranger Otto Hanak, she prepared for the trial. However, after several weeks of reviewing the transcripts, Siegler began to have doubts about the case against Graves. Siegler and Hanaf also had trouble finding evidence to support a new case against Graves. Ultimately, they concluded that Anthony Graves did not commit the murders. Siegler noted, "I can't pinpoint the exact day, but our thinking evolved from 'We have insufficient evidence to go to trial' to 'This is an innocent man' " (Colloff, 2011). On October 27, 2010, the State of Texas dropped all charges at the

recommendation of District Attorney Bill Parham and Kelly Siegler, releasing Graves from the Burleson County jail (Colloff, 2011).

After Graves' release, Siegler called out Sebesta as being uniquely responsible for Graves' wrongful conviction, noting

Charles Sebesta handled this case in a way that would best be described as a criminal justice system's nightmare. It's a prosecutor's responsibility to never fabricate evidence or manipulate witnesses or take advantage of victims. And unfortunately, what happened in this case is all of these things. [It was] a travesty. (Colloff, November 2010)

Charles Sebesta, however, remains convinced of Graves' guilt. In an interview with Texas Monthly reporter Pamela Colloff, Sebesta stated "I think in many ways the Graves case was the most difficult case that I tried. But at the same time, the cupboard wasn't bare when it came to evidence. We were comfortable with the evidence" (Colloff, October, 2010). In August, 2009, Sebesta paid to publish a 5000-word defense of his work on Graves' case in the Burleson County Tribune and the Brenham Banner-Press (Rice, 2009). The day following Graves' release, Sebesta took out an advertisement in the Brenham Banner-Press in order to argue that Graves was guilty of the murders (Colloff, 2011). Sebesta also voluntarily underwent two polygraph examinations in order to prove that he had not suppressed evidence from the defense (Colloff, 2011). He has maintained a web site entitled, *Charles Sebesta: Setting the Record Straight*, in which he painstakingly detailed a defense of his work on Graves' case (Sebesta, 2016).

In January, 2014, Anthony Graves filed a grievance against Sebesta with the Texas State Bar (Grissom, 2016). After an investigation, the State Bar's chief disciplinary counsel determined that there was just cause to support a finding that Sebesta had engaged in misconduct in Graves' case. Following a four-day evidentiary hearing,

the Texas State Bar concluded that Sebesta had violated five tenets of the Texas Disciplinary Rules of Professional Conduct and sanctioned Sebesta by revoking his law license in 2015. Sebesta lost his final appeal to have his law license reinstated in February, 2016 (Grissom, 2016). As of April, 2016, Charles Sebesta has not updated his web site to respond to his disbarment.

Emergent Themes

The weight of the State's evidence.

The weight of the State's evidence against Graves played a significant role in the ultimate outcome of his case. In determining if the State violated a defendant's due process rights under *Brady v. Maryland* (1963) and its progeny, a court will determine if the State withheld evidence which was favorable to a defendant's case and material to either guilt or punishment. In order to be material, there must be "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" (*Kyles v. Whitley*, 1995, p. 422). In other words, the court will evaluate the potential for a different outcome based on the addition of the suppressed evidence. If the suppressed evidence is substantial compared with the admitted evidence against a defendant, or if the suppressed evidence calls the credibility of the State's case into question, a court may conclude that there is a reasonable probability that the verdict may have been different had the suppressed evidence been known to the defendant.

The U.S. Court of Appeals for the Fifth Circuit evaluated the two suppressed statements Carter made to Sebesta under the standard of materiality set out in *Kyles v. Whitley* (1995). The weight of the state's evidence plays a significant role in the

standard, namely in determining whether the suppressed evidence could be seen as placing the “whole case in a different light as to undermine the confidence in the verdict,” and because materiality is defined in terms of the suppressed evidence being considered collectively along with the admitted evidence, not individual piece by piece (p. 434-435).

The Court indicated that Carter’s testimony was the State’s case in chief; without his testimony, the State had no evidence linking Graves to the crime. Statements that contradicted Carter’s trial testimony, or undermined his credibility as a truthful witness, would have been significant for Graves’ in raising reasonable doubt into the State’s case.

The court noted,

The only physical evidence tied to Graves that was marginally linked to the crimes was a switchblade knife brought forward by Graves’ former boss that was identical to the one he had given to Graves as a gift. The medical examiner testified that the knife wounds on the victims were consistent with that knife *or* a knife with a similar blade. Graves’ medical expert testified that a wide range of knives with similar dimensions to the switchblade were also consistent with the victims’ wounds including holes in skull caps of some of the victims. None of the murder weapons were recovered. Thus, it is obvious from the record that the state relied on Carter’s testimony to achieve Graves’ conviction. (*Graves v. Dretke*, 2006, p. 340)

Consequently, the Court of Appeals concluded that the disclosure of Carter’s statements “would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense” (*Graves v. Dretke*, 2006, p. 345; citing *Kyles v. Whitley*, 1995, p. 441).

The State argued to both the Fifth Circuit and the United State Supreme Court that the two statements withheld by Sebesta were not material by highlighting the credibility of the other evidence presented, as well as an unusual tactic of arguing that Carter’s credibility was also questionable based on the fact that he “had given four to five different accounts, and that his testimony differed from this own trial” (*Dretke v. Graves*,

2006). In weighing its evidence against the addition of the suppressed statements, the State argued that, when taken together, all of the evidence against Graves including the suppressed statements by Carter, “could well have been damaging to [Graves]” (*Dretke v. Graves*, 2006, p. 17).

The Fifth Circuit Court of Appeals disagreed with the State’s argument, noting that the State’s evidence was primarily dependent on the credibility of Carter’s testimony, and that the circumstantial evidence against Graves was relatively weak. Under the *Kyles* standard, and in light of the character of the State’s evidence, the court concluded that both of Carter’s statements under review were exculpatory, not discoverable by Graves’ defense attorneys using due diligence, and, when considered together, “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict” (*Graves v. Dretke*, 2006, p. 345). The U.S. Supreme Court denied the State’s petition to hear the case, leaving the Fifth Circuit Court of Appeals’ decision in place.

At a press conference covering his release, District Attorney Bill Parham emphasized the lack of evidence Sebasta’s case against Graves, noting “[t]here’s not a single thing that says Anthony Graves was involved in this case. There is nothing” (Colloff, 2010). Special prosecutor Kelly Siegler also highlighted the lack of evidence that led her to recommend dismissing the case against Graves, stating

After months of investigation and talking to every witness who's ever been involved in this case, and people who've never been talked to before, after looking under every rock we could find, we found not one piece of credible evidence that links Anthony Graves to the commission of this capital murder. This is not a case where the evidence went south with time or witnesses passed away or we just couldn't make the case anymore. He is an innocent man. (Rogers & George, 2010)

Prosecutor intent is irrelevant in *Brady* cases.

Prosecutor intent is not considered by courts under *Brady* claims because it is legally irrelevant in determining whether misconduct occurred (*Brady v. Maryland*, 1963). Under *Brady*, a court will find a violation of the defendant's due process rights regardless of whether the prosecutor knew that the evidence existed, or whether she purposefully or unintentionally withheld the evidence (*Brady v. Maryland*, 1963).

The facts in Graves' case underscore the irrelevance of intent in *Brady* cases. The Fifth Circuit Court of Appeals, as well as the U.S. District Court for the Southern District of Texas before it, concluded that Sebesta had not disclosed the two statements by Carter. Neither court commented on Sebesta's intent to withhold the evidence in their decisions. Graves' attorney claimed that he was not told of Carter's statement and the federal magistrate found his claim to be credible. Ultimately, the Court of Appeals found that a *Brady* violation occurred irrespective of Sebesta's intent in withholding evidence from the defense.

Sebesta defended his handling of the case by posting a lengthy description of events to his web site, incorrectly claiming that the Fifth Circuit had written that he had "intentionally" withheld the evidence. He also notes that he never found Carter's statements to be relevant or material to the case, and therefore he was not required to disclose them under *Brady*.

The night before Carter was 'tentatively' scheduled to testify in the Graves' trial, he was picked up and brought to the Sheriff's courthouse annex in Angleton by the Rangers. It would be my first opportunity to personally interview him. ... After asking him how he was doing and if his 'dad' or other family members had been to see him, Carter blurted out, 'Mr. Sebesta, I did it all it all by myself.'

At some point that morning, I ran into Calvin Garvey (*sic*), Graves' lead counsel, in the hallway and he could see the frustration on my face. I said to Calvin, 'Your

(sic) not going to believe this but now Carter is saying he did it all by himself.’ Calvin laughed and said, ‘What’s that, his eighth or ninth story?’

... I didn’t tell him because I thought it was ‘exculpatory’ or evidence that could be considered favorable to the defendant. It was a way of expressing my frustration.

What is interesting is that Calvin never said that I didn’t tell him what Carter said; He told the Court, ‘I don’t recall him (Sebesta) telling me.’

And it is quite possible that he doesn’t remember, considering the ‘admission’ that he made while testifying under oath before a Federal Magistrate in Galveston, Texas on September 28, 2004. That ‘admission’ puts this whole issue in its proper perspective and explains why ‘no one’ at the time—including the State, the Defense or Law Enforcement—considered Carter’s utterance that “I did it all by myself,” significant, material or relevant.

When [the Fifth Circuit Court of Appeals] issued their opinion, saying that I had ‘intentionally’ withheld Carter’s statement that ‘I did it all by myself,’ from Graves’ attorneys and that I had ‘intentionally’ tried to confuse Graves’ attorneys, I immediately took exception to their findings and ‘publicly’ announced ‘in advance’ to the ‘media’ that I would voluntarily take a ‘lie-detector’ test or ‘polygraph’ examination regarding same. (Sebesta, 2016)

Conclusion

Graves v. Dretke (2006) represents an egregious case of prosecutor misconduct.

District Attorney Charles Sebesta withheld exculpatory evidence from the defense, suborned perjury from two key witnesses, indicted at least one witness to coerce his key witness into testifying against the defendant, and intimidated at least one defense witness from testifying with the threat of indictment. As a result, Anthony Graves spent 18 years in prison for capital murder, and was almost executed two times, before being fully exonerated. Even the Texas District and County Attorneys Association reported that it has “serious doubts about the propriety of the original prosecutor’s conduct” (TDCAA, 2012, p. 12).

The weight of the State's evidence against Graves played a significant role in the outcome of the case. The United States Court of Appeals for the Fifth Circuit overturned Graves' conviction after finding that Sebesta committed misconduct by withholding two statements by the State's key witness which were exculpatory and material to Graves' case. The court determined that the statements were material to Graves' case in large part because the State's evidence was primarily dependent on the credibility of the key witness's testimony, and that the circumstantial evidence against Graves was relatively weak.

The irrelevance of prosecutor intent in *Brady* cases is also an important theme arising in Graves' case, particularly in light of the recommendations by prosecutors that sanctions are appropriate only when misconduct is intentional. However, under *Brady*, a court will find a violation of the defendant's due process rights regardless of whether the prosecutor knew that the evidence existed, or whether she purposefully or unintentionally withheld the evidence (*Brady v. Maryland*, 1963). Although the Fifth Circuit Court of Appeals, and the U.S. District Court for the Southern District of Texas, concluded that Sebesta had not disclosed the two statements by the State's key witness, neither court commented on Sebesta's intent to withhold the evidence in their decisions. Only Sebesta, the prosecutor, included the element of intent into his defense of how he handled the case.

Sebesta's intent was considered, however, by the Texas State Bar during its evidentiary hearing of Sebesta's conduct surrounding Graves' case. The State Bar concluded that Sebesta had violated five rules of professional conduct, two of which explicitly include the element of knowing conduct, such as "knowingly" making a false

statement of fact or law” and “not knowingly offer or use evidence [known] to be false” (Tex. Disciplinary R. Prof. Conduct, 1989).

Case Study Two (Intentional Misconduct / Harmful Error): *Ex parte Lewis*

Description of the Case

Ex parte Lewis (2005), when viewed as an individual case, presents a deceptively limited picture of the seven-year criminal litigation surrounding the murder trial of Swanda Marie Lewis. Erroneously listed in the Innocence Project study as a case in which prosecutor misconduct resulted in a harmless error finding, in fact the Fort Worth Court of Appeals found not only that the misconduct required a mistrial, but that a second prosecution was barred under double jeopardy protections of the Fifth Amendment of the US. Constitution and Article I, § 14 of the Texas Constitution. The Texas Court of Criminal Appeals later reversed the decision only regarding the double jeopardy bar on retrial, remanding the case for reanalysis under a different double jeopardy mistrial standard (*Ex parte Lewis*, 2007).

Over seven years, from trial through dismissal, *Ex parte Lewis* was considered by three different state courts on seven separate occasions. Differing standards for evaluating prosecutor misconduct in the context of double jeopardy jurisprudence were created, tested, and ultimately rejected. At the same time, a separate but similar case involving the same prosecutor, trial judge, and appellate division chief, wound its way through the courts under the same evolving standards, but with a different outcome.

In August 2000, Swanda Lewis shot and killed Kenneth Wiley. The couple met in 1999 and started living together roughly a month after meeting. While they were living together, Wiley had an affair with his ex-wife, often disappeared for days at a time,

and was diagnosed with A.I.D.S. On the morning of August 10, 2000, Wiley allegedly raped Lewis two times without a condom. Later that afternoon, the couple argued and, during a struggle over Wiley's handgun, Lewis fatally shot Wiley in the head. Lewis subsequently called the police and admitted to accidentally shooting Wiley. The Tarrant County District Attorney's office charged Lewis with murder, and the case went to trial on November 13, 2001.

During the trial, prosecutor Michael "Mick" Meyer, asked questions of witnesses concerning Lewis' post-arrest silence on three separate occasions (*Ex parte Lewis*, 2005). On the first instance, the trial court sustained an objection by the defense counsel. On the second instance, the trial court sustained an objection by the defense counsel and instructed the jury to disregard the question. On the third instance, the court sustained an objection, instructed the jury to disregard the question, and declared a mistrial. The State intended to proceed with a second trial.

Generally, mistrials do not prohibit the State from trying the case a second time. However, Lewis filed an application for a writ of habeas corpus, claiming that a second prosecution was barred by double jeopardy provisions in both the federal and state constitutions. The Double Jeopardy Clause of the Fifth Amendment prohibits the State from prosecuting a person a second time for the same offense after he has been tried and convicted or acquitted, it bars the State from ordering multiple punishments for the same offense in successive proceedings, and it can protect a defendant from being prosecuted a second time after a judge prematurely declares a mistrial or dismisses the charges before the jury can reach a verdict (Rudstein, 2005).

After a hearing in April 2002, the trial court denied Lewis' request for habeas relief, opening the way for the State to retry Lewis (*Ex parte Lewis*, 2003). Lewis appealed this decision, claiming Meyer deliberately attempted to goad her into requesting a mistrial, or in the alternative, recklessly disregarded the risk that his misconduct would require a mistrial (*Ex parte Lewis*, 2003; see also *Oregon v. Kennedy*, 1982; *Bauder v. State*, 1996; *Ex parte Bauder*, 1998). In conducting its analysis, the Fort Worth Court of Appeals ascertained whether Lewis' motion for a mistrial was her own choice, or if she had been forced to request a mistrial after the prosecutor had deliberately or recklessly acted improperly, rendering the trial unfair to the point of being beyond repair by the judge (*Ex parte Bauder*, 1998). The court concluded that Meyer had in fact, either intentionally or recklessly, triggered the mistrial and dismissed the case with prejudice, barring retrial (*Ex Parte Lewis*. 2003).

The state appealed this decision to the Court of Criminal Appeals of Texas (CCA). Before the CCA considered this appeal, however, it took up another case to address a problematic lack of clarity in the criteria for determining whether double jeopardy under the Texas constitutional prohibits retrial following a mistrial (*Ex parte Peterson*, 2003). Although under *Oregon v. Kennedy* (1982), the Fifth Amendment's double jeopardy clause barred retrial only when the prosecutor intended to provoke the defendant into requesting a mistrial, the Court of Criminal Appeals of Texas interpreted the Texas Constitution's double jeopardy provision more broadly, holding that retrial would also be barred when a prosecutor consciously disregarded the risk that the defendant would be forced to request a mistrial (*Bauder v. State*, 1996)). Subsequently, however, courts in Texas struggled to interpret and apply this standard. Consequently, in

Ex parte Peterson (2003), the CCA developed a three-prong analysis to be used by courts in assessing whether double jeopardy barred retrial under the state's constitution.

In light of the *Peterson* decision, the Court of Criminal Appeals deferred considering *Ex parte Lewis* and remanded it back to the Fort Worth Court of Appeals for reconsideration under the new standard (*Ex Parte Lewis*, 2003).

Applying the *Peterson* standard, the Fort Worth Court of Appeals again dismissed the case with prejudice (*Ex Parte Lewis*, 2005). Lewis argued that all three of Meyer's questions regarding her post-arrest silence were manifestly improper, while the state claimed that Meyer's conduct was inadvertent trial error (*Ex parte Lewis*, 2005). In Meyer's first question, he asked a police officer witness if Lewis had given him her name. The court found this was not an improper comment on her silence, but a permissible question regarding police questioning during an arrest. In Meyer's second question, he asked Lewis on cross-examination, "In fact, you never told any law enforcement about the rape?" (p. 383). The state claimed that Meyer was permitted to ask the question as Lewis had given a prior inconsistent statement to police about the alleged rape. The court disagreed, finding no prior inconsistent statement had been admitted into evidence before Meyer asked the question. Finally, the state conceded that Meyer's third question of Lewis, "And you denied [the police officer] opportunity to speak--", was an improper question since the jury would have interpreted it as a comment regarding Lewis' 5th Amendment right not to speak with police (p. 384). The court then concluded that the two improper questions amounted to more than simple trial error, and were manifestly improper prosecutorial misconduct.

The Fort Worth Court of Appeals also found that the mistrial was necessary because Meyer's misconduct could not have been cured by an instruction to the jury to disregard the questions (*Ex Parte Lewis*, 2005). Regarding the weight of the incriminating evidence, the court concluded that because the evidence against Lewis was not overwhelming, her credibility would have been significant to the jury, and therefore attempts by Meyer to highlight instances in which she failed to speak with law enforcement could have influenced the jury as they considered her credibility. In conducting a harmless error analysis, the court found that the weight of the State's case could not overcome the prejudicial effect of Meyer's questions. Finally, in addressing Meyer's intent, the court concluded that Meyer, at the very least, consciously disregarded the risk that Lewis might be forced to request a mistrial. Consequently, the Fort Worth Court of Appeals dismissed the case with prejudice.

The State subsequently appealed this decision back to Texas' highest criminal court (*Ex Parte Lewis*, 2007). Agreeing that a prosecutor should not be able to sabotage a bad case in order to have a second chance at trying a defendant, the State argued that in order for double jeopardy to bar retrial, the prosecutor must have had the specific intent to engage in misconduct for the purpose of avoiding an acquittal by prematurely terminating the trial. Merely intending to engage in misconduct should not warrant double jeopardy protections. The State supported this high standard, in part, with a public safety argument, claiming that a lower intent standard creates a punishment for society more so than for the prosecutor if a guilty defendant avoids the consequences of her criminal offending. Additionally, as a practical policy consideration, the State

asserted that it is bad public policy to use double jeopardy ban on retrial *as a sanction* for the prosecutor.

The Texas Court of Criminal Appeals concluded that the *Bauder / Peterson* standard was not rooted in the understanding of double jeopardy that the framers of the Texas Constitution would have had, did not manifest the purpose of double jeopardy protections, and was unworkable in practice (*Ex Parte Lewis*, 2007). The court noted that prosecutors may be unaware of what conduct that an appellate court would find carried a substantial risk of mistrial, and that judges may be hesitant to grant mistrials if they thought it might bar prosecution of a defendant who may be factually guilty, even to the point of pushing a trial to completion in the face of egregious prosecutor misconduct.

Consequently, the Court of Criminal Appeals overruled the *Bauder* and *Peterson* standards, and returned to the more limited standard of intent articulated under *Oregon v. Kennedy* (1982) in which double jeopardy applies only when the prosecutor's conduct was intended to cause a mistrial. The case was remanded back to the Fort Worth Court of Appeals to reconsider under *Oregon v. Kennedy*. Shortly thereafter, the Fort Worth Court of Appeals dismissed Lewis' appeal on her own motion (*Ex parte Lewis*, Memorandum Opinion and Judgment, 2007).

As *Ex parte Lewis* wound its way through the state courts, another case in Tarrant County was following a similar track. Only three months after the trial court held a hearing to consider Swanda Lewis' petition to have a second trial barred following the mistrial in her case, *Ex parte Twine* went to trial with the same judge and the same prosecutor, Mick Meyer. During the defendant's testimony, Meyer asked a question that was found to be an improper reference to the defendant's post-arrest silence and the trial

judge subsequently granted a mistrial (*Ex Parte Twine*, 2003). Twine then filed an application for writ of habeas corpus to bar his retrial, claiming that Meyer had intentionally or recklessly provoked the mistrial. During the pretrial hearing, Twine's defense attorney tried to introduce the trial record from *Lewis*, asserting that Meyer had goaded him into a mistrial in the same manner. The court denied both the request to use the *Lewis* record as evidence in the hearing, and the application to bar retrial.

Twine appealed to the Fort Worth Court of Appeals which, having dismissed *Ex parte Lewis* five months earlier, remanded the case back to the trial court to reconsider with evidence from the *Lewis* trial record (*Ex parte Twine*, 2003). The trial court found that Meyer had engaged in misconduct with the intent to goad the defendant into requesting a mistrial, or with conscious disregard for a substantial risk that the trial court would be required to declare a mistrial, and dismissed his case with prejudice. On appeal, the Fort Worth Court of Appeals disagreed, concluding that Meyer's error was not flagrant or egregious, that the trial court had given a strong jury admonition, and that the evidence of Twine's guilt was not overwhelming. Consequently, the appellate court overturned the trial court's bar on retrial. Twine was retried in September, 2006 and acquitted by the jury 12-0 (McDonald, 2006).

The Fort Worth Court of Appeals decided *Ex parte Lewis* and *Ex parte Twine* differently under the same legal standard (*Peterson*) and similar facts. Differentiating the two cases is the repeated misconduct by Meyer in *Ex parte Lewis*, compared with the single question by Meyer in *Ex parte Twine*, and the importance of the defendant's credibility to the case in *Ex parte Lewis*, compared with the relatively weak evidence against the defendant in *Ex parte Twine*. Arguably, the appellate court also may have

been frustrated with Meyer by the time the *Ex parte Lewis* case came before it for the second time, following the court's final decision in *Ex parte Twine*.

Another commonality between *Ex parte Lewis* and *Ex parte Twine* is the Chief of the Appellate Section for Tarrant County, Charles M. Mallin, who was named as a party in the appeals of both cases. Mallin spoke out against the *Bauder / Peterson* standard and applauded the Court of Criminal Appeals' decision in *Lewis* in an article published in the *Texas Prosecutor*, the Official Journal of the Texas District and County Attorneys Association (TDCAA) (Mallin, 2007). In his article entitled "A wooden stake for *Bauder*," Mallin voiced concern that under the recklessness standard a simple mistake or "statement in the heat of battle could, by itself, obliterate the chance to ever try that defendant again" (p. 1). The *Peterson* three-prong standard, he noted, created more confusion for prosecutors, as well as trial and appellate courts. Rob Kepple, TDCAA's Executive Director, echoed Mallin's concerns in his editorial in the same issue of the *Texas Prosecutor*.

Except for the court records and the TDCAA article and editorial, the cases of Swanda Lewis and Gary Twine, and the repeated misconduct of Mick Meyer, seem to have gone largely unnoticed by the community. There was one brief mention of Meyer in the blog *Indefensible: The Intermittent Musings of a Pedantic Public Defender*, entitled "This from Texas" posted in April, 2004 (Feige, 2014). The blog author laments that Meyer's name is not specifically mentioned in *Ex parte Lewis*. In fact, prosecutors are rarely mentioned by name in appellate court rulings (Gershowitz, 2009).

The standard in Texas for determining when prosecutor misconduct triggers a bar to retrial remains the one articulated under *Oregon v. Kennedy* (1982). The Fort Worth

Court of Appeals did not have the opportunity to apply this standard in Swanda Lewis' case. Instead, the court granted Lewis' motion to dismiss her appeal (*Ex parte Lewis*, 2007). It is possible that Lewis accepted a plea offer from the State to resolve her case rather than continue the appeal process and, potentially, a second murder trial.

The Texas Court of Criminal Appeals did apply the *Kennedy* standard in a prosecutor misconduct case shortly after *Ex parte Lewis*, demonstrating that it is possible for a defendant to meet the high standard of proving the prosecutor deliberately provoked the defendant into requesting a mistrial (*Ex parte Masonheimer*, 2007). In *Ex parte Masonheimer* (2007), the prosecutor intentionally withheld exculpatory evidence from a defendant in a first trial for murder. A subsequent prosecutor who took the case for the second trial also withheld exculpatory evidence which was available before the first trial. The court barred a third trial, finding the defendant's requests for mistrial in both cases were necessary due to the State's intentional decision to suppress exculpatory evidence in an effort to avoid an acquittal.

Emergent Theme

Prosecutor intent.

Prosecutor intent arose as the central theme in *Ex parte Lewis*. Unlike analysis addressing prosecutor misconduct in *Brady* claims, prosecutor intent is at the center of the double jeopardy analysis. The purpose of applying double jeopardy protections following a defense-requested mistrial is to prevent the State from seeking a new opportunity to convict a defendant when a trial is going poorly for the State.

Consequently, courts struggled with identifying the appropriate level of prosecutor intent

in causing a mistrial that should trigger double jeopardy protections for a defendant under the U.S. and Texas Constitutions.

In *Oregon v. Kennedy* (1982), the U.S. Supreme Court concluded that the prosecutor must “*intend* to provoke the defendant into moving for a mistrial” in order for a retrial to be barred (p. 679) (emphasis added). In addressing the potential difficulty in determining the prosecutor’s intent, the Court noted that “a standard that examines the intent of the prosecutor, though certainly not entirely free from practical difficulties, is a manageable standard to apply” and that a court could ascertain intent from the “objective facts and circumstances” in a case (p. 675).

The Court of Criminal Appeals of Texas extended double jeopardy protection under the Texas Constitution to cover *reckless* conduct by the prosecutor, noting there was no real “distinction of a constitutional significance between conduct of prosecuting attorney in which he intends to cause a mistrial and conduct of a prosecuting attorney which he is aware is reasonably certain to result in a mistrial” (*Bauder*, 1996, p. 699). In *Bauder*, the court also commented on the practicality of applying the *Kennedy* standard, noting that it was “too difficult to distinguish between intent and recklessness with respect to a prosecutor’s culpable mental state regarding the occurrence of a mistrial” (*Ex parte Lewis*, 2007, p. 360).

The *Bauder* standard, however, also proved difficult to apply. Consequently, the Court of Criminal Appeals of Texas devised a three-prong analysis to be used by courts in assessing whether double jeopardy barred retrial under the state’s constitution (*Peterson*, 2003). Under the third prong, a court would attempt to determine the prosecutor’s intent by considering several factors, including whether the prosecutor was

reacting to a trial going badly, whether the prosecutor continued to repeat the misconduct despite admonishment by the judge, and if there was any reasonable justification for the misconduct.

The State challenged the *Bauder / Peterson* standards claiming that their application acted as a sanction against the State for misconduct, which was not a protection intended under the double jeopardy provisions of the state constitution. Moreover, it is bad public policy to use the double jeopardy ban on retrial as a sanction for the prosecutor, particularly when a guilty person might avoid the consequences of his or her crime. The State also argued that although double jeopardy protections should be available to prevent a prosecutor from sabotaging a trial in order to gain a second chance to gain a conviction, the defendant should have to prove a very specific level of prosecutor intent to trigger the double jeopardy protection. The State concluded that even intentional misconduct is rarely committed with the specific intent of forcing a defendant into requesting mistrial.

The *Bauder / Peterson* standard was eventually abandoned by the Court of Criminal Appeals of Texas in its final review of Lewis' case (*Ex parte Lewis*, 2007). The court was also concerned that judges might be hesitant to grant mistrials if they thought it would bar prosecution of a defendant who could be factually guilty, even to the point of pushing a trial to completion in the face of egregious prosecutor misconduct. Consequently, the court returned to the higher intent standard articulated under *Oregon v. Kennedy* (1982).

Ex parte Lewis highlights one of the reasons why prosecutor advocacy groups are concerned with prosecutor intent when identifying and sanctioning prosecutor

misconduct. As demonstrated by the complicated path of this case through the Texas appellate courts system, courts struggle considerably with the application of standards of intent for prosecutor misconduct, as well as the appropriate legal response when misconduct occurs. Even when a standard is chosen, prosecutor intent is difficult for appellate courts to prove in individual cases, and the line between zealous advocacy and intent to commit misconduct is not always clear.

Conclusion

Ex parte Lewis (2007) demonstrates the difficulty for appellate courts in identifying and responding to prosecutor misconduct. Over seven years, from trial through dismissal of the appeal, the case was considered by three different state courts on seven separate occasions. Differing standards for evaluating prosecutor misconduct in the context of double jeopardy jurisprudence were created, tested, and ultimately rejected. Ultimately, the Court of Criminal Appeals of Texas decided that under the state constitution, the State would be barred from retrying a defendant following a mistrial only if the prosecutor committed misconduct with the *intent* of provoking the defendant into requesting the mistrial.

Prosecutor intent arose as the central theme in the case. Unlike the legal analysis addressing prosecutor misconduct in contexts such as alleged *Brady* violations, prosecutor intent is at the center of analysis when a defendant petitions to bar retrial under double jeopardy following a mistrial. The purpose of applying double jeopardy protections following a defense-requested mistrial is to prevent the State from seeking a new opportunity to convict a defendant when a trial is going poorly for the State. Consequently, in *Ex parte Lewis* courts struggled with identifying the appropriate level of

prosecutor intent in causing a mistrial that should trigger double jeopardy protections for a defendant under the U.S. and Texas Constitutions. Prosecutors argued that protection against double jeopardy is warranted for only the most egregious and intentional prosecutorial conduct. Ultimately, the court returned to a standard in which only the most culpable level of prosecutor intent would trigger a bar on retrial.

Case Study Three (Intentional Misconduct / Harmless Error): *Ramon v. State*

Description of the Case

Ramon v. State (2004) is correctly listed in the Innocence Project study as a case in which the courts found prosecutor misconduct had occurred but determined it was harmless error. As with *Ex parte Lewis*, *Ramon* parallels a second case through the Texas courts with the same prosecutor, the same trial judge, and similar misconduct, resulting in strong admonitions to the prosecutor in both cases.

In June, 2000, Marie McGraw, a 74-year-old grandmother, was allegedly sexually assaulted by Noel Betancort Ramon. McGraw's grandson, Jason Ammann, testified that when he arrived at her home, he saw Ramon and McGraw sitting on her couch. Ramon immediately stood up, put on a shirt, fastened his pants, and left the home. After he left, McGraw told Ammann that Ramon "grabbed her out of her chair and drug [sic] her to the bedroom, threw her on the bed and cut her bra off with a knife and-and that was pretty much it" (*Ramon v. Quarterman*, 2009, p. 340). During the criminal investigation, police found palm prints on the headboard of McGraw's bed, a pink bed sheet with semen on it, and a knife. The palm prints and DNA from the semen matched Ramon's. Fibers on the knife's blade matched the fabric of McGraw's bra.

Ramon was charged with aggravated sexual assault, found guilty by a jury in Boerne, Texas, and sentenced to life in prison. During the trial, Ramon's defense attorney argued that Ramon had not been in McGraw's home, but had been in his own home and asleep with his girlfriend at the time of the crime. To support this claim, Ramon's attorney admitted into evidence a phone message left by the prosecutor, Assistant District Attorney Lucy Cavazos, for the State's DNA expert witness in response to his inquiry whether the State would be sending DNA samples from anyone other than Ramon for comparison. The message read, "Noel Ramon case. The grandson and his roommate had access to the home, but they only care about suspect's DNA" (*Ramon v. Quarterman*, 2009, p. 341). Ramon's attorney argued that Cavazos' message shows that the State had ignored potential inculpatory evidence in favor of focusing solely on Ramon.

In response, Cavazos requested that the court allow her to testify as a witness, in order to correct a false impression created by the introduction of the phone message (*Ramon v State*, 2004). Her intent as a witness was to explain to the jury that when she left the message, she understood that the defense's trial strategy was to show Ramon had not been at McGraw's home; consequently, only Ramon's DNA was needed to prove his presence and rebut the defense claim. The trial judge initially denied Cavazos' request to testify following a defense objection, but allowed her to testify after her second request. When the defense attorney started his cross-examination of Cavazos, however, she objected. The trial court then decided to stop the testimony, fearing it would result in an error. The defense attorney subsequently asked for a mistrial, which the judge denied, instead instructing the jury to disregard all of Cavazos' testimony. During closing

arguments, Cavazos again explained her rationale when leaving the phone message for the DNA expert.

The Court of Appeals of Texas, San Antonio, upheld Ramon's conviction, holding that Cavazos' testimony during the trial did not unduly prejudice the case (*Ramon v. State*, 2003). Under Texas law, if an attorney in a case also testifies as a witness regarding a controversial matter, the combined role of advocate-witness may unfairly prejudice the opposing party if the jury cannot discern whether the statements made by the advocate-witness were to be considered facts or as commentary on the facts (*Gonzalez v. State*, 2001). A mistrial is required if that prejudice was so substantial that a jury would not be able to disregard it (*Mathews v. State*, 2001). Using both of these standards, the court held that Ramon had not shown that Cavazos' comments resulted in actual prejudice to his case. Moreover, the court ruled that the comments were inconsequential to the trial, and therefore did not deprive him of a fair trial. Judge Catherine Stone wrote separately in a concurring opinion to emphasize her concerns with Cavazos' testimony, calling with both error and a violation of the Texas Disciplinary Rules of Professional Conduct.

Ramon then appealed his case to the Court of Criminal Appeals of Texas (CCA) (*Ramon v. State*, 2004). The CCA analyzed the case by considering the severity of the misconduct, the measures taken by the judge to cure the misconduct, and the strength of the State's evidence. In addressing the severity of Cavazos' conduct, the CCA agreed with the lower appellate court's finding that Cavazos' behavior was improper, adding a footnote indicating that similar behavior by Cavazos' was at issue in another case before the court (see also *Flores v. State*, 2002).

In conducting a harmless error analysis, the court found that the content of the prosecutor's testimony was not consequential to the outcome of the trial, and therefore the judge's admonition to the jury to disregard that testimony sufficiently cured any error. Moreover, the court assessed the strength of the State's case against Ramon to be compelling, with direct testimony from the victim identifying Ramon as the person who sexually assaulted her, and physical evidence supporting the eyewitness' statements. Balancing these factors, the CCA concluded that the trial court did not err in deciding not to declare a mistrial, and upheld Ramon's conviction.

In subsequent appeals, both the United States District Court for the Western District of Texas and the United States Court of Appeals for the Fifth Circuit upheld the Texas Court of Criminal Appeals decision finding that the jury disregarded Cavazos' testimony as ordered by the judge, the State's evidence was sufficient to overcome any impact of Cavazos' testimony, and Cavazos' stated rationale for testifying seemed to be supported by the facts of the case (*Ramon v. Quarterman*, 2009).

On the same date that the Court of Criminal Appeals of Texas issued its decision in *Ramon v. State*, it also issued a decision in another case with Cavazos, the same trial and appellate judges, and similar misconduct (*Flores vs. State*, 2002). In *Flores* (2002), Cavazos called Flores' defense counsel as a witness, in order to clear up a false impression made during cross-examination of the victim regarding the victim's ability to identify the defendant. The issue of whether or not the victim could identify the defendant was fiercely contested during the trial. The trial judge approved Cavazos' request despite the defense counsel's objection. The jury ultimately convicted Flores of aggravated assault and he was sentenced to 15 years in prison.

On appeal, Flores claimed that he was denied a fair trial because having his attorney called to testify adversely affected his defense counsel's credibility. The Court of Appeals of Texas, San Antonio, disagreed, holding that the defense counsel being called to testify neither helped the State's case nor did it hurt the defendant's case, nor was the defense counsel's credibility damaged by his testimony. Moreover, the strength of the State's case was overwhelming and was not adversely affected by the defense counsel's testimony.

Flores appealed this decision to the Court of Criminal Appeals of Texas (*Flores v. State*, 2004). The CCA reversed the judgment of the appellate court, holding that allowing the State to call defense counsel as a witness without showing a compelling need, and without first attempting mitigating measures to avoid harm to the defendant's case, was prejudicial error. Justice Johnson, who delivered the unanimous opinion in *Ramon v. State* (2004), wrote a concurring opinion in the *Flores* case, both correcting and admonishing Cavazos directly. No censure of Cavazos occurred, however, according to records at the State Bar of Texas (State Bar of Texas, 2016).

Emergent Themes

Weight of the State's evidence.

The weight of the State's evidence played a prominent role in the outcome of *Ramon v. State* (2004). As previously discussed in this chapter, the quality of the state's evidence is often more consequential (weighted more heavily) in determining the legal consequences of misconduct than any other element in a case. In conducting a harmless error analysis, the court's legal response to prosecutor misconduct is by and large a factor of the weight of the state's evidence balanced against the prejudicial effect of the

misconduct on the jury. In other words, if the impact of misconduct is slight compared with the strength of the state's case against a defendant, the harmless error analysis will result in a finding that the trial was fair. If the state's evidence is overwhelming, even egregious misconduct will not change the outcome of the case.

Despite findings from all courts that Assistant District Attorney Cavazos' conduct was improper, including several judges writing separately to personally admonish her, all but one court reached the conclusion that the strength of the State's case nevertheless overcame any prejudice caused by Cavazos' trial tactics. Each court, when conducting the harmless error analysis, found the evidence against Ramon to outweigh any prejudicial effect caused by Cavazos' misconduct.

Inexperience of the prosecutor.

There is no doubt that the courts in *Ramon v. State* (2004), as well as in *Flores v. State* (2004), found Cavazos' decisions to call herself and a defense attorney as witnesses during criminal cases to be improper. She was personally admonished, repeatedly, by several different judges. In *Flores* (2004), Justice Johnson wrote

The most appropriate action ... would have been to call the interpreter who had allegedly been asked for help in identifying the defendant and who was the only person who could testify from personal knowledge. Instead, the prosecutor improperly called the defense counsel, who had no personal knowledge and who had properly attempted to impeach the complainant's identification of his client. When the state disrupts the attorney-client relationship in such a manner, the client is underrepresented during the time that the counsel is testifying, a constitutional violation. (p. 152)

Johnson then went further to admonish Cavazos personally,

Pending in this Court is another appeal, from Kendall County, in which the court of appeals noted that this same prosecutor, citing the creation of "false impressions" by defense counsel, called herself as a witness, testified to an irrelevant and collateral matter, revealed the substance of pre-trial negotiations with defense counsel, declined to allow herself to be cross-examined by the

defense counsel, and then “resumed her role as an advocate for the state and continued to try the case.” The prosecutor in this cause has demonstrated an unfortunate tendency to abuse her authority to call witnesses. Such conduct is reprehensible in a public official and ought to be soundly censured, especially when the conduct is a continuing course of conduct, not a single lapse. Article 2.01 of the Texas Code of Criminal Procedure states that it ‘shall be the primary duty of all prosecutors, ...not to convict, but to see that justice is done.’ Justice is not done when the defendant is deprived of a fair trial by the actions of the prosecutor. (p. 153; citing *Ullmann v. State*, 1994)

Cavazos herself admits that she was in error and had learned a lesson never to be repeated. In an interview with the San Antonio Express-News regarding the Flores case, Cavazos said it was the first case she prosecuted that was overturned since becoming an assistant district attorney in 1997. However, she also said that she “welcomed the court's guidance,” and predicted that “prosecutors are not going to be calling defense attorneys to the stand in the future. I know I'm not.” And, she added, “I won't be testifying anymore.” (MacCormack, 2005).

Cavazos' statements to the media make it clear that she had little training before being assigned to serious cases. In an interview discussing her candidacy to replace District Attorney Bruce Curry as the 216th District Attorney, Cavazos explained her experience as a new assistant district attorney, noting “I applied for a job with Bruce Curry as soon as I got my bar exam results. ... He hired me in January 1997, for a little pay, and in March we had a capital murder case here, and then another one a year later” (Arnold, 2016, p. 1).

Cavazos explained in the interview that although the usual professional progression for assistant district attorneys is to start with traffic cases and misdemeanors, later moving to more difficult felony cases, she was allowed to work as “second chair” to District Attorney Bruce Curry in the murder trial only two months after being hired.

Additionally, Cavazos may have overestimated the benefit of the training she received in law school during participation in mock trials, and in studying rules of evidence and courtroom procedure. In a recent interview, she described her experience in law school at Baylor University,

Baylor is known for really preparing students to work in the courtroom. They have moot courts and mock trials in courtrooms at the school. One thing they do very well is teach about evidence – what evidence you can keep in and what you can keep out. Especially during the last year, they're heavy on courtroom procedure. (Arnold, 2016, p.1)

Cavazos was hired immediately after passing the Texas State Bar Exam, and was participating in a capital murder case within two months of being hired. Her professional training as a prosecutor did not follow the typical path of new prosecutors in larger agencies in which they start with misdemeanors and traffic cases, and then gradually move to more difficult and serious cases. Cavazos' experience may reflect a common reality for small prosecutors' offices, which make up the majority of the country's prosecutorial agencies.

Conclusion

Ramon v. State (2004) illustrates how the weight of the State's evidence plays a prominent role in the outcome of a case in which the harmless error analysis is applied. Because a court's legal response to prosecutor misconduct is by and large a factor of the weight of the state's evidence balanced against the prejudicial effect of the misconduct on the jury, even egregious misconduct will not change the outcome of the case in which the state's evidence against a defendant is overwhelming.

In *Ramon*, the State had compelling physical and testimonial evidence linking Ramon to the crime, include direct evidence in the form of testimony by the victim, who

was found to be a credible witness. Despite findings from all courts that Assistant District Attorney Cavazos' conduct was clearly improper, appellate courts at both the state and federal level found that any prejudicial effect of Cavazos' improper testimony on the jury was outweighed by the substantial physical and testimonial evidence presented against Ramon.

Ramon v. State (2004) also demonstrates the role of inexperience in prosecutor misconduct, as well as how a strong case against a defendant will outweigh the prejudicial effect of misconduct. During the trial, Assistant District Attorney Lucy Cavazos requested that the court allow her to testify as a witness, in order to correct a "false impression" created by the introduction of a telephone message she had left for a State's witness. As several appellate courts pointed out in their admonitions of Cavazos, there were other, appropriate trial procedures available to her in introducing that evidence during the trial.

When interviewed following the appellate court rulings, Cavazos admitted that she had made a mistake and would not repeat it. At the time of the trial, Cavazos had less than five years of experience as a prosecutor. Her supervised training in trial practice could best be characterized as not ideal. She began working on a murder trial less than two months after being hired immediately upon receiving her license to practice law. It is reasonable to assume that she was not afforded the time and trial practice that would have given her the best opportunity to learn the job without making significant yet avoidable trial errors.

Case Study Four (Not Intentional Misconduct / Harmful Error): *U.S. v. Gutierrez*

Description of the Case

U.S. v. Gutierrez (2007) is correctly listed in the Innocence Project Texas study as a case in which the court found that prosecutor misconduct led to harmful error. On October 18, 2005, San Antonio Police Department (SAPD) officer Dean Gutierrez was indicted by a federal grand jury for aggravated sexual abuse (*U.S. v. Gutierrez*, 2005). While on duty earlier that year, Gutierrez picked up a transgender woman, Gabriel “Starlight” Bernal, in his police car and drove her to an isolated location where he allegedly made her perform oral sex on him before hitting and raping her (*U.S. v. Gutierrez*, 2007). Gutierrez then drove Bernal to a local grocery store at her request. Bernal reported the rape to her uncle, Frank Mireles, who happened to be at the store. Mireles called the police. Gutierrez was arrested on July 9, 2005. DNA evidence from body fluids found in Gutierrez’s police car and on Bernal matched that of Gutierrez. At his trial Gutierrez did not dispute the DNA evidence but claimed that the sex had been consensual.

Gutierrez was convicted of aggravated sexual abuse by a federal jury in August, 2006, and sentenced to a prison term of 24 years. The following July, the prosecution disclosed for the first time two police reports which had been in its possession since before the trial. The first was an SAPD report, dated June 17, 2005, detailing an anonymous call claiming Bernal was not raped and that she had been bragging that she would be receiving a large amount of money from the incident (*U.S. v. Gutierrez*, 2007). The second was an “FBI 302” report, dated August 21, 2005, indicating that Bernal’s aunt, Carol Lopez, may have been the anonymous caller. The report also included

information from an interview with Ms. Lopez conducted by FBI Special Agent Nava in which Lopez claimed that a friend of her daughter's overheard Bernal talking about how she was going to get money from the City of San Antonio. During a pretrial hearing, the prosecutor, Assistant United States Attorney (AUSA) Bill Baumann, told the court that he had provided all of the FBI 302 reports that he had (*U.S. v. Gutierrez*, 2007).

However, he had not disclosed the FBI 302 report concerning the interview with Carol Lopez, because he not found Lopez's information to be neither relevant to the case, nor credible.

Nearly one year after Gutierrez's conviction, a woman named Yvonne Trevino reported new information to the FBI and the U.S. Attorney's Office (*U.S. v. Gutierrez*, 2007). Trevino had overheard Carol Lopez talking about the case, stating that Bernal had had a relationship with Gutierrez prior to the alleged rape and that Bernal had lied about being hit by Gutierrez, and consequently, it was unlikely that the rape allegations were true. The U.S. Attorney's Office then issued an "advisory" to the court with this information as well as providing the previously undisclosed SAPD and FBI 302 reports (*U.S. v. Gutierrez*, 2007, p. 1). AUSA Baumann also provided several reports to the defense, including notes from his conversation with FBI Special Agent Nava in August, 2005 regarding her interview with Carol Lopez, as well as notes from an October, 2005 conversation he had with Lopez and Special Agent Nava. Gutierrez's defense counsel subsequently interviewed Lopez and determined that the anonymous caller from the June 17, 2005 SAPD report was Yvonne Bernal, Gabriel Bernal's sister-in-law. This information enabled Gutierrez's defense counsel to identify and interview a chain of witnesses with information favorable to the defense. Around this same time, additional

witnesses came forward with information confirming that Bernal and her boyfriend, Miguel Galan, had intentionally set up Gutierrez in a plan to get money from the city of San Antonio.

Gutierrez's defense counsel subsequently filed a motion for a new trial based on this new evidence, in addition to a claim that the prosecution had withheld exculpatory evidence from the defendant. During an evidentiary hearing on the motion, a woman who witnessed the trial testified that she overheard Bernal say that she was "a good liar" and that she was going to lie in order to get money to take care of her mother (*U.S. v. Gutierrez*, 2007).

The United States District Court ruled on the motion for a new trial in an order dated October 16, 2007, holding that Gutierrez was entitled to a new trial based on both the *Brady* violations and the newly discovered evidence (*U.S. v. Gutierrez*, 2007). Regarding the *Brady* claim, the court found that there was a reasonable probability that had AUSA Baumann's notes and the FBI 302 report been disclosed prior to the trial, the outcome of the case would have been different. Under *Brady v. Maryland* (1963), a prosecutor is required to disclose evidence that is both favorable to the defendant and material to the finding of guilt. Gutierrez claimed that the prosecution should have disclosed the FBI 302 report, as well as AUSA Baumann's notes from the August and October 2005 interviews with Carol Lopez. Gutierrez's defense counsel was able to obtain the SAPD report before the trial from a source other than the prosecution.

The prosecution claimed that it did not have a duty to disclose Baumann's notes or the FBI 302 report (*U.S. v. Gutierrez*, 2007). Baumann claimed that he did not disclose his notes because he believed them to be protected from disclosure as attorney

work product. Although the U.S. Supreme Court has not ruled on this issue, the United States District Court held that, at the very least, Baumann should have disclosed the information in his notes that was favorable to the defendant, including several statements regarding Bernal's history of lying and his intent to sue the city (*U.S. v. Gutierrez*, 2007; citing *Dickenson v. Quartermen*, 2006). Many of these statements were not included in Special Agent Nava's 302 report, even though she included them in her conversation with AUSA Baumann, nor did she file a supplemental report. The court found that this information was potentially favorable to Gutierrez, and consequently, Baumann should have disclosed the content of his notes before the trial.

Baumann also claimed that he was not required to disclose the FBI 302 report because Gutierrez's attorneys could have obtained it through reasonable diligence since they had a copy of the SAPD report in which the anonymous caller had been identified as someone in Bernal's family (*U.S. v. Sipe*, 2006). The court, however, concluded that this would have been unlikely, noting that it is unreasonable to expect Gutierrez's defense counsel to spend pre-trial time and resources tracking down a person in Bernal's large, extended family who, despite having called anonymously, would be willing to testify with unfavorable information against Bernal in front of the rest of the family (*U.S. v. Gutierrez*, 2007).

The court further noted that without the FBI 302 report, an ordinary defense counsel would not have been able to piece information together in a way that revealed the identities of witnesses and evidence favorable to Gutierrez's case. Had Gutierrez's counsel been given the information from Carol Lopez, it would have provided impeachment information against Bernal, the state's key witness, as well as leading to

additional witnesses whom all in some way undermine the State's version of the facts in the case (*U.S. v. Gutierrez*, 2007). Consequently, the court found that the FBI 302 report and Baumann's notes were favorable to Gutierrez.

The court then considered whether this evidence was material to the jury's finding of guilt in Gutierrez's trial. The court outlined all of the information that came to light once the evidence was disclosed and concluded that the prosecutor's notes and the FBI report, together with all of the information derived from them, would have sufficiently discredited Bernal, the key witness in the case, undermining confidence in the jury's verdict. AUSA Baumann should have disclosed the evidence and, by not doing so, deprived Gutierrez of a fair trial. The court then recommended to the Fifth Circuit Court of Appeals that the case be remanded for a new trial.

Following the United States District Court's decision, the State reached an agreement with Gutierrez in which he pled guilty to "depriving the person in his custody of the victim's right to be free from an unreasonable seizure and causing bodily injury to the victim" (*U.S. v. Gutierrez*, 2010. p. 1). Pursuant to the plea agreement, Gutierrez received a new term of "time served" and three years of supervised release beginning February, 2008. He had served approximately 14 months in prison before his release.

Emergent Themes

Rules of disclosure are not clear, even for experienced attorneys.

Prosecutors are required to disclose exculpatory evidence to the defense, including information that may reduce the culpability of the defendant or aid in impeaching a prosecution witness. Although the Model Rules of Professional Conduct require prosecutors to disclose *any* exculpatory evidence, the Supreme Court has limited

disclosure to evidence that is both favorable to a defendant *and* “material to guilt or punishment” (Model Rules 3.8(d); *Brady v. Maryland*, 1963, p. 87). The concept of materiality has continued to develop in subsequent cases. In *United States v. Bagley* (1985), the U.S. Supreme Court concluded that evidence is material when “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome” (*United States v. Bagley*, 1985, p. 682). In other words, “...the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of ‘reasonable probability’ is reached” (*Kyles v. Whitley*, 1995, p. 437).

U.S. v. Gutierrez aptly illustrates the premise that decisions regarding disclosure of exculpatory evidence can be difficult for the most well-meaning prosecutor. AUSA Baumann did not disclose four pieces of what came to be exculpatory evidence:

- The SAPD report of an anonymous caller claiming Bernal was not raped and that she had been bragging that she would be receiving a large amount of money from the incident;
- The FBI 302 report indicating that Bernal’s aunt, Carol Lopez, may have been the anonymous caller, as well as information from an interview in which Lopez claimed that Bernal was talking about receiving money from the city; and
- Two sets of Baumann’s notes summarizing his conversation with FBI Special Agent Nava regarding her interview with Carol Lopez, as well as a subsequent conversation he had with Lopez and Nava in which Lopez characterized Bernal as

a good liar and mentioned her intent to sue the city. Many of Lopez's statements were only available from Baumann's notes since Special Agent Nava did not file a supplemental 302 report after her interview with Lopez.

Baumann told the court that he did not disclose the SAPD and FBI 302 reports on the anonymous call and the interviews with Carol Lopez because he did not consider her information to be relevant or credible. Information which is not relevant nor credible to a case would most likely not, in and of itself, be considered by a prosecutor to be material under *Brady* and its progeny. Ultimately, together with additional information which came to light a year after the trial, the police reports and Baumann's notes were used by Gutierrez's defense counsel to identify the anonymous caller and find new witnesses whose testimony would undermine Bernal's credibility as the Government's key witness and confidence in the jury's verdict.

The United States District Court in this case ruled that "at the very least, the prosecutor should have disclosed the content of the favorable evidence contained" in the notes (*U.S. v. Gutierrez*, 2007, p. 5). The court concluded that "despite the good faith investigation of the Government to determine the credibility of Ms. Lopez's statements, the defense was able in two months to do what the prosecution and FBI could not do in two years" (*U.S. v. Gutierrez*, 2007, p. 3). The court found that this information was potentially favorable to Gutierrez, even though it was recorded in the prosecutor's notes. Assuming that Baumann made a good faith effort at deliberating over which information, if any, from his case notes he should have disclosed, his intent in deciding not to disclose what turned out to be exculpatory evidence under *Brady v. Maryland* is irrelevant to a court's consideration of whether prosecutor misconduct occurred.

Prosecutor intent is irrelevant in *Brady* cases.

As noted in the findings in Chapter Four, judges do not often distinguish between intentional misconduct and unintentional mistakes when determining whether misconduct occurred or in conducting harmless error analysis. This is particularly important because prosecutor advocacy groups focus on the distinction between intentional misconduct and good faith error when suggestion which sanctions are appropriate for prosecutors. This distinction is weakest in the context of *Brady* violations since by definition under the law, prosecutor intent is irrelevant in determining whether a violation occurred. Intent is only considered as one factor when determining if the suppressed, exculpatory evidence was material to the case.

The facts of *U.S. v. Gutierrez* underscore the irrelevance of intent in *Brady* cases. AUSA Baumann did not disclose the two police reports and information from his case notes. The Government argued that Baumann did not consider the content of the reports or notes to be material to the case, nor was he required to disclose information that considered to be attorney work product. Prior to the trial, he did not have the information that Yvonne Trevino disclosed over a year after Gutierrez was convicted and that led to the identification of several witnesses who subsequently gave testimony that undermined Bernal's credibility. Immediately after receiving this information, Baumann disclosed it to the court, along with the previously undisclosed SAPD and FBI 302 reports, possibly after realizing that the evidence in his notes and the FBI reports may have been, in fact, relevant and credible to Gutierrez's case.

Conclusion

U.S. v. Gutierrez (2007) demonstrates the complexity of disclosure requirements under *Brady v. Maryland* (1963) and its progeny. The U.S. Supreme Court articulated the prosecutor's duty under *Brady*, noting that prosecutors, alone, know the totality of the evidence in the State's control and therefore have the responsibility to determine its likely effect on the case (*Kyles v. Whitley*, 1995). However, decisions regarding the disclosure of specific items of evidence can be difficult for the most well-meaning prosecutor.

Assistant United States Attorney Bill Baumann's case against a San Antonio Police Department officer relied heavily on the credibility of the victim's testimony. Baumann did not disclose police reports on an anonymous caller because he did not consider her information to be relevant or credible. He did not disclose his own case notes in an interview with a woman who he believed to be the anonymous caller for the same reason, in addition to believing his notes were protected from disclosure under rules governing attorney work product.

U.S. v. Gutierrez also underscores the theme that prosecutor intent is irrelevant in *Brady* cases. This is particularly important because prosecutor advocacy groups focus on the distinction between intentional misconduct and good faith error when suggesting which sanctions are appropriate for prosecutors. Although AUSA Baumann seemed to have a good faith explanation for not disclosing two police reports and information from his case notes, the finding of a *Brady* violation was not dependent on his intent. The court would have found a violation of Gutierrez's due process rights regardless of whether Baumann believed the evidence to be exculpatory or material to Gutierrez's case.

Case Study Five (Not Intentional Misconduct / Harmless Error): *Ex Parte Jackson*

Description of the Case

Ex parte Jackson (2006) is correctly listed in the Innocence Project Texas study as a case in which the court found prosecutor misconduct but harmless error. Vickie Dawn Jackson, a nurse who worked at Nocona General Hospital in Nocona, Texas, was indicted for allegedly killing ten of her patients at the hospital, including her husband's grandfather, between December 11, 2000 and February 2001 (Hollandsworth, 2007). Jackson, who worked the night shift, was thought to have killed up to 20 patients, and attempted to kill five more, by injecting them with fatal doses of mivacurium chloride, causing paralysis to their respiratory systems (Hollandsworth, 2007).

Nocona, Texas is a small town with a population of 3200, and its hospital is one of the smallest in the state with a single story and only 18 rooms (Hollandsworth, 2007). Vickie Dawn Jackson was known throughout the town, and widely considered to be a hard worker, and an optimistic and a caring nurse and mother. None of the nurses at the hospital believed Jackson could have been responsible for the unusually high number of Nocona General Hospital's patients who died between December, 2000 and February, 2001. For many of the victims, Jackson was the nurse who notified their family of their deaths, and she attended some of their funerals. The town was deeply affected by the many deaths from the hospital. During the criminal investigation, and even after she was fired from the hospital, Jackson stayed in town. The local newspaper regularly ran stories about her, referring to her as the "Angel of Death."

Jackson's first trial was moved from Montague County to Archer County due to pretrial publicity and the likelihood that any juror from Montague County might know

someone involved in the case (Choate, 2005). Jury selection in Archer County, however, was halted in February, 2005, when attorneys discovered that potential jurors had been prejudiced by pre-trial publicity. The case was then moved to San Angelo, Texas, in Tom Green County. Residents of Nocona “caravanned up to San Angelo” to attend the trial (Hollandsworth, 2007, p. 1).

It is against this background of public pressure and publicity that Jackson’s capital murder trial for two of the murders started on March 14, 2005, but never progressed past the State’s opening statement. The prosecutor in the case, Assistant Texas Attorney General Ralph Guerrero, was a Yale Law School graduate who had been practicing law in Texas for less than two years (Choate, 2005). Until the first day of the trial, he had never before given an opening statement, nor had he ever participated in a capital murder trial (*Ex Parte Jackson*, 2006). He was assisting the Montague County District Attorney’s office because District Attorney Tim Cole was unable to be in court due to health problems (Choate, 2005). At Jackson’s attorney’s request, Guerrero had experienced prosecutors available to help him with the trial (Choate, 2005).

During his opening statement, Guerrero improperly commented on Jackson’s right not to testify under the 5th and 14th Amendments of the United States Constitution.

The following exchange took place in front of the jury.

[Guerrero]: . . . But what's going to--one question that's going to remain unanswered and is probably unanswerable except from perhaps the defendant herself--

[Defense Counsel Bruce Martin]: Your Honor, I'm going to object. That is a comment upon the defendant's ability or desire to testify.

[District Judge Roger Towery]: Sustained.

[Defense Counsel Bruce Martin]: We move for a mistrial, Your Honor. He has directly commented on the defendant testifying or not testifying.

[District Judge Roger Towery]: Overruled. The jury is instructed to disregard the last statement.

[Guerrero]: In most--fortunately, the law does not require us to prove motive. And I want to--when a burglar or a robber or a bank robber goes into a bank and steals the money and holds up the teller, you know why she did it. When a drug addict goes on the street and buys cocaine, you know why she did it. Well, when a nurse starts killing her patients, you're left wondering why. You're going to hear from Alan Brantley, a behavioral psychologist, a scientist from the F.B.I. who has studied serial murders, who has studied people in hospitals who have done this type of thing. And he's going to talk to you about some--about how some of the times they do this because they need to get control of their life. Other things are spiraling out of control and this is the only thing that gives them control. Sure enough, at this time, the defendant was having problems in her marriage, lost custody of her two children. Maybe that's why she did it.

[Defense Counsel Bruce Martin]: Again, Judge, that's a comment on the failure of the defendant to testify or her right not to testify. Speculating about why she did it in that manner is a direct comment.

[District Judge Roger Towery]: Overruled.

[Guerrero]: You're also going to hear that some of these patients were not the easiest patients to deal with. Some were kind of ornery. Maybe they said the wrong thing to her. Maybe she said, I'll fix you.

[Defense Counsel Bruce Martin]: Judge, again, he's putting words in the defendant's mouth and he's talking about things that might come from Vickie Jackson. That is a direct comment on the defendant's right to testify or not testify.

[District Judge Roger Towery]: Sustained. The jury is instructed to disregard.

[Defense Counsel Bruce Martin]: I would move for mistrial, Judge.

[District Judge Roger Towery]: Denied. (p. 1)

Following Guerrero's opening statement, the judge recessed the jury and spoke privately with the attorneys. Jackson's attorney again requested a mistrial, and the judge granted the request. The trial was then reset for a date later that month in a neighboring county (*Ex Parte Jackson*, 2006).

Before the third trial started, Jackson's attorney filed a pretrial petition for habeas relief, claiming that her case was barred from retrial under double jeopardy protections of the Texas and U.S. Constitutions (*Ex Parte Jackson*, 2006). More specifically, Jackson claimed that Guerrero's comments implicating her right to not testify during his opening statement amounted to prosecutor misconduct that was intended to goad the defendant into a mistrial, or, in the alternative, that he was aware of, but consciously disregarded, the risk that his conduct would require the defendant to request a mistrial (*Bauder v. State*, 1996; *Ex parte Peterson*, 2003).

During an evidentiary hearing to address the defendant's petition, the trial judge highlighted Guerrero's inexperience in the findings of fact, noting that the assistant attorney general had never before participated in a capital murder trial, nor had he ever given an opening statement in any trial. Guerrero testified during the hearing, explaining his rationale for the comments he made regarding the defendant's state of mind. The court concluded that Guerrero had a reasonable explanation for his comments, and that the facts did not support the conclusion that he was intentionally or recklessly commenting on the defendant's right not to testify in order to end a trial going poorly for the State. Ultimately, the court found that Guerrero's conduct was the result of his inexperience and consequently denied Jackson's petition that requesting that the State be barred from retrying her (*Ex Parte Jackson*, 2006).

Jackson's attorney then challenged the trial court's decision in the Court of Appeals of Texas, Second District, Fort Worth. As explained in much greater detail earlier in this chapter in the case study of *Ex parte Lewis* (2007), the double jeopardy clauses of both the U.S. and Texas Constitutions protect a defendant from repeated

prosecution if the prosecutor intentionally commits misconduct in order to provoke the defendant into requesting a mistrial (*Oregon v. Kennedy*, 1982). Under the Texas Constitution, until 2007, the bar on retrial also applied when the prosecutor consciously disregarded the risk that his or her behavior would require a mistrial (*Bauder v. State*, 1996; *Ex parte Peterson*, 2003; see also *Ex Parte Lewis*, 2007, overturning *Bauder v. State* and *Ex parte Peterson*).

Using the standard set forth in *Bauder v. State* and *Ex parte Peterson*, the court reviewed Assistant Attorney General Guerrero's opening statement in light of the facts from the trial to determine if Guerrero's misconduct provoked the mistrial, whether any prejudice resulting from the misconduct could have been cured by a jury instruction, and whether the Guerrero intended to provoke Jackson into a mistrial, or consciously disregard the risk that his comments would result in a mistrial (*Ex parte Jackson*, 2006; referencing *Ex parte Peterson*, 2003).

The court concluded that when viewed from the standpoint of the jury, only one of Guerrero's comments was a clear violation of Jackson's constitutional right not to testify. However, there was a good faith explanation for Guerrero's opening statement comments: inexperience. As a result, the court found that Guerrero's statements were not made intentionally to goad the defendant into a mistrial, nor were they made in conscious disregard for the risk that they might lead to a mistrial, and that the trial court did not abuse its discretion in denying the defendant's request to bar a retrial. (*Ex parte Jackson*, 2006). A third trial for Jackson was set for March 29th in San Angelo, Texas. Before the jury selection began, however, Jackson pleaded no contest to the two murder charges in exchange for a life sentence (Horany, 2005).

Emergent Themes

Weight of the State's evidence.

The weight of the State's evidence played a significant role in the appellate court's analysis of Jackson's claim. In evaluating whether Guerrero's comments during opening statement necessitated a bar to retrial, the Texas Court of Appeals determined whether or not Guerrero intentionally goaded Jackson into requesting a mistrial, or if he acted with conscious disregard of the risk that his comments would trigger a mistrial. As noted earlier in the case discussion, this analysis involves consideration of facts and circumstances that would aid a court in assessing the prosecutor's intent, including whether the misconduct was a reaction to the State's case going badly, or "in other words, at the time that the prosecutor acted, did it reasonably appear that the defendant would likely obtain an acquittal" (*Ex parte Peterson*, 2003, p. 818-819).

The appellate court concluded that the facts presented from the trial, in addition to the testimony of Guerrero and Martin at the pretrial habeas hearing, supported a finding that the trial was not going badly for the State when Guerrero made his opening statement. The weight of the State's evidence and the harmless error analysis played a central role in this conclusion. The court noted in its findings that Guerrero had informed the jury that the State intended to present substantial physical and testimonial evidence in support of a conviction: Jackson's confession, testimony from two eyewitnesses including a former hospital patient, a syringe found in Jackson's garbage with traces of mivacurium chloride, a video of Jackson taking the drug from the hospital crash cart, and evidence showing that tissue taken from the bodies of ten patients who had died at the hospital tested positive for the drug. Moreover, Guerrero testified during the habeas

hearing that he had been pleased with the jury, that he was “confident with the case” (*Ex parte Jackson*, 2006, p. 11).

The court then weighed this finding with the conclusion that although at least one of Guerrero’s statements were clearly erroneous, he had a reasonable, good faith explanation for the statement and, ultimately it was a result of a “prosecutorial blunder” (*Ex Parte Jackson*, 2006, p. 25). In its closing statement, the court reiterated that the trial was not going badly for the State at the time Guerrero made his opening statement, then issued the finding that his misconduct was the result of “inadvertence, sloppiness, or even simple negligence” (*Ex Parte Jackson*, 2006, p. 25-26).

Inexperience of the prosecutor.

Ralph Guerrero’s inexperience clearly arose as a significant theme in this case study. Both the trial and appellate courts, as well as newspaper coverage, and comments from Guerrero himself, underscore his relative inexperience in a complex and highly publicized trial. Guerrero was an inexperienced attorney serving in the Texas Attorney General’s Special Prosecutions Unit. He had never prosecuted a capital murder trial, nor had he given an opening statement before a jury. Members of the town, including relatives of victims, had driven to San Angelo to view the trial. Publicity in the region had caused the trial venue to be changed two times. The defendant had been nicknamed the “Angel of Death” by the press. Surely the pressure was unyielding on a prosecutor in a case in which most citizens of a small town knew the defendant and the victims, in which the press coverage was heavy, and in which the State’s case relied on the admission of complicated medical evidence.

At the pretrial habeas hearing, Guerrero explained to the trial judge that he had only been practicing law for 16 months, and had never before made an opening statement at a murder trial. Guerrero also noted that he had not intended to make the statement at all; in fact, he was only trying to explain to the jury that even the defendant did not know why she killed her patients.

Guerrero's testimony during the pretrial habeas hearing revealed the pressure he felt during his opening statement

In the heat of the moment . . . I added the 'except for perhaps the defendant herself,' something that I did not plan on saying. . . . I don't know why. I wish I hadn't said it. In the heat of an opening statement or in the heat of any port of your life, you say things and do things you regret later. . . . Unfortunately, those six words were . . . a mistake that I wish I had not said. (*Ex Parte Jackson*, 2006, p. 21)

He further explained,

I don't even know if I would have caught myself saying it. Because, you know, it wasn't something I intended on saying, it came out during the flow of the opening statement. You're 15 minutes in and the adrenaline is going, so had [defense attorney Bruce Martin] not objected, it may not have even crossed my mind what had just come out of my mouth. And I heard the content of your objection, it was sustained, and then I started thinking, you know, oh, expletive. (p. 22)

The appellate court concluded that Guerrero was "a relatively inexperienced attorney who had never made an opening statement in a capital murder trial" (*Ex parte Jackson*, 2006, p. 23). Jack Strickland, chairman of the Texas Board of Law Examiners implicated Guerrero's inexperience as the reason for his mistake, stating, "An experienced trial lawyer will stay away from even any kind of implication of that because that's one of the few things courts don't have any patience with" (Choate, 2005, p. 1).

Conclusion

Ex parte Jackson (2006) illustrates the risk of assigning an inexperienced prosecutor to lead a complex felony trial. The courts reviewing the case, as well as Guerrero himself, concluded that his inexperience was the cause of his misconduct that led to a mistrial immediately after the trial began. Guerrero, who had never prosecuted a capital murder trial, nor had he given an opening statement before a jury, was inexplicably assigned to handle Jackson's trial in the absence of the District Attorney. The State's case involved complicated medical evidence, and the trial had been highly publicized in the local area.

Guerrero's testimony during the pretrial habeas hearing revealed the pressure he felt during his opening statement. Not only did he add the improper comment by mistake, having never intended to comment on Jackson's 5th Amendment rights not to testify, but he may not have even noticed that he said it but for the objection made by Jackson's attorney. The appellate court concluded that Guerrero's mistake was due to his inexperience.

The weight of the State's evidence in the harmless error analysis also arose as a theme in *Ex parte Jackson*. The appellate court considered the strength of the State's case in its assessment of Guerrero's mental state when he committed prosecutorial misconduct in his opening statement. The court concluded that Guerrero was not reacting to a case going badly since the trial had just started, and because Guerrero had been confident that the State's case was solid and credible. He had intended to present multiple pieces of physical evidence that corroborated testimonial evidence, include a

confession by Jackson. Instead, Guerrero's misconduct was the result of a "prosecutorial blunder" due to his inexperience as a trial attorney in felony cases.

Overall Emergent Themes

The Weight of the State's Evidence

The overall credibility and extent of admissible evidence against a defendant, often referred to as the "weight of the State's evidence," played a considerable role in the legal analysis applied throughout the five case studies. Specifically, the Texas courts considered the weight of the State's evidence in determining whether defendants' due process rights were violated using the harmless error analysis, in deciding if prosecutors intended to goad defendants into declaring a mistrial, and in determining if suppressed evidence was material in *Brady* cases. The merit of the state's evidence was more important in determining the legal consequences of prosecutor misconduct than any other element in the cases, including the intent of the prosecutor.

Under the harmless error doctrine, an appellate court assesses whether a legal error affected the due process rights of a defendant (Edwards, 1995). The doctrine is rooted in several sources, including the Federal Rules of Criminal Procedure and decisions from the U.S. Supreme Court (Edwards, 1995; see also Fed. R. Crim. P. 52(a); *Chapman v. California* (1967)). In cases with claims of prosecutor misconduct, the harmless error doctrine is normally applied once a court has made a finding that prosecutorial misconduct occurred. The court will then balance the strength of the state's evidence against the prejudicial effect of the misconduct on the jury. If the impact of misconduct is slight compared with the weight of the state's case against a defendant, a court will most likely conclude that the misconduct did not violate the due process rights

of the defendant. Consequently, if the state's evidence against a defendant is overwhelming, even egregious misconduct may not result in an overturned conviction.

The strength of the State's case was also an important consideration in the cases in which *Brady* violations were considered on appeal. Under *Brady* analysis, courts weigh evidence presented against a defendant during the trial against the potential weight of the suppressed evidence in determining whether the suppressed evidence was material to the outcome of the trial. Suppression of material evidence by the State will result in an overturned conviction and possible retrial.

Prosecutor Intent

Prosecutor intent arose as a significant theme throughout the five case studies. Specifically, the Texas courts wrestled with identifying the appropriate level of prosecutor intent that would trigger double jeopardy protection against retrial, as well as considered prosecutor intent under the materiality requirement in *Brady* cases. The role of prosecutor intent in the five case studies is central to the overall discussion of prosecutor misconduct because prosecutor advocacy groups focus on the distinction between intentional misconduct and human error as dispositive in determining if sanctions are appropriate for prosecutors.

Prosecutor intent is not considered by courts under *Brady* claims because it is legally irrelevant in determining whether a violation occurred (*Brady v. Maryland*, 1963). Under *Brady*, a court will find a violation of the defendant's due process rights regardless of whether the prosecutor knew that the evidence existed, or whether she purposefully or unintentionally withheld the evidence. The facts in *Graves v. Dretke* (2006) highlight the irrelevance of intent in *Brady* cases. The Fifth Circuit Court of

Appeals, as well as the U.S. District Court for the Southern District of Texas before it, concluded that District Attorney Charles Sebesta had not disclosed the two statements by the State's key witness Robert Earl Carter. Neither court commented on Sebesta's intent to withhold the evidence in their decisions. Although a federal magistrate found Sebesta's claim that he disclosed the statements to be dubious, this conclusion was not relevant during subsequent consideration of the case by the federal courts (*Dretke v. Graves*, 2006). The Texas State Bar, however, did consider Sebesta's intent when considering whether he violated five of the Texas Rules of Professional Conduct.

The law surrounding the duty to disclose exculpatory evidence is difficult for prosecutors to navigate, further aggravating any attempt to determine a prosecutor's intent in these cases. Prosecutors are required to disclose exculpatory evidence to the defense, including information that may reduce the culpability of the defendant or aid in impeaching a prosecution witness. Although the Model Rules of Professional Conduct require prosecutors to disclose *any* exculpatory evidence, the Supreme Court has limited disclosure to evidence that is both favorable to a defendant *and* material to guilt or punishment (Model Rules 3.8(d); *Brady v. Maryland*, 1963). The concept of materiality has continued to develop in subsequent cases.

Decisions regarding whether or not to disclose exculpatory evidence can be difficult for prosecutors. Information which is not relevant nor credible to a case would most likely not, in and of itself, be considered by a prosecutor to be material under *Brady* and its progeny.

Inexperience of the Prosecutor

The inexperience of the prosecutor arose as a significant theme in two of the five case studies. In *Ex parte Lewis*, Assistant Attorney General Ralph Guerrero's inexperience was the direct cause of a mistrial. Both the trial and appellate courts, the news media, and Guerrero himself, stressed the impact of his relative inexperience on his performance as lead prosecutor in a complex and highly publicized murder trial.

Assistant District Attorney Lucy Cavazos was also extremely inexperienced when she was assigned as lead prosecutor in an aggravated sexual assault case. In *Ramon v. State*, Cavazos improperly called herself as a witness in order to correct what she considered to be a false impression created by the introduction of a phone message by Ramon's attorney. Although Ramon's conviction was upheld by all appellate courts reviewing the case, due in large part to the overwhelming evidence of his guilt admitted during the trial, Cavazos was personally admonished for her misconduct by several different appellate judges. (*Ramon v. Quarterman*, 2009). Cavazos herself admits that she was in error and had learned a lesson never to be repeated. Additionally, her statements to the media following the case made it clear that she had little training before being asked to handle serious cases.

Limitations

The present study has several methodological limitations. First, the researcher has no control over the initial sample of 91 cases from the Innocence Project Texas and TDCAA studies from which five cases were selected for the case studies. By relying on the cases identified by researchers in the four previous studies, any error or bias that was introduced by their selection of cases will carry forward into this research. Second, the

present study cannot account for cases of misconduct that are not recognized through appeal. Third, findings will not be generalizable to a larger population of prosecutor misconduct cases. Purposeful sampling is not suitable for generalizing findings from the sample to the population. Instead, this study reexamines data from earlier research and identifies themes surrounding prosecutor misconduct in order provide recommendations for future research.

Chapter Summary

A collective case study of five individual appellate cases selected from the Innocence Project Texas study was conducted to further explore the phenomenon of prosecutor misconduct. The units of analysis were the individual court cases in which prosecutor misconduct is at issue. Purposeful sampling was used to select cases that allowed for further exploration into intent of the prosecutor and harmful error analysis. The fifth case was chosen as a comparison case to the other four since it represents the most egregious example of prosecutor misconduct in the Texas sample, and is often considered representative of prosecutor misconduct.

Several different sources of data for each case study included the trial transcripts, motions, appellate briefs and decisions, media and television coverage, and blog entries. The cases were first coded with the four initial research questions in mind, and additional coding categories were added as themes emerged. The five cases were then considered collectively to identify themes emerging across many or all of the cases.

The qualitative analysis indicated that several major themes were common to most or all cases: the weight of the State's evidence, the intent of the prosecutor, and how a prosecutor's inexperience can result in misconduct or error. First, the overall credibility

and extent of admissible evidence against a defendant, often referred to as the “weight of the State’s evidence,” played a considerable role in the legal analysis applied throughout the five case studies. Specifically, the Texas courts considered the weight of the State’s evidence in determining whether defendants’ due process rights were violated using the harmless error analysis, in deciding if prosecutors intended to goad defendants into declaring a mistrial, and in determining if suppressed evidence was material in *Brady* cases. The weight of the state’s evidence was often more important in determining the legal consequences of prosecutor misconduct than any other element in the cases, including the intent of the prosecutor.

Second, prosecutor intent arose as a significant theme throughout the five case studies. Texas courts identified the appropriate level of prosecutor intent which would trigger double jeopardy protection for a defendant against retrial, as well as trying to assess prosecutor intent under the materiality requirement in *Brady* cases. Under double jeopardy protections in the Texas state constitution, courts found that only when a prosecutor intentionally goads a defendant into requesting a mistrial was barring a second trial warranted, rather than also including prosecutor misconduct which recklessly disregarded the risk of a mistrial. Under *Brady v. Maryland* (1963) and its progeny, intent is irrelevant in reaching a finding that the prosecutor had unconstitutionally withheld exculpatory, material evidence from a defendant.

Finally, the inexperience of the prosecutor arose as a significant theme in two of the five case studies. In both cases, the prosecutors were assigned to complex felony cases despite their limited trial experience. Courts in both cases recognized the central role of their inexperience in their improper behavior, even as they were admonished for

their misconduct. Even the prosecutors themselves admitted their own inexperience to the media following the misconduct rulings. The role of a prosecutor's inexperience is important to the overall discussion of prosecutor intent. In *Ex parte Jackson*, the prosecutor's inexperience weighted significantly in the appellate courts' determination that the prosecutor did not intend to cause a mistrial in order to compensate for a bad case. On the other hand, in *Ramon v. State*, the prosecutor's inexperience had no influence on the courts' findings of misconduct and harmless error. The dispositive factor for appellate courts in reaching decision regarding prosecutor misconduct, therefore, is the type of legal analysis applied in the case, not the intent of the prosecutor.

Neither intent nor the case outcome (harmless error / harmful error) were useful in characterizing the prosecutor's misconduct in a way that might inform a court or sanctioning authority in determining an appropriate response to the misconduct. For example, the prosecutors in *Ex parte Lewis* (2007) and in *Ramon v. State* (2004) were found to have committed intentional misconduct. However, the outcomes of their cases were largely the result of the weight of the State's evidence, not the prosecutor's intent in committing the misconduct. Moreover, in the case with arguably the most malicious intent, *Graves v. Dretke* (2006), the prosecutor's intent was not mentioned by the court as it was irrelevant to the legal analysis under the law governing the withholding of exculpatory evidence. The other case in which court the found the prosecutor to have not intended to commit the misconduct was decided primarily on the strength of the State's case weighed against the prejudicial effect of the misconduct on the jury, not on the intent of the prosecutor. In all of five cases, the weight of the State's evidence

played a more significant role in the outcome of the case than the intent of the prosecutor to break or disregard the rules in order to win cases.

VI. FINDINGS AND ANALYSIS OF INTERVIEWS

This chapter presents the third qualitative study exploring the phenomenon of prosecutor misconduct consisting of semi-structured interviews with current and former prosecutors in order to gain a deeper understanding of prosecutor misconduct through prosecutors' daily experiences. The units of analysis are the individual interviews. Snowball sampling was used to identify ten attorneys willing to participate in interviews about their experiences as prosecutors. The first interview subject in this study was a colleague of the researcher, with the remaining participants identified through recommendations from each interview subject. Whenever possible, the researcher interviewed current and former prosecutors from both large and small district attorney's offices in order to more fully describe the phenomenon of prosecutor misconduct. Conducting interviews with ten participants allowed the researcher to gather enough data to see significant themes emerge. Although additional interviews may have more clearly revealed a saturation point at which markedly new information ceases to emerge, sufficient data was collected to shed light on the lived experiences of prosecutors, and the interview data was consistent with other findings.

The interview protocol involved a semi-structured design, which provided a consistent set of initial interview questions while still allowing for great flexibility to pursue interesting topics mentioned by specific participants. In order to explore the phenomenon of prosecutor misconduct as seen by prosecutors, as well as compare emergent themes with those from the content analysis and case studies, the interview questions were based on the research questions, including the range and prevalence of prosecutor misconduct, and the types of misconduct or error that most commonly occur.

The interview protocol was pretested with a former prosecutor to gauge how the interview would work, how long it would take, if the interview questions elicited the type of information sought, and whether there were any problems with the questions such as poorly worded questions, questions that might have been offensive, or questions that revealed the researcher's own bias.

Interviews were audio recorded and later transcribed. Several of the interview participants were not able to conduct the interview in person, so they responded to the interview questions through email. When the researcher had follow-up questions, the interview continued through email. All email correspondence was collected and saved by the researcher. During the interviews, every attempt was made to ask each participant all of the initial interview questions in order to compare responses across the entire sample.

A coding protocol for the interviews was developed and revised throughout the coding process, starting with a handful of broad categories centered on the interview questions. The initial coding protocol was created with the initial research questions in mind, as well as the themes which emerged from the ethnographic content analysis of the created sample of 190 cases, as well as the collective case study. The researcher conducted a holistic analysis of each interview by first coding to record the following:

- Job history in the criminal justice field
- Experiences with prosecutor misconduct and error
- Office culture regarding prosecutor misconduct
- Types of misconduct or error that most commonly occur
- Reasons for misconduct or error occurring
- Perceptions of prosecutor misconduct over time

- Solutions for prosecutor misconduct or error
- Proposed solutions that would not work

After coding the first interview, the following coding categories were added as themes emerged:

- Training and apprenticeships
- Gamesmanship and “win-at-all-costs” mentality
- Open File policies
- Materiality in *Brady* cases
- Limited time and resources for prosecutors

Once all ten interviews were coded, the researcher conducted an analysis of the themes arising out of each interview, as well as common themes across the interviews.

Coding was conducted using NVivo software. To check reliability, a second coder reviewed coding of the first three interviews to assess inter-coder reliability. The second coder and the researcher met to resolve inconsistencies before recoding the interviews. To check validity, a group of three legally trained readers checked the interview coding sheet of the first interview and verified that the researcher was using language and terms accurately within the commonly understood meaning in the legal community.

The following discussion is divided into four main sections. The first section is a description of the ten interview subjects. The second section discusses the prevalent themes which emerged from across the interviews. Finally, the chapter ends with a discussion of limitations, and the chapter summary.

Description of the Interview Subjects

All ten interview subjects have experience practicing law as prosecutors with lengths of service ranging from two to 26 years. Their experiences as prosecutors extend over a 40 year timespan, with the earliest career beginning in the 1970s. All ten subjects started their careers in criminal justice as prosecutors except one, who started his career as a police officer, and all have served in county or federal offices in Texas. Many have also served in offices outside of Texas. All ten subjects served in county-level prosecutor offices in counties with populations ranging from 25,000 to over 2,500,000 residents. Two of the ten subjects are currently serving as prosecutors, with the remaining eight having moved into different roles in the criminal justice system, including practicing law as defense attorneys, city attorneys, prosecutor advocacy agencies, and judgeships. Of the ten subjects, only one is female.

Emergent Themes

Reflection on the interview data included consideration of statements made by the interview subjects in response to the initial questions and throughout discussions spurred by follow up questions. Through this analysis, the following three prevalent themes emerged regarding prosecutor misconduct in the lived experiences of prosecutors.

- Prosecutor culture
- *Brady* violations and open file policies
- Prosecutor training

Prosecutor Culture

Each of the interview subjects discussed the role of the prosecutor culture in emboldening prosecutors to commit misconduct. The “us versus them” mentality, referring both to the State versus defendant roles, and between prosecutors within an office, was commonly cited as contributing to pressure felt by prosecutors to push the limits of acceptable behavior.

I encountered institutional biases and willingness to push the envelope all the time because there was a very developed, mature culture of “us and them.” The world was seen through the lenses of “us and them” and people were further categorized to the degree that they were perceived as career prosecutors. Some prosecutors even were categorized as “them,” for example, if they were not willing to buy the whole “us vs. them” mentality. Those things are necessary for those who later go on to engage in prosecutor misconduct as a grooming period.

There’s definitely a culture of us against them, which I find offensive because it’s not a game. You know, attorneys talk all the time about winning and losing, and there’s a lot of pressure, especially in the Department of Justice, to win if you go to trial. And it shouldn’t be about us winning or losing, you know, we don’t win, the attorneys don’t win. It’s the public who wins or loses, depending on how justice is done.

Interview subjects also discussed the role of a “win-at-all-costs” culture that increases the pressure on prosecutors to be aggressive and push legal boundaries in order to win cases.

[There was a] win at all cost mentality in that office. Very strong, and entrenched, win at all costs mentality that pervaded the entire office.

When you have a basic human instinct in competitive situations to win, and it’s paired with an administration that made you fill out trial reports and one of the first things they asked was he guilty or not guilty and if you lost the case, why, all of those sorts of things tended to create a culture in which, I think, there would be a greater possibility of prosecutor misconduct.

I don't think anybody sets out to be a dirty lawyer. And the only incentive for a prosecutor not to play by the rules is that gamesmanship thing we were talking about because they feel like they've got a record to uphold.

Intentional misconduct is a function of the competitive nature that is exacerbated by the adversarial process. Also, institutional formal and informal rewards that are attached to winning, and the sort of disincentives for losing, in terms of promotion, visibility, and professional regard.

I am aware that in other counties, district attorneys' offices have reputations for being very aggressive, pushing the ethical boundaries concerning disclosure of favorable evidence to the defense and so forth.

There has to be a culture set at highest level of office, that the office is one in which the integrity of the office is paramount to everything. To everything. The higher the stakes for the prosecutor, the higher the pressure to cheat. It goes back to who is leading the office.

The size of the prosecutor's office may influence the culture of the office if increased visibility to the public serves as a disincentive to prosecutor misconduct.

Being such a small jurisdiction it is a constant goal to have a good reputation as to honesty and fair dealing. This saves a lot of time and aggravation fighting with the defense bar over discovery issues, etc. Every citizen knows me by name and will not hesitate to approach me at the office, grocery store or home. One misconduct event could easily cost me an election and/or my staff their jobs.

The role of not wanting to expose colleagues for misconduct within the prosecutor's office was highlighted by several interview subjects.

In the larger jurisdiction, when I observed what I believed to be misconduct I would only raise the issue with the offending prosecutor. It was well understood that snitching or tattling was not a good career move.

I would never file a grievance against a prosecutor in my office.

But, there are some very aggressive attorneys out there that, to me, it's pretty clear the evidence isn't admissible, but I would never file a grievance on them with the state bar for attempting to push the envelope or, in my opinion, going way beyond it.

The harmless error rule may play a role in contributing to a culture that enables misconduct.

I think that the way we formulate the harmless error analysis contributes to some of [the misconduct] too. Both judges and prosecutors approach error from context that it is harmless or not. Which is a problem. So if you have a doctrine that says we will allow errors, as long as we can conclude that they did not interfere with the outcome; there's a certain amount of blasé attitudes towards certain mistakes. You know, I think that contributes to [prosecutor misconduct] as well.

Brady Violations

A second theme that arose from the interviews was the belief that *Brady* violations are the most common type of prosecutor misconduct. When asked about other types of misconduct, the interview subjects offered examples of various types of misconduct, but no consistent theme emerged from those examples. Most interview subjects discussed their experiences with prosecutors who withheld exculpatory, material evidence, as well as their perceptions of why this is a common source for misconduct or error.

When I was a defense attorney, I had a case where the prosecutor hid an expert report from me that supported the position that I had taken at trial. There were so many of them. Prosecutors take witness statements out of their file that are favorable to defense. Prosecutors knowingly represented that a ballistics exam indicated a weapon seized from my client was a murder weapon, when it was not.

I have reviewed one case in which I believe this failure was inadvertent, but valuable impeachment evidence was not disclosed to the defense. This can be a problem just of sloppy filing or document management.

I also acknowledge the occasional temptation to take a very limited view of what is “Brady” or misconduct.

Sort of two areas where I think there’s potential, and some actual misconduct. One is, something that was resolved in Texas with the Michael Morton Act, but’s not resolved yet in the federal court, and that’s the withholding of exculpatory evidence. Of course, from a defense perspective, you really don’t know how many times that’s happened to you because you don’t really know until somebody else takes it up on appeal and finds something you missed, like in the Michael Morton case where, you know, after he’d done 25 years, for a crime he didn’t commit, then it comes to light that there’s all this evidence that had been withheld.

In that one a prosecutor failed to disclose that his primary witness had gotten a favorable deal in a federal case against him because he turned in the defendant as a suspect. I think the prosecutor (who is no longer in the office) could have told himself the witness didn't have a deal with the state because it was a federal case, and he didn't have a deal if he provided favorable testimony, so justified to himself withholding this information. But the witness had already gotten a sentence reduction by naming the defendant as a suspect, and after that he had to keep making that claim, so he did have an incentive to testify against the defendant. I am very uncomfortable with the position our prosecutor took.

And I saw a lot of that, the hiding of the evidence.

Interview subjects also discussed the role of open file policies and laws expanding automatic disclosure to prevent *Brady* violations. Many spoke specifically of the Michael Morton Act in Texas, which requires prosecutor’s offices to make available for inspection and duplication the evidence collected in a criminal case “as soon as practicable after receiving a request from the defendant” (Tex. Code Crim. Proc. Art. 39.14 (a)).

But one thing [my] office did that most in Texas did, but not all, was we had an open file policy. And I truly mean open file. I can’t say that documents, uh, didn’t get disclosed, I mean, copiers skip and things of that nature, but I believe prosecutors went out of their way because the defense was looking at the very

same file that I was going to use to prosecute. The only time I would close it to them is if I was actively working on it, like talking to a witness or something, so it use to be, my policy on discovery was, of course following the DA's office policy, have at it, and if they wanted to look, I would recommend if they needed additional time, it's a thick file, just show up at my court off docket, I'll go upstairs and bring it to you. I'd give them lab reports, and I'd give them the autopsy, even though they could get the autopsy elsewhere. Other than that, they had the full run of everything in there and quite frankly for as long as they wanted, I didn't set limits. The only rule was that they couldn't take verbatim notes, but they could certainly take notes. And then of course, at the time of trial, after a witness testifies, then they can get the witness's statement for cross examination.

You know, in [city redacted] we had a policy that was an open file policy. We did basically out there thirty years ago, but now Texas is required to do basically is open the file and you had to keep a record of what you presented to the defense. I think the state of Texas is light years of where the federal system is now in handling the hiding of exculpatory evidence.

Changes in prosecutor offices have led to open file discovery and the state legislature expending discovery rights. I think those could reduce those sort of occurrences [prosecutor misconduct].

But the Michael Morton Act, I think, is one of the most exciting things to happen in criminal justice here in Texas here in a long time. Unfortunately the Feds haven't picked it up, but, maybe someday.

The better thing to do is to ... go to an open file discovery process where each side knows everything the other side knows. What's to hide?

We did have an open file policy. It's like, OK, I'm going to give you everything I have then I'm gonna come in and kick your ass. 'Cuz there's no question, you had it, you saw it, uh, if you win, OK, so be it.

The difficulty for prosecutors of defining "material" evidence that is subject to disclosure under *Brady* and its progeny, and thereby knowing which evidence to disclose, was mentioned by several interview subjects.

The proposed solution that I like that no one seems to want to go along with it the materiality rule that I was talking about before, to get rid of that. That's not really in the statute, that's more case law where it talks about materiality, but they should codify the fact that, like in the Michael Morton Act, that it doesn't make any difference, it's not for a prosecutor to decide what's material and what's not.

In the federal system, we're still stuck with this thing about whether the prosecutor gets to decide on their own whether or not it's material to the defense. And that's where the problem lies. In the federal system there's that game about, well, I'm going to decide this is not material. Well it should be a judge who should decide that if you're going to leave that materiality part there.

Above and beyond *Brady* violations, no single type of prosecutor misconduct was noted consistently throughout the interviews. Other types of misconduct or error mentioned by the interview subjects varied, including behavior both in and out of the courtroom during a trial.

The easiest way to get a case reversed is to comment on the defendant's failure to testify. The other ways would be just strictly evidentiary.

OK, there's one other specific instance of something like that I can recall that was improper. And this is a prosecutor who was a second chair so should have been fairly experienced, made several comments during final argument about, essentially commenting on the failure of the defendant to testify. And there were repeated objections, and the judge said, yet again, I'm gonna sustain the objection and instruct the jury to disregard and it never got, quite frankly it didn't get reversed because, actually I don't recall why.

I believe more often is going to be, it doesn't come from the prosecutor, it comes from a witness, and either the witness doesn't follow instructions they've been given, or the prosecutor either forgot, or didn't have time, to instruct the witness on what the rules were. And that can sometimes, the forgetting or not having time, is just in the press of so many witnesses coming in if it's a big case. There are some police officers, in my experience, even if you tell them, they're going to try and blurt it out. And as much as the prosecutor tells them you're not doing me any favors, I'm not asking you to do this, please don't say this, they'll just blurt it out thinking they're helping, which, they never are.

I believe the primary issue, and you call it prosecutorial misconduct, but anyway, maybe even error may be a fairer word for what you're talking about, because what we're talking about I don't really believe is intentional. It can be, but in my experience it's not. And that is a prosecutor makes a mistake. They feel that evidence is admissible and it's not, or make a statement, an opening statement, but again that's relating to inadmissible evidence.

[T]here is prosecuting people with the intention of making them testify. Not just prosecuting the person you are going after, but for instance, I had cases where, in the federal government, where my defendant didn't necessarily want to cooperate and with the government, and the government's threat was let's go ahead, we have enough evidence to indict his wife too. And they will do that.

Prosecutors mislead the judge about whether or not they had any evidence at all to proceed at trial. They didn't, and the judge continued to hold client in jail until they could make another case.

Intake abuses of intentionally delaying the rejection of charges that the state knows are not supported by sufficient evidence for a conviction.

I had a case where a prosecutor had DNA results from a sex assault victim, a sexual assault murder, actually several murders, and the prosecutor had DNA profiles that did not match my client. And at least one profile they refused to subject to a 2nd validation test after their expert had told them that such a test was necessary. And the reason why they didn't test it, is because if they had tested it, and the results were validated, they would no longer to proclaim publically my client's guilt. Which means that they would not be able to wage a public campaign against my client that they surely were not willing to engage in in the courtroom.

The Lack of Training for Prosecutors

The final theme that emerged addressed the role that insufficient training plays in prosecutors committing misconduct and making errors, as well as the types of training that would be most beneficial to new prosecutors.

A lot of times [misconduct is] sort of innocent because a lot of times, young prosecutors especially, don't realize that uh how certain things are interpreted.

Unintentional errors have to do with larger systemic issues with the practice of law in general; how attorneys are licensed and continuing legal education.

The only prosecutor errors I've seen have been (usually younger) prosecutors making legally improper objections that were sustained. In the past prosecutors have not been very well trained in the law. When I began as a young misdemeanor prosecutor in this office, the only "training" I received was to watch my first chair, who had himself been a prosecutor for probably a year or so, and the only training he'd received was from someone equally inexperienced. That's a way for prosecutors to develop bad habits.

Well, absolutely [the way to prevent misconduct is] the training for young lawyers.

As a general rule, I believe prosecutors should receive more training in the law, as they are doing in this office. Prosecutors' offices need to understand occasional trial losses and not put pressure on trial prosecutors to win at all costs. [Our DA] understands that prosecutors are not going to win every trial. He also knows that sometimes difficult cases with thin evidence just have to be tried even if the chances of success are not great. District attorneys' offices should base evaluations and promotions on effort and how well a prosecutor has learned the job rather than on win/loss records. Making the win all-important is what leads to prosecutorial misconduct. Prosecutors need oversight, but not hostile oversight.

Types of training that would be most effective included an apprentice model for new prosecutors, as well as a shift away from focusing on seminars addressing prosecutor ethics.

More safeguards should be in place, like we have in plumbing and for electricians. Lawyers need apprenticeships. We currently train prosecutors in the crucible of fire. We give them a dog case and they learn by survival of the fittest, which coincides with the competitive nature of the criminal justice system. There has to be an acknowledgement that mistakes are made by inexperienced prosecutors. We could do more.

I used to tell people that prosecutors are trained by questions. But it's like anything in my experience, you can't just have a prosecutor come into a room and once a week on a Friday give them an hour or hour and a half worth of training. It's not going to soak in until they actually start doing things so that they have

some real basis to understand how what you're telling them fits in with what they're doing. So we would do that, but the most common way of training in my experience is that they have a question and they come and ask you, and there, people were around, there was always a supervisor available, or most often, to answer questions, but if it happens in the middle of a trial, there may not be enough time. Judges aren't going to give a break so prosecutors can take five minutes and ask how to get this piece of evidence in or not.

The office should be committed to rigorous program of training. We can set this up so that prosecutors are always thinking about making mistakes, a shift from losing a case to violating rights. Offices should be committing resources to training. There should be people in office floating from trial to trial and assist prosecutors in the heat of trial to make decisions that decrease opportunities for prosecutor misconduct and error.

The continued *Brady* and other ethical training prosecutors continually receive in the aftermath of the Michael Morton case are ineffective. Just saying, "Rah rah, let's be ethical," which is what some of this training amounts to, is utterly useless. Someone inclined to cut ethical corners is not going to see the light in such a session.

In addition to the need for training inexperienced prosecutors, the idea of stricter sanctions was offered as an appropriate response in cases of intentional misconduct.

I do think that the disciplinary committee should be a lot more severe. I mean if, it shouldn't just be a matter of filing habeas corpus petitions later saying that there was prosecutorial misconduct. If there was prosecutorial misconduct, they should be susceptible to the same disciplinary rules that a defense attorney would be, or a civil attorney would be. It's almost never that a prosecutor gets hauled up in front of the disciplinary committee.

There should be sanctions, severe sanctions for knowingly violating constitutional rights. The only way to make prosecutors worry about making a mistake that hinders a defendant is to get them thinking about how that mistake hinders the prosecutor.

I really do think that the issues are culture and leadership and training. And real penalties. *Real* penalties, meaning loss of license, a probation period in which they can't be assigned to certain cases. Real penalties for that sort of thing. That will be the only thing that can address that.

Interview subjects also commented on the rarity of sanctions, both in and out of the courtroom.

And realistically, very rarely, does a prosecutor, let me back up. I believe very rarely is misconduct by an attorney reported at the state bar. Um, I just think it's extremely uncommon.

[During a trial] my response to misconduct ranged from asking for contempt of court rulings or sanctions, which never went anywhere by the way, to simply asking judge to give us some type of remedy that allowed us discovery or inspection of whatever it was. It typically went nowhere. Judges were not interested in creating what they thought was going to be scandal. They were simply not interested in that, period. So what they would do was, give us what we wanted, but they would not take the other step such as sanctioning the prosecutor, or holding them in contempt, taking away certain authority for them make decisions. In every case [of misconduct] we saw, we responded with legal motions, attempting to have it litigated in the courtroom itself, but I can't think of a single time where the needs of the judge to have a trial go through to conviction or acquittal didn't take priority.

There's the question of lack of real disincentives for prosecutor misconduct. There's no real accountability when someone makes a mistake. Rarely does the public punish an elected official for a mistake in wrongfully convicting someone, much less, the public doesn't even hear about those cases where there are violations of constitutional rights, either intentional or unintentional. So I don't think that there is a real system of disincentives that really make prosecutors accountable for intent or ignorant violations of people's constitutional rights. It has a lot to do with the whole idea of prosecutorial independence, executive independence, discretion, and being beyond scope of judicial review.

Discussion of the Themes

Prosecutor culture arose as a significant theme among the current and former prosecutors interviewed. Specifically, the interview subjects spoke about the role of prosecutor culture in emboldening prosecutors to commit misconduct. The "us versus them" mentality was commonly cited as contributing to pressure felt by prosecutors to

push the limits of acceptable behavior. Prosecutors consider themselves to be entrusted with the public's safety and are expected to be tough on crime, meaning that they are tough on criminals and the defense attorneys who represent them. As part of this culture, prosecutors may express loyalty to colleagues by protecting them by not "snitching" when misconduct or error becomes apparent. Conversely, the "them" label may be extended to include fellow prosecutors who have not fully bought in to the culture of the office. Finally, interview subjects often spoke of a "win at all costs" mentality which impels prosecutors to take risks in order to avoid losing a case and jeopardizing their standing in the office.

A second prevalent theme emerging from the interviews was that *Brady* violations were thought to be the most common type of prosecutor misconduct. Many interview subjects discussed their experiences with prosecutors who withheld exculpatory, material evidence, as well as their perception of why this is a common source for misconduct or error. The interview subjects also considered the law surrounding how, and by whom, "materiality" is defined to be a primary cause of *Brady* violations. They suggested that shifting the determination of materiality to a judge rather than a prosecutor would alleviate the potential for unintentional withholding of evidence that is material to a case. The interview subjects frequently identified open file policies as an effective approach to preventing *Brady* violations.

Other types of misconduct and error mentioned during the interviews included commenting on a defendant's failure to testify, eliciting inadmissible evidence from a witness, referring to inadmissible in an opening statement, misleading a judge about whether there was enough evidence to proceed to trial, and refusing to validate scientific

evidence which may undermine a case. In these examples, some seemed to be intentional and others were clearly explained as mistakes made by inexperienced prosecutors or witnesses who were not following instructions by the prosecutor. The role of training for inexperienced prosecutors was mentioned often in discussions of inadvertent errors, and arose frequently as a theme throughout the interviews.

The third theme that surfaced throughout the ten interviews was the role that insufficient training plays in prosecutors committing misconduct and making errors. All of the interview subjects mentioned the need for new prosecutors to be trained better in the law, as well as in trial practice. Several interview subjects mentioned apprenticeships and active oversight as a way to prevent misconduct and error. The current law in Texas requiring prosecutors to undergo periodic ethics training was not thought to be particularly effective in preventing misconduct. In addition to training inexperienced prosecutors, many interview subjects were open to the idea of stricter sanctions by the State Bar Association for prosecutors who intentionally violate a defendant's constitutional rights.

Limitations

The present study has several methodological limitations. First, findings will not be generalizable to all prosecutors. Snowball sampling, especially with such a small sample, is not useful for making generalizations from the sample to the population. Instead, this study was designed to explore themes surrounding prosecutor misconduct identified in the ethnographic content analysis of the sample of 190 appellate cases and the collective case study, as well as identify new themes emerging from the lived

experiences of prosecutors not identified in the appellate cases. These themes will help to identify areas for future research.

Second, the researcher's findings may include bias due to her professional relationship with some of the research subjects and her previous experience as a prosecutor. Every effort has been made to recognize and minimize the possible effects of bias in the interview findings and analysis, including asking follow up questions for clarification in order to reduce assumptions as to the meaning of question responses. Additionally, all interviews were recorded and transcripts were created to reduce any bias that may have occurred by the researcher selectively taking notes throughout the interviews. In order to prevent bias in coding, a second reviewer checked the coding in the first three interviews to test for inter-rater reliability, and three legal experts reviewed the coding to check for accuracy in legal meaning.

Chapter Summary

Semi-structured interviews with current and former prosecutors were conducted in order to gain a deeper understanding of prosecutor misconduct through prosecutors' daily experiences. Snowball sampling was used to identify ten attorneys willing to participate in interviews about their experiences as prosecutors. The interviews were coded using NVivo software. This analysis revealed three emergent themes.

A prevalent theme which arose throughout the interviews was the role of the prosecutor culture in emboldening prosecutors to commit misconduct. The "us versus them" mentality was commonly cited as contributing to pressure felt by prosecutors to push the limits of acceptable behavior. Additionally, a "win at all costs" mentality

further impelled prosecutors to take risks in order to avoid losing a case and jeopardize their standing in the office.

A second prevalent theme was that *Brady* violations were thought to be the most common type of prosecutor misconduct. The prosecutors interviewed also considered the law surrounding how, and by whom, “materiality” is defined as a primary cause of *Brady* violations and promoted open file policies.

The third significant theme that surfaced throughout the ten interviews was the role that insufficient training plays in prosecutors committing misconduct and making errors. Periodic ethics training, in and of itself, was mentioned as an ineffective approach to preventing misconduct.

VII. DISCUSSION AND CONCLUSIONS

This chapter discusses the findings of the three qualitative studies exploring the phenomenon of prosecutor misconduct and offers conclusions. The first study used ethnographic content analysis to reexamine a sample of appellate cases from California which were analyzed in a widely cited study by an Innocence Project organization, and re-analyzed by a prosecutor's advocacy group who disputed the original findings. A separate sample of Texas appellate cases from another Innocence Project study, and disputed by prosecutor's advocacy group, was also examined. The second study was a collective case study focusing on five of the appellate cases from the Texas sample in order to examine the circumstances surrounding prosecutor misconduct at a much deeper level than reasonable with the larger number of appellate cases. The third study was a phenomenological inquiry using semi-standardized interviews with 10 current and former prosecutors in order to illuminate and describe prosecutor misconduct from their unique perspective. Themes from all three studies were then analyzed in order to compare prosecutors' perspectives with those of the judges and other practitioners expressed in case law.

This chapter presents the findings of the overall research project. First, conclusions regarding the four research questions, including emergent themes across all three studies, are presented. Second, overall implications of the research findings are presented. Next, recommendations for future research based on the findings are presented. Finally, the chapter concludes with a discussion of the limitations of the study and a chapter summary.

Findings from the Four Initial Research Questions

The first research question asked what is the range and prevalence of prosecutor misconduct identified by appellate judges in the sample cases, and how do findings compare with the NCIP and Innocence Project Texas studies, and the response reports by the CDAA and TDCAA? The range and prevalence of prosecutor misconduct identified by appellate judges in the sample cases was similar to the findings in the Northern California Innocence Project (NCIP) and Innocence Project Texas studies. Similarities between findings in the NCIP and Innocence Project reports and findings from this present analysis included the rates of types of misconduct claims, the occurrence of multiple acts of misconduct claimed in many of the cases, and the rates of harmful error rulings. However, the reports from the two prosecutor associations did not give enough detail in what definitions they used to replicate their analysis. The range of misconduct in the combined sample spanned from nominal to egregious within each category of misconduct claimed. In the least serious instances of misconduct, prosecutors made a singular inaccurate statement or asked one improper question of a witness during the trial. In more egregious instances of misconduct, prosecutors continued to make prejudicial statements even after being admonished by the judge, or withheld material, exculpatory evidence from defendants, depriving them of their constitutional rights to due process and a fair trial.

The second research question asked what types of prosecutorial misconduct or errors most commonly occurred. In the California Sample and the Texas Cases, the types of prosecutorial misconduct or errors which most commonly occurred included improper comments during closing arguments, eliciting improper testimony from a witness, and

prejudicial statements made to the jury, together totaling half of the claims in the sample. In fact, over 80% of the claims of misconduct were derived from instances in which a prosecutor was speaking in the courtroom, rather than out-of-court conduct. *Brady* violations accounted for no more than six percent of the claims in the combined sample. These findings seem to contradict findings from the prosecutor interviews that *Brady* violations are the most common type of misconduct. This dissimilarity in findings will be discussed in more detail in the next section of this chapter.

The third research question asked what do judges rely upon to make their decisions regarding misconduct or error. In the present study, judges overwhelmingly cited case law, rather than statutes or policy rationale, as a basis for their decisions regarding whether or not prosecutor misconduct had occurred. Only 20% of the cases with findings of misconduct in the Combined Sample resulted in the conviction or sentence being overturned because judges found the misconduct to be harmless error. In fact, harmless error analysis was more influential in determining case outcomes than the seriousness of prosecutor misconduct or even prosecutor intent.

The fourth research question asked if there are any sanctions directed to prosecutors if a determination of misconduct is made, and if so, what sanctions do the judges apply? In this study's analysis of appellate decisions, judges did not directly sanction prosecutors who were found to have committed misconduct, nor did they recommend in their written decisions that prosecutors should be sanctioned by an outside authority. In only 10% of the cases did trial and appellate court judges admonish prosecutors in their written decisions, often taking the unusual step of mentioning the prosecutors by name.

Summary of the Emergent Themes across the Three Studies

The re-analysis of case decisions and more in-depth case study analysis showed clearly that judges do not distinguish between misconduct and error in their appellate decision language, nor are they concerned with the intent of the prosecutor when first assessing claims of misconduct. Despite the importance placed on differentiating intentional misconduct from good faith error by the Texas and California district attorney associations in their reports, judges used the terms “misconduct” and “error” interchangeably in the combined sample cases. In many of the cases, a judge did not reach a specific finding on the misconduct claim before proceeding to the harmless error analysis.

Perhaps of greater consequence to the “misconduct versus error” discussion is that judges often did not consider the prosecutor’s intent when determining whether misconduct occurred or in conducting harmless error analysis, frequently avoiding a judgment on intent altogether. While prosecutor intent can be central in unique types of appellate claims, such as whether double jeopardy protections bar retrial, it was not addressed in most of the cases analyzed, including cases with *Brady* claims. In fact, prosecutor intent is legally irrelevant in determining whether a violation occurred under *Brady*, considered by prosecutors interviewed for this study to be one of the most common types of prosecutor misconduct.

In the harmless error analysis, the legal consequences of prosecutor misconduct are by and large a factor of the weight of the state’s evidence balanced with the prejudicial effect of the misconduct on the jury, not the seriousness of the misconduct or the intent of the prosecutor. Consequently, a strong case against the defendant can

overcome even the most egregious prosecutor misconduct when determining whether the defendant's due process rights were violated. The weight of the state's evidence was also an influential factor in deciding if a prosecutor's misconduct triggered a bar on retrial under double jeopardy protections, and in determining if suppressed evidence was material in *Brady* cases.

Finally, the inexperience of the prosecutor played a central role in why some prosecutors committed misconduct and errors. The prosecutors in two case studies lamented their own inexperience following the misconduct rulings. Current and former prosecutors highlighted the need for new prosecutors to be trained better in the law, as well as in trial practice. Often new prosecutors in small offices are expected to handle complex cases with little oversight. New prosecutors are also trained by being given bad cases with the expectation that mistakes will be made, but without consideration for the fairness of the outcome for the defendant. Instead, prosecutors in the interviews suggested a more thorough training program that includes mentorship and active supervision in the courtroom. Prosecutors did not consider ethics training, alone, to be effective in preventing misconduct.

Training was also a key component in how a prosecutor was enculturated into a particular prosecuting agency. Prosecutors noted how informal training in the pervasive "us versus them" and "win at all costs" mentalities in an office may have a significant effect on how much pressure a prosecutor may feel to push the limits of acceptable behavior in order to win cases and succeed in the office. The "us versus them" mentality may also lead to the use of ad hominem attacks during a trial in which a prosecutor uses derogatory epithets to assail the defendant.

Overall Implications

Appellate Cases as Sources for Identifying Misconduct

This study shows that appellate decisions alone are not adequate sources for identifying and policing prosecutor misconduct. They are not a good data source to discover the extent of misconduct nor do they serve as a vehicle for identifying and sanctioning errant prosecutors. First, judges often use the terms “misconduct” and “error” interchangeably, making the determination of whether misconduct has occurred a subjective judgement call for the reader. Moreover, in many cases, judges either reach an unclear decision regarding the misconduct claim, or do not reach a specific finding of misconduct at all. Additionally, it is the nature of appellate decisions that they can be overturned. In many of the cases in the present study, the decisions regarding misconduct and harmless error shifted several times as the cases made their way through both state and federal appellate courts. Although the last appellate court to review a case seemingly makes the conclusive ruling on misconduct, it is possible that the decision could be overruled if appealed to a higher court. Consequently, findings of misconduct a researcher at a particular point in time may be inaccurate if the case is overruled at a later date.

Second, because harmless error analysis, not prosecutor intent, is used in determining the case outcome, prosecutor wrongdoing is less dispositive than the strength of the State’s case against a defendant. The better the State’s case, the more leeway that a prosecutor may have to engage in intentional misconduct that will not result in an overturned conviction or new sentence. Moreover, unintentional errors coupled with a weak case result in a finding of harmful error and an overturned case decision. Thus, the

distinction between bad-intent misconduct and unintentional error is not a practical distinction when using appellate decisions as the source of data.

Claims of misconduct are not an accurate indicator of the frequency of misconduct. Defense attorneys claim misconduct and other errors on appeal for various reasons, not the least of which is to try and keep a client off of death row. Additionally, appellate courts only answer questions posed to them. In the interviews, prosecutors raised several concerns regarding misconduct that was not reflected in this study's analysis of appellate case decisions, including the issue of prosecutor overreaching and over charging in order to pressure witnesses to testify. Reviews of appellate cases will not identify this problem and others. For instance, *Brady* violation claims can only be made if the defense is aware of exculpatory evidence and appear in appellate case decisions only if the defense files an appeal.

Another important point to make is that the majority of misconduct and error identified in these appellate cases could be described as minor, such as misstatements during trial or improper questions. Often in the literature, estimates of prevalence of misconduct is combined with examples of egregious conduct with the implicit premise that the prevalence estimates all refer to serious breaches of ethics and law. This is not borne out by this analysis since the majority of misconduct was minor. Far more common in this study were ordinary lapses such as misstatements made during closing statements or inadvertent violations of evidentiary rules. Counting misconduct claims without further exploration into each case may lead to a misleading picture of prosecutor misconduct which does not represent the more common appellate cases.

Prosecutors Need and Want Training to Prevent Misconduct and Error

Prosecutors in the case studies as well as the interview subjects highlighted the need for training, particularly for new prosecutors. Ideally, training would consist of more than yearly ethics seminars or periodic Friday afternoon sessions. Instead, prosecutors suggested a more thorough training program that includes gradual advancement starting with misdemeanor cases, mentorship, and active supervision in the courtroom. Training should also include the informal enculturation of the office, which ultimately depends on the elected district or county attorney leading the office to set the expectations and standards for employees to follow. The “us versus them” and “win at all costs” mentalities in an office may contribute to the amount of misconduct and error occurring in a prosecutor agency.

The Prevalence of *Brady* Violations is Not Clear

Prosecutors in the interviews considered *Brady* violations to be the most common types of misconduct, however the ethnographic content analysis of the 190 cases indicated that *Brady* violations appeared in less than 10% of the case decisions. Most often, the appellate cases included misconduct claims in which prosecutors intentionally or inadvertently broke evidentiary rules or pushed the limits of zealous advocacy in their statements to the jury.

This discrepancy illustrates why triangulating data in qualitative studies is a valuable exercise. Why would prosecutors have a different perception of which types of misconduct is most common from what appears in appellate decisions? It is possible that they are influenced by the media coverage of egregious cases, or unaware of the frequency of routine errors made in courtrooms every day. Perhaps in their minds, they

distinguished trial misstatements and improper questioning as error compared to *Brady* violations which they perceived as misconduct. Alternatively, it is possible that *Brady* violations occur frequently but because defense attorneys are not aware of them, they do not raise *Brady* claims on appeal. This is an area that is ripe for additional research in light of recent open file and discovery laws enacted in Texas and other states in an attempt to reduce *Brady* violations. An understanding of the prevalence of *Brady* violations, compared with other types of misconduct, also directly affects the types of training prosecutors should receive.

Recommendations for Future Research

As the present research is an exploratory study, several themes emerged worthy of future research, including the relationship between prosecutor intent and harmless error analysis, the value of using appellate cases to identify and sanction prosecutor misconduct, prosecutor training and culture, and the dissimilarities between findings from the ethnographic content analysis and the interviews with prosecutors regarding the most frequent type of misconduct.

More research is needed to explore the relationship between prosecutor misconduct, unintentional error, and the harmless error analysis. Prosecutor advocacy groups responded to the Innocence Project studies by reframing the discussion of appropriate sanctions for prosecutor misconduct to focus on prosecutor intent, however this distinction appears to be meaningless as far as case outcomes are concerned. Obviously the question is relevant an ethical discussion. If the discussion of prosecutor misconduct continues to focus on prosecutor intent, these questions must be addressed in light of the current application of the harmless error analysis. An alternate approach would be to

focus research on the types of prosecutor conduct which most often result in findings of harmful error, in order to reduce violations of due process, as well as the time and resources expended by the State when cases are appealed. The findings would ostensibly guide prosecutor agencies and advocacy groups in determining the most effective response, such as training, mentoring, active supervision, internal sanctions, or public scrutiny.

Additional research is needed to determine if appellate case decisions will ever be an effective source of data for identifying and sanctioning prosecutor misconduct. Instead of using appellate decisions to count instances of misconduct and draw conclusions regarding the need for sanctions, there could be greater value in taking a deeper look at misconduct through in-depth case studies focusing on cases from specific prosecuting agencies or prosecutors individually.

Formal and informal training of prosecutors is another area in need of continued research. Findings from the case studies as well as from the prosecutor interviews highlighted the need for training for prosecutors, possibly starting in law school and then throughout their service at a prosecuting agency. Suggestions for training included focusing on trial practice, the rules of evidence, and discerning which evidence is exculpatory and material, and therefore must be disclosed. Open file laws may alleviate the need for training in disclosure requirements. Future research comparing agencies with and without open file laws may be beneficial. Additionally, research into the most effective types of training in reducing errors may focus on offices in which mentoring and active supervision is part of the training program for new prosecutors, compared with those for which this is not emphasized or feasible.

Future research should also focus on prosecutor culture and how it contributes to, or prevents, misconduct and errors. A prevalent theme throughout the prosecutor interviews was the "us versus them" and "win at all costs" mentalities that were seen as pervasive within prosecuting agencies. These attitudes may contribute to pressure to push the limits of ethical and legal boundaries in order to succeed within an agency. They may also contribute to the use of derogatory epithets towards defendants and defense attorneys during trial to fully characterize them to the jury as being in the "them" category. Future research should build on current research by Medwed (2009), Fisher (1988), and Ferguson-Gilbert (2001), in examining the effect of prosecutor culture on misconduct and errors committed in preparation for, and during, trial.

Finally, it may not be relevant or necessary to know the most frequent type of prosecutor misconduct identified in appellate decisions, to the extent that a definitive study could ever be conducted. Dissimilarities between findings from the ethnographic content analysis and findings from the interviews with prosecutors regarding the most frequent type of misconduct highlight the need for research beyond appellate cases alone in identifying common types of misconduct in order to address them effectively. More telling, perhaps, might be research into frequently committed types of misconduct within specific prosecutor agencies so that focused training can be developed and implemented within that agency.

Limitations

Several limitations of the overall study should be noted. Since the qualitative methodologies used in this study do not incorporate the measurement processes found in quantitative methodologies, they cannot be assessed using standard methods for

reliability and validity, nor are they generalizable to larger populations. Consequently, the present study was designed to address validity and reliability by collecting and recording data in a way that allows for accessibility and auditing by peer researchers. A second, independent coder reviewed coding in the ethnographic content analysis and the prosecutor interviews, and subsequently met with the researcher to resolve inconsistencies in the coding protocol. Additionally, a group of three legally trained readers checked the content analysis code sheet, one coded case study, and one coded interview, in order to verify that consistent legal meaning was derived by the researcher and the readers.

Second, the researcher had no control over how the initial sample of cases were chosen. By relying on the cases identified by researchers in four previous studies, any bias that was introduced from their selection of cases will have carried over into this study.

Third, the present study cannot account for cases of misconduct that are not recognized, either because the case disposition was not appealed, or because misconduct was not recognized by the defense attorney and brought up on appeal. Additionally, snowball sampling, especially with such a small sample, is not useful for making generalizations from the sample to the population. Consequently, none of the findings from either the NCIP or Innocence Project Texas, the response reports from the CDAA or the TCDA, nor the present study, are generalizable beyond the combined sample. The current study is an assessment of the findings from the NCIP and Innocence Project Texas reports, and the reanalysis done on these reports by the CDAA and TDCAA,

respectively. The findings in this study cannot be attributed to all prosecutors, nor should findings be generalized to all cases of prosecutor misconduct.

Finally, the researcher's findings may include bias due to her professional relationship with some of the research subjects and her previous experience as a prosecutor. Every effort has been made to recognize and minimize the possible effects of bias in the interview findings and analysis, including asking follow up questions for clarification in order to reduce assumptions as to the meaning of question responses. Additionally, all interviews were recording and transcripts were created to reduce any bias that may have occurred by the researcher selectively taking notes throughout the interviews. In order to prevent bias in coding, a second reviewer re-coded the first three interviews to test for inter-rater reliability, and three legally trained experts reviewed coding to check for consistency in legal meaning.

Conclusion

Prosecutors are in a unique position to ensure procedural safeguards are followed in order to prevent wrongful convictions. However, not all prosecutors are able or willing to do so. Both intentional misconduct and unintentional errors can contribute to violations of due process and possibly wrongful convictions. While understanding the role of prosecutorial misconduct and unintentional error is essential to reducing due process violations and wrongful convictions, there exists very little research on prosecutors generally and prosecutorial misconduct specifically.

The Northern California Innocence Project and the Innocence Project Texas conducted studies of California and Texas appellate court cases in which prosecutor misconduct was raised on appeal. As these studies are often cited to support the

conclusion that prosecutors frequently commit misconduct but are infrequently sanctioned, the validity of their findings has been questioned by two prosecutor advocacy organizations. All four organizations, however, have a vested stake in outcomes. Therefore, the present study was conducted in order to reanalyze a sample of the appellate cases in the Innocence Project studies by an objective reviewer using standard social science methodology to avoid potential bias in the methodology or findings. Three related studies were conducted to assess the validity of the Innocence Project studies, as well as explore the phenomenon of prosecutor misconduct in order to identify areas for future research.

The findings in the present study were similar to the findings in the NCIP and Innocence Project Texas study in terms of the types and frequency of misconduct, and accuracy in reporting the percentage of harmless error findings from the sample cases. Findings from the present study were not consistent with the findings of the TDCAA response report regarding the frequency of misconduct in the 91 Texas cases. The TCDA report found no prosecutor misconduct in 11 of the cases, whereas reanalysis in the present study found that courts ruled no misconduct in only four of the 11, ruled there was misconduct in two of the cases, and reached an ambiguous ruling regarding misconduct in five of the cases.

The more important conclusion of the present study, however, is that counting claims of misconduct in appellate cases is not an accurate indicator of the frequency of misconduct which occurs generally. Defense attorneys raise multiple claims misconduct and other errors on appeal for various reasons, but most are not found to have a prejudicial effect on the trial. Also, appellate courts only answer questions posed to them.

There is no way to account for additional instances of misconduct that are not raised on appeal.

Additionally, appellate decisions are not adequate sources for identifying prosecutor misconduct because judges either use the terms “misconduct” and “error” interchangeably, reach an unclear decision regarding the misconduct claim, or do not reach a specific finding of misconduct at all. Moreover, it is the nature of appellate decisions that they can be overturned. Even a seemingly conclusive ruling on misconduct could be overruled if appealed to a higher court.

Appellate cases are poor sources for policing prosecutor misconduct in part because they focus on legal analysis, not necessarily the culpability of the prosecutor. Because the harmless error analysis, not prosecutor intent, is used in determining the consequences of misconduct, the outcome of a case is less dispositive of the prosecutor’s wrongdoing as it is of the strength of the State’s case against a defendant. Only if lack of ill intent always resulted in harmless error rulings, or if malicious intent always led to harmful error rulings, would the distinction be practical in identifying which prosecutors were deserving of sanctions. Instead, the dispositive factor in most harmless error findings is not intent, but the strength of the State’s case. Moreover, judges often do not consider the prosecutor’s intent when determining whether misconduct occurred or in conducting harmless error analysis. A finding of prosecutor misconduct is a legal conclusion, not necessarily one of culpability. It is therefore not constructive nor practicable to utilize appellate cases to formulate the issue of misconduct in terms of intentional misconduct or inadvertent error to identify prosecutors who are deserving of sanctions.

Formal and informal training of prosecutors is an important consideration in the work to understand and prevent prosecutor misconduct and errors. Starting in law school, prosecutors most likely need training focused on trial practice, the rules of evidence, and discerning which evidence must be disclosed. Additionally, mentoring and active supervision have been suggested as features of an effective training program.

Prosecutor culture may also play a significant role in contributing to misconduct and errors. A prevalent theme throughout the prosecutor interviews was the "us versus them" and "win at all costs" mentalities that were seen as pervasive within prosecuting agencies. These attitudes may contribute to pressure to push the limits of ethical and legal boundaries in order to succeed within an agency.

The disparity between the prosecutors' perceptions and the findings from the appellate cases regarding the prevalence of *Brady* violations highlights the need for future research into identifying the most common types of misconduct, as well as explaining the disparity between prosecuting in practice and prosecuting as seen through appellate cases. An accurate understanding of the types of misconduct and their prevalence within specific jurisdictions would inform policy makers in addressing them effectively, as well as informing prosecutor agencies and advocacy groups in the most effective approaches to training.

More research is needed in order to understand how and why prosecutors engage in intentional misconduct and good faith error leading to misconduct. Future research should focus on the relationship between prosecutor intent and harmless error analysis, the role of prosecutor training and culture in preventing misconduct and error, and the dissimilarities between findings in from the ethnographic content analysis and the

interviews with prosecutors regarding the most frequent type of misconduct. Knowledge from this research will inform policy makers and legislators in addressing prosecutor misconduct, will be helpful in creating more effective prosecutor training, and will encourage the design and implementation of meaningful prosecutor disciplinary systems that contribute to reducing wrongful convictions.

This dissertation study has contributed to the body of research on prosecutor misconduct in the several ways. First, it has raised questions regarding the suitability of using only appellate decisions for identifying the frequency and severity of misconduct. Second, it has identified the significance of the harmless error analysis over prosecutor intent in policy discussions regarding appropriate sanctions for prosecutor misconduct. Next, it has identified a disparity between prosecutors' perceptions of common misconduct and those identified through appellate cases which warrants future research. Finally, it has reinforced concerns regarding the negative impact of prosecutor culture in furthering misconduct.

APPENDIX SECTION

Appendix A

Initial Coding Protocol for Ethnographic Content Analysis of 190 Appellate Decisions

1. Case citation
2. Procedural History
3. Subsequent History
4. Brief factual summary of case
5. Specific misconduct / error alleged (description of all)
6. Court's decision (choose one)
 - a. Misconduct leads to harmful error / Conviction overturned
 - b. Misconduct leads to harmless error / Conviction sustained
 - c. Unintentional error leads to harmful error / Conviction overturned
 - d. Unintentional error leads to harmless error / Conviction sustained
 - e. No misconduct or error / Conviction overturned on other grounds
 - f. No misconduct or error / Conviction sustained
7. Rationale for ruling on misconduct / Narrative exemplar
8. Rational for ruling on unintentional error / Narrative exemplar
9. Court's support for decision
 - a. Case law
 - b. Statute
 - c. Public policy
10. Themes (Major themes such as explanations for misconduct or error, descriptive language used by judges, repetitive language or terms, defense attorney role)
11. Researcher comments

Appendix B

Initial Coding Protocol for Case Studies

1. Case citation
2. Procedural History
3. Brief factual summary of the case
4. Ultimate disposition of the case (court's holding on misconduct)
5. Documents / sources included in case study
6. Primary questions (This list may change or be enlarged during first case studies)
 - a. What is the prosecutor's reputation in the community?
 - b. Were there allegations or documentation of prior misconduct?
 - c. What is the relationship between the judge and the prosecutor?
 - d. Was the judge a former prosecutor?
 - e. What is the relationship between the police and the prosecutor?
 - f. Was there media coverage of the case?
 - g. Was there pressure from the media to resolve the case?
 - h. Were there questions of victim / witness credibility?
7. Themes (Major themes that run through all or majority case studies)
8. Researcher comments

Appendix C

Interview Consent Script

Hello, I am Tiffany Cox Hernandez, and I am a doctoral student at Texas State University. I am researching the issue of prosecutor intentional misconduct and good faith error leading to wrongful convictions. We were introduced through _____, and you tentatively agreed to be interviewed for this research. Before we begin, I would like to give you some information that explains what I am doing and to help you decide if you will be willing to participate. Are you ready to continue?

You are being asked to participate in a research study that I am conducting in order to fulfill the requirements to complete a dissertation for the Texas State University School of Criminal Justice. I am interested in understanding more about why prosecutors engage in intentional misconduct, and make good faith errors, as well as the extent to which this occurs. I will be examining appellate cases from California and Texas, and am also conducting interviews with prosecutors and former prosecutors to better understand the lived experiences that are common to prosecutors, as well as to compare the perceptions of prosecutors to those of judges that are reflected in the appellate cases. I am the primary researcher working under the supervision of Dr. Joycelyn Pollock (jp12@txstate.edu).

This project (add IRB Reference Number) has been approved by the Texas State University Institutional Review Board (add IRB approval date). Questions or concerns about the research, research participants' rights should be directed to the IRB chair, Dr. Jon Lasser (1-512-245-3413 / lasser@txstate.edu) and to Becky Northcut, Director, Research Integrity & Compliance (512-245-2314 / bnorthcut@txstate.edu).

What I will ask: I will ask you questions about your experiences as a prosecutor, about the office in which you work(ed), and about your perceptions of prosecutor misconduct and error in the office(s) in which you work(ed). This interview should take approximately one hour. The interview will be recorded, and I will be taking notes. If you do not want to be recorded, I will take only notes.

Participation is voluntary: Participation in this study is completely up to you. It is entirely voluntary. If you decide not to participate, you may end this interview at any time. You can choose to skip any questions that do not feel comfortable answering.

Confidentiality: All identifying information that I collect from you, including the office in which you work(ed), will remain confidential. This means that only I will have this information. It will not be shared with anyone without your written consent, and it will not be published. All research materials will be kept in a secure location by the researcher.

Risks and benefits: I need to identify any risks associated with your participation. The only potential risks involved in this study may include a feeling of discomfort associated with answering the questions. Possible benefits include being able to voice your opinion as well as adding to the research on prosecutor misconduct and good faith error.

If you have questions: If you have questions, you may ask them now, at any time during the interview, or later. You may also request the results of this survey as well by emailing me at TC1337@txstate.edu.

Do you have any questions?
Are you willing to participate?

VERBAL CONSENT DOCUMENTATION FOR PARTICIPATION

Subject: Prosecutor misconduct and good faith error

This consent serves as documentation that the required elements of informed consent have been presented orally to the participant by using the consent script above. Verbal consent to participate in this interview has been obtained by the below researcher on the below date documenting the participant's willingness to continue with the interview.

Researcher's Name (Printed)

Researcher's Signature

Date

Appendix D

Interview Template

Information about the Interview:

Interviewee: _____ Interviewer: _____

Date: _____ Time: _____ Place: _____

Interview Questions

1. What is your experience as a prosecutor? Size of agency / office?
2. What types of cases did you prosecute? How long were you in this position?
3. Describe your experiences with the issue of prosecutor misconduct and unintentional error in your office.
4. Describe the office culture regarding prosecutor misconduct.
5. What types of misconduct or error do you think most commonly occurred?
6. What were the reasons for misconduct occurring? Error occurring?
7. What work do you do now? Has your perception of prosecutor misconduct changed from this new position?
8. Do you suggest any solutions to the prosecutor misconduct? Solutions to error?
9. Are there any proposed solutions that you feel would not work?
10. What else would you like to tell me about prosecutor misconduct or error?

Wrap Up and Thank Participant for Time

- Thank you very much for your time today. I appreciated hearing your insights on this topic.

- Would you like to recommend a friend or colleague that may want to participate in this study by being interviewed?

Appendix E

Initial Coding Protocol for the Interviews

1. Interviewee job history in criminal justice field
2. Experiences with prosecutor misconduct and unintentional error in your office
3. Office culture regarding prosecutor misconduct
4. Types of misconduct or error commonly occur
5. Reasons for misconduct or error occurring
6. Any changes in perception of prosecutor misconduct
7. Solutions to the prosecutor misconduct or error
8. Proposed solutions that would not work
9. Themes (Major themes that run through all or majority interviews)
10. Researcher comments

Appendix F

Types of Misconduct from Chapter Four with Excerpts from Appellate Cases

1. Improper comments during closing statement: Stating facts not in evidence

STATE: She's not here to speak on her behalf. We only have a defendant's self-serving statements... But we do have this. We have the trauma that she suffered. The reason the defendant had to keep her body in and have decomp (sic) eat away the remains of whatever trauma she faced on her face, to bleed this kind of blood, she did not go gentle into that good night. She had trauma that cannot be explained by the defendant's little study in forensics and by watching all these people die in the so-called—in the places that he's been. (*People v. Broughton*, 2008)

2. Improper comments during closing statement: Drawing conclusions outside the record

The most troubling line of argument during the prosecutor's closing argument was the repeated statement that there was an alien-smuggling 'business.' The government contends that this line of argument was just a reasonable inference. There was nothing in the record, however, to support an inference connecting Fimbres with any such business. Nor did the prosecutor use any language to make it clear to the jury this was an inference. The suggestion that Fimbres was an employee of the business and that this was 'her job' is particularly problematic, as it suggests that she smuggled aliens regularly. There was no evidence of other smuggling operations. (*United States v. Fimbres*, 2002)

3. Improper comments during closing statement: Prejudicial mischaracterization of the defendant

During closing argument at the guilt-innocence stage of trial, the following exchange occurred:

STATE: [T]he rift started and it got worse and worse and worse. She went to the park with her dad and the defendant and his wife, she's there with three adults, three authority figures and one who is a child molester. (*Ex parte Munson*, 2005)

4. Improper comments during closing statement: Referring to defendant's demeanor:

Reference to defendant's "dead pan, insensitive, expressionless face; ... description of defendant's "cold fish eyes on everybody and everything that has come in here, and he just merely stared and watched very impassively, very cold heartedly, much like he probably did that morning outside the fire when he watched and listened. (*Willis v. Cockrell*, 2004)

5. Improper comments during closing statement: Eliciting improper testimony from a

witness

Testimony which was previously excluded during pretrial hearing [T]he court properly prohibited both parties from introducing evidence about the connection between nervousness at the border and criminal culpability. Again, however, we are troubled by the prosecutor's conduct. At trial, the AUSA elicited improper testimony from Agent Thomas Hammerly and demonstrated a disregard for the district court's pretrial order, as well as for her own obligations as a prosecutor. (*United States v. Baltazar-Murrietta*, 2002)

6. Improper hearsay

During Mercado's testimony, the prosecutor asked her if she remembered telling Detective McGuire that the victim was afraid of Broughton. The trial court sustained defense counsel's objection and struck Mercado's 'yes' answer. The prosecutor's next question was whether Mercado was 'in fear of the defendant,' to which the defense objection was also sustained. Similarly, during her direct examination of Detective McGuire, the prosecutor asked: 'Remember when you stated in your interview to the defendant, you had mentioned a doctor who had stated that [Davila] ... was in fear of the defendant?' The trial court struck McGuire's 'yes' answer. (*People v. Broughton*, 2008)

7. Asking hypothetical questions based on facts not in evidence

[T]he prosecutor asked Dr. Rosenthal to assume he had spoken with a probation officer named Maylene Pastor, that he found her credible, and that she had told him defendant 'was extremely manipulative.' She then asked, 'Would that change your opinion that [defendant] was manipulating you?' Dr. Rosenthal answered that he did not think defendant was manipulating him. Because the prosecutor did not present any evidence from a probation officer named Maylene Pastor, defendant contends this was an improper hypothetical question. (*State v. Boyette*, 2002)

8. Prejudicial statements made to the jury (not during closing statement): Inflammatory comments

Appellant was then questioned about the time Erica left the bus. After being asked to examine a chart containing the bus schedule, [the prosecutor] interrupted. (She) stated she did not know which side of the chart appellant was discussing, and thus if he was discussing the westbound or eastbound schedule. The trial court requested appellant separate the two. [The prosecutor] then stated, 'Can you ask him to keep his voice up? I can tell he's lying, because his lips are moving, but I can't hear him.' The trial court responded, 'Shut up. Don't say that.' The trial court excused the jury for a recess. (*People v. Howell*, 2002)

9. Prejudicial statements made to the jury (not during closing statement): Implying a

defendant is guilty solely because they are on trial
During voir dire, the prosecutor asked whether any of the panelists honestly believed that after the police found Bentler's body 'they went out and just rounded up three folks, just picked three folks?' After receiving no response, the prosecutor said, 'Great.' Defense counsel objected and moved for a mistrial or dismissal of the panel, arguing the question suggested defendants were guilty just because they were on trial. The court denied the motions. (*People v. Jordan*, 2002)

10. Miscellaneous misconduct: Approaching defendant in bathroom to ask about testifying against co-defendants

Beardslee also claims that he is entitled to an evidentiary hearing on whether Prosecutor Carl Holm encouraged him to waive his constitutional rights and testify against his co-defendants while his attorney was not present. According to Beardslee, Holm approached him during a bathroom break and asked him if would be willing to testify. Although Holm made no explicit promise, Beardslee understood this to be an implicit promise for fair treatment. (*Beardslee v. Woodford*, 2004)

11. Miscellaneous misconduct: *Batson* violations:

During jury selection, a number of prospective jurors were removed for cause until 43 eligible jurors remained, 3 of whom were black. The prosecutor used 3 of his 12 peremptory challenges to remove the black prospective jurors. The resulting jury, including alternates, was all white. (*Johnson v. California*, 2005)

12. Misstatements of the law: Incorrect statements regarding the presumption of innocence:

STATE: '[I]n a short period of time, the case will be handed to you. You're going to go back into that deliberation room and that presumption of innocence, that presumption of innocence that these men have all been cloaked with for the last year, the last year while we've litigated motions-you've heard about all the motions that have been held beforehand. That's why it's taken so long to get here. That presumption, when you go back in the room right behind you, is going to vanish when you start deliberating. And that's when the presumption of guilt is going to take over you' [interrupted by objection]

When given the opportunity to respond, the Prosecutor confirmed that his statement was intentional: 'That's what I said, when they get back there and start looking at it is when the presumption takes over, presumption of guilt.' (*United States v. Perlaza*, 2004)

13. Misstatements of the law: Improper comments on the defendant's failure to testify

Denney complains of the prosecutor's language. For example: 'Now, presumably nobody likes to talk with the police. I shouldn't say nobody. Most people. However, if you did not commit a murder and you knew the police were looking to talk to you about it and that they were outside the front door, I would submit that most innocent people would talk to the police, try to find out what the circumstances are, why are they saying this, and hopefully be able to talk with them and explain why you're not guilty of the murder. That is not what [Denney] does....' (*People v. Denny*, 2006)

14. *Brady* violations: Failure to disclose a non-testifying potential witness and co defendant

Inzunza also argues that *Brady* required disclosure of statements by a non-testifying potential witness and co-defendant, D'Intino, who also characterized payments to the councilmen as 'campaign contributions.' As a matter of law, such statements are not exculpatory, and therefore they are not material under *Brady*. (*People v. Inzunza*, 2009)

15. *Brady* violations: Failure to turn over drug tests

In the alternative, Jacques contends her conviction should be reversed due to prosecutor's misconduct by failing to provide defense counsel with the drug test results prior to trial. After defense counsel learned the results of the drug test, he requested a sidebar conference. At that conference, the prosecutor stated the drug test result had been turned over to the defense. However, the prosecutor had no documentary proof that the result had been given to the defense. The court granted defense counsel's motion to exclude the drug test result. By granting the defense motion to exclude the evidence, the court imposed appropriate sanctions on the prosecution for its untimely disclosure of the drug test result. (*People v. Jacques*, 2002)

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