

DEFENSE ATTORNEYS' PERCEPTIONS OF PROSECUTORIAL MISCONDUCT

by

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## ABSTRACT

According to the National Registry of Exonerations (2015), more than 1,500 individuals have been declared factually innocent or had a criminal conviction overturned in the United States since 1989, and official misconduct by government actors, including police and prosecutors, was a contributing factor in nearly half. Prosecutorial misconduct, despite being identified as a leading cause of wrongful convictions, is believed to be largely undetected. It has been posited that most instances of prosecutorial misconduct will never be discovered (Barkow, 2010), and an accurate assessment of the prevalence of prosecutorial misconduct has not been made. Prosecutors enjoy a great deal of autonomy in their work and remain isolated from the research community. They are generally difficult to access and are reluctant to share information (Johnson, 2014). Defense attorneys work with prosecutors regularly and have a unique opportunity to become aware of acts of misconduct. This exploratory study employed a mixed-methods approach, using both qualitative interviews and self-administered surveys to determine defense attorneys' perceptions of the prevalence and types of prosecutorial misconduct, as well as their assessments of proposed responses to misconduct. Findings indicate that defense attorneys perceive prosecutorial misconduct as a relatively frequent event that is somewhat underreported, due in part to a fear of retaliation from prosecutors and a perception that the current sanctioning process is ineffective. Selective prosecution, the failure to disclose evidence, improper conduct with informants and/or witnesses, and improper conduct at the grand jury stage were identified as the most common types of

prosecutorial misconduct. Increasing sanctions, increased training, and the open files policy were identified as promising responses to prosecutorial misconduct. Findings failed to find a relationship between prosecutorial experience and perceptions of the prevalence of misconduct.

## I. INTRODUCTION

Gary Dotson became the first person to be exonerated by DNA evidence in 1989, when his convictions for rape and aggravated kidnapping were vacated after semen found in the victim's underwear was tested and found to be from an unknown suspect, not Dotson (Acker & Redlich, 2011). The Innocence Project has since identified 325 individuals exonerated based on DNA evidence, and 20 of them had been sentenced to death (Innocence Project, 2015). According to the National Registry of Exonerations, a project of the University of Michigan Law School, there have been a total of 1,553 exonerations in the United States since 1989 (2015)<sup>1</sup>. As the number of wrongful convictions continues to rise, the topic has gained increasing attention from the research community.

The devastating consequences of wrongful conviction cannot be understated. The National Registry of Exonerations estimates that wrongfully convicted inmates have collectively spent about 12,500 years in prison, averaging ten years each. Thirty states plus the federal government have statutes requiring compensation for the wrongfully convicted (Innocence Project, 2014). While financial compensation is an important gesture, it hardly makes up for the experience of being an innocent person incarcerated. There is no way to make up for the lost time with family, lost employment or educational opportunities, decreased quality of health care, and the psychological toll of wrongful incarceration.

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<sup>1</sup> The National Registry of Exonerations' definition of exoneration is as follows: "A person has been exonerated if he or she was convicted of a crime and later was either: (1) declared to be factually innocent by a government official or agency with the authority to make that declaration; or (2) relieved of all the consequences of the criminal conviction by a government official or body with the authority to take that action."

A number of causes of wrongful convictions have been identified by the Innocence Project (2015), including eyewitness misidentification, forensic science errors, false confessions, attorney incompetence or poor performance, and government misconduct. Of the 1,769 exonerations identified by the National Registry of Exonerations, 916 (52%) were the result, at least partially, of official misconduct, which includes both police and prosecutorial misconduct. Misconduct committed by prosecutors is especially troubling, since they are officers of the court and should serve as a first line of defense against wrongful conviction (Joy, 2006).

Prosecutorial misconduct that does not result in a wrongful conviction is equally concerning. The failure of prosecutors to live up to their legal and ethical obligations can result in an unfair trial and the violation of civil rights. This has the potential to subvert the criminal justice system, even if the victim of the misconduct is not convicted. In order for our system to function properly, all participants must play by the rules. This is especially true of those individuals representing the state.

It is impossible to gauge the prevalence of prosecutorial misconduct, because no objective national statistics exist. Additionally, researchers hypothesize that most of it will never be discovered (Barkow, 2010). Reports published by the Innocence Project and other wrongful conviction research groups provide some background on the frequency with which misconduct occurs, but the methodologies of these studies have been criticized by prosecutor groups. The studies often fail to distinguish between intentional and unintentional misconduct, and the conceptual difference between the two warrants more precise categorization. More research is needed to discover the frequency of prosecutorial misconduct, and the types of misconduct that are occurring.

The purpose of this dissertation is to increase the knowledge base regarding prosecutor misconduct. Existing data sources, such as wrongful conviction cases or court holdings that describe misconduct, are a small sample of the potential range of misconduct. An innovative way of assessing the problem is through the experiences of other courtroom participants who may be aware of the misconduct. Defense attorneys are an ideal source of information about prosecutorial misconduct because of their experience with prosecutors, but they have been largely ignored by researchers. Specifically, this dissertation attempted to answer the following research questions:

1. What is the prevalence of prosecutorial misconduct as identified by defense attorneys?
2. What do defense attorneys perceive as the most common types of prosecutorial misconduct?
3. How do defense attorneys respond to suspected prosecutorial misconduct?
4. What methods, including methods that have been proposed but are not in practice, do defense attorneys perceive as most successful in preventing prosecutorial misconduct?

This dissertation is divided into seven chapters, and a set of appendices. The first chapter briefly introduces the purpose of the current research. The second chapter consists of a thorough review of the literature addressing prosecutorial misconduct. The third chapter presents and justifies the methodology by which the research will be conducted. The fourth chapter discusses the findings of the qualitative interviews with defense attorneys. Quantitative findings from 107 surveys are presented in Chapter 5. The sixth chapter integrates the qualitative and quantitative findings and discusses policy

implications. Chapter Seven presents conclusions, including a summary of major points from the literature review and findings. Appendices include the interview protocol, survey instrument, and approval from the institutional review board to conduct the research.

## II. LITERATURE REVIEW

This chapter consists of six sections providing background on prosecutorial misconduct. First, various types of prosecutorial misconduct are presented. The second section provides an introduction to several theories that can be applied to better understand why prosecutors intentionally engage in misconduct that subverts the system of justice. The third section discusses factors that contribute to intentional misconduct. The fourth section explains the different types of immunity that protect the actions of prosecutors. The fifth section presents a number of proposed responses to prevent prosecutorial misconduct. The final section discusses how little we know about the prevalence of prosecutorial misconduct.

### Types of Prosecutorial Misconduct

According to the Center for Prosecutorial Integrity (2016, paragraph 1), prosecutorial misconduct can be defined as “as any conduct, intentional or inadvertent, during the course of prosecution that violates the applicable code of professional ethics, breaks a pertinent law, or prejudices...the administration of justice.”

The potential for misconduct exists at virtually every stage of a criminal trial, including the decision to file charges and to initiate grand jury proceedings. One type of misconduct involves abuse of the charging function. Prosecutors wield a great deal of power in deciding against whom to file charges and what charges to file. These decisions are generally private and insulated from judicial review, which makes it difficult to prove that misconduct occurred at this stage (Henning, 2009).

Bad faith prosecution is identified by Gershman (2014) as the epitome of abuse of power. Prosecutors acting in bad faith may bring minor or questionable charges, or bring

charges without any real belief that a conviction will follow. This can be motivated by potential personal gain, desire for retaliation, or cynical practice to increase convictions. An example of charging abuses occurred when former Maricopa County, Arizona, district attorney, Andrew Thomas, and his former deputy, Lisa Aubuchon, were disbarred for bringing unfounded criminal and civil charges against several public officials (*State Bar of Arizona v. Andrew Thomas, Lisa Aubuchon, and Rachel Alexander*, 2012).

The prosecutor also exerts tremendous influence in the grand jury proceeding where the prosecutor presents the case for the grand jury to decide whether to issue an indictment or not. Gershman (2014) asserts that the potential for misconduct is especially great during grand jury proceedings because judges are not involved in the process, resulting in a lack of oversight. Prosecutors are supposed to remain neutral during grand jury proceedings, and misconduct results if they harass witnesses or jurors, intimidate witnesses or jurors, make misleading statements, provide jurors with incorrect instructions, or misstate the law. As an example of this type of misconduct, an ethics complaint was recently brought against St. Louis County Prosecutor Bob McCulloch and his assistant prosecutors, Kathi Alizadeh and Sheila Whirley, for their actions in the grand jury proceedings in the Michael Brown, Jr. case (Lippman, 2015). Brown was fatally shot by Officer Darren Wilson in August, 2014. The ethics complaint alleges that jurors were presented with an outdated instruction about police use of force law that was ruled unconstitutional by the U.S. Supreme Court in *Tennessee v. Garner* (1985), and that prosecutors knowingly allowed witnesses to present perjured testimony, including Officer Wilson (Lippman, 2015).



Prosecutorial misconduct may also occur during plea bargaining. Gershman (2014) explains that improper inducements for the defendant to plead guilty can constitute misconduct. Prosecutors may make false promises to a defendant, including a promise to drop other charges or “put a good word in” to the judge. They may overcharge, meaning that they present the defendant with charges at plea bargaining that are more serious than what they have evidence to support and what would be brought to trial. Communicating with a defendant in the absence of his or her attorney could also constitute misconduct. While the United States Supreme Court held that prosecutors are not required to disclose impeachment evidence at plea bargaining (*United States v. Ruiz*, 2002), they did not elaborate as to other types of exculpatory evidence. The possibility that defendants may not be aware of all relevant evidence calls into question whether the decision to enter into a plea bargain is well-informed.

Prosecutors are limited in the statements they may make to the media regarding active cases. They are generally discouraged from making public statements because it could potentially prejudice a defendant’s right to a fair trial by an impartial jury (Gershman, 2014). Misconduct occurs when prosecutors make public statements criticizing a defendant’s bad character, disclose confessions, or release grand jury material. Former North Carolina Prosecutor Michael Nifong was disciplined for public statements he made in the infamous Duke University Lacrosse case, in which team members were accused of raping a hired dancer. In conversations with the media, Nifong compared the case to a cross burning, stated that the accuser could identify at least one of the offenders, and criticized the defendants for refusing to speak to investigators (Cassidy, 2008). These statements and other acts of misconduct led to Nifong’s

disbarment in 2007 (*North Carolina State Bar v. Michael B. Nifong*, 2007). In a more recent example, New York Assemblyman Sheldon Silver filed a motion to have his indictments for mail fraud, wire fraud, and extortion dismissed on the basis that U.S. Attorney Prett Bharara made improper statements to the media about Silver's guilt on two occasions prior to the grand jury returning the indictment (Weiser, 2015). In her ruling, District Judge Valerie Caproni acknowledged being troubled by Bharara's statements, but denied Silver's motion (*United States of America v Silver*, 2016). Silver was convicted and sentenced to 12 years in prison (Weiser & Yee, 2016).

Misconduct may also occur when prosecutors make misleading statements or reference inadmissible evidence during pre-trial hearings and trials. In *Alcorta v. Texas* (1957), Alcorta was convicted of murdering his wife after catching her kissing another man identified as Castilleja. Alcorta's defense was that the murder was a crime of passion. Castilleja was the only witness to the murder, and testified that he had not been romantically involved with Alcorta's wife, discrediting Alcorta's narrative of events. Following Alcorta's conviction, Castilleja provided a sworn statement that his testimony had been false, and that the prosecutor in the case told him not to volunteer information about his romantic relationship with Alcorta's wife. In Alcorta's appeal, the United States Supreme Court held that prosecutors cannot solicit false testimony, and have a duty to correct testimony they know to be false.

Former Pima County, Arizona prosecutor Kenneth Peasley was disbarred for his misconduct in the murder trial of Andre Minnitt and Christopher McCrimmon. Peasley allowed Detective Joseph Godoy to falsely testify that a police informant had identified Minnitt and McCrimmon as the offenders, when Minnitt and McCrimmon were actually

first identified by an anonymous tip and their names were supplied by Godoy to the informant (Roberts, 2005). In their report, the Disciplinary Commission noted the especially egregious nature of Peasley's actions as they took place in a death penalty case (*State Bar of Arizona v. Peasley*, 2002).

The impact of prosecutor misstatements is especially detrimental in death penalty cases. Misconduct occurring at this stage in a capital trial can have devastating consequences. Prosecutors may ask the jury to sentence the defendant for improper reasons or with emotional appeals (Platania & Moran, 1999). Brewer (2001) indicates that prosecutors have repeatedly made statements regarding a defendant's mindset at the time of the crime and expressed their personal views regarding the death penalty, despite the fact that they are not permitted to make such remarks. While judges are presumably desensitized and able to maintain a more objective position, jurors may be influenced by this type of misconduct.

Prosecutors are also responsible for ensuring the accuracy and admissibility of their own statements made during hearings, trial, and sentencing. Potential misconduct involves mentioning inadmissible evidence, including polygraph tests or statements made during plea negotiations (Gershman, 2014). Ted Duffy, deputy attorney for Maricopa County, Arizona, had his license to practice law suspended for 30 days in addition to one year of professional probation in 2009 (*State Bar of Arizona v. Duffy*, 2009). Duffy brought charges of first degree murder against Edwin Martin Jones. The State Bar of Arizona reviewed the case following a recommendation from the judge, who reported that Duffy repeatedly mentioned inadmissible evidence during the trial (Kieffer, 2009).

Prosecutors are not allowed to engage in overly inflammatory conduct during a trial, including that which “appeals to jurors’ fears, passions, and biases” (Gershman, 2014, p. 448). Inflammatory conduct includes showing shockingly gruesome crime photos or pornography to jurors arguably to simply scare jurors. Pima County, Arizona Deputy Attorney Thomas Zawada was placed on one year of professional probation, and his license to practice law was suspended for six months and one day for his inflammatory conduct in the trial of Alex Vidal Hughes. The unanimous decision relied on Zawada’s appeal to fear (he told the jurors that if they failed to convict Hughes, no one was safe). In addition, they noted his prejudice and disrespect for the mental health experts of the defense, and for making improper arguments to the jury (*Supreme Court of Arizona v. Zawada*, 2004).

Inflammatory statements made at sentencing are also problematic, especially if sentencing is decided by jurors (Gershman, 2014). In *Hance v. Zant* (1983), the Eleventh Circuit of the United States Court of Appeals found that a prosecutor erred by instructing a sentencing jury that it must impose the death penalty because nobody would be safe if the defendant remained in prison due to his possible escape, and encouraging the jurors to do their part in the war against crime.

One of the most prevalent types of misconduct involves the failure to disclose required evidence to the defense. A prosecutor’s duty to disclose evidence is identified in the American Bar Association’s Model Rule 3.8 (d), adopted subsequent to *Brady v. Maryland* (1963). According to this rule, prosecutors must:

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the

offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal

Prosecutors are required to disclose any and all exculpatory evidence to the defense, including that which may influence sentencing after a conviction is obtained. Every state bar association has adopted some type of disclosure rule, with sanctions for failure to comply (Smith, 2008). Guidance on the types of evidence that must be disclosed is provided in *Brady v. Maryland* (1963) and subsequent case law.

In the United States Supreme Court's 1963 case of *Brady v. Maryland*, Brady and his accomplice were separately tried for first degree murder, and both defendants were found guilty. Prosecutors failed to provide Brady's attorneys with an extrajudicial statement in which the accomplice admitted to actually killing the victim. The Court found that the suppression of the statement violated Brady's constitutional due process rights under the Fourteenth Amendment. In further explanation, the Court indicated that "the suppression by the prosecution of evidence favorable to an accused upon request violated due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution" (*Brady v. Maryland*, 1963, p. 87).

The *Brady* decision means that judges are not required to consider the intent of the actor to determine if prosecutorial misconduct has occurred. Instead, judges consider whether the conduct violated an established rule of trial practice, and if the defendant's rights were violated (*U.S. v. Gonzalez*, 1991). Gershman (1998) argues that intent should

be considered, as it is relevant to the level of harm caused by the misconduct. Prosecutor offices are often plagued by large caseloads and understaffed offices with high turnover (Barkow, 2010), which can affect a prosecutor's ability to properly try a case.

Prosecutors may make an honest misstatement at trial, or deem an exculpatory piece of evidence as immaterial. They may misunderstand a policy or court holding, or misplace a piece of evidence. Given the grave consequences, some argue that the negligence associated with inadvertent misconduct is also blameworthy (Green & Yaroshefsky, 2016).

The Court revisited the disclosure requirements of prosecutors in *United States v. Bagley* (1985), in which a single standard for determining materiality was adopted (Gier, 2006). Evidence (including exculpatory evidence and that which is related to impeachment) is considered material and must be disclosed if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" (*United States v. Bagley*, 1985, p. 682). Barkow (2010) explains that Brady violations are generally dealt with post-conviction, and convictions are only reversed if the Court finds that the evidence is material, meaning that it is relevant to the case, and the error not "harmless," meaning that the error did impact the outcome of the trial. A harmless error ruling means that the prosecutorial misconduct in not disclosing the exculpatory evidence had no bearing on the case outcome.

Throughout the criminal proceedings, prosecutors are responsible for determining if a piece of evidence is exculpatory, which is potentially problematic. Courts continue to disagree on what constitutes materiality (Green, 2010). Some argue for the removal of

the “material” standard because it is difficult for prosecutors to determine materiality (Polzer, Nhan, & Polzer, 2014). One assumes that if a prosecutor believed that evidence was truly material and exculpatory, he would not have brought charges in the first place (Barkow, 2010). This lack of clarity in how prosecutors must define material and exculpatory may be a contributing factor to unintentional prosecutorial misconduct.

Alan Beaman sued former McLean County, Illinois prosecutors James Souk and Charles Reynard for their actions in the trial that led to his wrongful conviction of the murder of his ex-girlfriend. The prosecutors withheld evidence regarding another suspect who had previously been romantically involved with the victim and lived near her. This suspect had a known history of domestic violence and claimed that the victim owed him money at the time of her murder (National Registry of Exonerations, 2015). Though his suit against the prosecutors who tried the case was dismissed in 2015 due to a finding of no error, Beaman has been granted a certificate of innocence and a pardon from Illinois’ governor (Vincent, 2015). Interestingly, both Souk and Reynard went on to become judges in the county (Brady-Lunny, 2014). The murder case remains unsolved.

Shawn Massey was wrongfully convicted of kidnapping in Charlotte, North Carolina, serving nine years in prison before being exonerated in 2010. The prosecution’s case heavily relied on the victim’s identification of her attacker (Scripps, 2014). The prosecution failed to disclose to the defense that the victim had expressed doubt in her identification of Massey to prosecutors after seeing Massey in court (National Registry of Exonerations, 2015). The conviction was vacated.

Kristine Bunch was convicted in 1996 of setting a fire in her trailer that killed her three year old son in Decatur County, Indiana. Bunch was exonerated in 2012 after ATF

reports surfaced stating that no evidence of accelerant was found in the trailer. These reports, not provided to the defense, directly contradicted prosecution analysts who testified at trial that heavy petroleum distillate had been found in the child's bedroom (National Registry of Exonerations, 2015). Charges were dropped against Bunch in 2012 (Mariano, 2015).

In addition to making inappropriate statements to the media, Michael Nifong, the district attorney who prosecuted the Duke University Lacrosse case, also failed to disclose evidence showing that none of the defendants' DNA was present on the victim (*North Carolina State Bar v. Michael B. Nifong*, 2007). Former Texas district attorney Ken Anderson was jailed for official misconduct after he failed to disclose exculpatory witness statements to the defense in the Michael Morton case. Morton served nearly 25 years in prison before being exonerated (Lindell, 2013b).

As a final example of cases involving evidence suppression, former Burleson County, Texas District Attorney Charles Sebesta was recently disbarred for his actions in the case of Anthony Graves. Graves served 18 years in prison before his exoneration. In addition to presenting false testimony and making a false statement to the judge, Sebesta failed to disclose a statement made by Graves' co-defendant indicating that he had committed the crime alone (*State Bar of Texas v. Sebesta*, 2015).

There are many reasons why Brady violations continue to occur, both intentionally and unintentionally. Scheck (2010) identifies three causes of Brady violations. First, the information may not have been provided to the prosecutor by the police. The omission by police may have been intentional or inadvertent. Second, prosecutors may fail to properly identify Brady material, either through misunderstanding



Brady requirements or not seeing the evidence in the file. A third cause of Brady violations identified by Scheck is when the prosecutor intentionally violates Brady rules and does not disclose evidence which may weaken his or her case.

Advancing technology has provided new forums for prosecutorial misconduct (Browning, 2014). In a modern twist on ex-parte communication, former Florida prosecutor Howard Scheinberg's license was suspended for two years as a result of his actions in a murder case tried before Judge Ana Gardner. During the five month period between the time the jury recommended a death sentence and a sentence of death was imposed by the court, Scheinberg and Gardner exchanged 949 phone calls and 471 text messages. While the content of the messages did not contain discussions of the pending case, the bar association found that the frequency and intensity of the communication threatened judicial impartiality (*Florida Bar v. Scheinberg*, 2013).

Former assistant Cuyahoga County, Ohio prosecutor Aaron Brockler was recently disciplined for his actions while trying Damon Dunn for murder. Dunn had identified his girlfriend and a friend of his girlfriend as alibi witnesses. After listening to a jail phone conversation between Dunn and his girlfriend in which the girlfriend expressed concern that Dunn had been unfaithful with an unknown woman named Taisha, Brockler created a fictitious Facebook account under the name of Taisha Little. Using the fake account, Brockler sent messages to both alibi witnesses stating that she had a child with Dunn and questioning the alibi in an attempt to induce the witnesses into admitting that they lied about Dunn's alibi. The Ohio Disciplinary Counsel suspended Brockler's license for only year, finding that the event was an "isolated incident in an otherwise notable legal career" (*Disciplinary Counsel v. Brockler*, 2016).

## **Factors Contributing to Intentional Misconduct**

As previously described, some prosecutors engage in misconduct unintentionally. More troubling are acts of intentional misconduct, in which the prosecutor knew that his or her actions were improper and chose to commit them anyway. Researchers have demonstrated that there are both individual and organizational influences that can foster prosecutorial misconduct (Pollock, 2016).

### **Individual Explanations**

The internal drive for success is likely not a new phenomenon for people working as prosecutors. The education necessary to obtain such a position is significant; people who are not highly motivated by a desire for success are not likely to complete law school and pass the bar exam. Prosecutors tend to be high-achievers who are not accustomed to losing (Phillips, 2010). This internal drive may facilitate a prosecutor's adoption of the "win-at-all costs" mentality that characterizes most prosecutors' offices.

Social cognitive theory assumes that values, moral standards, and conduct norms come from a variety of influential sources (Bandura, 1991b). Moral standards are formed "from information conveyed by direct intuition, evaluative social reactions to one's conduct, and exposure to the self-evaluative standards modeled by others" (Bandura, Barbaranelli, Caprara, & Pastorelli, 1996, p. 364). In cognitive-based motivation, people motivate and guide themselves based on anticipating outcomes (Bandura, 1991a). As people are placed in new environments, their moral standards may change to accommodate those of the group through socialization. The socialization may include direct experiences and the perceived reactions of others (Phillips, 2010). This shared morality is vital to the ability of a society to function (Bandura, 1991b).

When people violate their personal conduct standards, an unpleasing self-censure results (Bandura et al., 1996). Deviant conduct is regulated by social sanctions and internal self-sanctions (Bandura, 1991b). In order to avoid the self-sanctions, a person goes through a process of moral judgment when confronted with a new dilemma. People generally avoid behavior that violates personal morals to avoid painful self-condemnation (Cummings, 2010). However, what people perceive as inappropriate behavior changes.

Exposure to a new environment can induce re-socialization, in which a person's moral self-sanctions become disengaged (Cummings, 2010). The process may be gradual and occur as the individual adapts to the new environment. A person will begin to justify actions as acceptable that would have previously resulted in self-censure (Bandura et al., 1996), and the resulting cognitive restructure makes improper conduct internally accepted through moral justification (Bandura, 1991b). A person's moral compass is changed, and new behaviors are allowed by the individual. As the new behaviors are repeated, less discomfort is experienced as the amount of self-censure decreases (Bandura, 1991b; Cummings, 2010).

Bandura (1991b) discusses a number of explanations for how the moral disengagement process takes place. Through displaced or diffused responsibility, responsibility for the action is transferred to someone else, such as a person's boss. When a person is acting under the direction of another, self-censure is avoided because the individual is simply doing what he/she is told (Bandura et al., 1996). Dehumanization also facilitates the process of moral disengagement. In general, mistreating a human induces self-censure (Bandura, 1991b). The strength of one's self-sanction depends on how the people being mistreated are viewed (Bandura et al., 1996).

Removing human qualities from the targeted group makes it less difficult to treat a person unfairly, because it can be internally justified that the person does not deserve fair treatment.

The re-socialization process that occurs as one adapts to working in a prosecutors' office may foster moral disengagement by prosecutors. The intensive pressure to obtain convictions can displace one's pre-existing moral standards (Cummings, 2010). The standards of the office may be internalized by prosecutors, who experience a gradual change in self-sanctions. This disengagement may include a diffusion of responsibility for their own actions based on the fact that they are just doing their job, carrying out the head prosecutor's orders, or that the jury is truly responsible for determining guilt. By referring to people accused of crimes as "defendant," case number or crime, as in "I'm in court with the aggravated assault" rather than by name, and by generally distancing themselves from these individuals, prosecutors are able to dehumanize them to avoid self-censure.

Moral disengagement is similar to Sykes and Matza's (1957) techniques of neutralization. The theorists predict that delinquency is often based on an "unrecognized extension of defenses to crimes" that is perceived as legitimate by the offender, but is not accepted by society (Sykes & Matza, 1957, p. 666). The theory presents five techniques of neutralization that are employed by offenders to protect them from both self-blame and blame from others, allowing them to overcome the moral hurdle that often prevents delinquency.

The first technique of neutralization is *denial of responsibility*. Sykes and Matza (1957) explain that offenders may justify their criminal behavior by denying their fault.

Based on society's distinction between intentional and unintentional acts, this technique of neutralization is employed when the offender believes that forces outside of his control are truly responsible for the occurrence. The second technique of neutralization, *denial of injury*, focuses on the amount of harm resulting from the action. For the offender employing this neutralization, the wrongful nature of the crime is contingent upon whether someone has been hurt by the deviance. Vandalism may be perceived by the offender as simple mischief, because the property owner can afford to repair damage. In the third technique, *denial of victim*, the offender neutralizes the behavior by transforming the victim into the real wrong-doer. Some fault is found with the offender's victim, and the criminal behavior is viewed as retaliation. *Condemnation of the condemners* is employed when an offender shifts his focus to those individuals that disapprove of the behavior, viewing the condemners as hypocrites (Sykes & Matza, 1957). The criminal behavior may be justified by a corrupt legal system, or teachers who play favorites. The final technique of neutralization, *an appeal to higher loyalty*, occurs when the demands of one's smaller social group supersede those of the larger society. Sykes and Matza (1957) identify the "conflict between claims of friendship and the claims of law" (p. 669). This technique may be employed by gang members, whose status in the gang is more important than abiding by the law.

Techniques of neutralization may be employed by prosecutors who intentionally engage in misconduct. Through the technique of denial of injury, prosecutors may justify their actions by arguing that nobody is really hurt by their actions. The defendant is viewed as guilty of a crime, and is therefore not hurt by the prosecutorial misconduct. In denial of the victim, prosecutors may see the victims of their misconduct (criminal

defendants) as the real wrong-doers, deserving of their sentence whether it was obtained fairly or not. Finally, prosecutors may be most susceptible to the technique of appealing to higher loyalties. Prosecutors represent the state and its citizens, and are under pressure to get criminals off the street. Their loyalty to obtaining justice may supersede the need to play by the rules.

Sykes and Matza (1957) find support for their theory in research demonstrating that offenders feel guilt and exhibit selectivity in choosing their victims. For example, it is rare to hear that nuns or other clergy members have been victimized. This demonstrates that offenders do not find their behavior to be completely morally acceptable, because they exclude certain groups of people from being acceptable victims and feel guilt.

Other errors in thinking can affect how prosecutors do their jobs. Similar to police, prosecutors are susceptible to both tunnel vision and confirmatory bias, in which some pieces of evidence or potential suspects are overlooked because they do not support the prosecutor's theory of how the crime was committed (Rossmo, 2014). These types of cognitive biases are closely related. Tunnel vision occurs when individuals are unable to objectively evaluate information, while cognitive bias refers to the unintentional exclusion of information that does not support one's belief. People do not approach new information with a clean slate (Aviram, 2013). Attorneys are trained to interpret information in a manner that is most supportive of their position (Bandes, 2006), which can affect their ability to properly weigh the probative value of evidence. Cognitive research has demonstrated that bias may be present in the processing of new information and the manner in which information is stored and analyzed (Burke, 2010b). Tunnel

vision and confirmatory bias can have a devastating effect on how a prosecutor takes a case through the justice process.

Cognitive bias occurs when a person deviates from rationality in judgments and decision-making (O'Brien, 2009). Prosecutors and police officers experiencing confirmation bias tend to look for information and evidence that confirm their hypotheses rather than attempt to falsify them (Burke, 2010b; Bandes, 2008). They may become convinced of a suspect's guilt and find themselves unable to properly interpret new information that points to that suspect's innocence, or the guilt of another individual. Aviram (2013) explains the presumption of guilt as a belief among prosecutors that a suspect who becomes a target of a police investigation must be guilty. The primacy effect occurs when an early opinion is formed and new information is interpreted as supporting that opinion (O'Brien, 2009). This is especially problematic in a criminal justice setting, where more reliable information about alternate suspects may be too easily dismissed. A fierce loyalty to the idea that the defendant is guilty develops in the prosecutor, who is unable to see the bigger picture (Bandes, 2006). Additionally, these types of cognitive biases make prosecutors overconfident in their evaluation of cases (Bowman, 2015).

Tunnel vision is one manifestation of confirmation bias, identified as the culmination of confirmation bias by Burke (2007). Tunnel vision occurs when a suspect becomes the focus of investigators, and all new pieces of information are processed through that "lens" (Burke, 2010b, p. 93). Instead of viewing new information objectively, the prosecutor views it in a light that is favorable to his or her position. It is a natural human tendency, but the effects are magnified when it occurs in the criminal

justice system (Findley & Scott, 2006). One consequence of cognitive bias is that a prosecutor may over-evaluate a case's strengths (Burke, 2010b). The most serious consequences are those involving wrongful convictions.

Prosecutors may be more likely to experience cognitive biases due to their obligation to represent the state. This position may exert tremendous pressure on prosecutors to avoid making mistakes (Bandes, 2006). While charges can be dropped in light of new evidence, prosecutors do not want to give the appearance of ineptitude. Identified by Burke (2010b) as belief perseverance, cognitive bias can result in an adherence to one's beliefs regardless of the presence of contradictory information.

Perhaps this type of cognitive bias is most clearly evidenced in prosecutors' failure to acknowledge innocence even after defendants have been exonerated. Juan Rivera was recently awarded the largest settlement of any wrongfully convicted person in Illinois when he reached a \$20 million settlement with Lake County (Hinkel & Mills, 2015). DNA eliminated Rivera as the offender who raped and murdered an eleven year old victim. Despite this scientific evidence, Prosecutor Michael Mermel pursued another trial, suggesting a highly unlikely scenario that the recovered semen was left during a consensual sex act by the 11 year old and an unknown party prior to the murder (National Registry of Exonerations, 2015).

Deterrence theory can also be applied to explain prosecutorial misconduct. As explained by Kubrin, Stucky, and Krohn (2009), people consider the consequences of their actions when choosing a behavior, and the balance of potential risks and rewards influences the likelihood of one engaging in criminal acts. Punishments must be swift, severe, and certain in order to deter a potential offender (Akers & Sellers, 2013). It is the



threat of punishment that prevents, or deters, the criminal behavior. General deterrence refers to how governmental punishment enacted on lawbreakers serves as an example of the negative consequences to the population at large. Conversely, specific deterrence refers to punishing an offender with the goal of preventing that individual from engaging in future criminal activity (Akers & Sellers, 2013). In their reconceptualization of deterrence theory, Stafford and Warr (1993) argue against the traditional distinction between these two forms of deterrence, indicating that most people have a mixture of direct (specific deterrence) and indirect (general deterrence) experience with punishment. Indirect experience may also include the punishment experiences of one's peers or with avoiding punishment, as these occurrences are likely considered when one is determining the risk of being detected (Stafford & Warr, 1993).

Prosecutorial misconduct can be considered as a type of criminal behavior explained by deterrence theory. Findings of prosecutorial misconduct are rare, and are often not discovered until the appeal process takes place years after the original trial (Weiss, 2011). Punishments, often limited to a public reprimand, are not generally perceived as severe. Punishments for prosecutorial misconduct are neither swift, nor severe, nor certain. Using Stafford and Warr's (1993) reconceptualization, prosecutors are also likely to consider the lack of punishment suffered by peers who have engaged in misconduct. The threat of punishment is an ineffective deterrent to prosecutors considering breaking the rules.

Each of the factors described above sheds some light on how misconduct occurs among the individuals responsible for administering justice. The lack of sanctions imposed on those who engage in misconduct fails to provide a deterrent against rule

violations. In addition to the knowledge that they are unlikely to be caught, prosecutors' actions may be condoned (whether officially or unofficially) by the culture of the offices in which they work. The following section will discuss potential explanations for prosecutorial misconduct at the organizational level.

### **Organizational Explanations**

Several organizational factors have been identified as potential contributors to prosecutorial misconduct. Prosecutors enjoy a great deal of autonomy and discretion in their decision-making, including what charges to bring against whom and what evidence to share with the accused. Many prosecutors' offices function without formal quality assurance programs or manuals of best practices (Scheck, 2010). Discovery-disclosure policies that are implemented are often developed by the office itself, rendering them subject to subjective interpretations of the law (Green, 2010). Thus, the activities of prosecutors are often shielded from the public.

While the public may lack insight into the day-to-day decisions of prosecutors, they nonetheless remain an important influence on prosecutorial behavior. District attorneys are elected, and must remain popular to remain in office. As the public rarely embraces a "weak-on-crime" philosophy, prosecutors are pressured to obtain convictions. Criminal convictions represent the predominant measure of prosecutor performance, a yardstick that encourages a "win-at-all costs" subculture. It is reported that some offices post prosecutors' conviction percentages to encourage winners and shame losers (Cummings, 2010). Prosecutors may also internalize the focus on conviction and use it as a measure of self-worth (Cummings, 2010). Barkow (2010) speculates that offices

with a more dominant “in-it-to-win-it” culture are more likely to have instances of intentional prosecutorial misconduct.

The prosecutorial culture may foster the development of so-called noble-cause corruption. According to Crank and Caldero (2000), a law enforcement officer’s noble cause “is a profound moral commitment to make the world a safer place to live” (p. 35). Noble-cause corruption develops when a utilitarian rationale (“the end justifies the means”) is used to justify misconduct, such as “testilying,” inventing probable cause, or hiding exculpatory evidence. This type of corruption has a different motivation from self-serving corruption. While Crank and Caldero (2000) explained noble-cause corruption in terms of police officers, it may also be experienced by prosecutors. Pollock (2016) describes noble-cause corruption as a concept that is shared between police and prosecutors; both see their role as getting the “bad guy” off the street. A prosecutor may be so confident that a defendant committed a crime that he or she is able to neutralize intentional misconduct as a necessary means to a desirable end. The prosecutor sees his duty as obtaining the conviction, regardless of the methods by which it is obtained. This perception is bolstered by the fact the prosecutors represent the victims and may feel an internal pressure to obtain justice for them. The prosecutorial culture may embrace or encourage noble cause corruption as part of an “us-versus-them” mentality. The pervasiveness of the culture is fostered by the fact that law enforcement and prosecutors are, in some ways, alienated from conventional society (Polzer et al., 2014).

This desire to obtain convictions is even more problematic when combined with the relatively limited sanctions applied to prosecutors who break the rules (Phillips, 2010). Courts are often reluctant to intrude upon prosecutorial discretion (Burke, 2010b).

Defense attorneys are hesitant to report allegations of prosecutorial misconduct due to the potential implications for their continued interactions with the prosecutor's office.

Defense attorneys often want to maintain a professional relationship with prosecutor offices because they will have to work with them in the future (Gier, 2006). According to Barkow (2010), most cases of prosecutorial misconduct will never be discovered, and reversal or modification of a verdict is rare even when misconduct is found. Individual attorneys are rarely identified by name in appellate decisions and the public often remains unaware of the occurrence of misconduct.

Regardless of whether misconduct results from "bad apple" individual prosecutors or from an organizational culture that supports it, prosecutors are generally protected from liability for their actions through prosecutorial immunity. The following section will discuss the immunity enjoyed by individual prosecutors and the offices in which they function.

## **Prosecutorial Immunity**

### **Individual Immunity**

The issue of prosecutorial immunity was addressed by the United States Supreme Court in *Imbler v. Pachtman* (1976), in which U.S.C. § 1983 was interpreted. It was in this case that a functional test for determining whether prosecutors enjoy qualified or absolute immunity was established. The majority of the Supreme Court determined that the prosecutor function is quasi-judicial, meaning that it is more similar to the role of a judge than the executive function of the police. Absolute immunity applies to prosecutors when their actions are "intimately associated with the judicial phase of the criminal process" (*Imbler v. Pachtman*, 1976, p. 430). Even if constitutional rights are

violated, absolute immunity attaches so long as the prosecutor's actions are within the scope of his or her judicial duties. The Court acknowledged that absolute "immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest..." (*Imbler v. Pachtman*, 1976, p. 427).

This functional test was applied in *Burns v. Reed* (1991) to determine what level of immunity prosecutors enjoy for their non-judicial actions. In this case, the prosecutor failed to reveal at a probable cause hearing that a suspect's confession was obtained while the suspect was under hypnosis. The prosecutor was aware of the circumstances surrounding the confession, as he had instructed police officers to proceed with the hypnosis interrogation plan. The United States Supreme Court held that the prosecutor's actions at the probable cause hearing were part of the judicial function and therefore protected by absolute immunity; however, only qualified immunity applied to the prosecutor's action of advising police officers to conduct an interrogation while the suspect was under hypnosis, because the action was not a judicial function.

The United States Supreme Court provided more guidance on the distinction between the investigative function (to which qualified immunity applies) and the judicial advocate function (to which absolute immunity applies) in *Buckley v. Fitzsimmons* (1993). The prosecutor in that case allegedly consulted a number of expert witnesses before finding one that would corroborate the police theory of how the crime occurred (Grometstein & Balboni, 2012). The Court found that only qualified immunity applied to the prosecutor's actions, as they took place in an investigative function, explaining that

“A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested” (*Buckley v. Fitzsimmons*, 1993, p. 274).

Qualified immunity is an affirmative defense that protects behavior that does not clearly violate law or constitutional rights (Zhang, 2011). When a prosecutor is acting as an investigator, he or she is only entitled to the same qualified immunity as police officers and other public officials engaged in non-judicial functions. This position was reaffirmed in *Kalina v. Fletcher* (1997), where the United States Supreme Court held that absolute immunity did not apply to a prosecutor who included untrue statements in an affidavit for an arrest warrant. The Court held that in filing the affidavit, the “only function that she (prosecutor) performs in giving sworn testimony is that of a witness,” not a prosecutor (*Kalina v. Fletcher*, 1997, p. 131). Thus, the actions were not part of the judicial function and absolute immunity did not apply. The distinction between the investigative function and quasi-judicial function could be further clarified in future case law.

The Seventh Circuit recently provided more clarity on the distinction between qualified immunity and absolute immunity in their holding in *Fields v. Wharrie and Kelley* (2014). Nathsom Fields was released from prison in 2003 after being wrongfully convicted of murder and spending 18 years in prison (National Registry of Exonerations, 2015). Fields discovered that prosecutors had knowingly coerced false testimony from witnesses (Balko, 2014). Prosecutor Lawrence Wharrie argued that the fabricated evidence did not cause the conviction, and that absolute immunity attached when the actual violation of rights occurred at trial (*Fields v. Wharrie and Kelley*, 2014; Balko, 2014). The Court rejected Wharrie’s argument, holding that he was not entitled to absolute immunity because the misconduct occurred prior to trial. In 2015, a federal

judge held that Fields was entitled to a new trial in his suit against the city of Chicago and Chicago police and prosecutors. In the original trial, the jury awarded only \$80,000 to Fields as compensation for his wrongful conviction after finding for him on only one count. Fields successfully argued that a different verdict may have been returned if the jury had been told that a key witness had made a deal with prosecutors and was released shortly after testifying (Meisner, 2015).

### **Municipal Liability under § 1983**

Because prosecutors enjoy absolute immunity for their actions as long as their actions are considered to be more akin to the judiciary function rather than an executive or investigative function, another option for the wrongfully convicted is to seek relief from the office employing the individual prosecutor under 42 U.S. § 1983. The relevant portion of § 1983 reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.... (42 U.S.C. § 1983 (2006)).

Liability under this statute springs from the Civil Rights Act of 1871, with § 1983 being designed to provide private citizens access to the federal court (Johnson, 2010). The court held in *Monell v. Department of Social Services of the City of New York* (1978) that the language of § 1983 applied to municipalities, holding that “there is no reason to

suppose that municipal corporations would have been excluded” from the protection offered by the statute (p. 686).

The United States Supreme Court addressed violations of constitutional rights committed by public officials in *Monroe v. Pape* (1961). In this case, 13 police officers conducted a warrantless search of a private home and detained an occupant for ten hours before declining to file charges. In this case, the Court held that municipalities were fully immune from liability for their employees’ actions (McClelland, 2012). This ruling was subsequently overturned in *Monell v. New York City Department of Social Services of the City of New York* (1978), a case in which employees filed suit to combat an office policy that required pregnant women to take leaves of absence before medically necessary. The existence of a formal policy in *Monell* (1978) distinguished it from the circumstances in *Monroe*. The U.S. Supreme Court rejected the application of a *respondeat superior* theory of liability in which municipalities are liable for the actions of their employees, instead stating that municipalities are responsible if the “action pursuant to official municipal policy of some nature caused a constitutional tort” (*Monell v. New York City Department of Social Services of the City of New York*, 1978, p. 691; statement emphasis added). The official policy must be the “moving force of the constitutional violation” for the municipality to be responsible (p. 694).

The question of whether a municipality’s failure to properly train employees constitutes a policy was addressed in *Oklahoma City v. Tuttle* (1985). This case was brought by the widow of a man who was shot and killed by a rookie police officer. The litigant presented testimony from a police expert who found that the officer’s training was “grossly inadequate” (*Oklahoma City v. Tuttle*, 1985, p. 812). The Supreme Court



explained that in order for something to be a policy, it must be chosen from a number of alternatives. Unless it could be proven that “the policymakers deliberately chose a training program which would prove inadequate,” a single constitutional violation was insufficient to hold the municipality liable under § 1983 (*Oklahoma City v. Tuttle*, 1985, p. 823).<sup>2</sup>

The Supreme Court further elaborated on the issue of whether municipal liability under § 1983 extends to a single failure-to-train violation in *City of Canton v. Harris* (1989). In *Canton*, respondent Harris alleged that her constitutional rights were violated by police officers who failed to provide medical treatment while she was in custody. The Court renewed their position that “only where a failure to train reflects a ‘deliberate’ or ‘conscious’ choice by a municipality — a ‘policy’ as defined by our prior cases — can a city be liable for such a failure under § 1983” (*Canton v. Harris*, 1989, p. 389). Indeed, liability only attaches to municipalities under § 1983 when the “failure to train reflects deliberate indifference to the constitutional rights of its inhabitants” (*Canton v. Harris*, 1989, p. 389). This failure to train must be “so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need” for the municipality to be liable (*Canton v. Harris*, 1989, p. 390). The Court also presented a hypothetical scenario in *Canton* in which liability would result for a single failure-to-train violation;

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<sup>2</sup> The United States Supreme Court clarified its position regarding municipal liability for a single violation in *Pembaur v. City of Cincinnati* (1986). In *Pembaur* (1986), the prosecutor advised sheriff’s deputies to unlawfully enter a medical clinic in search of employees who failed to respond to subpoenas. The Court held that the specific directive to enter the clinic was issued by a policy maker and therefore constituted a policy.

this hypothetical scenario involved a failure to train police officers on the constitutional limitations of use of force.

The concept of deliberate indifference was again addressed in *Board of Commissioners of Bryan County v. Brown* (1997). In this case, the respondent alleged that a sheriff's deputy had used excessive force against her, and that the municipality was responsible because of the sheriff's decision to hire the deputy despite his prior criminal convictions. The U.S. Supreme Court explained that the standard of deliberate indifference is only met if a municipal policy maker "disregarded a known or obvious consequence of his action" (*Board of Commissioners of Bryan County v. Brown*, 1997, p. 410). They found that the respondent did not fully demonstrate that the excessive force was a plainly obvious consequence of the sheriff's decision to employ the deputy. The court further instructed that future plaintiffs must demonstrate that the municipality's deliberate conduct was the "moving force" behind the injury alleged (*Board of Commissioners of Bryan County v. Brown*, 1997, p. 404).

Thus, in order to bring suit against a prosecutor's office for the actions of its employees, one must prove that an official policy was the moving force behind a constitutional violation. Failure to train can rise to the level of a policy, provided that the need for training was so obvious and that the policy maker was deliberately indifferent to the inadequate training. The possibility of relief under § 1983 for a single failure-to-train violation exists and was explained in the *Canton v. Harris* (1989) hypothetical. This became the basis of John Thompson's claim in *Connick v. Thompson* (2011).

The circumstances of Thompson's case seemed to fit the parameters laid out in case precedent for a § 1983 claim against a prosecutors' office. Thompson was convicted

of attempted armed robbery before being tried for the murder of Raymond Luizza, Jr. The decision to conduct the armed robbery trial first was a strategic decision made by prosecutors, who predicted that a conviction would decrease the likelihood that Thompson would testify in the homicide case (McClelland, 2012). Their prediction was accurate: Thompson did not testify at the homicide trial, and was sentenced to death. Unbeknownst to Thompson or his attorneys, a swatch of pants stained with the robbery offender's blood was analyzed by the police crime laboratory, and results indicated that the offender had blood type B. Thompson's blood was never tested, and the report was never disclosed. The laboratory report was discovered by a private investigator just weeks before Thompson was scheduled to be executed. After being diagnosed with a terminal illness, prosecutor Gerry Deegan had confessed to a colleague that he had suppressed the exculpatory evidence (*Connick v. Thompson*, 2011). Thompson was retried for the murder, and testified in his defense; a jury acquitted him after just 35 minutes of deliberation (*Connick v. Thompson*, 2011).

Thompson relied on two theories in his claim. First, the Orleans Parish District Attorney's Office had an unconstitutional policy of failing to train employees on the requirements of the disclosure of exculpatory evidence. Pleading in the alternative, Thompson also argued that the need for training was so obvious that District Attorney Connick's failure to provide it amounted to deliberate indifference. No prosecutor testified that he/she had received any training on *Brady* requirements (*Connick v. Thompson*, 1985, p. 1357). The office was staffed primarily with inexperienced attorneys due to high turnover, and Connick himself indicated that he was not familiar with evolving disclosure requirements (p. 1379). The Court held, however, that Thompson

failed to prove a pattern of behaviors that sufficiently constituted a failure to train, and that the single *Brady* violation was insufficient to give rise to liability.

The *Connick* decision further restricted the ability of a wrongfully convicted individual to obtain relief for his ordeal. While the hypothetical scenario presented in *Canton* still allows for municipal liability under a single failure-to-train violation, one is left to wonder just how egregious the conduct would have to be for it to apply. The *Connick* decision does little to deter prosecutors from engaging in misconduct. The following section discusses potential responses to misconduct that may serve as a more effective deterrent.

### **Possible Responses to Prosecutorial Misconduct**

Several potential responses to prosecutorial misconduct have been proposed, including restricting immunity, employing independent investigators to look into allegations of misconduct (Gier, 2006), and changing the indicator of prosecutor success from number of convictions to a reduction in crime (Cummings, 2010). While some scholars recommend a preventive approach involving more training, others advocate increasing sanctions against individual prosecutors and their offices. The prosecutorial subculture combined with immunity presents a substantial hurdle to overcome in the goal to reduce misconduct. Burke (2010a) indicates that prosecutor participation is essential to successful reform. This section discusses several potential responses to prosecutorial misconduct.

#### **Increased Sanctions against Individual Prosecutors**

Sanctions against prosecutors are primarily administered by state bar associations. In Texas, these sanctions include public or private reprimand, suspension, and disbarment

(Polzer et al., 2014). The efficacy of state bar sanctions is debatable. As state bar associations rarely initiate investigations on their own (Keenan, Cooper, Lebowitz, & Lerer, 2011), the system relies on attorneys to report allegations of misconduct against one another. Rule 3.8 (a) of the Texas Disciplinary Rules of Professional Conduct states as follows: “A lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority.” Not surprisingly, however, lawyers are often unwilling to report misconduct for fear of potential negative repercussions in their continued working relationships. Sanctions that are issued by state bars are rare and minor, as bar associations may not want to dole out harsh punishments to fellow attorneys perceived as peers (Weiss, 2011). State bar associations could increase the severity of reprimands by maintaining a publicly accessible database of the disciplinary records of prosecutors. Providing this information to voters in a user-friendly format might discourage publicly elected prosecutors from engaging in misconduct, and encourage publicly elected prosecutors to invest more resources into the hiring and training of assistant district attorneys.

Some researchers have called for a review and revision of absolute prosecutorial immunity. Henning (2012/2013) argues that while absolute immunity is appropriate for judges, who are supposed to remain impartial, it is inappropriately applied to prosecutors, who are charged with presenting and arguing their version of the case. Prosecutors are charged with presenting the best case possible, and this removal of objectivity makes them different from judges. Henning (2012/2013) suggests a new model for holding

prosecutors accountable for wrongful convictions. An individual who wants to hold a prosecutor liable for wrongful conviction must show factual innocence before a § 1983 suit would commence; at that time, the prosecutor would no longer be covered by absolute immunity, but would retain qualified immunity. This requirement would protect prosecutors from the anticipated onslaught of cases that would overwhelm the criminal justice system if prosecutors could be sued in this capacity (Henning, 2012/2013). Qualified immunity represents a balance between vindication for victims and protection against excessive litigation (Zhang, 2011).

Imposing criminal sanctions on prosecutors who commit Brady violations is one proposed way to decrease misconduct (Gier, 2006). If bar sanctions are not enough to deter misconduct, the threat of jail time may be severe enough to encourage prosecutors to play by the rules. The imposition of such sanctions, however, would likely be difficult. Willful actions that result in the violation of constitutional rights are subject to criminal charges under 18 U.S.C. § 242 (Deprivation of Rights Under Color of Law), but it is often impossible to determine if one's misconduct is "willful" or unintentional. Since its enactment in 1866, only one prosecutor has been charged under the statute (Weiss, 2011). Another option is to charge prosecutors with criminal contempt, as in the case of Michael Nifong of the Duke Lacrosse case, but that, too, is rare (Gurwitch, 2010).

Gier (2006) suggests that prosecutors' disciplinary record, including allegations of misconduct, should be made available to defense attorneys and judges. Defense attorneys should be permitted to use a prosecutor's prior disciplinary record as a foundation for concerns of misconduct in active cases. Gier (2006) provides the example of a case in which the prosecutor's sole evidence is witness testimony; if the defense attorney

presents the judge with documentation that the prosecutor has been untruthful about witness deals in the past, the judge may be more skeptical of the witness testifying that there was no deal in return for testimony in the present case. If provided with information about prosecutors' prior transgressions, defense attorneys would be more aware of potential misconduct in future cases. Similarly, Gershowitz (2009) encourages judges to release the names of names of sanctioned prosecutors in trial transcripts and opinions. This will force judges to acknowledge the repeat offenders of misconduct that fall through the cracks of a fragmented record-keeping system.

Not all researchers support increasing the punishments toward prosecutors who engage in misconduct. McMunigal (2013) argues that increasing the punishment would lessen prosecutors' transparency and cooperation in uncovering wrongful convictions. Prosecutors will not want to risk punishment by admitting a prior mistake, and they will be hesitant to report a peer's misconduct. A treatment perspective would focus on the underlying causes of Brady violations, including cognitive error, in an attempt to understand the systemic reasons for failures to disclose evidence (McMunigal, 2013). Moving beyond the individual is an approach suggested by those who believe prosecutors' offices are responsible for their employees' actions.

### **Hold Prosecutors' Offices Responsible**

As discussed previously, district attorneys' offices enjoy municipal immunity from § 1983 suits unless a pattern of deliberate indifference to a need for training can be proven. The Court's reluctance to hold offices responsible for individual prosecutor misconduct was exemplified in *Connick v. Thompson* (2010), where District Attorney Henry Connick, Sr. admitted that he did not provide training on *Brady* requirements. The

United States Supreme Court had the chance revisit the issue of Connick's office in a filing by Earl Truvia and Gregory Bright, who were recently exonerated after being convicted of murder in 1975 (Editorial Board, New York Times, 2015). Truvia and Bright allege that the prosecutors' failure to disclose evidence in their trial was the result of Connick's office policy of not disclosing evidence. The United States Supreme Court declined to hear the case in March 2015 (St. Louis Post Dispatch, 2015). Faced with the failure of other avenues to prevent prosecutorial misconduct, including state bars and criminal sanctions, some legal scholars have called for prosecutors' offices to have increased accountability for the actions of their prosecutors (Barkow, 2012; Fry, 2012). Corn and Gershowitz (2010) suggest imposing vicarious liability on a jurisdiction's chief prosecutor when it can be established the he or she should have known the misconduct would occur.

In *Monell* (1978), the United States Supreme Court held that the doctrine of *respondeat superior* is not applicable under § 1983 unless the "failure to train" policy is present. McKay (2012) argues that the doctrine should be available in such suits if prosecutorial misconduct leads to a wrongful conviction. The *respondeat superior* doctrine is rooted in enterprise liability theory and vicarious liability. Liability for employees' actions is viewed as a business expense to be absorbed by the employer (McKay, 2012). Perhaps if prosecutors' offices could be held liable for the behavior of its prosecutors, a greater effort would be placed on ensuring the rules were followed.

Barkow (2010) opines that prosecutors' offices should hold themselves to the same legal liability to which other organizations are held when law violations occur, based on the perceived success of deterring corporate crime. She explains that prior to



the 1990s, corporations had more incentives to engage in criminal activity than deterrents to prevent it. The passage of the Sarbanes-Oxley Act in 2002 increased the fines for corporate law violators, holding CFOs and CEOs responsible for crimes committed with their knowledge and/or approval, and imposed court-supervised probation as a potential sanction. Compliance programs were established by many corporations to monitor the actions of employees to ensure that their practices did not foster law violations. Barkow (2012) maintains that the establishment of similar compliance programs within prosecutor offices would discourage intentional prosecutorial misconduct. While prosecutors are not rewarded financially in the way corporate employees are, they are rewarded with incentives, including promotions and desirable caseloads. An additional benefit of establishing compliance programs within prosecutor offices is that *Brady* violations or other types of misconduct that do occur can be tracked, allowing any systemic patterns to emerge.

Other authors suggest using financial incentives or deterrents to encourage supervisors to take a more involved role in the actions of their prosecutors. Individuals who are wrongfully convicted are financially compensated by the state for their ordeal. While payment procedures vary by state, the amount paid out in wrongful conviction claims is significant. For example, the state of Texas provides \$80,000 for each year incarcerated as the result of wrongful conviction; since 1992, the state has paid out more than \$65 million dollars to wrongfully convicted men and women (Ward, 2013). Fry (2012) suggests holding individual counties partially responsible for compensating the wrongfully convicted rather than drawing the entire amount from a state-wide fund.

Those counties responsible for multiple wrongful convictions would be required to contribute.

While requiring counties responsible for a number of wrongful convictions to pay for their mistakes seems logical, it may have a negative effect on the criminal justice system. Budgetary issues often lead to offices being understaffed, and prosecutors are often required to take on more cases than ideal (Barkow, 2010). If these offices had to take funds from their already meager budgets to compensate the wrongfully convicted, the results could lead to the deterioration of the justice process in that cases may not be tried because of budget constraints. A proactive incentive might be more effective than punishing offices after the violations occur. As an increasing number of prosecutors' offices receive state funding, states may be able to require additional *Brady* training in return for state funds (Fry, 2012).

Punishing individual prosecutors and their offices for misconduct represents a reactive strategy designed to deter prosecutors with strong sanctions. Some research suggests, however, that a number of wrongful convictions are the result of unintentional misconduct, in which the prosecutors did not knowingly break the rules. Thus, proactive measures designed to prevent unintentional misconduct may be more successful in preventing this type of misconduct. Ethical leadership in the form of an observant head district attorney can encourage ethical behavior among prosecutors (Corn & Gerschowitz, 2010).

### **Increase Training**

In writing her dissent in *Connick v. Thompson* (2010), Justice Ginsburg questioned the majority's assumption that attorneys receive training in how to prevent

*Brady* violations in law school. The validity of the majority's assumption was investigated by Fry (2012), who reviewed the curriculum of 202 law schools accredited by the American Bar Association. Fry (2012) found that while each school offers courses in criminal law and criminal procedure, there was some variance in what was required for graduation. Criminal law was required by 196 schools, while only 53 require criminal procedure. Fry (2012) also found that only three of the nation's 53 top tier schools require criminal procedure. Regardless of individual school's requirements, the law school culture may be ill-suited for training attorneys to hand over any evidence that may decrease the likelihood of a conviction. As explained by Romero (2012), law school fosters an "adversarial mindset among lawyers, rather than an ethical one" (p. 789). The environment may not be conducive to conveying the importance of disclosing evidence. Conversely, the argument can be made that law school is an appropriate venue because the message can be instilled before young prosecutors become immersed in the adversarial process (Bazelon, 2011).

Justice Ginsburg also refutes the majority's assertion that preparation for the bar exam, and successfully passing it, demonstrate knowledge of *Brady* requirements. Her dissent in the *Connick v. Thompson* case reported that *Brady* questions have accounted for less than 10% of the total points in the criminal procedure and criminal law section of the Louisiana Bar Examination from 1980 to the present (*Connick v. Thompson*, 2010, at 1385). Another study found that this trend also extended to national bar exams administered since 1980 (Fry, 2012).

It seems entirely plausible that a recent law school graduate may not have knowledge of the disclosure requirements under *Brady* to successfully follow them in

practice. Because these restrictions will be relevant to a significant proportion of the prosecutor's cases, and the consequences of ignorance are so drastic, it is imperative that prosecutors are properly trained on evidence disclosure requirements. The failure to do so has the potential to cause the wrongful convictions and subsequent incarceration of innocent people.

The need for increased training was seemingly recognized by the Department of Justice (DOJ) in a 2010 initiative to provide additional training to federal prosecutors regarding their duties in terms of evidence disclosure (Green, 2010). In a memorandum to DOJ prosecutors, Deputy Attorney General David Ogden instructs them to err on the side of inclusiveness when evaluating whether evidence should be disclosed (2010). State organizations have also encouraged additional training for prosecutors.

The Texas District and County Attorneys Association (2012) recommend training on *Brady* requirements for both new and experienced prosecutors. In New York, a training program has been developed to educate police officers about a prosecutor's disclosure obligations (Hamann, 2013). This collaborative training reflects an acknowledgement that both branches of the law are responsible for ensuring fair trials. Hamann (2013) also describes how New York prosecutors undergo ethics training that forces them to respond to hypothetical scenarios involving ethical dilemmas. In 2012, the District Attorneys' Association of the State of New York published a handbook of ethical guidelines that was distributed to prosecutors statewide. The handbook explains that convicting an innocent person is worse than losing a case or letting a dangerous defendant go free (2012). The consequences of unethical prosecutorial behavior is discussed, including the devastating effect on both the defendant, victim, and their

families. The handbook highlights possible consequences of unethical conduct, including disbarment, demotion, job loss, and criminal prosecution. Prosecutors are encouraged to tell the truth, comply with rules, and avoid improper communication with the media; in addition, requirements of discovery are detailed (2012).

### **Open Files**

One change that has been made at the organizational level is the adoption of open files policies. In Texas, the Michael Morton Act was signed into law by Governor Perry on May 16, 2013 following a 146-0 vote by the House (Lindell, 2013a). The Act's namesake, Michael Morton, spent nearly 25 years in prison for the murder of his wife before being exonerated by DNA evidence. The prosecutor in the case, Ken Armstrong, was sentenced to ten days in jail for contempt of court for telling the judge that he did not possess evidence favorable to the defense (Osborn, 2013). Before the Michael Morton Act, the defense bore the burden of both requesting evidentiary disclosure unless it was material, and showing good cause. The Michael Morton Act now requires prosecutors to turn over file materials to the defendant within 30 days of the initial appearance, unless the evidence could potentially harm a victim or witness (Polzer et al., 2014). The hope is that some of the ambiguity of determining which pieces of evidence are material, and therefore required under *Brady*, would be eliminated by more inclusively identifying what must be disclosed.

### **Conviction Integrity Programs**

Defined by Scheck (2010) as a "set of procedures adopted by a district attorney's office to review and investigate cases where there is a plausible post-conviction claim of innocence," conviction integrity programs, also known as wrongful conviction units,

have been established by several jurisdictions to provide an avenue for investigating allegations of wrongful conviction. It is recommended by Scheck (2010) that these programs should provide training to prosecutors and establish a clear office policy for what constitutes a *Brady* violation, as well as create pretrial checklists to maintain records of the receipt and disclosure of evidence. Scheck (2010) also recommends that the units gather data on wrongful convictions as well as near-misses to identify systemic issues or repeat offenders.

The structure and function of these units vary. Boehm (2014) compares and contrasts the wrongful conviction units of Dallas County, Texas; Harris County, Texas; New York County; Santa Clara County, California; and Cook County, Illinois. Distinctions may be made in what type of claims are reviewed, requirements for review, and access to files. Dallas County reviews all claims of innocence regardless of when they occurred, including misdemeanors, and unrepresented inmates are allowed access to prosecutor's files (Boehm, 2014). Conversely, the Harris County (Houston) District Attorney's Office Post-Conviction Review unit only reviews cases in which forensic confirmation of innocence could be obtained, and inmates must have representation in order to access prosecutor's files. The Santa Clara County (San Jose) District Attorney's Office Conviction Integrity Unit generally requires new evidence that was not presented by the attorneys, or concerns brought by credible individuals. The Cook County (Chicago) State's Attorney's Office Conviction Integrity Unit pays special attention to cases in which factors associated with wrongful conviction are present, including confessions from juveniles or individuals with a low IQ, or confessions obtained in the absence of physical evidence (Boehm, 2014).

Most wrongful conviction units also foster the prevention of misconduct before it occurs. New York County District Attorneys' Office Conviction Integrity Program and Santa Clara County both use training as front-end methods of preventing misconduct (Boehm, 2014). In New York County, examples in which locally revered district attorneys were at fault are used in training. Training on ethics, discovery, and wrongful convictions is provided by Santa Clara County, as well as office policy that requires that evidence disclosures are made as soon as feasible.

### **Protect the Whistle-blowers**

Prosecutor offices should also be responsible for protecting whistle-blowers from retaliation. While the American Bar Association instructs attorneys to notify the appropriate authority when they have knowledge that another lawyer has violated the Rules of Professional Conduct, it does not provide protection to the individuals who come forward (Gier, 2006). Faced with the "win-at-all costs" subculture that dominates most prosecutor offices, prosecutors with knowledge of misconduct fail to come forward for many reasons, including the fear of backlash from both peers and supervisors. This fear is not unfounded. A deputy prosecutor in Los Angeles, Richard Ceballos, was demoted after testifying that he found a sheriff's deputy's testimony to be dishonest, and sharing a memorandum with a defense attorney that he had submitted to his superiors explaining his concern (*Garcetti v. Ceballos*, 2006). The United States Supreme Court ultimately held that Ceballos' actions in sharing the memorandum were not protected by his First Amendment rights because his statements were made in his official capacity. The Court further explained that restricting speech that only exists as the result of a public employee's professional duties does not violate the employee's liberties. In a

more recent case (*Lane v. Frank*, 2014), the United States Supreme Court held that public employees who provide truthful testimony, pursuant to subpoena, outside the course of their normal job activities are protected by the First Amendment. Lane was fired from his position at Central Alabama Community College following his testimony against a former employee who was subsequently convicted of mail fraud and theft.

### **Prevalence of Misconduct**

While we know generally the types of prosecutorial misconduct, an accurate assessment of their prevalence is difficult, if not impossible to obtain. It is likely that most cases of misconduct will never be discovered (Barkow, 2010). When evidence is suppressed, a defendant does not know it exists. Only if it comes to light can the convicted claim that it was not properly disclosed. Very few prosecutors' offices track misconduct among their own employees (Scheck, 2010), and no national statistics exist.

It is important to note that wrongful convictions may not be a good proxy for prosecutorial misconduct. The difficulties in researching wrongful convictions are discussed by Acker and Redlich (2011). First, a definitional problem exists with the concept of wrongful convictions. Wrongful convictions often result from procedural or trial error but do not necessarily mean the defendant is innocent (Bandes, 2008). A prosecutor may misspeak during trial, or a procedural error may have occurred, but it does not mean that every defendant who experiences this at his or her trial is factually innocent (Acker & Redlich, 2011). Offenders who are factually guilty of the crime may still be considered as having experienced wrongful convictions because of procedural errors or misconduct. Investigators and Innocence Projects have conducted studies in



recent years in an attempt to identify cases of wrongful conviction, including those that result from prosecutorial misconduct.

A study conducted by Armstrong and Possley (1999) of the Chicago Tribune found that between 1963 and 1999, 381 homicide convictions were reversed nationally due to evidence suppression or the knowing presentation of false evidence. This figure does not include other types of prosecutorial misconduct or those associated with charges other than homicide. Punishments were only imposed upon three of the prosecutors involved: one was fired but reinstated after appeal; one prosecutor was suspended for 30 days; and another's license was suspended for 59 days resulting from other misconduct in the case (Armstrong & Possley, 1999).

In 2003, the Center for Public Integrity released a report looking at state bar disciplinary proceedings, trial court rulings, and state appellate court opinions addressing prosecutor misconduct. Relying primarily on Westlaw and Lexis but also incorporating media accounts, the researchers identified 11,452 cases across the nation in which prosecutor misconduct was alleged from 1970 to 2003. Decisions were reversed or remanded by appellate judges in 2,012 of these cases (18%). The researchers cautioned that despite their efforts, their search was more than likely incomplete. An unknown number of mistrials due to misconduct issued by trial judges and other unpublished decisions were not included in the study.

A 2010 Veritas Initiative Report by the North California Innocence Project (NCIP) searched Westlaw records from 1997-2009 for instances of prosecutorial misconduct in state and federal proceedings in California. Specific findings of misconduct were found in 707 (18%) of the 4,000 cases identified; mistrials, barred

evidence and overturned convictions resulted in 159 (22%) of the 707 cases in which misconduct was identified. The misconduct in the remaining cases was deemed harmless error (Ridolfi & Possley, 2010).

The validity of this report was refuted by the California District Attorneys Association (CDAA, 2012), who questioned the methodology and argued that the NCIP's conceptualization of prosecutorial misconduct failed to meet the standard of the legal definition of misconduct. The legal definition requires that a prosecutor's actions must render a trial unfair in order to amount to misconduct (CDAA, 2012) but the NCIP report (2010) seems to include all cases in which a prosecutor erred, regardless of the error's effect on the trial. Cases were allegedly included as prosecutorial misconduct despite appellate judgments that specifically held that no prosecutorial misconduct occurred. The CDAA characterized the NCIP study as unscientific, inaccurate and misleading information.

Interestingly, the NCIP report is criticized by Johns (2011) for being under-inclusive. Johns (2011) maintains that the report fails to include cases that are disposed of at the trial level or those that were never appealed. Additionally, cases resolved through plea bargaining were also excluded from the study. This limitation in the NCIP report is understandable given the lack of available data; however, Johns (2011) raises valid arguments for her position that more prosecutorial misconduct occurs than is indicated in research dependent on appellate decisions.

A study conducted by the Arizona Republic reviewed allegations of misconduct in death penalty cases occurring in Arizona since 2003. Capital cases in Arizona receive an automatic direct appeal. Prosecutorial misconduct was alleged in 42 (51%) of the 82

appeals occurring in the state during this time period. Arizona's Supreme Court found impropriety or misconduct in 16 of the 42 prosecutor misconduct cases, with two of them being reversed and remanded (Kieffer, 2013).

The Innocence Project's Prosecutorial Oversight Campaign conducted a study using Westlaw searches for trial and appellate court decisions in four states from 2004-2008 (New York, Texas, Arizona, and Pennsylvania) in which prosecutorial misconduct was addressed, supplemented with state bar disciplinary records to determine how often sanctions were imposed. The most common type of misconduct in all states involved making improper arguments. The study distinguished between harmful error and harmless error, with the former including only cases in which the outcome of the case was influenced by the misconduct. Whether or not the case was determined to be harmless error is a separate and distinct issue from the issue of the severity of the misconduct. Intentional, egregious misconduct might still be harmless error. In New York, 151 instances of error were found, only 35 of which were deemed harmful error. Three prosecutors were publicly disciplined. In Texas, 91 instances of error were discovered, 72 of which were harmful. One Texas prosecutor was publicly disciplined. Twenty instances of prosecutor misconduct were found in Arizona, five of which were harmful. No Arizona prosecutors were disciplined. In Pennsylvania, 46 instances of misconduct were identified, 17 of which were harmful. Two prosecutors were publicly disciplined (Prosecutorial Oversight Campaign, 2014).

The Texas District and County Attorneys Association (TDCAA) published a report in 2012 refuting the findings of the Innocent Project's Prosecutorial Oversight Campaign's analysis of Texas cases, highlighting the organization's failure to define

prosecutorial misconduct and to distinguish between intentional and unintentional actions. The TDCAA (2012) analyzed all 91 of the identified cases, eliminating 10 at the beginning because they were federal cases. Of the remaining 81 cases, no error was found in 11 cases, and minor trial error deemed harmless was present in 59 cases. Eleven cases were reversed in part due to prosecutorial misconduct (TDCAA, 2012). The TDCAA study (2012) also found that *Brady* violations were alleged in 236 Texas criminal appellate decisions from 2007 to 2011. In 92 (39%) of these cases, nondisclosure of evidence was confirmed, and the withheld evidence was considered material in 58 (25%) of the 236 cases. In only four (1.7%) of the 236 cases, the evidence had been intentionally withheld by prosecutors (TDCAA, 2012).

While these studies shed some light on prosecutor misconduct, their numbers must be approached with caution. First, the advocacy organizations cannot be presumed to be neutral researchers. Studies such as these often do not distinguish between intentional and unintentional misconduct, or may not exclude cases in which findings of misconduct were overturned upon review, which could cause the reported cases of misconduct to be inflated. Conversely, some studies only look at misconduct occurring in death penalty cases, excluding an unknown frequency of misconduct occurring in other criminal proceedings or plea bargains.

In sum, types of prosecutorial misconduct have been identified in the literature, as well as organizational and individual factors that can potentially contribute to prosecutorial misconduct. As prosecutors are protected by absolute immunity for their actions during the judicial phase of a case, several responses have been proposed to decrease the frequency with which prosecutorial misconduct occurs. The devastating

consequences misconduct on prosecutorial misconduct, including wrongful convictions, warrants a better understanding of how often prosecutors engage in misconduct.

Despite the studies reviewed herein, the actual prevalence of prosecutorial misconduct remains unknown. General research on prosecutors and their decision-making remains scant, and prosecutors continue to function under a veil of secrecy. The purpose of this dissertation is to obtain a better understanding of how often prosecutors engage in misconduct. Through the adversarial process, defense attorneys often work in close contact with prosecutors and are likely to be familiar with their practices, including those practices that constitute misconduct. As such, defense attorneys present a unique opportunity to provide more clarity as to how often prosecutorial misconduct occurs.

This dissertation will respond to the following research questions:

1. What is the prevalence of prosecutorial misconduct as perceived by defense attorneys?
2. What do defense attorneys perceive as the most common types of prosecutorial misconduct?
3. How do defense attorneys respond to suspected prosecutorial misconduct?
4. What methods, including methods that have been proposed but are not in practice, do defense attorneys perceive as most successful in preventing prosecutorial misconduct?

### III. METHODOLOGY

This chapter will discuss the methodology used in this study, as well as the limitations. The purpose of this research is to respond to the following primary research question:

1. What is the prevalence of prosecutorial misconduct as perceived by defense attorneys?

As explained in the previous chapter, the prevalence of prosecutorial misconduct remains a mystery. Prosecutor groups are generally difficult to access and are reluctant to share information (Johnson, 2014). As such, this study focuses on defense attorneys as a source of information about prosecutorial misconduct. Defense attorneys present an untapped resource in the effort to better understand prosecutorial misconduct. They work with prosecutors regularly and have the opportunity to observe their conduct.

Additionally, defense attorneys may have worked as prosecutors at one point in their career, providing them with an insider perspective on how misconduct occurs. The use of defense attorneys as participants leads to the following secondary research questions:

2. What do defense attorneys perceive as the most common types of prosecutorial misconduct?
3. How do defense attorneys respond to suspected prosecutorial misconduct?
4. What methods, including methods that have been proposed but are not in practice, do defense attorneys perceive as most successful in preventing prosecutorial misconduct?

Exploratory research is generally used to explore a specific problem about which little is known, and may include a variety of methods (Maxfield & Babbie, 2015). In order to develop a more comprehensive understanding of prosecutorial misconduct, a

mixed method approach was employed. Mixed method designs allow researchers to develop a more complete account of the phenomenon under study, and have become an increasingly accepted approach to conducting social research (Bryman, 2012). The primary research method consists of in-depth, qualitative interviews with 25 criminal defense attorneys in Texas. The secondary research method introduces a more quantitative component, consisting of a survey administered to a sample of Texas criminal defense attorneys.

This chapter will provide detailed descriptions of both the qualitative interview and supplementary survey, as well as a discussion of the limitations of these methods.

## **Qualitative Interview**

### **Interview Structure**

Three types of qualitative interview designs are identified in the literature: structured, semi-structured, and unstructured (Berg, 2007; Bryman, 2012; Maxfield and Babbie, 2015). The rigidity and lack of depth associated with the structured interview make it inappropriate for this study (Maxfield & Babbie, 2015). Unstructured interviews often result in the richest responses, but the variability of questions among interviews makes them difficult to analyze (Bryman, 2012). Thus, semi-structured interviews were conducted with participants, in which a standard list of questions is prepared, but emerging themes were also explored further during the interview (Maxfield & Babbie, 2015). Both structured and unstructured probes were used during the interviews to encourage the participant to elaborate as necessary.

The interview protocol was designed to elicit in-depth responses. Respondents were asked to indicate their perception of the prevalence of misconduct by quantifying

the amount of misconduct they have personally witnessed, and distinguish that which they believed was intentional. If the misconduct was not reported, the respondent was asked to explain the reason(s) for not coming forward. Participants were asked to fully describe their experience with a number of common types of prosecutorial misconduct to provide a more comprehensive account of misconduct.

Interviews were primarily conducted face-to-face, though some were conducted by phone due to geographic constraints. One advantage of face-to-face interviewing is that it allows the interviewer to establish a rapport with the participant, which can increase the honesty and depth of responses (Maxfield & Babbie, 2015). Additionally, face-to-face interviews allow the researcher to observe the participant's reactions to questions and general demeanor. This ability to observe reactions is beneficial to the researcher, who can use participant responses as probes to obtain more information. For example, the researcher may be able to pick up on evasion, denial, or defensiveness and use those responses to elicit richer responses.

In order to fully capture the responses, interviews were audio recorded and subsequently transcribed, excluding the interviews of two participants who did not want their responses recorded. The benefits of audio recording include a verbatim transcript of the interview response, which improves the study's validity and allows for more accurate analysis. In fact, Creswell (2013) indicates that audio recording is a necessity to accurately record information. The interviews took place at locations that were selected by the participants, and included offices and coffee shops. Participants were granted confidentiality in their responses. Participants' names were never discussed on the record, and audio recordings of interviews were deleted immediately after they were



transcribed. Text transcriptions of interviews do not contain any identifying information about participants.

### **Sampling**

Unlike quantitative methods, qualitative research does not generally employ probability sampling. Rather, participants are often intentionally chosen based on their ability to provide unique information that cannot be obtained from other sources in a process Maxwell (2005) refers to as “purposeful selection” (p. 88). One method of recruiting participants that is commonly used in qualitative research is snowball sampling, in which the researcher begins with a small number of participants, who then introduce the researcher to other individuals who also have the experience or characteristics being studied (Bryman, 2012). Beginning with a small number of defense attorney acquaintances of the researcher, snowball sampling was used to identify potential participants. At the end of each interview, the participant was asked if he or she was willing to identify anyone else that might be willing to participate. While most participants were identified in this manner, the researcher also contacted defense attorneys in other areas of the state via email to request their participation.

Qualitative research does not require the large sample sizes necessary for quantitative analysis. Some researchers suggest sample sizes of about 30 for qualitative interviewing (Bryman, 2012), while others suggest that interviews should be conducted until saturation, the point at which responses become repetitive and no new information is being learned (Creswell, 2013). This study consists of 25 interviews. The decision was made to stop data collection after the researcher reached the point of saturation. No new information was being gleaned from the interviews.

## **Validity and Reliability**

Measures of validity and reliability commonly employed in quantitative research cannot be used to assess qualitative research (Maxwell, 2005). Qualitative validation can be understood as attempting to assess the accuracy or trustworthiness of one's findings (Creswell, 2013) or the findings "correctness or credibility" (Maxwell, 2005, p. 106). Many different definitions of qualitative validity exist in the literature, and not all qualitative research can be assessed the same way (Krefting, 1991). These methods of establishing validity include triangulation, peer debriefing, member checks, and external audits.

Triangulation of data occurs when more than one type of data is used, increasing the range of data to develop a more complete understanding (Krefting, 1991). Using multiple methods reduces the disadvantage of using just one potentially biased data source or collection method (Long & Johnson, 2000). The mixed-mode design employed in the current study serves as a measure of triangulation. The themes and patterns identified in the interviews were further explored by the survey. Using multiple forms of evidence can increase a qualitative study's validity (Creswell & Miller, 2000).

Peer debriefing occurs when the researcher discusses the research process and findings with colleagues (Long & Johnson, 2000). Through this peer examination process, the researcher's colleagues identify problems and potential solutions, and discuss working hypotheses (Krefting, 1991). This method of qualitative validation was achieved through discussion with the researcher's peers and dissertation advisors.

Reliability refers to the consistency of the measurement instrument (Long & Johnson, 2000). In order to improve the reliability of a qualitative study, inter-coder

agreement can be evaluated to ensure that different people apply the codes similarly (Creswell, 2013). Inter-coder agreement ensures that the researcher is consistent in her interpretation and development of themes and patterns. Miles and Huberman's (1994) recommendation of an 80% agreement rate was considered acceptable reliability. The first five interviews were coded by one of the researcher's colleagues and compared to the coding of the primary researcher to evaluate inter-coder reliability. This resulted in an 85% agreement rate.

### **Coding**

The goal of qualitative coding is to arrange the data into categories to facilitate the development of theoretical concepts and broader themes (Maxwell, 2005). The coding process allows for the discovery of patterns that are not immediately visible (Auerbach & Silverstein, 2003). The coding process assists in the development of themes, defined by Creswell as "broad units of information that consist of several codes aggregated to form a common idea" (2013, p. 186). The interpretation process allows the researcher to move beyond simply identifying codes to extract the larger meaning of the data.

The first step in the present qualitative analysis involves the transcription of the interviews. Interviews that were audio recorded were transcribed verbatim. The two interviews that were not recorded were transcribed based on the researcher's comprehensive notes. Once the transcription process was completed, the researcher identified a short list of themes as recommended by Creswell (2013). Once this list of codes was developed, the interview transcripts were reanalyzed and recoded. The recoding process continued until all relevant themes and patterns have been identified. Interviews were coded by hand and with the assistance of Nvivo computer software.

Nvivo is a computer program designed to assist qualitative researchers in the analysis of their data. Users are able to upload documents and create nodes, which are analogous to codes. Child nodes can also be created as subcategories of main nodes. One of the main benefits of Nvivo software is that after data has been entered, it can be added to and expanded as necessary (Richards, 1999).

Because the researcher conducted and transcribed all interviews by herself, she was very familiar with the content of the interviews prior to formal analysis began. This familiarity with the data coupled with the relatively small sample size allowed the primary coding analysis to be performed by hand. Following this initial analysis, interview transcripts were uploaded to Nvivo. The themes identified in the initial analysis were entered as nodes in Nvivo, and transcripts were recoded. This provided a secondary measure of reliability, as the results of the Nvivo analysis were very similar to those of the by-hand analysis. The interview protocol is attached as Appendix A.

### **Survey**

In order to supplement the findings of the qualitative interviews, self-administered internet surveys were distributed to a sample of criminal defense attorneys in the state of Texas.

#### **Survey Description**

The survey consisted of 35 questions designed to triangulate the data obtained through interviews. This survey incorporated open-ended, closed-ended, ranking, and Likert question formats. Open-ended questions are most appropriate when the researcher wants to avoid providing clues or limit the depth of the response (Schwarz & Oyserman,

2001). Because the interview protocol consists almost entirely of open-ended questions, the bulk of the survey consists of closed-ended questions.

The survey contains a number of questions about the perceived prevalence of prosecutorial misconduct. The format of questions and the order in which they are asked can have an impact on the elicited responses (Bradburn, Sudman, & Wansink, 2004). Participants were asked the percentage of their cases they suspect to have involved prosecutorial misconduct, as well as if the alleged misconduct was intentional or unintentional. They were asked if they perceive prosecutorial misconduct as an intentional or unintentional event in a Likert-scale format, as well as whether the same respondents repeatedly engage in misconduct. A rank-order design is used for participants to distinguish the frequency of different types of misconduct. Perceptions of the efficacy of proposed responses to misconduct are assessed in a Likert-scale question. Respondents were asked whether they perceive each response as very effective, somewhat effective, or not at all effective in decreasing prosecutorial misconduct.

Survey respondents were granted anonymity in their responses. Surveys were not tracked or labeled with any type of identifier, and the researcher is unable to link completed surveys to respondents.

### **Sampling**

The sampling frame for the survey consisted of the 3,200 members of the Texas Criminal Defense Lawyers Association (TCDLA). In order to obtain the desired response rate, all members of the organization were emailed a link to complete the survey online via Survey Monkey. Internet surveys provide many advantages over telephone and mail surveys, including time, expense, and convenience (Dillman et al., 2009). An

additional advantage of the internet survey is that it is self-administered, so there is no potential of interviewer interference or bias in participant response. The absence of human interviewers can result in an increased response rate for sensitive items (Couper, 2005). Each respondent received the exact same survey and instructions, increasing the reliability of responses. Respondents were free to complete the survey at their leisure and could do so privately. This privacy can further decrease the concern of social desirability, which occurs when respondents try to provide the “right” or “moral” answer rather than providing a truthful response (Kreuter, Presser, & Tourangeau, 2008).

### **Response Rate**

Many measures were taken to increase the survey’s response rate. For a population between 2,000 and 3,000, Dillman, Smyth & Christian (2009) recommend a sample size of between 699 and 843 to maintain a 95% confidence interval, within three percentage points. Israel (2009) recommends a sample size of 811 to confine to the same parameters. Maxfield and Babbie (2015) recommend a 50% response rate for analysis, and this threshold became the researcher’s target. The survey was distributed by a professional organization (TCDLA) with a reminder email distributed approximately two weeks later. Unfortunately, this entreaty and follow up resulted in only a small number of surveys completed. The researcher then emailed the survey link to county and city criminal defense attorney organizations throughout Texas. The researcher also asked interview participants to urge their colleagues to participate. The survey was initiated by 111 attorneys. Two of these attorneys did not identify themselves as criminal defense attorneys, and the surveys were terminated. An additional two participants identified as criminal defense attorneys, but failed to answer any additional survey questions. In sum,

107 surveys were included in the analysis. The decision was made to stop data collection due to exhausting recruitment attempts. The researcher queried other researchers and criminal defense attorneys in an effort to discover other ways to recruit survey participants, but no further options emerged.

Further reflection upon the small sample size is necessary to further justify the termination of data collection. One must consider whether any bias was introduced to the findings as a result of the small sample size. One way to determine if findings are representative is to compare the sample and population in terms of demographics. Table 1 below compares sample demographic data with that of active Texas attorneys in 2015, as reported by the State Bar of Texas.

**Table 1. Comparison of Population and Sample Demographics**

	<b>Active Texas Attorneys N = 87,957</b>		<b>Survey Respondents N = 107</b>	
<b>Gender</b>	Male	65%	Male	64%
	Female	35%	Female	36%
<b>Race/Ethnicity</b>	White	80%	White	88%
	Black	5%	Black	1%
	Hispanic/Latino	9%	Hispanic/Latino	8%
	Asian	3%	Asian	1%
<b>Years Licensed</b>	2 or less	8%	2 or less	1%
	3 to 10	22%	3 to 10	28%
	11 to 20	23%	11 to 10	26%
	21 to 25	11%	21 to 25	16%
	26 or more	35%	26 or more	30%

Table 1 shows that this study's sample demographics are comparable to the state demographics. The gender ratio is nearly identical, and racial composition is very

similar. While some slight differences exist in terms of professional age, the differences are not significant enough to invalidate the current study. Thus, despite the small sample size, the respondents' demographics seem to be representative of Texas attorneys as a whole.

Another concern associated with a small sample size is the possibility that something about the respondents made them more likely to participate in the research or to recognize prosecutorial misconduct. Regarding research participation, it can be argued that younger attorneys may be more comfortable using the internet, making them more likely to participate in an online survey. This concern is negated by the fact that 72% of the sample participants have been practicing law for more than ten years and are also, presumably, older in age than more recent law school graduates. This younger demographic may also be more likely to perceive that prosecutorial misconduct has occurred because they attended law school during the age of wrongful convictions. Again, this concern is somewhat alleviated by the distribution of professional experience. It is also possible that participants who had strong opinions about prosecutorial misconduct may have been more likely to participate. The small sample size is admittedly a limitation and further discussion will be provided in the Limitations section.

### **Analysis Plan**

Surveys were included in this research as a supplement to the qualitative interviews and to allow for triangulation of data. As this is an exploratory study with no real hypothesis, advanced statistical methods are inappropriate. Primarily descriptive statistics were used to interpret the survey findings. The majority of the survey consists of closed-ended questions. For each of these questions, the percentage of respondents



indicating each possible response category was determined. Percentages were also used to analyze responses to each of the Likert-scale questions. Respondents were asked to identify the year in which they graduated law school. The purpose of this question was to determine respondents' "professional age," the average of which will be reported.

While no real hypothesis testing is taking place, the researcher is interested in possible differences between defense attorneys who are former prosecutors and those with no prosecutorial experience. To test this relationship, a number of correlations were tested to determine if a relationship exists between prior experience as a prosecutor and perceptions of prosecutorial misconduct. Cross-tabulations were constructed to test the relationship between experience as a prosecutor and the following variables:

- Whether the respondent has been involved in case involving prosecutorial misconduct (Survey item #15)
- Whether observed misconduct was intentional or unintentional (Survey item #17)
- Whether respondent believes observed misconduct contributed to a wrongful conviction (Survey item #18)
- Whether the observed misconduct was reported (Survey item #19)
- The effectiveness of proposed responses to prosecutorial misconduct (Survey items #27 and #28)
- The extent to which respondents agree with the statements presented in Survey item #26

Because the data is not measured at the interval or ordinal level, nonparametric tests of significance should be employed. One of the benefits of using this technique is

that there are no requirements regarding sample sizes, providing further justification the study's small sample size (Fox, Levin & Shively, 2005). The chi-square test of significance indicates if a relationship exists between two variables. The data for this study meet all four assumptions of chi-square presented by Fitzgerald and Fitzgerald (2014). The data is sourced from a presumably unbiased sample, no cell frequency is expected to be less than five, raw frequencies will be used, and the data exists at the nominal or interval level.

While the chi-square test indicates the presence of a relationship, it does not provide any information on the strength of that relationship. Three different measures of association were used in this study. The phi coefficient was used to assess the strength of the relationship between nominal level variables in 2x2 cross-tabulations (Walker & Maddan, 2013), and Cramer's V was used for larger cross-tabulations (Bachman & Paternoster, 2017). As recommended by Bachman and Paternoster (2017), the strength of the relationship was interpreted as follows: 0 - .29 weak relationship, .3 - .59 moderate relationship, and .6 – 1 strong relationship. The survey protocol is attached as Appendix B.

### **Methodological Limitations**

There are some methodological limitations associated with this study. While defense attorneys are a valid data source for this research, they may present a biased perception of the behavior of prosecutors. They may perceive an unintentional mistake as deliberate misconduct, or exaggerate the magnitude of the occurrence. Defense attorneys may not be aware of many occurrences of prosecutorial misconduct. They may not know that a Brady violation has occurred unless someone somehow discovers the

suppressed evidence. Statements made by prosecutors may not be recognized as improper, or defense attorneys may not be made aware of improper actions during a grand jury proceeding. In an effort to balance this potential bias, the researcher targeted defense attorneys who were formerly employed as prosecutors for the qualitative portion of the study. Using snowball sampling, each interview participant was asked to identify other potential participants, especially those with prosecutorial experience. Other limitations are more specific to the two methodologies, and will be discussed in this section.

### **Interviews**

Qualitative research, in general, has been criticized for a perceived lack of methodological rigor and generalizability (Bryman, 2012). The external validity of qualitative research is often criticized for a lack of a probability sample. However, the goal of these qualitative interviews is to get a better understanding of prosecutorial misconduct through perceptions of defense attorneys. The study's generalizability is increased by coupling the interviews with surveys.

A qualitative approach is most appropriate for this study due to its advantages in conducting exploratory research (Bryman, 2012; Creswell, 2013; Maxfield & Babbie, 2015). Maxfield and Babbie (2015) identify qualitative interviewing as the “best way to capture (the) experiences and feelings” of populations about which little is known (p. 266). To the researcher's knowledge, no published research has sought defense attorneys' perceptions of prosecutorial misconduct. Prior research has generally relied on reviews of state bar disciplinary proceedings and wrongful conviction reports. As such,

the flexibility of a semi-structured interview provides the best opportunity for obtaining the rich, detailed information desired.

## **Survey**

This study suffers from a number of methodological limitations regarding the survey. With any self-administered survey, the researcher risks having someone other than the intended respondent provide the responses, such as a paralegal or assistant. This possibility is outside the control of the researcher, but addressing each survey to the specific attorney rather than the firm in general may have decreased this occurrence. Questions on the survey were clearly directed toward the attorney, including asking if the respondent is a defense attorney and how long he or she has practiced.

The sampling method for obtaining survey participants had some weaknesses. Membership in the Texas Criminal Defense Lawyers Association is voluntary, and does not include every criminal defense attorney in the state. The collaboration with the Association is justified, however, in that it was expected that the organization's involvement would increase response rates. Obtaining sponsorship from a legitimate authority is one way of increasing trust with a respondent and, in turn, increasing response rates (Dillman et al., 2009).

The mixed method research design can potentially alleviate some of the concern associated with qualitative research. The design allows “the various strengths to capitalized upon and the weaknesses offset somewhat” of each the qualitative and the quantitative components (Bryman, 2012). The lack of generalizability of the qualitative interviews is balanced by the larger sample size used for the survey. A mixed methods

approach can increase a study's validity and credibility (Bryman, 2012). Because of the exploratory nature of this study, a mixed methods approach was the best design to answer the research questions and maximize the potential for relevant findings.

The mixed-mode methodology is appropriate for this research because of the lack of prior research of this kind. The methodological limitations associated with this study are justified by the exploratory nature of the research. Concern about the small sample size of the survey portion of the study is alleviated by the fact that the statistical analyses performed make no assumptions about sample size. As such, the techniques employed in this research are methodologically sound.

#### **IV. INTERVIEW FINDINGS**

As previously discussed, qualitative interviews were conducted with 25 active criminal defense attorneys practicing in the state of Texas. Interview participants were recruited through snowball sampling as well as unsolicited email invitations. Interviews were conducted between September 2015 and February 2016. The length of interviews ranged from 31 minutes to 83 minutes, with an average of 47 minutes. All interviews were audio recorded, with the exception of two. These two participants did not give permission for their interviews to be audio recorded. For these two interviews, the researcher took detailed notes and composed the transcript immediately following the interview.

##### **Sample Description**

Of the 25 interview participants, 23 were males (92%). Regarding race, 24 participants self-identified as white (96%) and one participant identified as Hispanic (4%). Experience as an attorney ranged from 1 to 39 years, with an average of 16 years. Participants were asked to identify they type(s) of law they currently practice, and most participants self-identified as more than one type of attorney. Nineteen participants indicated that they were in private practice. Five participants identified as being appellate attorneys, and five participants were public defenders. The number of clients represented by participants ranged from 1 to 115, with an average of 37 clients. Most of the participants worked at small law firms. Twenty three of the participants (92%) were employed by firms with less than four attorneys, including 13 participants (52%) who were solo practitioners. The remaining two participants worked at law firms employing 10 and 16 attorneys.

The majority of the participants (76%) reported working primarily in urban counties. Two participants (8%) described their counties as rural, and four participants (16%) described their counties as a mixture of urban and rural. Only six participants (24%) reported working with a small number of prosecutors, while the remaining participants indicated that they worked with a large number of different prosecutors. Ten of the participants (40%) had experience working as a prosecutor.

The next sections of this chapter will present the findings from the qualitative interviews, organized by research question.

### **What is the Prevalence of Prosecutorial Misconduct as Perceived by Defense Attorneys?**

As discussed in the literature review, prior research conducted with the goal of estimating the prevalence of prosecutorial misconduct has largely focused on appellate decisions and disciplinary proceedings (Arizona Republic, 2003; Armstrong & Possley, 1999; Center for Public Integrity, 2003; Prosecutorial Oversight Campaign, 2014; Ridolfi & Possley, 2010). Because most cases of prosecutorial misconduct are believed to go undetected and/or unreported, research focusing on appellate cases probably fails to fully capture its prevalence. Thus, the primary goal of this research is to gain a better understanding of criminal defense attorneys' perceptions of how often prosecutorial misconduct occurs.

#### **Defining Prosecutorial Misconduct**

Before participants could be asked how often prosecutorial misconduct occurs, it was necessary to first establish a unique conceptualization of misconduct for each participant. Because the goal of this research is to understand how defense attorneys perceive misconduct, the researcher wanted participants to explain their own

understanding of what behaviors constituted misconduct rather than imposing a universal definition. The researcher prompted participants to think beyond a textbook definition by encouraging participants to explain what the term meant to them.

When asked to define misconduct, several participants took some time to consider their responses before speaking. Most participants indicated that any violation of procedure or ethical rules constitutes misconduct. These concepts became the themes for this area.

It (misconduct) happens when there is something that is misconduct by the prosecutor, that means they have violated the rights of the defendant and at least the spirit, if not the rules, of the criminal justice system. – Participant #3

When a prosecutor focuses more on winning than doing the right thing that is just, and because of that, winds up doing something that he or she knows is either against the rules or a bad interpretation of the rules. – Participant #8

The part of the criminal justice system that is charged with responsibility of pursuing charges against individuals does something that is inappropriate under the constitution. – Participant #22

Some participants included *Brady* violations in their definition of misconduct.

The inclusion of this specific type of prosecutorial misconduct without prompting may indicate that participants perceive the withholding of evidence as most indicative of misconduct or the type of misconduct that they are most concerned with. While every participant did not include *Brady* violations in their definition, no participant specifically included any other types of misconduct in their explanations.

When a prosecutor sits on exculpatory evidence and fails to turn it over to the defense, and any intentional violation of the rules of ethics and rules of evidence. Intentionally, knowingly, purposely violating not only the tenets of ethics but also the rules of evidence during a trial, that is what I think misconduct is. – Participant #2

I think misconduct is when they fail to give me all of the evidence. It's crazy. They hide evidence on purpose, like it's a game. It's breaking the rules, and it's



bullshit. But even more than breaking the rules, it's really screwing over people who might be innocent. – Participant #19

Participants were often careful in their responses to clearly differentiate between intentional and unintentional prosecutorial misconduct. Only two participants did not use the word “intentional” or a synonymous phrase in their definitions of prosecutorial misconduct.

Well, I think any time a prosecutor hides information. Sometimes people make mistakes, and I don't want to call that misconduct. It has to be on purpose. But to me if they hide anything that is exculpatory or mitigating, that is misconduct. – Participant #1

It means to me when a prosecutor disregards their duty to do the right thing, to do justice, and they cut corners. Obviously, any breaking of the rules or any ethical behavior. But I do think it is has to be conscious on their part, intentional. – Participant #15

Some participants admitted that there was not always a consensus in identifying behavior as acceptable or unacceptable. Some of this discord concerned the lack of confirmation that prosecutors had *intentionally* violated the rules, but the confusion extended to determining exactly when actions rose to the level of misconduct. Some participants indicated that there was some difficulty identifying prosecutorial misconduct.

It's hard to say if what I've seen is intentional. There are lots of prosecutors who are not intentionally trying to violate the rules or the rights of the defendant but are blinded by the desire to win. So their interpretation of right and wrong is tainted. There's also some gray area about what constitutes misconduct. People disagree about how far you can go. – Participant #5

The variety in participants' definitions of prosecutorial misconduct may be indicative of a broader difference in perceptions of misconduct. If some attorneys include in their conceptions actions that are not considered misconduct by others, it is difficult to come to a consensus on the prevalence with which it occurs. For example, Participant #3 included violations of “the spirit, if not the rules, of the criminal justice

system” in his definition of misconduct (see full quote above), making it inclusive of behavior that is not expressly prohibited. Participant #3 is expecting prosecutors to live up to a subjective standard that others may not be aware exists.

Interview participants included a range of concepts in their definitions of prosecutorial misconduct, but most included the theme of intentionality. Most participants mentioned *Brady* violations in their definitions, and some expressed difficulty in identifying behavior as misconduct. Thus, it is likely that some differences in perceptions of prosecutorial misconduct exist among criminal defense attorneys.

### **Prevalence of Misconduct**

Participants were asked to estimate how often prosecutorial misconduct occurs in their cases, and were encouraged to include not only times that formal allegations were made but also instances where they believed it had occurred. Almost all of the participants indicated that they had personally observed prosecutorial misconduct in at least one of their cases.

It is a concept that is more often than not present in a case and has to be investigated and found and I have found in my experience that some aspect of misconduct is almost always there because they don't do anything even if you find it. – Participant #25

We only do death penalty cases and I think it occurs, purposefully or not, in nine out of ten if not more cases. – Participant #1

I would say about half of my cases have involved prosecutor misconduct. But those are just the cases that I noticed it. If they are hiding it, then it's hard for me to know it exists. – Participant #7

It's hard to say (how many of his cases have involved misconduct) but my best guess is about 90%. Yeah, if we are including intentional and accidents and all different kinds of misconduct, I would say about 90%. – Participant #20

When I am on a case now, and if I am consulting with folks now, I don't have to expect there is misconduct. I assume it, so it doesn't really change how I handle

my cases. But in my early years, I had to wait until I had a reason to suspect it and be reactive. I presume it now. I just presume that it is there. – Participant #3 (Appellate attorney)

Only two participants reported that they had not been involved in a case that involved prosecutorial misconduct. Interestingly, both of these participants had prosecutorial experience. While the other eight participants who were former prosecutors acknowledged that misconduct occurred, these two participants could not recall personally witnessing misconduct.

(It happens) Infrequently. I think years ago, twenty years plus, we are seeing now the exonerations from then. Back in the 70s and 80s it was very common and accepted, just like we still accept perjury from law enforcement. I don't think I have ever seen it myself. Prosecutors today I don't believe are as accepting of that misconduct. – Participant #5

No, I don't think I have (observed misconduct). I can't....Not even when I was a prosecutor. It wouldn't have been tolerated. I really can't....no. – Participant #18

About half of the participants indicated that they are not surprised when they begin to suspect prosecutorial misconduct. Other participants indicated that while they are vigilant for signs of prosecutorial misconduct, they are still surprised by its occurrence because they assume prosecutors to be ethical.

Participant #16: I'm always on alert for it, yeah. I like to give them the benefit of the doubt but I am always looking for it.

Interviewer: What are you looking for?

Participant #16: Prosecutors that don't keep their word. I make it a practice to try to make sure that prosecutors are aware of their duty to go out and find, in certain circumstances, exculpatory material. A lot of them aren't conscious enough of the idea that they are responsible for what is in the files of the police department and the backgrounds of their witnesses and things like that. I can't get any of that. They have a duty to look for it for my client.

I mean, it's kind of like walking to your car at night. You always look around and walk quickly and try to park in well-lit areas, so you're at least thinking about

the possibility that you might get jumped. But you would still be surprised if it happens. I'm always on top of things to make sure nothing slips by me, but it's still kind of a shock to see it happen. – Participant #11

In addition to considering the prosecutorial misconduct that they have personally experienced, participants were asked to estimate the prevalence of misconduct in their county or state. Most participants expressed difficulty in answering these questions, as they did not want to speculate or admitted to only knowing about their local jurisdiction. Some participants, however, perceived prosecutorial misconduct as a state-wide problem.

It happens so frequently (in this county) that as a defense bar we are actually starting a Brady bank, a bank of Brady information to where we can help each other out, help each other stay strong against prosecutors that are hiding the ball. It is a huge issue. – Participant #19

It is bad in my county, but even worse in small counties because you get small counties that don't receive a lot of media attention or they get stuck in their own little ways. – Participant #10

Participant #18, a former prosecutor who had never been involved in a case that involved prosecutorial misconduct, estimated the prevalence of misconduct in the state of Texas as much lower than other participants.

Depends on the jurisdiction and magnitude. I would not say a huge percentage. I would say probably not more than 3 or 4 percent. – Participant #18

The majority of participants have experienced some form of prosecutorial misconduct in their cases, with the notable exception of two participants who have experience working as a former prosecutor. Difference in perceptions between defense attorneys with and without prosecutorial experience will be further examined through the survey portion of this research, discussed in the next chapter. In general, participants perceive prosecutorial misconduct to be a statewide problem.

## **What Do Defense Attorneys Perceive as the Most Common Types of Prosecutorial Misconduct?**

In addition to obtaining a better understanding of the prevalence of prosecutorial misconduct, a secondary goal of this research is identify the types of misconduct most frequently engaged in by prosecutors. Participants were asked if they had any experience with several different types of misconduct, including selective prosecution, bad faith prosecution, misconduct occurring at the grand jury stage, prosecutors making inappropriate statements to the media, prosecutors referencing inadmissible evidence or making inflammatory statements at trial, *Brady* violations, misconduct involving informants and/or witnesses, and making false promises at plea bargaining. After participants discussed their experience with each type of misconduct, they were asked to identify the misconduct that they perceive as occurring most frequently. Three patterns in terms of type of misconduct were identified: *Brady* violations, misconduct involving witnesses and/or informants, and misconduct occurring at the grand jury stage.

### ***Brady* Violations**

Participants identified *Brady* violations as the most common type of misconduct engaged in by prosecutors. This failure to disclose evidence was identified by 15 participants as being the most common type of prosecutorial misconduct. Participants often used examples in their discussions of *Brady* violations.

There was a woman accused of killing her husband. The experts couldn't figure out what happened and they exhumed the body. They ended up saying that a hole in his buttocks was where she must have shot him up the medicine. Nobody told anyone that they gave him a shot at the hospital when he went in for the overdose. She wasn't exonerated but they let her out. – Participant #3

(Discussing witnesses in an appellate case) “They (the witnesses) gave us videotaped and sworn testimony that the police threatened to deport them and take their kids away, held them in jail, and said “if you don't say what we want when

you testify, this is all going to happen but if you agree we will let you out.” So they let him out and then they paid for his apartment, they paid for their utilities, gave them cash in envelopes, brought a Christmas tree and toys for the kids, and did all of this until they were done testifying. And nobody had ever told anybody about this before. So then we went out and looked for the police officers and we got some affidavits from them confirming this. Still, the prosecutors had hid all that stuff. They knew what was going on.” – Participant #8

Some participants indicated that they were basing their assessment in part on the experiences of others, learned about through media coverage.

It’s (the most common type of misconduct) gotta be *Brady*. Not turning over evidence. That’s definitely the one you hear about the most. – Participant #14

I’m going to guess evidence disclosure, but it really is a guess. I have suspected it happening in my cases but haven’t been able to prove it. If I am counting those occurrences, plus what I see on message boards and hear about from other people, then it is probably hiding evidence. – Participant #12

The gray area in determining what constitutes misconduct that was problematic in defining prosecutorial misconduct was also found in identifying *Brady* violations. Most participants again indicated that some level of intent must precede the failure to disclose evidence in order to consider an occurrence as a *Brady* violation. One participant was also unsure as whether a last minute evidence disclosure would be considered a violation.

In a high profile case and something surfaces that hurts the state’s case and they don’t disclose it, I think it is absolutely intentional. It could be a political career on the line, or they are too far into it. You can assume they would be more careful in those big cases that can make their career, so I think with those cases it is more intentional. Either way, it is still misconduct. Then you got a situation where when there is a run of the mill crime, nobody is going to stake their reputation on something that doesn’t really mean that much. I think those are less intentional and less serious. – Participant #21

It’s not, at least in my experience, it isn’t an epidemic, but I would say it is the most common. More often or not, what I see, in my jurisdiction, when we get close to trial, like the Friday before, we are handed evidence that the prosecutor tells us they didn’t know they had. Same old story – the police found it in their evidence closet and I didn’t know about it. Is that a failure to disclose? Eventually they give it to you, but not at a time when you can really do anything

about it. And this is routine. And judges hate it, too, because I have to file a motion to continue. – Participant #13

Participants expressed a general frustration in the fact that the majority of their suspicions of *Brady* violations can never be proven. Simply put, there is no way to prove that something you were never given exists. Participants sometimes indicated that evidence disclosure violations probably occurred in even more cases than they knew about.

### **Misconduct Involving Witnesses and Informants**

Participants also identified misconduct involving witnesses and informants as one of the most prevalent types of prosecutorial misconduct. Some participants indicated that they have experienced prosecutors who they perceive as knowingly allowing perjured testimony, but a pattern developed in which coaching of witnesses was seen as occurring more frequently.

They (prosecutors) don't give them the chance to make up their own stories. They tell them what to say. They get these witnesses on the stand, and they are just reciting a script that they (prosecutors) gave them. The prosecutor tells them what to say. – Participant #25

I don't know about letting them commit perjury, but I do think that sometimes prosecutors might be a little too hands on with witnesses. Witnesses, informants...they know what they are supposed to say. They go up on the stand and do what they are told, and then get the benefit of some deal that the jury may or may not know about. – Participant #6

Similar to the findings regarding *Brady* violations, some participants were unsure if occurrences constituted misconduct. They expressed concern that prosecutors might avoid committing misconduct by not expressly offering a reward for testimony, but rather insinuating that witnesses and informants will benefit from their testimony. Similarly, some participants believe that prosecutors do not specifically instruct witnesses and/or

informants to lie, but that they should be aware that the value of the proposed benefit may serve as an inducement to commit perjury.

I mean, as a prosecutor you have to have the tools of using an informant. You have to talk to witnesses. All these things have to happen in the process. When you start making promises that might induce someone to lie, then that is a fine line. Where does that line end? I don't know. If a prosecutor says, 'If you say this, I will give you that,' that is a problem. It may be suggested but not overt, it is veiled. – Participant #4

Come on. They know that dangling a reduced charge in front of someone facing serious time is impossible to resist. They might excuse it by saying that they didn't tell the person to lie, but they know what they're doing. They know the deal is too good to pass up. Some people might not consider that misconduct because they didn't technically break the rules, but it is definitely intentional. They know exactly what they're doing. – Participant #10

Participants also expressed frustration with the perceived reluctance of judges to interfere with the prosecutor's relationship with informants and witnesses. One participant went into some detail about his perception that judges are very reluctant to believe that prosecutors engage in this type of misconduct.

It is very problematic. If you look at the data on exonerations, actual innocence, it is eyewitness testimony and informant testimony at the top of the list. You have to catch them red-handed giving them liquor and women to have sex with on repeated occasions before you can get them. The use of informants and the reluctance of courts....some jurisdictions let them give instructions that these witnesses are inherently suspect. But you know, juries don't understand these instructions. They are incomprehensible to the lawyers working the case. The jurors don't understand them. – Participant #3

Similar to the patterns observed with *Brady* violations discussed above, participants seemed to assume that informants had been coached or perjured themselves, but were unable to prove it. Again, some definitional issues in terms of what constitutes misconduct were presented. Participants expressed uncertainty about how far prosecutors can go when preparing witnesses and/or informants before it becomes misconduct.



## Misconduct at the Grand Jury Stage

When asked about prosecutorial misconduct occurring at the grand jury stage, most respondents indicated that they simply lacked the information to know if it had occurred in their cases. A recurring theme in this area was the mystery of the grand jury stage. Defense attorneys are generally excluded from these proceedings. In most jurisdictions, defense attorneys do not participate in grand juries and the transcripts of the proceedings are sometimes sealed. Several participants expressed frustration at their difficulty in obtaining copies of the transcripts post-indictment.

In most jurisdictions, you can't get the [grand jury] transcript. There is no involvement of attorneys or defendants at grand juries. Prosecutors are in complete control and it's very hard to prove what they did or didn't do. – Participant #9

I wouldn't know. We aren't really allowed to know. I do suspect that there is misinformation....I suspect that is more common than we know or can ever find out. – Participant #23

Despite their uncertainty as to whether they had actually experienced this type of misconduct, a large number of participants identified it as a type of misconduct that occurs frequently. This pattern is interesting. Despite having direct experience with other types of misconduct, participants identified misconduct at the grand jury stage as one of the most prevalent types of misconduct. A recurring theme was the belief that the secrecy surrounding these proceedings is so conducive to misconduct, that it simply must be happening.

I don't have much experience with grand juries, but do I think that they do? Think about this. What we have statewide is that cop shootings always go in front of a grand jury and they always no bill it. Regardless, it goes on in every police shooting. Do they indict police officers? Yeah, sometimes, but not for something done when they are doing what they are supposed to be doing. It's when they steal money or something, but not for what they do in the line of duty. – Participant # 21

Sometimes these cases get through, and it doesn't make sense. I often wonder what they (prosecutors) say in there (grand jury proceedings) because sometimes stuff doesn't add up. It would be hard for me to say for sure, but I would guess that there is a lot of minor misconduct that happens there. – Participant #2

One participant with prosecutorial experience did indicate that he had experienced misconduct at the grand jury stage with a prior boss:

When I was in a prosecutor's office years and years and years ago, the man that I worked for used the grand jury to weed out cases he didn't want to prosecute. He sometimes felt that he had to try it for political reasons but he really didn't want to. He put it on the grand jury to indict. Or he would call the defense attorney to try to get the guy to testify. The attorney wouldn't be allowed to go in, but the prosecutor would give a wink wink to insinuate that he would present the evidence in a way that would make an indictment unlikely. – Participant #5

While few participants identified direct knowledge of prosecutorial misconduct occurring at the grand jury stage, a pattern of assuming that it occurred frequently was evident among participants. Participants believed that the opportunity to get away with misconduct is too great for some prosecutors to resist. Their exclusion from this proceeding, however, renders them unable to confirm these beliefs.

Thus, participants identify the failure to disclose evidence, improper coaching and inducement of witnesses and informants, and misconduct relating to the grand jury stage as the most prevalent types of prosecutorial misconduct. It is important to note that these three types of misconduct are perhaps the most difficult to uncover and to prove. For example, it is easy to identify and prove when a prosecutor references inadmissible evidence, or makes inappropriate statements to the media. The same cannot be said for the types of misconduct identified by participants. One cannot prove that a prosecutor failed to disclose evidence if one is not aware the evidence exist. The less overt deals between prosecutors and informants and/or witnesses are often not documented. Defense

attorneys generally do not know what happens at grand jury proceedings. As such, some of the determination of prevalence relied, at least in part, on assumptions rather than observations.

### **How Do Defense Attorneys Respond to Suspected Prosecutorial Misconduct?**

In order to better understand how criminal defense attorneys respond to suspected prosecutorial misconduct, interview participants were asked to explain how they prepare for misconduct, and how they make the decision to report it.

#### **Preparing for Misconduct**

Most participants indicated that they prepared for misconduct by remaining vigilant and filing the appropriate motions to preserve the record in case of appeal. These themes were prevalent in most of the interviews.

You can't prepare for it. You can watch for it. You can know that you are watching for it. You can try to be proactive in your attempts to keep a good record in case it does happen. You make all the requests and put on the record that you want X, Y, and Z...I always put it on the record to make sure. I try to be proactive on making a record on the things that you want and how they would affect your case. Sometimes you try to do that in multiple ways. – Participant #4

I file motions, make sure the judge knows what is going on and hopefully he rules in my favor. I take care of it that way, which also preserves the record for any future appeals. Sometimes that is all you can do, is try to make the record as clear as possible for the appeal. – Participant #13

I always file my standard *Brady* motion. It's in my standard package of any case that I set for trial, I always file it. And prosecutors are always like 'Why are you filing that? It's our duty.' And I always tell them that I know it's their duty but I still want it on the record. I want it on the record that I asked for it. – Participant #21

As indicated by these comments, there was a strong desire for the court record of the case to reflect the participants' efforts to zealously represent their clients. Participants

often indicated that they wanted to preserve the record in case of appeal, acknowledging that the possibility that misconduct could be uncovered in the future always exists.

### **Reporting Misconduct**

Thirteen interview participants indicated that they had reported allegations of misconduct. Most participants indicated that they had reported these allegations to judges or head district attorneys due to a perceived ineffectiveness of the state bar organizations. Participants who indicated that they had made reports to judges or district attorneys were often asked why they did not file grievances with the bar association. They simply did not think that filing an official grievance was worth the trouble.

Participant # 3: I just bring it to the judge. The judge can deal with it right away so it doesn't drag out. And overall, my duty is to my client so I have to deal with it right away. If you bring it to the bar, you have to wait a really long time.

Interviewer: Why not still bring it to the state bar after the trial?

Participant #3: A lot of risk for me with little chance of reward.

Participant #12: When I reported it, I told the guy's boss. I had a good relationship with that district attorney, so I called him and told him what was going on. It's better to deal with it that way than making a big thing out of it and involving more people.

Interviewer: Why didn't you report it to the bar?

Participant #12: I wanted it to be dealt with right away. What you need to understand is that they bar doesn't want to go after prosecutors. Even if I filed a grievance and they did their investigations, they aren't going to do anything. Maybe a short period of license suspension, but even that is unlikely.

When participants indicated that they reported allegations of misconduct to district attorneys, they expressed a desire to deal with the situation more informally, as evidenced by Participant #12's statement above. These participants often mentioned having a good relationship with the prosecutor's boss, or giving the misbehaving prosecutor an opportunity to correct his or her error. The goal of bringing allegations of

misconduct to the judge's attention seems to be to have the issue dealt with immediately. Participants who complained to the judge indicated that their goal was for the judge to issue an order compelling the disclosure. In choosing these options, participants were less concerned with the prosecutor being punished, and more concerned about righting the wrong. The recurring theme of the bar association's ineffectiveness was also present in participants' reasons for not reporting misconduct.

### **Reasons for Not Reporting Misconduct**

If applicable, interview participants were asked to explain their decision to not report misconduct. All interview participants were asked to speculate as to why other attorneys fail to report misconduct. Two themes were developed in this area: fear of retaliation from prosecutors, and perceived ineffectiveness of the bar association.

Participants overwhelmingly indicated that the consequences of reporting prosecutorial misconduct prevented them from doing so. They feared vengeance from both the prosecutor they made allegations against and his or her entire office, in both the current case and future cases. They perceived an ethical duty to future clients to give them the fairest trial possible, and were concerned that actions against prosecutors in prior cases would hinder their ability to live up to this duty.

If you go against one prosecutor you go against them all. I would be treated differently. I've seen it happen with other attorneys. You get frozen out. They make all your cases harder for you – no more deals, they cancel hearings, they drag things out... – Participant #21

It depends on how important it is to the case, whether or not it's affecting my client. Sometimes misconduct could be going on and it doesn't necessarily affect the client so even though I would love to shout and scream about it, it might not be in the best interest of my client. When you start making noise about those kinds of things, be ready for the repercussions. Prosecutors might come back stronger against your client, and/or the judges can get upset at you in the case and

they are going to take it out on your client. You get to walk away. Your client doesn't. – Participant #22

In the end, my job is to represent my client. My job is to do the best job I can for my client. At that particular time, in trial, I was winning my case and I didn't want to divert the attention away from the fact that we were winning and they couldn't prove their case beyond a reasonable doubt to this case is now going to be about what the prosecutor didn't give me. That turns the focus away. – Participant #14

You think about all the repercussions of reporting, and the one that always gets me is how it will affect the client and my future clients. I can't piss off a whole district attorney's office. This is a small county. At the end of the day, I still have to pay my bills and I can't risk being shut out. – Participant #16

The ineffectiveness of the State Bar of Texas at responding to claims of prosecutorial misconduct was another pattern observed in this topic. Participants did not file grievances with the bar because they did not have confidence that any meaningful sanction would result.

The bar isn't going to do anything. They really don't think prosecutors can do anything wrong. There is no way that a prosecutor would intentionally break the rules, but defense counsel is telling them it happens all the time. – Participant #23

It's not a secret that the bar association sides with prosecutors. We all know it. That's why I don't bother filing grievances. Your name gets dragged through the mud and the prosecutor walks away. – Participant #15

Some participants did indicate that they are hopeful that high-profile cases and increased attention could foster a change in how the bar association responds to allegations of prosecutorial misconduct.

The state bar, for a long time I think, has not regarded prosecutors as lawyers like everybody else. The state bar doesn't see itself, although I think that is evolving after Morton, as being the watchdog for prosecutors. Maybe they will start paying more attention. I don't know. But they just can't imagine that prosecutors would ever break the rules. – Participant #17

Actually, in the end, they (bar association) have done more than most states. It is a big state, there is a lot that still goes on, but I do have to give them credit. You

can count on your hands prosecutors that something has happened to them for it, and I think this is the only state with multiple. Maybe Arizona has two. We just did one in the Graves case, and we have the Morton case. In the scheme of things, I think they have done well but per capita, they still suck. – Participant #8

Perhaps state bar associations will become more active in the fight against prosecutorial misconduct in response to these high profile cases. Participants seemed hopeful that being able to put a face to the consequences of misconduct, including Michael Morton, may be the catalyst needed to reform the system.

### **What Methods Do Defense Attorneys Perceive as Most Successful in Preventing Prosecutorial Misconduct?**

Researchers have proposed several methods designed to deter prosecutors from engaging in intentional misconduct. Interview participants were asked their opinion on the potential effectiveness of these responses.

#### **Michael Morton Act**

As discussed in Chapter 2, Michael Morton spent nearly 25 years in a Texas prison for the brutal murder of his wife before he was exonerated after the prosecutor withheld evidence from the defense. The Michael Morton Act requires prosecutors to turn over all file materials to the defense attorney, removing the prosecutor's discretion to identify and disclose only that evidence that is exculpatory and material. Participants were asked their opinion on whether the Michael Morton Act will prevent prosecutorial misconduct.

Most participants responded that they thought the open files policy would be somewhat effective at preventing prosecutorial misconduct, but a pattern of uncertainty was observed as to if it would significantly eliminate *Brady* violations or force prosecutors to play by the rules.

The idea behind it is good, that prosecutors will turn everything over. Maybe once we get some cases through that clarify some of the ambiguity, it will work. I do fear that it will make defense counsel lazy, that they will assume everything is there even if it isn't. Or maybe they slack on their own investigations. They shouldn't do that, none of the good ones would, but some of us are lazy. – Participant #23

Well, supposedly, in theory, it is going to limit their opportunity to make decisions on what is and is not material, so it should reduce the suppression type of misconduct. I don't think it will really affect things like selective prosecution, racial bias, things like that. I think that will still go on. I think it is also creating some opportunities for them to take improper steps to conduct misconduct but gaming the statute until courts rule on certain things. For example, many counties are interpreting it to mean that everything is handed over after indictment. The statute is not clear what the timeframe means, what does "as soon as possible" mean? We don't know if waiting until indictment is misconduct. – Participant #2

I think it's good, now that we have all of this discovery. That is wonderful. What I do find is there is much more material and it is kind of overwhelming. I like looking at the physical file. I want to look myself. I don't trust the prosecutor or clerk to give me everything. There is other things in that file that I want to look at. I want criminal histories and other stuff I don't get it. Overall, it is a great thing but I have to make up for it in other ways. – Participant #17

Participants' optimism about the proposed effectiveness of the Michael Morton Act was clouded by the relative short amount of time since the Act's passage. They did not feel that enough time had passed since the Act went into effect to really assess if it is working. Participants seemed hopeful that the open files policy would decrease recidivism, but cautioned that defense attorneys should not rely on prosecutors to do their job.

### **Increase Training**

Researchers have indicated that attorneys do not receive enough training to prepare them for a career as a prosecutor. Specifically, that new attorneys do not have enough training on *Brady* requirements, and that increased and regular training could be effective at preventing misconduct. Confirming these researchers' suspicions, every



interview participant laughed when they were asked about the training they received on evidence disclosure requirements in law school.

Look, law school was good preparation in general, but we were not trained as lawyers. We were not trained to learn about bias, tunnel vision, all these psychological things of how we make decisions and perceive things. All that needs to be taught. It has nothing to do with the law, but is just how to get around in the world. A prosecutor needs to learn to not think that every file is guilty. The presumption of innocence means something, and prosecutors are not taught to look at things in that objective fashion. – Participant #12

You learn a lot in law school. *Brady* comes in in your professional life. That is where you learn it. It doesn't take long to learn *Brady* once you are practicing. Law school, it was maybe under ethics. But you take so many classes, real estate and contracts and all that. I can't criticize law schools for not providing the training because they aren't just training criminal lawyers. They are training all lawyers. – Participant #24

Whether you are a second chair, first chair, elected prosecutor, setting the culture, I think that there should be a number of options that would include training. There should be some need to have them supervised or their cases reviewed by someone else to establish a track record of being open and honest. – Participant #14

Well, the training, if you can even call it that, that you get in law school is a joke. And the law is constantly changing. They need to get training. I don't know if it should come from the Bar or the prosecutor association or the elected prosecutor, but they need it. – Participant #7

Most participants agreed that increased training in evidence disclosure requirements would be beneficial in reducing this type of prosecutorial misconduct.

It couldn't hurt, that much I know. Regular training on new cases, ethical stuff...I think that would be good. It would probably piss them off though, somebody telling them they don't know how to do their job. That might be a good thing, too. – Participant #6

It will help, for sure. Just a subtle little reminder about their duty. Even if they don't learn anything at the training, they will see that it's important stuff to know. Make them remember that they are dealing with peoples' lives. – Participant #16

A notable exception to the support of increased training came from one participant. While some participants were more ambivalent than others about the potential benefit of increased training, one participant was adamantly against it.

No. They don't need more training. They know what they are supposed to do, they just choose not to do it. Telling them the rules over and over and over again isn't going to do anything when you are dealing with people who don't care about the rules. If you can't tell if something is *Brady*, you shouldn't be a prosecutor. It's as simple as that. Stop making excuses for them – 'oh, they weren't trained properly.' That's BS. – Participant #9

This participant also indicated that he believed that most of the misconduct that he had experienced was intentional, which may contribute to his perception that prosecutors purposefully withhold evidence.

Overall, participants were at least somewhat optimistic about the potential effect of increasing training for prosecutors. Most participants expressed the belief that training wouldn't hurt, but that it probably wouldn't have a huge impact on the prevalence of prosecutorial misconduct.

### **Increase Sanctions**

Another proposed response to prosecutorial misconduct is to increase sanctions on prosecutors who are found to engage in misconduct. Interview participants were asked how they thought prosecutors who broke the rules should be punished. A recurring pattern was participants' belief that prosecutors should be subject to criminal and/or civil lawsuits.

Criminal charges. There should be criminal charges. And I should be able to sue their ass off. – Participant #1

I think at a minimum, a Class A Misdemeanor, up to a year in jail. It should be meaningful. It should be, let's forget all the rules, it should be a felony conviction. You should be a felon for trying to hide evidence. – Participant #9

If you can prove someone hid stuff, they need to be disbarred and lose their license. The reason is because you are dealing with peoples' liberty. If you ruin someone's life like that, you have to pay for it. You are maiming someone's life. You are ruining their life, and they can't get it back. And if you did it on purpose, you should be held responsible in a court of law. – Participant #20

Criminal penalties. Of all the things, criminal penalties are more effective than allowing personal lawsuits. Penalties that are commensurate with the charges. But police have to face criminal penalties for their actions, too. – Participant #23

If a prosecutor knowingly hides evidence, and an innocent person is sentenced to death or even life in prison, that prosecutor should be charged with attempted murder because that is what he did. He ended or almost ended someone's life. – Participant #12

As evidenced by these quotes, most participants felt very strongly that more stringent punishments should be imposed on prosecutors who engage in misconduct. As discussed in Chapter 2, prosecutors have absolute immunity that protects them from being subjected to lawsuits in most circumstances. These responses indicate that there is at least some support for the argument that prosecutorial immunity should be restricted.

Participants were also asked if they thought increased sanctions would deter prosecutors from breaking the rules. This question was responded to with overwhelming support. Every participant indicated that they believed in the general deterrent effect of increased sanctions, in that prosecutors in general would be less likely to engage in misconduct if the potential penalty was more likely or more severe.

There is no doubt that it would help. Definitely. They know they won't get caught now, and if they do it will be a slap on the wrist. There is more motivation to break the rules than to be honest and play fair. But I bet the real threat of potential jail time would keep them in line. – Participant #24

You know, I would love to see that. I really would. I think it would be better if they were a little bit scared. They wouldn't push the line so much. Really, they should be scared. They are dealing with peoples' lives. – Participant #16

Increasing sanctions, including holding prosecutors criminally and civilly responsible for their misconduct, is seen as a very promising response to prosecutorial misconduct. This response to misconduct seemed to be very strongly supported by every participant. Given the extensive range of behaviors that are protected by prosecutorial immunity, it is unlikely that these types of proceedings will increase in the future. However, a better reporting process might increase formal complaints of misconduct in the future.

### **Reform Reporting Methods**

As previously discussed, a theme identified among reasons for not reporting allegations of misconduct was fear of retaliation by the prosecutor. Defense attorneys often work with prosecutors from the same office, if not the same individuals, on a large number of cases. They feared more strained relationships with their prosecutorial adversaries if they raised allegations of misconduct. A large number of participants predicted that reports of prosecutorial misconduct would increase if changes were made to the current reporting system.

Interview participants often expressed a desire for more protection after filing an official grievance against a prosecutor. They indicated that they would be more likely to file grievances if they wouldn't be forced to work with the prosecutor in question or his or her colleagues while the investigation was pending.

After a grievance has been filed, they should bring somebody else in, a special prosecutor, to handle all of the reporting attorney's cases in that county. It's the only way to make sure you aren't treated differently if you file. – Participant #10

If there was a way to truly make the allegation anonymously, I think more guys would come forward. But it's just such a risk. Everyone is going to know sooner or later that you're the guy who did it. I don't know. And like we said before, the

other prosecutors are going to take it out on you. If I didn't have to work with them, that might make me report it. – Participant #9

### **Summary**

Participants indicated that they perceive prosecutorial misconduct as a frequently occurring problem affecting the state of Texas. While almost all of the interview participants believed they had experienced prosecutorial misconduct, a large portion of them failed to report it. Fear of retribution from prosecutors as well as an ineffective sanctioning process were the primary reasons for not reporting misconduct. Participants identified the failure to disclose evidence, improper coaching or witnesses and/or informants, and misconduct at the grand jury stage as the most common types of misconduct engaged in. All participants identify making sanctions for prosecutors caught engaging in misconduct as the best way to prevent misconduct. Participants were optimistic but hesitant about the effectiveness of the Michael Morton Act.

## V. SURVEY FINDINGS

In total, 107 online surveys were completed by criminal defense attorneys in Texas. Respondents were recruited through an email solicitation distributed by the Texas Criminal Defense Lawyers Association, with a follow-up email sent approximately two weeks later. Following a low response rate, emails were sent to county level criminal defense groups to encourage participation, and interview participants were contacted and asked to urge their colleagues to participate. Surveys were completed between October 2015 and March 2016. Because respondents were allowed to skip questions without being forced to answer, the raw numbers may not sum to the total of 107 surveys.

**Table 2. Survey Sample Description**

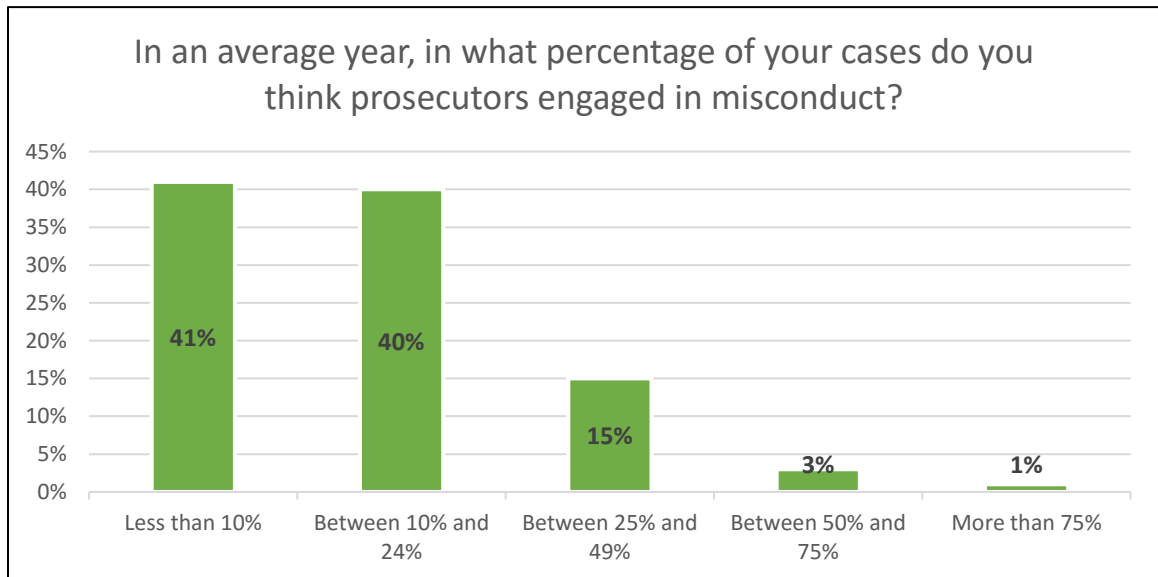
<b>Sample Demographics</b> <b>N = 107</b>		
<b>Gender</b>	Male	64%
	Female	36%
<b>Race/Ethnicity</b>	White	87%
	Black	1%
	Hispanic/Latino	8%
	Asian	1%
	Other	2%
<b>Size of Jurisdiction</b>	Urban	51%
	Rural	12%
	Suburban	36%
<b>Years as a Criminal Defense Attorney</b>	Less than one	4%
	One to four	10%
	Five to Nine	26%
	Ten to Twenty	32%
	More than Twenty	28%
<b>Prosecutorial Experience</b>	Yes	47%
	No	53%

As indicated in Table 2 above, there were significantly more female survey respondents than female interview participants. Survey respondents were more diverse in terms of race and size of jurisdiction than interview participants. Additionally, just less than half of survey participants reported having experience working as a prosecutor.

The survey findings will be organized by research question, followed by a discussion of the findings regarding the influence of prosecutorial experience.

### **What is the Prevalence of Prosecutorial Misconduct as Perceived by Defense Attorneys?**

Respondents were asked a number of questions that were designed to gauge their perceptions of the prevalence of prosecutorial misconduct. When asked if they had ever been involved in a case where they thought prosecutors were engaging in misconduct, 93% (100 respondents) indicated that they had experienced misconduct. Respondents were also asked to estimate the percentage of their cases that involve prosecutorial misconduct in an average year; these findings are presented in Figure 1 below.



**Figure 1. Annual Percentage of Cases Involving Prosecutorial Misconduct**

While a significant portion of survey respondents indicated that prosecutorial misconduct occurs in less than 10% of their cases annually, the majority of respondents indicate that they experience it more frequently. Of the respondents who reported observing prosecutorial misconduct, 41% (41 respondents) believe the majority of it was intentional. The remaining respondents were evenly split between believing the misconduct was unintentional (30%) and being unsure about the intent (30%). Slightly more than half of respondents (59%, 58 respondents) believe they have witnessed prosecutorial misconduct that has led to a wrongful conviction.

Thinking beyond personal experience, respondents were asked to indicate the percentage of cases in which misconduct occurs in their county and in the state of Texas. These findings are presented in Table 3 below.

**Table 3. Perceptions of Prevalence of Misconduct in Participant County and State of Texas**

<b>Thinking beyond misconduct that you have witnessed, in what percentage of criminal cases in your county and in the state of Texas do you think prosecutorial misconduct occurs?</b>		
	<b>County</b>	<b>State</b>
<b>Less than 10%</b>	35%	22%
<b>Between 10% and 24%</b>	41%	43%
<b>Between 25% and 49%</b>	15%	26%
<b>Between 50% and 75%</b>	8%	5%
<b>More than 75%</b>	2%	4%

Survey participants did not perceive prosecutorial misconduct as a rare event in neither their county nor in the state of Texas. Most respondents indicated that they think



prosecutorial misconduct is present in between 10% and 49% of cases both locally and statewide.

Respondents were asked the extent to which they agree with the statements that prosecutorial misconduct is a rare occurrence, that most prosecutors play by the rules, and that there are some prosecutors who repeatedly engage in misconduct. The response options were presented in a Likert scale ranging from strongly agree to strongly disagree, and findings are presented in Table 4 below.

**Table 4. Agreement with Statements Regarding Prevalence**

	<b>Strongly Agree</b>	<b>Agree</b>	<b>Both Agree and Disagree</b>	<b>Disagree</b>	<b>Strongly Disagree</b>
<b>Prosecutorial misconduct is a rare occurrence.</b>	2%	14%	23%	44%	18%
<b>Most prosecutors play by the rules.</b>	8%	36%	36%	17%	4%
<b>There are some prosecutors who repeatedly engage in misconduct.</b>	58%	32%	6%	2%	2%

Most participants do not perceive prosecutorial misconduct is a rare occurrence, with only 16% of the sample agreeing or strongly agreeing with that statement. While a large portion of the survey respondents both agreed and disagreed that most prosecutors played by the rules, more respondents agreed or strongly agreed than disagreed. Most respondents agree or strongly agree that some prosecutors are responsible for multiple instances of misconduct.

Overall, respondents seem to perceive prosecutorial misconduct as a regularly occurring event, both in their county and the state of Texas. The findings indicate,

however, that criminal defense attorneys believe that most prosecutors play by the rules. They seem to think that a small number of prosecutors repeatedly engage in misconduct.

### **What Do Defense Attorneys Perceive as the Most Common Types of Prosecutorial Misconduct?**

Respondents were asked to indicate how often they think a number of types of prosecutorial misconduct occurs. These findings are presented in Table 5, below.

**Table 5. Perceptions of Prevalence of Types of Misconduct**

	<b>Always</b>	<b>Often</b>	<b>Sometimes</b>	<b>Rarely</b>	<b>Never</b>
<b>Selective Prosecution</b>	5%	50%	33%	11%	3%
<b>Bad Faith Prosecutions</b>	4%	39%	40%	17%	1%
<b>Grand Jury Stage</b>	7%	18%	37%	19%	0
<b>Inappropriate Statements to Media</b>	2%	41%	43%	13%	1%
<b>Referencing Inadmissible Evidence</b>	4%	41%	39%	17%	0
<b>Withholding Evidence</b>	9%	34%	40%	17%	0
<b>Knowingly Allowing Perjured Testimony</b>	5%	17%	42%	33%	3%
<b>Withholding Nature of Relationship with Informants</b>	9%	36%	34%	21%	0

Respondents identified selective prosecution as being most common, with 55% of respondents indicating that it occurs always or often. Least common is knowingly allowing perjured testimony, with only 22% of the sample indicating it occurs always or

often. For four types of misconduct, no respondents indicated that it never happens, which also speaks to the prevalence of misconduct as a whole.

### **How Do Defense Attorneys Respond to Suspected Misconduct?**

Respondents who indicated that they had experienced misconduct were asked four additional questions to better understand how they respond to misconduct. Most respondents (60%, 60 respondents) indicated that they did not report the misconduct they observed. These respondents were asked to indicate the primary reason why they did not report the misconduct. The overwhelming majority (83%) indicated that the misconduct was not reported because they did not have proof that it occurred, while 10% of respondents wanted to preserve a working relationship with the prosecutor. The complicated formal complaint process was the reason 5% of respondents did not report misconduct, and 3% did not want to “rat out” a colleague.

The respondents who did report misconduct were asked how many times they have reported. Most respondents (59%) have reported misconduct between two and four times, and 31% of respondents have reported it once. The remaining 8% of respondents have reported misconduct more than four times. They were also asked to indicate to whom they reported the misconduct, and were allowed to select more than one response. Respondents most frequently reported misconduct to the judge (70%), followed by the district attorney (58%). Despite the fact that the state bar association is the agency that formally sanctions attorneys who misbehave, only 36% of respondents have reported misconduct to that agency.

## What Methods Do Defense Attorneys Perceive as Most Successful in Preventing Prosecutorial Misconduct?

Respondents were asked questions designed to assess their opinion of potential responses to misconduct, in terms of perceived efficacy at reducing prosecutorial misconduct. First, 85% of respondents either disagree or strongly disagree that prosecutors who caught engaging in misconduct are disciplined properly, and only 2% of respondents agree or strongly agree that state bar associations are effective at administering discipline in response to prosecutorial misconduct.

Respondents were also asked to provide their opinions on how effective a number of proposed responses to misconduct would be in terms of preventing *Brady* violations. These findings are presented in Table 6 below.

**Table 6. Perceptions of Proposed Responses to *Brady* Violations**

	Very Effective	Somewhat Effective	Not at all Effective
<b>Restrict absolute immunity</b>	64%	36%	0
<b>Maintain publicly accessible database of prosecutors' disciplinary records</b>	48%	45%	8%
<b>Impose criminal sanctions</b>	83%	16%	2%
<b>Require additional training on <i>Brady</i></b>	36%	37%	27%
<b>Open files policy under the Michael Morton Act</b>	40%	49%	11%

These findings indicate that restricting prosecutor's absolute immunity is predicted by respondents to be very effective at preventing *Brady* violations as all respondents indicated that it would be at least somewhat successful, followed very

closely by imposing criminal sanctions. Increased training on *Brady* requirements is believed to be least effective at preventing this type of misconduct, with 27% of the sample reporting that it would be not at all effective at reducing this type of misconduct.

### **Influence of Prosecutorial Experience**

As discussed in Chapter 3, a secondary goal of the survey research was to determine if criminal defense attorneys who had experience working as a prosecutor answered questions differently than those who had no prosecutorial experience. In order to determine if a relationship exists between prosecutorial experience and a number of other variables, cross-tabulations were constructed. Chi-square tests were employed to first determine if a relationship existed. If a significant relationship was found, the strength of that relationship was assessed through the use of phi and Cramer's V.

### **Prosecutorial Experience and Perceived Experience of Prosecutorial Misconduct**

Respondents were asked if they have ever been involved in a case where they thought prosecutors were engaging in misconduct. Table 7 presents the cross-tabulation for this relationship.

**Table 7. Prosecutorial Experience and Experiencing Misconduct**

	<b>Prosecutorial Experience</b>	<b>No Prosecutorial Experience</b>
<b>Experienced Misconduct</b>	48	52
<b>Did Not Experience Misconduct</b>	2	5
Pearson's Chi-Square	.992	
Phi	.096	
* p < .05		

The Pearson's chi-square for this relationship fails to reach the .05 level of statistical significance. No significant relationship exists between experience as a prosecutor and the perception of experiencing prosecutorial misconduct.

### **Prosecutorial Experience and Perceiving Misconduct as Intentional**

Respondents who indicated that they had perceived prosecutorial misconduct were asked if they thought that the majority of that misconduct was intentional.

**Table 8. Prosecutorial Experience and Perceiving Misconduct as Intentional**

	<b>Prosecutorial Experience</b>	<b>No Prosecutorial Experience</b>
<b>Majority Was Intentional</b>	19	22
<b>Majority Was Unintentional</b>	16	13
<b>Not Sure</b>	12	17
Pearson's Chi-Square	1.142	
Cramer's V	.107	
* p < .05		

The Pearson's chi-square for this relationship fails to reach the .05 level of statistical significance. No significant relationship exists between experience as a prosecutor and the perception that experienced misconduct was intentional.

### **Prosecutorial Experience and Believing that Observed Misconduct Led to a Wrongful Conviction**

Participants who indicated that they had observed misconduct were asked if they believed they had ever seen misconduct that led to a wrongful conviction.

**Table 9. Prosecutorial Experience and Perception of Observing a Wrongful Conviction**

	<b>Prosecutorial Experience</b>	<b>No Prosecutorial Experience</b>
<b>Observed Wrongful Conviction</b>	30	28
<b>Did Not Observe Wrongful Conviction</b>	17	24
Pearson's Chi-Square	1.014	
Phi	.101	
* p < .05		

The Pearson's chi-square for this relationship fails to reach the .05 level of statistical significance. No significant relationship exists between experience as a prosecutor and the perception of experiencing a wrongful conviction.

#### **Prosecutorial Experience and Reporting Misconduct**

Respondents who indicated that they had experienced prosecutorial misconduct were asked if they had ever reported that misconduct.

**Table 10. Prosecutorial Experience and Reporting Misconduct**

	<b>Prosecutorial Experience</b>	<b>No Prosecutorial Experience</b>
<b>Reported Misconduct</b>	20	19
<b>Did Not Report Misconduct</b>	27	33
Pearson's Chi-Square	.374	
Phi	.061	
* p < .05		

The Pearson's chi-square for this relationship fails to reach the .05 level of statistical significance. No significant relationship exists between experience as a prosecutor and reporting allegations of prosecutorial misconduct.

### **Prosecutorial Experience and Prevalence of Prosecutorial Misconduct**

Respondents were asked a number of questions designed to obtain their perceptions of the prevalence of prosecutorial misconduct beyond their own personal experience. Using a Likert scale, they were asked to indicate the extent to which they agree with a number of statements.

**Table 11. Agreement that Prosecutorial Misconduct is a Rare Occurrence**

	<b>Prosecutorial Experience</b>	<b>No Prosecutorial Experience</b>
<b>Strongly Agree</b>	1	1
<b>Agree</b>	10	4
<b>Both Agree and Disagree</b>	11	13
<b>Disagree</b>	20	25
<b>Strongly Disagree</b>	7	11
Pearson's Chi-Square	3.949	
Cramer's V	.196	
* p < .05		

The chi-square value of 3.949 fails to reach significance at the .05 level. No significant relationship exists between prosecutorial misconduct and agreement that prosecutorial misconduct is a rare occurrence. The failure to reach statistical significance persists even when cases in which the respondent indicated that they "both agree and disagree" were removed from the analysis ( $\chi^2 = 3.908$ ).



Respondents were asked to indicate the extent to which they believe that most prosecutors play by the rules.

**Table 12. Agreement that Most Prosecutors Play by the Rules**

	<b>Prosecutorial Experience</b>	<b>No Prosecutorial Experience</b>
<b>Strongly Agree</b>	8	0
<b>Agree</b>	17	20
<b>Both Agree and Disagree</b>	17	20
<b>Disagree</b>	7	10
<b>Strongly Disagree</b>	0	4
Pearson's Chi-Square	12.803*	
Cramer's V	.353	
* p < .05		

The Pearson's chi-square of 12.803 is statistically significant at .05 level, which indicates that a relationship exists between having formerly worked as a prosecutor and belief that most prosecutors played by the rules. The Cramer's V of .353 indicates that this is a moderately strong, positive relationship.

Respondents were asked the extent to which they agree that most prosecutorial misconduct is unintentional. These findings are presented in Table 13.

**Table 13. Agreement that Most Prosecutorial Misconduct that Does Occur is Unintentional**

	<b>Prosecutorial Experience</b>	<b>No Prosecutorial Experience</b>
<b>Strongly Agree</b>	1	0
<b>Agree</b>	18	10
<b>Both Agree and Disagree</b>	19	20
<b>Disagree</b>	8	21
<b>Strongly Disagree</b>	3	2
Pearson's Chi-Square	9.196	
Cramer's V	.300	
* p < .05		

The Pearson's chi-square of 9.196 fails to reach statistical significance at the .05 level. No relationship exists between prosecutorial experience and the belief that most misconduct is unintentional when cases in which the respondent indicated they "both agree and disagree" with the statement. When cases in which that response was selected are removed from the analysis, however, the relationship reaches statistical significance at the .05 level ( $\chi^2 = 9.191$ ). The Cramer's V of .382 indicates that this a moderately strong relationship.

Respondents were asked the extent to which they agree that there are some prosecutors who repeatedly engage in misconduct.

**Table 14. Agreement that There are Some Prosecutors Who Repeatedly Engage in Misconduct**

	<b>Prosecutorial Experience</b>	<b>No Prosecutorial Experience</b>
<b>Strongly Agree</b>	30	30
<b>Agree</b>	14	19
<b>Both Agree and Disagree</b>	3	3
<b>Disagree</b>	1	1
<b>Strongly Disagree</b>	1	1
Pearson's Chi-Square	.516	
Cramer's V	.071	
* p < .05		

The Pearson's chi-square of .516 fails to reach statistical significance at the .05 level. No relationship exists between prosecutorial experience and belief that some prosecutors repeatedly engage in misconduct.

### **Prosecutorial Experience and Perceptions of Responses to Misconduct**

Before being asked their perceptions of proposed responses to prosecutorial misconduct, respondents were asked the extent to which they agreed that prosecutors who were caught engaging in misconduct were disciplined appropriately.

**Table 15. Agreement that Prosecutors Caught Engaging in Misconduct are Disciplined Appropriately**

	<b>Prosecutorial Experience</b>	<b>No Prosecutorial Experience</b>
<b>Strongly Agree</b>	0	1
<b>Agree</b>	1	1
<b>Both Agree and Disagree</b>	6	6
<b>Disagree</b>	14	18
<b>Strongly Disagree</b>	28	28
Pearson's Chi-Square	1.260	
Gamma	.111	
* p < .05		

The Pearson's chi-square value of 1.260 fails to reach the .05 level of statistical significance. No relationship exists between having experience as a prosecutor and the extent to which one believes that prosecutors caught engaging in misconduct are disciplined appropriately.

Respondents were asked to indicate how effective several proposed responses to misconduct would be at decreasing the frequency of *Brady* violations. The proposed responses include imposing criminal sanctions, increased training, and the open files policy under the Michael Morton Act. These cross-tabulations are presented in Tables 16, 17, and 18.

**Table 16. Effectiveness of Imposing Criminal Sanctions**

	<b>Prosecutorial Experience</b>	<b>No Prosecutorial Experience</b>
<b>Very Effective</b>	38	47
<b>Somewhat Effective</b>	10	6
<b>Not at all Effective</b>	1	1
Pearson's Chi-Square	1.714	
Cramer's V	1.29	
* p < .05		

**Table 17. Effectiveness of Additional Training on Brady Requirements**

	<b>Prosecutorial Experience</b>	<b>No Prosecutorial Experience</b>
<b>Very Effective</b>	18	19
<b>Somewhat Effective</b>	19	19
<b>Not at all Effective</b>	12	16
Pearson's Chi-Square	.357	
Cramer's V	.059	
* p < .05		

**Table 18. Effectiveness of Open Files Under the Michael Morton Act**

	<b>Prosecutorial Experience</b>	<b>No Prosecutorial Experience</b>
<b>Very Effective</b>	21	20
<b>Somewhat Effective</b>	21	29
<b>Not at all Effective</b>	7	4
Pearson's Chi-Square	1.969	
Cramer's V	.139	
* p < .05		

The Pearson's chi-square value failed to reach statistical significance for any of the proposed responses to prosecutorial misconduct. Thus, no relationship exists between prosecutorial experience and perceptions of these responses to misconduct.

### **Summary**

Survey findings seem to indicate that experiencing prosecutorial misconduct is not a rare event. Nearly all respondents indicated that they had been involved in a case where they believed misconduct was occurring, but most of them failed to report the misconduct because they were unable to prove that it had occurred. Reports of misconduct most commonly went to the judge or district attorney, but not the state bar association. This might be because the majority of respondents did not perceive the bar association as being effective at disciplining prosecutors. Selective prosecution was identified as the most prevalent type of misconduct, followed by referencing inadmissible evidence and withholding evidence in violation of *Brady*.

A relationship does not seem to exist between prosecutorial experience and perceptions of prosecutorial misconduct. The only significant relationships found with prosecutorial experience include the belief that most prosecutors play by the rules, and the belief that most prosecutorial misconduct that does occur is unintentional (but only when the "both agree and disagree" cases are excluded from the analysis). These findings will be discussed in more detail and compared with the interview findings in the next chapter.

## VI. DISCUSSION AND POLICY IMPLICATIONS

This research employed a mixed-methods design to explore defense attorneys' perceptions of the prevalence and prevention of prosecutorial misconduct. This chapter will discuss the findings from the survey and interview, and will be organized by research question. The chapter concludes with a discussion of preliminary policy implications. Given the exploratory nature of the study and the low sample sizes, further research is necessary before any implications are implemented.

### **What is the Prevalence of Prosecutorial Misconduct as Perceived by Defense Attorneys?**

Interview participants and survey respondents were in agreement that the occurrence of prosecutorial misconduct is not a rare event. With the exception of two, every interview participant (92%) indicated that they had experienced prosecutorial misconduct at some point in their career. This estimate of prevalence is mirrored in the 93% of survey respondents who reporting having observed prosecutorial misconduct in at least one of their cases. Interview participants predominately included notions of intentionality in their definitions of prosecutorial misconduct. Additionally, 62% of survey respondents disagreed with the statement that prosecutorial misconduct is a rare occurrence. Interview participants elaborated on their lack of surprise when confronted with prosecutorial misconduct.

The findings of this research indicate that criminal defense attorneys perceive misconduct as a somewhat frequent experience. Frankly, research participants' estimates of the prevalence of prosecutorial misconduct are alarming. Several interview participants indicated that some level of prosecutorial misconduct is probably present in

all of their cases, and 59% of survey respondents believe misconduct occurs in more than 10% of their cases annually. Given that 47% of the survey respondents and 40% of the interview participants had formerly worked as prosecutors, it would be difficult to argue that the high estimates are the result of a bias on behalf of criminal defense attorneys.

### **What Do Defense Attorneys Perceive as the Most Common Types of Prosecutorial Misconduct?**

While consensus between survey respondents and interview participants was found in terms of the prevalence of misconduct, some differences emerged in their perceptions of the most common types of misconduct. Interview participants identified the failure to disclose evidence as the most prevalent type of prosecutorial misconduct, and as the most concerning due to the intentionality behind the action. Several interview participants had a number of examples of experiences where prosecutors failed to disclose evidence, and their anger when discussing the events was visible to the researcher. It was clear that these occurrences had affected the participants. Others admitted that they were basing the assessment of prevalence based on media and other coverage of those types of misconduct.

Conversely, the survey respondents did not perceive the occurrence of *Brady* violations to be as common as interview participants. While 83% of the survey respondents indicated that *Brady* violations occurred at least some of the time, they identified selective prosecution as being most prevalent with 88% of respondents indicating that it occurred at least sometimes. This finding is interesting, as selective prosecution was not identified as most prevalent by any interview participant. When interview participants were asked about selective prosecution, they generally were unable



to hold prosecutors fully accountable for its occurrence. The below quote is representative of most interview participants' response.

I have heard of it happening but I don't know the cause. I don't know to judge whether they are targeting this group of minorities because they are minorities, or if it is because the minorities are committing the crime more because they are of a lower socioeconomic status. I don't know the cause. Go to the courthouse, any courthouse. The people sitting behind the bar waiting for their cases to be called, they are all minority. The prosecutors are all white. The judges, they are a more of a better mix. But I don't know the cause. I can't say it is prosecutors. – Participant #1

The coaching of informants and/or witnesses was identified by interview participants as another type of prosecutorial misconduct that occurs frequently. Interview participants indicated that prosecutors tell these individuals what to say in their testimony. They were hesitant to say that prosecutors were allowing perjury, but were more concerned that prosecutors coached witnesses and informants on what to say so that they could provide a better testimony. Additionally, interview participants felt that prosecutors were aware that the magnitude of benefits received in exchange for cooperating with the prosecution was enough to induce informants to lie.

The concept of witness and informant coaching was not specifically addressed in the survey. This demonstrates the advantages of mixed-methods approaches to exploratory research, as questions about coaching did not occur to the researcher and were not included in the survey but often came up in the semi-structured interview. Survey respondents were asked, however, how often they thought prosecutors withheld the nature of their relationship with informants, and 89% of respondents indicated that they think it occurs at least some of the time.

Regardless of if prosecutors are blatantly making promises to informants or insinuating that they will be rewarded for their testimony, there is definitely an

inducement for informants to be untruthful. Prosecutors should be cognizant of this possibility. The informants that they work with have a lot to gain by getting on the prosecutor's good side. Even if the prosecutor doesn't expressly offer a reward, the informant may assume he will receive some benefit based on what he has heard from others and seen in the media. This can result in an innocent person convicted based on the false testimony of an actual criminal who receives a lesser sentence.

Finally, interview participants identified misconduct at the grand jury stage as being one of the most common types of misconduct. It is important to note, however, that many of them included the caveat that they were making this determination based on assumptions. The lack of oversight makes the grand jury process ripe for potential prosecutorial misconduct. Several interview participants expressed frustration in their inability to obtain grand jury transcripts following an indictment, and described the process as a mystery.

Survey respondents did not rank misconduct at the grand jury as one of the most common types of prosecutorial misconduct, as only 62% of the respondents indicated that it occurred at least some of the time. However, no survey respondent indicated that prosecutorial misconduct never occurred at the grand jury stage. Perhaps the differences between interview participant responses and survey responses can be explained by the interview participants' ability to clarify that they had largely not actually witnessed misconduct at this stage. Survey respondents were not able to provide an explanation for their response to this item, and may not have wanted to overestimate the prevalence of this type of misconduct.

The findings from the interviews and surveys were similar in terms of the most common types of misconduct. Both methods found misconduct concerning informants and witnesses and *Brady* violations as occurring frequently. Differences in the estimates of misconduct occurring at the grand jury stage could be explained by the method in which the questions were asked (open-ended interviews versus closed-ended survey items).

### **How Do Defense Attorneys Respond to Suspected Misconduct?**

Interview participants largely indicated that they regularly anticipate prosecutorial misconduct, which could also speak to the prevalence of misconduct. A theme that developed in response to this research question involved preparation for misconduct by preserving the record in case of appeal. Interview participants explained that they take steps throughout each case to ensure that the record shows that they specifically requested exculpatory evidence from the prosecutor, increasing the likelihood of a successful future appeal. Identifying the filing of these motions as routine allows defense attorneys to protect their client without experiencing the retaliation feared by formal reporting of misconduct. This theme of filing anticipatory motions was unanticipated by the researcher, and thus not assessed on the survey.

A slightly higher percentage of interview participants (52%) indicated that they had reported misconduct than survey respondents (40%). The fact that only about half of research participants reported observed misconduct supports researchers' prediction that some instances of misconduct go unreported. Both interview participants and survey respondents indicated that they report misconduct more often to judges and district attorneys than to the bar association. Interview participants explained that they did not

take the allegations of misconduct to the bar association because they could not prove the allegations, perceived the bar investigation process as too long, and generally did not feel that the bar was effective at disciplining prosecutors. When asked why they did not report misconduct, survey participants most often indicated that they did not have enough proof that misconduct had occurred (82%). Inefficiency of the state bar was not a response option for survey participants.

Disapproval with the state bar association was echoed throughout interviews and surveys. Only 2% of survey respondents agreed with the statement that bar association is effective at administering discipline in response to prosecutorial misconduct. While some interview participants expressed hope that the bar would become more effective, the overwhelming sentiment was that filing these formal grievances is pointless.

A second theme developed in response to this research question involved the fear of retaliation from prosecutors for reporting misconduct. Interview participants explained that the need to continue working with prosecutors in the future prevented them from reporting misconduct. They feared that the prosecutor and his or her colleagues would take vengeance on defense attorneys who report misconduct by making cases harder and not offering fair deals. They also expressed an ethical duty to their other clients to not do anything that would impact their clients' ability to receive a fair trial.

In the closed-ended survey question asking why respondents did not report misconduct, the majority of respondents indicated that they did not report because they could not prove it. Only 10% of survey respondents indicated that they did not report the misconduct because they wanted to "preserve the relationship with the prosecutor." The language of this response option is not conceptually the same as fearing retaliation, which

could explain why it was not selected by more respondents. This question did allow respondents to write in other reasons for not reporting misconduct, and some of these comments are indicative of the fear of retaliation described by interview participants. For example, one respondent wrote, “retaliation and negative impact on all clients.” Another wrote “prosecutor will retaliate against other clients.” These comments reinforce the concern interview participants felt for their future clients.

In terms of responses to prosecutorial misconduct, survey respondents and interview participants provided similar information. Both groups indicated that they were more likely to report misconduct to a judge or district attorney. The perceived ineffectiveness of the state bar association combined with the fear of retaliation and inability to prove allegations prevent defense attorneys from making formal allegations of prosecutorial misconduct.

### **What Methods Do Defense Attorneys Perceive as Most Successful in Preventing Prosecutorial Misconduct?**

There was agreement among survey respondents and interview participants that the current disciplinary process does not work. Interview participants discussed this at length, and 83% of survey respondents agreed that prosecutors who engage in misconduct are not disciplined properly. Both groups indicated that increasing sanctions, including the imposition of criminal and/or civil proceedings, would be very effective at preventing prosecutorial misconduct. The imposition of criminal sanctions would serve as a general deterrent discouraging all prosecutors from engaging in misconduct.

In order to impose civil proceedings, the doctrine of prosecutorial immunity would have to be changed. While 100% of survey respondents indicated that restricting

this immunity would be at least somewhat effective at deterring misconduct, interview participants did not come to such a clear consensus. Some interview participants did want to see immunity restricted, as explained in the following quote.

I think it is too much. They should be afraid. They are dealing with human beings. They should be afraid, and be careful. If that immunity went away, you would have some of these cases that never would be charged. We have a system in place that encourages people to do wrong. I can do whatever the hell I want, and nobody can do anything. The simple issue for me is that the prosecutor should not have immunity. If I can prove there is a deliberate hiding of evidence, then there should be a criminal penalty for that. – Participant #3

The majority of interview participants, however, expressed hesitancy at removing prosecutorial misconduct due to the potential ramifications discussed in Chapter 1. The following quote is indicative of most interview respondents.

Would I like it (immunity to be restricted), absolutely. It's bullshit that we can't go after them when they break the rules on purpose but that is part of the problem – how do we know it is on purpose? You can't always tell. If we got rid of immunity every defendant would claim misconduct. I don't know. I don't know if I think that would be a good thing. – Participant #7

Interview participants and survey respondents were in agreement that increased training would be beneficial, specifically in reducing *Brady* violations. Interview participants overwhelmingly agreed that the training they received in law school was insufficient. About 71% of survey respondents indicated that increased training would help, and most interview participants concurred, although the support for more training was not as enthusiastic as the support for increasing sanctions.

Finally, interview participants and survey respondents agreed that the open files policy under the Michael Morton Act is a step in the right direction. Interview participants were optimistic that prosecutors would be less likely to commit *Brady* violations because they are no longer charged with determining if a piece of evidence is

exculpatory. There was some hesitancy to think that the Michael Morton Act would solve the problem because it has been implemented only recently and attorneys are still waiting for interpretations to be handed down by higher courts.

Some interview participants did express concern that the open files policy will change how they prepare for cases. They anticipate receiving more voluminous files for each case that will take more time to investigate, but participants were amenable to the extra work. Survey respondents were also optimistic about the open files policy, as 89% of respondents indicated that it would be at least somewhat effective at preventing misconduct.

### **Policy Implications**

As this is an exploratory study, further research is needed before any policy implications can be fully developed. Additionally, efforts should be made to include prosecutors in the research process so that a more comprehensive understanding of prosecutorial misconduct is considered by policy makers. Despite the early stages of this research a few policy implications can be suggested for consideration.

First, there is consensus between survey respondents and interview participants that the current sanctioning is ineffective. Sanctions must be more severe and implemented swiftly to serve as an effective deterrent. State bar associations should take allegations of prosecutorial misconduct seriously, and impose severe punishments on those allegations that are proven true. While research participants support criminal and/or civil penalties, this would be difficult to implement as it would require a redefinition of prosecutorial immunity. Perhaps prosecutors could receive the more limiting qualified immunity that protects law enforcement officers.

Second, attorneys need to learn their evidence disclosure requirements at some point. Given the evolving nature of case law, this is better accomplished through regular training rather than only being taught in the law school environment. The training might be best administered by someone objective rather than a fellow prosecutor who may be vulnerable to the demands of the culture. A prosecutor position is often the first step on an attorney's career path, meaning that a sizable portion of prosecutors have minimal trial experience. Perhaps imposing a minimum number hours worked under the direction of senior colleagues before a new prosecutor can handle his or her own cases would provide better preparation. Hamann (2013) recommends providing training for law enforcement as well as prosecutors so that everyone understands evidence disclosure requirements.

Third, the implementation of independent review boards within prosecutor offices could curtail misconduct. Similar to those used in law enforcement, independent reviewers would monitor prosecutors to ensure that they are following the rules. A similar suggestion would be to separate the duties of prosecutors, so that someone other than the person who initiates the charges actually tries the case. This limits the potential for cognitive bias, as the strength of the evidence is independently evaluated by two individuals. This practice has already been implemented in some jurisdictions. Regardless of how it is accomplished, something needs to be done to limit prosecutors' autonomy so that they can be held responsible for their actions.

Finally, changes must be made to the current reporting process to encourage criminal defense attorneys to come forward with knowledge of prosecutorial misconduct. Because defense attorneys were most concerned about retaliation, one suggestion would be for special prosecutors to be appointed to the reporter's cases until the issue is



resolved. This prevents the feared backlash and allows for a thorough investigation of the allegations of misconduct. Another suggestion would be for a more autonomous organization within the bar association to review cases of prosecutorial misconduct, in a more anonymous way.

### **Summary**

With some notable exceptions discussed above, the findings from the qualitative interviews and surveys are similar. Participants indicated that prosecutorial misconduct is a prevalent and serious problem in the state of Texas. The failure to disclose exculpatory evidence, selective prosecution, coaching of informants, and improper behavior at grand jury proceedings were identified as the most common types of prosecutorial misconduct. Research participants expressed dissatisfaction with the current sanctioning process administered by the state bar association, and recommend additional training and open files policies as promising methods of deterring prosecutors from engaging in misconduct.

Another interesting finding involves the very little difference in responses given by participants with prosecutorial experience. Excluding agreement with statements that prosecutorial misconduct is a rare occurrence and that most misconduct is unintentional, no relationship was found between prosecutorial experience and perceptions of misconduct. The findings from this exploratory study further justify the use of a mixed-methods research strategy. A number of themes developed in the interview analysis were not addressed in the survey.

## VII. CONCLUSION

The findings of this study support researchers' predictions that much prosecutorial misconduct goes unreported. The vast majority of research participants reported observing misconduct, but only about half of them reported it. Because so much misconduct goes unreported, prior research that uses disciplinary proceedings and appellate decisions to assess the prevalence of misconduct is incomplete and provides an inaccurate estimate. In order to develop a more comprehensive understanding of prosecutorial misconduct, alternative research methodologies are necessary.

In her passionate dissent in *Connick v. Thompson* (2010), Justice Ginsburg questions whether prosecutors receive proper training on their duty. The findings of this study confirm Justice Ginsburg's concern. Every interview participant laughed when asked to explain the training they received on evidence disclosure requirements in law school, clearly demonstrating their perception that the training was insufficient. Participants demonstrated support for increased, regular training for prosecutors on their ethical and procedural requirements although a minority argued that further training would not help to control intentional misconduct

Gershman's (2014) assertion that the secrecy surrounding grand jury proceedings creates an environment ripe for misconduct was confirmed in this study. While interview participants were generally unable to confirm that misconduct occurred at the grand jury stage, they exhibited confidence in their beliefs that it was prevalent. These findings reflect the perception of defense attorneys. Whether prosecutors misstate the law or present the evidence in way that encourages grand juries to indict, the lack of judicial or

other oversight gives prosecutors a great deal of autonomy that could become problematic.

Support for the open files policy under the Michael Morton Act corroborates the assertion posited by Polzer et al. (2014) that the standard of materiality should be removed from evidence disclosure requirements under *Brady v. Maryland* (1963). Participants were in agreement that requiring prosecutors to turn over their entire file could be effective at reducing misconduct that results from a failure to disclose evidence. Indeed, these types of violations were identified by interview participants as being most common.

The findings of this study support Stafford and Warr's (1993) reconceptualization of deterrence. Research participants repeatedly discussed the fact that prosecutors who engage in misconduct are not punished appropriately. The sanctions tend to be minor, private, and imposed long after the misconduct takes place. Thus, prosecutors' assessment of both their direct (personal experience) and indirect (experience of peers) experiences with punishment result in a determination that punishment is rare and not severe. Increasing the severity and certainty of punishments would likely result in sanctions becoming a more effective deterrent to prosecutorial misconduct.

In order for punishments to become more severe, the doctrine of prosecutorial immunity would need to be revised. While this suggestion was overwhelmingly supported by survey respondents, interview participants expressed more hesitancy. Zhang's (2011) assertion that the qualified immunity enjoyed by law enforcement would be more appropriate for prosecutors than their current absolute immunity should be considered. Qualified immunity would present an ideal balance between protecting

prosecutors from frivolous suits and allowing relief for those that have been a victim of misconduct.

Perhaps another reason for the perception that the bar association is ineffective is due to the methods by which investigations are initiated. Keenan et al. (2011) explain that bar associations generally do not initiate proceedings. Instead, they rely on attorneys to report misconduct, and those allegations are investigated. As previously discussed, research participants rarely report allegations of misconduct to the bar association. If the people who observe misconduct fail to report it to the bar association, the bar association cannot investigate it. Thus, a reciprocal relationship may exist in that attorneys fail to report misconduct because they perceive the bar as ineffective, and the bar association cannot investigate cases unless grievances are filed. Changes to reporting requirements are needed to both encourage attorneys to formally report misconduct, and to allow the bar association to take action against misbehaving prosecutors.

Further research is needed to better understand prosecutorial misconduct. First, it would be beneficial to include prosecutors in the research process as this is the only way to truly understand how and why this misconduct occurs. Second, an assessment of how the bar association investigates and responds to cases of misconduct is needed before reforms can be implemented. Third, as the Michael Morton Act places new disclosure requirements on prosecutors, attention may need to shift to how law enforcement discloses information to prosecutors. While prosecutors are required to turn over their files, the same burden is not placed on law enforcement. Law enforcement can more easily hide evidence by not disclosing it to the prosecutor.

The findings of this study corroborate predictions made by researchers regarding the prevalence of misconduct. In Texas, defense attorneys seem to perceive prosecutorial misconduct as somewhat frequent and taking many different forms. The failure to disclose evidence, selective prosecution, improper conduct with informants and/or witnesses, and improper conduct at the grand jury stage were identified as the most common types of misconduct. Promising responses include increased training, more severe punishments, and the open files policy under the Michael Morton Act. It is clear that systemic change is needed to develop a formal reporting procedure that encourages criminal defense attorneys to come forward with allegations of misconduct without fear of retaliation from prosecutors.

As previously discussed, the policy implications derived from these findings should be considered proposals for future study. This was an exploratory study that was limited in sample size. The small sample size of the survey respondents coupled with the non-probability sampling employed in identifying interview participants limit the generalizability of the findings. The study should be expanded and replicated before concrete policy recommendations may be posited.

This study contributes to the literature by utilizing a new data source that provides a more in-depth understanding of the prevalence of and responses to prosecutorial misconduct. This mixed-method approach assesses incidences of misconduct that are never reported, filling the gap in research left by prior studies that have used disciplinary proceedings or appellate decisions to estimate the prevalence of prosecutorial misconduct. Additionally, this research directly answers the question of why defense

attorneys fail to report misconduct, and their perceptions of the best ways to prevent its occurrence.

## APPENDIX SECTION

### APPENDIX A

#### Interview Protocol

Date:

Time:

Place:

#### Demographic Questions

Sex:

Race:

1. How long have you practiced criminal defense law?
2. What type of law do you currently practice? (Public defender, private practice, appellate)
3. About how many criminal defendants do you currently represent?
4. How many attorneys are employed by your firm?
5. What other types of law have you practiced?  
For each, how long?
6. Have you ever worked as a prosecutor?  
If so, for how long?  
  
If so, was it in the same county in which you currently practice?
7. How would you describe the county in which you primarily work?  
Probe: Urban or rural? Size?
8. Is there a small number of prosecutors with which you generally have cases, or do you work with a large number of prosecutors?

#### Prevalence of Misconduct – Personal Experience

9. How do you define prosecutorial misconduct?
10. How frequently do you suspect that prosecutors engaged in misconduct in your cases?
11. Do you anticipate or prepare for prosecutorial misconduct, or would its occurrence be a surprise?

12. Have you ever been involved in a case where you thought prosecutors were engaging in misconduct? Please explain.

If YES, ask questions 13 through 19

If NO, proceed to question 20

13. Of the misconduct that you have observed, what percent of it do you think was intentional?

14. Walk me through one case in which you suspect prosecutorial misconduct occurred.

15. Would you be willing to provide the name of a case? The name of the case will not be published to protect your confidentiality.

16. How does suspected prosecutorial misconduct change how you handle a case?

17. Please describe any experience you may have with any of the following types of prosecutorial misconduct:

(Prompts: Have you seen it happen, how did it happen, was it reported, was it intentional or unintentional, outcome)

Selective prosecution, in which certain groups of people are targeted

Bad faith prosecutions, in which questionable charges are brought or charges are brought without any real belief that a conviction will follow

Misstating the law or providing inaccurate instructions to grand jurors

Making inappropriate statements to media

Referencing inadmissible evidence at trial

Making inflammatory statements at trial or sentencing

Withholding evidence/Brady violations

Knowingly allowing perjured testimony, e.g. jailhouse informants

Withholding nature of relationship with informants (such as that they are being paid or receiving a reduced sentence)

Making false promises at plea bargaining

18. Have you ever reported allegations of prosecutorial misconduct?

If yes, why did you report it?



If yes, who did you report it to? What was the outcome? (For each allegation reported)

If no, why not?

19. Do you think you have witnessed any prosecutorial misconduct that led to a wrongful conviction? Explain.

#### Prevalence of Misconduct - General

20. Thinking beyond misconduct you have personally witnessed, how frequently do you think prosecutorial misconduct happens in your county?

21. Thinking beyond misconduct you have personally witnessed, how frequently do you think prosecutorial misconduct happens in the state of Texas?

22. Which Texas county do you think has the highest prevalence of prosecutorial misconduct?

23. Why do you think other defense attorneys who witness prosecutorial misconduct fail to report it?

24. How would the circumstances of a case affect your response to suspected prosecutorial misconduct? For example, would you be more likely to report the misconduct in felony cases, or those that carry a potentially long sentence?

#### Proposed Responses to Misconduct

25. What do you think should happen to whistleblowers, or people who come forward to report allegations of prosecutorial misconduct?

26. What would be needed for more attorneys to come forward as whistleblowers?

27. What other steps could be taken to increase reports of prosecutorial misconduct?

28. Why do you think prosecutors engage in intentional misconduct?

29. In what ways does prosecutorial immunity contribute to misconduct?

30. How would restricting or removing prosecutorial immunity affect the prevalence of misconduct?

31. How effective do you think the Texas state bar association is at administering discipline in response to prosecutorial misconduct? In what ways could they improve?

32. How do you think prosecutors who are found to have engaged in misconduct should be disciplined? Why?
33. What effect do you think the open file policy under the Michael Morton Act will have on prosecutorial misconduct? Why?
34. How will the open file policy change the way you handle cases?
35. Researchers have called for increased training in *Brady* and other disclosure requirements, arguing that attorneys do not receive sufficient training in law school. Tell me about the training you received in preventing *Brady* violations in law school.  
Prompts: What courses or requirements were most beneficial? What could have been done to better prepare you?
36. How do you think that increased training and/or continuing education would affect *Brady* violations?
37. Researchers have suggested that defense attorneys should be provided with a copy of the prosecutor's disciplinary record to use as a basis for concerns of misconduct. What are your thoughts on this suggestion?  
Prompts: Is it necessary? Would you use it? How would you use it?
38. What policies do you think could be implemented to deter prosecutors from engaging in intentional misconduct?
39. What can be done to prevent unintentional prosecutorial misconduct?

#### Closing

40. Is there anything else you would like to say about prosecutorial misconduct that has not been discussed?
41. Do you have any friends or colleagues that might be interested in participating in this research?
42. Is it okay if I contact you in the future to review the findings?

## APPENDIX B Survey Instrument

### 1. Consent Form

You are being asked to be part of a research project. Research is being conducted to learn more about defense attorneys' perceptions of prosecutorial misconduct. If you agree to be part of this research, you will be asked to take a survey of about 20 questions. It should take about 15 minutes to finish the survey. The research is being conducted by Shannon Cunningham, a doctoral student of the School of Criminal Justice at Texas State University, (snc32@txstate.edu, 708254-3083) and Dr. Joycelyn Pollock (jp12@txstate.edu).

No serious risks to you are anticipated, but some of the questions may be personal (for example, asking about your experience with prosecutorial misconduct). An example: "Have you ever reported an allegation of prosecutorial misconduct?" You may choose not to answer any question(s) for any reason.

There are no direct benefits to you for participating in this research. However, your participation will increase the knowledge base regarding prosecutorial misconduct. You will not receive anything for participating.

The surveys are anonymous. Your name is not being recorded. The survey responses will be stored electronically for five years, and will then be destroyed. Only the researchers, Shannon Cunningham and Dr. Pollock, will have access to the surveys.

This project, IRB #2015W1137, was approved by the Texas State IRB on July 28, 2015. Pertinent questions or concerns about the research, research participants' rights, and/or research-related injuries to participants should be directed to the IRB chair, Dr. Jon Lasser (5122453413 lasser@txstate.edu) and to Becky Northcut, Director, Research Integrity & Compliance (5122452314 bnorthcut@txstate.edu).

Your participation is voluntary, and refusal to participate will involve no penalty or loss of benefits to which you are otherwise entitled. You may discontinue participation at any time without penalty or loss of benefits to which you are otherwise entitled.

A summary of the findings will be provided to participants upon completion of the study, if requested. To access results of the study, contact Shannon Cunningham.

- I have read the consent form, and agree to participate in the research.
- I would not like to participate in this research.

If the respondent does not consent to participate in the research, the survey will end.

### 2. Are you currently employed as a defense attorney?

- Yes
- No

If the respondent answers "No" to question #2, the survey will end.

### 3. Have you ever worked as a prosecutor?

- Yes
- No

Questions #4 and #5 are presented only to those respondents who respond “yes” to question #3.

4. For how long were you employed as a prosecutor?

- Less than one year
- Between one year and four years
- Between five years and ten years
- More than ten years

5. Were you employed as a prosecutor in the same county in which you currently practice?

- Yes
- No

6. What is your sex?

- Male
- Female

7. What is your race?

- White
- Black
- Hispanic/Latino/Spanish origin
- American Indian/Alaska Native
- Asian
- Native Hawaiian/Other Pacific Islander
- Biracial
- Other

8. In what year did you graduate law school?

9. What types of law do you currently practice?

(If you practice more than one type of law, please only consider your experience with criminal cases while taking this survey).

10. What other types of law have you practiced?

11. For how many years have you practiced criminal defense?

- Less than one year
- Between one year and four years
- Between five years and nine years
- Between ten years and twenty years
- More than twenty years

12. What percentage of your practice involves criminal defense?

- Less than 10%
- Between 10% and 24%
- Between 25% and 49%
- Between 50% and 75%
- More than 75%

13. About how many clients do you currently represent?

- Less than 10
- Between 10 and 24
- Between 25 and 49
- Between 50 and 74
- More than 75

14. About how many criminal defense clients do you represent in an average year?

- Less than ten
- Between 10 and 24
- Between 25 and 49
- Between 50 and 75
- More than 75

15. Have you ever practiced in a state other than Texas?

- Yes
- No

16. How many attorneys are employed by your firm?

- Less than five
- Between five and ten
- Between eleven and twenty
- More than twenty

17. How many prosecutors are employed by the county in which you primarily practice?

- Less than five
- Between five and ten
- Between eleven and twenty
- More than twenty

18. Which term best describes the county in which you primarily practice?

- Urban
- Suburban
- Rural

The following questions ask about your experience with prosecutorial misconduct. For the purpose of this survey, please consider as prosecutorial misconduct any violation of local, state, or federal rules, whether intentional or unintentional, including those that are considered both harmful error and harmless error.

19. Have you ever been involved in a case where you thought prosecutors were engaging in misconduct?

- Yes
- No

Questions #20 through #23 are presented only to respondents who respond “yes” to #19. Respondents who answer “no” to #19 are redirected to #27.

20. In an average year, in what percent of your cases do you think prosecutors engaged in misconduct?

- Less than 10%
- Between 10% and 24%
- Between 25% and 49%
- Between 50% and 75%
- More than 75%

21. Of the misconduct that you have observed, do you think the majority of it was intentional or unintentional?

- The majority was intentional.
- The majority as unintentional.
- I'm not sure.

22. Have you ever witnessed prosecutorial misconduct that you believe led to a wrongful conviction?

- Yes
- No

23. Have you ever reported an allegation of prosecutorial misconduct?

- Yes
- No

Questions #24 and #25 are presented only to respondents who respond “yes” to #23. Respondents who respond “no” to #23 are redirected to #26.

24. To whom have you reported allegations of prosecutorial misconduct? Choose all that apply.

- District Attorney
- Judge
- State Bar Association

Other (please specify)

25. How many times have you reported allegations of prosecutorial misconduct?

- Once
- Between 2 and 4 times
- Between 5 and 9 times
- Between 10 and 15 times
- 16 times or more

Question #26 is answered by respondents who indicated that they have observed prosecutorial misconduct, but did not report it.

26. What was the primary reason you did not report the misconduct?

- Preserve working relationship with prosecutor
- Did not want to upset judge
- Formal complaint process is too complicated
- Did not want to “rat out” a colleague
- Did not have proof of misconduct
- Have never experienced prosecutorial misconduct

Other (please specify)

The remaining questions are answered by all respondents.

27. Thinking beyond misconduct you have personally witnessed, in what percentage of criminal cases in your county do you think prosecutorial misconduct occurs?

- Less than 10%
- Between 10% and 24%
- Between 25% and 49%
- Between 50% and 75%
- More than 75%

28. Thinking beyond misconduct you have personally witnessed, in what percentage of criminal cases in the state of Texas do you think prosecutorial misconduct occurs?

- Less than 10%
- Between 10% and 24%
- Between 25% and 49%
- Between 50% and 75%
- More than 75%

29. How often do you think each type of prosecutorial misconduct occurs?

	Always	Often	Sometimes	Rarely	Never
Selective prosecution, in which certain groups of people are targeted	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Bad faith prosecutions, in which questionable charges are brought or charges are brought without any real belief that a conviction will follow	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Misstating the law or providing inaccurate instructions to grand jurors	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Making inappropriate statements to media	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Referencing inadmissible evidence at trial	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Making inflammatory statements at trial or sentencing	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Withholding evidence	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Knowingly allowing perjured testimony	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Withholding nature of relationship with informants (such as that they are being paid or receiving a reduced sentence)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Making false promises at plea bargaining	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>



30. Please indicate the extent to which you agree with the following statements.

	Strongly Agree	Agree	Both Agree and Disagree	Disagree	Strongly Disagree
Prosecutorial misconduct is a rare occurrence.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Most prosecutors play by the rules.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Most prosecutorial misconduct that does occur is unintentional.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The prosecutorial culture condones intentional prosecutorial misconduct.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The pressure on prosecutors to obtain convictions causes misconduct.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Most prosecutors who engage in misconduct are "bad apples" who would be deviant in any occupation.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Prosecutors neutralize their misconduct by thinking that the defendant is probably guilty anyway.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Prosecutors justify their misconduct as part of their duty to protect the public.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
If prosecutors were not protected by immunity, they would be less likely to engage in misconduct.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
There are some prosecutors who repeatedly engage in misconduct.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Prosecutors who engage in misconduct are disciplined appropriately.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
State bar associations are effective at sanctioning prosecutorial misconduct.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Intentional misconduct is discouraged by most prosecutor offices	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

31. Please indicate how effective each of the following proposed responses would be at decreasing the frequency of Brady violations, or withholding evidence.

	Very Effective	Somewhat Effective	Not at all Effective
Restricting absolute immunity	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Maintaining a publicly accessible database of prosecutors' disciplinary records	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Imposition of criminal sanctions	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Provide prosecutors' disciplinary records to judge and/or defense attorney	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Require additional training on Brady requirements	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Open Files under the Michael Morton Act	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Increased protection for whistleblowers	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

What other responses do you think would be effective?

32. Please indicate how effective each of the following proposed responses would be at preventing prosecutors from withholding the nature of the relationship with informants, including any benefit the informant may be receiving.

	Very Effective	Somewhat Effective	Not at all Effective
Restricting absolute immunity	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Maintaining a publicly accessible database of prosecutors' disciplinary records	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Imposition of criminal sanctions	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Provide prosecutors' disciplinary records to judge and/or defense attorney	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Require additional training on Brady requirements	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Open Files under the Michael Morton Act	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Increased protection for whistleblowers	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Prohibiting the use of informants	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

What other responses do you think would be effective?

33. Is there any other information you would like to provide about the prevalence and/or types of misconduct?

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The survey is now completed. Thank you for your participation!

## APPENDIX C

### Cover Email Distributed With Survey

Subject: Research Participation Invitation: Prosecutorial Misconduct

Dear Attorney,

This email message is a request for you to participate in research that has been approved or declared exempt by the Texas State Institutional Review Board (IRB).

Prosecutorial misconduct has been identified as a leading cause of wrongful convictions. While several studies have been conducted to determine the prevalence of prosecutorial misconduct, these studies have focused on appellate cases or those that have resulted in discipline of the prosecutor. As it is believed that most prosecutorial misconduct is never uncovered, the results of these studies fail to identify how often misconduct occurs and what types of misconduct occur most frequently.

As a criminal defense attorney, you are in a unique position to contribute to the knowledge base of prosecutorial misconduct. Even if you have not personally witnessed prosecutorial misconduct, your opinion on how misconduct occurs and proposed responses to misconduct is valuable. We need your help to develop a better understanding of prosecutorial misconduct. While there may not be a direct benefit to you, your participation will add to the limited knowledge base of prosecutorial misconduct.

Please take 15 minutes to complete a brief survey. Responses are completely anonymous. Your participation is completely voluntary, and you may choose to end your participation at any time without penalty. It is anticipated that the study will be completed within the next year. Please contact Shannon Cunningham (snc32@txstate.edu) if you would like to receive a copy of the findings.

This project, IRB #2015W1137, was approved by the Texas State IRB on July 28, 2015. Pertinent questions or concerns about the research, research participants' rights, and/or research-related injuries to participants should be directed to the IRB chair, Dr. Jon Lasser (512-245-3413 - lasser@txstate.edu) and to Becky Northcut, Director, Research Integrity & Compliance (512-245-2314 - bnorthcut@txstate.edu).

Questions about this research should be addressed to Shannon Cunningham (708-254-3083 – snc32@txstate.edu) or Dr. Joycelyn Pollock ([jp12@txstate.edu](mailto:jp12@txstate.edu)).

## APPENDIX D

### Interview Consent Form

You are being asked to be part of a research project. Research is being conducted to learn more about defense attorneys' perceptions of prosecutorial misconduct. If you agree to be part of this research, you will be asked to participate in an interview of 42 questions. It should take about one hour to finish the interview. The research is being conducted by Shannon Cunningham, a doctoral student of the School of Criminal Justice at Texas State University, (snc32@txstate.edu, 708-254-3083) and Dr. Joycelyn Pollock (jp12@txstate.edu). The interview will take place at a location and time that is convenient for you, the participant. Your interview will be audio recorded unless you request otherwise. The audio file of your interview will be deleted after it has been transcribed by the researcher. If you do not want your interview recorded, please tell the researcher.

No serious risks to you are anticipated, but some of the questions may be personal (for example, asking about your experience with prosecutorial misconduct). An example: "Have you ever reported an allegation of prosecutorial misconduct?" You may choose not to answer any question(s) for any reason. Please do not provide any identifying information about any specific cases, including case names or numbers.

There are no direct benefits to you for participating in this research. However, your participation will increase the knowledge base regarding prosecutorial misconduct. You will not receive anything for participating.

The interviews are confidential. No identifying information will be included with the interview transcript. Signed consent forms will be stored separately from the interview transcripts. Consent forms will be stored in locked file cabinet at the researcher's home for five years and will then be destroyed. The interview transcripts will be stored on a password protected USB flash drive. Only the researcher and her advisor will know the password and have access to the data. The transcripts will be stored for five years and will then be deleted. Only the researchers, Shannon Cunningham and Dr. Pollock, will have access to the interview transcripts and consent forms..

This project, IRB #2015W1137 was approved by the Texas State IRB on July 28, 2015. Pertinent questions or concerns about the research, research participants' rights, and/or research-related injuries to participants should be directed to the IRB chair, Dr. Jon Lasser (512-245-3413 - lasser@txstate.edu) and to Becky Northcut, Director, Research Integrity & Compliance (512-245-2314 - bnorthcut@txstate.edu).

Your participation is voluntary, and refusal to participate will involve no penalty or loss of benefits to which you are otherwise entitled. You may discontinue participation at any time without penalty or loss of benefits to which you are otherwise entitled.

A summary of the findings will be provided to participants upon completion of the study, if requested. To access results of the study, contact Shannon Cunningham.

I have read the consent form, and agree to participate in the research and to have my interview audio recorded.

---

Name

Date

I have read the consent form, and agree to participate in the research. I do not consent to having my interview audio recorded.

---

Name

Date

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