Winter 2025

Accidental *Brady* Violations

Adam M. Gershowitz

ACCIDENTAL *BRADY* VIOLATIONS

*by: Adam M. Gershowitz**

ABSTRACT

Prosecutors are often seen as the villains of the criminal justice system. And the most villainous thing a prosecutor can do is to commit an intentional Brady *violation by withholding favorable and material evidence from the defense. Not surprisingly, there is a wide literature criticizing prosecutors for flagrant misconduct.*

But not all Brady *violations are intentional. Prosecutors sometimes—perhaps often—commit accidental* Brady *violations by inadvertently failing to recognize favorable evidence. Because many prosecutors are inexperienced, overworked, and under-trained, they do not recognize exculpatory or impeachment evidence when it is in their files. Additionally, prosecutors also fail to disclose evidence that is in the hands of police, sheriffs, crime laboratories, and other government agencies. Because the criminal justice "system" is riddled with communication breakdowns, prosecutors are sometimes unaware of* Brady *evidence that they were obligated to disclose.*

The breadth of the Brady *doctrine and the dysfunction of the criminal justice system do not make* Brady *violations acceptable or harmless. To the contrary,* Brady *errors are serious violations of a defendant's constitutional rights. To reduce future violations, however, we cannot simply condemn prosecutors for intentional misconduct. Instead, it is important to understand why accidental* Brady *violations occur. Drawing on nearly two-dozen recent cases, this article builds a typology of situations where accidental* Brady *violations occur, and it sets forth solutions for reducing accidental violations in the future.*

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DOI: https://doi.org/10.37419/LR.V12.I2.3

* James D. & Pamela J. Penny Research Professor and Hugh & Nolie Haynes Professor of Law, William & Mary Law School.

I. Introduction

In their zeal to win convictions, prosecutors sometimes commit intentional *Brady* violations by hiding favorable and material evidence from the defense. Examples are not hard to come by. Prosecutors have suppressed witness statements that pointed to someone other than the defendant as the shooter.[1] They have failed to disclose pre-trial statements showing that witnesses changed their story to be more favorable to the government's case.[2] Prosecutors have buried favorable plea deals that helped government witnesses.[3] And prosecutors have even hidden crime lab reports that suggested the defendant was innocent.[4]

Commentators rightly criticize intentional *Brady* violations.[5] And there are plenty of intentional misconduct cases to highlight.[6] Intentional *Brady* violations are the ultimate abuse of the vast power that prosecutors wield. They render trials unfair and sometimes lead to wrongful convictions.[7] For this reason, it is understandable that most

1. *See* Goudy v. Basinger, 604 F.3d 394, 399 (7th Cir. 2010).

2. *See* Vida B. Johnson, *Federal Criminal Defendants out of the Frying Pan and into the Fire? Brady and the United States Attorney's Office*, 67 Cath. U. L. Rev. 321, 329 n.49 (2018); Mahler v. Kaylo, 537 F.3d 494, 503 (5th Cir. 2008) (describing the difference in the withheld statement as a "stark contrast").

3. *See* Johnson, *supra* note 2, at 328 n.47 (referencing multiple cases).

4. Consider the infamous John Thomson murder prosecution in *Connick v. Thompson*, where prosecutors failed to disclose a crime lab report showing the perpetrator's blood type. Connick v. Thompson, 563 U.S. 51, 55–56 (2011). Years later, the elected district attorney conceded that the office had committed a *Brady* violation. *See id.* at 57. Or consider the even higher profile Duke Lacrosse prosecution where the elected district attorney failed to disclose DNA evidence tending to negate the defendants' guilt. *See* Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice"*, 76 Fordham L. Rev. 1337, 1338 (2007).

5. *See, e.g.*, Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. Crim. L. & Criminology 415, 432 (2010).

6. *See* Jason Kreag, *Disclosing Prosecutorial Misconduct*, 72 Vand. L. Rev. 297, 307 (2019) ("Despite being settled law for over fifty years, noncompliance with *Brady*'s constitutional protections persists."). In a recent study of five years of *Brady* violations, my colleagues and I found numerous egregious cases where prosecutors purposefully hid evidence. *See generally* Brandon L. Garrett, Adam M. Gershowitz & Jennifer Teitcher, *The Brady Database*, 114 J. Crim. L. & Criminology 185 (2024).

7. *See* Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 169–70, 208 (2011).

academic commentary about the *Brady* doctrine focuses on intentional violations by unethical prosecutors.[8]

But not all *Brady* violations are intentional. A *Brady* violation occurs *whenever* prosecutors fail to turn over evidence that is favorable and material.[9] Just because a prosecutor failed to disclose evidence does not mean that she did it on purpose. Numerous *Brady* violations occur because of accidental mistakes.[10]

When prosecutors believe the defendant is guilty, psychological obstacles can prevent them from recognizing exculpatory evidence.[11] For that reason, ethical prosecutors sometimes fail to spot and disclose favorable evidence that is in their possession.

Some prosecutors—especially junior lawyers—have an inadequate understanding of the legal rules surrounding the *Brady* doctrine. For instance, a young prosecutor might not realize that courts have held that dismissing charges against a government witness is impeachment evidence that must be disclosed.[12] Or inexperienced prosecutors might not recognize that they are obligated to disclose preparation sessions with a key witness that improved the witness's recollection of the perpetrator.[13]

District attorneys' offices around the country fail to provide prosecutors with adequate *Brady* training.[14] When a district attorney's office only provides an hour-long continuing legal education ("CLE") every few years, prosecutors do not receive the necessary training to learn and internalize the *Brady* rules and the myriad situations in which *Brady* evidence can turn up. Yet, prosecutors' offices regularly provide only cursory *Brady* training.[15]

Worse yet, under-staffed district attorney's offices also create excessive workloads for prosecutors, which in turn lead to accidental *Brady*

8. As Professor Alafair Burke has thoughtfully explained, "the prosecutors described in much of the traditional *Brady* literature intentionally, knowingly, or at least recklessly withhold potentially exculpatory evidence, playing 'games' with a doctrine that allows them to maximize their conviction rates." Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2128 (2010). For example, former Judge Alex Kozinski (who subsequently resigned in scandal) critically remarked that prosecutors as a group do not play fair. *See* Hon. Alex Kozinski, Preface, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, viii–ix (2015).

9. *See* Adam M. Gershowitz, *The Challenge of Convincing Ethical Prosecutors That Their Profession Has a* Brady *Problem*, 16 OHIO ST. J. CRIM. L. 307, 311 (2019).

10. *See id.* at 312.

11. *See* Burke, *supra* note 8, at 2132 (describing the psychological challenges that prosecutors face in recognizing exculpatory evidence).

12. *See infra* Section IV.A.

13. *See infra* Section IV.B.

14. Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285, 301 (2016) ("[T]he infrequency of . . . sanctions provides little incentive for police departments and prosecutors to institute robust training and auditing necessary to prevent *Brady* violations.").

15. *See infra* notes 56–60 and accompanying text.

violations.[16] On the eve of trial, busy prosecutors who are carrying hundreds of open cases can neglect to double-check witness statements to look for inconsistencies, or they can fail to do background checks that would identify unfavorable information about the testifying witnesses they will put on the stand.[17] These officewide failures result in prosecutors committing *Brady* violations that would not have occurred with proper training and adequate staffing.

Moreover, prosecutors are not just responsible for their own files. For nearly 30 years, the Supreme Court has held that prosecutors are obligated to disclose evidence held by the police, crime laboratories, and other members of the prosecution team.[18] Prosecutors can commit a *Brady* violation without ever being personally aware of exculpatory or impeachment evidence.[19] Police missteps and poor communication with law enforcement can lead to accidental *Brady* violations. The problem is particularly acute in and around Washington, D.C., where prosecutors must deal not only with "regular" police but also with regulatory and national security agencies that sometimes possess favorable evidence.[20] The lack of a functioning criminal justice "system" creates situations where line prosecutors unknowingly fail in their discovery obligations.

With so many ways for prosecutors to inadvertently commit *Brady* violations, we should expect the academic literature to differentiate between individual prosecutors who have hidden evidence and systemic failures resulting from inadequate training, excessive caseloads, and poor communication networks.

When malicious prosecutors hide evidence, they should be ferreted out, fired, and publicly shamed so that they cannot move to another district attorney's office.[21] But when *Brady* violations are the result of systemic failures, we should not blame the line prosecutors. Instead, we should focus on how the district attorney's office and law enforcement agencies can remedy a dysfunctional system.

If the elected district attorneys and their senior leaders can learn how accidental *Brady* errors occur, they can redesign trainings to be

16. *See* Adam M. Gershowitz, *The Prosecutor Vacancy Crisis* 46–47 (Wm. & Mary L. Sch., Research Paper No. 09-480, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4666047.

17. *See* Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 Nw. U. L. Rev. 261, 262–63 (2011).

18. *See* Kyles v. Whitley, 514 U.S. 419, 421 (1995).

19. *See id*. at 437–38 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith), the prosecution's responsibility . . . is inescapable." (citation omitted)).

20. *See infra* Section VI.C.

21. In drawing attention to accidental *Brady* violations, I do not intend to minimize the existence or importance of intentional *Brady* violations where prosecutors purposely hide evidence. These cases are too common and amount to a horrifying deprivation of defendants' due process rights.

more effective, create checklists, and provide adequate supervision to prevent accidental violations in the future. Differentiating intentional and accidental *Brady* violations will help to train generations of future prosecutors and protect future defendants.

This Article seeks to fill a gap in the scholarly literature, which typically focuses heavily on intentional prosecutorial misconduct and pays little attention to accidental prosecutorial errors. To understand the universe of accidental *Brady* violations, I draw on nearly two dozen recent judicial decisions to create a typology of accidental *Brady* violations. After demonstrating how accidental *Brady* violations occur, I propose a set of best practices for prosecutors' offices to implement so that they can minimize future *Brady* violations.

Part II of this Article describes the *Brady* doctrine and focuses on prosecutors' responsibility to disclose all evidence held by the prosecution team. Part II also details the obstacles that line prosecutors face in complying with *Brady*, including excessive caseloads, inadequate training, and poor information flow between the many law enforcement agencies that are supposed to work together. Part III explains why little attention has been paid to accidental *Brady* violations.

Parts IV through VII are the heart of the paper, and they break down the types of cases where prosecutors commit accidental *Brady* violations. Part IV analyzes cases in which prosecutors failed to understand that they were dealing with impeachment evidence that had to be disclosed. Part V then reviews cases where prosecutors were negligent in their pre-trial preparation. These prosecutors failed to disclose inconsistent witness statements, neglected to check witnesses' criminal histories, and failed to recognize that police officers' prior conduct raised *Brady* problems. Part VI considers cases in which prosecutors were unaware of (and thus failed to disclose) evidence held by other members of the prosecution team. Part VI includes cases where prosecutors neglected to turn over evidence held by police officers, crime labs, national security agencies, fire marshals, and even other prosecutors in their office. Part VII describes more nefarious situations where police and crime lab analysts intentionally hid evidence from the prosecutors handling the case.

Part VIII then offers solutions for minimizing accidental *Brady* violations in the future. In particular, Part VIII advocates redesigning *Brady* training to be more effective, checklists for prosecutors to use in each case, and for district attorney's offices to reduce caseloads so that prosecutors have more time to comply with their *Brady* obligations.

II. The Dysfunctional Realities of the Criminal Justice "System"

A. *The* Brady *Doctrine*

In *Brady v. Maryland*, the Supreme Court held that it violates due process if the State fails to provide the defendant with evidence that

is favorable and material to guilt or to punishment.[22] In the years since *Brady* was decided, the Court has clarified the doctrine and interpreted "favorable" evidence to include both exculpatory evidence tending to show a defendant is innocent, as well as impeachment evidence that calls into question the truthfulness of a witness.[23] Today it is clear that favorable evidence includes a variety of recurring situations. For example, a promise to a witness from a prosecutor or police officer that they will not be charged with a crime or that they will receive a lighter sentence constitutes favorable information.[24] A witness's prior criminal convictions or anything else that reflects on their honesty constitutes favorable evidence for *Brady* purposes.[25] Even omissions can be favorable evidence.[26] If a witness initially failed to identify the defendant in a lineup, that would also amount to favorable impeachment evidence.[27]

At the same time that the Court adopted a broad view of "favorable" evidence, it created a narrow definition of what constitutes material evidence.[28] The Court required the petitioner to show a reasonable probability that the outcome would have been different.[29] That standard was further defined to require "a probability sufficient to undermine confidence in the outcome."[30] To meet that standard, a petitioner raising a *Brady* claim must be able to show that had the favorable evidence been disclosed that he would have been found not guilty.[31] That tough standard applies regardless of whether the defense requested the *Brady* material or not.[32] Many petitioners are able to demonstrate that

22. Brady v. Maryland, 373 U.S. 83, 87 (1963).

23. *See* Giglio v. United States, 405 U.S. 150, 151, 154–55 (1972).

24. *See id*. at 154–55.

25. *See, e.g*., Crivens v. Roth, 172 F.3d 991, 998 (7th Cir. 1999); United States v. Perdomo, 929 F.2d 967, 970–71 (3d Cir. 1991); R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1431 (2011) ("[Impeachment evidence] includes promises, rewards, and inducements made by the prosecution to its witnesses that might establish the witness's bias in favor of the government; prior statements inconsistent with the witness's trial testimony that could be used on cross-examination to show fabrication or mistake; acts or conduct showing the witness's motive of ill will or hostility toward the defendant; past misconduct of the witness showing character for dishonesty; and medical, mental health, or addiction issues that might cloud the witness's ability to perceive, remember, or narrate.").

26. *See* Cassidy, *supra* note 25, at 1483.

27. *See id.*; State v. Curtis, 384 So. 2d 396, 398 (La. 1980) ("The fact that Donald Gilmore failed to identify defendant in an earlier photographic display weakens the reliability of his later identification of defendant at trial.").

28. *See* Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 647 (2002) ("[T]he Court ultimately rejected the heroic view through a series of decisions that gradually defined *Brady*'s materiality requirement with increasing strictness.").

29. *See* United States v. Bagley, 473 U.S. 667, 682 (1985).

30. *Id*. (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).

31. *Id.*

32. *See id.* at 682 (opinion of Blackmun, J.); *see also* United States v. Agurs, 427 U.S. 97, 107 (1976) ("[W]e conclude that there is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases, like

favorable evidence had been suppressed, but are unable to show that the evidence was significant enough that it would have changed the outcome.[33] Thus, many *Brady* claims fail on the materiality prong.[34]

While the Court has adopted a narrow view of materiality, there are two important ways in which the Court has created an expansive protection for defendants. First, the *Brady* decision made clear from the doctrine's inception that withholding favorable and material evidence would violate due process "irrespective of the good faith or bad faith of the prosecution."[35] The reason was that the *Brady* doctrine was designed to protect the defendant from an unfair trial, not to punish prosecutors for intentional misconduct.[36] Thus, it does not matter if the prosecutor is the most well-intentioned, ethical lawyer imaginable. If the defendant did not receive favorable and material evidence, there has been a *Brady* violation.

Second, the Court has interpreted the *Brady* doctrine to apply not just to the trial prosecutor handling the case, but to the entire prosecution team. The prosecutor is held responsible for "any favorable evidence known to the others acting on the government's behalf in the case, including the police."[37] Lower courts have made clear that the prosecution team is not just the local police; it also includes crime laboratories, sheriffs, constables, and any other law enforcement agency in possession of relevant information,[38] even national security agencies in the federal government.[39] The broad definition of the "prosecution team" imposes a substantial burden on the trial prosecutor. She must proactively seek out information held by the rest of the team that could be favorable and material.

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the one we must now decide, in which there has been no request at all."). While the test under consideration in *Bagley* was tougher for defendants to meet than some other possible approaches, it is notable that the Court did not follow the Government's recommendation to impose an even higher burden when the defense had failed to request *Brady* material.

33. *See* Garrett, Gershowitz & Teitcher, *supra* note 6, at 229.

34. *See id*.

35. Brady v. Maryland, 373 U.S. 83, 87 (1963).

36. *See id*. at 88 (explaining that the State cannot be "in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile'" (quoting Brady v. State, 174 A.2d 167, 169 (Md. 1961))).

37. Kyles v. Whitley, 514 U.S. 419, 437 (1995).

38. *See* Paul C. Giannelli & Kevin C. McMunigal, *Prosecutors, Ethics, and Expert Witnesses*, 76 FORDHAM L. REV. 1493, 1517 (2007) ("Some courts have explicitly included crime labs within the reach of *Brady*.").

39. *See infra* Section VI.C. The Department of Justice instructs its prosecutors that "[m]embers of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant." U.S. Dep't of Just., Just. Manual § 9–5.002(B)(3) (2020). *See also* United States v. Skaggs, 327 F.R.D. 165, 174 (S.D. Ohio 2018) ("The prosecution is deemed to have knowledge of and access to material that is in the possession of any federal agency that participated in the investigation that led to defendant's indictment, or that has otherwise cooperated with the prosecution.").

As described in Section II.B below, the prosecutor's obligation to disclose all evidence held by the prosecution team can be very challenging in a dysfunctional criminal justice "system."

B. *Systemic Problems That Lead to* Brady *Violations*

Brady violations result not just from intentional misconduct by prosecutors seeking to hide evidence, but also as a result of failures in the criminal justice system. These system failures include (1) excessive prosecutor caseloads, (2) inexperienced prosecutors with substantial responsibility but minimal training on their *Brady* obligations, and (3) poor communication and coordination between prosecutors and law enforcement agencies. One of these problems by itself may result in prosecutors failing to disclose evidence. But in some cases, multiple of these factors are at play. Indeed, the term "criminal justice system" (or "criminal legal system" that some scholars now utilize[40]) is a misnomer. In most jurisdictions there is no true "system"—just a collection of parts that do not work well together.

1. Excessive Prosecutor Caseloads Lead to *Brady* Violations

Some—perhaps many—prosecutors' officers are under-staffed.[41] Prosecutors handle enormous caseloads. As I detailed more than a decade ago, prosecutors in Cook County were handling "300 or more open cases at any one time" and "felony prosecutors there handle between 800 and 1000 total cases."[42] In Fort Worth, Texas, prosecutors were handling "upwards of 150 felony cases at any one time, and misdemeanor prosecutors juggle[d] between 1200 and 1500 matters apiece."[43] In Houston, a single felony prosecutor could be handling upwards of 1,500 cases per year.[44] Matters have not improved over the last decade.[45]

When prosecutors have such huge caseloads, they are not able to thoroughly prepare for cases and ensure that they have complied with their *Brady* obligations. Consider a prosecutor with hundreds of open

40. *See, e.g.*, Michal Buchhandler-Raphael, *Underprosecution Too*, 56 U. RICH. L. REV. 409, 417–18 (2022) ("Many refrain from using the term 'criminal justice system' due to its failure to do justice, using instead the more descriptive 'criminal legal system' language."). For a helpful explanation of the types of cases in which the two terminologies—"legal" and "criminal"—might be appropriate, see JEFFREY BELLIN, MASS INCARCERATION NATION: HOW THE UNITED STATES BECAME ADDICTED TO PRISONS AND JAILS AND HOW IT CAN RECOVER 24 (2023).

41. *See* Gershowitz, *supra* note 16, at 1–2.

42. Gershowitz & Killinger, *supra* note 17, at 271–72.

43. *Id*. at 272

44. *See id*. at 271.

45. *See, e.g.*, Clare Amari, *She's a Dedicated Harris County Prosecutor. An Unsustainable Caseload Tests Her Limits.*, HOUS. LANDING (Oct. 12, 2023, 4:00 AM), https://houstonlanding.org/harris-county-district-attorney-prosecutor-caseload-kim-ogg/ [https://perma.cc/9GRB-FTN2] (describing a 26-year-old junior prosecutor with about 1,200 cases).

cases.[46] Multiple cases may be set for trial in a given week. The prosecutor does the basic work for each of the trial cases but devotes less time to the ones that she thinks are likely to plea bargain. Sometimes, however, she guesses wrong and a case she expected to plea bargain is the one that goes to trial. The "basic work" she has done on that case (such as filing subpoenas) is inadequate, however. To go to trial, she must meet with key witnesses, closely study prior witness statements, run criminal histories of the witnesses, talk with the police officers who handled the case, and complete many more tasks. With all of these tasks to do at the last minute, the prosecutor might—indeed, likely *will*—make a *Brady* mistake. The prosecutor might fail to recognize that the witnesses' statements in a last-minute pre-trial preparation session conflict with something he said in an earlier statement. Or the prosecutor might realize that a witness who she did not plan to use is much more important than she previously recognized. And the prosecutor may fail to run that witness's criminal history. Or perhaps the prosecutor had long been aware of impeachment evidence against a government witness and had always intended to produce it. But because the prosecutor was worried about witness intimidation, she delayed and then forgot because she was juggling many other cases.

The under-staffing and excessive caseload issue is just as problematic today as it has been in the past. For instance, in 2023, a defense attorney in Philadelphia explained that "she had seen cases repeatedly continued and passed from one prosecutor to another due to the understaffing."[47] Another defense attorney noted that "she had encountered significant obstacles in obtaining discovery and getting responses from the office."[48] In New York, prosecutors have quit in droves in the last few years, with many pointing to the enormous paperwork and workload that comes with complying with their discovery obligations.[49]

A logical response to the problem of excessive prosecutor caseloads is that line prosecutors should simply charge fewer defendants and do a better job complying with their discovery violations in all of them.[50]

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46. The example in this paragraph is drawn from Gershowitz & Killinger, *supra* note 17, at 283–84.

47. Aleeza Furman, *Philadelphia Prosecutors Struggle to Manage Caseloads as DA's Office Slows Turnover*, Legal Intelligencer (Feb. 13, 2023, 9:00 AM), https://www.law.com/thelegalintelligencer/2023/02/13/philadelphia-prosecutors-struggle-to-manage-caseloads-as-das-office-slows-turnover/ [https://perma.cc/P5DW-T79K].

48. *Id*.

49. *See* Jonah E. Bromwich, *Why Hundreds of New York City Prosecutors Are Leaving Their Jobs*, N.Y. Times (Apr. 4, 2022), https://www.nytimes.com/2022/04/03/nyregion/nyc-prosecutors-jobs.html [https://perma.cc/SM38-8T2M].

50. *See* Stephanos Bibas, *Sacrificing Quantity for Quality: Better Focusing Prosecutors' Scarce Resources*, 106 Nw. U. L. Rev. Colloquy 138 (2011) ("A surer solution is to refocus prosecutors' efforts to make the best use of inevitably limited money."); Josh Bowers, *Physician, Heal Thyself: Discretion and the Problem of Excessive Prosecutorial Caseloads, A Response to Adam Gershowitz and Laura Killinger*, 106 Nw. U. L. Rev. Colloquy 143, 146 (2011) ("[B]ecause prosecutors may under-exercise their

There are two difficulties with this answer though. First, as Dan Richman and Bill Stuntz explained two decades ago, "a small but important part of state criminal codes are politically mandatory. Local prosecutors do not have the option of ignoring violent felonies and major thefts."[51]

Second, the line prosecutors exert little to no control over office charging policies. To be sure, supervisory prosecutors have discretion to dismiss charges and greenlight favorable plea deals.[52] But this only goes so far. While it might be wise for overburdened line prosecutors and their supervisors to stop charging drug possession cases or other non-violent offenses,[53] they lack the authority to do so. In almost all counties, prosecutors are elected.[54] And elected prosecutors set the agenda and can constrain line prosecutors' declination policies.[55] Line prosecutors who may want to drop or generously plea bargain cases are sometimes forbidden from doing so because the elected prosecutor has imposed no-drop policies[56] or has insisted on plea offers requiring jail time.[57]

Many elected prosecutors do not want to seem soft on crime. So they continue to charge more cases than their line prosecutors can effectively handle. Over-worked line prosecutors in turn fall behind on their cases. Without time to carefully review and double-check their files, they commit unintentional *Brady* violations.

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considerable charging discretion, the problem of excessive prosecutorial caseloads, in fact, may be a problem (at least partially) of prosecutors' own making.").

51. Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 600 (2005).

52. *See* Bibas, *supra* note 50, at 140 ("Supervisors are in the best position to compare office priorities and workloads and to adjust intake, screening, deferral, diversion, and dismissal policies to ease workloads.").

53. *See* K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 287 (2014) (calling on "chief prosecutors to exercise their discretion to decline to prosecute minor offenses where arrest patterns show a disparate impact on racial minorities or where overburdened prosecutors and courts cannot provide procedural justice").

54. *See* Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1548 (2020).

55. *See* Daniel Fryer, *Race, Reform, & Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 769, 783 (2020) ("[L]ine prosecutors have an obligation to advance the policies of the elected prosecutor."); *see also* Ronald F. Wright, *Prosecutors and Their State and Local Polities*, 110 J. CRIM. L. & CRIMINOLOGY 823, 834 (2020) ("A local chief prosecutor can control the declination choices of her line prosecutors . . . .").

56. *See* Nancy Simpson, *Benefits and Drawbacks of No-Drop Policies and Evidence-Based Prosecution*, 26 RICH. PUB. INT. L. REV. 141, 154–55 (2023) (discussing no drop policies in domestic violence cases and noting that "[w]hen line prosecutors manage several dockets each week with many cases per docket, requesting, keeping track of, and reviewing all the relevant evidence in advance of each domestic violence trial can be incredibly challenging" and can lead to "prosecutors having to triage their cases").

57. *See* Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1175–76 (2013) ("Under the official policy of the Harris County District Attorney, plea bargains to probation are not available for persons 'in this country illegally.' Under the written policy, prosecutors are directed '[a]s a general rule . . . not [to] offer community supervision as a part of a plea agreement with a defendant who is a foreign national in this country illegally.'" (alterations in original)).

2. Inadequate Training for Inexperienced Prosecutors Leads to *Brady* Violations

There is wide agreement that prosecutors need ample *Brady* training.[58] It is difficult to know, however, how much training prosecutors actually receive. At the outset, there are roughly 200 law schools in the United States and not all of them provide an identical education. And there are thousands of district attorney's offices. It stands to reason that some prosecutors receive more *Brady* training than others. Unfortunately, there is reason to believe that, on balance, most prosecutors receive minimal training about their *Brady* obligations.

First, criminal procedure courses are not mandatory in most law schools. And it is far more common for students to enroll in the Criminal Investigation course (about the Fourth and Fifth Amendments) than the Criminal Adjudication course that covers the *Brady* doctrine. For those students who take a Criminal Adjudication course, the average instructor likely devotes only one class session to the *Brady* doctrine.[59] Moreover, Criminal Adjudication courses tend to be focused on doctrine rather than realistic simulations. Put differently, class sessions often focus on memorizing and understanding doctrine, rather than putting it into practice.[60]

Once they are employed, some prosecutors likely receive quality training from their offices. For instance, the Department of Justice has instituted discovery training programs and tasked a senior lawyer in each U.S. Attorney's Office with conducting training.[61] But most prosecutors work in state courts and many offices likely have little or no training.[62] After all, as discussed above, many offices are terribly overburdened and struggle just to stay on top of their cases.[63]

58. *See* Enrico B. Valdez, *Practical Ethics for the Professional Prosecutor*, 1 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 250, 279–80 (2011) ("It is essential that prosecutors receive both formal and informal training on *Brady* . . . . Training should begin as soon as new prosecutors begin their employment. It should also occur at regular intervals to reinforce the training's importance.").

59. For instance, even though I have published multiple articles about the *Brady* doctrine and believe it is critically important, I spend only one class session on it in my Criminal Adjudication course.

60. *See* Melissa Lawson Romero, Connick v. Thompson*: Forsaking Constitutional Due Process for Fear of Flooding Litigation and Loss of Municipal Autonomy*, 89 DENV. U. L. REV. 771, 789 (2012).

61. *See* Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2113 (2010).

62. The low watermark was the New Orleans District Attorney's Office under Harry Connick. Supervising lawyers working under Connick "did not recall any *Brady* training in the Office." Connick v. Thompson, 563 U.S. 51, 96 (2011).

63. *See* Miriam Baer, *Timing* Brady, 115 COLUM. L. REV. 1, 21 (2015) ("Limited resources leave supervisors and chief prosecutors with fewer opportunities for formal training, which in turn leaves prosecutors less able to identify and comply with statutory and constitutional obligations.").

Even when district attorney's offices do provide *Brady* training, there is a danger that they do a "once and done" approach. For instance, Florida adopted a rule that:

> Before an attorney may participate as counsel of record in the circuit court for any adult felony case . . . the attorney must complete a course, approved by The Florida Bar for continuing legal education credits, of at least 100 minutes and covering the legal and ethical obligations of discovery in a criminal case, including the requirements . . . established in *Brady v. Maryland* . . . .[64]

As educators know, students learn best from repeated exposure to a concept rather than sitting through a lengthy one-time course.[65]

Of course, some prosecutors learn about recurring *Brady* situations by working closely with senior prosecutors who mentor them.[66] Just as prosecutors learn trial skills on the job from repeatedly doing it, they also learn about the *Brady* doctrine from practice.

Unfortunately, there is tremendous turnover among prosecutors.[67] Philadelphia, New York, St. Louis, and many other cities have recently reported senior prosecutors quitting in droves.[68] As prosecutors leave their offices, so does institutional knowledge, making it harder for junior prosecutors to receive on-the-job training and mentoring on the *Brady* doctrine (and countless other skills).

3. The Criminal "System" Is No System at All

Commentators disagree about the appropriate terminology for criminal prosecutions. Some call it the "criminal justice system"; others prefer the "criminal legal system" to indicate that the system does not achieve justice.[69] Some scholars cut the middle word and refer to it

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64. FLA. R. CRIM. PROC. 3.113.

65. *See, e.g.*, Alette H. Svellingen, Margrethe B. Søvik, Kari Røykenes & Guttorm Brattebø, *The Effect of Multiple Exposures in Scenario-Based Simulation*, 8 NURSING OPEN 380, 391 (2021), https://doi.org/10.1002/nop2.639; *see also infra* notes 353–54 and accompanying text.

66. *See* Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065, 1070 (2014).

67. *See* Disha Raychaudhuri & Karen Sloan, *Prosecutors Wanted: District Attorneys Struggle to Recruit and Retain Lawyers*, REUTERS (Apr. 13, 2022, 3:39 PM), https://www.reuters.com/legal/transactional/prosecutors-wanted-district-attorneys-struggle-recruit-retain-lawyers-2022-04-12/ [https://perma.cc/JF4X-CGXM].

68. *See* Gershowitz, *supra* note 16, at 25, 41 (discussing New York and Philadelphia); Katie Kull & Erin Hefferman, *St. Louis Prosecutor's Staff Down by Nearly Half as Caseloads Jump. 'Seriously Underwater.'*, ST. LOUIS POST DISPATCH, (Mar. 6, 2023), https://www.stltoday.com/news/local/crime-courts/st-louis-prosecutor-s-staff-down-by-nearly-half-as-caseloads-jump-seriously-underwater/article_11520815-e7b1-57f4-8f3e-d51137a44d75.html [https://perma.cc/4KRH-FXJ5]; Caroline Love, *Collin County DA Struggling to Hire Entry-Level Prosecutors*, KERA NEWS (July 12, 2022, 4:42 PM), https://www.keranews.org/news/2022-07-12/collin-county-da-struggling-to-hire-entry-level-prosecutors [https://perma.cc/5R7F-6CAC].

69. *See* sources cited *supra* note 37 and accompanying text.

as the "criminal system."[70] But few observers stop to notice that there really is no "system."[71] There is no one person or department driving the train to ensure stability or to plan goals or outcomes.[72] And there is no clear structure guiding the communications between different parts of the "system." as Professor Lawrence Friedman has explained:

> [T]he criminal justice "system" is not a system at all . . . [but instead] is a jigsaw puzzle with a thousand tiny pieces . . . [in which n]o one is really in charge. Legislatures make rules; police and detectives carry them out (more or less). Prosecutors prosecute; defense attorneys defend; judges and juries go their own way. So do prison officials. Everybody seems to have power over everybody else. Juries can frustrate judges and the police; the police can make nonsense out of the legislature; prison officials can undo the work of judges; prosecutors can ignore the police and the judges.[73]

Of course, some individual prosecutors do work closely and harmoniously with particular police officers.[74] But that does not mean that prosecutors' *offices* work closely with police *departments*. Nor does it mean that the district attorney's office and police department have clear protocols for police and prosecutors to work together And it surely does not mean that there are formal *written* policies that communicate to line prosecutors and individual police officers how to proceed.[75] Moreover, even if there were clear, formal, written policies telling prosecutors how to work with police, that would not mean that police and prosecutors actually follow them.

And, of course, it is not just the local police department whom prosecutors must work with to bring successful cases. Prosecutors must also work in tandem with the other law enforcement agencies that bring cases to the prosecutor's office. In a large county, this can be dozens

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70. *See, e.g.*, Sara Mayeux, *The Idea of "The Criminal Justice System,"* 45 AM. J. CRIM. L. 55, 56 (2018).

71. For an exception, see *id.* at 56–57 ("It is thus taken nearly universally for granted that in the United States there exists something called 'the criminal justice system,' a unitary, integrated set of component institutions, processes, and actors that interact with one another through various relational structures and processes . . . .").

72. *See* Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward A Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1475 n.7 (2020) (noting that the word "system" obscures "complexity[] and irrationality within and between particular criminalizing institutions and limit imaginings about new frameworks for justice").

73. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 461 (1993).

74. Daniel C. Richman, *Law Enforcement Organization Relationships with Prosecutors*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 294 (Ronald F. Wright et al. eds., 2021).

75. There are exceptions that prove the rule. For instance, in "sensitive criminal matters, the United States Attorney or an appropriate Department of Justice official shall be notified [by the FBI] of the basis for an inquiry as soon as practicable after the opening of the inquiry." OFF. OF THE ATT'Y GEN., U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND TERRORISM ENTERPRISE INVESTIGATIONS 8–9 (2002), https://epic.org/wp-content/uploads/privacy/fbi/FBI-2002-Guidelines.pdf [https://perma.cc/4Y2A-CJZW].

upon dozens of agencies from airport police to local constables, to various university police departments, to name just a few. In Los Angeles, the prosecutor's office works with nearly one hundred law enforcement agencies.[76] Prosecutors also have to work with the sheriff's deputies who operate the jails.[77] They have to interact with the agency that runs and records 911 calls for the jurisdiction.[78] And of course, prosecutors frequently must interface with the crime laboratory.[79]

Matters are just as complicated, if not more, in the federal system. As Professor Dan Richman has explained, prosecutors must work with agents from the Federal Bureau of Investigation ("FBI"), the Drug Enforcement Administration, the Secret Service, Customs, Immigration, the Internal Revenue Service, the Postal Service, the Securities and Exchange Commission, the EPA, and others.[80]

There is no one manual that tells all of these agencies and their employees who is in charge in which situations and what exact steps they must take in which order. In some situations, there is simply no one entity in charge. Prosecutors thus do not control the actions of the numerous agents they work with. As Professor Richman noted, "[o]ne often hears rookie prosecutors refer to 'my agents.' Most soon learn to drop the possessive."[81] Additionally, there are cultural barriers between different agencies that create silos. Prosecutors and police sometimes believe that the other should stay in their "own lane" and not second-guess the decisions on each other's turf.[82]

Some of the communication barriers can be overcome through criminal justice coordinating councils, which "bring together the principal stakeholders from across the criminal justice system to discuss issues of common interest."[83] But such organizations operate at a high level and can only tackle so many issues. An enforceable day-to-day operating

76. *See* Adam M. Gershowitz, *Prosecutorial Dismissals as Teachable Moments (and Databases) for the Police*, 86 GEO. WASH. L. REV. 1525, 1544 (2018).

77. NATIONAL DISTRICT ATTORNEYS ASSOCIATION, COLLABORATION ACROSS THE CRIMINAL JUSTICE SYSTEM: POLICING AND PROSECUTION 1 (2019), https://ndaa.org/wp-content/uploads/CNA-Keynote-Speech-Policing-and-Prosecution-7-17-19.pdf [https://perma.cc/G235-ZE6W].

78. *See* Jessica Frisina, *A Call for Reform: What Amy Cooper's 911 Call Reveals About the "Excited Utterance" Exception*, NE. U. L. REV. EXTRALEGAL (Nov. 10, 2020), https://nulawreview.org/extralegalrecent/2020/10/28/a-call-for-reform-what-amy-coopers-911-call-reveals-about-the-excited-utterance-exception [https://perma.cc/BF26-3YJM].

79. *The Prosecutorial Phase – Pre-Trial*, NAT'L. INST. OF JUST. (Aug. 7, 2023), https://nij.ojp.gov/nij-hosted-online-training-courses/forensic-dna-education-law-enforcement-decisionmakers/communicating-prosecutor/prosecution-phase-pre-trial [https://perma.cc/TK5B-UC35].

80. *See* Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 756 (2003).

81. *Id.*

82. *See* Jonathan Abel, *Cops and Pleas: Police Officers' Influence on Plea Bargaining*, 126 YALE L.J. 1730, 1743–45 (2017) (explaining from interviews with prosecutors and police how each believe police should not be involved in plea bargaining).

83. Roger A. Fairfax, Jr., *Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda*, 122 YALE L.J. 2316, 2333 (2013).

manual that tackles all the situations in which police and prosecutors work together is nearly impossible to imagine.

For instance, consider some examples from the *Brady* universe. When must police look through their files for possible *Brady* evidence? If a prosecutor calls a police officer looking for information about a case, how quickly must the officer respond? Are police obligated to drop what they are doing because a prosecutor wants information that day? Or can police put off the prosecutor for weeks or months? As Professor Miriam Baer has explained, young prosecutors in particular may lack "the institutional knowledge necessary to secure evidence from the various law-enforcement agencies that have worked on the case."[84] Put differently, when a junior prosecutor is working on a case with seasoned police officers it is quite possible that the police officers will be calling the shots and pushing around the prosecutor, rather than the other way around.[85]

Even when police and prosecutors have an excellent working relationship, calling their work flow a "system" is still a gross exaggeration. Police often do not work traditional business hours.[86] During daylight hours, officers are often on the street or engaged in tasks that prevent them from meeting with prosecutors in person or talking on the phone. Police officers do not spend their days on Microsoft Teams or Slack. Instead, officers trade voicemails with prosecutors. Information transfers from police to prosecutors are therefore delayed and, at least initially, often incomplete.

For their part, prosecutors also do not find it easy to keep police informed.[87] They may be in court for part or all of a day dealing with the general docket, suppression hearings, or trials. Line prosecutors work on scores of cases and may not respond in a timely way to the police officers who contact them about a particular case.

And then there is the employee turnover problem. As described above, prosecutors regularly quit their jobs.[88] The average prosecutor stays in her position for only a few years.[89] For those who stay, they are often rotated around to different parts of the office.[90] When new prosecutors are assigned to existing cases, they are sometimes overwhelmed,

84. *See* Baer, *supra* note 63, at 21.

85. *See* Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RSRV. L. REV. 531, 545–46 (2007) ("[I]t is reasonable to expect that some prosecutors, particularly those who are young and inexperienced, may not press the more experienced police agents too hard.").

86. *See, e.g.*, *FAQ: How Long Are Allen Police Department Patrol Shifts?*, ALLEN POLICE, https://allenpolice.org/about_allen_pd/join_our_force/recruiting_faqs.php [https://perma.cc/Y2K5-XXEN].

87. *See* Brenda I. Rowe, *Predictors of Texas Police Chiefs' Satisfaction with Police-Prosecutor Relationships*, 41 AM. J. CRIM. JUST. 663, 664–65 (2016).

88. *See* Bromwich, *supra* note 49.

89. *See id*.

90. *See* Roberta K. Flowers, *An Unholy Alliance: The Ex Parte Relationship Between the Judge and the Prosecutor*, 79 NEB. L. REV. 251, 290 (2000).

which leads to delays in contacting the police officers they will be working with.[91] And of course, there are sick days, vacations, holidays, and myriad other life events that get in the way.

The criminal justice "system" relies on human capital to drive cases. It is not a mechanical system where cogs can be easily replaced when someone is underperforming, out sick, or on vacation. Police departments and prosecutors' offices are not like a grocery store where the job of cashier can be transferred to the next employee and have the cases seamlessly continued. Instead, when the police and prosecutors are busy, overworked, out sick, or dysfunctional, cases get bogged down and the "system" breaks down.

And, of course, all of this is happening with cases that are not completely static. New information is coming in the door from defense attorneys and investigators, which may require consultation at unexpected moments in the life of a case.

In short, there is no clear command and control system for criminal cases or the *Brady* disclosures that must be made in those cases. There are often no written procedures to guide prosecutors and police in working together on disclosing all favorable evidence. And even if there were, prosecutors would lack the power to order police around anyway. Police may resent being told what to do by prosecutors, particularly junior ones, which may slow down disclosures. When police and prosecutors are getting along, there are still practical and logistical obstacles because police are regularly out on the street and prosecutors are tied up in court, making both of them difficult to reach. Prosecutorial turnover and rotations to different courts and offices make things even more complicated. *Brady* disclosures are thus not happening inside of a smooth system or, indeed, any system at all.

* * *

Of course, the systemic problems described in Section II.B above are not an acceptable excuse for *Brady* violations. While prosecutors must contend with excessive caseloads, inadequate training, and the lack of a real system to coordinate with police, that does not permit them to withhold favorable and material evidence. It makes no difference to the defendant that the prosecutor was busy or the police department failed to respond promptly. The *Brady* doctrine makes no exception for these problems, nor should it. The defendant is entitled to a fair trial. However, it is important to understand how the current "system" gives rise to accidental *Brady* violations. Without an understanding of how accidental violations happen, district attorney's offices cannot take steps to prevent future violations. Unfortunately, as described in

91. *See* Blance Bong Book, *Stepping into the Gap: Violent Crime Victims, the Right to Closure, and a Discursive Shift Away from Zero Sum Resolutions*, 101 KY. L.J. 671, 690 (2012).

Part III, little attention is paid to differentiating between intentional and accidental *Brady* violations.

III. The Importance (and Difficulty) of Understanding Accidental *Brady* Violations

The Supreme Court has long held that a *Brady* violation occurs when the government fails to disclose favorable and material evidence "irrespective of the good faith or bad faith of the prosecution."[92] Because the prosecutor's intent does not matter to whether there has been a violation, most courts that decide *Brady* cases are silent on whether the violation was the result of intentional misconduct or accidental error.[93]

To be sure, in some cases courts are outraged by the conduct of the prosecutor and make a point of publicly castigating the individual prosecutor (and perhaps the entire district attorney's office) for the *Brady* violation.[94] But more often than not, courts are silent on the cause of the *Brady* violation.

In some cases, there are good reasons for judicial silence. Because no legal consequences turn on the intent of the parties, there is no legal reason to document whether the cause was intentional or accidental.[95] Additionally, even if judges wanted to comment on the cause of the *Brady* violation, in many cases it is simply not clear how it happened. Indeed, in some cases it is not even clear whether the error was committed by the prosecutor's office or the police. For instance, the police officer may say that he gave all evidence to the prosecutor, and the prosecutor may say that she turned over everything that the police provided. In that situation, something went wrong, but it is not clear who made the error.

There are also illegitimate reasons why judges may not comment on whether the *Brady* violation was intentional or accidental. Judges are often reluctant to criticize prosecutors who commit reversible error.[96] In some cases, this is because the judges were once themselves prosecutors.[97] Or, it may be that judges empathize with the challenges that prosecutors face and do not want to call them out and harm their careers.[98]

92. Brady v. Maryland, 373 U.S. 83, 87 (1963).

93. *See* Garrett, Gershowitz & Teitcher, *supra* note 6, at 211.

94. *See, e.g.*, United States v. Olsen, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, J. dissenting from the order denying the petition for rehearing en banc) ("I wish I could say that the prosecutor's unprofessionalism here is the exception, that his propensity for shortcuts and indifference to his ethical and legal responsibilities is a rare blemish and source of embarrassment to an otherwise diligent and scrupulous corps of attorneys staffing prosecutors' offices across the country. But it wouldn't be true.").

95. *See generally* Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. Davis L. Rev. 1059 (2009).

96. *See id.* at 1075.

97. *See id*. at 1085.

98. *See id.* at 1086–87.

Whether or not courts have legitimate reasons for discussing the causes of *Brady* violations, the lack of discussion in most cases is unfortunate. Without explanation of why a *Brady* violation happened, it is difficult to learn from the errors and advise prosecutors' offices, police departments, and policymakers about how they can prevent *Brady* violations in the future.

To create a typology of cases in which accidental *Brady* violations happened, I turned to *The* Brady *Database* that I designed in collaboration with Brandon Garrett, Jennifer Teitcher, and The Wilson Center for Science at Duke Law School.[99] *The* Brady *Database* gathered more than 1,000 federal and state cases from 2015 to 2019 in which individuals raised a *Brady* claim.[100] Among the dozens of variables we coded for were whether a court indicated that the *Brady* error was accidental.[101] In the vast majority of the 195 cases in the database where courts found that prosecutors failed to disclose favorable evidence,[102] the courts were silent on whether the prosecutor was personally aware of the evidence.[103]

But not all courts were silent. There were 25 cases in which the courts clearly indicated that the prosecutor was not personally at fault.[104] But not all of those cases included enough detail to decipher exactly what had happened. Upon examining all of the decisions, I located nearly two dozen cases where it was clear *who* had withheld the information and *why* the evidence was not disclosed. In these cases, courts clearly indicated that prosecutors were not personally at fault. In the Parts that follow, I explain what kind of errors happened in those cases and what they tell us About accidental *Brady* violations.

IV. Prosecutors Fail to Understand What Constitutes Impeachment Evidence

Every prosecutor knows that the *Brady* doctrine obligates them to turn over evidence that is favorable and material. And almost all prosecutors likely know that favorable evidence includes not just exculpatory evidence, but also impeachment evidence. Knowing the legal standards—the textbook language—is the easy part though. In order to comply with their *Brady* obligations, prosecutors must be able to

99. *See* Garrett, Gershowitz & Teitcher, *supra* note 6. While the database was a group project, this article on accidental *Brady* violations is not, and all errors and opinions remain my own.

100. *Id.* at 189–90.

101. *Id.* at 210.

102. Not all of these cases amounted to *Brady* violations, however, because the courts sometimes found that the evidence, even though it was favorable, was not material to the outcome. *See id.* at 209.

103. *Id.* at 210–11.

104. *Id.* at 209–10.

recognize impeachment evidence in the real world. And sometimes they fail at that obligation.

Legal scholars have explained that cognitive biases can prevent prosecutors from recognizing favorable evidence that is sitting right in front of them in a casefile.[105] Additionally, many cases present entirely new situations that prosecutors have not seen before. All of this can give rise to prosecutors failing to appreciate that they are in possession of favorable evidence, particularly impeachment evidence. I therefore begin with three cases where courts indicated that prosecutors inadvertently failed to recognize and disclose impeachment evidence.[106]

A. *Dismissing Charges Against a Witness Is Impeachment Evidence but Sometimes Prosecutors Don't Realize It*

As a general matter, almost all prosecutors likely understand that dropping charges against an individual in exchange for them testifying against another defendant is impeachment evidence that must be disclosed. For example, imagine that police arrest D'Angelo Barksdale for drug dealing, but plead him down to simple possession when he agrees to testify as a witness against the drug kingpin (his uncle, Avon Barksdale).[107] The charge reduction for D'Angelo is obviously impeachment evidence because the defense could argue to the jury that there had been a quid pro quo in exchange for his testimony.

But what if prosecutors merely drop charges against D'Angelo on an unrelated matter because dismissing the charges was the right thing to do in that case? For instance, what if D'Angelo was charged with burglary, but a few weeks before trial the key witness said he was no longer sure that D'Angelo was the perpetrator? Without a strong identification, the prosecutors had no choice but to drop the burglary charge. Around that time though, D'Angelo agreed to testify against Avon in a drug-dealing case.

If the prosecutors truly believe the dismissal of the burglary charge against D'Angelo was unrelated to his testimony against Avon, they might fail to appreciate that the defense could use the burglary dismissal as impeachment evidence. In other words, the prosecution—by its own actions—would be in possession of impeachment evidence because it had dismissed charges against a key witness. But because the charges involved a totally unrelated crime from the one that the witness is testifying about, the prosecutors might have failed to realize they were

105. *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 351 (2006); Alafair S. Burke, *Improving Prosecutorial Decisionmaking: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1609–12 (2006) (explaining how confirmation bias and selective information processing can get in the way of prosecutors recognizing their *Brady* obligations).

106. In some of these cases (as well as others that follow), courts did not find *Brady* violations because even though the evidence was favorable, it was not material.

107. D'Angelo and Avon's fictional names come from the HBO series *The Wire*.

dealing with impeachment evidence. This exact scenario happened in a Delaware death penalty case.[108]

Chauncey Starling allegedly shot two people in Pennsylvania. Two victims died.[109] Prosecutors charged Starling with first-degree murder and sought the death penalty.[110] Alfred Gaines, Starling's victim in a separate shooting case, was a key witness against Starling.[111]

Gaines had been on probation and was not supposed to leave the state of Delaware.[112] Because Gaines had gone to Pennsylvania (and violated other probation conditions), his probation officer filed a criminal charge against Gaines for violation of probation ("VOP").[113] While the first-degree murder charge was pending against Starling, one of the prosecutors working on that case requested that the VOP charge against Gaines be dismissed. The prosecutor later testified that the reason for dismissing the VOP charge was so that Gaines could recuperate from his injuries in his current location in Pennsylvania; there was no quid pro quo.[114]

The dismissal of the VOP charge nevertheless constituted impeachment evidence, and the Delaware Supreme Court concluded that it was material.[115] Indeed, the law in Delaware is crystal clear that "[w]henever the State reduces any pending charges (related or not) or makes any arrangements with any State witness, disclosure is mandatory."[116]

The prosecutor failed to understand that the dismissal of the VOP charge was impeachment evidence, however.[117] The court made clear that the *Brady* violation was an accident by repeatedly stating the prosecutor's actions were "unintentional."[118] It appears that the prosecutors simply thought they were doing the right thing—allowing a witness to medically recuperate without facing charges—and seemingly failed to recognize that there could be impeachment evidence when no quid pro quo had in fact occurred.

Had the prosecutor received better training on the definition of impeachment evidence, the *Brady* error would not have occurred.

B. *Witnesses Improving Their Identification After a Pre-Trial Preparation Session Is Impeachment Evidence*

Prosecutors often meet with witnesses in advance of trial. Sometimes they conduct these witness meetings to gather factual information

108. Starling v. State, 130 A.3d 316 (Del. 2016).
109. *See id*. at 319.
110. *See id.* at 320.
111. *See id.* at 321.
112. *See id*.
113. *See id*. at 331.
114. *See id*. at 331, 334.
115. *See id*. at 328.
116. *See* Michael v. State, 529 A.2d 752, 756 (Del. 1987).
117. *See Starling*, 130 A.3d at 320.
118. *See, e.g.*, *id.* at 337.

about the case. Other times prosecutors meet with witnesses to calm their nerves before the witnesses undertake the daunting task of testifying in a criminal case. Meeting with a witness in advance of trial is not unethical, nor does it always create *Brady* evidence that must be shared with the defense. But sometimes a pre-trial meeting with a witness creates impeachment evidence that is easily overlooked. A 2015 Massachusetts case provides an example.[119]

Elysee Bresilla was charged with murder and tried based on the testimony of multiple witnesses.[120] Police found a light brown leather jacket in a parking lot next to the crime scene.[121] Before trial, two witnesses identified the jacket as the one worn by the shooter.[122] But other witnesses identified a black jacket, or a bubble jacket, or no jacket at all.[123] The witnesses' ability to identify what Bresilla was wearing would obviously be a major issue in the case.

"During the trial, defense counsel learned that, just prior to trial, the prosecutor had conducted witness preparation sessions with [three witnesses] in which he showed each witness a photograph of the jacket found in the parking lot to determine whether they could still identify it."[124] The prosecution never disclosed the witness preparation session information to the defense. The defendant argued that these "jacket identification sessions" were a *Brady* violation because at least one of the witnesses had previously only described the jacket generally, but was now able to identify it more specifically.[125] The defendant's argument was that the pre-trial witness preparation session helped the witnesses to tighten up their identifications.[126] In other words, the defense should have been informed about the witness preparation sessions because the defense could have used it to impeach the witness's testimony about the identifications.

The court concluded that the State had suppressed favorable evidence, but that the *Brady* claims failed on the materiality prong because it would not have changed the outcome of the case. Regardless, the court explained that "any nondisclosure was not in bad faith."[127]

The court seemed to be suggesting that to the extent there was wrongdoing on the part of the prosecutors, it occurred because they did not appreciate that they were dealing with impeachment evidence. In other words, the prosecutors misunderstood the legal doctrine of what constitutes impeachment evidence. Had the prosecutors received better

119. Commonwealth v. Bresilla, 23 N.E.3d 75 (Mass. 2015).
120. *See id.* at 78.
121. *See id.*
122. *See id.* at 79.
123. *See id.* at 79–80.
124. *Id.* at 81.
125. *See id.* at 82–84.
126. *See id.*
127. *Id.* at 84.

training or had more experience, they likely would have disclosed the evidence.

C. *Being a Witness in Multiple Cases and Appearing to Be Cozy with Prosecutors Is Impeachment Evidence*

Police and prosecutors often interact with the same people while investigating multiple crimes.[128] These people might be innocent bystanders who live in high-crime neighborhoods. Or they might be people who have engaged in criminal activity and are serving as informants to reduce their criminal exposure. Whatever the reason, police and prosecutors often deal with "repeat players."[129] And those repeated interactions can create impeachment evidence without prosecutors recognizing it. A recent Maryland case provides an example.[130]

George Johnson was convicted of first-degree murder in large part based on the eyewitness testimony of James Nelson.[131] Unbeknownst to Johnson or his defense lawyer, Nelson had worked with prosecutors on other murder cases.[132] After the trial, Johnson learned that Nelson was also a witness "against at least two other murder defendants whose cases (unrelated to appellant's) were pending at the time of his testimony."[133]

Prosecutors said that Nelson cooperated with police of his own volition and was not promised anything in exchange for his testimony.[134] Nevertheless, a Maryland appellate court concluded that Nelson's role as a witness in another homicide case "might establish that Nelson was amenable to cooperation with the State to the detriment of other defendants."[135] In other words, it is so unusual for a person to be an eyewitness in multiple unrelated homicides that it could lead jurors to think that the witness was very cozy with law enforcement and was just telling them what they wanted to hear.

The State did not claim that it was unaware of Nelson's position as a witness in another case. Instead, the State took the position that "there is no *Brady* violation 'when the State fail[s] to disclose that one witness is also a witness in a different case.'"[136] In other words, prosecutors seemed not to recognize that working with the witness in another homicide case amounted to impeachment evidence. Without finding fault by

128. This is particularly true of informants. *See* Emily Jane Dodds, Note, *I'll Make You a Deal: How Repeat Informants Are Corrupting the Criminal Justice System and What to Do About It*, 50 Wm. & Mary L. Rev. 1063, 1066 (2008).
129. *See id.* at 1078.
130. Johnson v. State, 139 A.3d 1039 (Md. Ct. Spec. App. 2016).
131. *Id.* at 1047, 1051–52.
132. *See id.* at 1047.
133. *See id.* at 1064.
134. *See id.* at 1065.
135. *Id.* at 1064–65.
136. *Id.* at 1064 (alteration in original).

the individual prosecutors, the court agreed that Nelson's involvement in the other case was potentially favorable impeachment evidence.[137]

Had the prosecutors had more training or more experience, they would have recognized that they were in possession of impeachment evidence and disclosed it.

V. Negligent Pre-Trial Preparation Results in *Brady* Violations

In the lead-up to trial, prosecutors (and defense attorneys) are incredibly busy. Lawyers must meet with witnesses, prepare and respond to pre-trial motions, draft opening and closing statements, and complete a host of other tasks. In a well-functioning district attorney's office, the pre-trial frenzy is difficult but temporary. But in an overburdened prosecutor's office, the frenzy is the normal state of affairs and continues week after week.[138]

Courtrooms with overflowing dockets may have multiple cases set for trial each week, and it will be unclear until the last minute which cases will plead and which will go to trial. In that frenzied environment, prosecutors will fail to complete all the required tasks for each of their cases, including collecting and disclosing *Brady* evidence. In this Part, I describe cases involving negligent pre-trial preparation. Many of these *Brady* errors involve failing to review witness statements for inconsistencies or failing to check witnesses' criminal histories.

A. *Prosecutors Fail to Double-Check Witness Statements and Identify Inconsistencies*

If a witness gives two statements that are inconsistent, the inconsistency constitutes impeachment evidence.[139] To put it simply, a defense attorney could use the inconsistent statements in front of the jury to ask the witness, "Were you lying then, or are you lying now?" In the abstract, prosecutors know that they must turn over inconsistent statements. But under a crushing caseload they may not have the time to carefully look through prior statements to identify (or even remember) inconsistencies. An example of this scenario occurred in two recent cases.

In *United States v. Ramos-Gonzáles*, prosecutors turned over an FBI interview report (a so-called "302 report") only three days before a drug case went to trial.[140] The police had found drugs in a truck after Ramos-Gonzáles fled from the scene of an accident.[141] One of the investigating

137. *See id.* at 1064–65. The court ultimately found no *Brady* violation because while the evidence was favorable, it was not reasonably likely to change the outcome. *See id*. at 1065.

138. *See supra* Section II.B.1.

139. Fed. R. Evid. 613.

140. *See* United States v. Ramos-González, 775 F.3d 483, 491 (1st Cir. 2015).

141. *See id.* at 487–88.

officers (Vélez) wrote in her 302 report that she "did not see the driver's face during or after the chase."[142] In a previous trial (which was reversed for a Confrontation Clause violation), the same officer had said that she noticed Ramos-González's "light-colored eyes."[143] Thus, the 302 report was inconsistent with earlier trial testimony and constituted impeachment evidence.[144]

The court went to the trouble of noting that the trial prosecutor was not at fault for failing to disclose the 302 report.[145] The court specifically said there was no evidence that the prosecutor acted in bad faith.[146] Instead, the court suggested that a heavy caseload was a reason for the error, noting that "prosecutors in every case—even in a district with a burdensome and congested criminal docket, such as Puerto Rico—have a duty to learn of evidence favorable to the accused."[147]

Despite there being no bad faith by the prosecutor, the court "nonetheless express[ed] concern about the repeated nondisclosure of evidence."[148] And it suggested that "[t]he United States Attorney's Office should develop procedures to avoid repeating the lapses that occurred in these cases."[149]

* * *

A similar error occurred in a recent Michigan case where prosecutors inadvertently failed to turn over an inconsistent witness statement from a preliminary hearing.[150] Rodrigues Talbert was convicted of felony murder in large part based on the testimony of Nicole Vaid.[151] Vaid had waited in the car while her boyfriend went into a house to conduct a drug deal.[152] While she was waiting in the car, Vaid heard gunshots and saw two men come out the front door.[153] Vaid identified Talbert numerous times—at a lineup, a preliminary hearing, and at trial—as one of two men who came out the front door.[154]

142. *Id.* at 491.
143. *Id.* at 493.
144. Perhaps because the officer's 302 report was inconsistent with her testimony in the first trial, the prosecution did not call her in the second trial. *See id*. at 491. Thus, even though the court found the 302 report to be impeachment evidence, the court found that it was not significant enough to be material. *See id.* at 492.
145. *See id.* at 494.
146. *See id.*
147. *Id.*
148. *Id.*
149. *Id.* The U.S. Attorney's Office and all district attorney's offices should require trial prosecutors to review all interview statements well in advance of trial to provide timely disclosure. And they should provide adequate staffing so that the procedure can be followed in practice.
150. *See* People v. Talbert, No. 336843, 2019 WL 1370677, at *3 (Mich. Ct. App. Mar. 26, 2019) (per curiam).
151. *See id.* at *1.
152. *See id.*
153. *See id.*
154. *See id.*

After his conviction, Talbert discovered that Vaid had testified in the preliminary hearing of the other defendant and that she had said "that she could not see the men's faces 'in great detail.'"[155] Moreover, Vaid also testified at the preliminary hearing that "the first one who came out [Talbert], I didn't see."[156]

Both the state and Talbert recognized that Vaid's testimony at the preliminary hearing of the other defendant was favorable evidence that had been "inadvertently suppressed."[157] The appellate court concluded that it was not material, however, because Talbert's blood was found in the house.[158]

It appears that the prosecutors made an honest mistake in failing to disclose Vaid's prior testimony from the preliminary hearing. However, if the prosecutor's office had provided its lawyers with a checklist that reminded them to disclose any conflicting testimony from prior proceedings, the error might not have occurred in this case.

B. *Prosecutors Fail to Find and Disclose Allegations of Police Misconduct Against the Investigating Officers*

If a police officer has been caught lying in the past, those prior lies constitute impeachment evidence that prosecutors must disclose to the defense.[159] Indeed, some prosecutors' offices maintain *Brady* lists with the names of officers who have engaged in dishonesty.[160] Unfortunately, prosecutors still make inadvertent mistakes by failing to turn over impeachment evidence related to police officers.

In *State v. Serfrere*, one of the investigating officers in a drug trafficking case—Detective D.J.—was "the subject of a *Brady* notice and '[was] under investigation by the State Attorney's Office . . . for Grand Theft.'"[161] The trial prosecutor never disclosed this information. Instead, the defense counsel found out from the court clerk during jury deliberations.[162]

Defense counsel contended that even though Detective D.J. did not testify at trial, the theft allegation was critical because D.J. and his partner "were the only people who could confirm whether a purported confidential informant was documented with the police department," which was relevant to the defendant's entrapment defense.[163]

155. *Id.* at *3.
156. *Id.*
157. *Id.* at *4.
158. *See id.* at *5–6.
159. Jonathan Abel, Brady*'s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 745 (2015).
160. *See* Rachel Moran, Brady *Lists*, 107 MINN. L. REV. 657, 658 (2022).
161. State v. Serfrere, 267 So. 3d 407, 408 (Fla. Dist. Ct. App. 2019) (alteration in original).
162. *Id.*
163. *Id.* at 409.

The prosecutor's failure to disclose the impeachment evidence was accidental. A "*Brady* notice was filed by the prior prosecutor," but it was not placed on the docket, and the trial prosecutor "had not verified that the notice was docketed."[164]

The court concluded that the prosecution failed to turn over favorable evidence but that the conviction could stand because the error was not material. Because the officer did not testify, the court found that his possible involvement in criminal activity was not enough to be reasonably likely to change the outcome.[165]

The *Serfrere* case demonstrates two failure points. First, the trial prosecutor failed to review whether any of the officers involved in the case were subject to *Brady* disclosures.[166] The trial prosecutor did not check whether the officers had engaged in or been accused of misconduct that reflected on their honesty.[167] Second, there was a breakdown in communication between the prosecutor who ultimately tried the case and the prior prosecutor who had worked on the matter.[168] The district attorney's office should have had better procedures in place for checking officers for *Brady* problems. And the district attorney's office should have had a better communication system in place so that all prosecutors who had worked on the case could know what steps each of them had taken.

C. *Prosecutors Fail to Run and Disclose Witnesses' Criminal History*

When a witness for the prosecution has prior criminal convictions that bear upon their honesty, the prosecutor is obligated to turn over the witness's criminal history to the defense.[169] Prosecutors thus have to check each witness's criminal history and disclose certain convictions in a timely manner so that the defense can use them to impeach the witness. Prosecutors have accidentally run afoul of this *Brady* obligation in multiple recent cases.

Mark Kilgore was on trial for a relatively straightforward assault charge.[170] Kilgore rented part of his home to his brother and to another tenant named Dennis Vogt. Upon finding rotten food in the refrigerator, Kilgore became incensed and attacked Vogt.[171] Both Vogt and Kilgore's brother testified at trial.[172]

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164. *Id.* at 408.
165. *See id.* at 410.
166. *See id.* at 408.
167. *See id.* at 408–11.
168. The problem of miscommunication among prosecutors is explored in more detail and with additional cases *infra* Section VI.E.
169. *See supra* note 25 and accompanying text.
170. State v. Kilgore, 505 S.W.3d 362, 364 (Mo. Ct. App. 2016).
171. *Id.* at 365.
172. *See id.* at 368.

On the morning of trial, the prosecution filed a motion to add three additional witnesses—two police officers and Robert Swarts.[173] Swarts was a third tenant in Kilgore's home, but he was not present at the time of the assault.[174] Prosecutors presented Swarts as a character witness, and he testified that Kilgore (the defendant) had a history of being violent and that Vogt (the victim) had a history of being peaceful.[175]

The prosecution's addition of Swarts as a witness on the day of trial indicates that the prosecutor was likely not fully prepared for trial. This conclusion is buttressed by what happened on the day of trial. Just as Swarts was entering the courtroom, the prosecutor whispered to Kilgore's defense attorney that Swarts had a prior conviction for drunk driving.[176]

But Swarts had more than just a DWI conviction. After the case went to the jury, Kilgore's lawyer did his own research and learned that Swarts had multiple other prior convictions, including leaving the scene of an accident and stealing, which are both crimes of honesty.[177]

The prosecutor later acknowledged that "[t]he State did not have knowledge of the three felonies, as it had not availed itself of that information by conducting a background search of Swarts."[178] The prosecutor further conceded that he "failed to make a diligent effort to conduct a background search of Swarts, and Swarts's three prior felonies constituted impeachment evidence against him that would have been useful to the defense."[179] There are two possible reasons for the prosecutor's mistake: (1) the prosecutor was over-burdened by an excessive caseload and lacked the time to run the witness's criminal history; or (2) the prosecutor was not adequately trained and did not understand that (s)he was even obligated to search the witness's criminal history.

The appellate court recognized that the prosecutor's failure to disclose Swarts's criminal history was negligent rather than intentional.[180] (The Court also correctly observed that the prosecutor's "inadvertence and good faith" were irrelevant to whether there was a *Brady* violation.[181]) Ultimately, the court upheld the conviction because Swarts's criminal history was not reasonably likely to change the outcome of the case. Both the victim and Kilgore's brother were first-hand witnesses to the assault, thus making Swarts's character evidence of minimal importance.[182]

173. *See id.* at 365.
174. *See id.*
175. *See id.*
176. *Id.*
177. *See id.* at 366.
178. *Id.* at 368.
179. *Id.*
180. *See id.*
181. *Id.*
182. *Id.*

The State was very fortunate to have so much evidence in Kilgore's case. In another case without eyewitness testimony or with less persuasive witnesses, withholding a character witness's criminal history may very well have changed the outcome. If the district attorney's office made systemic improvements (reducing caseloads and providing adequate training) the favorable impeachment evidence likely would have been disclosed to the defense.

* * *

Prosecutors in a South Carolina case also accidentally failed to turn over multiple witnesses' criminal history information.[183] Ron McCrary was charged with murder based on the testimony of multiple witnesses.[184] Two witnesses had criminal records, but the State did not notify the defense of that information before trial.[185]

"The State acknowledged its failure to immediately turn over the reports was a mistake, but noted it did not realize this mistake until the witnesses were on the stand."[186] The State apologized to the trial court and stated that it did not purposely suppress the evidence.[187] The appellate court accepted the State's explanation that failing to disclose the criminal history information was a mistake, calling it an "oversight."[188]

The appellate court found the evidence to be favorable. But as in the *Kilgore* case, the court found the evidence was not material because there were multiple other witnesses and other incriminating evidence.[189] Once again, the prosecution got lucky—even though it made an avoidable discovery mistake—and the conviction survived because of other strong evidence.

VI. Prosecutors Fail to Disclose Evidence Held by the Prosecution Team Because of Communication Failures

The Supreme Court has made unmistakably clear that prosecutors have an obligation to disclose favorable evidence held by the entire prosecution team.[190] The prosecution team is not just the trial prosecutors who litigate a case in the courtroom. The prosecution team includes local police, other law enforcement agencies, other prosecutors in the district attorney's office, the crime laboratory, the law enforcement department that handles 911 calls, national security agencies, and other entities.

183. State v. McCray, 773 S.E.2d 914, 917 (S.C. Ct. App. 2015).
184. *See id.* at 918–20.
185. *See id.* at 924.
186. *Id.* at 918.
187. *See id.* at 925.
188. *See id.*
189. *See id.*
190. *See* Kyles v. Whitley, 514 U.S. 419, 421 (1995).

Prosecutors are obligated to turn over evidence held by these other team members regardless of whether the trial prosecutor is personally aware of it.[191] In this Part, I explore cases in which prosecutors failed to fulfill this obligation because of poor information flow and communication breakdowns. This Part examines cases in which all members of the prosecution team acted in good faith but nevertheless failed to coordinate the production of favorable evidence. (Later, in Part VII, I will consider cases in which prosecutors acted ethically but were stymied by police officers who engaged in intentional misconduct.)

A. *Police Repeatedly Fail to Provide All Favorable Evidence to Prosecutors*

It is very common for *Brady* errors to occur because of miscommunication between prosecutors and law enforcement officers. As explained below, 8 of the 22 cases described in this article involve *Brady* errors that happened because of poor communication.

1. Police Do Not Turn Over All Witness Statements and Reports to Prosecutors

The criminal justice system is a chaotic mess of actors. In the smallest jurisdiction, prosecutors may work only with a single local police department. But in most cities, prosecutors have to interact with a wide array of law enforcement agencies. In addition to local police, there are campus police, airport police, sheriffs, constables, and a host of other agencies. Some large district attorney's offices work with dozens of law enforcement agencies.[192] And, of course, within each agency, there are dozens, hundreds, or even thousands of officers.

When law enforcement officers bring in cases, they are not assigned to any particular courtroom or any particular prosecutor.[193] Instead, police must interface with many different prosecutors. And they must communicate with their prosecutor counterparts while continuing their patrol, detective, and other obligations on the street.[194] The result is disjointed communication that gives rise to mistakes. Police may forget about cases, or they may lose track of which pieces of evidence they have conveyed to prosecutors. Because police officers are dealing with many cases and many prosecutors, they sometimes neglect to transmit favorable or exculpatory evidence.

A straightforward example of police failing to provide exculpatory evidence to the prosecutor occurred in a recent Ohio murder case.[195]

191. *See id.* at 437.
192. *See* Gershowitz, *supra* note 76, at 1544.
193. *See id.*
194. *See id.* at 1538.
195. State v. Buehner, 118 N.E.3d 1175, 1180 (Ohio Ct. App. 2018).

Michael Buehner's lawyer requested the witness statements of multiple people, including Debbie Anderson.[196] The prosecution replied that "[n]o exculpatory material [wa]s available to or in the possession of the Prosecuting Attorney."[197] Buehner was subsequently convicted.[198]

More than a decade after trial, a family friend of Buehner made a public records request about the case.[199] In response, the Cleveland Police Department produced multiple witness statements, including one from Debbie Anderson.[200] According to the report, Anderson had told the police that "the shooter and the other two individuals in the truck were black."[201] It was undisputed, however, that Buehner was white.[202] Misidentifying the race of the defendant is surely exculpatory evidence.

The appellate court very bluntly placed responsibility for withholding the evidence at the feet of the Cleveland Police Department. The court explained that

> The record indicates that the [prosecution] provided full discovery responses to Buehner's requests based on the evidence in the [prosecutor's] possession, and that the undisclosed witness statements remained in the possession of the Cleveland Police Department. Therefore, there is no evidence that the [prosecutor] intentionally withheld exculpatory evidence from the defense.[203]

The court properly recognized that the prosecutor's good faith was irrelevant and found a *Brady* violation.[204]

Although it is impossible to know for sure, it appears likely that the police negligently failed to provide the evidence to the prosecution (rather than intentionally hiding it). The police did not entirely hide the identity of Debbie Anderson; she was listed as a witness and her identity was provided to the defense.[205] Moreover, the police did not destroy the report either before or after trial. And when a records request was made years later, Anderson's witness statement was still in the file and was immediately handed over by the police department. All of these facts point to the likelihood that the police department was negligent rather than malicious in failing to provide the report to the prosecutor.

While the negligent error by police indicates that the trial prosecutor was not personally responsible for the *Brady* violation, that does not absolve the district attorney's office of responsibility for the error.[206] If the prosecutor's office had procedures in place to document the transfer

196. *Id.* at 1179.
197. *Id*. (alterations in original).
198. *Id.* at 1180.
199. *See id*.
200. *See id*.
201. *Id*.
202. *See id.*
203. *Id.* at 1182.
204. *See id.* at 1183.
205. *See id.* at 1179.
206. *See id.* at 1183.

of all files from the police to the trial prosecutors, the Anderson witness statement might well have been produced.

* * *

Police also failed to turn over a witness statement in an attempted murder case from Montana.[207] Once again, the lack of communication prevented the disclosure of favorable evidence.

Michael Root was convicted of attempted murder based in part on the testimony of the victim, who said that Root pulled out a knife and stabbed him.[208] Between the second and third day of trial, "the State provided the defense with a copy of a recording of an interview between police and a previously disclosed witness named Lonnie Boyd."[209] The recording was exculpatory. Boyd said that someone else—a minor—had confessed to stabbing the victim.[210]

The court noted that the prosecutor was not at fault for failing to disclose the recording. The majority opinion remarked that "there is no contention that the prosecutor in Root's case knew about the recording prior to disclosing it to the defense."[211] And the dissent called the suppression "inadvertent."[212] The police themselves had made the recording when the witness—who was in police custody on unrelated charges—offered to provide the information.[213]

Perhaps the officers forgot about the recording, or perhaps they did not turn it over because they did not think to contact the prosecutor with this new information. Either way, this problem could have been avoided if the police and prosecutors had a clear policy reminding police to constantly update the prosecutor with any new information about the case.

* * *

Even FBI agents sometimes fail to provide *Brady* evidence to prosecutors. Consider the case of Thomas Szczerba, who was charged with various offenses under the Mann Act and other federal statutes after moving women across state lines for prostitution.[214]

During trial, the prosecutor produced for the first time an interview summary prepared by an FBI agent.[215] The summary indicated that the FBI agent had interviewed a man who had met one of the women that

207. *See* State v. Root, 359 P.3d 1088, 1092 (Mont. 2015).
208. *Id.* at 1090.
209. *Id.* at 1092.
210. *See id.* at 1092–93. The appellate court found the withheld evidence to be favorable but split on the materiality. The majority concluded that it was not material because there was so much evidence of Root's guilt. *See id.* at 1094.
211. *Id.* at 1092.
212. *Id.* at 1095 (Cotter, J., dissenting).
213. *Id.* at 1092 (majority opinion).
214. *See* United States v. Szczerba, 897 F.3d 929, 932–33 (8th Cir. 2018).
215. *See id.* at 935.

Szczerba had allegedly trafficked.[216] According to the interviewee, the woman said she was "a stripper and showed him photos of her wearing lingerie."[217] Defense counsel used the memo to argue that the incident demonstrated that the woman—not Szczerba—advertised herself as a prostitute.[218]

The appellate court's decision did not specify why the evidence was not disclosed before trial. But a hearing held the day the document was disclosed sheds more light. The prosecutors told the judge that the U.S. Attorney's Office had not received the document until that morning.[219] The clear implication was that the FBI agent turned over the document late and that the prosecutor then immediately produced it to the defense. The fact that the agent turned over the document in the middle of trial, rather than never disclosing it, suggests unintentional error on the part of the FBI agent.

Once again, improved communication between the prosecutor's office and law enforcement likely could have prevented this *Brady* issue.[220]

* * *

Just as communication breakdowns lead to problems with disclosing witness statements, communication problems have also resulted in police failing to provide prosecutors with police reports.

For instance, in a 2019 murder case, the prosecution was forced to make a late disclosure of 19 police reports after the trial began.[221] One of the reports "contained information about a canine search on the night of the murder that tracked footprints in many directions, not just the one path the State believed, and which the officers testified to at trial, the shooters had followed."[222] Another report included allegations that the victim's wife (who was not one of the charged defendants) was involved in the murder.[223] All of these documents were in a file in the police department's homicide office.[224]

The court noted that there was "no evidence or allegation that the State acted in bad faith or intentionally in failing to timely produce the

216. *See id.*
217. *Id.*
218. *See id.*
219. 4 Transcript of Trial at 1–4, United States v. Szczerba, No. 4:15-cr-00348, 2017 WL 2132366 (E.D. Mo. May 17, 2017), ECF No. 295 ("[W]e were made aware of the existence of this [FBI interview document] 302 this morning and promptly turned it over to defense counsel.").
220. The court found the witness's statement to be favorable but did not find it to be material for two reasons. First, there was ample other incriminating evidence. And second, even though the document was turned over late, the defense still had an opportunity to use it at trial. *See Szczerba*, 897 F.3d at 941–42.
221. State v. Brown, 201 A.3d 77, 84 (N.J. 2019).
222. *Id.*
223. *See id.*
224. *Id.*

discoverable material."[225] The court correctly recognized that intent was irrelevant though and found that the withheld evidence was a *Brady* violation because it was favorable and material.[226]

Given the court's comments about the lack of bad faith and the fact that the reports were turned over during trial and not hidden indefinitely, it once again appears that the officers were not intentionally trying to hide evidence. Rather, the case appears to be yet another instance of sloppy record-keeping and transmission. If the prosecutors and police had better procedures in place, the *Brady* violation might not have occurred.

2. Police Fail to Transmit All Video Footage to Prosecutors

We live in an increasingly digital world and there is far more video evidence than in the recent past. Police body cameras and dash-cams (not to mention Ring doorbells and cell phone video) create many recordings that may have to be disclosed to the defendant. But before the prosecutor can disclose video evidence, the police must provide it to the prosecutor. And sometimes the police neglect to provide all the video recordings.

A textbook example of miscommunication between police and prosecutors with respect to video footage occurred in *State v. Smith*.[227] David Smith was on trial for robbing a man in a motel room.[228] The prosecutor had disclosed video camera footage from one camera at the motel.[229] During cross examination of the detective who worked the case, the defense asked if video footage from another camera—the one in the motel lobby—had been seized.[230] The detective testified that he had seized video footage from "all" the video cameras and placed them on a DVD, which was given to the prosecutor's office.[231]

The defense had not received the DVD or footage from any other cameras.[232] The prosecutor then told the judge that "she also had not received any footage from any other cameras, and she later told the court every piece of evidence she had was turned over to defense

225. *See id.* at 80. The Court's opinion said the reports were "in a file that was actually in [the State's] office in homicide," which leaves some ambiguity about whether it was the police department's homicide office or the prosecutor's homicide unit. *See id.* at 84. The lower court opinion, however, indicates that the files were in the police department. The lower court noted that the trial judge "ordered the State to produce four police officers the next day, so they could be questioned regarding the late production of the evidence." State v. Brown, No. A-4898-14T1, 2017 WL 2376517, at *4 (N.J. Super. Ct. App. Div. June 1, 2017) (per curiam).

226. *Brown*, 201 A.3d at 90, 94.

227. State v. Smith, 491 S.W.3d 286, 291–92 (Mo. Ct. App. 2016).

228. *See id.* at 292.

229. *See id.* at 294.

230. *See id.* at 295.

231. *Id.*

232. *Id.*

counsel and that she learned of the additional surveillance videos at the same time as defense counsel."[233]

The judge then ordered the prosecution to immediately disclose the other surveillance footage.[234] Subsequently, the defense asserted a *Brady* violation on the ground that the footage from another camera showed a truck resembling the defendant's vehicle leaving the motel parking lot before the crime.[235] The court ultimately found this evidence to be favorable, but not material because there were multiple witnesses who placed the defendant in the motel room at the time of the crime.[236]

The *Smith* case seemed to involve a genuine mix-up between the police and prosecutor about the DVDs and surveillance footage. The most likely explanation is that the police turned over only the most relevant camera footage to the prosecution but thought they had delivered all of the surveillance footage.

* * *

Busy caseloads combined with poor computer systems can also lead to inadvertent police errors and *Brady* problems. In *State v. Auman*, the defendant was on trial for aggravated battery after driving into a motorcyclist and severely injuring him.[237] The prosecution took a long time to bring the case to trial and ran right up against the speedy trial statute.[238]

The prosecutor also waited a long time to ask the police department for information related to the case. According to the appellate court, shortly before the first trial date in August, "the State submitted a Media Request to the Lawrence Police Department," which "sought, among other things, a 'Full Copy of everything' on the department's management software relating to the incident, as well as copies of 'In-car videos.'"[239] The prosecutor asked for the information "Within a Week."[240] The police department never sent the discovery. Fortunately for the prosecution, the court continued the case at the last minute because there were other trials scheduled for that day.[241]

The new trial was to take place in late October.[242] On October 24th—just five days before trial—the prosecutor filed another request with the police department and "asked for the same information requested in August, including any in-car videos, and specifically asked whether there were any diagrams constructed for this incident."[243] The prosecutor

233. *Id.*
234. *See id.*
235. *See id.* at 295–96.
236. *See id.* at 298–300.
237. *See* State v. Auman, 455 P.3d 805, 807–08 (Kan. Ct. App. 2019).
238. *See id.*
239. *Id.* at 808.
240. *Id.*
241. *See id.*
242. *See id.*
243. *Id.*

said that they "needed this information 'Immediately.'"[244] Yet again, the police sent no documents to the prosecutor.

The next day, the prosecutor made a third request for the same information and asked the police department to "provide this information 'Immediately.'"[245] Finally, on Friday, October 26—the last business day before the Monday trial—the police sent the prosecutor two dashcam videos.[246] The prosecutor immediately provided the videos to the defense. The videos contained the names and phone numbers of three witnesses who had not been previously identified.[247] More significantly, the videos included a conversation in which one police officer told another officer he was "not sure whether Auman had seen the motorcycle."[248] An officer then said, "he took a left turn in front of a bike looking right into the sun. Makes sense."[249]

The trial and appellate courts found this evidence to be favorable and material.[250] And because there was no time for a continuance before the speedy trial clock ran out, the trial and appellate courts both concluded that the correct remedy was the dismissal of the charges.[251] The appellate court added valuable context about the interplay between prosecutors and police in the *Brady* context:

> [W]e are sensitive to the difficult position a prosecutor may find himself or herself in when faced with a law enforcement department that does not promptly respond to discovery requests. Here, the prosecutor submitted numerous requests to the Lawrence Police Department for evidence related to Auman's collision—including multiple requests for dashcam video evidence. In dismissing this case, the district court specifically found that "this is not a blaming game that somehow the prosecution didn't do enough in order to make sure that the discovery was complete," but rather surmised that the issue may have arisen as a result of the computer system used by the State. We have no reason to doubt this assessment, though we note that the State's requests all came within a week of a then-scheduled trial.[252]

The *Auman* case appears to be a perfect storm that created a *Brady* violation despite the good intentions of the prosecutors. The prosecutors did not file the case promptly, nor did they seek out discovery information from the police department promptly. They waited until the last minute and acted in a rush. It is of course possible that this frenzied activity was the result of laziness or incompetence. But the more likely explanation is that the prosecutors were buried by huge caseloads.

244. *Id.*
245. *Id.*
246. *See id.*
247. *Id.* at 808–09.
248. *Id.* at 809.
249. *Id.*
250. *See id.* at 809–10.
251. *See id.* at 809, 811.
252. *Id.* at 811.

This is supported by the fact that there were multiple cases set for trial on Auman's first trial date and that the case was not continued until the day of trial.[253] Moreover, when the case was continued, it was scheduled for the very last date possible under the speedy trial statute[254]—a sure sign that the court's docket was overflowing and that the parties thought the case might plea bargain.

In addition to caseload problems, the court pointed to a flawed computer system.[255] It thus appears that a malfunctioning criminal justice system—too many cases and out-of-date equipment—led to a coordination failure between the prosecution and the police and resulted in a *Brady* violation.

3. Prosecutors Can Be Unaware of Benefits Police Provide to Witnesses

It is not just video recordings and witness statements that police fail to provide to prosecutors. In one recent case, police failed to communicate to prosecutors that they had paid a witness.[256] At first blush, not disclosing witness payments sounds like outrageous and intentional misconduct. But when the facts become clearer, it is possible to see how the police inadvertently failed to recognize that they were dealing with *Brady* material that needed to be provided to the prosecutor.

Emmanuel Butler was convicted of first-degree murder based on a confession he made to his girlfriend as well as a confession he made to a man named Hamilton, who had surreptitiously recorded the conversation.[257] Hamilton had a long rap sheet with prior convictions, and he had previously lied to law enforcement.[258] Hamilton's problematic history was disclosed to the defense in advance of trial, and it was used on cross-examination.[259]

However, the defense did not learn until after trial that "Hamilton had received one hundred dollars from the police to buy a bus ticket to go to his mother's house and that he received two hundred dollars from Crime Stoppers for providing information about the crime."[260] Notably, the police "agreed to provide him with money for the bus ticket because Hamilton and Butler were members of the same gang, and there was concern for Hamilton's safety after he 'ratted out' Butler to the police."[261]

253. *See id.* at 808 ("When the parties arrived for the first day of trial on August 27, the court indicated that, because of other trials scheduled that day, Auman's trial would need to be continued to October 29, 2018.").
254. *See id.*
255. *Id.* at 811.
256. *See* State v. Butler, 263 So. 3d 195, 197 (Fla. Dist. Ct. App. 2019).
257. *Id.* at 196.
258. *See id.* at 197.
259. *See id.*
260. *Id.*
261. *Id.*

The fact that Hamilton received $300 never reached the prosecutors. According to the court, "[t]he police officers had no recollection of providing any of this information to the State prior to trial."[262] The court correctly recognized that payment to a witness constituted favorable evidence.[263] However, given the more damning evidence about Hamilton's background that was disclosed and the other evidence against the defendant, the court found that the cash payments were not material.[264]

Once again, there is reason to believe the police accidentally, rather than intentionally, failed to disclose this favorable evidence. Given Hamilton's extensive criminal history, it is hard to imagine that police would have thought $300 in payments—most of which was to protect the witness from retaliation—would make or break the case. This is especially likely given that the police knew that Hamilton's rap sheet and his previous lies to police would be disclosed. In all likelihood, the police simply failed to appreciate that the bus ticket and crime stoppers funds constituted favorable evidence.

This case demonstrates the need for police to have adequate training in what constitutes favorable evidence for *Brady* purposes. And it demonstrates the prosecutors should have a *Brady* checklist with an item for payments to informants that they double-check with law enforcement agencies involved in the case.

B. *Prosecutors Fail to Acquire 911 Recordings*

Prosecutors often have to produce 911 recordings to the defendant. The reason is that 911 callers are witnesses to the charged crime and might have uttered exculpatory (or inculpatory) evidence during the 911 call.[265]

The recording of a 911 call does not always magically show up on a prosecutor's desk, however. There are a lot of 911 calls each day, and many of them amount to nothing.[266] So the law enforcement agency that handles the 911 line does not always know which 911 calls involve criminal prosecutions.[267] For instance, if a bystander calls 911 and tells the dispatcher that she just saw someone being robbed, the dispatcher will not know that the police department eventually arrested a particular

262. *Id.*
263. *See id.* at 198.
264. *See id.*
265. *See, e.g.*, People v. Moscat, 777 N.Y.S.2d 875, 877 (Crim. Ct. 2004) ("There are thousands of homicide and assault cases every year where a 911 call for help made by the victim to the police is an important piece of evidence.").
266. *See* S. Rebecca Neusteter, Maris Mapolski, Mawia Khogali & Megan O'Toole, The 911 Call Processing System: A Review of the Literature as It Relates to Policing 34 (2019), https://www.vera.org/downloads/publications/911-call-processing-system-review-of-policing-literature.pdf [https://perma.cc/TM9Y-NLHT].
267. *See id*. at 6 (describing that 911 call centers operate independently by agencies separate from the prosecutor).

person for that crime. And the entity overseeing the 911 system will not know which courtroom the case has been assigned to, nor would they know which prosecutor in that courtroom is handling the case.

In many jurisdictions, the prosecutor has to specifically request a copy of the 911 call from the law enforcement agency that oversees the 911 system.[268] The prosecutor has the obligation to make a timely request for a copy of the 911 call.[269] Unfortunately, prosecutors sometimes forget to request the 911 call.

In *State v. Washington*, a prosecutor was assigned to a road-rage case a few weeks before trial and noticed that the recording of the 911 call was not in the casefile.[270] The prosecutor then requested the recording from the dispatcher and received it three days before Thanksgiving, which was only a week before trial.[271] On the eve of trial, the prosecutors scurried to track down the 911 caller. In the ensuing days, the caller made clear that he did not want to be a witness in the case.[272] And there was a subsequent dispute between the prosecution and the defense about whether the prosecution learned the 911 caller's identity before trial.[273]

A 911 call can be a source of extremely valuable information. The *Washington* case highlights the need for district attorney's offices to have a clear protocol telling prosecutors to request 911 calls from the dispatcher and to disclose those calls to the defense. Without clear guidance, prosecutors can forget to request 911 calls from the dispatcher and run afoul of the *Brady* doctrine.

C. *Prosecutors Fail to Gather Evidence from National Security Agencies*

It is not just traditional police who might be in possession of *Brady* evidence. Federal agencies ranging from the EPA to the CIA can also possess evidence related to a criminal case. Accordingly, federal prosecutors (and even some state prosecutors in proximity to Washington, D.C.) sometimes have to work with regulatory and national security agencies to find and disclose favorable evidence to the defense.[274]

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268. *See, e.g.*, People v. Donovan, No. F070345, 2016 WL 5787281, at *4 (Cal. Ct. App. Oct. 4, 2016) ("The reason the prosecutor did not request the 911 call from the dispatcher is because it would have been cumulative evidence.").

269. *See id*. at *3.

270. *See* State v. Washington, 189 A.3d 43, 51 (R.I. 2018).

271. *See id.* at 51–52.

272. *See id.* at 52.

273. *See id.* at 51–52. The Supreme Court of Rhode Island did not clearly indicate whether the prosecution failed to disclose favorable evidence, but it held that it could not have been material in light of the other evidence against the defendant. *See id.* at 63–64.

274. *See* Jonathan M. Fredman, *Intelligence Agencies, Law Enforcement, and the Prosecution Team*, 16 YALE L. & POL'Y REV. 331, 370 (1998); *see also* Mark D. Villaverde, Note, *Structuring the Prosecutor's Duty to Search the Intelligence Community for* Brady *Material*, 88 CORNELL L. REV. 1471, 1474, 1515 (2003) (referencing the occasional need for federal prosecutors to depend on federal agencies to collect evidence internationally).

After Senator Ted Stevens' conviction was reversed for a *Brady* violation, the Deputy Attorney General issued a guidance document for federal prosecutors about their discovery obligations.[275] The document noted that "in complex cases that involve parallel proceedings with regulatory agencies (SEC, FDIC, EPA, etc.), or other non-criminal investigative or intelligence agencies, the prosecutor should consider whether the relationship with the other agency is close enough to make it part of the prosecution team for discovery purposes."[276] Courts have also held that regulatory[277] and national security agencies[278] can be part of the prosecution team and that information in their possession must be disclosed. As would be expected, communication flow between prosecutors and federal agencies is not always smooth.

Consider the case of Haji Bagcho, who was convicted of three narcotics charges and sentenced to life imprisonment.[279] The prosecution's "principal witness" was an informant named Qari,[280] who provided corroborating evidence for two charges against Bagcho and who was the sole witness for one charge.[281]

Three years after Bagcho's conviction, the Government notified defense counsel that the Department of Justice had learned of information relevant to Qari's credibility.[282] Qari had been an informant for another government agency since at least 2007.[283] The Department of

275. *See Prosecution of Former Senator Ted Stevens: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. of the Judiciary*, 112th Cong. 45 (2012) ("[T]he Department, through its U.S. attorney's manual, has a provision, which has recently been revised, together with guidance from the then-deputy Attorney General Ogden, right after the Stevens trial, which as a matter of policy tells the federal prosecutors that they are to disclose Brady and Giglio material.") (testimony of Henry F. Schuelke III, Partner, Janis, Schuelke, and Wechsler).

276. *See* Memorandum from David W. Ogden., Deputy Att'y Gen., to Dep't Prosecutors, Guidance for Prosecutors Regarding Criminal Discovery (Jan. 4, 2010), https://www.justice.gov/archives/jm/criminal-resource-manual-165-guidance-prosecutors-regarding-criminal-discovery [https://perma.cc/ZN95-8HB7] (outlining a prosecutor's duty to review information collected by the entirety of a prosecution team, including intelligence and regulatory agencies conducting parallel investigations).

277. *See* KENNETH M. MOGILL ET AL., EXAMINATION OF WITNESSES § 2:6, Westlaw (2d ed. database updated Oct. 2024) ("The 'prosecution team' includes any federal, state, or local agency that participated in the investigation leading to the defendant's indictment in a given case, and the government's disclosure obligation extends to discoverable materials that it has 'knowledge of and access to' in the possession of any such agency.").

278. *See* Fredman, *supra* note 274, at 370 ("At the other end will be the relatively few instances in which the CIA, NSA, or DIA provides a law enforcement agency with specific information about criminal defendants, their organizations, or the underlying offenses, with that information employed directly in a prosecution. In such cases, discovery normally would extend to the intelligence agency, so that the appropriate records searches should be conducted."); *see also* Villaverde, *supra* note 274, at 1474.

279. *See* United States v. Bagcho, 151 F. Supp. 3d 60, 63 (D.D.C. 2015), *aff'd* 923 F.3d 1131 (D.C. Cir. 2019).

280. *Id.* at 64.

281. *Id.* at 74–75.

282. *See id.* at 65.

283. *See id.*

Justice explained to defense counsel that "[p]rior to the 2012 trial, a U.S. government agency concluded that Qari had made statements that were not credible and that Qari was therefore a fabricator."[284] Another government agency opined in 2010 that Qari was providing information that was "unrealistic and sensational."[285]

Prior to Bagcho's trial, prosecutors had searched for information about Qari in the files of other agencies but "did not locate the evidence in question."[286] The Department of Justice later conceded that the impeachment evidence "was stored in government records, but the prosecution failed to discover it during its searches for *Brady* material prior to the defendant's two trials."[287]

Given that the prosecutors searched for the evidence, it seems clear that the failure to disclose it was accidental. Of course, under the *Brady* doctrine, it is irrelevant that the prosecution made a good faith effort to discover the information.[288] The court thus found a *Brady* violation.[289]

The case demonstrates that prosecutors working in the national security space will need to re-double their efforts to check databases and communicate with other agencies to discover and disclose information about key prosecution witnesses.

D. *Prosecutors Fail to Work with Other Agencies, Including the Fire Marshall*

As noted in Section VI.C above, the "prosecution team" can extend not just to national security agencies but to regulatory agencies as well. For instance, in a conspiracy prosecution related to seeking drug approvals, a court has held that the Food and Drug Administration was part of the prosecution team.[290] Given the broad definition of the prosecution team, it is not surprising that prosecutors fail to acquire *Brady* evidence from agencies that we do not typically think of as being involved with criminal cases. A recent case where the fire marshal possessed favorable evidence is a good example.

In *State v. Nisbet*, the defendant was on trial for involuntary manslaughter and various fire code violations after a building he owned

284. *Id*. (alteration in original).
285. *Id*. at 66.
286. *Id.* at 67.
287. *Id.* at 66.
288. *See id.* at 67.
289. *Id.* at 76.
290. *See* United States v. Wood, 57 F.3d 733, 737 (9th Cir. 1995) ("For *Brady* purposes, the FDA and the prosecutor were one. We need not decide how far the unity of the government extends under the *Brady* rule. We hold only that under *Brady* the agency charged with administration of the statute, which has consulted with the prosecutor in the steps leading to prosecution, is to be considered as part of the prosecution in determining what information must be made available to the defendant charged with violation of the statute.").

burned down and killed six people.[291] After being convicted on the fire code violations (but acquitted of the involuntary manslaughter charges), Nisbet argued that prosecutors should have disclosed a policy memorandum that the state fire marshal had issued a few years earlier.[292] That memorandum stated that the windows in certain older buildings would be acceptable if they met particular specifications.[293]

According to the trial court, neither of the prosecutors handling the case were aware of the fire marshal's memo until the assistant fire marshal mentioned it after the second day of trial.[294] One of the prosecutors told the assistant fire marshal to bring the memo to court the next morning, but after receiving it, the prosecutor "read it quickly and did not correctly understand its contents."[295] The trial court found that the prosecutor believed he had disclosed the memo but likely failed to do so because he was busy working on a stipulation with defense counsel about other issues.[296]

The state conceded that the memorandum was favorable, but both the trial court and appellate court rejected the *Brady* claim.[297] The trial court found that the windows still "did not comply with the Fire Code even applying [the more lenient requirement contained in the 2013 Memorandum]."[298]

Nothing in the *Nisbet* case points to intentional misconduct on the part of the prosecutors. Yet, once again, that does not mean that the prosecutor's failure to disclose was unavoidable. The district attorney's office should have had a checklist directing the prosecutor to find and disclose documents from all agencies on the prosecution team. And that checklist should have indicated that in a case involving a fire, the prosecutors must check with the fire marshal for relevant documents.

E. *Prosecutors Even Fail to Coordinate with Other Prosecutors in Their Office*

Given that the key players in the criminal justice system are very busy, it should not be surprising that prosecutors have difficulty coordinating the production of evidence with local police and other law enforcement agencies. Yet the problem goes deeper. Prosecutors even have difficulty coordinating evidence disclosure with other prosecutors in their own office!

291. *See* State v. Nisbet, 191 A.3d 359, 363 (Me. 2018).
292. *See id.* at 364.
293. *See id.*
294. *See id.* at 365.
295. *Id.*
296. *See id.*
297. *Id.* at 369–70.
298. *Id.* at 366.

First, in large offices, prosecutors often rotate through different sections to enhance their professional development and prevent burnout.[299] A prosecutor might do a six-month stint in the misdemeanor division, followed by another six months in the juvenile division, before being transferred to the felony division. Thus, in the middle of a case—indeed in the middle of hundreds of cases—one prosecutor leaves and a new prosecutor takes over. The new prosecutor may fail to appreciate that *Brady* disclosures had not been made in some (or many) cases.

Second, and similarly, prosecutors quit their jobs frequently.[300] When a prosecutor with a large caseload leaves—particularly on short notice—they may not write an exit memo that carefully explains where matters stand in each of their dozens or hundreds of cases.

Third, a case filed in one court that is assigned to a particular prosecutor may not stay in that court. Cases are sometimes downgraded from a felony to a misdemeanor (or vice versa) and thus may be transitioned to a new courtroom and new prosecutors. Moving a case to a new prosecutor and a new court can result in losing track of *Brady* disclosures. An example of this scenario occurred in a recent New York case.

In *People v. Lamb*, the defendant drove into a pedestrian who was crossing a highway and killed her.[301] Lamb was originally charged with a violation of the criminal code, but after pre-trial motions, the case was downgraded to a traffic offense.[302] Lamb was allegedly exceeding the speed limit, and the key witness was an accident reconstruction expert who opined that Lamb was traveling at 54 mph in a 40-mph zone.[303] The expert acknowledged having a large file of notes about the case, but it was never provided to the defendant as required by state law.[304]

The court found that the prosecution had committed a discovery violation but took pains to indicate that "the prosecution neither acted in bad faith nor attempted to gain an unfair tactical advantage to subvert justice by the nondisclosure."[305] The court explained that when the criminal offense was downgraded to a traffic offense the prosecutors responsible for the case changed, and there was a "miscommunication during a transition."[306] The court said that it "f[ound] no fault with [either set of prosecutors] . . . [and that] the nondisclosure was caused by the lack of prosecutorial continuity, not the lack of prosecutorial integrity."[307]

299. *See* Ronald F. Wright & Kay L. Levine, *Place Matters in Prosecution Research*, 14 Ohio St. J. Crim. L. 675, 684–85 (2017) (addressing the frequent rotation of prosecutors in large offices).

300. *See* Gershowitz, *The Prosecutor Vacancy Crisis*, *supra* note 16, at 1, 13; Wright & Levine, *supra* note 299, at 688 n.46 (2017) (documenting high turnover in some offices but noting that small and mid-sized offices often have only modest turnover).

301. People v. Lamb, 72 N.Y.S.3d 799, 800 (City Ct. 2018).

302. *See id*.

303. *See id.* at 800–01.

304. *See id.* at 801.

305. *Id.*

306. *Id.*

307. *Id.*

Similarly, in *State v. Serfrere*,[308] there was a mix-up between the prosecutor who handled the case during the pre-trial stages and the trial prosecutor who later took over.[309] When the original prosecutor learned that one of the investigating officers in a drug trafficking case was under investigation for grand theft, the pre-trial prosecutor filed a *Brady* notice. But that prosecutor did not follow through and make sure the notice was placed on the docket and seemingly failed to inform the new prosecutor who took over and tried the case.[310]

In *Lamb* and *Serfrere*, the individual prosecutors did not act in bad faith. But that does not mean that the discovery problems were inevitable. If the District Attorney's Office had a better system in place for transferring cases between prosecutors and a checklist listing discovery obligations, the *Brady* problems could have been avoided.

VII. Prosecutors Fail to Disclose *Brady* Evidence Because of Intentional Misconduct by Other Members of the Prosecution Team

Prosecutors can only comply with their *Brady* obligations if the rest of the prosecution team is acting ethically. If police or crime lab technicians are engaged in intentional misconduct to hide evidence, those bad actors will not tell the prosecutor that they are up to no good. In these cases, the police will have committed intentional misconduct and the prosecutors (who were most likely not personally blameworthy) will be left holding the bag to answer for the *Brady* violation.

A. *Police Can Hide Evidence from Prosecutors*

Police sometimes hide evidence in order to help convict defendants who they believe to be guilty.[311] When police lie or hide evidence, they rarely announce it to the prosecutor handling the case.[312] After all, the police know that prosecutors would have a duty to report the evidence under the *Brady* doctrine and the ethics rules.[313] Consider two cases where police hid their misconduct from prosecutors.

308. The *Serfrere* case is discussed in more detail in the context of negligent trial preparation. *See supra* notes 161–68 and accompanying text.

309. State v. Serfrere, 267 So. 3d 407, 408 (Fla. Dist. Ct. App. 2019).

310. *See id.*

311. *See, e.g.*, Garrett, *supra* note 7, at 167–69 (citing claims from exonerated individuals that police destroyed evidence in their favor); Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 Am. Crim. L. Rev. 1, 4 (2010); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. Colo. L. Rev. 1037, 1041–42 (1996).

312. Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 Wis. L. Rev. 739, 837 (2006) ("Sometimes the police choose to hide from the prosecutor the existence of witnesses or information that is favorable to the defense.").

313. *See* Model Rules of Pro. Conduct r. 3.8(d) (Am. Bar Ass'n 2024).

Juan Carballido was the getaway driver in a gang shooting.[314] He received a lengthy 35-year sentence in large part because he knew about the presence of a gun.[315] Prosecutors established that Carballido knew about the gun through the testimony of Detective Dempsey, who testified that he gathered the information from a witness named Lucy.[316] According to Detective Dempsey, Carballido told Lucy that he and another man traveled to procure a gun. Detective Dempsey's trial testimony was an exaggeration though, and it was inconsistent with his field notes.[317]

The prosecution never turned over Detective Dempsey's field notes, but it was not from lack of effort from the prosecutor. The court explained that:

> The assistant State's Attorney recounted that, when first assigned to the case, he contacted Dempsey to ask for the notes. "Dempsey asked which notes." He told him he wanted the notes of the conversation with Lucy. Dempsey provided some notes. The notes did not contain the conversation with Lucy. He then asked Dempsey to send *all* of his notes. In the second tendering, Dempsey again sent no notes about Lucy. Before the April hearing, the State contacted Dempsey for the third time. Dempsey confirmed that these notes existed, but he represented that he already gave them to the State. The State did not have them. In June, Dempsey faxed the State 33 pages of field notes, labeled SMD1 through SMD33. . . SMD3 "purportedly details the interview with Lucy." SMD3 is the only page with Lucy's name on it.[318]

Upon reviewing Dempsey's notes, the appellate court concluded that they constituted material impeachment evidence under the *Brady* doctrine. The court explained that:

> Dempsey's field notes do *not* state that Lucy told him that defendant told her that he knew prior to the shooting that Perez had a gun. This means that, when the defense tried to impeach Dempsey on the potential weaknesses of his written report, drawn up eight days after the actual interview, Dempsey should *not* have been allowed to imply that the written report was reliable because it reiterated the information contained in the contemporaneously transcribed field notes. Dempsey was able to testify unchecked as to the reliability of his recollections.[319]

The fact that the field notes did not match his report indicated that Dempsey had exaggerated what Lucy had told him or perhaps even outright lied.[320] The prosecutor, of course, did not know about Detective

314. *See* People v. Carballido, 46 N.E.3d 309, 312 (Ill. App. Ct. 2015).
315. *Id.* at 311–12.
316. *Id.* at 319.
317. *See id.* at 326–27.
318. *Id.* at 324 (emphasis in original).
319. *Id.* at 326 (emphasis in original).
320. *See id.* (using the term "fabrication").

Dempsey's deception because—in spite of multiple requests—the police officer did not turn the notes over. The inconsistency between Detective Dempsey's notes and his report, as well as his repeated obstruction in not turning over the notes, suggests intentional police misconduct.[321]

* * *

Police have ample other opportunities to lie to prosecutors. For instance, at the early stages of an investigation, it is often the police—not the prosecutor—who interact with the crime lab to ensure that evidence is tested.[322] Before the prosecutor is involved, it is possible for police to receive favorable evidence from the crime laboratory and never provide it to the prosecutor down the road. An example of this situation happened in a recent Missouri case.

In *State v. Berger*, a gunshot death was initially ruled to be a suicide.[323] The deceased's family was unsatisfied with that conclusion, however, and encouraged Highway Patrol Investigator Daniel Nash to review the case.[324] Officer Nash obtained the bathrobe that the victim's husband was wearing on the night of her death.[325] Officer Nash personally went to the crime lab to observe DNA testing, which yielded inculpatory evidence.[326] Separately, another criminalist in the lab performed a gunshot residue test, which yielded exculpatory evidence.[327] The lab sent the exculpatory results to Officer Nash's office, but those exculpatory test results were never provided to either the prosecution or the defense.[328]

The trial court found a *Brady* violation, and the Missouri Court of Appeals agreed.[329] The prosecutors never knew about the evidence intentionally hidden by the patrol investigator.[330]

B. *Crime Lab Technicians Can Engage in Intentional and Hidden Misconduct*

Crime laboratories are part of the prosecution team for *Brady* purposes.[331] While most laboratory analysts are ethical actors, there is ample

321. While it seems clear that the *Carballido* case did not involve intentional prosecutorial misconduct, the appellate court was nevertheless critical of the prosecutor's office. The court suggested that the prosecution should have worked harder to get information from the police department, subpoenaing Detective Dempsey if necessary. *See id.* at 329. The court remarked that "[t]he State failed to ensure a 'flow of information' between investigative agencies and its office." *Id.*

322. *See* GARRETT, *supra* note 7, at 92–93.

323. *See* State *ex rel* Hawley v. Beger, 549 S.W.3d 507, 510 (Mo. Ct. App. 2018).

324. *See id.*

325. *See id.*

326. *See id.*

327. *See id.*

328. *See id.*

329. *See id.* at 510, 513.

330. *Id.* at 511–12.

331. *See, e.g.*, *In re* Brown, 952 P.2d 715 (Cal. 1998).

opportunity for them to engage in misconduct without prosecutors knowing. The most infamous example is Annie Dookhan, who worked at the Hinton State Laboratory in Massachusetts.[332] Dookhan was put on leave in early 2012 after it came to light that she had falsified reports.[333] In 2013, she pled guilty to 27 counts and was sentenced to prison.[334]

Dookhan's misconduct gave rise to *Brady* violations.[335] For example, Dewayne Hampton pled guilty to conspiring to distribute cocaine, and the main issue at his sentencing was the drug quantity.[336] Hampton's case involved multiple drug transactions, and most of the drugs were weighed at the Hinton State Laboratory where Dookhan had been a chemist.[337]

There is no evidence that Dookhan tampered with the evidence in Hampton's case.[338] But Hampton argued that Dookhan's misconduct at the lab rendered the drug computation (and thus his 10-year mandatory minimum sentence) unreliable.[339] The court agreed that Dookhan's involvement in the case constituted favorable *Brady* evidence and that it was material.[340]

Of course, the prosecutors who handled Hampton's case did not personally know of Dookhan's malfeasance. As the court explained, "There is no allegation . . . that the prosecutors knew of Dookhan's misconduct at the time Hampton plead guilty. Indeed, the first communication about the misconduct to any prosecutors took place almost a year after Hampton pled guilty."[341] The trial court nevertheless imputed knowledge to the prosecutors as required by the *Brady* doctrine. The court accordingly vacated Hampton's sentence.[342]

VIII. Proposals for Preventing Accidental *Brady* Violations

At the outset, it is worth noting again that some *Brady* violations are the result of intentional prosecutorial misconduct. I want to acknowledge that such violations exist and that the reform proposals I consider in this part would do little to prevent intentional misconduct. This Article, however, has documented numerous ways in which *Brady* violations

332. *See* United States v. Hampton, 109 F. Supp. 3d 431, 432–33 (D. Mass. 2015).
333. *See id.* at 443.
334. *See id.*; Gabrielle Bruney, *Annie Dookhan's Drug Lab Crimes Compromised More Than 20,000 Criminal Convictions*, Esquire (Apr. 1, 2020, 8:13 AM), https://www.esquire.com/entertainment/tv/a31994111/annie-dookhan-now-how-to-fix-a-drug-scandal-netflix-true-story/ [https://perma.cc/4RJN-W26C].
335. *See Hampton*, 109 F. Supp. 3d at 439–40.
336. *See id.* at 434.
337. *Id.* at 432–33.
338. *See id.* at 437.
339. *See id.* at 437–38.
340. *See id.* at 438, 440.
341. *Id.* at 438.
342. *See id.* at 440.

occur accidentally. *Brady* problems resulting from inadequate training, excessive caseloads, and unconscious bias can be prevented. In this Part, I set out proposals—some very feasible and others more challenging—that would reduce accidental *Brady* violations in the future.

A. *Personnel and Technology Proposals to Reduce Accidental* Brady *Violations*

Multiple *Brady* errors discussed in this article occurred because prosecutors were overburdened. Busy prosecutors did not have the time to carefully review their files or to communicate with police officers in order to ensure that all favorable evidence had been disclosed to the defense. To compound the problem, these junior prosecutors almost surely lacked adequate supervision from senior prosecutors who could have caught the *Brady* errors. There are steps that district attorney's offices could take, however, to deal with *Brady* violations caused by excessive caseloads and inadequate supervision.

First, elected prosecutors could charge fewer cases. With lighter caseloads, line prosecutors would have more time to focus on each of their cases. For example, with the added time, the line prosecutors could carefully compare a witness's prior statement with what they are now saying in a trial preparation session. And line prosecutors would have time to check and double-check with police that all favorable evidence has been disclosed.[343]

Second, prosecutors' offices could hire more line prosecutors so that each junior prosecutor is not drowning under excessive caseloads. There is a prosecutor vacancy crisis in the United States, in which some large district attorney's offices have 15%, 20%, 25%, or even 33% of their prosecutor positions vacant.[344] Hiring enough prosecutors to reasonably manage the existing caseloads would enable those prosecutors to better search for and disclose *Brady* evidence.

Third, district attorney's offices could hire more senior prosecutors (or pay higher salaries to retain the ones who are about to depart). Senior prosecutors are an invaluable resource in training junior attorneys on the job.[345] Senior prosecutors will be able to recognize *Brady* evidence that junior prosecutors might miss.[346] If there were more senior prosecutors offering guidance, junior prosecutors would make fewer inadvertent *Brady* violations.

343. The suggestion that prosecutors step back from charging so many cases is not just related to *Brady* violations. Scholars have argued for diminished prosecutorial power as well. *See, e.g.*, Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. Rev. 164, 211 (2022) ("[T]he only way for prosecutors to contribute to a transformed system is to cede both their influence as political elites and professional experts and their material resources.").

344. *See* Gershowitz, *supra* note 16, at 1.

345. *See id.* at 2; discussion *supra* Section II.B.2.

346. Gershowitz, *supra* note 16, at 47.

This Article has also demonstrated that *Brady* violations result from poor communication between prosecutors and police (and other law enforcement agencies). Accordingly, a fourth reform proposal would be for jurisdictions to spend the money necessary to improve information flow. Better communication software (perhaps cell phone applications specifically designed for communicating between police and prosecutors) and case management technology would make it easier for police to ensure that all evidence has been surfaced to prosecutors and disclosed to the defense.

All of these suggestions are wise, but they are politically challenging. The first proposal—reduced caseloads—is particularly challenging. Elected prosecutors usually have strong views about which cases should be charged.[347] And because they have to be re-elected, those prosecutors are also responsive to public opinion.[348] Both of these realities make it unlikely that elected prosecutors will change their charging instincts because of a hope that it will result in fewer *Brady* violations.

The remaining reform proposals—hiring more line prosecutors and senior prosecutors and adopting better communication and case-management software—also face a major obstacle: they are expensive. The one thing that police, prosecutors, and public defenders have in common is that they often suffer from a lack of resources.[349] Most counties (with the exception of the wealthiest jurisdictions) simply do not have the funds to hire large numbers of additional personnel or to spend money on the best technology.[350]

In short, decades of history tell us that we are not likely to see a drastic reduction in prosecutor caseloads, a dramatic increase in prosecutor hiring, or a massive expenditure of funds to solve communication problems. Moreover, decreasing caseloads or increasing hiring would be incomplete remedies in any event. It is important to equip prosecutors in each of their cases with the training and tools to avoid *Brady* violations. Accordingly, I move in Section VIII.B to modest and plausible solutions that will reduce accidental *Brady* violations.

347. *See id.* at 38–40.

348. *See, e.g.*, Michael J. Nelson, *Responsive Justice? Retention Elections, Prosecutors, and Public Opinion*, 2 J.L. & Cts. 117, 122–23, 140 (2014), https://doi.org/10.1086/674527.

349. *See* Gershowitz & Killinger, *supra* note 17, at 264; Cara H. Drinan, *Getting Real About Gideon: The Next Fifty Years of Enforcing the Right to Counsel*, 70 Wash. & Lee L. Rev. 1309, 1312–13 (2013).

350. *See* Gershowitz & Killinger, *supra* note 17, at 273–74 ("[M]ost large district attorneys' offices have not been in a position to hire additional prosecutors to keep pace [with skyrocketing case filings].").

B. *Training and Checklists Designed to Minimize Accidental* Brady *Violations*

To reduce accidental *Brady* violations, district attorneys' offices should increase and improve training. They should also establish detailed *Brady* checklists that can guide prosecutors in every case.

1. Improving *Brady* Training for Prosecutors

We know almost nothing about how much *Brady* training district attorneys' offices provide to their prosecutors. Prosecutors' offices are under no obligation to announce their training practices and so we are left to speculate about how many hours of training they receive, in what form, and provided by whom. And of course, with more than 2,000 prosecutors' offices across the country,[351] there are surely variations between offices. So, it is possible that some offices are providing robust training. But given that prosecutors' offices are exceedingly busy and that most CLE courses in the United States are delivered in dry lecture format,[352] the likelihood is that (1) prosecutors receive a minimal amount of *Brady* training; and (2) what they receive is minimally effective.

To provide effective *Brady* training, district attorneys' offices should embrace two key principles: (1) frequently repeating *Brady* concepts; and (2) interactive exercises about hypothetical scenarios, rather than dry lectures.

First, educators have long known that repeating information periodically is far more effective than simply providing a once-and-done annual training.[353] Memory decays over time, and people thus have difficulty remembering concepts that are only addressed infrequently.[354]

Moreover, when institutions assign annual trainings, they may (unintentionally) signal that those trainings are unimportant and that they are asking employees to simply "check the box." Put differently, when a district attorney's office tells prosecutors it is time for your annual *Brady* training, it may be signaling "this is not something we care about."

When a district attorney's office assigns more frequent trainings (even if they are shorter), it will promote better recollection and signal that it is a task the institution values. Frequent reminders about *Brady* obligations are more likely to be effective.

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351. *See* Steven W. Perry & Duren Banks, Bureau of Justice Statistics, NCJ 234211, Prosecutors in State Courts 1 (2011).

352. *See supra* notes 61–64 and accompanying text (discussing ineffectiveness of existing prosecutor training).

353. *See* Gabriel H. Teninbaum, *Spaced Repetition: A Method for Learning More Law in Less Time*, 17 J. High Tech. L. 273, 279 (2017).

354. *See id*. at 278–82 (describing the "forgetting curve").

Second, the format of the *Brady* instruction matters. Many CLEs (not to mention law school classes) are given in lecture format.[355] Worse yet, there is an unfortunate tendency among legal educators (both in law school and in continuing legal education) to center presentations around the governing legal standards.[356] A lecture on the *Brady* doctrine might therefore stress the standard for materiality—"a reasonable probability that . . . the result of the proceeding would have been different."[357]—and a recitation of recent court decisions finding withheld evidence to either be material or not.[358] When students or lawyers (or anyone else) are lectured at without other interactive teaching tools, they often tune out.[359]

Equally problematic, lectures and presentations often immediately tell the audience the answers to recent decisions.[360] Rather than having prosecutors think about and discuss the right way to proceed in a particular case, lectures often say something to the effect of: "This was the question posed, and this is what the court decided." Prosecutors thus do not have to struggle with the fact pattern and consider whether they would have reached the same conclusion as the court. Prosecutors can simply assume, "Oh, I would have done what the court said was the right answer."[361]

Thus, a district attorney's office can go to the trouble of providing *Brady* instruction without actually reaching prosecutors and creating knowledge they are likely to retain.

Instead of focusing on dry legal standards and recounting recent court decisions, *Brady* instruction should focus on common scenarios that prosecutors are likely to face in the future. Instructors should pose hypothetical scenarios and ask prosecutors to think about their own answers before revealing the correct legal answer.

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355. The advent of virtual CLEs (as opposed to gathering in person) has only made the attention issue worse.

356. *See* Romero, *supra* note 60, at 789.

357. United States v. Bagley, 473 U.S. 667, 682 (1985).

358. *See* Calvin William Sharpe, *Evidence Teaching Wisdom: A Survey*, 26 SEATTLE U. L. REV. 569, 573–74 (2003) (discussing the case method).

359. *See* Emily Nordmann, Jacqui Hutchinson & Jill R.D. MacKay, *Lecture Rapture: The Place and Case for Lectures in the New Normal*, 27 TEACHING HIGHER EDUC. 709, 710 (2022), https://doi.org/10.1080/13562517.2021.2015755. The authors explain how lectures can be very effective in certain circumstances when paired with other teaching tools. *See id.* However, the authors also note that "[i]f the purpose of a teaching session is to develop skills or engage in critical discussion, then lectures are unlikely to be the most effective method available." *Id.*; *see also id.* at 713 ("To sum up, if there is an argument to abandon poorly designed, passive lectures, then we are in full agreement.").

360. *Cf.* Teninbaum, *supra* note 353, at 283 ("[P]eople achieve recall of learned information more readily when they have tested themselves on it, as opposed to just passively observing it.").

361. This is why law professors strongly advise students not to review the answer key to a model exam before sitting down and taking the entire exam themselves. *See, e.g.*, ADAM M. GERSHOWITZ, CRIM PRO 360º: THE INVESTIGATION PROCESS 399 (2021) ("Below you will find seven essay questions . . . Do not look at the answers right after reading the questions.").

One way to do this would be for district attorneys' offices to break up *Brady* trainings into multiple bite-sized quizzes or exercises that prosecutors take periodically throughout the year. District attorneys' offices could provide a training workshop and then, days or weeks later, email out a set of hypothetical *Brady* scenarios that prosecutors have to consider. And the office could then wait a few weeks before putting those questions into an online quiz that each prosecutor has to answer. Doing this would provide reinforcement after the training session and it would provide prosecutors with a chance to think about the scenarios (perhaps even talking about the questions over lunch with fellow prosecutors) before they see the concept a third time when they are required to answer the quiz questions.

In short, effective *Brady* training should go beyond lectures and not be limited to legal standards and recent court decisions. Prosecutors should be forced to grapple with common *Brady* scenarios. And the *Brady* concepts should be repeated multiple times throughout the year—in different formats—to promote memory retention.

2. Creating *Brady* Checklists

While additional *Brady* training is important, it is not sufficient. District attorneys' offices should also implement checklists for prosecutors to use in all of their cases. Doctors, airline pilots, and other professionals who handle serious matters regularly use checklists to ensure that they have not missed something important.[362] Prosecutors can benefit from the same standardization and reminders.[363]

Over a decade ago, Professor Barry Scheck suggested that district attorneys' offices utilize *Brady* checklists.[364] His proposal has been endorsed by the American Bar Association, which in turn has been implemented by some state and local bar associations.[365] Indeed, the New York City Bar Association ("NYCBA") publicly disseminated a

362. *See* Darryl K. Brown, *Defense Counsel, Trial Judges, and Evidence Production Protocols*, 45 TEX. TECH L. REV. 133, 147 (2012).

363. *See* Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2242 (2010) ("Even in offices that have an 'open file' discovery policy, a good 'real time' checklist can significantly assist in this process by not only laying out the information that needs to be gathered, but also by providing an accurate running record of what has been done, what still needs to be done, precisely what was received by the defense, and when it was received.").

364. *See id.*

365. *See* N.Y.C. BAR, REPORT BY THE CRIMINAL COURTS COMMITTEE AND CRIMINAL JUSTICE OPERATIONS COMMITTEE RECOMMENDING THE ADOPTION OF A BRADY CHECKLIST 1–2 (2011) https://www2.nycbar.org/pdf/report/uploads/20072170-Reportrecommendingtheadoptionof Bradychecklist.pdf [https://perma.cc/S6XY-PGNJ] (excerpting the ABA proposal and noting that it had been endorsed by the New York State Bar Association).

model checklist that directed prosecutors to specific things that they should be alert for during pre-trial discovery:

1. Information that would tend to negate or reduce the defendant's guilt on any count of the accusatory instrument or reduce punishment.
2. Information about any promise, reward, or inducement regarding a prospective witness.
3. Information regarding criminal convictions or pending cases of a prospective witness and, where available, in circumstances that would not compromise ongoing investigations, information regarding criminal conduct of a prospective witness.
4. Information regarding the failure of a prospective witness to make a positive identification at an identification procedure involving the defendant or a co-defendant.
5. Any prior inconsistent oral or written statement by a prospective witness regarding the alleged criminal conduct of the defendant.
6. Whether a prosecution witness has recanted any testimony or statement and, if so, the substance of that recantation.
7. Information that would impeach a prospective witness by showing the witness's bias or prejudice against the defendant, character for lack of truthfulness, or mental or physical impairment that may affect that witness's ability to testify accurately or truthfully.[366]

The NYCBA's model checklist is an excellent start and other district attorneys' offices should follow suit by adopting their own checklists. But the NYCBA's checklist is both incomplete and too vague.

First and foremost, the NYCBA's model checklist does not clearly remind prosecutors *who* to work with to find *Brady* evidence. A key part of the *Brady* doctrine is that prosecutors must disclose favorable evidence held by the entire prosecution team. In each case, prosecutors should be reminded who is included in the prosecution team so that the prosecutors do not forget to check with all of those entities.

For instance, a checklist should tell prosecutors to contact the local police department and the crime lab to see if those entities are in possession of favorable evidence. But the checklist should go further and list agencies that are less frequently involved in criminal prosecutions and thus are easily overlooked. For example, a checklist should ask: Is this an arson case, or a prosecution involving a fire? If so, contact the fire marshal. Did any part of this case happen in an airport? If so,

366. *See id.* at 4.

contact the airport police agency to make sure it is not in possession of *Brady* evidence.

In addition to a checklist for the members of the prosecution team, there should also be a step-by-step checklist about the *Brady* evidence that can be related to witnesses. The NYCBA model checklist effectively raises topics such as prior convictions, prior inconsistent statements, payments or rewards, recanted testimony, and failed identifications.[367] District attorneys' offices could improve on this though by using language with active commands that tell prosecutors to take specific affirmative actions.[368] And the checklists should use the language that prosecutors actually use themselves. For example:

1. *Run* the witness's criminal histories;
2. *Notify* the defense of changes in a witness's story following an interview or prep session with the prosecution;
3. *Check* with police and other law enforcement agencies whether the witness has been promised any benefits by any other prosecutor in exchange for testimony;
4. *Check* whether any criminal charges have been dismissed against the witness while the defendant's case has been pending.

Additionally, the checklists should be more specific. The NYCBA proposes that prosecutors should be alert to "[i]nformation about any promise, reward, or inducement regarding a prospective witness."[369] But what does this include? A better approach would be to provide examples of payments and rewards. For example, the checklist should tell prosecutors to be alert for "money to act as an informant, 'walking-around money,' transportation costs, witness relocation, and help with housing."

For cases with eyewitness identifications, the NYCBA checklist reminds prosecutors to consider "the failure of a prospective witness to make a positive identification at an identification procedure involving the defendant."[370] Yet, this description of prosecutors' responsibility is far too general. Much more specific checklist questions would better signal to prosecutors what they are obligated to disclose. For instance, consider the more effective and detailed checklist questions Professor Cynthia Jones has proposed:

1. Any information that any witness failed to identify the defendant in any pretrial proceeding.
2. Any information that any witness identified someone other than the defendant.

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367. *See id.*

368. *See* John Clayton, *A Call to Action for Business Writing*, HARV. MGMT. COMMC'N LETTER, Oct. 2001, at 7, 7 ("Verbs push your meaning across to the reader.").

369. *See* N.Y.C. BAR, *supra* note 365, at 4.

370. *See* N.Y.C. BAR, *supra* note 365, at 4.

3. Any information that any witness expressed reluctance or doubt about an identification of the defendant (i.e., "I'm not sure, but I think that's him" or "I believe that's him, but I can't be 100% sure").
4. Any information that any witness has recanted or repudiated any identification of the defendant.
5. Any information that any pretrial identification of the defendant was not conducted pursuant to established pretrial identification procedures.
6. Any information that any person, whether or not a witness in this case, failed to identify the defendant as the perpetrator or has identified another person as the perpetrator.[371]

Another way to improve the NYCBA's proposed checklist would be to more clearly indicate that police officers are a special kind of witness and that prosecutors must take additional steps to comply with their *Brady* obligations. In addition to checking an officer's criminal history (which they would have to do for any regular witness), prosecutors should check to see if there is any known information about dishonesty or misconduct in the officer's past. This could include internal police department discipline for lying, use of racial slurs, or allegations of police brutality. Of course, checking on each officer is time consuming. So it would be preferable for district attorneys' offices to maintain *Brady* lists.[372]

Witnesses are a fertile ground for *Brady* evidence, but they are far from the only type of *Brady* evidence. Accordingly, an effective *Brady* checklist should remind prosecutors to consider tangible evidence. This includes, at a minimum, (1) forensic evidence; (2) police body camera recordings; (3) security camera footage; (4) medical records; and of course (5) physical evidence from the crime scene.

Brady checklists have the power to help prosecutors avoid many types of accidental *Brady* violations. But who will impose them? Professor Cynthia Jones has suggested that judges use pre-trial hearings to review *Brady* checklists and "query the prosecutor about specific categories of favorable information that might exist[] in the case."[373]

371. Cynthia E. Jones, *Here Comes the Judge: A Model for Judicial Oversight and Regulation of the* Brady *Disclosure Duty*, 46 HOFSTRA L. REV. 87, 116 (2017); *see also id.* at 114 (suggesting that "local law enforcement agencies seek to adopt standard operating procedures on *Brady*"); Lissa Griffin, *Pretrial Procedures for Innocent People: Reforming* Brady, 56 N.Y.L. SCH. L. REV. 969 app. at 1005 (2012) (suggesting comparable questions).

372. For a detailed analysis of the variations in how *Brady* lists are maintained, see Moran, *supra* note 160, at 696–712.

373. *See* Jones, *supra* note 371, at 120. In a different context, Professor Darryl Brown has similarly suggested that judges use mandatory protocols in guilty plea hearings to make sure that defense attorneys have adequately investigated and prepared their clients' cases. Professor Brown explains how Federal Rule of Criminal Procedure 11 and

Judicial orders mandating *Brady* checklists would surely be helpful, but history suggests they are unlikely. While it is possible that state legislatures or judicial rule-making bodies could mandate that district attorneys' offices establish *Brady* checklists, those bodies have historically been reluctant to micro-manage prosecutors.[374] And, to date, few judges appear to have taken active control of the discovery process and ordered *Brady* checklists along the lines of what Professors Jones proposes.[375]

Just because legislatures and judges will not intervene does not mean checklists are a lost cause, however. Many district attorneys' offices—particularly progressive prosecutors—are keen on preventing *Brady* violations. And district attorneys' offices have operating procedures and policies that are not judicially or legislatively mandated. Proactive district attorneys' offices could thus decide on their own to utilize *Brady* checklists.[376] For example, the Manhattan District Attorney's Office reportedly uses such checklists.[377]

Finally, the virtue of *Brady* checklists is that they can be used by police departments as well as prosecutors.[378] Police officers need not wait for requests from prosecutors to transmit *Brady* evidence to the district attorney's office. The checklist will provide straightforward guidance telling police that evidence needs to be disclosed. More active police engagement thus creates two bites at the apple: police can take initiative to provide *Brady* information, in addition to prosecutors specifically asking for such evidence. Relatedly, the checklist can help to teach police officers about the discovery obligations the *Brady* doctrine imposes on the prosecution team. Most importantly, best practices experts on *Brady* have explained that police are not likely to resist checklists: "The use of a formal checklist can be something that police

state and local rule equivalents could be used to institutionalize such a practice. *See* Brown, *supra* note 362, at 147–48.

374. *See* Moran, *supra* note 160, at 659–60 (noting that *Brady* lists are unregulated).

375. *See* Adam Gershowitz, *The Race to the Top to Reduce Prosecutorial Misconduct*, 89 FORDHAM L. REV. 1179, 1179–80 (2021) (noting that there is still "a greater role for courts to play in regulating lawyers").

376. District attorneys' offices should see little downside to creating checklists that help their prosecutors comply with the *Brady* doctrine. Indeed, the checklists for individual cases should not even be discoverable because they would amount to attorney work product.

377. *See* Dana Carver Boehm, *The New Prosecutor's Dilemma: Prosecutorial Ethics and the Evaluation of Actual Innocence*, 2014 UTAH L. REV. 613, 635 (2014) (noting that the Manhattan District Attorney's Office Conviction Integrity Committee had "updated the office's checklists for *Brady*-disclosure obligations, reminding prosecutors of what types of material they should be looking for and specific places where they should be looking").

378. *See* Jones, *supra* note 371, at 114 (suggesting that "local law enforcement agencies seek to adopt standard operating procedures on *Brady*").

can accept if they are trained to understand that completing the checklist will help them do their job more professionally and completely."[379]

IX. Conclusion

Not all *Brady* violations are created equal. When prosecutors intentionally hide evidence from defendants, they should be publicly castigated and fired. But prosecutors commit many *Brady* violations accidentally. Excessive caseloads, inadequate training, and poor communication with police and the other members of the prosecution team can lead to inadvertent *Brady* violations.

This Article has documented nearly two dozen recent cases in which prosecutors accidentally failed to disclose favorable evidence. In some of these cases, the *Brady* errors clearly resulted from the prosecutors' own negligence.[380] Prosecutors failed to recognize impeachment evidence; they did not double-check witness statements for inconsistencies; they failed to locate allegations of police misconduct; and they neglected to run witnesses' criminal histories.

In many other cases, the accidental *Brady* errors happened because prosecutors did not communicate effectively with other members of the prosecution team.[381] Prosecutors failed to acquire and disclose witness statements, police reports, 911 calls, and video footage held by police. Prosecutors also did not recognize that police had provided benefits to witnesses. And prosecutors failed to acquire relevant evidence from less obvious members of the prosecution team, such as national security agencies and fire marshals. Finally, in a few cases, prosecutors were unable to meet their *Brady* obligations because police and crime lab technicians lied to them and hid evidence. In all of these scenarios the prosecutors erred, but their errors were unintentional.

All too often, scholars and reformers have proceeded as if *Brady* violations are always the result of intentional misconduct. In order to reduce *Brady* violations, we must recognize that many *Brady* errors are accidental, and we should tailor reform proposals with accidental violations in mind.

There are bold steps we could take to reduce accidental *Brady* violations. Dramatically reducing caseloads could give prosecutors the time to carefully review their files and double-check evidence disclosures with the police. In the alternative, legislatures could ensure manageable prosecutor caseloads (and thus time to handle *Brady* disclosures) by appropriating the necessary money to fund more prosecutors.

379. Jennifer Blasser et al., *New Perspectives on* Brady *and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 Cardozo L. Rev. 1961, 1975 (2010).

380. *See supra* Parts IV–V.

381. *See supra* Parts VI–VII.

Reducing caseloads and appropriating funds for more prosecutors would be a positive step forward, but they cannot be the only solutions. District attorneys' offices should also provide more training on the *Brady* doctrine. Offices should break the training into smaller pieces so that it can reasonably be spread out throughout the year. And the experts who provide the training should avoid stale lectures that regurgitate court decisions and instead provide interactive scenarios that require prosecutors to critically think about how they would handle the discovery challenges in their own courtrooms.

In addition to better structured *Brady* training, district attorneys' offices should implement *Brady* checklists. These checklists should list all members of the prosecution team in a particular jurisdiction so that prosecutors will not inadvertently overlook an agency that might be in possession of favorable evidence. The checklists should provide step-by-step instructions for considering the *Brady* evidence that relates to witnesses—including prior convictions, recanted testimony, payments or rewards, and failed identifications. Checklists should also remind prosecutors that police officers are a special breed of witness and that prosecutors should be alert for disciplinary actions, past lying of any type, past use of racial slurs, and allegations of police brutality. And checklists should go beyond police and other witnesses to alert prosecutors to other types of favorable evidence such as body camera recordings, security footage, forensic evidence, medical records, and crime scene evidence.

If the legal profession begins to acknowledge that a substantial portion of *Brady* violations are accidental, we can take the necessary steps to prevent many *Brady* violations in the future.