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THE BRADY DATABASE

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The Supreme Court's landmark ruling in Brady v. Maryland *turns sixty this year. The Brady doctrine, which requires the government to disclose favorable and material evidence to the defendant, is one of the most frequently litigated criminal procedure issues. Yet, despite decades of Brady cases in federal and state courts, we still know relatively little about how Brady claims are litigated, adjudicated, and what such claims can tell us about the criminal justice system writ large. Scholars are in the dark about how often Brady violations occur, whether it is primarily the fault of prosecutors or the police, whether violations are intentional or accidental, and a host of related questions.*

This Article fills a gap in the data and literature by analyzing five years of Brady claims—over 800 cases—raised in state and federal courts. We coded each case for more than forty variables to answer big-picture questions like how often Brady claims are successful and which courts are most likely to grant relief. We also studied more intricate questions such as

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the types of crimes and evidence at issue, whether judges deemed violations intentional or accidental, and whether judges chastised or disciplined prosecutors for failing to disclose evidence.

Our study revealed some important and surprising findings. Despite suggestions in some quarters that prosecutorial misconduct is not a major problem, courts found Brady violations in 10% of the cases in our study. Prosecutors, not police, were responsible for most violations and they were almost never referred to the Bar for discipline. While federal prosecutors are supposed to be elite highly trained lawyers, they were responsible for a disproportionate share of Brady violations. And while the federal courts are lauded as the protector of civil liberties, it was state courts that granted relief more frequently, often on direct review rather than in habeas corpus proceedings as scholars would have expected.

These findings and many others—such as petitioners having to wait on average ten years for relief for Brady violations—demonstrate that we continue to have egregious prosecutorial misconduct problems in the United States and that further study is needed. To that end, this project not only reports significant data, but also is the first step in the creation of a searchable database that we are creating to empower other researchers to further analyze how Brady claims are being litigated and adjudicated.

INTRODUCTION

Prosecutors commit a violation of the rule set out in the U.S. Supreme Court's 1963 ruling in *Brady v. Maryland* when they fail to disclose favorable and material evidence to a criminal defendant.[1] Although defendants sometimes raise *Brady* claims during trial or even before trial, the typical claim is brought post-trial, on direct review or during the habeas process, regarding evidence that only came to light after a conviction. The claims involve not just prosecutorial misconduct, but also implicate policing, as police have an obligation to convey favorable evidence to prosecutors.[2] *Brady* violations are one of the most common and most serious types of prosecutorial misconduct,[3] and frequently contribute to wrongful convictions that come to light.[4]

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[1] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[2] *See* Kyles v. Whitley, 514 U.S. 419, 438 (1995) (holding that a 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.").

[3] ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 131 (2007) ("*Brady* violations are among the most common forms of prosecutorial misconduct."); 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, 323 (2018) ("*Brady* violations are the most common form of prosecutorial misconduct cited by courts when overturning convictions.").

[4] *See* Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 54 (noting that *Brady* claims involving exculpatory evidence are

Yet, although the *Brady* doctrine has existed for sixty years, we still know relatively little about how *Brady* claims are litigated, adjudicated, and what such claims can tell us about the criminal justice system writ large.[5] Consider these basic questions:

- How many people raise *Brady* claims?[6]
- How often are *Brady* allegations successful?[7]
- When petitioners receive relief on their *Brady* claim is it typically in state or federal court?
- Do courts usually act on direct appeal or in post-conviction proceedings?[8]

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the most common fair trial claim brought in civil wrongful conviction cases); *see also* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 201–03 (2011) (documenting post-conviction litigation by first 250 DNA exonerees in the United States and describing how 29 of 165 exonerees with written rulings had brought *Brady* claims).

[5] *See* Ellen Yaroshefsky, *Foreword: New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943, 1945 (2010) ("*Brady* is a hidden problem for which it is impossible to gather accurate data."); GARRETT, CONVICTING THE INNOCENT, *supra* note 4, at 202–03 (noting many *Brady* violations surfaced only after an exoneration and were not asserted during post-conviction litigation).

[6] *Compare* United States v. Olsen, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting) ("There is an epidemic of *Brady* violations abroad in the land.") *with* Timothy C. Harker, *Faithful Execution: The Persistent Myth of Widespread Prosecutorial Misconduct*, 85 TENN. L. REV. 847, 850 (2018) ("[P]rosecutorial misconduct occurs with admirable infrequency"). Newspapers and non-profits have periodically attempted to identify *Brady* violations. *See, e.g.*, Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., (Jan. 10, 1999) (reviewing 11,000 homicide cases from 1963 to 1999 and finding 381 *Brady* violations); Steve Weinburg, *Breaking The Rules: Who Suffers When a Prosecutor is Cited for Misconduct*, THE CTR. FOR PUB. INTEGRITY (June 26, 2003) (studying 11,000 appellate decisions and finding 2,000 cases of reversible error, the majority of which were *Brady* violations); Bill Moushey, *Win at All Costs: Hiding the Facts*, PITTSBURGH POST-GAZETTE, (Nov. 24, 1998) (studying 1,500 cases and finding many *Brady* violations); KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997-2009, N. CAL. INNOCENCE PROJECT 37 (2010) (identifying dozens of *Brady* violations in California courts). These meaningful efforts are outdated, incomplete, and unlikely to be supplemented. The decline of newspaper journalism makes it unlikely future comprehensive efforts will be forthcoming.

[7] We know that a majority of *Brady* claims fail, but beyond that general statement we have little additional information. *See* Janet Moore, *Democracy and Criminal Discovery Reform after Connick and Garcetti*, 77 BROOKLYN L. REV. 1329, 1345 (2012) ("The majority of postconviction *Brady* claims do not succeed, often because courts hold that undisclosed information was either immaterial or available to the defense through a reasonable investigation.").

[8] The conventional wisdom has long been that the federal courts are the key backstop protecting criminal defendants' constitutional rights and remedying wrongful convictions. *See*

- Do most successful *Brady* claims involve exculpatory evidence or impeachment material?
- What kinds of evidence—for instance, forensic or eyewitness identifications—are most common in successful *Brady* claims?[9]
- Who is at fault more often for failing to disclose *Brady* material —the prosecutors or the police?[10]
- Do *Brady* violations usually result from intentional prosecutorial misconduct or negligence?[11]
- Do judges refer prosecutors to the Bar for potential disciplinary action arising out of *Brady* violations?[12]

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generally Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105 (1977). But scholars are increasingly skeptical that the federal courts serve that purpose. *See, e.g.*, Rachel E. Barkow, *Criminal Justice Reform and the Courts*, U. CHI. L. REV. ONLINE 1, 1 (Oct. 15, 2019) (noting, primarily in the punishment context, that the "federal courts have largely failed to protect constitutional guarantees for criminal defendants across a range of doctrinal areas, thus allowing the government to run amok in criminal cases without check.").

[9] We know both types of evidence factor heavily in wrongful convictions. *See generally* BRANDON L. GARRETT, AUTOPSY OF A CRIME LAB: EXPOSING THE FLAWS IN FORENSICS (2021); GARRETT, CONVICTING THE INNOCENT, *supra* note 4.

[10] As noted, prosecutors are obligated to turn over favorable and material evidence in the possession of the prosecution team, which includes the police. *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("[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."). In some states however, prosecutors cannot access information in a police officer's personnel file, thus creating difficulty in turning over all possible *Brady* material. *See* Jonathan Abel, *Brady's Blindspot, Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 745–46 (2015).

[11] A *Brady* violation occurs even if the prosecutor's failure to disclose is accidental. Strickler v. Greene, 527 U.S. 263, 288 (1999) ("[U]nder *Brady* an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment."); *see also* United States v. Agurs, 427 U.S. 97, 110 (1976) ("If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."). Although most news coverage involves flagrant violations, accidental *Brady* violations occur regularly. *See* Adam M. Gershowitz, *The Challenge of Convincing Ethical Prosecutors That Their Profession Has a Brady Problem*, 16 OHIO STATE J. CRIM. L. 307, 312 (2019) [hereinafter Gershowitz, *Convincing Ethical Prosecutors*] (arguing many *Brady* violations are "accidental violations by well-meaning prosecutors who are inadequately trained and overburdened"). Scholars have also recognized that prosecutors, who believe defendants to be guilty, face psychological challenges in recognizing exculpatory evidence. *See, e.g.*, Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2132 (2010).

[12] Scholars have observed defense attorneys and judges rarely report prosecutors to the bar for *Brady* violations and other misconduct. *See* Johnson, *supra* note 3, at 363; Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L.

Sixty years after the Supreme Court's decision in *Brady v. Maryland*, we still lack clear answers to these critical questions and many others.

Perhaps more importantly, there is no centralized database for criminal defense attorneys and scholars to access when litigating and studying *Brady* violations.[13] The Court's *Brady* decision is one of the most cited Supreme Court cases in history—with nearly five times as many citations as *Brown v. Board of Education*.[14] Defense attorneys are therefore forced to sift through thousands of court decisions from state and federal courts in an effort to find analogous precedent. Worse yet, because many cases arise in the habeas corpus context, the judicial decisions are often long, complicated, and difficult to use as points of comparison.[15] Scholars face a similar morass when trying to study prosecutorial misconduct and make reform proposals.

This Article fills a gap in the data and literature and is designed to assist both scholars and practitioners. We have attempted to locate and catalog every *Brady* claim raised by petitioners from 2015 through 2019, in order to assemble a large body of cases, and to focus on more timely recent rulings. In total, we analyzed more than 1,300 cases where petitioners raised the

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REV. 275, 292 (2007). Indeed, as one of us has documented, appellate judges sometimes go to great lengths to redact and hide the names of prosecutors who committed *Brady* violations. *See* Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1075–76 (2009) [hereinafter, Gershowitz, *Prosecutorial Shaming*].

[13] Scholars have advocated for greater disclosure and aggregation of *Brady* violations. *See, e.g.*, Jason Kreag, *Disclosing Prosecutorial Misconduct*, 72 VAND. L. REV. 297, 299 (2019) (suggesting a *Brady* violation disclosure letter "memorializing the prosecutorial misconduct and its effect on the case" and that it be sent to participants in the adjudicatory process—the jurors, witnesses, judge, prosecutor, and defense attorney from the original trial; the victim of the underlying crime; and relevant criminal justice organizations, including victims' rights organizations, the public defender's office, the local prosecutor's office, and the law enforcement agency that investigated the case.).

[14] Westlaw lists over 132,000 citing references to *Brady v. Maryland* as of the date of this article. *Citing References - Brady v. Maryland*, WESTLAW, https://1.next.westlaw.com/RelatedInformation/I236bf5969c1e11d9bdd1cfdd544ca3a4/kcCitingReferences.html?originationContext=documentTab&transitionType=CitingReferences&contextData=(sc.Default)&docSource=faf42a5e40d14824a53d82ccc69d472c&rulebookMode=false&ppcid=e86e88e4e3244410bd113ccc12693349. That is nearly three times as many as *Batson v. Kentucky*, 476 U.S. 79 (1986), three times as many as *Katz v. United States*, 389 U.S. 347 (1967), and nearly five times as many as *Brown v. Board of Education*, 347 U.S. 483 (1954). Indeed, the number of citations even rivals *Miranda v. Arizona*, 384 U.S. 436 (1966), which has about 146,000 citing references.

[15] *See* Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting) (describing habeas jurisprudence as "a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights").

Brady doctrine.[16] Among those cases, we focused our analysis on 808 cases in which a judge was ruling on the merits of a *Brady* claim, raised after conviction (we separately consider "non-paradigmatic" cases in which *Brady* is discussed in some other context, like a collateral disciplinary hearing). We then coded each case for more than forty variables that shed light on the kinds of cases in which *Brady* violations occur, when in the process courts find *Brady* violations, and the percentage of cases in which *Brady* claims are successful.

We detail our findings in Part II, below. To provide an overview, our main findings include that courts found *Brady* violations in about ten percent of cases in which a judge ruled on the merits of a *Brady* claim raised after a conviction (81 of 808 cases). *Brady* violations were not found in 88% of these cases (712 of 808 cases) and no ruling took place in about two percent of cases (14 of 808). Of 81 cases in which judges found violations, 9 (or about 11%) involved death sentences. In 114 additional cases, courts found prosecutors suppressed evidence, but refused to find a *Brady* violation, often because the evidence was not deemed sufficiently material.

Judges found that prosecutors, rather than police, were most often responsible for failing to disclose evidence. And in many cases courts found the misconduct to be intentional, not accidental. Yet, in only *one* of the 808 cases did a court refer the prosecutors to the Bar for possible disciplinary action. Courts also rarely identified the misbehaving prosecutors by name. Surprisingly, federal prosecutors accounted for a disproportionate share of *Brady* violations. And even though *Brady* is often thought of as a quintessential federal habeas claim, we found that state courts wrote most judicial opinions, and often on direct review rather than in post-conviction litigation.

In the pages that follow, we explain these findings as well as others such as the types of crimes where *Brady* claims arose and the types of evidence in those cases. Additionally, we have created a searchable database that includes all of the cases we analyzed, which we will make available online so that scholars and defense attorneys can utilize our data and develop further insights.[17] We plan to update the database over time.

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[16] We used a keycite search on Westlaw, for cases between 2015 and 2019, and identified 1,340 cases. One case was deemed duplicative, another case was coded twice because it involved two co-defendants with different claims, and 250 cases were deemed irrelevant for various reasons (*e.g.,* no mention of *Brady,* or no discussion of a *Brady* claim). For a discussion of our methods, see *infra* Part II.A.

[17] We expect the public-facing database will be completed by Fall 2024. It will be available at a resource website built and hosted by the Duke Law Library, at https://bradydatabase.law.duke.edu.

We nevertheless emphasize that there are important questions that this *Brady* database cannot answer. We can only describe *Brady* claims that were litigated and that resulted in reported judicial decisions. Our work cannot answer the largely unknowable question of how often prosecutors conceal exculpatory evidence from the defense in criminal cases.[18] Thus, scholars and policymakers have wondered whether there are repeat offender prosecutors and police departments who are responsible for a disproportionate number of *Brady* violations.[19] What we can explore is how judicial opinions discuss and resolve *Brady* claims, what types of facts and claims correspond with successful versus unsuccessful *Brady* litigation, and how judges respond to *Brady* violations when identified. We hope that as a result, this Article and our database will provide a powerful resource for not only scholars seeking to better understand constitutional discovery violations in criminal cases, but also litigators and policymakers seeking to address individual claims and underlying causes.

Part I of this article reviews the *Brady* doctrine and how the law applies to both prosecutors and police. Part II describes our methodology for identifying and cataloging more than 1,300 *Brady* decisions from across the country and our findings. Part II then discusses our findings, including the percentage and types of successful and unsuccessful claims, the types of courts involved, the types of evidence alleged to have been suppressed, and whether judges discussed the respective roles of police and prosecutors in *Brady* violations. Part III then considers the implications of our data for understanding *Brady* litigation, the problem of post-conviction remedies and prosecutorial misconduct more generally, and finally, what upstream and institutional reforms may be needed to systematically address failures of

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[18] Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L. J. 481, 499 (2009) ("Because of cognitive biases, prosecutors will overestimate the strength of their case in the absence of the evidence at issue, underestimate the potentially exculpatory value of the evidence, and therefore fail to recognize materiality even when it exists.").

[19] As a result of discovery obtained in civil rights lawsuits, we sometimes learn that certain prosecutors' offices have a history of *Brady* violations. For instance, John Thompson's conviction for attempted robbery was reversed because the Orleans Parish District Attorney's Office failed to turn over evidence in violation of *Brady*. Connick v. Thompson, 563 U.S. 51, 54 (2011). Thompson subsequently filed a section 1983 suit and documented four additional convictions from New Orleans that had been overturned for *Brady* violations during a ten-year period. *Id.* at 54, 62. Thompson's claim that the District Attorney failed to train prosecutors to disclose *Brady* material failed because the four prior *Brady* violations did not involve the same type of evidence as was at issue in his criminal case and thus failed to put the District Attorney on notice that specific training was necessary. *See id*. at 63–64. If more information were publicly available about *Brady* violations in particular counties, plaintiffs might be more likely to succeed in their civil rights lawsuits (and offices might better train prosecutors to avoid *Brady* violations).

criminal discovery. While we do not know how often such prosecutorial misconduct occurs, we can reform the system based on a better picture of the portion of the iceberg that surfaces in our courts.

I. UNDERSTANDING *BRADY* LITIGATION

A. THE *BRADY* DOCTRINE AND ITS FLAWS

In *Brady v. Maryland*, the U.S. Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[20] The Court explained that the goal was not to punish society for the misdeeds of the government, but instead to avoid an unfair trial for the defendant.[21] The Court further noted that the government 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.'"[22]

The Supreme Court's brief opinion in *Brady* made clear that the good faith of the prosecutor was irrelevant. But it left other questions —such as what amounts to favorable and material evidence— unresolved. In the years since *Brady*, the Court has not only defined these terms but also expanded the scope of the *Brady* doctrine in some ways, while constricting its utility in other ways. The Court has interpreted "favorable" evidence to include not just exculpatory evidence tending to show a defendant is innocent, but also to impeachment evidence that calls into question the veracity of a witness.[23] For instance, if a prosecutor or police officer promised a government witness that she would not be charged or that she would receive a sentencing reduction, that would be favorable information.[24] But favorable evidence also includes more than deals with prosecutors and the police. If a government witness failed to identify the defendant in a pre-trial lineup that would also be favorable impeachment evidence.[25] And, a witness's prior criminal

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[20] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[21] *Id*.

[22] *Id*. at 88.

[23] *See* Giglio v. United States, 405 U.S. 150, 150–51, 154–55 (1972) (reversing a conviction for failure to disclose to the defense that a witness was offered immunity from prosecution in exchange for testifying).

[24] *Id.*

[25] R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1483 (2011); 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.").

conviction that called his truthfulness into question would also be favorable evidence for *Brady* purposes.[26]

Further, the Court ruled over three decades later, in its 1995 ruling in *Kyles v. Whitley* that if police withhold evidence from prosecutors, the *Brady* rule still applies, as 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."[27] Where multiple pieces of evidence are considered, they should be "considered collectively, not item by item," when addressing the next question, that of materiality.[28]

While the Court adopted a broad view of what constitutes favorable evidence, it eventually gravitated toward a fairly narrow definition of materiality.[29] The Court could have used one of the more inclusive standards in its procedural repertoire, such as requiring the prosecution to turn over any evidence that "might affect the jury's verdict"[30] or even any evidence that is "relevant."[31] But the Court feared that such a broad standard would force prosecutors to open their entire files to the defense.[32] Instead, in its 1985 ruling in *United States v. Bagley*, the Court adopted a tougher standard for defendants to meet. For evidence to be material, it must create a reasonable probability that the outcome would have been different but for the prosecution's error.[33]

But what constitutes such a reasonable probability? A reasonable probability is "a probability sufficient to undermine confidence in the

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[26] *See, e.g.*, Crivens v. Roth, 172 F.3d 991, 998–99 (7th Cir. 1999); United States v. Perdomo, 929 F.2d 967, 967 (3d Cir. 1991); *see also* Cassidy, *supra* note 25, at 1431. ("[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.").

[27] Kyles v. Whitley, 514 U.S. 419, 437 (1995).

[28] *Id.* at 436.

[29] *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.").

[30] United States v. Agurs, 427 U.S. 97, 108 (1976) (discussing the test used by the lower court).

[31] Sundby, *supra* note 29, at 646 ("Indeed, one perfectly plausible reading of 'material' within the context of the opinion is that it means 'relevant,' such that the prosecution would be obligated to turn over all *relevant* favorable evidence.").

[32] *See Agurs*, 427 U.S. at 109.

[33] United States v. Bagley, 473 U.S. 667, 682 (1985).

outcome."[34] Thus, looking at the entire record in the case, the reviewing court must grant *Brady* relief only when the outcome would have been different.[35] In other words, a convicted defendant must be able to demonstrate that had the favorable evidence been disclosed, he would have been found not guilty. That prejudice standard applies regardless of whether the defense requested the *Brady* material.[36] The prejudice standard had become an increasingly familiar one by the mid-1980s, and it tracked the standards that the Court adopted for ineffective assistance of counsel claims in *Strickland v. Washington*, and in other post-conviction contexts, where beginning in the 1970s, the Supreme Court sought to narrow the remedies for asserted constitutional violations.[37]

Quite significantly, the Court also adopted a narrow approach to disclosure with respect to plea bargaining. The vast majority of criminal convictions result from guilty pleas.[38] Yet, in 2002 the Court held that prosecutors are not required to disclose *impeachment* evidence—even if it would be favorable and material—before a defendant pleads guilty.[39] And while the Court has never addressed whether prosecutors are required to disclose *exculpatory* evidence before a defendant pleads guilty,[40] the reason is not because almost all lower courts require such disclosure. To the contrary, numerous lower courts—including at least four of the federal circuits—have indicated that prosecutors need not disclose exculpatory evidence before a defendant pleads guilty.[41] Given that the vast majority of criminal convictions result from guilty pleas, and the lack of robust discovery

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[34] *Id.*

[35] *See Agurs*, 427 U.S. at 112–13.

[36] *See Bagley*, 473 U.S. at 667. While the test 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.

[37] Strickland v. Washington, 466 U.S. 668, 694 (1984); *see also* Brandon L. Garrett, *Validating the Right to Counsel*, 70 WASH. & LEE L. REV. 927, 937 (2013) ("This was part of a general approach in which the Court, by the late 1970s, increasingly focused on limiting reversals based on whether error sufficiently affected the outcome.").

[38] *See* Missouri v. Frye, 566 U.S. 134, 143 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.").

[39] United States v. Ruiz, 536 U.S. 622, 629 (2002).

[40] *See* Cameron Casey, Comment, *Lost Opportunity: Supreme Court Declines to Resolve Circuit Split on Brady Obligations During Plea Bargaining*, 61 B.C. L. REV. E. SUPP. 73, 73 (2020).

[41] *Id*. at 86–88; *see also* Michael Nasser Petegorsky, Note, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3614–31 (2013) (examining the split between circuits regarding allowing *Brady* challenges to guilty pleas).

rules in most jurisdictions, scholars have been quite critical of the lack of constitutionally-required *Brady* disclosure during the plea negotiation process.[42]

While the Court has adopted a narrow view of the *Brady* doctrine regarding the materiality prong and with respect to plea bargaining, it has proven to be more generous in other areas. Even as the Supreme Court began to scale back criminal procedure protections from the Warren Court era and impose procedural default rules,[43] the Court made it easier for defendants to raise *Brady* claims when their trial lawyer had failed to push for discovery. In 1976, the Court held that the prosecution was obligated to turn over *Brady* material even if the defense had never requested it.[44] The Court explained that there was no practical difference between a defense attorney vaguely asking for "all *Brady* material" and making no request whatsoever.[45]

Just as important, the Supreme Court has stated that prosecutors have "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[46] This includes not just any prosecutor in the District Attorney's Office, or any police officer who gathered evidence, but other state agencies that were involved with the case.[47] Lower courts have included crime laboratories as part of the prosecution team, although the Supreme Court has never explicitly held as such.[48] However, this obligation to disclose favorable evidence ceases once

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[42] *See, e.g.*, Kevin C. McMunigal, *Guilty Pleas, Brady Disclosure, and Wrongful Convictions*, 57 CASE W. RES. L. REV. 651, 652 (2007); *see also* John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437, 441 n.17 (2001) (citing sources). *But see id.* at 441–45 (expressing skepticism that allowing *Brady* challenges to plea bargains would promote the goals of the idea's proponents).

[43] *See generally* Carol S. Steiker, *Counter-Revolution in Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2531–32 (1996) (surveying the Burger and Rehnquist Courts' restrictions on the availability of federal habeas review and their adoption of "inclusionary" rules that excuse constitutional violations).

[44] United States v. Agurs, 427 U.S. 97, 97 (1976).

[45] *Id*. at 106–07.

[46] Kyles v. Whitley, 514 U.S. 419, 437 (1995); *see also* Strickler v. Greene, 527 U.S. 263, 281–82 (1999) (same).

[47] 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(A); *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.").

[48] *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*.").

a defendant is convicted.[49] In the next Section, we turn to the procedural contexts in which *Brady* claims are litigated after a conviction.

B. *BRADY* AND PROCEDURE

Brady claims are often brought after an appeal and during state post-conviction proceedings.[50] In order to assert such a claim in federal court, the claim must have been properly exhausted in state court.[51] Further, the factual record must typically be fully developed in state court.[52] Yet, state post-conviction proceedings do not typically involve robust discovery.[53] And outside capital cases, there is typically no right or availability of counsel for indigent persons during state post-conviction proceedings.[54] It is therefore not easy for a person to develop potentially concealed evidence.[55] So, when *Brady* material comes to light, it may be entirely fortuitous.[56] And, if it takes time for that evidence to come to light, the litigant may run into strict timing rules that bar late-filed claims regarding newly discovered evidence.[57] Further, federal habeas corpus rules have been dramatically tightened by

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[49] Dist. Att'y's Off. for Third Jud. Dist. v. Osborne, 557 U.S. 52, 68–69 (2009).

[50] *See generally* BRANDON L. GARRETT & LEE KOVARSKY, FEDERAL HABEAS CORPUS: EXECUTIVE DETENTION AND POST-CONVICTION LITIGATION 170–73 (Foundation Press, 1st ed., 2013) (providing an overview of the stages of post-conviction review and of post-conviction development of *Brady* claims).

[51] 28 U.S.C. § 2254(b) (setting out exhaustion requirement for federal habeas corpus petitions); *see also* Rose v. Lundy, 455 U.S. 509, 518–19 (1982) (developing the "total exhaustion rule[,]" requiring that mixed federal habeas petitions be dismissed, unless unexhausted claims are themselves dismissed); Rhines v. Weber, 544 U.S. 269, 275 (2005) (describing the *Lundy* exhaustion rule).

[52] Cullen v. Pinholster, 563 U.S. 170, 186 (2011).

[53] Tiffany R. Murphy, *Futility of Exhaustion: Why Brady Claims Should Trump Federal Exhaustion Requirements*, 47 U. MICH. J. L. REFORM 697, 718 (2014) (describing state post-conviction discovery rules and noting that "twenty-four states lack any state or court rule whatsoever that would allow defendants to pursue discovery during their state collateral proceeding.").

[54] *See, e.g.,* Murray v. Giarratano, 492 U.S. 1, 7 (1989) ("[We have] ruled that neither the Due Process Clause of the Fourteenth Amendment nor the equal protection guarantee of 'meaningful access' required the State to appoint counsel for indigent prisoners seeking state postconviction relief.").

[55] Regarding the inadequacy of state procedures to discover, post-conviction, concealed evidence, see Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 685–86 (2005).

[56] *See*, *e.g*., United States v. Bagley, 473 U.S. 667, 671–72 (1985) (describing how Freedom of Information Act and Privacy Act requests resulted in uncovering *Brady* material that had not been provided in response to discovery motions at trial).

[57] There are exceptions in federal habeas rules regarding such evidence which raise complex litigation issues on their own. *See*, *e.g.*, Strickler v. Greene, 527 U.S. 263, 283 (1999) (finding state suppression of documents constituted cause for default of *Brady* claim).

statute and U.S. Supreme Court interpretations, as we will discuss further, making federal litigation of *Brady* claims challenging.[58]

In addition to post-conviction review, people may litigate *Brady* claims in civil rights lawsuits, in order to seek civil compensation for a constitutional violation.[59] In order to allege a *Brady* violation in a § 1983 lawsuit brought in federal court,[60] however, a plaintiff must show that their criminal litigation was favorably terminated, such as through a vacated conviction or clemency.[61] That may in practice require not only a vacated conviction, but an exoneration, since the plaintiff may need to show actual innocence in order to show that a *Brady* violation both caused their conviction and resulted in wrongful-conviction-related damages.[62]

C. *BRADY'S* AMBIGUITIES AND INCENTIVES

Scholars have been critical of *Brady* on doctrinal grounds. As noted above, the Court has failed to adopt a clear list of what types of impeachment evidence qualify as favorable, and it has adopted a cramped view of materiality.[63] Moreover, even though the vast majority of criminal cases are resolved by plea bargaining, the Court has not required prosecutors to disclose impeachment evidence prior to entering guilty pleas, and it has never decided whether exculpatory evidence must be disclosed prior to a guilty plea.[64]

There are also practical problems with the *Brady* doctrine for ethical prosecutors trying to properly do their jobs. Under the Model Rules of Professional Conduct, prosecutors are obligated to disclose all evidence that might be held by police officers and other members of the law enforcement team, even if the prosecutor handling the case has never seen nor heard about it.[65] Additionally, prosecutors must be able to predict—before seeing the defense's case—which evidence qualifies as material such that it carries a reasonable probability of changing the outcome.[66] These challenges explain

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[58] *See, e.g.*, GARRETT & KOVARSKY, *supra* note 50, at 449–450.

[59] GARRETT, CONVICTING THE INNOCENT, *supra* note 4, at 54.

[60] 42 U.S.C. § 1983.

[61] Heck v. Humphrey, 512 U.S. 477, 477 (1994).

[62] GARRETT, CONVICTING THE INNOCENT, *supra* note 4, at 60 (discussing the difficulty in obtaining civil compensation for a *Brady* violation).

[63] *See supra* Part I.A.

[64] *Id.*

[65] *See* MODEL RULES OF PRO. CONDUCT r. 3.8(d) (AM. BAR. ASS'N 2015).

[66] Daniel S. Medwed, *Brady*'s *Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1542 (2010) ("Specifically, how is a prosecutor supposed to apply the *Brady* materiality standard

why *Brady* violations include not just flagrant cases of intentional misconduct, but also accidental violations in which prosecutors inadvertently failed to comply with their obligations.[67]

The accidental misconduct cases demonstrate the need for district attorneys' offices to provide their prosecutors with specific training on avoiding and learning from *Brady* violations, as well as to develop checklists and improve internal culture surrounding disclosure.[68] And the intentional misconduct cases demonstrate the importance of clearly disciplining prosecutors and law enforcement officers who have acted unethically. Yet, scholars have long postulated that existing training and disciplinary actions are insufficient. In particular, the conventional wisdom is that prosecutors who commit *Brady* violations are rarely disciplined by the Bar;[69] that judges rarely name and shame prosecutors who engaged in intentional misconduct;[70] and that judges rarely call for enhanced training to avoid future misconduct.[71] These theories arise primarily from anecdotal examples and studies with small sample sizes. Despite the thousands of reported *Brady* decisions, we have only a limited understanding of how courts handle such prosecutorial misconduct.[72]

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prospectively before any evidence has been adduced or the defense strategy divulged at trial?"); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1610 (2006) ("Because *Brady*'s materiality standard turns on a comparison of the supposedly exculpatory evidence and the rest of the trial record, applying the standard prior to trial requires that prosecutors engage in a bizarre kind of anticipatory hindsight review.").

[67] *See* Gershowitz, *Convincing Ethical Prosecutors*, *supra* note 11, at 312.

[68] *See* Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn from Their Lawyers' Mistakes?*, 31 CARDOZO L. REV. 2161, 2169–70 (2010) (criticizing the Justice Department and state prosecutors' office for failing to systematically study past disclosure errors and develop new training based on avoiding prior mistakes).

[69] *See* David Keenan, Deborah Jane Cooper, David Lebowitz & Tamar Lerer, *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 205, 220–21 (2011).

[70] *See* Gershowitz, *Prosecutorial Shaming*, *supra* note 12, at 1067–84; *see also* Lara Bazelon, *For Shame: The Public Humiliation of Prosecutors by Judges to Correct Wrongful Convictions*, 29 GEO. J. LEGAL ETHICS 305, 319, 324 (2016).

[71] Judges arguably have power to demand increased *Brady* training for prosecutors who appear in their courtrooms, but the judges rarely utilize their inherent authority to demand it. *See* Adam M. Gershowitz, *The Race to the Top to Reduce Prosecutorial Misconduct,* 89 FORDHAM L. REV. 1179, 1182–83, 1196 (2021) [hereinafter Gershowitz, *Race to the Top*].

[72] *See B*ruce A. Green, *Regulating Prosecutors' Courtroom Misconduct*, 50 LOY. U. CHI. L.J. 797, 815 (2019) (noting utility of, and the current lack of, data on prosecutorial misconduct in court, such as during summations).

D. EMPIRICAL LITERATURE REGARDING *BRADY*

There have been few studies that have documented the types of claims that are brought post-conviction and which claims tend to result in relief. Several of those studies noted the incidence of prosecutorial misconduct claims generally, and sometimes they noted data regarding the incidence of *Brady* claims that helps to shed some light on *Brady* litigation.

A 1994 study by the National Center of State Courts—one of the few to examine state post-conviction litigation—found that prosecutorial misconduct claims generally were found in 11% of state post-conviction petitions and in 16% of federal petitions, but that only a subset of those included claims of failure to disclose evidence.[73] (That study noted that even classifying petitioners' claims can raise challenges where so many petitioners are pro se and the petitions themselves "are not always clear.")[74]

A 1995 study examined federal habeas corpus petitions in eighteen district courts and found that prosecutorial misconduct claims (not limited to *Brady* claims) occurred in 6% of federal habeas petitions.[75] More recently, in 2007, a National Center for State Courts study led by Nancy King and Joseph Hoffman examined post-conviction litigation in 2,384 noncapital cases, studying the types of claims brought and resulting in relief.[76] The most commonly litigated post-conviction claims were ineffective assistance of counsel claims, which made up over half of noncapital petitions and over 80% of capital cases.[77] Claims regarding *Brady* violations, as well as claims of false and lost evidence, were far more common in capital than noncapital petitions.[78] Further, far more noncapital cases were found time-barred.[79]

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[73] *See* VICTOR E. FLANGO, NAT'L CTR. FOR STATE CTS., HABEAS CORPUS IN STATE AND FEDERAL COURTS 53–54 (1994) (noting that "failure to disclose" claims amounted to five percent of federal and four percent of state petitions).

[74] *Id.* at 60.

[75] ROGER A. HANSON & HENRY W.K DALEY, U.S. DEP'T JUST., BUREAU OF JUST. STAT., NCJ-155504, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS 6–7, 17 (1995), https://bjs.ojp.gov/redirect-legacy/content/pub/pdf/FHCRCSCC.pdf [https://perma.cc/TG97-JR98] (examining a sample of habeas corpus petitions filed in eighteen federal districts in 1992).

[76] NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 52 (2007) [hereinafter VANDERBILT-NCSC STUDY], http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf*; see also* Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 811 (2009) (discussing findings from the *Vanderbilt-NCSC Study*).

[77] VANDERBILT-NCSC STUDY, *supra* note 76, at 28.

[78] *Id*. at 64 (finding that claims of false, lost, or undisclosed evidence not limited to *Brady* claims, consisted in 43% of capital cases and 13% of non-capital cases).

[79] *Id.*

A second type of study has focused on exonerations, in which a conviction is reversed at least in part based on newly discovered evidence of innocence.[80] Such studies have highlighted the role of *Brady* violations, including those that come to light only after post-conviction litigation is concluded. In a 2012 report, the National Registry of Exonerations highlighted the high incidence of failures to disclose exculpatory or impeachment evidence in exonerations in the United States; the Registry documented such failures in 42% of those exonerations.[81] In a more recent 2020 report, the National Registry of Exonerations focused on the role of official misconduct and found that concealed exculpatory evidence "contributed to the convictions of 44% of exonerees, more than any other type of official misconduct that we know of."[82]

A study by the Quattrone Center at the Penn Carey Law School examined prosecutorial misconduct claims in Pennsylvania from 2000–2016. The Quattrone study focused on a broad range of types of misconduct, but found that *Brady* claims were most commonly litigated.[83] Similarly, one of us studied litigation by DNA exonerees in some detail, and found in a 2011 study, that while some brought *Brady* claims post-conviction, in many more cases, exculpatory evidence of innocence was concealed but only came to light years later, due to the work of journalists or civil rights lawyers who had access to federal discovery.[84]

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[80] The word exoneration refers to an official decision to reverse a conviction based on new evidence of innocence. An exoneration occurs if the judge, after hearing the new evidence of innocence, vacates the conviction and there is no retrial, or there is an acquittal at a new trial, or if a governor grants a pardon. GARRETT, CONVICTING THE INNOCENT, *supra* note 4 at 11; *see also* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 64 n.33 (2008) (discussing exonerations in the context of newly discovered DNA evidence).

[81] SAMUEL R. GROSS & MICHAEL SHAFER, EXONERATIONS IN THE UNITED STATES, 1989–2012: REPORT BY THE NATIONAL REGISTRY OF EXONERATIONS 67 (2012), https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf.

[82] SAMUEL GROSS, MAURICE J. POSSLEY, KAITLIN JACKSON ROLL & KLARA HUBER STEPHENS, NATIONAL REGISTRY OF EXONERATIONS GOVERNMENT MISCONDUCT AND CONVICTING THE INNOCENT, iv (2020), https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf [hereinafter GROSS ET AL, GOVERNMENT MISCONDUCT].

[83] *See* QUATTRONE CENTER, HIDDEN HAZARDS: PROSECUTORIAL MISCONDUCT CLAIMS IN PENNSYLVANIA 10 (Table 1), 2000–2016 (2020), https://www.law.upenn.edu/live/files/11857-hidden-hazards-prosecutorial-misconduct-claims-in.

[84] *See* GARRETT, CONVICTING THE INNOCENT, *supra* note 4, at 202–03 (documenting post-conviction litigation by first 250 DNA exonerees in the United States and describing how 29 of 165 exonerees with written rulings had brought *Brady* claims). An earlier study of the first two hundred such cases found that 21 out of 133 exonerees (16%) with written rulings in their cases had brought *Brady* claims, of which three were granted. Garrett, *Judging Innocence*, *supra* note 80, at 110.

A third set of studies has described high error rates and reversal rates in death penalty cases. The "Broken System" studies led by James Liebman, Jeffrey Fagan and Valerie West found that after ineffective assistance of counsel claims, the second most common claim resulting in reversals—in 16–19% of cases—involved prosecutorial suppression of evidence of innocence or ineligibility for the death penalty.[85] The Death Penalty Information Center similarly found that withholding favorable evidence was "the most common" type of misconduct in death penalty cases, implicated in 35% of reversed capital convictions.[86]

Finally, then-Professor (now Judge) Stephanos Bibas reviewed all of the *Brady* cases decided in 2004.[87] Those 210 cases included 25 (~12%) that were successful in reversing a conviction, 11 (~5%) that were remanded for additional proceedings, and 174 (~83%) that were unsuccessful.[88] Judge Bibas also reviewed all of the *Brady* claims that were successful or remanded between 1959 and August 2004.[89] His study examined 448 claims and coded what types of evidence were involved, including which involved exculpatory versus impeachment evidence.[90] Most common were cases involving undisclosed plea agreements, promises of leniency to witnesses, or other impeachment information, present in 262 cases (~59%).[91] Another large group of cases, 71 cases (~16%) involved documentary evidence, including forensic reports or evidence of failure to test forensic evidence.[92]

The findings in these studies all highlight how ineffective assistance of counsel claims are more ubiquitous than *Brady* claims. Allegations that trial counsel or appellate counsel performed in a subpar fashion may not just reflect the pervasiveness of inadequate indigent defense representation, but also that alleging such a claim does not require access to police and prosecution files, which may be required to credibly allege a *Brady* violation. Further, these studies show how in capital cases, more claims are raised

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[85] JAMES S. LIEBMAN, JEFFREY FAGAN & VALERIE WEST, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995, at 5 (2000).

[86] *Misconduct Reversals and Exonerations by Type and Defendant*, DEATH PENALTY INFO. CTR., https://images.dpic-cdn.org/People-affected-by-type.png [https://perma.cc/4GTQ-3UP5] (last visited June 10, 2024) (216 of 616 (35.06%) misconduct reversals and exonerations due to withholding favorable evidence).

[87] Stephanos Bibas, *The Story of* Brady v. Maryland*: From Adversarial Gamesmanship Toward The Search for Innocence?, in* CRIMINAL PROCEDURE STORIES 13 (Carol Steiker ed., 2005) (discussing analysis of one year of *Brady* claims).

[88] *Id.*

[89] *Id*. at 14;

[90] *Id*.

[91] *Id.*

[92] *Id*.

generally, and more successfully. This may be because capital petitioners have consistent representation in state and federal habeas proceedings.

The Bibas study coded information about *Brady* litigation, with a focus on successful claims; in contrast, the other studies had the goal of understanding post-conviction litigation generally, or exoneree or capital post-conviction litigation specifically. Our goal is to more comprehensively unpack *Brady* litigation.

II. FINDINGS FROM THE *BRADY* DATABASE

A. METHODOLOGY AND OVERVIEW OF FINDINGS

Any effort to study *Brady* claims is complicated by the huge universe of possible cases. Each year, petitioners cite the *Brady* doctrine thousands of times in their direct appeals and post-conviction petitions in both state and federal court. Many cases, of course, raise frivolous claims that are quickly disposed of. But in huge numbers of cases, judges must grapple with plausible claims that the prosecution failed to turn over favorable and material evidence. In turn, courts issue thousands of opinions—both published and unpublished—that discuss *Brady* allegations. The universe of *Brady* cases is massive, and it would be nearly impossible to review every single case.

To capture the maximum number of cases in which petitioners asserted viable *Brady* claims, we utilized the Westlaw Key Number System, to return all published decisions in which courts engaged in a meaningful discussion of *Brady v. Maryland* as well as some unpublished decisions.[93]

We then studied a five-year period, examining all decisions issued from 2015 through 2019, in order to focus on more recent cases. This approach yielded 1,340 federal and state cases.[94] Next we removed cases that did not

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[93] We used the Westlaw Key Number SY,DI(110XXXI(D)2). This Key Number is for the topic of "Counsel > Duties and Obligations of Prosecuting Attorneys > Disclosure of Information." Westlaw does not provide more detail on how it decides which cases to include under its key numbers. The downside to utilizing a key number search is that it does not include most unpublished decisions. (Westlaw does assign Key Numbers to selected unpublished cases, presumably the ones they think are important to researchers.) However, our focus is on reasoning in published decisions. Further, in most cases in which a petitioner raised a viable, or at least plausible, *Brady* claim, we expect that the court would provide reasoning and designate the decision as publishable. We would expect that the bulk of unpublished decisions would be summary denials of relief.

[94] One case was duplicative and was removed (a second citation merely included the appendix). In two cases, a single opinion involved two co-defendants with factually and legally separate *Brady* claims. *See* United States v. Pasha, 797 F.3d 1122, 1125 (D.C. Cir.

discuss *Brady* claims, including because they decided to rule on the merits of a different claim or mentioned *Brady* in passing and did not discuss an actual dispute about the disclosure of evidence; 250 cases were not analyzed for that reason. We stress again that this is the universe of cases in which defendants alleged a *Brady* violation, not the total universe of cases in which the government may have failed to disclose evidence. *Brady* claims are difficult for defendants to identify.[95]

This left 1,091 relevant cases discussing *Brady* claims. Among these, we separated non-paradigmatic cases in which the judge did discuss the merits of *Brady v. Maryland,* but not in the paradigmatic setting in which a person is challenging the non-disclosure of impeachment or exculpatory evidence after a criminal trial. Thus, for example, we treated as non-paradigmatic a case in which a person had already obtained a new trial but sought to have the indictment also dismissed based on *Brady* violations.[96] This ultimately left us with 808 paradigmatic cases that adjudicated *Brady* claims to identify and review.

We designed a coding system with 49 variables to examine in each case.[97] Some of the coding was to document basic information such as case names and citations so that it will be easily accessible to future researchers and litigators. Other coding was designed to shed light on the types of cases in which *Brady* allegations are arising. We considered the type of crime, whether the defendant was sentenced to death, and whether it was a state or federal prosecution. We also sought to code for the stage of the process and types of courts that were ruling on *Brady* claims so that we could gather more information on whether *Brady* claims tend to be more successful in state courts as opposed to federal courts or on direct review as opposed to habeas review.

We also coded each case for numerous details about the merits of the *Brady* claims. In particular we documented whether courts found the

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2015); United States v. Pembrook, 876 F.3d 812, 815 (6th Cir. 2017). If multiple defendants' claims were resolved in the same way, using the same reasoning to discuss the same evidence, then they were coded as a single entry.

[95] *See* Samuel R. Wiseman, *Brady, Trust, and Error*, 13 LOY. J. PUB. INT. L. 447, 454 (2012) ("*Brady* violations are difficult to discover—the only one with proof of the violation is often the violator. As a result, many are never revealed."); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 432 (2001) ("*Brady* violations, like most other forms of illegal prosecution behavior, are difficult to discover and remedy."). Accordingly, the universe of actual *Brady* violations is surely higher than what we have identified.

[96] The state court concluded that the appropriate remedy was the prior grant of a new trial, not dismissal. *See Ex parte* State of Alabama v. Martin, 287 So. 3d 384, 399 (Ala. 2018).

[97] *See* Appendix A.

evidence to be favorable (and if so, whether it was exculpatory or impeachment evidence), whether the evidence was material, and whether it was the police or the prosecutors who were at fault. Additionally, we coded for whether courts used their authority in a way that might deter future *Brady* violations. For example, we analyzed whether the courts referred prosecutors to the Bar for potential discipline, expressed an opinion on the need for further *Brady* training, castigated prosecutors for ethical violations, or specifically named the prosecutors who were responsible for the *Brady* violations. A full list of the 49 coding variables is included in Appendix A. A team of excellent research assistants carefully read each of the cases and coded all the variables. We turn next to our findings.

B. COURTS FOUND *BRADY* VIOLATIONS IN 10% OF CASES[98]

First, we focus on the far smaller subset of successful *Brady* claims. We identified 81 cases, or 10% of 808 cases, in which a *Brady* violation was found. In 88%, or 713 of 808 cases, no violation was found. Further, in 14 of the 808 cases—6 of which were remanded—a *Brady* violation was discussed but not ruled upon. Fifty-one cases found a procedural issue, and therefore either did not rule on the *Brady* claim (2 cases) or did not find a *Brady* violation (49 cases). Finally, 24 of the 808 cases involved § 1983 claims. Although courts that find flagrant *Brady* violations on rare occasions forbid a re-trial,[99] we did not locate any such cases in our five-year sample. The table below summarizes these main results.

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[98] By cases, we mean 10% of cases in which *Brady* claims were raised, rather than 10% of all criminal cases.

[99] *See* United States v. Garrison, 888 F.3d 1057, 1065 (9th Cir. 2018) ("Because dismissing an indictment is a 'drastic step,' it is 'disfavored.'") (internal citations omitted). But, "where a defendant was prejudiced by the late disclosure and there was flagrant prosecutorial misconduct, dismissal with prejudice may be an appropriate remedy." *Id.*

Table 1: Successful and Unsuccessful Brady Cases, 2015–19

	***Brady* Violation Found**	**No *Brady* Violation Found**	**No *Brady* Ruling**	**Total Types of Cases**
Total Paradigmatic Cases	81	713	14	**808**
Remand	0	0	6	**6**
Procedural Issue	0	49	2	**51**
1983 Claim	5	19	0	**24**

Note: "*Brady* Violation Found" is when the court found at least one piece of evidence to be a *Brady* violation (the other pieces of evidence did not find a *Brady* violation). As such, some cases may double count and add up to more than 808 (or the total subset) when reviewing certain elements of judicial rulings.

Our results from the years 2015 to 2019 are similar to the findings of the single year study done by Judge Bibas for the year 2004. Judge Bibas found that 12% of *Brady* claims were successful.[100] But our data indicates that in roughly 10% of filed claims, courts agree that there has been a *Brady* violation.[101] The subsequent Sections drill down on more specific aspects of *Brady* claims.

C. THE OUTSIZED PRESENCE OF FEDERAL PROSECUTORS

The vast majority of prosecutions in the United States occur in state courts, rather than federal court. In a typical year, there are over 13 million state prosecutions,[102] compared to fewer than 100,000 federal prosecutions.[103] One would therefore expect *Brady* violations to have been discovered almost exclusively in cases that were prosecuted in state court. Moreover, given that federal prosecutors are supposed to be the cream of the

[100] *See* Bibas, *supra* note 87, at 13.

[101] Again, no study can tell us the total percentage of cases in which prosecutors fail to disclose favorable evidence, because some or perhaps many such cases will never come to light.

[102] *See* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 13 (2018).

[103] *See* UNIV. ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS Tbl. 5.11 (2010), https://wayback.archive-it.org/org-652/20230412160153/https://www.albany.edu/sourcebook/pdf/t5112010.pdf [https://perma.cc/8FLU-JJVP] (identifying 78,428 federal prosecutions filed in fiscal year 2010).

crop with more training,[104] better resources, and fewer cases to handle,[105] one would expect that accidental *Brady* violations would be less common in federal court.

Yet, our data show that a large number of *Brady* violations occurred in federal prosecutions. As Table 2 indicates below, about one-third of the *Brady* claims in our study arose from cases prosecuted in federal court. Put differently, while fewer than 1% of nationwide prosecutions occur in federal court, 33% of *Brady* claims appeared to have originated from those prosecutions.[106]

Table 2. Brady Claims by Jurisdiction of Prosecution

	Total cases (of 808)	*Brady* Violation Found (of 81)
Federal Court	275	17
State Court	532	64

More startling than the number of *Brady* claims arising out of federal prosecutions is the number of successful claims. Seventeen of the 81 successful *Brady* claims in our study originated from federal prosecutions. That means that while federal prosecutions account for fewer than 1% of nationwide prosecutions, they amounted to more than 20% of successful *Brady* claims during our five-year study.

This data, along with the facts of individual cases, raise questions about federal prosecutors, although they also might suggest the relative ability of federal defenders in uncovering and litigating violations. For instance, there were five federal *Brady* violations in 2015, four of which involved prosecutors' failure to turn over favorable evidence and one of which

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[104] *See* Louis J. Virelli III & Ellen S. Podgor, *Secret Policies*, 2019 U. ILL. L. REV. 463, 490 nn.139–40 (highlighting that the U.S. Attorney's Manual provides that "[a]ll new federal prosecutors assigned to criminal matters and cases shall complete, within 12 months of employment, designated training through the Office of Legal Education on *Brady/Giglio,* and general disclosure obligations and policies" and that "[a]ll federal prosecutors assigned to criminal matters and cases shall annually complete two hours of training on the government's disclosure obligations and policies.") (quoting U.S. Dep't Just., Just. Manual § 9-5.001(E), https://www.justice.gov/usam/united-states-attorneys-manual).

[105] Frank O. Bowman, III., *American Buffalo: Vanishing Acquittals and the Gradual Extinction of the Federal Criminal Trial Lawyer*, 156 U. PA. L. REV. PENNUMBRA 226, 235 (2007) ("[W]ith the possible exception of some of the Mexican border districts, federal prosecutors have very modest caseloads relative to state prosecutors").

[106] One possible explanation for the high number of federal prosecutions is that those cases might have paying clients with lawyers who will continue to rigorously work the cases after conviction. This is purely speculative however and will require future study.

involved misconduct by a crime lab technician. Of the four cases in which the prosecutors were the responsible actors, three involved prosecutors who were personally aware of the withheld evidence.

In the most flagrant case, the prosecutor failed to turn over information that cast doubt on the credibility of a star witness—specifically a hand-written letter from the witness and interview notes that demonstrated him to be "a fawning, desperate supplicant willing to 'do everything [the prosecutor] said.'"[107] The First Circuit recognized that defense counsel could have used the *Brady* material to "call into question the credibility of both the key witness and, implicitly, the lead prosecutor."[108] The court went on to explain that the "unproduced *Brady* materials were the only evidence that would have eliminated the claim that the testimony was entirely uncoordinated . . . and [that] the prosecutor were hiding something from the jury."[109] The prosecutor's response was that she "forgot about" the letter and notes while preparing for trial.[110]

In a second case, the federal prosecutor had been "personally present at an interview in which a witness gave a scene-of-the-crime account that, if credited, would [have] contradict[ed] the identity of at least one of the [defendants]."[111] The eyewitness had mistakenly identified "a man and a woman (rather than two women)."[112] The prosecutor should have immediately recognized the "obligation to give that information to the defense," yet they waited "over eight months until the eve of trial" in what the appellate court called an "inexcusable" delay.[113]

In a third case, one of the Special Assistant United States Attorneys working on a wire fraud prosecution had personal knowledge of exculpatory evidence that he had acquired from working on a different state prosecution.[114] The court never elaborated on whether it considered the prosecution's failure to disclose to be an inadvertent oversight or something more sinister.

The court was similarly inconclusive in a fourth case in which prosecutors failed to disclose that there was a pending SEC investigation into a key witness. The court reasoned that the SEC investigation was "admissible, favorable impeachment evidence" because it suggested that the

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[107] United States v. Flores-Rivera, 787 F.3d 1, 19 (1st Cir. 2015)

[108] *Id.*

[109] *Id*. at 20.

[110] *Id*. at 11.

[111] United States v. Pasha, 797 F.3d 1122, 1133 (D.C. Cir. 2015).

[112] *Id.*

[113] *Id*.

[114] United States v. Denunzio, 123 F. Supp. 3d 135, 143–44 (D. Mass. 2015).

witness might have incentive to lie as well as his general character for untruthfulness.[115] The court made no finding that the prosecutors handling the case intentionally withheld evidence or were even personally aware of the SEC investigation.

The final federal prosecution from 2015 involved the infamous and disgraced crime analyst Annie Dookhan from the Hinton State Laboratory. Dookhan "had taken evidence from a safe without authorization, removed ninety drug samples from the office, and forged a co-worker's initials on the evidence log."[116] While Dookhan had engaged in flagrant misconduct in many cases, there was no evidence that she had tampered with evidence in this particular case.[117]

The federal *Brady* violations do not look fundamentally different than state *Brady* violations. In some cases, the prosecutors who were handling the cases personally failed to turn over favorable evidence to the defense. In other cases, a member of the prosecution team was responsible for the *Brady* violation and the prosecutor was in the dark.

We emphasize, however, another explanation for why we might see more federal *Brady* claims succeeding. For state convictions, a range of severe procedural and substantive restrictions make litigation of *Brady* claims challenging, particularly during federal habeas corpus, as discussed further below. It may be the case that federal *Brady* violations are simply remedied more often by federal judges, and that similarly serious instances of misconduct among state prosecutors are not as readily addressed.

D. PROSECUTORS, NOT POLICE, WITHHOLDING

The *Brady* doctrine applies not just to prosecutors, but also to the police and other government actors on the prosecution team. As the Supreme Court explained in *Kyles v. Whitley,* the *Brady* rule applies to "any favorable evidence known to the others acting on the government's behalf in the case, including the police."[118] Courts can thus find a *Brady* violation at the hands of police officers, even when the prosecutor was unaware of the favorable evidence, because the prosecutors have a duty to apprise themselves of all such evidence that the government has uncovered that should be disclosed to the defense.

Our study analyzes how often *Brady* violations are attributable to the conduct of prosecutors as opposed to police. While we can only report on

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[115] United States v. Parker, 790 F.3d 550, 558–59 (4th Cir. 2015).

[116] United States v. Hampton, 109 F. Supp. 3d 431, 433 (D. Mass. 2015)

[117] *Id.* at 437.

[118] 514 U.S. 419, 437 (1995).

Brady claims raised in reported court rulings, our data is nevertheless illuminating. We coded 195 cases in which courts found that at least one piece of evidence was suppressed. Some of these cases involved multiple pieces of evidence that were deemed withheld by different actors, thus certain cases are counted multiple times to reflect those circumstances—creating 200 instances in total. This cohort included cases in which courts found a *Brady* violation, as well as cases in which courts rejected petitioners' claims because the evidence was either not favorable, not material, or both.

For 48 cases (about 24% of 195 in which the court found a piece of evidence was suppressed) the courts did not state who was responsible for suppressing the evidence—perhaps because it was not entirely clear who was at fault. For the remaining 152 instances, courts pointed to prosecutors most of the time. The court indicated that prosecutors were solely responsible in 119 of the instances and were jointly responsible with the police an additional 8 times. Thus, in 127 of the 200 instances (64%) prosecutors knew of the evidence and failed to produce it. Put differently, most cases did not involve purely police misconduct that was hidden from the view of prosecutors.

To be sure, courts found that police (and not prosecutors) were responsible for suppressing evidence in 18 instances, including 10 cases in which courts ultimately found a viable *Brady* violation. This is no small matter. But to the extent that we might previously have thought *Brady* violations largely result from misconduct by "police on the street" rather than the prosecutors who have ethical obligations as members of the legal profession, our data suggests otherwise. Of additional interest are the seven cases in which it was neither prosecutors nor police who courts identified as withholding the evidence. These "other" cases included forensic laboratories[119] and technicians,[120] as well as medical examiners.[121]

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[119] *See Hampton*, 109 F. Supp. 3d at 433–34).

[120] Diamond v. State, 561 S.W.3d 288, 291–94 (Tex. App. (14th Dist.) 2018).

[121] Stevens v. Carlin, 286 F. Supp. 3d 1092, 1097 (D. Idaho 2018); People v. Dimambro, 897 N.W.2d 233 (Mich. App. 2016).

Table 3. Evidence Withheld by Prosecutors and Police

	Total Instances of Withheld Evidence	Cases with Withheld Evidence Amounting to a *Brady* Violation	Cases with Withheld Evidence Not Amounting to a *Brady* Violation
Prosecution	119	55	64
Police	18	10	8
Both Police & Prosecution	8	5	3
Other	7	6	1
Not Stated	48	11	37

E. ACCIDENTAL AND INTENTIONAL *BRADY* VIOLATIONS

The Government commits a *Brady* violation *whenever* it fails to disclose favorable and material evidence, irrespective of whether the prosecutor (or police officer) intended to hide the evidence. In other words, the *Brady* doctrine does not require the petitioner to demonstrate bad faith by a government actor.[122] Prosecutors and police can commit *Brady* violations by accident.

The media, reformers, and scholars typically talk about *Brady* violations in terms of intentional misconduct by unethical prosecutors seeking to railroad defendants. As one of us has explained "[a] Westlaw search for accidental or inadvertent prosecutorial error turns up a fraction of results compared to a search for flagrant or intentional prosecutorial misconduct. Put simply, the news media, reform organizations, and academics devote a lot more ink to outrageous prosecutorial behavior than to negligent conduct."[123] We therefore sought to determine how often judges found that evidence was suppressed accidentally as opposed to intentionally.

In most of the judicial decisions we studied, courts did not indicate whether there was any intentional misconduct that led to suppression of evidence. In one-third of the cases (66) in which courts found that a piece of evidence was suppressed, courts additionally indicated clearly whether they

[122] In this respect the *Brady* doctrine differs from the government's failure to preserve potentially exculpatory evidence. To prevail on a claim that the government destroyed evidence that might have been exculpatory, the defendant must demonstrate bad faith. Arizona v. Youngblood, 488 U.S. 51, 58 (1988).

[123] Gershowitz, *Convincing Ethical Prosecutors*, *supra* note 11, at 322.

had concluded that the evidence was withheld intentionally or accidentally. In 25 of those 66 cases (38%), the court clearly stated that the failure to disclose was accidental. And in 15 of those 25 cases the accidental mistake was attributable to the prosecutor, not the police officer.[124]

Not all of those 66 cases in which courts spoke to whether the evidence was withheld intentionally or accidentally, resulted in courts finding a *Brady* violation; in some cases, courts found that evidence was suppressed but that the evidence was not favorable or material and thus not a violation. Among the 66 cases in which the judicial decisions indicated whether the withholding of evidence was intentional or accidental, in 9 of the 66 (14%), courts found a *Brady* violation that was accidental.

Table 4. Was Evidence Withheld Intentionally of Accidentally?

	Total Cases	Cases with Withheld Evidence Amounting to a *Brady* Violation	Cases with Withheld Evidence Not Amounting to a *Brady* Violation
Accidental	25	9	16
Intentional	41	28	13
Not Stated	129	46	83

Given that an accidental violation does not absolve the government of responsibility for a *Brady* violation, courts may have seen no reason to describe whether prosecutors were at fault for withholding the evidence. We can speculate that there were far more accidental violations than the judicial decisions indicated. Relatedly, we might speculate that if prosecutors engaged in unethical conduct that the judges would have felt an obligation to say so and not paper over it.[125] But, as noted, these theories are simply speculation. For two-thirds of the cases in our sample, we simply do not know whether the withholding of the evidence was inadvertent or intentional, because judges did not comment on the question.

At minimum though, the limited data reveal the following conclusions: (1) in at least 25 of 195 cases (roughly 13%) evidence was withheld by accident; and (2) in at least 9 of the 81 *Brady* violations (11%) the violation was accidental. This is a notable number of cases. And this data provides cause for optimism that with more training prosecutors could better identify

[124] In five of the cases, the accidental mistake was attributed to the police. Four of the remaining cases do not specify who was responsible. And one case was coded as "Other."

[125] *But see* Gershowitz, *Prosecutorial Shaming*, *supra* note 12, at 1069–70 (finding judges sometimes redact names of prosecutors when describing intentional misconduct).

Brady material, which would in turn lead to fewer *Brady* violations. Further, consider the table below, concerning attribution of the 81 cases in which *Brady* violations were found. For the vast bulk of the cases in which we know someone was at fault, the misconduct was attributed to prosecutors rather than police.

Table 5. Attribution of Withholding in Cases Finding Brady Violations

	***Brady* Violations Found**			
	Accidental	Intentional	Not Stated	TOTAL
Prosecutor	6	22	27	55
Police	1	2	7	10
Both	0	2	3	5
No Person Mentioned	1	2	8	11
Other	1	1	4	6
TOTAL	9	29	49	

Note: "Both" means that both the prosecutor and police were implicated for the same piece of evidence.

F. THE NEAR-ABSENCE OF *BRADY* CLAIMS IN PLEAS

Of the 808 total paradigmatic cases studied, almost all of them involved a conviction at trial, while only 21 involved convictions resulting from plea bargains. The data is starker when we focus on successful *Brady* claims. Of the 81 successful *Brady* claims, none arose from cases that were plea bargained. Initially, these findings should seem startling because the vast majority of convictions in the United States result from plea bargaining. As Justice Kennedy explained for the Court in *Missouri v. Frye,* plea bargaining is "not some adjunct to the criminal justice system; it *is* the criminal justice system."[126]

[126] 566 U.S. 134, 144 (2012).

Table 6: Brady Claims in Trial and Plea-Bargained Cases

Original Case Outcome	Total Cases (808)	*Brady* Violation Found (81)
Trial Conviction	761	77
Plea	21	0
Acquittal	2	1
Dismissal	8	3
Pretrial	10	0
Other	5	1

A partial explanation for the absence of *Brady* claims in plea bargained cases can be found in Supreme Court precedent. In its 2002 decision in *United States v. Ruiz*, the Supreme Court held that prosecutors have no obligation to turn over impeachment evidence during plea bargaining.[127] Perhaps convicted defendants know that they cannot raise a successful *Brady* claim based on withheld impeachment evidence and thus do not even try to litigate the issue. But, of course, that does not explain the prospect of withheld *exculpatory* evidence. The Supreme Court has never decided the question of whether prosecutors must turn over exculpatory evidence prior to a defendant pleading guilty.[128] Multiple federal circuits have held that prosecutors have no such disclosure obligation.[129] However, the Seventh, Ninth, and Tenth Circuits have held that prosecutors do have a constitutional obligation to disclose exculpatory evidence.[130]

With multiple federal circuits holding that failure to turn over exculpatory evidence during plea bargaining is a *Brady* violation, one would expect to see more than a trickle of such claims. Yet, plea bargained cases accounted for fewer than 3% of the cases we studied and zero successful claims.

The reason for this modicum of cases is not entirely clear but it may simply be that defendants who plead guilty waived the ability to pursue post-conviction remedies.

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[127] 536 U.S. 622, 629 (2002).

[128] *See supra* notes 39–41 and accompanying text.

[129] *Id.*

[130] *Id.*

G. MOST *BRADY* CLAIMS ARE BROUGHT ON DIRECT REVIEW, BUT SUCCEED IN HABEAS

Scholars have long assumed that *Brady* claims are typically brought as post-conviction petitions, usually in state or federal habeas review.[131] This assumption is based on the (logical) belief that *Brady* claims involve withheld evidence that would likely be unknown at trial or shortly after trial when defendants are litigating their direct appeals. This conventional wisdom suggests that withheld evidence is found years later, perhaps by new counsel, and raised for the first time on habeas review. Our data show that the situation is more complicated than the conventional wisdom has assumed. *Brady* claims are frequently raised on direct review, however, they are also most likely to succeed in post-conviction litigation.

In our review, we found *Brady* claims that were raised not just on habeas review but also in other types of non-collateral proceedings. A small number of successful *Brady* claims were raised at trial or even in pre-trial motions. Petitioners also brought § 1983 federal civil rights lawsuits against police departments and other government actors alleging that they had been deprived of their due process rights under *Brady v. Maryland*. And in *rare* cases we found *Brady* allegations that were raised as part of the lawyer disciplinary process. Finding any *Brady* claims—including a handful of successful claims—litigated using these vehicles was surprising, even if they were small in number.

More surprising, and more significant, though, was the breakdown in cases between direct review and habeas petitions. The majority of *Brady* claims we reviewed were raised on direct review (474 cases or 59%), not habeas review (248 cases or 31%). Put differently, defendants frequently alleged *Brady* violations shortly after their convictions in the direct review process.

But while direct appeals accounted for a majority of *Brady* claims, they did not account for a majority of *successful Brady* claims. Of the 81 successful *Brady* violations we found, 41 (or 50%) were habeas claims, while only 25 (or 30%) were direct appeals. To put the point more starkly, only 25 of the 474 direct appeals (or 5%) were successful, while 41 of the 248 habeas petitions (or 17%) were successful.

It thus seems most accurate to modify but not discard the conventional wisdom that *Brady* claims are post-conviction claims. Instead, it seems more

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[131] *See* Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of Brady Through the Defendant Due Diligence Rule*, 60 UCLA L. REV. 138, 151 (2012) ("[D]efendants often raise *Brady* claims for the first time in federal habeas.").

appropriate to conclude that *Brady* claims are *brought* more often on direct appeal but are brought more *successfully* in habeas petitions.

Table 7: Procedural Posture of Brady Claims

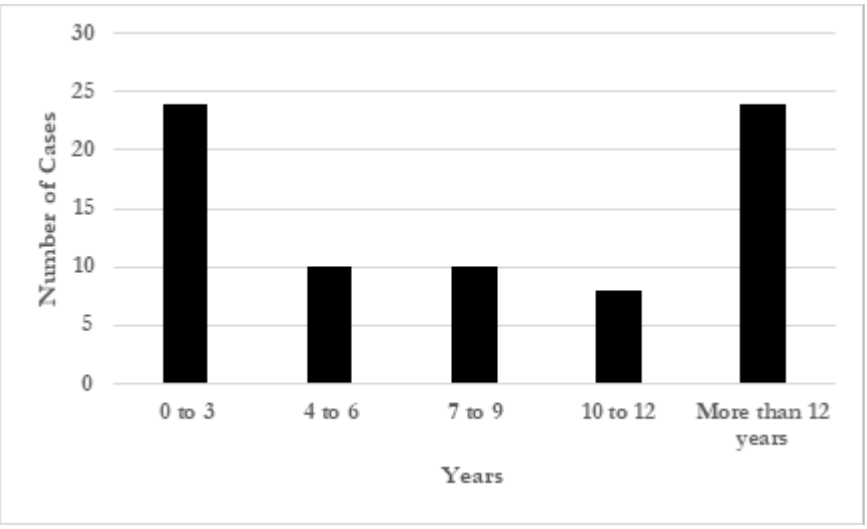
	Total *Brady* Claims (808)	*Brady* Violation Found (81)
State or Federal Pretrial Motion	16	2
State or Federal Post-Trial Motion	43	9
State or Federal Direct Appeal	474	25
State or Federal Post-Conviction	248	40
Federal 1983 Claim	25	5
Other	2	0

H. SUCCESSFUL *BRADY* CLAIMS TOOK MANY YEARS AFTER CONVICTION

Scholars have frequently remarked that *Brady* violations typically do not become known until years or even decades after conviction. These assertions are primarily based on anecdotes though. Accordingly, we sought to move beyond anecdotal stories to document how long it takes for *Brady* violations to be discovered after convictions. We started with the 81 cases in our sample in which federal and state courts found a *Brady* violation. In 77 of those cases, we were able to determine the date of conviction and thus compute the length of time.

The mean time from conviction to a successful *Brady* claim in our sample was 10 years. But the data on timing showed a bimodal result. Because many claims were resolved in pre-trial and post-trial motions and on direct review, a large number of *Brady* violations were identified within a few years of conviction. But there were a similarly large number of claims that were not recognized until more than a dozen years after conviction. The timing of successful *Brady* claims thus looks like an inverted bell curve with a large peak shortly after conviction and a large peak long after conviction.

Fig. 1: Time Between Conviction and Successful Brady Claims



Note: Total number of cases is 77.

As Figure 1 above indicates, in one-third of the cases where courts found *Brady* violations it took more than a dozen years for the claim to be recognized. Some cases took a particularly lengthy amount of time. In five cases from our sample, courts found *Brady* violation more than 30 years after conviction.[132] An additional ten cases took at least 20 years to resolve.[133]

[132] Fontenot v. Allbaugh, 402 F. Supp. 3d 1110 (E.D. Okla. 2019) (thirty years); *Ex parte* Chaney, 563 S.W.3d 239 (Tex. Crim. App. 2018) (thirty years); Browning v. Baker, 875 F.3d 444 (9th Cir. 2017) (thirty-one years); Shelton v. Attorney General, 796 F.3d 1075 (9th Cir. 2015); Floyd v. Vannoy, 894 F.3d 143 (5th Cir. 2018) (thirty-five years).

[133] Lewis v. Connecticut Comm'r of Correction, 790 F.3d 109 (2d Cir. 2015) (twenty years); Patrick v. City of Chicago, 154 F. Supp. 3d 705 (N.D. Ill. 2015) (twenty years); State v. Glover *et al.*, 64 N.E.3d 442 (Ohio Ct. App. 2016) (twenty years); Commonwealth v. Johnson, 174 A.3d 1050 (Pa. 2017) (twenty years); Powell v. Miller, 104 F. Supp. 3d 1298 (W.D. Okla. 2015) (twenty-two years); State *ex rel.* Clemons v. Larkins, 475 S.W.3d 60 (Mo. 2015) (twenty-four years); Dennis v. Sec'y, Pennsylvania Dep't of Corr. 834 F.3d 263 (3d Cir. 2016) (twenty-five years); Jones v. Gardiner 807 S.E.2d 849 (Ga. 2017) (twenty-five years); Sims v. Hyatte, 914 F.3d 1078 (7th Cir. 2019) (twenty-five years); Jimerson v. Kelley, 350 F. Supp.3d 741 (E.D. Ark. 2018) (twenty-six years).

I. STATE COURTS, NOT FEDERAL COURTS, WERE MORE LIKELY TO PROVIDE RELIEF

Conventional wisdom is that *Brady* claims are usually brought in post-conviction proceedings.[134] Additionally, distrust in state courts has led scholars to believe that federal post-conviction review—the federal habeas process—is where petitioners are most likely to succeed in demonstrating constitutional violations.[135] Remarkably, our data showed otherwise: defendants often brought *Brady* claims on direct review and they often succeeded in state, not federal court.

1. Direct Versus Post-Conviction Review

Direct review is the set of appeals directly following a conviction. Convicted defendants appeal to the intermediate court of appeals (if there is one), then the state supreme court, and finally to the U.S. Supreme Court. Once the Supreme Court denies a petition for certiorari (or grants certiorari but rules against the defendant) direct appeal is over.[136] At that point, the conviction is final, and the petitioner may file post-conviction (usually habeas corpus) petitions in state court. Once the petitioner exhausts their state habeas remedies, they may then file post-conviction petitions for federal habeas corpus relief.

As noted above, *Brady* claims are typically thought of as post-conviction claims. This is because it often takes a while for suppressed evidence to come to light. Petitioners also need a forum to build the record that evidence was suppressed. Direct appeals begin with appellate courts, which examine the trial record, and thus a forum to examine new evidence is typically absent. By contrast, post-conviction proceedings begin in a trial court that is well-suited to building a record. For that reason, courts will sometimes insist that a *Brady* claim brought on direct review be delayed until the post-conviction process.[137]

Yet, of the 81 cases in which we found a *Brady* violation, 25 of them were on direct review. Moreover, and also surprising, another 11 cases

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[134] *See* Harvey v. Horan, 278 F.3d 370, 379 (4th Cir. 2002) ("*Brady* claims are typically raised in habeas petitions.").

[135] *See* Burt E. Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1125 (1977).

[136] *See* Teague v. Lane, 489 U.S. 288, 295 (1989).

[137] *See, e.g.*, State v. Wells, 191 So. 3d 1127, 1139 (La. Ct. App. 2016) ("Despite our concerns about the prosecution's compliance with its *Brady* obligations, however, we decline to consider this claim on the merits on this direct appeal because we find it would be better developed in a post-conviction posture, where the trial court can conduct a thorough evidentiary hearing.").

involved pre-trial and post-trial motions that occurred *before* the direct appeal. Table 8, below, summarizes these data.

Table 8: Successful Brady Claims Prior to Post-Conviction Review

State Post-Trial Motion	4
State Direct Appeals	20
Federal Pre-Trial Motion	2
Federal Post-Trial Motion	5
Federal Direct Appeals	5
Total	36/81 (43%)

2. Post-Conviction Relief Was Often Granted by State Courts

We identified 41 cases in which post-conviction courts granted relief for *Brady* violations.[138] All but one of those cases involved state prosecutions.[139] This teed up the question of which court—state or federal—would grant *Brady* relief in the post-conviction process.

Criminal law scholars often devote considerable attention to *federal* habeas corpus review.[140] Yet, just over half of the successful *Brady* claims in our study were brought on *state* post-conviction review.[141]

[138] As explained in Part II.I.1 above, 36 of the successful 81 *Brady* claims were found in pre-trial motions, post-trial motions, or direct appeals and thus pre-dated the post-conviction process. Another five cases that found *Brady* violations were in § 1983 civil rights actions.

[139] The one exception was *United States v. Hampton*, 109 F. Supp. 3d 431 (D. Mass. 2015), in which federal courts granted habeas relief under 28 U.S.C. § 2255 (rather than § 2254) for a case originally prosecuted in federal court.

[140] *See, e.g.*, GARRETT & KOVARSKY, *supra* note 50; Eve Brensike Primus, *A Crisis in Federal Habeas Law*, 110 MICH L. REV. 887, 892–908 (2012).

[141] The disparity in some years was particularly stark. For example, of the 14 successful habeas petitions brought in 2015, 9 of them were granted by state courts. In 2015, only 4 of the 14 successful cases did a federal court grant habeas relief to a state petitioner. The final successful habeas case for 2015 involved a federal defendant who was granted federal habeas relief under § 2255.

Table 9. Post-Conviction Relief for State Convictions Granted in State vs. Federal Court

	Total cases (of 41)
Federal Court	20
State Court	21

The picture becomes starker when we recall the considerable number of *Brady* violations found by state courts in pre- and post-trial motions and on direct appeal. In total, we reviewed 65 state convictions in which courts found *Brady* violations. Federal habeas courts were responsible for granting relief in only 20 of those 65 cases, or less than one-third of cases.

Table 10: Successful Brady Claims for State Court Convictions by Forum

State Post-Trial Motion	4
State Direct Appeals	20
State Post-Conviction Review	21
Federal Post-Conviction Review	20
Total	65

On one level, the small percentage of successful federal post-conviction challenges to state convictions should not be surprising. In order to properly preserve their federal habeas claims, petitioners must first exhaust their direct appeals and state habeas petitions in state court first, lest they risk procedurally defaulting their federal claims.[142] The courts deciding the direct appeals and the state post-conviction petitions thus have the first bite at the apple. One would hope that when those courts are presented with a compelling claim that a *Brady* violation occurred that they would grant relief and thus remove the case from the system before the federal post-conviction courts ever encountered it.

The smaller number of successful claims in federal court may also be attributable to the challenges of asserting claims based on new evidence in federal court, even if that evidence was suppressed due to alleged prosecutorial misconduct.[143] Thus, in a study of the appellate and post-conviction litigation by DNA exonerees in the United States, by far the most relief was granted in state direct appeals, and not in federal habeas

[142] Wainwright v. Sykes, 433 U.S. 72, 87–88 (1977).

[143] For an overview, see Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 705 (2002).

proceedings.[144] While the small body of successful federal post-conviction *Brady* claims makes sense, it nevertheless runs counter to the narrative that it is the federal habeas process that serves as the ultimate protector of civil liberties.[145]

The narrative of federal habeas review as the "Great Writ"[146] providing a bulwark against constitutional violations in state courts has declined dramatically in recent decades, which may also help to explain our findings. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") put forth a series of restrictions regarding the scope and process for federal habeas review of state convictions.[147] AEDPA, as interpreted by the U.S. Supreme Court, made it far more difficult to introduce new evidence in federal court, in support of a constitutional claim.[148] Moreover, most habeas petitions are dismissed on procedural grounds of some type.[149] Even if a person uncovers exculpatory evidence that had been concealed at trial, it almost never can be relied upon in federal court for various reasons: if that claim was procedurally defaulted,[150] if the complex AEDPA statute of limitations had expired,[151] if it is a second or successive habeas petition,[152] if the state court denial of relief is deemed to not be "unreasonable" or "contrary

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[144] *See* Garrett, *Judging Innocence*, *supra* note 80, at 101 (describing how of the first 200 DNA exonerees, of the 133 with written judicial decisions, 23 pursued federal habeas corpus, and only 4 had reversals granted during federal habeas corpus, as compared with 15 during direct appeal and one during state postconviction).

[145] The Supreme Court famously called the writ of habeas corpus the "Great Writ." Fay v. Noia, 372 U.S. 391, 399–400 (1963).

[146] *Id.* at 399.

[147] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.). For an overview, see Brandon L. Garrett & Kaitlin Phillips, *AEDPA Repeal*, 107 CORNELL L. REV. 1739 (2022); *see also* Stevenson, *The Politics of Fear and Death, supra* note 143, at 705.

[148] For example, in *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011), the Supreme Court interpreted 28 U.S.C. 2254(d)(1) to bar consideration of newly discovered evidence for purposes of applying the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") restriction on merits relief.

[149] *See* VANDERBILT-NCSC STUDY, *supra* note 76, at 48.

[150] *See, e.g.*, Martinez v. Ryan, 566 U.S. 1, 22 (2012) (discussing procedural default doctrine and standards for excusing such a default). To be sure, a *Brady* claim can constitute "cause" to excuse a procedural default, as discussed earlier in this Article. *See supra* note 43 and accompanying text; *see also* Megan Raker, *Comment: State Prisoners with Federal Claims in Federal Court: When Can a State Prisoner Overcome Procedural Default?,* 73 MD. L. REV. 1173, 1180 (2014) (concluding "that the nature of *Brady* claims—in how they are raised on collateral review and the constitutional rights they protect—are such that the *Martinez* exception can, and should, apply to *Brady* claims as well.").

[151] 28 U.S.C. § 2244(d)(1).

[152] 28 U.S.C. § 2244(b)(2)(b)(ii).

to" Supreme Court law,[153] and if the failure to develop new evidence cannot be excused under the complex AEDPA restrictions.[154]

Scholars have much debated the degree to which AEDPA merely deepened existing court-made restrictions on federal habeas corpus, or constituted a severe break from past practice.[155] To be sure, strong new evidence of innocence, which may also support a *Brady* claim, can excuse certain of these statutory barriers to habeas relief.[156] Overall, however, there has been a decades-long trend of sharply restricting access to federal habeas corpus remedies for those convicted in state court.[157] Our study provides additional support for the view that restrictions on federal habeas corpus relief may impact cases in which a person seeks relief on a constitutional violation involving new evidence not disclosed at the time of trial.

J. SUCCESSFUL *BRADY* CLAIMS OFTEN INVOLVED MURDER CONVICTIONS

The people who alleged a successful *Brady* violation had been convicted of a wide variety of criminal offenses, but they were concentrated in the most serious criminal cases. Far and away, the largest group of cases involved murder prosecutions: of the total group of 808 paradigmatic cases, 320 were homicide or attempted homicide cases.[158] Of the 81 cases in which a *Brady* violation was found, 42 were homicide cases. To describe just one year of data, defendants in the 2015 cases had been convicted of rape,[159]

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[153] 28 U.S.C. § 2254(d)(1)-(2).

[154] 28 U.S.C. § 2254(e).

[155] *See, e.g.*, John H. Blume, *AEDPA: The "Hype" and the "Bite*," 91 CORNELL L. REV. 259, 261 (2006) (questioning whether AEDPA constituted a sharp change from prior practice); Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 793 (2009) ("In 99.99% of all state felony cases—excluding those cases in which the defendant is sentenced to death—the time, money, and energy spent on federal habeas litigation is wasted, generating virtually no benefit for anyone."); Justin F. Marceau, *Challenging the Habeas Process Rather Than the Result*, 69 WASH. & LEE L. REV. 85, 198–99 (2012) (describing these debates and calling for constitutional challenges to the AEDPA process).

[156] *See, e.g.*, Schlup v. Delo, 513 U.S. 298, 315–16 (1995) (recognizing miscarriage of justice exception to procedural default doctrine); 28 U.S.C. § 2244(b)(2)(B) (creating a narrow innocence-related exception to the second or successive petition restriction).

[157] *See* VANDERBILT-NCSC STUDY, *supra* note 76, at 9.

[158] This is of course striking because murders make up a comparatively small portion of violent crimes in any given year. Murder accounts for under 20,000 of the more than 1 million violent crimes in the United States in most years. *See 2018 Crime in the United States*, CRIM. JUST. INFO. SERVICES DIV., F.B.I., https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/murder [https://perma.cc/K9YY-36NJ] (last visited June 10, 2024).

[159] *See* Wrice v. Burge, 187 F. Supp. 3d 939 (N.D. Ill. 2015); Buffey v. Ballard, 782 S.E.2d 204 (W. Va. 2015).

burglary,[160] possession of stolen property,[161] distribution of controlled substances,[162] conspiracy to obstruct justice,[163] illegal gambling,[164] and wire fraud.[165] But of the 20 successful *Brady* claims in 2015, 9 were murder prosecutions.[166] The Table below describes the crime types across the entire group of 808 cases that we studied during the full five-year period.[167]

Table 11. Types of Crimes in Successful Brady Claims

	Total Cases (808)	*Brady* Violation Found (81)
Homicide/Attempted Homicide	320	42
Sex Crimes	90	6
Other Crimes against People	235	21
Crimes against Property	128	20
Drug Crimes/Narcotics	142	6
Motor Vehicle Crimes	25	1
Crimes involving Firearms	192	19
Financial Crimes	69	4
Other	105	9
Not Stated	2	0

At first glance, the most striking part of the "type of crime" data is both the large number of homicide and attempted homicide cases and how often *Brady* claims in those cases were successful. Of the 808 cases in our sample, 320 (or nearly 40%) involved homicide or attempted homicide cases. Homicides, of course, account for a fraction of the criminal offenses committed in the United States each year. Yet, they were an enormous percentage of the *Brady* claims we reviewed. Perhaps even more significant

[160] *See* Pherigo v. State, 475 S.W.3d 233 (Mo. Ct. App. 2015).

[161] *See* Comstock v. Humphries, 786 F.3d 701 (9th Cir. 2015).

[162] *See* United States v. Flores-Rivera, 787 F.3d 1 (1st Cir. 2015); United States v. Hampton, 109 F. Supp. 3d 431 (D. Mass. 2015).

[163] *See* United States v. Pasha, 797 F.3d 1122 (D.C. Cir. 2015).

[164] *See* United States v. Parker, 790 F.3d 550 (4th Cir. 2015).

[165] *See* United States v. Denunzio, 123 F. Supp. 3d 135 (D. Mass. 2015).

[166] There was also an attempted murder prosecution and an involuntary manslaughter case. In short, 11 of the 20 successful *Brady* claims for 2015 involved a homicide or an attempted homicide prosecution.

[167] Some cases, of course, involved more than one criminal offense. Thus, while we found 81 *Brady* violations and 808 paradigmatic cases in total, our data for types of offenses considerably exceeds these numbers.

is that in 42 of those 320 homicide cases—13%—courts found a *Brady* violation. Put differently, in 1 of every 8 homicide cases where the defendant raised a *Brady* claim, courts agreed the government had violated *Brady*.

That so many successful *Brady* claims should occur in homicide cases might seem disproportionate, but it should not be surprising. Murder cases are emotional and high stakes; they may create tunnel vision and lead otherwise neutral prosecutors and police to engage in aggressive tactics in an effort to convict the defendant.[168] Police officers and prosecutors who are deeply committed to procuring a conviction may engage in intentional misconduct or suffer from cognitive biases that inadvertently lead them to overlook *Brady* material.[169] Moreover, murder cases can be complicated and involve multiple law enforcement agencies, numerous officers, and considerable involvement by the crime laboratory.[170] There are therefore multiple opportunities for prosecutors to lose track of evidence and to accidentally fail to disclose favorable and material evidence known to other members of the law enforcement team.

The National Registry of Exonerations, for example, has highlighted the prevalence of prosecutorial misconduct issues in murder cases in its analysis of exonerations. The Registry's authors found that concealing exculpatory evidence was "the most frequent type of official misconduct among known exonerations" in the United States.[171] Further, concealing exculpatory evidence was most common in murder cases, constituting 61% (908 of 1296) of exonerations with any official misconduct.[172] And of course homicide cases will receive more scrutiny on appeal and post-conviction, perhaps also attracting more investigative resources, along with more consistent defense representation.

It is not just homicide cases where we found a huge number of *Brady* claims, but also cases involving death sentences. Of the 808 cases in our study, 91 (or 11%) involved death sentences. Even more notable was that 9

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[168] *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, WIS. L. REV. 291, 325–27 (2006).

[169] *See id.* at 351 ("Not only do cognitive biases make it unlikely that prosecutors (and judges) can envision a different outcome or appreciate the value of the withheld evidence, prosecutors situated as adversaries are not well-positioned to handle that task."); *see also* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1609–12 (2006) (discussing how confirmation bias and selective information processing can prevent prosecutors from recognizing their *Brady* obligations).

[170] *See* Brandon L. Garrett, *The Costs and Benefits of Forensics*, 57 HOUS. L. REV. 593, 604 (2020).

[171] GROSS ET AL., GOVERNMENT MISCONDUCT, *supra* note 82, at 66.

[172] *Id.*, at 81.

of the 81 successful *Brady* claims were found in death-penalty cases, even though death-penalty cases are relatively rare. In other words, 11% of successful *Brady* claims were in cases with death sentences.

Table 12. Death Sentences

	Total Cases (808)	*Brady* Violation Found (81)
Death Penalty Sentencing	91	9
No Death Penalty Sentencing	717	72

At first glance, the huge percentage of death-penalty cases would seem startling. There are more than one million state and federal felony convictions in the United States each year.[173] By contrast, the recent peak for death sentences in the United States was a little more than 300 per year in the 1990s. And the number of death sentences has declined dramatically since 2000, with fewer than 100 per year for the last decade.[174] Indeed, since 2015 there has not been a single year with more than 50 death sentences per year.[175] To put it in perspective, death sentences in the United States account .005% of felony convictions, but were 11% of the *Brady* violations in our study. How can this be?

First, even more so than "regular" murder cases, death-penalty cases are high-stakes and involve a considerable number of players. So there is simply more opportunity for prosecutors (or police) to intentionally or accidentally fail to disclose favorable evidence. This is consistent with findings from the National Registry of Exonerations, which found huge numbers of errors in capital cases and determined that 13% of murder exonerees were sentenced to death.[176]

Second, in capital cases, lawyers are typically assigned to handle post-conviction proceedings,[177] and those lawyers, one would expect, would be more likely than pro se defendants to uncover potential *Brady* violations and to properly preserve them for review. Third, and related, it stands to reason that appellate courts pay particularly close attention to the cases with the

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[173] William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2028 n.275 (2008).

[174] *Death Sentences in the United States Since 1977*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year [https://perma.cc/7XFM-5C34] (last visited June 10, 2024).

[175] *Id.*

[176] GROSS ET AL., GOVERNMENT MISCONDUCT, *supra* note 82, at 110 n. 193.

[177] *See* Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117, 142 (2010).

highest stakes. It is not surprising that our findings are consistent with other studies regarding prosecutorial misconduct and *Brady* violations in death penalty cases.[178]

K. MORE SUCCESSFUL *BRADY* CLAIMS INVOLVED IMPEACHMENT THAN EXCULPATORY EVIDENCE

The *Brady* doctrine requires the government to produce two types of favorable evidence: exculpatory evidence and impeachment material.[179] Evidence is exculpatory when it helps to show that a defendant is innocent of the criminal charges. For example, if an eyewitness identified someone other than the defendant (or if the eyewitness originally failed to identify the defendant but did so later), that would be exculpatory evidence. It is also exculpatory if forensic evidence suggested that the defendant did not have the genetic markers of the perpetrator. Any information suggesting an alibi, or a lack of involvement would also be exculpatory. The list of possibilities is vast.[180]

Impeachment evidence does not show a defendant to be innocent, but it does help the defendant's case by casting doubt on a witness's testimony. For instance, information that an eyewitness was not wearing her eyeglasses or that she had a prior conviction for perjury would be impeachment evidence.[181]

In some instances, *Brady* material can be both exculpatory and impeachment evidence at the same time. For example, in one case the government failed to turn over evidence that the key witness had initially told the police that he had not been at the crime scene and that his story changed only after the police told him that they would let him go if he gave a detailed statement implicating others.[182] This evidence was exculpatory (because it cast doubt on evidence linking the defendant to the crime) and impeachment (because it showed the witness had changed his story).[183] Our review of successful *Brady* claims showed that there were more cases involving impeachment evidence but that the number of cases involving exculpatory evidence was not far behind.

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[178] *See Misconduct Reversals and Exonerations by Type and Defendant*, *supra* note 86; LIEBMAN ET AL., *supra* note 85.

[179] Giglio v. United States, 405 U.S. 150, 154–55 (1972).

[180] *See* EDWARD A. RUCKER & MARK E. OVERLAND, EXCULPATORY EVIDENCE—POINTS AND AUTHORITIES, 1 CAL. CRIM. PRACTICE: MOTIONS, JURY INSTR. & SENT. § 15:49 (4th ed.).

[181] *Id.*

[182] Lewis v. Connecticut Comm'r of Corr., 790 F.3d 109, 114–15 (2d Cir. 2015).

[183] *See id.* at 124 ("As the district court concluded, Sweeney's testimony was clearly exculpatory under *Brady* or impeachment material under *Giglio,* if not both.").

Table 13: Exculpatory, Impeachment, or Both[184]

	Total Cases (808)	*Brady* Violation Cases (81)	No *Brady* Violation Cases (727)
Exculpatory	166	28	138
Impeachment	250	39	211
Both	49	15	34
Neither	143	0	143
Not Stated	232	5	227

We were also interested in how many types or pieces of evidence were alleged to have been suppressed in *Brady* claims. Sometimes these are denominated as separate claims, and other times courts discuss a series of suppressed items as a single claim. Most of the claims involved a single piece of evidence. The numbers decline, with fewer and fewer cases involving multiple pieces of evidence, as shown below in Table 14.

Table 14. Number of Pieces of Evidence in Brady Cases

	Total Cases (808)	*Brady* Violation Cases (81)	No *Brady* Violation Cases (727)
One	650	63	587
Two	72	6	66
Three	46	10	36
Four	16	1	15
Five	9	1	8
Six	5	0	5
Seven	1	0	1
Eight	1	0	1
Fifty	1	0	1
Not Stated	7	1	6

[184] Numbers in this chart add up to more than 808 *Brady* claims and more than 81 *Brady* violations. The reason is that some cases involve multiple pieces of evidence.

L. SUCCESSFUL *BRADY* CLAIMS OFTEN INVOLVED IMPEACHMENT INFORMATION ABOUT KEY PROSECUTION WITNESSES

Brady evidence can take many forms. To provide a snapshot of the types of evidence involved, our 2015 cases (which are representative of other years) involved crime lab misconduct, DNA evidence, exculpatory notes from investigators' files, and multiple instances of police brutality that suggested coerced confessions. However, the most common type of *Brady* evidence—by far—was information about testifying witnesses. Prosecutors failed to turn over information about deals with cooperating witnesses, inconsistent statements from witnesses, and prior misconduct by witnesses.

In 5 of the 20 successful *Brady* claims from 2015, prosecutors failed to turn over evidence about government assistance to key witnesses. In one case, prosecutors failed to turn over a sticky note indicating that a prior prosecutor had intervened to help block a witness from having their community supervision revoked.[185] In another case, the prosecution did not disclose that a witness received favorable treatment for drug charges on which she had recently been arrested.[186] In yet another case, the prosecutor told the defendant that a warrant and charge for violation of probation were pending against a witness, when in fact they had been dismissed at prosecutor's request prior to trial.[187] In a fourth case, the prosecutor had provided assistance to the key witness in exchange for testimony while repeatedly maintaining at trial that there had been no such assistance.[188] In the final case, prosecutors did not inform the defendant accused of first-degree murder that they had reached a plea deal with another defendant/witness suffering from psychiatric issues. The prosecutor believed a psychiatric examination of the witness before trial would "supply ammunition to the defense" so the witness's lawyer agreed to refrain from a psychiatric examination in exchange for having murder charges dropped against the witness.[189] The defendant was never informed of the deal or the concerns that the witness was suffering from psychiatric issues.[190]

In four of the 2015 cases, prosecutors failed to turn over inconsistent statements from a key witness.[191] For instance, in one case a key witness

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[185] State *ex rel.* Okla. Bar Ass'n v. Ward, 353 P.3d 509, 518 (Okla. 2015).

[186] Reynolds v. State, 236 So. 3d 189, 199 (Ala. Crim. App. 2015).

[187] Starling v. State, 130 A.3d 316, 323-24 (Del. 2015).

[188] Powell v. Miller, 104 F. Supp. 3d 1298, 1308 (W.D. Okla. 2015).

[189] Shelton v. Marshall, 796 F.3d 1075, 1082 (9th Cir. 2015).

[190] *Id.*

[191] *See, e.g.*, Comstock v. Humphries, 786 F.3d 701 (9th Cir. 2015); Danforth v. Chapman, 771 S.E.2d 886 (Ga. 2015); Lewis v. Connecticut Comm'r of Correction, 790 F.3d 109 (2d Cir. 2015); United States v. Pasha, 797 F.3d 1122 (D.C. Cir. 2015).

"repeatedly denied to the police that he was at the murder site and that he knew anything about the murders."[192] He changed his story, however, after the detective "provided critical details about the case," told the witness that it was "in his best interest" to give a detailed statement implicating the other defendants, and said that the detective would "'let [the witness] go' if he did so."[193] In another three cases, prosecutors did not disclose information about witnesses that would have cast doubt on their truthfulness. For instance, prosecutors failed to disclose a gushing letter from one cooperating witness that described himself as "the best cooperator" and promised "to do everything [the prosecutor] said."[194] In another case, prosecutors failed to disclose that a witness was under investigation by the SEC.[195] In a third case, prosecutors failed to disclose that they had re-opened a burglary investigation into a key witness.[196]

It is startling that half of the successful *Brady* cases from 2015 involved witness plea deals or other information that called into doubt the testimony of key witnesses. One possible explanation is that prosecutors have not been sufficiently trained or conditioned to be on the lookout for impeachment evidence. Indeed, as discussed, the Supreme Court has specifically held that prosecutors are not obligated to disclose impeachment evidence before a defendant pleads guilty.[197] Given that most defendants plead guilty,[198] it is possible that prosecutors are simply not devoting enough attention to impeachment evidence when cases fail to settle and instead go to trial.

M. UNSUCCESSFUL *BRADY* CLAIMS WHERE FAVORABLE EVIDENCE WAS NOT DISCLOSED

Much can also be learned from the large set of unsuccessful *Brady* claims. In particular, scholars have long wondered: Are courts rejecting *Brady* claims because they are entirely frivolous? Or are courts rejecting claims because, while prosecutors withheld favorable evidence, that evidence was not persuasive enough to be material to the outcome? The latter situation is obviously much concerning than the former, particularly if courts have a cramped view of materiality. As explained in Part I, to demonstrate a *Brady* violation, the petitioner must demonstrate that the withheld evidence was

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192 *See Lewis*, 790 F.3d at 124.

193 *See id.*

194 United States v. Flores-Rivera, 787 F.3d 1, 12 (1st Cir. 2015).

195 United States v. Parker, 790 F.3d 550, 556 (4th Cir. 2015).

196 Barton v. Warden, S. Ohio Corr. Facility, 786 F.3d 450, 465 (6th Cir. 2015).

197 United States v. Ruiz, 536 U.S. 622, 629 (2002).

198 *See* Missouri v. Frye, 566 U.S. 134, 143 (2012).

both favorable and material.[199] Courts can reject a *Brady* claim by finding either prong lacking. To date, we have had little knowledge about why courts reject so many *Brady* claims. Our new data shows that courts frequently decide cases solely based on the materiality prong.

We examined the 714 cases in which at least one piece of evidence was found to not support a finding of a *Brady* violation.[200] In a minority of these cases, 9% (65 of 714) the evidence was favorable, but not found to be sufficiently material or prejudicial to the defense. In other words, courts believed the evidence could have been helpful to the defendant at trial, but looking retrospectively at the case the courts did not believe it would have changed the outcome of the case (from guilty to not guilty) had the prosecutor turned it over to the defense. Some of these 65 cases involved serious prosecutorial and police misconduct, but it was not deemed harmful enough to justify reversing the conviction.

For instance, in a 2019 case the government failed to disclose that police made three cash payments totaling $400 to a testifying witness, including one payment "the day after the trial concluded."[201] The Eighth Circuit found that the cash payments were not material because the defendant's conviction did not hinge on the testimony of that witness.[202] Then, remarkably, the court added that the cash payments were not concerning because $400 was a small amount of money and that "we have held that undisclosed payments of $2,000 from law enforcement to a witness were not material, where there was no evidence that the payments gave the witness an incentive to testify."[203] The court noted that the prosecution case did not "hinge" on the witness's testimony, and further, did not find this information as sufficiently "devastating," given that prior courts had been unconcerned about the payment of thousands of dollars.[204]

Another example from 2019 involved a drug case in which the defendant allegedly consented to a search that turned up the evidence against him.[205] Following trial, it became clear that the officer who testified about consent being given had been "indicted for aggravated perjury due to allegations that he had testified falsely in other criminal cases."[206] The court

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[199] *See supra* Part I.A.

[200] Some cases had more than one piece of evidence and sometimes treated different pieces of evidence differently.

[201] United States v. Dones-Vargas, 936 F.3d 720, 722 (8th Cir. 2019).

[202] *Id.* at 723.

[203] *Id.*

[204] *Id.* at 722–23.

[205] *See Ex parte* Lalonde, 570 S.W.3d 716, 720 (Tex. Crim. App. 2019).

[206] *Id.* at 721.

found that this favorable evidence was immaterial because other officers had also testified that the defendant consented.[207] The court seemed unconcerned about the well-documented "blue wall of silence"—the "unwritten code in many departments which prohibits disclosing perjury or other misconduct by fellow officers."[208] Put bluntly, the court's cramped view of the materiality prong made it possible for the judges to ignore that the defendant was convicted based on the testimony of an officer under indictment for aggravated perjury.

Or consider a 2018 case in which the court found that the government's secret deal with a key witness—the driver who picked up the murder defendant from the crime scene—was not material.[209] The prosecution failed to disclose that it treated the crucial witness "more favorably at sentencing . . . because of his testimony against [the murder defendant]."[210] The court found the withheld evidence to be immaterial, in part, because the witness "was successfully impeached by the defense at trial" for lying to the police when he was originally picked up for the crime.[211] As such, "further impeachment would be unlikely to have an effect on the outcome of the case."[212] The court never explained why a secret deal to give leniency to the witness who placed the defendant at the crime scene would not be material, in light of the already-concerning impeachment.

In a larger group of cases, (199 of 714 cases, or 28%), the court found the evidence immaterial without discussing favorability. Again, this is a large group of cases, far larger than the 81 cases in which *Brady* claims were granted. The materiality prong is thus doing a great deal of work in this entire body of cases. Yet, on its face, the materiality standard should not be unduly demanding. It requires a showing of a "reasonable probability" of a different outcome at trial, and not a preponderance or more likely than not.[213] Nevertheless, the inquiry is contextual and requires a review of the suppressed evidence "in the context of the entire record."[214] Thus, in the one Supreme Court case in our sample, the Court concluded that, given that

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[207] *See id.* at 726.

[208] Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 237 (1998).

[209] *See* Campbell v. State, 916 N.W.2d 502, 510–11 (Minn. 2018).

[210] *Id.* at 510

[211] *Id.* at 511.

[212] *Id.*

[213] United States v. Dominguez Benitez, 542 U.S. 74, 82 (2004); *see also* United States v. Bagley, 473 U.S. 667, 682 (1985).

[214] United States v. Agurs, 427 U.S. 97, 112 (1976).

context, the evidence in question was "too little, too weak, or too distant from the main evidentiary points to meet *Brady*'s standards."[215]

Another large group of cases (393 of 714, or 55% of these cases) concluded that the evidence was in fact not suppressed. In 387 cases, favorability and materiality were not discussed or were not found. In an additional 6 cases, the evidence was deemed favorable and material, but found to not have been withheld.

Table 15: Brady Claims Rejected Even Though Evidence Was Favorable or Favorability Was Not Assessed

Prongs of *Brady* Test Analyzed Before Rejecting Claim	Instances Where Courts Analyzed At Least One Piece of Favorable Evidence but rejected the *Brady* claim (714)
Claim Rejected Because Evidence Was Found to Be Favorable But Not Material	65
Claim Rejected Because Evidence Was Immaterial, With No Analysis of Whether It Was Favorable	199
Claim Rejected for Other Reasons, Including that Evidence Was Neither Favorable Nor Material	393

What does this data tell us? At minimum, it shows that—in addition to the 81 *Brady* violations we found—there were 65 additional instances in which prosecutors failed to turn over favorable evidence to the defense. While not a *Brady* violation, these cases are concerning as they could involve prosecutors making a lucky guess that the evidence would not change the outcome of the case. These cases are also concerning because some of them involve instances in which well-intentioned prosecutors failed to recognize favorable evidence. Moreover, the problem may be greater; in the 199 cases where courts disposed of the *Brady* claim solely based on the immateriality prong, we have no idea whether the evidence was favorable.

N. JUDGES RARELY FORMALLY OR INFORMALLY SANCTION PROSECUTORS FOR *BRADY* VIOLATIONS

Scholars have raised alarm bells about *Brady* violations and urged judges to do more than simply reverse convictions. In particular, scholars

[215] Turner v. United States, 582 U.S. 313, 326 (2017).

have encouraged judges to refer prosecutors to the bar so that they can be disciplined for failing to turn over *Brady* material.[216] Academics have also called on judges to shame prosecutors by publicly naming the prosecutors who engaged in *Brady* violations.[217] They, along with reformers, have suggested that judges use their bully pulpits to point out violations of the ethics rules and to castigate prosecutors for unethical behavior when they have committed *Brady* violations.[218] Finally, one of us has suggested that trial judges go further and use their inherent authority to impose additional training requirements on prosecutors to prevent *Brady* violations.[219] In short, academics and activists have suggested that judges have robust tools to impose costs on prosecutors (beyond simply reversing convictions) for *Brady* violations. Unfortunately, our study indicates that judges are doing no such thing.

1. Judges Rarely Castigated Prosecutors for Failing to Fulfill Their Ethical Obligations

Prosecutors are subject to specific rules of professional responsibility. In particular, Model Rule of Professional Conduct 3.8(d), which has been adopted by many states,[220] provides that prosecutors shall "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense."[221] As such, when judges reverse cases for *Brady* violations—particularly when it was the prosecutors, rather than the police, who knew about and withheld the evidence—one would expect courts to mention the ethics rules and to chide the prosecutors for possibly running afoul of those

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[216] *See, e.g.*, Kenneth Williams, *The Death Penalty: Can it be Fixed?*, 51 CATH. U. L. REV. 1177, 1200 (2002) ("Prosecutors should be named in court opinions finding prosecutorial misconduct and judges should automatically refer their names to state bar disciplinary committees."); *see also* Johnson, *supra* note 3, at 362 ("Legal commentators have observed that if prosecutors were sanctioned more frequently, the instances of *Brady* violations would decrease.").

[217] *See* Bazelon, *supra* note 70; Gershowitz, *Prosecutorial Shaming*, *supra* note 12.

[218] For instance, Professor Jason Kreag has argued that judges should write a *Brady* Disclosure Letter—"a concise and clear statement explaining the *Brady* misconduct" that should be distributed to "the victim, jurors, witnesses, prosecution and defense attorneys, and the law enforcement officers who investigated the crime" as well as "the heads of various agencies, including the elected prosecutor, public defender, police chief, sheriff, and directors of any victims' rights organization in the community." Kreag, *supra* note 13, at 322.

[219] *See* Gershowitz, *Race to the Top*, *supra* note 71.

[220] *See* Cassidy, *supra* note 25, at 1452 ("Most states have enacted attorney conduct rules fashioned after ABA Model Rule 3.8(d)."); Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 427, 435–36 (2009) (same).

[221] MODEL RULES OF PRO. CONDUCT r. 3.8(d) (Am. Bar. Ass'n 1983).

rules.[222] Yet, this rarely happens. In only 14 cases out of the 808 we reviewed did courts specifically reference the professional ethics rules, such as Model Rule of Professional Conduct 3.8(d), that bind prosecutors. Half of those cases involved *Brady* claims that were not sustained. That means that in only 7 of the 81 cases where judges found a *Brady* violation did they note that the prosecutor violated the ethics rules.

In short, even though there is a rule of professional responsibility specifically directed at prosecutors' obligation to disclose evidence, courts rarely mention the rule or even discuss ethics issues generally. Perhaps most shocking, discussion of Rule 3.8(d) or even just general condemnation is typically absent even when courts find *Brady* violations and reverse convictions.

2. A Court Referred the Prosecutor to the Bar for Possible Disciplinary Action in Only 1 Out of the 808 Brady Claims We Studied

Legal scholars have long lamented the small numbers of prosecutors disciplined by state bars for prosecutorial misconduct.[223] Academics have advocated for judges to be more aggressive in referring prosecutors to the Bar and have called on judges to openly state in judicial opinions that they are doing so.[224] We therefore reviewed each case in which a *Brady* violation was alleged to see if judges made a statement about referring prosecutors to the Bar for potential discipline. We expected to see a small number of referrals, but the number was even smaller than we expected: just one.

In our review of 808 *Brady* cases, the court only once stated that it was referring a prosecutor to the Bar. In that case the defendant alleged multiple types of prosecutorial misconduct, including a *Brady* violation, improperly commenting on the defendant's choice not to testify, repeatedly seeking to elicit inadmissible testimony, as well as the prosecutor engaging in rude and intemperate behavior. The court concluded that the alleged misconduct did not create a basis for reversal; in other words, the court did not find a *Brady* violation. But perhaps because the case involved not just a *Brady* violation but other types of prosecutorial misconduct as well, the court agreed with the defendant that the prosecutor had behaved unprofessionally. Without any

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[222] As scholars have recognized, "[s]tate ethics rules based on Model Rule 3.8(d) potentially impose obligations beyond the federal constitutional requirements." Ellen Yaroshevsky, *Prosecutorial Disclosure Obligations*, 62 HASTINGS L.J. 1321, 1326 (2011). Given the potential breadth of Rule 3.8(d) and its wide adoption, one would expect it to be discussed widely by courts when credible *Brady* allegations have been raised.

[223] *See generally* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 720 (1987).

[224] *See* Williams, *supra* note 216, at 1200.

fanfare, the court simply said, "[t]he clerk of this court is directed to forward a copy of this opinion to the California State Bar for review and further proceedings, if appropriate."[225]

Another way to look at the data is that courts did not state that they were referring a case to the Bar for professional discipline in any of the 81 cases in which they found a *Brady* violation. *None*. This is particularly concerning, because prosecutors were responsible for at least 55 of the 81 *Brady* violations[226] and many of those violations were the result of serious and intentional misconduct.[227]

For instance, in one case, the prosecutor withheld a material part of its agreement with a key witness.[228] In another case, the prosecutor knew and failed to disclose that the detective who had procured the defendant's confession (the main evidence in the case) was the subject of an internal affairs investigation and a federal lawsuit for procuring a false confession in a different case.[229] In a third case, the court found that a prosecutor was "personally present at an interview in which a witness gave a scene-of-the-crime account that, if credited, would contradict the identity" of the defendant yet "waited over eight months until the eve of trial to reveal this information."[230]

Despite clear prosecutorial misconduct, none of the judges in these cases specifically stated that they were referring any of those prosecutors to the Bar. Courts were willing to reverse the convictions but not willing to alert the Bar that discipline or license revocation might be appropriate.

Even more dispiriting, we found cases where courts intervened to prevent lawyers from suffering disciplinary sanctions. In one case, a Bar Disciplinary Board recommended sanctioning an Assistant United States Attorney for "intentionally failing to disclose to the defense any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused."[231] Even though the appellate court faulted the prosecutor, it nevertheless reversed the 30-day suspension that the disciplinary board had recommended.[232]

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[225] People v. Poletti, 240 Cal. App. 4th 1191, 1217 (Cal. Ct. App. 2015).

[226] *See supra* Part II.D, Table 3.

[227] *See supra* Part II.E.

[228] Shelton v. Marshall, 796 F.3d 1075, 1088 (9th Cir. 2015).

[229] People v. Hubbard, 132 A.D.3d 1013, 1013–14 (N.Y. App. Div. 2015).

[230] United States v. Pasha, 797 F.3d 1122, 1133 (D.C. Cir. 2015) (describing the delayed disclosure as "inexcusable").

[231] *In re* Kline, 113 A.3d 202, 204 (D.C. 2015).

[232] *See id.* at 215–16.

Our review of *Brady* cases thus confirms what scholars have long speculated: judges rarely refer prosecutors to the Bar for discipline.[233] It is therefore not surprising that prosecutors rarely face discipline from ethics bodies.[234]

3. Judges Almost Never Demand, or Even Suggest, More Training to Avoid Brady Violations

Courts have inherent power to regulate their courtrooms. Judges can deny pro hac vice motions, impose contempt sanctions, and ban people from their courtrooms.[235] In a few high-profile cases that occurred outside the time window of our study, judges relied on their inherent authority to mandate training. For example, a federal judge in the Southern District of New York became very angry after federal prosecutors belatedly turned over *Brady* material and seemingly attempted to hide it in the middle of other documents. The judge then ordered every federal prosecutor in Manhattan to read the decision criticizing these prosecution *Brady* failures.[236]

Judges have a plausible legal basis to require that prosecutors appearing before them undergo *Brady* training.[237] And, of course, judges have every right to make a non-binding recommendation that prosecutors' offices provide additional *Brady* training to line prosecutors. Yet, judges practically never talk about the need for more training on *Brady* compliance.

Of the 808 *Brady* cases we reviewed (including 195 where a piece of evidence was suppressed, and 81 of those cases where courts found *Brady* violations), judges only *once* said anything about the need for prosecutors to have more training. And even then, the court only blandly noted that "[t]he

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[233] *See* Bazelon, *supra* note 70, at 319–20.

[234] *See* Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 754 (2001) ("Discipline for lawyering in criminal cases—whether for violations by prosecutors *or* defense attorneys—is quite rare.").

[235] *See* Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory*, 56 VAND. L. REV. 1303, 1343–46 (2003) (discussing judges' inherent authority to regulate federal proceedings).

[236] Debra Cassens Weiss, *Incensed Judge Orders Every Federal Prosecutor in Manhattan to Read Her Decision*, ABA J. (Sept. 17, 2020, 2:53 PM), https://www.abajournal.com/news/article/incensed-judge-orders-every-federal-prosecutor-in-manhattan-to-read-her-decision [https://perma.cc/M8VW-NYTM]. A judge in Texas initially went further by ordering thousands of federal prosecutors to attend a legal ethics course after concluding that prosecutors had lied to the court during litigation arising from the Deferred Action for Childhood Arrivals litigation in a federal court in Brownsville, Texas. The Justice Department contested the order and the judge eventually backed down and withdrew the training requirement. *See* Gershowitz, *Race to the Top*, *supra* note 71 at 1192–93.

[237] For a description of the legal basis for this contention, *see* Gershowitz, *Race to the Top*, *supra* note 71.

United States Attorney's Office should develop procedures to avoid repeating the lapses that occurred in these cases." [238] The court did not demand more training. It did not suggest CLE classes, or in-house exercises, or bringing in outside experts to teach prosecutors how to comply with their *Brady* obligations. The court did not even "strongly encourage" training. It blandly remarked that the United States Attorneys' Office "should develop procedures."[239] The word "should"—as we all know from our dentist telling us we should floss every day—is easy to ignore. And yet this tepid statement was the only judicial call for additional training. The other 807 cases said not a word.

4. Judges Avoid Naming the Prosecutor Who Engaged in the Brady Violation

When courts reverse convictions for prosecutorial misconduct reflecting concealment of exculpatory information known to prosecutors, it would seem logical that they would identify the name of the prosecutor who had engaged in the misconduct, at least if there was a finding of intentional misconduct. Yet, courts across the country—including the U.S. Supreme Court—sometimes omit the prosecutors' names from the judicial opinion when they reverse cases for *Brady* violations.[240] Worse yet, some courts will quote from the trial transcript and actively redact the name of the prosecutor so as not to identify the person by name.[241] Scholars have documented this practice through small studies and anecdotal examples, but not through large-scale analysis.[242]

Our data confirms that courts often avoid naming the prosecutors who commit *Brady* violations.[243] Our five-year study yielded 195 cases in which

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[238] United States v. Ramos-Gonzalez, 775 F.3d 483, 494 (1st Cir. 2015).

[239] *Id.* The existing federal guideline, which may be far more detailed than in many local prosecution offices, does require training for all new federal prosecutors, and notes that paralegals are "also encouraged to undertake periodic training," as well as to provide training to law enforcement agencies. U.S. Dep't of Just., Just. Manual § 9-5.001(E) (2020) ("All new federal prosecutors assigned to criminal matters and cases shall complete, within 12 months of employment, designated training through the Office of Legal Education on *Brady/Giglio*, and general disclosure obligations and policies.").

[240] *See* Gershowitz, *Prosecutorial Shaming*, *supra* note 12, at 1067–69.

[241] *See id*. at 1069–70.

[242] *See id.* at 1069–70 (reviewing twenty-six *Brady* reversals in capital cases between 1997 and 2007).

[243] There are other shaming approaches besides identifying prosecutors in writing in judicial opinions. Professor Lara Bazelon has observed that "some federal appellate judges have attempted to publicly shame prosecutors into dismissing AEDPA-governed habeas cases that they cannot put an end to themselves." Bazelon, *supra* note 70, at 334.

courts found that a piece of evidence had been suppressed. (Not all of these cases amounted to a *Brady* violation, typically because the evidence was not material.) Of the 195 cases, courts named the actor responsible for suppressing the evidence in only 34 cases (18%). In almost all of those cases—28 of 34—courts indicated that it was a single person who was responsible for not disclosing the evidence, but in 6 cases courts listed multiple people who failed to disclose. In naming the actors, courts pointed the finger at prosecutors most often (18), followed closely by police (13). In one case, the court identified the medical examiner's name, and in two cases—including the infamous Annie Dookhan case—the court listed the names of lab technicians.

Table 16. Courts Name the Actors Who Withheld Brady Material

	Cases With Undisclosed Favorable Evidence (195 Total)
No person named for withholding the evidence	161
Prosecutor named	18
Police named	13
Lab Technician named	2
Medical Examiner named	1

The most remarkable finding here, of course, is that in 159 of the 195 cases where courts found that evidence was suppressed (82%) the courts did not identify the responsible actor by name. A second finding is that courts seemed more willing to shield the names of prosecutors than police officers. Recall the findings in Part II.D that in 65% of cases involving failure to disclose favorable evidence it was prosecutors who were deemed responsible (127 cases). Now look again at Table 16 above. Only 18 prosecutors were named. This means only 14% (18 of 127) of prosecutors were named when explicitly implicated. By contrast, police were held accountable for suppressing evidence in 26 cases (13% of the 195 cases where evidence was deemed suppressed) and 13 police officers were named. That means 50% (13 out of 26), or 1 in 2 police officers, if implicated, were named.

There are two possible explanations for courts naming police more often. First, perhaps judges name actors only in egregious cases and perhaps police are at fault more often in egregious cases. This theory is belied by the fact that courts named prosecutors and police in a similar percentage of cases

where the courts declined to find a *Brady* violation.[244] A second and far more plausible explanation is that judges (many of whom are former prosecutors) have a soft spot for fellow lawyers and are therefore less willing to call out prosecutors by name for fear of damaging their careers. Judges may even subconsciously shield prosecutors from being named.

Indeed, in some cases we reviewed, courts seemed to go to great lengths to avoid identifying the names of the prosecutors. For instance, in one short six-page opinion the court used the phrase "the prosecutor" a dozen times rather than specifying the actual name of the lawyer.[245] In another case, the court identified the police officers by name, but when it came time to describe the officers' interactions with the prosecutor, the court described a "conversation with the Prosecuting Attorney's Office."[246] That phrase is, of course, grammatically incorrect because it is not possible to have a conversation with an office. It would have been simpler to identify the prosecutor by name, but the court avoided doing so.

Even when courts include a prosecutor's name, they appear to take steps to avoid repeating it. For instance, in one case, the government failed to turn over a letter from a cooperating witness that amounted to *Brady* material. The letter from the witness had been addressed to "The Prosecutor Dina Avíla Jímenez" and the court did not redact her name when excerpting the letter.[247] Yet, in every subsequent reference to the alleged prosecutorial misconduct—more than a dozen times—the court spoke of "the prosecutor" rather than identifying her by name. In one instance, the court quoted from the lower court opinion but went to the trouble of redacting the reference to Avila's name and replacing it with "the prosecutor."[248]

In sum, and consistent with prior research, our data demonstrates that judges are typically unwilling to publicly chastise prosecutors for *Brady* violations.[249]

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[244] Of the eighteen cases in which prosecutors were named for failing to disclose favorable, thirteen (or 72%) were found to be *Brady* violations. For cases where police were named it was eighteen of thirteen cases (or 69%). One case lists both prosecutors and police and is therefore counted twice, Fontenot v. Allbaugh, 402 F. Supp. 3d 1110 (E.D. Okla. 2019). Both this case and another case list multiple police officers, Avery v. City of Milwaukee, 847 F.3d 433 (7th. Cir. 2017).

[245] *See generally* Danforth v. Chapman, 771 S.E.2d 886 (Ga. 2015).

[246] Buffey v. Ballard, 782 S.E.2d 204, 219 (W. Va. 2015).

[247] United States v. Flores-Rivera, 787 F.3d 1, 12 (1st Cir. 2015).

[248] *Id.* at 14.

[249] *See supra* Part I.C.

III. A Systematic View of *Brady* Violations

In this Part, we turn to the systematic and policy implications of our data. We discuss our critique of how judges resolve *Brady* claims, implications for judicial practice, and what these data suggest regarding the problem of prosecutorial misconduct more broadly. In particular, a range of prophylactic policy recommendations flow from these findings. These include the need for stricter enforcement of the ABA Model Rules; open file discovery; certification of compliance with *Brady* before a plea or trial, and far more formal internal self-regulation and judicial review of systemic errors. Other creative institutional remedies should also be considered, including enhancing civil rights remedies for *Brady* violations and prosecutorial and police oversight boards.

A. A MUTED AND WEAK JUDICIAL RESPONSE TO *BRADY*

As Part II demonstrated, the judicial response to the *Brady* problem is extremely tepid. Judges rarely engage in a substantial discussion of prosecutors' failure to comply with the ethics rules or vocally condemn the prosecutors' conduct. Judges almost never refer prosecutors to the Bar for discipline. And courts have not invoked their legal authority to demand that the prosecutor's office provide more *Brady* training (or even their moral authority to recommend more training). Judges even seem to avoid using the name of the prosecutor in some judicial opinions.

There are reasons to suspect that changes in federal habeas doctrine may explain why only one-third of the successful claims appear in federal court, as discussed. Most problematically, it is extremely difficult to introduce new evidence in federal habeas proceedings, given the highly restrictive interpretations of the relevant statutes adopted by the U.S. Supreme Court.[250] Further, some courts have imposed new restrictions. Several federal courts of appeals, for example, now ask whether a lawyer with due diligence should have been able to uncover suppressed evidence on their own.[251]

To be sure, there are isolated cases in which judges become palpably upset at prosecutors' conduct and let them know it. For instance, the Sixth Circuit said: "*Brady* requires the State to turn over all material exculpatory and impeachment evidence to the defense. It does not require the State simply to turn over some evidence, on the assumption that defense counsel will find the cookie from a trail of crumbs."[252] The D.C. Circuit stated that "[t]he prosecution's behavior [was] . . . deeply disappointing and troubling

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[250] *See supra* Part II.I.

[251] *See* Weisburd, *supra* note 131.

[252] Barton v. Warden, S. Ohio Corr. Facility, 786 F.3d 450, 468 (6th Cir. 2015).

behavior, unbefitting those who litigate in the name of the United States."[253] Other courts have criticized the "blatantly obvious" failure to disclose *Brady* material,[254] or the "bad faith" effort "to impede the defense" though the petitioner was not required to demonstrate bad faith.[255] One court remarked that it "will not countenance such a careless attitude toward [the government's] obligations to identify evidence favorable to the defendant."[256] Another court criticized prosecutors for such a "tawdry episode [that] casts doubt on how much we judges can rely on [prosecutor's representations]."[257] And a Louisiana court criticized the New Orleans District Attorney's Office for the "storied, shameful history of the local prosecuting authorities' noncompliance with *Brady*."[258]

Such strong language is a rarity though. In most cases where courts criticized prosecutors and police, they used far more tepid language. An Illinois court expressed "disappointment" in "the State's minimal effort to comply with its discovery obligations."[259] A California court said that "we [do not] condone the prosecution's conduct."[260] Other courts have called prosecutors' failure to disclose *Brady* material "regrettable"[261] in the same way that one might react to a child who has failed to clean their room.

And, of course, in most cases the judicial opinions fail to even criticize the prosecutors or police at all. The judges simply work their way through the legal analysis, assessing favorability and materiality questions in a clinical and detached way as if they were working out a math problem in search of a right or wrong answer. While judges have demands on their dockets, these opinions typically contain some fairly detailed analysis of the relevant *Brady* doctrine, and yet, within those pages, moral approbation for suppressing favorable evidence is typically absent.

B. THE ROLES OF POLICE AND PROSECUTORS

The *Brady* doctrine requires the prosecutor to turn over all favorable evidence in the possession of the prosecution team, which includes the police and the crime lab. Failure to disclose is still a *Brady* violation even if the prosecutor had no knowledge of it. As the Supreme Court explained in *Kyles*

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253 United States v. Straker, 800 F.3d 570, 603–04 (D.C. Cir. 2015).
254 State v. Serigne, 193 So. 3d 297, 318 (La. Ct. App. 2016).
255 United States v. Salazar, 317 F. Supp. 3d 935, 939 (W.D. Tex. 2018).
256 United States v. Frazier, 203 F. Supp. 3d 1128, 1135 (W.D. Wash. 2016).
257 United States v. Cestoni, 185 F. Supp. 3d 1184, 1193 (N.D. Cal. 2016).
258 State v. Wells, 191 So. 3d 1127, 1139 (La. Ct. App. 2016).
259 People v. Carballido 2015 IL App (2d) 140760 ¶ 76.
260 People v. Lewis, 192 Cal. Rptr. 3d 460, 467 (Cal. Ct. App. 2015).
261 Socha v. Richardson, 874 F.3d 983, 990 (7th Cir. 2017).

v. Whitley, "the 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."[262] Thus, from the court and the defendant's perspective, it makes no difference who was "responsible" for the evidence not being disclosed. However, scholars and reformers should have information about where the problems on the prosecution team occur so that supervisors in the prosecutors' offices and police departments can set up better systems and training to avoid *Brady* violations in the future. For that reason, judges should discuss fault when examining alleged *Brady* violations, or at least when discussing the meritorious *Brady* claims.

The most important question is whether the prosecutors could have designed a system to avoid the *Brady* violations committed by other members of the prosecution team. In some cases, the answer appears to be yes. Consider a murder case from our study. The police canvassed an apartment complex to interview residents and the officers wrote their notes on index cards. One of the cards indicated that an apartment was vacant, yet the key witness later told the police that he had seen the perpetrator from that apartment. Had the police gathered up the cards and provided them to the prosecutor to review, the prosecutor testified that he "would have investigated the discrepancy had he possessed the information."[263] If the prosecutor's office had a better procedure in place to make sure that all documents from the police department were reviewed by the trial prosecutor, the *Brady* material would have been turned over.

In the other cases, however, there is nothing the prosecutor could have done to discover the *Brady* evidence because the police had engaged in intentional misconduct that they never would have admitted to the prosecutors. For instance, in one case the state's key witness "repeatedly denied to the police that he was at the murder site and that he knew anything about the murders."[264] He only implicated the defendant after a police officer told him to change his story and promised to let him go if he did.[265] In an even more egregious case, prosecutors were unaware that two police officers had tortured a suspect to get him to confess.[266]

In sum, improved communication between police and prosecutors and more comprehensive procedures could head off some *Brady* violations before they happen. But in other cases – those where police engage in

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[262] Kyles v. Whitley, 514 U.S. 419, 437 (1995).

[263] Manning v. State, 158 So. 3d 302, 306 (Miss. 2015).

[264] Lewis v. Connecticut Comm'r of Corr., 790 F.3d 109, 124 (2d Cir. 2015).

[265] *Id*.

[266] Wrice v. Burge, 187 F. Supp. 3d 939, 951 (N.D. Ill. 2015).

intentional misconduct – it is hard to imagine a procedure that could help prosecutors to prevent *Brady* violations.

C. THE PREVALENCE OF PROSECUTORIAL MISCONDUCT

We know that the cases we examined represent just the tip of a much larger iceberg, where the true scope of *Brady* violations remains unknowable and hidden.[267] Indeed, some of the cases in which *Brady* claims resulted in relief are well-known cases in which larger numbers of other cases were investigated and were known to have been affected by a pattern of misconduct. At the same time, there have also been large-scale scandals regarding police and prosecutorial misconduct that have not resulted in written judicial opinions or successful relief regarding *Brady* claims, including because the persons affected had already served their time or had secured other remedies.

Consider, for instance, a federal court decision involving the infamous crime analyst Annie Dookhan from the Hinton State Laboratory in Massachusetts.[268] The district judge found no evidence that Dookhan had tampered with evidence in the particular case.[269] However, over 70,000 state criminal convictions were ultimately reversed in the lab scandal in question, in what may be the largest systematic re-examination and audit in United States history. In response to this alarming scandal, the state courts established common procedures to review and remedy the violations across these tens of thousands of cases rather than simply reviewing the cases de novo and piecemeal.[270] Notably, however, while investigations of prosecution ethics occurred in response to that scandal, it took more than a decade for such investigations of prosecutors to proceed.[271]

D. INSTITUTIONAL REFORM TO PREVENT *BRADY* VIOLATIONS

A range of upstream and institutional approaches can aim to prevent *Brady* violations before then affect criminal cases. First, open file discovery policies, which require that the office share the complete case file with the defense, together with training and supervision regarding those policies, can help to ensure that police carefully document evidence, share that evidence with prosecutors, and disclose that information to the defense. An open file

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[267] *See, e.g.*, Yaroshefsky, *New Perspectives*, *supra* note 5, at 1943–44.

[268] United States v. Hampton, 109 F. Supp. 3d 431, 433 (D. Mass. 2015).

[269] *Id.* at 437.

[270] Deborah Becker, *DA Ryan Asks State's Highest Court to Review Cases Tied to Hinton Drug Lab*, WBUR, March 26, 2021.

[271] Andrea Estes, *Almost a Decade After Annie Dookhan and the State Drug Lab Scandal, The Fallout is Growing*, BOSTON GLOBE, Jan. 1, 2021.

policy can insure prosecutors are not making discretionary calls on whether they feel that evidence is sufficiently exculpatory or of impeachment value.[272]

Additional policies can cement compliance with the ABA Model Rules regarding ethical prosecution conduct. Many prosecutors' offices do not have clear written policies in place regarding *Brady* obligations.[273] Thus, a certification in open court, before a plea or trial, as required by the Michael Morton Act in Texas—named after a person wrongly convicted based on egregious *Brady* violations—can further assure that a prosecutor has carefully reviewed the discovery and is representing to the court that it has been shared with the defense, pursuant to an open file discovery law.[274] Requiring both open file discovery and a certification before a plea is particularly crucial given how few criminal cases result in a trial.

In order to audit compliance with *Brady* and criminal discovery rules, prosecutors and police should develop not just policies, but procedures to assure compliance. They can, for example, track information regarding informants or other witnesses for whom impeachment evidence may be common, require disclosures, and assure that the defense is notified of such evidence. The police and prosecutors would themselves then be able to assess whether unreliable evidence is being relied upon unduly. Several states and a range of law enforcement agencies have required that such databases be maintained,[275] including regarding *Giglio* information regarding dishonest conduct by police officers.[276] The American Law Institute has recommended such an approach in its *Principles of Policing*, focusing on the need to maintain and routinely review data, to provide "all relevant evidence" generally, consistent with discovery and *Brady* obligations, and regarding

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[272] Regarding moving away from a materiality requirement, for prosecution disclosures, *see generally* Riley E. Clafton, *Comment: A Material Change to Brady: Rethinking* Brady v. Maryland*, Materiality, and Criminal Discovery*, 110 J. CRIM. L. & CRIMINOLOGY 307 (2020).

[273] For a federal example, see *Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses*, U.S. Dep't of Just., Just. Manual § 9-5.100 (updated January 2020).

[274] TEX. CODE CRIM. PROC. ANN. Art. 39.14(a) (West 2018).

[275] *See* Thomas P. Hogan, *An Unfinished Symphony: Giglio v. United States and Disclosing Impeachment Material About Law Enforcement Officers*, 30 CORNELL J.L. & PUB. POL'Y 715, 734 (2021) (describing leading model policies and agency policies).

[276] *See, e.g.*, S.B. 1385, 2020 Leg., Reg. Sess. (Okla. 2000) (effective Nov. 2020) (requiring creation of a statewide informant-tracking database and requiring disclosure of a range of information, including recantations by jailhouse informant witnesses); CONN. GEN. STAT. § 54-86o-p (2023) (requiring data collection, tracking, and reliability hearings for jailhouse informants). A federal Justice in Policing Act would have created a national police misconduct database. *See* Justice in Policing Act, H.R. 7120, 116th Cong. § 201 (2020).

informants specifically, including with regard to agreements with informants and data tracking informant use over time.[277]

Similarly, states have required that databases and information about police misconduct be maintained and made accessible.[278] The movement to document more information in criminal cases has also led to efforts to require videotaping of interrogations, witness interviews, lineups, police-citizen interactions, and other important investigative steps.[279] Prosecutorial accountability has been a subject of data collection, first through efforts to collect data on prosecution performance indicators such as charging and case dispositions, and most recently, through efforts to open the "black box" of plea bargaining and require tracking of the plea process.[280]

Establishing new institutions could help detect, prevent, and remedy *Brady* violations and assure that discovery is carefully and ethically provided. As Ellen Yaroshefsky has pointed out, despite a range of prosecutorial misconduct scandals, "few offices have gathered data or performed system-wide studies" either in response to violations or to assess how well they disclose evidence.[281] One solution is to require prosecutors themselves to investigate, measure, and assess compliance with disclosure obligations. For example, the Los Angeles District Attorney's Office created a Discovery Compliance System to track relevant information.[282] Another solution would be to create a new entity. Thus, state oversight boards could

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[277] A.L.I., PRINCIPLES OF POLICING, §§ 8.03, 12.01, 12.04 (2023), https://policingprinciples.org/wp-content/uploads/2023/01/Policing-Tentative-Draft_1-31-23.pdf

[278] *See, e.g.*, S.B. S8496, 2019–2020 Gen. Assemb., Reg. Leg. Sess. (N.Y. 2020)_(repealing provision barring disclosure of law enforcement disciplinary records); S.B. 1421, 2017–2018 Gen. Assemb., Reg. Sess. (Cal. 2018) (effective Jan. 1, 2019) ("Right to Know Act" making publicly available police records regarding misconduct, including dishonesty, and serious use of force).

[279] The American Law Institute Principles also call for law enforcement to record interviews with informants, suspects, lineup procedures, and generally call for improved documentation of evidence during police investigations. PRINCIPLES OF POLICING, *supra* note 277.

[280] *See, e.g.*, Brandon L. Garrett, William Crozier, Kevin Dahaghi, Beth Gifford, Catherine Grodensky, Adele Quigley-McBride & Jennifer Teitcher, *Open Prosecution*, 75 STAN. L. REV. 1365, 1365 (2023).

[281] *See, e.g.*, Yaroshefsky, *New Perspectives*, *supra* note 5, at 1943.

[282] *See generally* DIST. ATT'Y, CNTY. OF L.A., DISCOVERY COMPLIANCE SYS. MANUAL (rev. Dec. 2021), https://da.lacounty.gov/sites/default/files/pdf/DCS-120921.pdf [https://perma.cc/ZE3M-8JDR].

also be created to ensure that misconduct is investigated and that compliance with discovery policies is sound.[283]

There is a deep literature on prosecution accountability, and as discussed in Part I, observers have largely formed a consensus that *Brady v. Maryland* itself is far from an adequate tool. We cannot prevent, much less remedy, prosecutorial misconduct by relying on an after-the-fact analysis of a possibly flawed trial.[284] The *Brady* database is just the beginning; far more data is needed on the hidden problem of *Brady* and non-disclosure violations in criminal cases. The *Brady* database can help to shed light on how judges handle violations, but more importantly, it illuminates the need for deeper policy reforms. Thus, one lesson from our study is that unless police, prosecutors, and judges develop tools to proactively remedy systematic misconduct, they will fail to remedy individual injustices and they will permit large scale injustices to multiply.

CONCLUSION

The Supreme Court's decision in *Brady v. Maryland* was designed to ensure a fair trial for criminal defendants. The *Brady* doctrine is supposed to ensure that prosecutors, police, and the other members of the prosecution team disclose all favorable and material evidence to the defendant. Yet, this article provides considerable evidence that unfairness continues to persist on a broad scale.

Our research indicates that unconstitutional *Brady* violations occur in 10% of the cases where petitioners raise claims. But the problem is far worse than just the cases where courts find violations. Our *Brady* database documented numerous additional cases in which prosecutors suppressed favorable evidence, but courts declined to grant relief because they did not believe the evidence was material. Many of these cases involved egregious facts such as failing to disclose cash payments to witnesses or hiding secret deals that spared key trial witnesses from having to serve prison time. In these cases, prosecutors learned an awful lesson—that suppressing favorable evidence has no consequences.

When courts have found *Brady* violations, they most often involve very serious convictions, especially in murder cases. Contrary to conventional wisdom though, federal prosecutors and federal courts are not the heroes of the story. A disproportionate share of *Brady* violations come from the

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[283] *See* QUATTRONE CENTER, *supra* note 83, at 6 (recommending the establishment of a Prosecution Oversight Commission in Pennsylvania); Laurie L. Levenson, *Do Prosecutors Really Represent the People? A New Proposal for Civilian Oversight of Prosecutors*, 58 DUQ. L. REV. 279, 280 (2020) (same to all states generally).

[284] *See, e.g.*, Yaroshefsky, *New Perspectives*, *supra* note 5, at 1945.

misconduct of federal prosecutors. And relief for *Brady* violations mostly occurs in state court, rather than federal court.

But perhaps most shocking is that when courts grant *Brady* relief, that is typically the end of the story. Judges almost never name prosecutors, demand more *Brady* training, or refer prosecutors to the Bar for potential disciplinary violations. Courts reverse or affirm convictions without making any effort to remedy the systemic failures that continue to create *Brady* violations year after year.

American prosecutors play a "special role" "in the search for truth in criminal trials," as the Supreme Court has often repeated.[285] Yet, we know very few prosecutors are ever disciplined for misconduct of any kind.[286] This creates a problem of prosecutorial accountability.[287] Unfortunately, the data we have compiled shows that prosecutorial accountability cannot be fully addressed through post-conviction litigation or other types of civil rights litigation. The Supreme Court in *Brady* noted that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair."[288] We hope that our initial data collection effort regarding five years of written rulings regarding *Brady* provides a starting point for reformers—whether policymakers, prosecutors, or judges—to better ensure that criminal convictions are fair for *all* defendants.

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[285] *See* Banks v. Dretke, 540 U.S. 668, 696 (2004) (quoting Strickler v. Greene, 527 U.S. 263, 281 (1999)).

[286] *See* Zacharias, *The Professional Discipline of Prosecutors*, *supra* note 234, at 751, 753.

[287] Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 975–78 (2009).

[288] Brady v. Maryland, 373 U.S. 83, 87 (1963).

APPENDIX: CODING OF *BRADY* CASES 2015–2019

A. Case Name
B. Citation
C. Year of Decision
D. Year of Conviction
E. Case Outcome (Trial Conviction, Plea, Acquittal, Dismissal)
F. Criminal Charges
G. Crime Type (Homicide/Attempted Homicide; Sex Crimes; Other Crimes against People; Crimes against Property; Drug Crimes; Financial Crimes; Crimes involving Firearms; Motor Vehicle Crimes; Other)
H. Death Penalty Sentence, Yes or No
I. State or Federal Prosecution
J. State of Conviction (+ D.C)
K. Court (trial, intermediate, state high court) ruling on the *Brady* claim.
L. Ruling (Pretrial Motion; Post trial motion; Direct Appeal; Post Conviction; Bar Complaint; 1983 Action)
M. *Brady* Claim Granted?
N. Remedy (Vacatur, Evidentiary Hearing, Retrial, Re-Sentencing, Retrial Forbidden, Other)
O. Evidence Determined to be Favorable – Yes, No, or N/A
P. What Was the Evidence?
Q. Kinds of Evidence (Witness Statements; Police Brutality/Misconduct; Objects; investigator's notes; forensic evidence; Other)
R. Type of Evidence (Impeachment/Exculpatory/Neither/Not Stated)
S. Evidence Found by Court to Have Been Suppressed by the State and Not Disclosed to the Defense – Yes, No, or N/A
T. Who Suppressed the Evidence? (police, prosecutor, other, not stated)
U. Evidence Found by Court to be Material? – Yes, No, or N/A.
V. Quote text explaining why the evidence was material
W. Quote text explaining why the evidence was immaterial
X. *Brady* Violation Found? – Yes, No, or N/A
Y. Was there a Procedural Problem that prevented a court from possibly granting relief?
Z. If claim was dismissed for procedural reason, state the procedural reason for the dismissal
AA. Was the decision appealed?
AB. Higher Court Citation
AC. Higher Court Case Name

AD. When did the defense find out about withheld evidence?

AE. Did the defense find out about the evidence pretrial, during trial, or post-trial?

AF. How did the defense find out about the withheld evidence?

AG. Prosecutor's Office that prosecuted the case

AH. How many people were involved in withholding the evidence?

AI. Did the court name the person who withheld the evidence?

AJ. Name of the person who withheld the evidence, if specified.

AK. Did the court find intent to hide the evidence?

AL. Quote opinion about intentional or accidental withholding.

AM. Did court say more training was needed on *Brady* requirements?

AN: Quote on training being needed.

AO: Did the court indicate that the prosecutors or police failed in their ethical obligations?

AP: Quote on ethics failure.

AQ: Did the court refer prosecutors to the Bar disciplinary body?

AR: Quote on referring to Bar.

AS: Additional notable commentary from the court's opinion.

AT: Other misconduct in the case, such as *Batson* violations or improper closing argument.

AU: Were there other important issues worth noting?

AV. How many total pieces of evidence are in the case?

AW: Paradigmatic – Yes or No