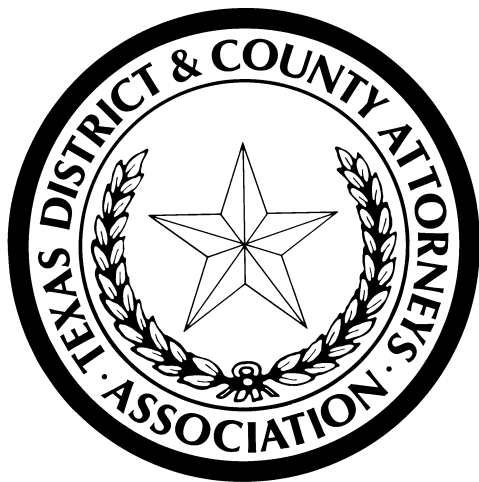


# Setting the Record Straight on Prosecutorial Misconduct

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# Setting the Record Straight on Prosecutorial Misconduct

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## TDCAA Training Subcommittee on Emerging Issues

September 10, 2012

### Introduction

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In 2012, a group of elected prosecutors from diverse jurisdictions around the state gathered at the Texas District & County Attorneys Association (TDCAA) headquarters to study three questions:

- What is the prevalence of “prosecutorial misconduct” around the state?
- Have policies and practices in the 1980s and 1990s that led to exonerations in the 2000s improved? and
- What measures can prosecutors and their member association, TDCAA, take to help eradicate wrongful convictions?

After eight months studying these critically important issues, this subcommittee concluded:

- wrongful convictions based on questionable prosecutor conduct are exceedingly rare (six of more than 4.3 million cases from 2004–2008);
- the criminal justice system has made many advances in both science and procedure that have decreased the chances of wrongful convictions since the 1980s; and
- any wrongful convictions or true prosecutorial misconduct is unacceptable, and there are a number of actions the subcommittee recommends for TDCAA and Texas prosecutors to address the factors that contribute to wrongful convictions.

### Background

In December 2011, the Texas District and County Attorneys Association’s Board of Directors created an ad hoc training subcommittee to study emerging issues in criminal justice and make recommendations for addressing them. The board instructed the subcommittee to focus on exonerations based on forensic science, eyewitness misidentification, and recent allegations of prosecutorial misconduct, including the duty to disclose exculpatory evidence. The committee was formed in January 2012 and began work that month.

During the same week that the subcommittee conducted its second meeting, the Innocence Project released a list of 91 Texas cases of alleged prosecutorial misconduct in which the State Bar failed to publicly discipline the responsible prosecutors. The subcommittee took these allegations seriously and focused on the merits of the Innocence Project’s claims. The subcommittee also examined law review articles, legal briefs, and other reports addressing these issues. In addition, subcommittee members conducted live interviews of people with intimate knowledge of some controversial cases at the core of the recent discussion about prosecutor conduct. The purpose of this process was to gain a better appreciation for the problems in those cases, with an eye towards how TDCAA might enhance training and other support services for the benefit of the profession.

## Summary

The report by the Innocence Project claiming 91 Texas cases of prosecutorial misconduct contains serious flaws that result in a vast overstatement of the problem. The overwhelming majority of exonerations have resulted from misidentification or reliance on faulty science, not prosecutorial misconduct, as documented in previous research by the national Innocence Project. A major factor in the misleading claim of widespread prosecutorial misconduct is the refusal of the Innocence Project to offer a definition of the term. This is a fundamental flaw for a study that purports to identify instances of such misconduct. **[See the subcommittee's offered definition of "prosecutor misconduct" on p. 8.]** In addition to this flaw, a close reading of the Innocence Project study revealed other fundamental research errors, such as failing to follow up on subsequent case history that cleared a prosecutor of wrongdoing. These and other shortcuts taken in compilation of the data casts significant doubt on the usefulness of the Innocence Project's research.

After eliminating 10 of the 91 cases in the Innocence Project study as federal prosecutions over which state court participants and policy makers have no control, the subcommittee closely analyzed the remaining 81 cases and discovered that 11 involved no finding of prosecutorial error at all, let alone misconduct; 59 cases involved minor trial error that appellate courts deemed harmless; and of the 11 remaining cases reversed at least in part on the prosecutor's conduct, six bore indications of actual prosecutorial misconduct. This paucity of cases implicating actual prosecutorial misconduct is significant because Texas trial courts disposed of 4,396,001 cases and appellate courts reviewed 66,712 cases during the time period of the Innocence Project study (2004–2008). The Innocence Project has strained credulity in an attempt to support its unfounded claim of widespread, unsanctioned prosecutorial misconduct. **[Details of this analysis are included in Sections I–III on pp. 7–17.]**

Despite the small number of cases that involve issues of true prosecutorial misconduct, multiple mechanisms exist to regulate prosecutor conduct. They include State Bar discipline, criminal investigation and prosecution, removal from office, civil lawsuits, courts of inquiry, contempt of court, the electoral process, employment transfer/termination, and court-ordered mistrials, reversals, and acquittals. The subcommittee documented examples of each remedy's use and emphasized the need to preserve prosecutorial immunity to maintain prosecutorial independence and prevent the abuse of civil lawsuits as a weapon to deter legitimate prosecution. **[Details of these remedies are included under "Prosecutorial Accountability" on pp. 17–20. Discussion of prosecutorial immunity is found on pp. 20–21.]**

That said, true prosecutorial misconduct is unacceptable and must be addressed when it arises. To that end, the subcommittee closely examined the allegations of prosecutorial misconduct in the cases of concern and found some recurring issues. Study of these issues led the committee to make 10 findings:

- **Finding 1:** Claims of widespread prosecutorial misconduct are vastly overstated.
- **Finding 2:** In the small number of cases involving actual misconduct by prosecutors, the central issue is often inadequate disclosure of exculpatory or impeaching information (called *Brady* information).
- **Finding 3:** Some *Brady* violations are committed by law enforcement officers, not prosecutors.
- **Finding 4:** Law schools typically do not teach *Brady* as part of their core ethics and criminal law curricula.
- **Finding 5:** Cognitive bias can play a negative role in prosecutor decision-making.
- **Finding 6:** Public information available from the State Bar is inadequate to assess the effectiveness of the State Bar's discipline of prosecutors.
- **Finding 7:** Prosecutorial immunity is necessary to ensure independent and effective prosecution in our adversarial system.
- **Finding 8:** Misidentifications by eyewitnesses are the leading cause of wrongful convictions.
- **Finding 9:** Accurate forensic science is vital to ensuring confidence in criminal convictions.
- **Finding 10:** The professionalism of Texas prosecutors has improved in the last 30 years due to increased state funding and cooperation with other allied entities, but high caseloads and other demands threaten that progress.

The subcommittee also made a number of recommendations attached to each of the 10 findings with the goal to prevent misconduct in the future. **[The complete list of findings and recommendations are on pp. 25–27.]**

## I. Response to Claims of Prosecutorial Misconduct in Texas

“I don’t believe that there’s an epidemic of prosecutorial misconduct in this country.”

—Barry Scheck, Innocence Project Co-Director, appearing on *60 Minutes* (March 25, 2012).

On March 29, 2012, the *Texas Tribune* published a short article announcing the release of a study by the Innocence Project concerning prosecutor conduct in Texas.<sup>1</sup> The opening line read: “In 91 criminal cases in Texas since 2004, the courts decided that prosecutors committed misconduct, ranging from hiding evidence to making improper arguments to the jury, according to data that the Innocence Project will release today. None of the prosecutors has ever been disciplined.” Cookie Ridolfi, the founder of the Northern California Innocence Project whose organization did the initial research, was quoted as lamenting, “It paints a bleak picture about what’s going on with accountability and prosecutors.” The release of the data was timed to coincide with the Texas stop of the Innocence Project’s “Prosecutorial Oversight Tour, A National Dialogue in the Wake of *Connick v. Thompson*,”<sup>2</sup> featuring a Louisiana exoneree who was denied monetary damages by the U.S. Supreme Court despite credible allegations of prosecutorial errors in his case.

The apparent purpose of the unnamed study is to make the case that there is significant prosecutorial misconduct occurring in Texas on a regular basis that is going unpunished by the State Bar. The implication is that in the 91 cases identified by the Innocence Project, the prosecutors were deserving of some sort of punishment. Upon closer review, however, the questionable methodology of the study led to seriously flawed results.

### A. Methodology of the study

As it turns out, no study or report was actually released on March 29, 2012. What was released to the media was a list of 210 appellate cases from Texas state or federal courts from 2004 through 2008, along with a PowerPoint presentation. The list and PowerPoint were not made available to the public until a week after the Innocence Project symposium. The original list of 210 cases was later removed from the Innocence Project’s website and replaced with the list of the first 91 cases appearing on that list.<sup>3</sup>

According to the Innocence Project PowerPoint, the methodology for identifying cases of “prosecutorial misconduct” was to do a Westlaw search for Texas cases in which those words or similar words appear.<sup>4</sup> Staff then reviewed the cases and decided which should be included in the study, resulting in the original list of 210 cases.<sup>5</sup> Those chosen cases were then grouped as “HF” (harmful error), “HL” (harmless error), or “DNR” (did not reach the issue in the opinion). The 91 cases that fell into the “harmful” and “harmless” categories were then compared to the number of State Bar disciplinary actions against prosecutors—one—that the Innocence Project believed had occurred during that time period. The implication is that from 2004 through 2008, at least 91 prosecutors were worthy of discipline, but 90 went unsanctioned.

### B. Lack of definition of “prosecutorial misconduct” in the study

When the Innocence Project spokesperson, Emily West, unveiled the list of cases and the PowerPoint presentation at the March 29, 2012, symposium, she consistently spoke in terms of “error and misconduct” yet never identified any case that was an example of only “misconduct.”<sup>6</sup> In fact, the Innocence Project’s list, its PowerPoint presentation, and the oral presentation made on March 29, 2012, never offer a definition of “prosecutorial misconduct” by which to analyze the cases under consideration. Instead, the Innocence Project uses the terms “prosecutorial misconduct” and “error” interchangeably, without any elaboration of what conduct is included or excluded.

This is not the first time that advocacy organizations have condemned prosecutor conduct while carefully avoiding defining just what conduct they are talking about. The Center for Public Integrity issued such a report in 2003, as discussed (and debunked) in the September–October 2003 issue of our association journal, *The Texas Prosecutor*.<sup>7</sup> And last year, the Innocence Project issued a California report similar to this Texas study that also avoided any attempt to define the conduct it condemned. That study was later eviscerated by the California District Attorneys Association for this and other errors.<sup>8</sup> By not defining the very problem they purport to quantify, these studies fail to meet basic standards necessary for their future use as policy drivers. In this most recent example, by announcing that there were 90 “unsanctioned” cases of prosecutorial misconduct in Texas between 2004 and 2008, the Innocence Project is making the case that those prosecutors deserved some sort of punishment for their conduct, when in reality, the conduct was seldom the type worthy of consideration for any sort of sanction. The result of these flawed studies is to leave the public with an incorrect understanding of both the scope and the nature of the problem of prosecutorial misconduct.

### C. A realistic definition of “prosecutorial misconduct”

The American Bar Association sees this issue as so fundamental that in 2010, its House of Delegates passed ABA Resolution 100B urging “trial and appellate courts, in criminal cases, when reviewing the conduct of prosecutors to differentiate between ‘error’ and ‘prosecutorial misconduct.’”<sup>9</sup> The comment to the resolution explains that “[a] finding of ‘prosecutorial misconduct’ may be perceived as reflecting intentional wrongdoing, or even professional misconduct, *even in cases where such a perception is entirely unwarranted*, and this Resolution is directed at this perception.”<sup>10</sup>

To evaluate the Innocence Project’s claims of prosecutorial misconduct for the purpose of identifying serious conduct that is not being adequately prevented or sanctioned, the subcommittee did what the Innocence Project avoided—it developed a definition of the term:

Prosecutorial misconduct occurs when a prosecutor deliberately engages in dishonest or fraudulent conduct calculated to produce an unjust result.

This working definition is not offered as a legal definition by which to judge whether a conviction or sentence should be overturned but is merely intended to help identify the type of underhanded or dishonest actions that the public would commonly identify as “misconduct.” For that reason, the definition contemplates that the actions be deliberate, but it excludes common trial errors and minor mistakes made in good faith.

Using this working definition, the subcommittee analyzed the claims made by the Innocence Project and concluded that its claims of prosecutorial misconduct in Texas were vastly overstated.

### D. The big picture

The Innocence Project study initially published a list of 210 cases for review, then pared that down to 91 alleged examples of prosecutorial misconduct deserving of punishment. To put that number into context, in the Texas criminal justice system during that same time period (from 2004 through 2008):

- **4,396,001** criminal cases were disposed of by district and county courts;
- **28,159** convictions were handed down by judges and/or juries after trial; and
- **66,712** criminal matters were reviewed by appellate courts.<sup>11</sup>

In other words, there were more than **4 million opportunities** for someone to complain about a Texas prosecutor’s conduct, there were more than 28,000 opportunities for someone to complain about how a Texas prosecutor conducted a trial, and a defendant officially complained about some aspect of his or her case almost 67,000 times—yet the Innocence Project identified 91 instances of supposed prosecutorial misconduct over that same time period, and it had to use the broadest possible understanding of that term to find those cases. Faced with this paucity of evidence, the Innocence Project offers the classic “tip of the iceberg” argument, e.g., “If we found 91 cases in the appellate rolls, just imagine how many there must be hidden in the 4 million criminal cases that were not appealed.”<sup>12</sup> This is unsupported by any actual evidence.



## E. Analysis of the “Innocence Project 91”

The subcommittee performed an in-depth review of the 91 cases offered by the Innocence Project as documented instances of prosecutor misconduct. Each case was analyzed and summarized, and follow-up interviews were conducted with original participants in some of the cases. The results of this review of the Innocence Project list can be found on the TDCAA website.<sup>13</sup>

In analyzing the Innocence Project’s list, the subcommittee was challenged by the inconsistencies, miscategorizations, and incomplete legal research underlying the Innocence Project’s study. For instance, the Innocence Project deemed three mistrials granted because of prosecutor error to be “harmful” error cases,<sup>14</sup> but two cases nearly identical to those three are listed as “harmless” error cases.<sup>15</sup> There is no meaningful distinction between those cases, yet they are categorized differently. In addition, some cases are included in the “list of 91” due solely to incomplete research. For example, the Innocence Project cites *Taylor v. State*<sup>16</sup> as an example of a “harmful” error case because an intermediate appellate court reversed the conviction based on the prosecutor’s jury argument concerning the parole charge. However, the Court of Criminal Appeals subsequently reversed the intermediate appellate court and affirmed the conviction, approving of the prosecutor’s argument.<sup>17</sup> Using a case like *Taylor* to underpin calls for greater accountability over prosecutors’ conduct is just one of several examples used by the authors of the Innocence Project’s study that don’t support its conclusions.

As a result of these and other faults with the study, the subcommittee was forced to discount the Innocence Project’s “type of misconduct” categorizations as arbitrary and unreliable. The subcommittee then reorganized the cases in an effort to identify those cases out of the “list of 91” in which the prosecutor’s conduct truly approached “prosecutorial misconduct.” Recalling that the original published list of 210 was eventually pared down to 91 cases in which the Innocence Project claimed that “prosecutors committed misconduct, ranging from hiding evidence to making improper arguments to the jury,” here is the subcommittee’s breakdown of those 91 cases:

- **10 of the 91** were federal cases not handled by Texas state prosecutors;
- **11 of the remaining 81** cases resulted in the courts’ approval of the prosecutor’s conduct, actual findings of good faith by the prosecutor, and/or no error by the prosecutor;
- **59 of the remaining 70** cases involved minor trial errors deemed harmless by the courts and falling well shy of any justifiable claim of “misconduct”; leaving
- **11 of the original 91** cases that were reversed based at least in part on the conduct of a Texas prosecutor during that five-year period.

When it comes to policy, training, and jurisprudential issues considered by the Texas legislature and other state and local entities, cases relating to conduct by federal prosecutors are of no use. Thus, the subcommittee excluded them from a constructive analysis of the Innocence Project study. The majority of the remaining 81 cases, as detailed below, contained conduct that might be characterized as “error” (sometimes by the defense attorney rather than the prosecutor), but not “misconduct.” The subcommittee believes it is important to provide some specific examples supporting its conclusions.

### NO FINDING OF PROSECUTOR ERROR (11 CASES)

In 11 of the cases listed in support of the Innocence Project’s claims of prosecutorial misconduct, **there was no court finding of prosecutor misconduct or error**—and in some of these cases, there were actual findings that the prosecutors acted properly and/or in good faith. Examples of those cases include:

- *Taylor v. State*, TDCAA Case Analysis, page 1.<sup>18</sup> During punishment argument in this aggravated robbery case, the prosecutor used the term “defendant” instead of “hypothetical defendant” when discussing applicable parole laws. The trial court thought the argument was proper and overruled the defense objection. The intermediate appellate court reversed for improper argument, but the Court of Criminal Appeals found that the prosecutor acted properly, saying “Nothing in this case indicates that the prosecutor’s explanations went beyond an attempt to clarify the meaning of the jury instructions.”

- *Wingo v. State*, TDCAA Case Analysis, page 2. After a police officer was convicted of tampering with a governmental record, an intermediate appellate court affirmed the conviction but noted that the prosecutor had asked an improper question during jury selection. On appeal from that decision, the Court of Criminal Appeals also affirmed the conviction, and it specifically found that prosecutor’s question was proper.
- *Corral v. State*, TDCAA Case Analysis, page 3. During an aggravated robbery trial, a witness gave a non-responsive answer to a prosecutor’s permissible question. The trial court sustained a defense objection and instructed the jury to disregard the witness’s answer. The conviction was affirmed on direct appeal, and there was no criticism of the prosecutor’s conduct by the appellate court. (See the case analysis for a discussion of an unrelated issue on a subsequent writ.)
- *Griggs v. State*, TDCAA Case Analysis, page 4. During a trial for aggravated sexual assault, the defendant’s cellmate volunteered that the defendant had told him he raped “older women” (plural) instead of “an older woman” (singular). The prosecutor properly worked to limit the witness’s testimony to the victim in the case on trial, and there was no defense objection. The intermediate court of appeals overturned the conviction, but the Court of Criminal Appeals reversed that opinion. (This reversal was not included in the Innocence Project’s study.)
- *Sanchez v. State*, TDCAA Case Analysis, page 5. Similar to *Griggs*, a witness offered inadmissible testimony and the trial court instructed the jury to disregard but denied a mistrial. The appellate court, in upholding this ruling, concluded: “The State did not appear to elicit the inadmissible testimony.”
- *Perwani v. State*, TDCAA Case Analysis, page 6. On appeal from a conviction for drugging and sexually assaulting the victim, the defendant complained that the prosecutor introduced improper testimony regarding date-rape drugs. The appellate court found that the evidence was relevant and admissible.
- *Reeders v. State*, TDCAA Case Analysis, page 7. The prosecutor, after requesting a hearing outside the presence of the jury to discuss admissibility, offered some impeachment evidence (typically, evidence that would discredit a witness or expose bias). The trial court specifically found the evidence to be admissible. The appellate court later found that the trial court erred in allowing impeachment testimony that was broader than necessary to rebut the defense evidence, but the error was harmless.

In each of these examples, as in the other cases in this category, there is no finding that the prosecutor committed any misconduct. Why these cases are listed in support of the Innocence Project’s claims is anyone’s guess, but at a minimum, their inclusion in the original data casts serious doubt upon the reliability and trustworthiness of the Innocence Project’s research.

### MINOR TRIAL ERROR (59 CASES)

Nearly two-thirds of the cases on the Innocence Project’s list of 91 involved minor trial errors that did not lead to a reversal of the conviction or sentence. Here are some examples:

- *Davis v. State*, TDCAA Case Analysis, page 12. After being assigned the appeal of a conviction for burglary with intent to commit sexual assault, the appellate defense attorney filed an *Anders* brief notifying the court that any appeal would be frivolous. The appeals court performed its obligatory review of the record, found any error harmless, and affirmed the conviction.
- *Carter v. State*, TDCAA Case Analysis, page 13. During cross-examination of a defense witness in a murder trial, the prosecutor asked a question that called for a hearsay response. The defense objection was sustained, and the prosecutor rephrased the question in a manner to avoid eliciting a hearsay response. The witness then answered the question without defense objection. (See the case analysis for a discussion of other rejected defense arguments related to the prosecutor’s closing arguments.)
- *Ortega v. State*, TDCAA Case Analysis, page 14. During a trial for possession with intent to deliver drugs, the prosecutor asked if the witness was afraid of the defendants because they were drug dealers. The defense objected

that the state had yet to establish that the defendants were drug dealers, and the court sustained the objection and instructed the jury to disregard the question, thereby curing any potential error.

- *Reynosa v. State*, TDCAA Case Analysis, page 15. When the defendant took the stand in his aggravated robbery case, the prosecutor impeached his credibility with prior convictions for burglary, assault, and auto theft. The trial court originally ruled that impeachment with the auto theft (which was a juvenile adjudication) was proper, but then reversed its own ruling and ordered the jury to disregard the auto theft event.
- *Bell v. Dretke*, TDCAA Case Analysis, page 16. In a federal habeas action based on ineffective assistance of counsel, the defendant complained that his attorney failed to object when the prosecutor misstated the law of unauthorized use of a motor vehicle, but the court found it was a minor and isolated misstatement that had no impact on the trial's outcome.
- *Brown v. State*, TDCAA Case Analysis, page 17. In the third trial of a case, the prosecutor inadvertently referred to the previous trials as "trials" after the court had instructed that everyone use the term "hearing." The defense objected and the court sustained the objection, but the trial court and defense counsel recognized that the mistake was simply a "slip of the tongue."

In each of these cases (as with the rest of this group of 59), something happened that made the trial less than perfect, but there was no allegation of fraudulent, deceitful, dishonest, or underhanded conduct by the prosecutor. While the Innocence Project included them in its list of 91 examples of "unsanctioned prosecutorial misconduct," these inconsequential trial errors fail to support any proposed need to increase prosecutorial oversight.

#### REVERSED AT LEAST IN PART DUE TO A PROSECUTOR'S CONDUCT (11 CASES)

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Eleven of the 81 state cases listed by the Innocence Project were actually reversed at least in part because of something a prosecutor did, and the reversals were upheld by higher appellate courts.<sup>19</sup> However, the subcommittee questions whether some of the errors or mistakes should be characterized as misconduct worthy of sanctioning. Here is the list of those 11 cases and observations about each:

- *Ex parte Wheeler*, TDCAA Case Analysis, page 71. After a month of hotly contested testimony in a manslaughter/negligent homicide case, the trial court granted a mistrial after the prosecutor asked a defense expert about a finding of fault by an insurance carrier. However, in the writ proceeding in which the defense sought to jeopardy-bar a retrial of the case, the Court of Criminal Appeals allowed the retrial to proceed, noting that the trial court had made the implicit conclusion that the prosecutor acted in good faith. The court specifically found that there was nothing in the record to support an allegation of willful or reckless conduct on the part of the prosecutor, and upon remand back to the trial court, the defendant pled guilty and received deferred adjudication. *Wheeler* is one of several cases in which the Innocence Project failed to review the full subsequent case history, leading it to erroneously conclude that the prosecutor had committed misconduct based on an intermediate court's opinion that was subsequently overruled.
- *Willis v. Cockrell*, TDCAA Case Analysis, page 72. This arson-related death penalty conviction was overturned largely because of improper administration of medication to the defendant and ineffective assistance of counsel. There was also a *Brady* violation because the State's expert's report containing exculpatory information (favorable to the defendant and significant to his defense) was not provided to defense counsel, but the case was dismissed by a subsequent prosecutor because the original investigation relied on faulty arson science, not because of the *Brady* violation.<sup>20</sup>
- *Banks v. Dretke*, TDCAA Case Analysis, page 73. This death sentence was reversed on the ground that the prosecutor failed to correct false statements made by State witnesses. The conviction stands—and Delma Banks recently accepted a negotiated life sentence<sup>21</sup>—but this case is a good example of how *Brady* issues arising in trial must be dealt with properly.

- *Thomas v. State*, TDCAA Case Analysis, page 74. The appellate court reversed this aggravated robbery conviction based on *Batson*<sup>22</sup> error after finding that the prosecutor had not demonstrated race-neutral reasons for striking an African-American venire member. The subcommittee is unaware of a *Batson* error ever being the basis of a State Bar sanction or other serious disciplinary action against a Texas prosecutor; traditionally, the courts have treated reversal and remand for a new trial as a sufficient sanction for that error. There is no discussion in the *Thomas* opinion of the prosecutor's intent, good or bad, and when faced with a retrial, this defendant subsequently pled guilty and was sentenced to 15 years in prison.
- *Ex parte Castillo*, TDCAA Case Analysis, page 75. In this three-paragraph unpublished opinion, the Court of Criminal Appeals granted relief for a *Brady* violation as recommended by the trial court after a writ hearing. However, there is no information in the opinion with which to evaluate this issue or determine whether the violation was by a prosecutor or by someone outside the prosecutor's office.
- *Graves v. Dretke*, TDCAA Case Analysis, page 76. This infamous death penalty case has been the subject of extensive analysis by the media and this subcommittee, both of which have serious doubts about the propriety of the original prosecutor's conduct. At a minimum, *Graves* involves *Brady* error and also represents an example of the negative role that cognitive bias can play in a prosecution (as will be discussed later in this report).
- *Ex parte Elliff*, TDCAA Case Analysis, page 77. Twenty years after a murder conviction, a person claimed that he told a prosecutor that someone else committed the crime but was threatened into silence. The witness could not identify the prosecutor, and the original prosecutor had passed away. Without the original prosecutor available to contest the allegations, the court granted relief under *Brady*.
- *Ex parte Masonheimer*, TDCAA Case Analysis, page 78. In this case, the Court of Criminal Appeals jeopardy-barred a third trial of a defendant after multiple *Brady* violations. This case has been the basis of TDCAA training for years and is a good example of how a closed-file discovery policy can negatively impact a case. Significantly, the Innocence Project failed to note that it is common knowledge within that local community that one of the trial prosecutors was sanctioned by the State Bar in this matter, while two others successfully contested the grievances filed against them.
- *Ex parte Lewis*, TDCAA Case Analysis, page 79. In this murder case, the trial court declared a mistrial after a prosecutor asked questions three separate times related to the defendant's right to remain silent. On appeal, the case was remanded for the trial court to determine if the prosecutor intentionally provoked the mistrial with the questions, and that issue was ultimately resolved in the prosecutor's favor. In other words, the prosecutor made a mistake, but there was no finding that the prosecutor intentionally caused the mistrial. In light of that finding, the defendant subsequently pled guilty and received a five-year prison sentence.
- *Ex parte Jackson*, TDCAA Case Analysis, page 80. In this capital murder case, a mistrial was granted after the prosecutor improperly commented on the defendant's Fifth Amendment rights in his opening statement. As in *Wheeler*, *Munson*, and *Lewis*, *supra*, the court allowed retrial after finding that the prosecutor's conduct was not intentional or reckless. Facing retrial for capital murder, the defendant subsequently pled no contest and was sentenced to life in prison.
- *Abbott v. State*, TDCAA Case Analysis, page 81. In this indecency with a child case, the prosecutor asked the defendant an improper question about another allegation of molestation made by his other stepdaughter, who had since recanted. The case was reversed for a new punishment hearing, at which the defendant received 10 years' probation.

Thus, even in this list of "the worst of the worst" cases, the subcommittee could identify only six cases—*Willis*, *Banks*, *Castillo*, *Graves*, *Elliff*, and *Masonheimer*—that raise serious questions about prosecutor misconduct (and two of those opinions—*Castillo* and *Elliff*—lack sufficient details to draw specific conclusions from their facts). The subcommittee reached this determination after doing the kind of detailed, individualized research that the Innocence Project failed to do. Instead of demonstrating an epidemic of prosecutorial misconduct that is going unaddressed by the State Bar and other entities, a detailed review of the Texas cases selected by the Innocence Project shows that true prosecutorial misconduct deserving of sanction is an extraordinarily rare phenomenon.

That said, the subcommittee believes that *any* true prosecutorial misconduct, no matter how rare, is unacceptable in our profession. Therefore, the subcommittee attempted to identify recurring issues that could be addressed by TDCAA and the profession at large. As a result of that analysis, the subcommittee identified three main areas of concern that should be addressed: *Brady* violations, cognitive bias, and the inadequacy of resources available to prosecutors.

## II. Discovery and *Brady*

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Upon request, a prosecutor is required to disclose certain information to the defense before trial. Under Article 39.14, Texas Code of Criminal Procedure, this discovery for the defense includes writings of the defendant, physical and documentary evidence held by the state, and witness lists. (Discovery is a different obligation than the duty to disclose exculpatory evidence under *Brady*.) Excluded from discovery are a prosecutor's work product, law enforcement offense reports, and witness statements. Conversely, the State is not entitled to any discovery from the defense except for notice of an intent to call an expert witness and the name and address of that potential expert.<sup>23</sup>

Notwithstanding the limited nature of the Texas discovery statute, today the vast majority of prosecutor offices allow the defense access to all of the information, statements, and reports in a criminal case file (other than confidential work product). This is commonly referred to as an "open-file policy." Offices that strictly follow the limitations of Article 39.14 are known to have a "closed-file policy."

In addition to the duties of disclosure under state law, any evidence in the State's possession that is material and favorable to the accused—either because it is exculpatory or because it is impeaching—must be disclosed by the State. This rule derives from the U.S. Supreme Court's opinion in *Brady v. Maryland*,<sup>24</sup> and it requires reversal in a case whether the nondisclosure was intentional or inadvertent. It also applies to all evidence held by the State, including evidence held by law enforcement that may be unknown to the prosecutor.<sup>25</sup> Thus, a court may find a *Brady* violation notwithstanding the good faith of the prosecutor handling the case in question. For instance, in *Ex parte Richardson*,<sup>26</sup> an officer assigned to keep watch over a State witness secretly kept a diary concerning the trustworthiness of that witness. Even though the prosecutor never knew about the diary, the court reversed the case for a *Brady* violation because the diary—which was not disclosed to the defense—contained impeachment evidence that would have been useful to the defense.

### A. Prevalence of *Brady* violations in Texas

The subcommittee commissioned an independent analysis of *Brady* violations in Texas to measure the extent of the problem in today's courtrooms.<sup>27</sup> Based on that analysis, the good news is that *Brady* violations are rarely confirmed by the courts despite the frequent claims raised by defendants on appeal and post-conviction writs of habeas corpus, but the troubling news is that *Brady* violations often play a role in the few confirmed cases of prosecutorial misconduct.

Looking back through the most recent five-year period (2007 through 2011) of criminal appellate decisions in Texas, the subcommittee's research found 236 appellate cases in which defendants raised *Brady* claims. In 92 of those cases, the court confirmed that nondisclosure occurred and conducted an analysis to determine whether the nondisclosure rose to the level of a constitutional due process violation under *Brady*. In an attempt to glean useful information from those 92 opinions that is related to the subject of prosecutorial misconduct, the subcommittee then examined those cases on three fronts: intentional vs. unintentional error; prosecutor vs. non-prosecutor error; and material vs. immaterial effect.<sup>28</sup>

Based on that analysis, the subcommittee determined that less than 25 percent (58 of 236) of the opinions in cases involving *Brady* claims found any nondisclosure to be of evidence material to the outcome of the case, regardless of how the nondisclosure occurred. In other words, three out of every four allegations by a defendant of a *Brady* violation were found to be without merit. More importantly, prosecutors were found to have intentionally withheld material evidence from the defense in only 1.7 percent (4 of 236) of the cases in which the defense alleged a *Brady* violation, as determined by appellate cases decided from 2007 through 2011. This result is consistent with the subcommittee's analysis of the Innocence Project's research (as detailed in Section I of this report) and provides further support for



the conclusion that prosecutorial misconduct—and specifically, prosecutors intentionally withholding key evidence from the defense—is extremely rare in Texas.

### **B. *Brady* and closed-file discovery**

Although it is rare, a prosecutor's failure to provide this important information to the defense can seriously impair the search for truth in the criminal justice system. In fact, non-compliance with *Brady* was an issue in each of the four cases from the Innocence Project's list that were of most concern to the subcommittee.

In *Willis*, an expert's report in which the expert equivocated on the issue of future dangerousness was not given to the defense.<sup>29</sup> Although there were other significant issues of more concern to the appellate courts—such as the improper administration of medication to the defendant and ineffective assistance of counsel—and even though a succeeding district attorney dismissed the case before retrial because of forensic science advances relating to arson, it is clear that the State expert's report was not provided to the defense in the original trial. There was some uncertainty as to whether the State was obligated to provide the report to the defense—the Court of Criminal Appeals initially ruled that there was no *Brady* violation—but the federal courts ultimately found that *Brady* had been violated. Based on inquiries by the subcommittee, it appears that the prosecutor's office had a closed-file policy at the time of the initial trial (c. 1987).

In *Banks*, the prosecutor failed to correct misstatements of a witness concerning his trial preparation with a prosecutor.<sup>30</sup> The witness in question had prepared a lengthy written statement with one of the initial prosecutors on the case (who was not one of the prosecutors who eventually tried the case), and that statement was not provided to the defense. The subcommittee has determined that prosecutor's office used a closed-file discovery policy at the time of Banks' original trial (c. 1979).

As in *Banks*, the prosecutors in *Masonheimer* operated with a closed-file policy (c. 2002).<sup>31</sup> This case provides a cautionary tale to prosecutors who still use closed-file policies because the complained-of information relating to the victim's alleged steroid use was not actually *Brady* material and the information was known to the defense before the second retrial. Nevertheless, the State's failure to disclose all information/evidence to the defense in advance of trial became the pivotal issue to the Court of Criminal Appeals when it barred a third retrial. After the final opinion was issued in 2007, the case quickly became a mainstay of TDCAA ethics training.

Finally, one of the core complaints of prosecutorial misconduct in the *Graves* case (c. 1992) revolved around the prosecutor's failure to disclose the key witness's many inconsistent statements and multiple attempts to recant his initial statements implicating Graves.<sup>32</sup> Although the original prosecutor argued that the witness's "flip-flops" were generally known to the defense, courts found the prosecutor had not disclosed the evidence in a manner that would satisfy the requirements of *Brady*.

The subcommittee noted that in each of these cases, a *Brady* violation could have been avoided if the prosecutor's office had an open-file policy that gave the defense access to witness statements and offense/expert reports prior to trial. An open-file policy is no panacea, in that the policy has to be properly enforced and defense access to the evidence needs to be well-documented, but such policies minimize the problems that arose in these cases.<sup>33</sup> In addition, prosecutors need to be on guard for *Brady* information that develops during trial, such as a witness testifying inconsistently with evidence or information known to the prosecutor that may not have been disclosed previously in the open file. Ironically, the proper way to handle an "in-trial" *Brady* situation appears in the initial Innocence Project list of cases involving prosecutor misconduct, *Davis v. State*.<sup>34</sup> In *Davis*, a witness testified that he had not viewed his prior recorded testimony. Upon subsequently learning that the witness had indeed reviewed the tape, the prosecutor immediately alerted the court and defense counsel and offered a number of remedies, including re-calling the witness or offering a stipulation. Despite this admirable action, the Innocence Project deemed it to be prosecutorial misconduct in its original analysis.

There are no statistics available on open-file policies through time, only anecdotal evidence that many jurisdictions did not adopt open-file policies until the 1990s. When discussions of wrongful convictions from before that time period take place, a closed-file policy may very well have contributed. For example, the subcommittee interviewed several peo-

ple about procedures instituted in the Dallas County Criminal District Attorney's Office to review old cases, a process that led to exonerations in several cases prosecuted under prior administrations. The Dallas County conviction integrity experience revealed that a closed-file policy played a part in several cases that pre-dated the discovery policy changes in that office. Today, however, the number of prosecutor offices maintaining a closed-file policy is minuscule. The subcommittee could identify only two prosecutor's offices—the Taylor County Criminal District Attorney's Office and the Brazos County Attorney's Office—that maintain such a policy out of more than 330 separate offices in this state. This is a significant development when considering the policy and training needs of prosecutor offices, because remedial efforts must address current practices and procedures rather than attempt to correct problems that may not have existed for 30 years.

In addressing the open-file/closed-file issue and its impact on *Brady* compliance, the subcommittee also examined the current discovery practices in jurisdictions outside Texas.<sup>35</sup> It appears that the majority of states have a statute patterned after the federal discovery statute implementing mutual discovery. In that system, the prosecutor provides broad discovery of all documents, evidence, and information (other than attorney work product) in the State's file in exchange for limited notice of defense witnesses and potential defenses such as self-defense and alibi. The subcommittee notes that a mutual discovery system can increase a prosecutor's ability to adhere to *Brady* in areas in which the defense is required to provide notice, and that such a statute was recently recommended by the Timothy Cole Advisory Panel on Wrongful Convictions (2010).<sup>36</sup> A mutual discovery bill has enjoyed support from some prosecutors in the past, but there has yet to be a consensus among prosecutors and the criminal defense bar on the concept.

### **C. Law enforcement and *Brady***

When a *Brady* violation has been identified by the courts, there is a significant chance that it was committed by someone other than a prosecutor. In 1995, the U.S. Supreme Court definitively held that an individual prosecutor's ignorance of possession of favorable evidence by an investigating officer in the case does not absolve the prosecutor from the duty to disclose it.<sup>37</sup> The subcommittee's previously discussed research into this issue shows that a minimum of 26 percent (24 of 92) of alleged nondisclosures of *Brady* material involved errors by law enforcement agencies or officers, not prosecutors.<sup>38</sup> However, *Brady* compliance is not currently taught as part of the TCLEOSE-mandated 40-hour training curriculum that must be completed by certified peace officers every two years.<sup>39</sup> In addition, it appears that few law enforcement agencies have adopted written procedures or policies to insure compliance with *Brady*.<sup>40</sup>

The lack of *Brady* training for law enforcement officers concerned the subcommittee. Most of the subcommittee members have tried cases in which they were surprised to find important information in a law enforcement agency file that had never made it to the prosecutor's office. This recurring problem highlights the need for a greater appreciation of *Brady* obligations among law enforcement officers, better coordination between prosecutors and investigating officers, and more thorough trial preparation by prosecutors.

In addition to external law enforcement officers, prosecutor offices employ investigators and other staff who have significant responsibilities with regard to witnesses, exhibits, and other evidence meant for trial. In the past, prosecutor offices have focused *Brady* training for the benefit of their lawyers, but such training would also be beneficial for other key staff members. For instance, in the "in-trial" *Brady* situation mentioned in the previous section (*Davis v. State*, p. 14), the district attorney's investigator recognized the significance of the witness's misstatement and brought that problem to the prosecutor's attention.

### **D. Law schools and *Brady***

It has been widely acknowledged that law schools do not generally teach students about the ethical responsibilities of prosecutors as "ministers of justice."<sup>41</sup> To the contrary, law school students become well-acquainted only with the duty to be a zealous advocate for their client.<sup>42</sup> Thus, new prosecutors are often not acquainted with the unique duties of a prosecutor, and elected prosecutors who hire newly minted lawyers need to be aware that those recent graduates may know nothing about *Brady* and the duty to disclose exculpatory evidence.

The subcommittee learned that the Dallas County Criminal District Attorney's Office has adopted a commendable way of dealing with this problem by assigning job applicants pre-interview "homework" on *Brady* and related issues.

Before interviewing a prospective prosecutor, the office sends the applicant caselaw relating to the duties and responsibilities of a prosecutor and then spends time during the interview discussing those concepts and assessing the lawyer's appreciation of the special role of the prosecutor. This creative approach is one that may deserve replication in other prosecutors' offices.

### E. Other entities

In June, subcommittee members met in Little Rock, Arkansas, with representatives from sister prosecutor organizations through the National Association of Prosecutor Coordinators. At that workshop, elected prosecutors from Oklahoma, Louisiana, Arkansas, and Texas discussed strategies for dealing with *Brady* issues and worked to identify successful *Brady* policies being implemented around the country. For instance, the Louisiana District Attorneys Association is developing a policy-and-practice manual that TDCAA should study and consider disseminating, along with other model policy manuals, to Texas prosecutor offices. Members of the Little Rock group also discussed the usefulness of *Brady* review teams, whereby experienced prosecutors are assigned to review *Brady* issues, either in major cases or on a case-by-case basis. The subcommittee believes TDCAA should continue to collaborate with prosecutor organizations from other states to identify effective policies and procedures to help Texas prosecutors meet their obligations under *Brady*.

## III. Cognitive Bias

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It has been suggested that research relating to human behavior can be helpful in analyzing the decision-making and conduct of prosecutors. As opposed to the stereotypical explanation that blames wrongful convictions on prosecutors' use of unethical and illegal tactics to obtain convictions "at all costs," there is another view that prosecutors may just be human, subject to the same failings as other people.<sup>43</sup>

The concept that prosecutors, like others, may hold a set of cognitive biases that sometimes render their decision-making less than perfect resonated with the subcommittee members.<sup>44</sup> From a curative perspective, this explanation offers an opportunity for additional research, study, and most importantly, training. For instance, an appreciation of one aspect of this research relating to "confirmation bias"—the tendency of people to favor information that confirms their beliefs or hypotheses<sup>45</sup>—can lead to new protocols for when prosecutors are confronted with unexpected evidence that undercuts a previous theory of guilt.<sup>46</sup>

Prosecutors hold a unique position in the criminal justice system and make numerous critical decisions from the beginning of an investigation through post-conviction litigation. As introduced in the literature regarding cognitive bias, at some time in this process, the unwary prosecutor—convinced of the righteousness of his case—may naturally become a zealous advocate for his client (the people of Texas) rather than an impartial minister of justice. If the prosecutor makes a decision concerning guilt too early in the process, he can develop "tunnel vision" and disregard or minimize subsequent evidence that contradicts his earlier conclusion of guilt. For example, the subcommittee's independent review of the Anthony Graves case yielded more than one observer who attributed that ill-fated prosecution to tunnel vision on the part of the prosecutor, who made the initial decision that three people participated in the crime, decided that the evidence pointed to three particular people, and stuck to that initial conclusion in the face of many contradictory circumstances.<sup>47</sup>

In addition, there is a particular danger as a case enters the trial phase that the adversarial nature of the process can influence decision-making. Prosecutors at all phases of a case, even in "trial mode," must remain alert to new facts and circumstances that may impact their understanding of a case during the heat of battle. This situation may have arisen in *Banks*, in which false testimony by two witnesses should have led the prosecutor to step out of the trial advocate role and take corrective action, but did not.<sup>48</sup>

In discussing the cases listed by the Innocence Project, the subcommittee noted that some prosecutors' conduct may have been influenced by, or been in response to, defense counsel's untoward behavior. For instance, in *Ex parte Wheeler*—where an improper question from the prosecutor led to a mistrial—the Court of Criminal Appeals recognized that the trial was a long and hotly contested affair with plenty of frayed tempers.<sup>49</sup> In addition, the subcommittee learned that the prosecutors in the *Masonheimer* case faced a very contentious defense team whose conduct may have played



a role in how the prosecutors behaved in response.<sup>50</sup> Despite these circumstances, prosecutors must learn to resist the urge to rebuff a defense attorney's assaults using tactics that may conflict with their duty to seek the truth at all times. This is often contrary to human nature, but as ministers of justice, prosecutors are called to a higher standard that must be constantly reinforced both within an office and within the profession.

In conclusion, the subcommittee recognizes that additional research on this emerging topic needs to be conducted and recommends that TDCAA continue to explore the concept of cognitive bias and how it may play a role in prosecutor conduct and decision-making.

## IV. Prosecutor Accountability

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The purpose of the Innocence Project's list of 91 cases is to bolster the claim that there is insufficient discipline or consequences for bad behavior by prosecutors. By lamenting that there apparently was only one prosecutor reprimanded by the State Bar in the time period of the study, the Innocence Project implies that there should be more punishment, because presumably more punishment would deter the conduct.<sup>51</sup> In addition to the fact that the Innocence Project overstated the prevalence of any problem that would be deserving of professional discipline, there are at least two additional problems with its approach.

First, the Innocence Project's focus on the rarity of State Bar discipline as an indicator of a systemic problem with prosecutorial oversight ignores the fact that the professional discipline of prosecutors *should* be rare in a profession in which prosecutors are rare. Specifically, of the approximately 80,000 active lawyers currently licensed to practice law in Texas, fewer than 2,800 (3.5%) of them are prosecutors in county attorney and district attorney offices.<sup>52</sup> Furthermore, the vast majority of State Bar disciplinary actions involve attorney-client disputes—especially over money—which are inapplicable to the job of prosecution.<sup>53</sup> Thus, a general lack of disciplinary actions against prosecutors should not be surprising; in fact, it is to be expected.

Second, the Innocence Project's approach to prosecutor accountability that focuses only on professional discipline ignores the numerous other sanctions and remedies currently available to hold prosecutors responsible for their misconduct. Moreover, if these alternative sanctions are effective as a deterrent, there *should* be very few true acts of prosecutorial misconduct. And indeed, this is exactly what the subcommittee discovered when it reviewed the existing mechanisms for prosecutor accountability in Texas (as demonstrated by historical examples from the past 20 years).

### STATE BAR DISCIPLINE<sup>54</sup>

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One of the problems the subcommittee encountered in researching this topic is the limited ability to obtain useful information from the State Bar. Generalized numbers on lawyer discipline are available, but there is no current ability to acquire facts about the number of grievances involving prosecutors, what those matters involved, and how they were resolved. This antiquated system suffers from a lack of transparency and accessibility caused by inadequate resources.

Notwithstanding this lack of data from the State Bar, the subcommittee's own research yielded examples of prosecutors having to answer for allegations of misconduct before the State Bar during the past decade, including (in no particular order):

- a former Swisher County District Attorney (DA) disciplined for violating the duty to produce exculpatory information in the Tulia drug sting;<sup>55</sup>
- a former Taylor County Assistant Criminal District Attorney (ACDA) disciplined in the *Masonheimer* case for violating the duty to produce exculpatory information (although the elected CDA and another ACDA contested the allegations with the State Bar and prevailed);<sup>56</sup>
- a former Tarrant County ACDA disciplined for violating the duty to produce exculpatory information;<sup>57</sup>
- a former Williamson County DA investigated by the State Bar for alleged *Brady* violations and other grievances (pending);<sup>58</sup>

- the current Williamson County DA investigated for alleged misconduct (but subsequently cleared);<sup>59</sup>
- the current Williamson County Attorney (CA) reprimanded for violating confidentiality but cleared of other charges;<sup>60</sup> and
- a former Winkler County CA suspended from the practice of law following convictions for misuse of official information, retaliation, and official oppression (under appeal) and removal from office.<sup>61</sup>

The subcommittee found this information through internet searches and personal interviews, raising serious doubts about the thoroughness or usefulness of the Innocence Project's findings on this issue, even though it was the crux of its entire study.

## **CRIMINAL INVESTIGATION AND PROSECUTION**

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Prosecutors, like any other public officials, have been subject to the ultimate sanction of criminal investigation and/or prosecution for their misconduct while in office, including:

- a former Winkler County CA convicted of misuse of official information, retaliation, and official oppression;<sup>62</sup>
- a former Kleberg County CA convicted of official oppression and official misconduct;<sup>63</sup>
- a former Jim Wells County DA convicted of misuse of asset forfeiture funds;<sup>64</sup>
- a former Brown County DA who resigned after being charged with aggravated perjury;<sup>65</sup>
- a former Gray County DA convicted of drug and weapons charges;<sup>66</sup>
- a former Rockwall County CDA convicted of theft of government funds;<sup>67</sup>
- a former Kimble County DA pleaded guilty to misuse of asset forfeiture funds;<sup>68</sup>
- a former Swisher County DA convicted of DWI in New Mexico;<sup>69</sup>
- a former Montague County DA convicted of DWI;<sup>70</sup> and
- the current Cameron County CA recently being charged with bribery and extortion.<sup>71</sup>

It should also be noted that in 2011, the Legislature amended Article 2.08 of the Code of Criminal Procedure to ensure a mechanism for appointment of a special prosecutor to investigate an elected prosecutor if there is credible evidence that a crime has been committed by that elected prosecutor (or staff member). This change will further enhance the ability of state and local authorities to hold accountable a prosecutor who crosses the line into criminal conduct.

## **REMOVAL FROM OFFICE**

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State law creates a special process for removing from office a local official on the grounds of incompetency, official misconduct, or intoxication.<sup>72</sup> This remedy is not often used, and when it is, it usually involves officials who have been convicted of criminal offenses. Still, petitions to remove prosecutors from office for actions not rising to the level of a criminal conviction have also been litigated with regard to the following prosecutors:

- a former Fort Bend County DA removed for misuse of secret grand jury information;<sup>73</sup>
- a former Harris County DA resigned in the face of removal proceedings;<sup>74</sup>
- the current Hidalgo County CDA survived removal proceedings;<sup>75</sup> and
- the current Cameron CA survived removal proceedings.<sup>76</sup>

## CIVIL LAWSUITS

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Much has been made about the *Connick v. Thompson*<sup>77</sup> case in which the Supreme Court preserved prosecutorial immunity; indeed, the case serves as the basis for the Innocence Project's entire "Prosecutorial Oversight" tour.<sup>78</sup> While immunity for core prosecutorial functions remains largely intact after that narrow decision, Texas prosecutors are not immune from federal civil rights actions (42 USC §1983) in all instances, as demonstrated by these cases:

- a former Willacy County CA was found liable for civil rights violations committed in the prosecution of other local officials (appeal pending);<sup>79</sup>
- the current Kimble County DA is being sued after prosecuting an embezzlement case;<sup>80</sup>
- the former Shelby County DA settled out of court after being sued for improper highway seizures (along with a criminal investigation of that conduct by federal authorities);<sup>81</sup>
- the current Guadalupe County CA is being sued for actions relating to animal control activities (pending);<sup>82</sup> and
- the current Lamb County CA was unsuccessfully sued after the prosecution of two men later freed due to ineffective assistance of defense counsel (the civil jury rendered a verdict in favor of the prosecutor).<sup>83</sup>

This abbreviated list invalidates claims that the limitations of *Connick v. Thompson* have rendered civil lawsuits useless as a check upon prosecutors.

## COURTS OF INQUIRY

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Several prosecutors have been subjected to a court of inquiry, which is similar to a grand jury criminal investigation but is conducted in public.<sup>84</sup> Those prosecutors include:

- the current El Paso County DA;<sup>85</sup>
- the current Brazos County DA (twice);<sup>86</sup>
- the current Guadalupe County DA;<sup>87</sup> and
- a former Williamson County DA (pending).<sup>88</sup>

To date, the subcommittee has been unable to discover a single example of a prosecutor being charged with a crime following a court of inquiry. However, these proceedings remain a very public form of regulation for the elected officials who have been their subject. Thus, although antiquated and frequently abused,<sup>89</sup> courts of inquiry are still available as an accountability tool for prosecutors.

## CONTEMPT OF COURT

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Barry Scheck, co-director of the Innocence Project, has argued that increased use of a court's contempt power<sup>90</sup> would be an effective tool for punishing bad behavior by prosecutors.<sup>91</sup> In that vein, Texas judges have in recent years charged prosecutors with contempt of court in cases that include the following:

- a former Brown County DA held in contempt for perjury (criminal indictments followed);<sup>92</sup> and
- a current Dallas County ACDA held in contempt for not complying with a court order (later reversed by successful mandamus actions against the judge).<sup>93</sup>

Although rare, contempt is yet another accountability tool available under current Texas law.

Elected prosecutors face the same public evaluation as all other elected public servants. Some examples of prosecutors who were relieved of their responsibilities by the voters or decided to forgo an election contest following misconduct issues include:

- the current Williamson County DA defeated after opposing post-conviction DNA testing;<sup>94</sup>
- a former Brown County DA defeated after opposing post-conviction DNA testing;<sup>95</sup>
- a former Willacy County CA defeated after allegations of misconduct and malicious prosecution;<sup>96</sup>
- a former Montgomery County DA defeated after allegations of misconduct regarding the use of office funds;<sup>97</sup>
- the current Dawson County DA defeated after an arrest for DWI;<sup>98</sup>
- a former Kaufman County DA defeated after an arrest for DWI;<sup>99</sup>
- the former Shelby County DA retired in the wake of federal lawsuits and investigations regarding highway interdiction activities;<sup>100</sup> and
- a former Montague County DA who resigned after an arrest for DWI.<sup>101</sup>

Clearly, Texas voters feel comfortable voting out elected prosecutors who fail to properly comport themselves in office. In addition, elected prosecutors have fired assistant prosecutors who have committed misconduct. This is exactly how our democratic system of local control through direct elections is supposed to work, and it provides a reliable safeguard for the public.

### Conclusion

From the subcommittee's perspective, the historical record is replete with examples of Texas prosecutors being held accountable for questionable conduct. The effectiveness of this system of sanctions is borne out by the rarity of prosecutorial misconduct, which is due in no small part to the deterrent effect of existing sanctions.

## V. Prosecutorial Immunity

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"The office of the public prosecutor is one which must be administered with courage and independence."<sup>102</sup>

In the 1976 case of *Imbler v. Pachtman*, the U.S. Supreme Court recognized the importance of maintaining the independence of America's prosecutors through prosecutorial immunity.<sup>103</sup> After Imbler's conviction for murder, the prosecutor discovered potentially exculpatory evidence regarding the truthfulness of the witnesses at Imbler's criminal trial and voluntarily turned that over to the court and the defense out of his belief that "a prosecuting attorney has a duty to be fair and see that all true facts, whether helpful to the case or not, should be presented." The case against Imbler was eventually dismissed, and Imbler later sued that prosecutor in a 42 USC §1983 civil rights action.

In denying relief by a unanimous 8-0 vote (with one recusal), the Court observed that prosecutors, along with judges and grand jurors, must be shielded from lawsuits relating to official acts intimately associated with the judicial phase of the criminal process to protect the criminal justice system from the animosity of those accused. If a prosecutor is subject to lawsuits by every person he fails to convict, the Court reasoned, it would open the door to unlimited harassment and embarrassment of even the most conscientious officials. The Court also noted that the independence gained through prosecutorial immunity worked to benefit Mr. Imbler in his case, notwithstanding the initial wrongful conviction, because the prosecutor was the person who brought to light the information that led to Mr. Imbler's release. Without immunity, such a revelation might not have happened if it would have exposed the prosecutor to civil liability.

In accordance with the wisdom of this unanimous opinion of the Supreme Court, the subcommittee discourages any further erosion of prosecutorial immunity. The public relies on an independent prosecutor to protect it from crime

in local communities. As the Supreme Court observed, eroding immunity does not give just those people who seem entitled to a cause of action a way to attack a prosecutor—it gives that right to everybody with an interest in slowing down a prosecution, reversing a conviction, or receiving a financial windfall, regardless of guilt or innocence. The prospect of introducing civil tort litigation into every criminal case—especially for well-heeled defendants who can afford attempts to hamstring a prosecutor—would introduce a different kind of injustice into the current system.

The subcommittee also notes that expanded civil liability is not necessary to allow compensation in the few cases of wrongful convictions attributable to prosecutorial misconduct. According to the Innocence Project, Texas has established the most generous “no fault” system of fixed compensation for exonerees in the country.<sup>104</sup> Thus, there is less need to erode immunity in Texas to allow for the just compensation of a wrongfully convicted individual when compared to other states that don’t have such a system in place.

In addition, if Texas were to create a new state court action for suing prosecutors, it must also address the resource issues that will accompany those new lawsuits, including providing representation for prosecutors sued for acting in their official capacity. Due to prosecutorial immunity, the state currently does not offer representation or indemnity to prosecutors, notwithstanding their positions as officials representing Texas in criminal cases, while county governments vary in their policies on this issue.<sup>105</sup> The savings currently being realized because of prosecutorial immunity would end if the state were to declare open season for litigation against prosecutors, and the state and county governments would have to account for the corresponding increase in costs. The fiscal impact of a 2011 bill proposing to create a new civil-rights-based cause of action in state courts was officially estimated to exceed \$4 million per year for the state and a “significant” but undetermined impact on local governments.<sup>106</sup>

Finally, the subcommittee notes that a number of prosecutors have faced lawsuits in federal court despite the existence of prosecutorial immunity, some of which have gone to judgment.<sup>107</sup> The subcommittee believes that the many other checks on the conduct of a prosecutor that have been previously documented in this report—from the ballot box to criminal prosecution—mitigate against the creation of a new state cause of action as a way to address prosecutorial misconduct.

## **VI. Eyewitness Identification**

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Nationally, nearly 75% of wrongful convictions have been due in part to misidentification by victims or eyewitnesses, leading the Innocence Project to deem it the single greatest cause of wrongful convictions.<sup>108</sup> Similar trends were found in Texas; out of the 44 Texas exonerations listed on the Innocence Project website, 35 (80%) were related to eyewitness errors and 17 (39%) were related to improper forensic science (see Section VII for more on the topic of forensic science).<sup>109</sup> In response to this overwhelming evidence, the Texas Legislature passed House Bill 215 in 2011.<sup>110</sup> As required by that legislation, the Bill Blackwood Law Enforcement Management Institute of Texas (LEMITE) at Sam Houston State University recently developed a model eyewitness identification policy based upon the latest scientific research in this area. This new model policy is to be used by law enforcement agencies as a guide for conducting all line-up identifications occurring on or after September 1, 2012.<sup>111</sup>

In preparation for this change, TDCAA presented four 3-hour regional seminars on the new law in Dallas, San Antonio, Houston, and Lubbock in summer 2012.<sup>112</sup> These programs were provided to prosecutors at no cost thanks to a grant from the Court of Criminal Appeals. In addition, the issue will be featured at TDCAA’s Annual Update in September 2012, and future TDCAA trainings will also focus on the research behind eyewitness identification and best practices for avoiding identification errors in the future.

In light of these actions, the subcommittee feels confident that TDCAA is adequately addressing its members’ needs on this emerging issue. The subcommittee also encourages TDCAA staff to keep abreast of new developments in this area and continue to provide assistance to prosecutors as requested.

## VII. Forensic Science

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When used correctly, forensic evidence can provide critical evidence about a crime. DNA evidence, the “gold standard” of forensic evidence, has been used effectively both to convict and to exonerate. Texas, one of the first states to enact laws providing fair use of post-conviction DNA testing, continues to expand the scope of those laws based on claims of possible innocence.<sup>113</sup> But an increased demand for DNA testing has led to a laboratory backlog in Texas. The subcommittee is concerned that the inadequate dedication of resources to forensic testing is creating false expectations among the public and the judiciary, as recently demonstrated in an oral argument in an appeal of a death penalty case in which a judge of the Court of Criminal Appeals complained that “prosecutors should be testing everything anyway,” regardless of cost.<sup>114</sup> The problem is that prosecutors tasked with obtaining these tests are at the mercy of those who must fund them.

In addition, not all sciences—used by the State and the defense—currently have the same degree of reliability as DNA. In 2009, the National Academy of Sciences published a critical report examining 13 types of forensic evidence and medical examiner offices entitled *Strengthening Forensic Science in the United States: A Path Forward*. Based in part on this report, the TDCAA Long-Range Planning Committee in 2010 recognized that prosecutors would need to stay current on the use of and advances in forensic evidence. As a result, the president of the TDCAA Board of Directors appointed a forensic evidence committee to develop resources and expertise in this emerging area. In its first year, committee members produced laminated sheets with information on six areas of forensic evidence: DNA, eyewitness identification, blood toxicology, drug toxicology, fingerprints, and crash reconstruction. TDCAA distributed these resources to all prosecutor offices in the state at no charge. The six prosecutor authors of these sheets also serve as faculty at TDCAA seminars, answer technical assistance questions for other prosecutors, and write articles on their assigned topics. TDCAA members participating in the forensic evidence committee will meet each year to expand the scope of the project, identifying additional forensic evidence topics of interest and updating the current publications. Given that, the subcommittee believes TDCAA is taking appropriate steps to address prosecutors’ needs in this area, but prosecutors can only do so much if the state and local governments fail to adequately fund forensic testing.

## VIII. Professionalism and Resources

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Although prosecution in Texas has traditionally been funded at the local level, the Texas Legislature has encouraged and supported professional prosecution for more than three decades. It has done so by providing financial supplements to help prosecutors operate their offices and by dedicating grant funding to help train the members of those offices. Unfortunately, these financial efforts still do not fully meet the need for them, which may result in errors that could have been avoided.

### A. Funding prosecution operations

By adopting the Professional Prosecutor Act (PPA) in 1979, the Legislature established a baseline salary for a full-time district attorney equal to that of a district judge to encourage district attorneys to abandon private practice and devote their full energy to public prosecution.<sup>115</sup> Today, out of 157 elected felony prosecutors in Texas, only eight are outside of the PPA.<sup>116</sup> In 1999, the Legislature also started providing supplemental support for county attorneys who provide significant representation for the State in criminal, juvenile, and/or child protection matters.<sup>117</sup>

Besides the salaries of district attorneys and the supplements for county attorneys, the state also provides each professional prosecutor’s office a minimal sum for general operations.<sup>118</sup> The statutory baseline for that apportionment funding was set in 1979 at \$22,500, and while the amount provided in the General Appropriations Act has varied over the years with the state’s budgetary outlook, the current budget still provides only \$22,500 per year for jurisdictions with a population of over 50,000, and \$27,500 for jurisdictions with a population under 50,000.<sup>119</sup> In addition to this apportionment funding, the Legislature passed a longevity pay provision for assistant prosecutors in 2003 funded by a fee on surety bonds.<sup>120</sup> The Legislature also provides supplemental funds to reimburse some prosecutors for appropriate travel costs and witness expenses,<sup>121</sup> and it supports the operations of a public integrity unit based in Travis



County and a prison prosecution unit based in Huntsville. All told, these commitments add up to approximately \$42.5 million in annual state appropriations for prosecution throughout the entire state of Texas. This is a significant amount, but it pales in comparison to the statewide costs incurred by local counties. For instance, the current annual budget of the Harris County District Attorney's Office alone is about \$56 million.<sup>122</sup>

Despite the funds currently provided by the state, inadequate funding for prosecutors' operations remains a critical issue in light of the growth of the profession. In 1979, when the PPA was passed, there were approximately 1,600 Texas prosecutors and attendant employees. In 2011, that number exceeded 5,300, more than triple the number in 1979. Furthermore, employment turnover results in approximately 300 new attorneys joining the profession each year, even if offices do not grow in size. While supplemental state funding has increased over the past 30 years, it has failed to keep up with this growth, resulting in prosecutors' resources being stretched thinner and thinner.

## **B. Professional training**

A key component to the focus on professionalism was an effort to increase the training afforded to the state's prosecutors. Recognizing the need to improve prosecution in Texas, in 1971 the Texas Criminal Justice Council funded a study by Peat, Marwick, Mitchell & Co., to examine all aspects of the Texas prosecution system and make recommendations for optimizing the handling of criminal cases. The resulting 1974 report by Peat, Marwick made a number of recommendations for the improvement of prosecution.

The Peat, Marwick report listed 10 statewide coordination functions that would greatly increase the effectiveness of local prosecution. First on the list was the training of prosecutors on a systematic and comprehensive basis.<sup>123</sup> The report specifically recognized that professional development and training requires expertise not easily developed in a state agency and recommended that the state continue to contract for such services with experienced providers such as TDCAA.<sup>124</sup> The report noted that TDCAA was uniquely capable of providing the needed training and communication services because of its knowledge and emphasis on programs and publications. Today, TDCAA is the fourth-largest provider of continuing legal education for attorneys in Texas, behind only the State Bar, the University of Texas School of Law, and the Dallas Bar Association.<sup>125</sup>

In October 1980, all Law Enforcement Assistance Administration funds previously available for prosecutor training were cut off by the federal government. Then-Governor Clements continued the funding of prosecutor training by grants from state Criminal Justice funds.<sup>126</sup> In 1991, those sources were no longer available, so the Judicial and Court Personnel Training Fund (Fund 540), administered by the Texas Supreme Court, took on funding for both prosecutor and indigent defense lawyer training. In 1993, supervision of Fund 540 was transferred to the Court of Criminal Appeals. In the 2012–2013 biennium, \$1,253,750 per year has been appropriated for prosecutor training.<sup>127</sup>

Using these grant funds in conjunction with other funding sources, TDCAA has been proactive in addressing important issues in criminal justice through the training and education of prosecutors. For instance, when *Brady* issues surfaced in cases such as *Masonheimer*, TDCAA devoted additional training to prosecutors' responsibilities with regard to exculpatory evidence. This included producing publications on relevant topics,<sup>128</sup> plus repeated *Brady* training at many TDCAA seminars and regional venues.<sup>129</sup> Today, TDCAA is actively training prosecutors in emerging areas like eyewitness identification and forensic science.<sup>130</sup> The only limit to how much training and assistance TDCAA can provide to prosecutors on these important issues is funding.

## **C. The relationship of professionalism/resources to outcomes**

In the study of cases involving claims of prosecutorial misconduct, the issue of professionalism and resources has come up on more than one occasion. For instance, the subcommittee learned that with regard to the 1979 trial in the *Banks* case, the elected district attorney who prosecuted the case was in his first term and was a civil practitioner who had a thriving law practice unrelated to criminal law. That elected prosecutor was subsequently defeated by an opponent who ran on a promise to professionalize the office. In addition, several assistant prosecutors rotated on and off the *Banks* case, and the assistant prosecutor who eventually sat second-chair at the trial with the elected prosecutor had been assigned to the case only for a few weeks. The subcommittee believes that factors such as these—a prosecutor lacking core competence in his duties and a case passed around among different prosecutors so much that key information was not shared—can contribute to problems with *Brady* compliance.

The subcommittee also spent valuable time studying the Dallas exoneration experience. The current Dallas County Criminal District Attorney and his First Assistant serve on the subcommittee, and others familiar with the work of that office's Conviction Integrity Unit provided information. The Dallas experience with exonerations generally mirrors what has happened around the country in that most faulty convictions have been attributed to misidentification and bad forensic science, but prosecutor conduct has been an issue in some.<sup>131</sup> The issues involved in the string of Dallas exonerations are complex because they do not involve only prosecutors, but judges and the defense bar as well. However, perhaps the biggest issue for prosecutors in Dallas during the 1980s and 1990s was a crushing case load. Dallas, as with most jurisdictions, was facing a huge crime wave, yet the resources devoted to the investigation and prosecution of crime were meager.<sup>132</sup> As a result, individual caseloads and case backlogs were huge, and prosecutors had little time to conduct investigations outside of the file they were given by the law enforcement agencies, resulting in them often simply trying the case at the top of their pile and then moving on to the next one.

Like many jurisdictions, Dallas relied on a stream of relatively new lawyers to try the bulk of the cases. As prosecutors rotated through courts and picked up cases that were already set for trial, it was hard for a relatively inexperienced prosecutor to put the brakes on a case that seemed to have been properly vetted and prepared by the prosecutor(s) previously assigned to it. In addition, the Dallas County Criminal District Attorney's Office did not have an open-file discovery policy in the 1980s and most of the 1990s. As discussed previously, a closed-file policy can create serious *Brady* problems for a prosecutor. Taken together, all of these factors contributed to the negative outcomes discovered years later. In hindsight, the subcommittee believes that many of these errors could have been prevented through better funding and training.

The subcommittee also discussed another resource issue faced in Dallas: a lack of funding necessary to conduct post-conviction investigations of questioned convictions. Some urban prosecutor offices have devoted staff to the re-investigation of questioned convictions despite those funding problems, but smaller offices are faced with an even greater resource challenge for such work. One recent example is the re-investigation by the Haskell County DA of a series of convictions based on the testimony of a police officer whose credibility was called into question after the officer's arrest for planting evidence on a suspect. The DA rightfully moved to re-investigate all cases involving that officer, but he was hard-pressed for time and resources in his one-man, four-county jurisdiction.

In response to this particular problem, members of the subcommittee met with representatives of the Department of Public Safety (DPS), the Texas Rangers, and the Governor's Office in May 2012. After learning of this problem, DPS and the Texas Rangers—with the support of the Governor's Office—agreed to supply investigation resources for rural prosecutors who need help reinvestigating questioned convictions. While the subcommittee hopes this new arrangement will be a boon to current prosecutors, the greater need remains for increased funding of prosecutor training and operations to help prevent wrongful convictions before they occur.

#### **D. A national problem**

The subcommittee is gratified to know that it is not the only group that sees a link between inadequate funding and wrongful convictions. Recently, the Florida Innocence Commission released a lengthy final report that echoes these concerns. To quote Commissioner Alex Acosta, dean of the Florida International University College of Law:

If one is serious about doing something about wrongful convictions, we must recognize that a lack of funding is the most serious threat that implicates the state attorneys, public defenders, the attorney general, criminal conflict counsel, and the judiciary. All of the other recommendations of the commission are secondary. More funding is fundamental to our rights and the system of law.<sup>133</sup>

The subcommittee shares this belief and encourages actions to remedy this shortcoming.



## Findings and Recommendations of the Subcommittee

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After concluding its research, the subcommittee developed the following findings and recommendations (set out in no particular order) to guide the association in the implementation of training and policies for the benefit of prosecution in Texas. These recommendations were approved and adopted by the TDCAA Board of Directors on August 31, 2012.

### **FINDING 1: Claims of widespread prosecutorial misconduct are vastly overstated.**

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After conducting an exhaustive review of recent research by the Innocence Project, the subcommittee uncovered only a handful of Texas cases in which there is a genuine indication that prosecutorial misconduct occurred. The Innocence Commission's incomplete research and failure to define the misconduct being quantified results in an overstatement of the prevalence of prosecutorial misconduct and creates false impressions among the public.

**Recommendation 1:** The profession should encourage the use of a common-sense definition of "prosecutorial misconduct" that matches the public perception of conduct meriting remedial action. The subcommittee suggests the term should be defined as follows: "Prosecutorial misconduct occurs when a prosecutor deliberately engages in dishonest or fraudulent conduct calculated to produce an unjust result."

### **FINDING 2: In the small number of cases involving actual misconduct by prosecutors, the central issue is often inadequate disclosure of exculpatory or impeaching information (called *Brady* information).**

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Most Texas cases with colorable claims of prosecutorial misconduct involved a failure to disclose exculpatory or impeaching information (known as *Brady* information) in a timely manner. Although these violations are exceedingly rare, addressing their causes can prevent future errors and wrongful convictions. Prosecutors in neighboring states have experienced similar problems and are taking unique steps to address the issue that could serve as models for Texas prosecutor offices seeking to implement effective *Brady* compliance policies. Most jurisdictions outside Texas have also adopted mutual discovery, which can enhance a prosecutor's ability to determine what must be revealed under *Brady*. In the absence of such a system, open-file discovery policies may facilitate *Brady* compliance and protect prosecutor offices from inadvertent nondisclosures.

**Recommendation 2a:** TDCAA should continue efforts to insure that all prosecutors are fully aware of their duties under *Brady* and Code of Criminal Procedure Art. 2.01 to seek justice by expanding its training to include digital/web-based materials and in-house office training programs.

**Recommendation 2b:** TDCAA should expand its *Brady* training beyond trial court prosecutors to meet the needs of other discrete groups within its membership, such as:

- experienced elected prosecutors;
- newly elected prosecutors;
- mid-level supervisors;
- new/inexperienced prosecutors; and
- non-lawyer staff and investigators.

**Recommendation 2c:** TDCAA should provide more training on the pros and cons of open-file and closed-file discovery policies and the *Brady* issues that apply to each situation.

**Recommendation 2d:** TDCAA should continue to work with the National Association of Prosecutor Coordinators to identify successful *Brady* policies being implemented around the country. Based on that outreach, the Association should develop resources for prosecutor offices seeking to implement effective *Brady* compliance policies. These resources could include:

- Manuals relating to *Brady* compliance and training. The Louisiana District Attorneys Association is developing a policies and practices manual that TDCAA should study and consider disseminating, along with other model policy manuals, to Texas prosecutor offices.

- *Brady* review team guidelines. If offices that are currently assigning experienced prosecutors to reviewing *Brady* issues—either in major cases or on a case-by-case basis—determine that those efforts improve *Brady* compliance, those offices could provide examples of their programs to TDCAA for wider dissemination.
- Pre-hiring *Brady* review models. Because too few attorneys have any knowledge of *Brady* before they become a prosecutor, the Dallas County Criminal District Attorney’s Office requires its prospective prosecutors to study *Brady* and related caselaw to gauge that prospective employee’s appreciation for the unique duties of prosecutors during the interview process. This process could serve as a model for other jurisdictions.

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**FINDING 3: Some *Brady* violations are committed by law enforcement officers, not prosecutors.**

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Under *Brady*, a defendant’s due process rights are violated when the State does not produce exculpatory evidence, regardless of whether that omission is by law enforcement officers or prosecutors. Prosecutors may be ultimately responsible for the case in court, but a substantial number of *Brady* violations relate to evidence held by law enforcement agencies that was never disclosed to prosecutors.

**Recommendation 3a:** TDCAA should develop *Brady* training programs and materials that prosecutors can use to train their local law enforcement officers, including written models of effective *Brady* compliance policies.

**Recommendation 3b:** TDCAA should urge the Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE) to develop *Brady* training for certified law enforcement officers and add it to their basic curriculum.

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**FINDING 4: Law schools typically do not teach *Brady* as part of their core ethics and criminal law curricula.**

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Too many new prosecutors come out of law school unacquainted with the unique duties of a prosecutor. Law school students learn about their duty to be zealous advocates for their clients but may be taught nothing about a prosecutor’s duty as a “minister of justice.”

**Recommendation 4:** Prosecutors should encourage law schools to include *Brady* discussions in their mandatory ethics and criminal law curricula, and TDCAA should assist those schools in the development of that content as requested.

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**FINDING 5: Cognitive bias can play a negative role in prosecutor decision-making.**

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Research relating to human behavior can be helpful in analyzing the conduct of prosecutors who—like other people—may hold a set of cognitive biases that can adversely affect their decision-making. Dovetailing this emerging research with cautionary tales drawn from real cases could produce valuable training for prosecutors, regardless of their level of experience. Prosecutors must remain open and alert during all phases of a case to new facts and circumstances that can change their theory of what happened and/or trigger additional disclosures under *Brady*.

**Recommendation 5:** TDCAA should develop appropriate training to educate Texas prosecutors on research relating to cognitive bias and “tunnel vision” and how to avoid mistakes attributable to these phenomena.

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**FINDING 6: Public information available from the State Bar is inadequate to assess the effectiveness of the State Bar’s discipline of prosecutors.**

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It is impossible to accurately assess the efficacy of the State Bar’s discipline of prosecutors because of a lack of data regarding the number of complaints made against prosecutors, the nature of those complaints, and the outcomes of those complaints. While anonymity is necessary to protect those attorneys who are wrongly accused, de-identified statistical information could still be collected and made publicly available for those purposes.

**Recommendation 6:** TDCAA should urge the State Bar to develop more robust data reporting for the purposes of identifying grievances involving prosecutors and detecting any trends, shortcomings, or changes needed in relation to those grievances.

**FINDING 7: Prosecutorial immunity is necessary to ensure independent and effective prosecution in our adversarial system.**

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Like legislative or judicial immunity, prosecutorial immunity protects public officials from liability for decisions made and actions taken in relation to the core functions of their offices. Calls for changes to existing immunity law ignore other, less drastic solutions that already exist and can be used at lower cost to the criminal justice system.

**Recommendation 7a:** TDCAA should continue to train prosecutors on the scope and limits of prosecutorial immunity so they know the core functions of their job and what actions may expose them to greater liability.

**Recommendation 7b:** Prosecutors should encourage the Texas Legislature to preserve prosecutorial immunity.

**FINDING 8: Misidentifications by eyewitnesses are the leading cause of wrongful convictions.**

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The Innocence Project and other similar entities have determined that approximately 80 percent of the wrongful convictions discovered to date in Texas were due at least in part to inaccurate eyewitness identification. As a result, the Texas Legislature imposed requirements for eyewitness identification procedures as new Code of Criminal Procedure Art. 38.20 (Photograph and Live Lineup Identification Procedures), which took effect September 1, 2012. To prepare for that event, TDCAA presented four regional seminars on this issue during summer 2012.

**Recommendation 8:** TDCAA should continue to provide prosecutors with resources and training on eyewitness identification issues, including the new statutory protocols and related provisions, and should continue to act as a resource for prosecutors on research-based best practices for eyewitness identification in the future.

**FINDING 9: Accurate forensic science is vital to ensuring confidence in criminal convictions.**

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Texas is a leader in the use of post-conviction DNA testing and continues to expand its application to claims of possible innocence, but backlogs and delays in DNA testing and questions about the reliability of some non-DNA forensic sciences still present a challenge to Texas prosecutors. For those reasons, TDCAA created a forensic science project to help prosecutors stay current on the uses of and advances in forensic evidence, including DNA, eyewitness identification, blood toxicology, drug toxicology, fingerprints, and crash reconstruction.

**Recommendation 9a:** The TDCAA forensic science project should continue to develop and update materials, information, and training for prosecutors on emerging issues and changing scientific standards in forensic science to assist prosecutors in developing the skills necessary to evaluate the scientific method underpinning current and future forensic science techniques.

**Recommendation 9b:** Prosecutors should encourage the Texas Legislature to increase funding for forensic sciences and other accredited labs to accommodate the increased demands for pretrial and post-trial testing.

**FINDING 10: The professionalism of Texas prosecutors has improved in the last 30 years due to increased state funding and cooperation with other allied entities, but high caseloads and other demands threaten that progress.**

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Texas committed to professionalizing prosecution in 1979 with the passage of the Professional Prosecutor Act, and the Legislature has committed state resources to that goal. As a result of these investments, the profession of prosecution today is much improved and Texas now has prosecutors who are less likely to commit errors due to inexperience or inadequate resources. However, high caseloads and limited resources present a continuing threat to the ability of prosecutors to see that justice is done in each case.

**Recommendation 10a:** TDCAA should continue to act as a resource for prosecutors seeking appropriate funding for their operations from state, local, and other sources.

**Recommendation 10b:** TDCAA should continue to serve as a liaison between prosecutors and other governmental entities that can assist in the re-evaluation and investigation of questioned convictions.

## Endnotes

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Editor's note: If viewing online, click on any of the Web pages listed below to open that page in your Web browser.

- <sup>1</sup> <http://www.texastribune.org/texas-dept-criminal-justice/michael-morton/study-prosecutors-not-disciplined-misconduct/>.
- <sup>2</sup> For information on the tour, go to: <http://prosecutorialoversight.org/>; *Connick v. Thompson*, 131 S.Ct. 1350 (2011).
- <sup>3</sup> [http://prosecutorialoversight.org/about-the-issue/Texas\\_Data\\_2004\\_2008.pdf](http://prosecutorialoversight.org/about-the-issue/Texas_Data_2004_2008.pdf).
- <sup>4</sup> <http://prosecutorialoversight.org/about-the-issue/court-findings-of-prosecutorial-error-and-misconduct-in-texas-2004-2008>, slide 3.
- <sup>5</sup> <http://www.veritasinitiative.org/about/>. The research was conducted by the Veritas Initiative, an entity of the Northern California Innocence Project at the Santa Clara (CA) University School of Law.
- <sup>6</sup> See video presentation of comments of Emily West at Texas symposium, <http://prosecutorialoversight.org/>, beginning at 30:15 mark.
- <sup>7</sup> <http://www.tdcaa.com/sites/default/files/newsletter/S003Prosecutor.pdf>.
- <sup>8</sup> <http://www.iacj.org/PDF/InnocenceProjectResponse2011.pdf>.
- <sup>9</sup> <http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf>.
- <sup>10</sup> *Id.* at 1 (emphasis added).
- <sup>11</sup> See “Texas Criminal Case Disposition Data (2004–2008)” at <http://www.tdcaa.com/reports/setting-the-record-straight-on-prosecutor-misconduct>.
- <sup>12</sup> <http://prosecutorialoversight.org/news-and-resources/new-research-illustrates-lack-of-accountability-for-prosecutors-in-texas>.
- <sup>13</sup> See “TDCAA Case Analysis” at <http://www.tdcaa.com/reports/setting-the-record-straight-on-prosecutor-misconduct>.
- <sup>14</sup> *Ex parte Munson*, *Ex parte Wheeler*, and *Ex parte Masonheimer*, TDCAA Case Analysis at pages 8, 71, and 78.
- <sup>15</sup> *Ex parte Lewis* and *Ex parte Jackson*, TDCAA Case Analysis at pages 79 and 80.
- <sup>16</sup> TDCAA Case Analysis, page 1.
- <sup>17</sup> *Id.*
- <sup>18</sup> See the TDCAA Case Analysis for more details on these cases in this and subsequent sections using the referenced page numbers.
- <sup>19</sup> Because of the inconsistent listing by the Innocence Project of some, but not all, of the cases involving mistrials as “harmful,” the subcommittee gave it the benefit of the doubt and included mistrial cases that were upheld by appellate courts in this list of 11. These cases were not “reversed,” but the trials were derailed when the court declared a mistrial.
- <sup>20</sup> In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court ruled that a defendant is denied due process when material and favorable evidence to the accused, either because it is exculpatory or because it is impeaching, is not disclosed by the State.
- <sup>21</sup> <http://www.texarkanagazette.com/news/2012/08/02/banks-gets-life-sentence-for-murder-782220.php>.
- <sup>22</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986), and subsequent cases hold that the use of peremptory strikes by a prosecutor or a criminal defense attorney in a racially discriminatory fashion violates the Due Process Clause and Equal Protection Clause of the U.S. Constitution.
- <sup>23</sup> TEX. CODE CRIM. PRO. Art. 39.14(b).
- <sup>24</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).
- <sup>25</sup> *Kyles v. Whitley*, 514 U.S. 419 (1995) (holding prosecutors bear the responsibility for turning over exculpatory evidence held by officers even if prosecutors do not actually know about the evidence); *Ex parte Mitchell*, 977 S.W.2d 575, 578 (Tex. Crim. App. 1997) (the “State,” for purposes of the duty to disclose, includes not only the particular prosecutor but other lawyers or employees in his office and members of law enforcement connected to the investigation and prosecution of a particular case).
- <sup>26</sup> 70 S.W.3d 865 (Tex. Crim. App. 2002).
- <sup>27</sup> The Innocence Project study claims 8 of its 91 cases of supposed misconduct (9%) involved *Brady* violations, 7 of which they deemed to be “harmful”; see <http://prosecutorialoversight.org/news-and-resources/new-research-illustrates-lack-of-accountability-for-prosecutors-in-texas>. However, “harm” is not a factor in a court’s *Brady* analysis, so the usefulness of such conclusions is limited.
- <sup>28</sup> See “*Brady* Stats (2007–2011)” at <http://www.tdcaa.com/reports/setting-the-record-straight-on-prosecutor-misconduct>. Note that some court opinions were silent in regard to one or more of those three categories (intent, office, materiality), as indicated by “n/a” in the chart, because the court did not need to address that issue to rule in the case.
- <sup>29</sup> TDCAA Case Analysis at page 72.
- <sup>30</sup> TDCAA Case Analysis at page 73.
- <sup>31</sup> TDCAA Case Analysis at page 78.
- <sup>32</sup> TDCAA Case Analysis at page 76.

<sup>33</sup> *Givens v. State*, 749 S.W.2d 954, 957 (Tex. App. — Fort Worth 1988, pet. ref'd) (“If a prosecutor opens his files for examination by the defense counsel, he fulfills his duty to disclose exculpatory evidence”).

<sup>34</sup> See *Davis v. State*, 276 S.W.3d 491 (Tex. App. — Waco 2008, pet. ref'd).

<sup>35</sup> For a list of discovery statutes for all 50 states, see “Discovery Statutes (2012)” at <http://www.tdcaa.com/reports/setting-the-record-straight-on-prosecutor-misconduct>.

<sup>36</sup> <http://www.txcourts.gov/tidc/tcap.asp>.

<sup>37</sup> *Kyles v. Whitley*, 514 U.S. 419 (1995).

<sup>38</sup> For *Brady*-related cases handed down from 2007 through 2011, see “*Brady* Stats (2007–2011)” at <http://www.tdcaa.com/reports/setting-the-record-straight-on-prosecutor-misconduct>. This figure could be as high as 52 percent, depending upon the unknown details of the nondisclosures in cases in which the courts did not rule on that basis.

<sup>39</sup> [http://www.tcleose.state.tx.us/content/licensing\\_certifications.cfm](http://www.tcleose.state.tx.us/content/licensing_certifications.cfm).

<sup>40</sup> The subcommittee is aware that the Waxahachie Police Department has adopted a policy, and the National Police Chiefs Association also offers a model policy to its members, but adoption of such policies in Texas appears to be the exception, not the rule.

<sup>41</sup> <http://prosecutorialoversight.org/>, video comments of Professor Robert Schuwerk, at 52:40 mark; TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 3.09 (Special Responsibilities of a Prosecutor) and Comment 1 to Rule 3.09.

<sup>42</sup> TDRPC Preamble, Paragraph 2.

<sup>43</sup> Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006), <http://scholarship.law.wm.edu/wmlr/vol47/iss5/3>.

<sup>44</sup> For a basic explanation of cognitive bias, see [http://en.wikipedia.org/wiki/Cognitive\\_bias](http://en.wikipedia.org/wiki/Cognitive_bias).

<sup>45</sup> [http://en.wikipedia.org/wiki/Confirmation\\_bias](http://en.wikipedia.org/wiki/Confirmation_bias).

<sup>46</sup> Burke, at 1594.

<sup>47</sup> See also the comments made in *Texas Monthly* by special prosecutor Kelly Siegler; <http://www.zinio.com/articles/Texas-Monthly/Jun-12/Trials-and-Errors/5141040>.

<sup>48</sup> TDCAA Case Analysis, page 73.

<sup>49</sup> *Ex parte Wheeler*, TDCAA Case Analysis, page 71.

<sup>50</sup> *Ex parte Masonheimer*, TDCAA Case Analysis, page 78.

<sup>51</sup> <http://prosecutorialoversight.org/news-and-resources/new-research-illustrates-lack-of-accountability-for-prosecutors-in-texas>.

<sup>52</sup> State Bar membership data is courtesy of its Department of Research and Analysis; [http://www.texasbar.com/AM/Template.cfm?Section=Demographic\\_and\\_Economic\\_Trends&Template=/CM/ContentDisplay.cfm&ContentID=18559](http://www.texasbar.com/AM/Template.cfm?Section=Demographic_and_Economic_Trends&Template=/CM/ContentDisplay.cfm&ContentID=18559). Prosecutor data is based on internal TDCAA records.

<sup>53</sup> This characterization was discerned through interviews with people who had served on State Bar disciplinary committees or had personal experience with State Bar disciplinary actions. For a publicly archived list of past State Bar disciplinary actions, see <http://www.law.uh.edu/libraries/ethics/attydiscipline/index.html>.

<sup>54</sup> For basic information about the State Bar’s grievance process, see [http://www.texasbar.com/AM/Template.cfm?Section=Filing\\_a\\_Complaint&Template=/CM/HTMLDisplay.cfm&ContentID=18855](http://www.texasbar.com/AM/Template.cfm?Section=Filing_a_Complaint&Template=/CM/HTMLDisplay.cfm&ContentID=18855).

<sup>55</sup> [http://amarillo.com/stories/071905/new\\_2374080.shtml](http://amarillo.com/stories/071905/new_2374080.shtml). This was the lone example of State Bar disciplinary action cited in the Innocence Project’s study.

<sup>56</sup> Phone interview with Dan Joiner, Taylor County ACDA.

<sup>57</sup> <http://www.star-telegram.com/2011/11/02/3495428/court-overturns-womans-death-sentence.html>.

<sup>58</sup> <http://www.statesman.com/news/texas-politics/state-bar-of-texas-in-rare-move-launches-1924108.html>.

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104 [http://www.innocenceproject.org/Content/Texas\\_Compensation\\_Bill\\_Heads\\_to\\_Governors\\_Desk.php](http://www.innocenceproject.org/Content/Texas_Compensation_Bill_Heads_to_Governors_Desk.php).

105 District attorneys are entitled to representation by the Attorney General only when they are sued in federal court by a prison inmate. TEX. GOV'T CODE §402.024(a). On the other hand, the state offers blanket representation and indemnity to state officials and state employees (TEX. CIVIL PRACTICES & REMEDIES CODE, §§104.001 and 104.002, 104.004), judges (TEX. GOV'T CODE §74.141), and grand jurors (TEX. GOV'T CODE §402.024(b)).

106 <http://www.capitol.state.tx.us/tlodocs/82R/fiscalnotes/pdf/HB02641l.pdf>.

107 See discussion at page 19 of this report.

108 <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php>.

109 <http://www.innocenceproject.org/know/Browse-Profiles.php>.

- <sup>110</sup> <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB00215>.
- <sup>111</sup> <http://www.lemitononline.org/publications/ewid.html>.
- <sup>112</sup> <http://www.tdcaa.com/training/tdcaa-summer-regional-series>.
- <sup>113</sup> See, e.g., the passage of Senate Bill 122 (2011) to facilitate inmates' access to post-conviction DNA testing; <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=SB00122>.
- <sup>114</sup> <http://www.texastribune.org/texas-dept-criminal-justice/hank-skinner/court-skeptical-states-efforts-stymie-dna-tests/>.
- <sup>115</sup> TEX. GOV'T CODE Chapter 46.
- <sup>116</sup> In the 82nd Legislative Session (2011), two felony prosecutors who sought inclusion in the PPA were denied due to budgetary constraints. This was the first time such a request was rejected.
- <sup>117</sup> TEX. GOV'T CODE §46.0031.
- <sup>118</sup> TEX. GOV'T CODE §46.004.
- <sup>119</sup> General Appropriations Act, 82nd R, Article IV, Judiciary Section, Comptroller's Department, Rider 6.
- <sup>120</sup> TEX. GOV'T CODE Chapter 41, Subchapter D.
- <sup>121</sup> TEX. GOV'T CODE §43.004 (travel); TEX. CODE CRIM. PROC. Arts. 24.28 and 35.27 (witnesses).
- <sup>122</sup> <http://app.dao.hctx.net/OurOffice/JudgeLykos.aspx>.
- <sup>123</sup> STUDY OF THE PROSECUTORS' OFFICES IN THE STATE OF TEXAS, Peat, Marwick, Mitchell & Co. 1974, page I-2 (on file at TDCAA).
- <sup>124</sup> *Id.*, pages VIII-9-10; VIII-14; VIII-16.
- <sup>125</sup> See "MCLE Market Share Report—Top 40 (2011–2012)" at <http://www.tdcaa.com/reports/setting-the-record-straight-on-prosecutor-misconduct>.
- <sup>126</sup> THE STATUS OF PROSECUTION IN TEXAS, A Study by the Texas Prosecutors Coordinating Council for the Senate Jurisprudence Committee, 1980, pages 16-17 (on file at TDCAA).
- <sup>127</sup> General Appropriations Act, 82d R, Article IV, Court of Criminal Appeals, Rider 3(a).
- <sup>128</sup> *Ethics* by Edward "Chip" Wilkinson (TDCAA © 2000, 2005); *Brady Duties & the Pretrial Disclosure of Evidence* by Edward "Chip" Wilkinson (TDCAA © 2009); *Brady* quick reference guide by Diane Beckham (© 2010, 2012).
- <sup>129</sup> For a listing of TDCAA *Brady* training, see "TDCAA *Brady* Training (2009–2012)" at [www.tdcaa.com/reports/setting-the-record-straight-on-prosecutor-misconduct](http://www.tdcaa.com/reports/setting-the-record-straight-on-prosecutor-misconduct).
- <sup>130</sup> In its first year, TDCAA's Forensic Project produced quick reference guides on DNA by Lance Long; Eyewitness Identification by Alan Curry; Blood Toxicology by Richard Alpert; Drug Toxicology by Warren Diepraam; Crash Reconstruction by Lindsey Roberts; and Fingerprints by John Bradley (© 2011).
- <sup>131</sup> The Innocence Project notes two such cases on its website list, those of Keith Turner and James Woodard. See <http://www.innocenceproject.org/know/Browse-Profiles.php>. The *Texas Tribune* has also recently published a list of Texas exonerations that includes an analysis of those involving "prosecutor error" at <http://www.texastribune.org/library/data/texas-wrongful-conviction-explorer/>.
- <sup>132</sup> See Morgan O. Reynolds, "Crime and Punishment in Texas in the 1990s" (NCPA Policy Report No. 237, November 2000); <http://www.ncpa.org/pub/st237>.
- <sup>133</sup> <http://www.sfgate.com/news/article/Funding-an-issue-in-Fla-wrongful-convictions-3670842.php>.