

Hidden Hazards:

Prosecutorial Misconduct Claims
in Pennsylvania, 2000 - 2016

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Introduction

Prosecutors have a sworn obligation to uphold justice, accuracy and fairness. To satisfy this obligation, they are entrusted with broad power and discretion regarding who to charge with crimes, what charges to file, what sentences to seek, and how to manage criminal prosecutions. Any suggestion that a prosecutor could abandon his or her obligation to justice to secure a specific result – whether intentionally or accidentally – is deeply troubling.

Acts of prosecutorial misconduct – and in fact even *allegations* of prosecutorial misconduct – have a negative impact on the criminal justice system. This negative impact goes beyond the single case and threatens the legitimacy of the system itself. Despite this, the general public has an almost total lack of understanding about what actually goes on in most prosecutor's offices. No organization – not courts, not prosecutors themselves, and not professional ethics boards – systematically publishes information on the frequency of prosecutorial misconduct allegations, much less the resolution of those allegations or any acts taken in instances where the allegations are proved accurate. Furthermore, the doctrine of absolute prosecutorial immunity protects prosecutors from litigation even in situations where their misconduct was intentional, ensuring a lack of public accountability for even the most egregious acts of prosecutorial misconduct.

While it is impossible to know how often prosecutorial misconduct occurs, the available data suggests that it happens far more often than one would hope, and often with significant negative consequences. In a recent study of over 2,400 confirmed exonerations, the National Registry of Exonerations found that official misconduct (i.e., misconduct committed by a government actor) was a feature in 54% of those cases and prosecutorial misconduct was specifically a factor in 30%.¹ Media outlets report new cases of misconduct on a daily basis across the United States, providing additional anecdotes that trouble many who care about the accuracy and legitimacy of the

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criminal justice system. Despite this, we have found no jurisdiction in the United States that regularly assembles and publishes information about how frequently allegations of prosecutorial misconduct are made, how often they are upheld, and what actions are taken when misconduct has been identified.² Without such basic information, communities are left with vague reassurances that misconduct is rare; that when it occurs, it is rapidly identified and addressed; and that no additional oversight or accountability measures are needed to improve the criminal justice system and ensure that good prosecutors will continue to serve our system, while bad prosecutors are weeded out.

In short, American citizens lack the ability to make even the most cursory inquiry into whether their prosecutors operate within the rules. In the absence of system-wide data, the increasing number of demonstrated cases of

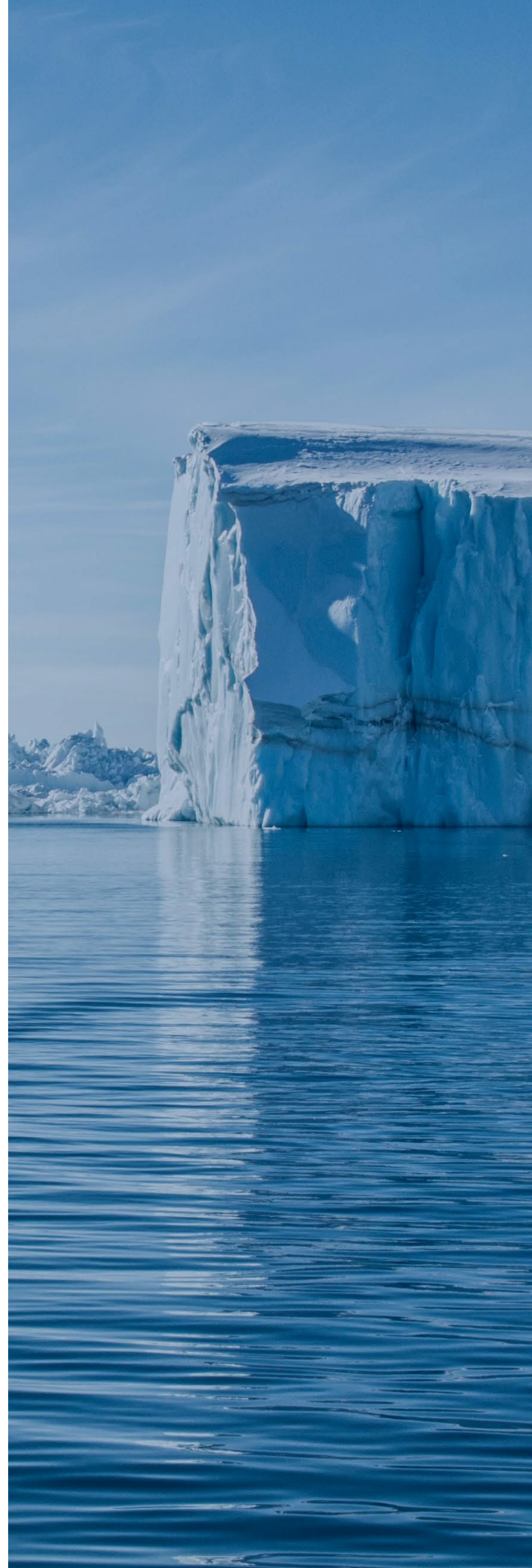
1 Gross, Samuel R., Possley, Maurice, Roll, Kaitlin and Stephens, Klara, *Government Misconduct and Convicting the Innocent, The Role of Prosecutors, Police and Other Law Enforcement* (Sept. 1, 2020). Available at https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf.

2 The Veritas Initiative published a statewide review of allegations of prosecutorial misconduct in California between 1997 and 2009. *Preventable Error: A Report on Prosecutorial Misconduct In California 1997 – 2009*, accessible at <https://law.scu.edu/veritas-initiative/>. They produced updated reports in 2010 and 2011.

prosecutorial misconduct, many of which have put innocent men and women in prison for decades, sows distrust and discontent throughout the community, making the jobs of ethical, high-quality prosecutors even more challenging.

In an effort to learn more about allegations of prosecutorial misconduct in Pennsylvania, the Quattrone Center sought to collect and analyze all judicial opinions from federal and state courts in Pennsylvania published between 2000 and 2016 in which either the phrase “prosecutorial misconduct” or the citation “*Brady v. Maryland*” appeared. We identified 4,644 opinions in which allegations of misconduct were raised. Each opinion was carefully read and analyzed to understand how many claims of prosecutorial misconduct were raised, what types of misconduct were raised, how often courts decided them on their merits, and how often misconduct was found.

Using this unique dataset, this report establishes a minimum floor of the frequency and prevalence of prosecutorial misconduct in Pennsylvania, and of how the criminal justice system resolves such cases. The report evaluates the current state of known instances of prosecutorial misconduct in Pennsylvania and makes recommendations that may help to reduce misconduct throughout the Commonwealth. In this way, the report seeks to initiate what should be an ongoing conversation among all stakeholders of the criminal justice system to enhance the prosecutorial role and improve confidence and trust in the criminal justice system statewide.



Executive Summary

We set out to provide an objective analysis of the prevalence of prosecutorial misconduct allegations in Pennsylvania and how those allegations are resolved, to initiate a conversation around the reduction of prosecutorial misconduct for the benefit of all – including, of course, prosecutors themselves.

At the outset, it is important to define the term “prosecutorial misconduct,” which is subject to many interpretations. This report uses the term in the broad manner it is used in Pennsylvania state and federal court opinions: **any action taken by a prosecutor that does not comport with a law or procedural or ethical rule governing prosecutorial activity at any point in a criminal proceeding, regardless of the prosecutor’s intent.** Thus, our definition of “misconduct” includes improper acts without any imputation of intentionality or moral lacking on the part of the prosecutor, though such intentionality could be identified in any specific instance.

Frequency and Types of Prosecutorial Misconduct

Our review of cases found many different prosecutorial acts that are alleged to be improper. Some of these are intentional but many are not. Two categories of misconduct were responsible for over half of the claims identified in our dataset: improper withholding of exculpatory evidence (2,114, 29.3%) and improper comments made by the prosecutor during closing arguments (1,915, 26.6%). Other substantial categories of prosecutorial misconduct allegations included making improper remarks during the trial (719, 10%) and presenting false evidence (382, 5.3%). A catch-all “other” category was also a substantial portion of the allegations (958, 13.3%), demonstrating the wide range of activities that qualify as prosecutorial misconduct. Allegations of other types of prosecutorial misconduct were, comparatively, less frequent.

Altogether, we identified 7,207 claims of prosecutorial misconduct over a 17-year period. Courts allowed 1,774 of those claims to remain unaddressed. Of the 5,432 claims of prosecutorial misconduct that courts addressed, misconduct was found in 204 (2.8% of total, 3.8% of addressed).

Two categories of misconduct were responsible for over half of the claims identified in our dataset: improper withholding of exculpatory evidence (2,114, 29.3%) and improper comments made by the prosecutor during closing arguments (1,915, 26.6%).

Of these 204, even fewer involved cases in which courts found that the prosecutor(s) acted intentionally to deprive a defendant of a fair trial. The vast majority of prosecutorial misconduct appears to be inadvertent, but even inadvertent mistakes can be hugely consequential to the crime victim, family members, and the defendant, and greatly undermine public confidence in our judicial system.

3 Philadelphia has a two-tiered trial court system that is unique in Pennsylvania; for reasons explained below in Philadelphia Criminal Caseloads by Court/Jurisdiction, these statistics should be analyzed separately to better understand the state as a whole.

4 From annual caseload reports compiled by the Administrative Office of Pennsylvania Courts, found at: <http://www.pacourts.us/news-and-statistics/research-and-statistics/caseload-statistics>. “Processed” is defined as: “To count as processed; a case must have been Adjudicated or Closed during the reporting period.” (Pennsylvania caseload statistics are discussed more fully below in Pennsylvania Criminal Caseloads and Dispositions.) In addition, Philadelphia is the only county in Pennsylvania to have a separate Municipal Court, which has initial jurisdiction over criminal charges with maximum sentences five years or fewer (this includes all misdemeanors).“

The Challenge of “Invisible” Prosecutorial Misconduct

Given the number of cases processed in Pennsylvania state and federal courts during the period of our review, 204 instances of “found” misconduct is a very small number. It is also almost certainly a substantial undercount. What became clear during our review is that the true extent of prosecutorial misconduct eludes a full analysis due to a number of systemic factors keeping such incidents from scrutiny. Excluding Philadelphia,³ there were a total of 1,066,293 criminal cases resolved with specific outcomes in the period covered by this review.⁴ With the overwhelming number of these criminal prosecutions ending in guilty pleas (71%), the ability to have a full record where such allegations would come to light is diminished. It is not only pleas, however, that effectively obscure the prosecutorial history. Of these cases, 324,529 (27%) of the cases were diverted, withdrawn, or dismissed before proceeding to trial.⁵

Recommendations for Change

To address both the presence of prosecutorial misconduct and the lack of transparency that prevents misconduct from being seen, we make ten policy recommendations, in order of the expected complexity of their implementation:

RECOMMENDATIONS: PREVENTATIVE MEASURES

Recommendation 1:

Require Open File Discovery

Recommendation 2:

Adopt ABA Model Rules 3.8(g) & (h)

Recommendation 3:

Certify Compliance with *Brady* Prior to Plea or Trial

Recommendation 4:

Enhance Prosecutorial Self-regulation and Reporting

Recommendation 5:

Formally Review Cases of Prosecutorial Misconduct to Identify Opportunities for Improvement

RECOMMENDATIONS: ACCOUNTABILITY MEASURES

Recommendation 6:

Require Automatic Reporting of Misconduct

Recommendation 7:

Eliminate Absolute Immunity for Prosecutors

Recommendation 8:

Create A Civil Tort Remedy for Individuals Who Are Harmed by Intentional or Grossly Negligent Prosecutorial Misconduct

Recommendation 9:

Consider a Criminal Statute Specific to Intentional Suppression of Evidence and Apply Other Statutes Relevant to Prosecutor Misconduct

Recommendation 10:

Establish a Prosecutorial Oversight Commission to Identify and Address Prosecutorial Misconduct

⁵ *Id.* Those cases evade any level of scrutiny for potential error by prosecutors. That left only 2% of cases, or 23,969, able to be reviewed. Any analysis of prosecutorial misconduct that cannot review 98% of all cases surely provides the floor, not the ceiling of its prevalence.

Defining Prosecutorial Misconduct

In order to identify the allegations of prosecutorial misconduct in Pennsylvania, we first had to define the term “prosecutorial misconduct.” Our answer was found in two parts: First, we researched those acts characterized as “prosecutorial misconduct” by litigants and judges in Pennsylvania courts. As explained in the Appendix — Methodology, our search methodology was intentionally broad to capture any occurrence of the term in judicial opinions. Second, in order to effectively catalogue allegations of prosecutorial misconduct in Pennsylvania, we adopted a description that emerged from the way the term was actually used and discussed. In this report, **“prosecutorial misconduct” is any conduct by a prosecutor that does not comport with a law or procedural or ethical rule governing prosecutorial activity at any point in a criminal proceeding, regardless of the prosecutor’s intent.** Thus, we use the term “Misconduct” as it is used in Pennsylvania courts – in its objective and literal sense – as conduct that is in violation of the rules, whether or not such conduct warranted specific legal relief or was intentional on the part of the prosecutor.

The term “prosecutorial misconduct” is often heard to include a sense of moral failure on the part of the prosecutor. Some prosecutorial misconduct in this report satisfies that definition (e.g., a prosecutor who knowingly possesses information that the defendant is innocent and hides or destroys that evidence). But since the Pennsylvania Supreme Court’s first use of the term in *Pennsylvania v. Wright* in 1970,⁶ courts have used the phrase “prosecutorial misconduct” to evaluate many different types of claims regarding prosecutorial actions,⁷ including both intentional acts and accidental errors.⁸

While some types of prosecutorial misconduct may be viewed as quite serious and others viewed as more trivial or “technicalities,” any such conduct has the potential to negatively impact the fairness of the criminal justice process. While intentional acts of deception by prosecutors that serve to enhance the likelihood of a conviction exemplify prosecutorial misconduct at its worst, such acts are only a small fraction of the total spectrum of prosecutorial misconduct. Many – indeed, most – of the actions held by courts to constitute prosecutorial misconduct occur in open court, in full view of a defense attorney, a judge, and often a jury who can evaluate them in real time and determine how they should be handled to avoid depriving a defendant of due process and the presumption of innocence. Many others reflect inadvertent procedural errors, and still others involve representations by prosecutors that are later found to be inaccurate despite the prosecutor’s good faith.

This report defines “prosecutorial misconduct” as any conduct by a prosecutor that does not comport with a law or procedural or ethical rule governing prosecutorial activity at any point in a criminal proceeding, regardless of the prosecutor’s intent.

6 266 A.2d 651, 653 (Pa. 1970).

7 See, e.g., *Commonwealth v. Cox*, 983 A.2d 666, 685 (Pa. 2009) (“the phrase “prosecutorial misconduct” has been so abused as to lose any particular meaning. The claim either sounds in a specific constitutional provision that the prosecutor allegedly violated or, more frequently, like most trial issues, it implicates the narrow review available under Fourteenth Amendment due process.”) (citing *Greer v. Miller*, 483 U.S. 756, 765 (1987)); *Commonwealth v. Chmiel*, 777 A.2d 459, 464 (Pa. Super. Ct. 2001) (“[it] includes actions intentionally designed to provoke the defendant into moving for a mistrial or conduct by the prosecution intentionally undertaken to prejudice the defendant to the point where he has been denied a fair trial”) (citing *Commonwealth v. Smith*, 615 A.2d 321, 325 (Pa. 1992)); *Smith v. Phillips*, 455 U.S. 209, 219 (1982) (“the touchstone is the fairness of the trial, not the culpability of the prosecutor”).

8 See, e.g., *Commonwealth v. Kearns*, 70 A.3d 881, 885 (Pa. Super. Ct. 2013) (further distinguishing that “most forms of undue prejudice caused by inadvertent prosecutorial error or misconduct can be remedied in individual cases by retrial...intentional prosecutorial misconduct, on the other hand, raises systematic concerns beyond a specific individual’s right to a fair trial that are left unaddressed by retrial”).

The elimination of prosecutorial misconduct cannot be pursued without identifying the full spectrum of acts that constitute prosecutorial misconduct and their motivations or causes. A lapse of attention that leads a prosecutor to ask a leading question of a government witness, an overly aggressive closing argument in which a prosecutor asks the jury to place themselves in the shoes of a crime victim, a prosecutorial failure to find and turn over exculpatory information never disclosed to the prosecution by the police, despite requests for such information by the prosecutor – these are all misconduct and should be addressed. But each is different in motivation and type, and none captures the intentional misconduct described above. As a result, each requires a different solution or reform. For intentional prosecutorial misconduct, firing or disbaring the prosecutor may well be appropriate. For the prosecutor who dutifully asks police for exculpatory information but does not receive it, only to learn of its existence later, however, termination will not solve the underlying problem.

It is understandable that the term prosecutorial misconduct conveys to the observer a moral flaw on the part of the prosecutor. The word “misconduct” itself, however, is simply a description of unpermitted conduct, and by itself conveys no assessment of intentionality or amorality.⁹ True intent can be extremely difficult to discern, so every allegation of misconduct should be evaluated with a fact-specific approach that carefully considers the reality that every instance of “misconduct” can create risk.

⁹ See, e.g., *Berger v. United States*, 295 U.S. 78, 89 (1935); *United States v. Lotsch*, 102 F.2d 35, 37 (2d Cir. 1939); *New York v. Esposito*, 121 N.E. 344, 347 (N.Y. 1918). However, the intentionality of a prosecutor’s misbehavior certainly mattered, see, e.g., *Berger*, 295 U.S. at 84–89; *Smith v. People*, 8 P. 920, 921-23 (Col. 1885), and, foreshadowing the terminological fluidity that was to come, was sometimes seen as critical as in *Washington v. Boone*, 118 P. 46, 51 (Wash. 1911) and *California v. Gleason*, 59 P. 592, 593 (Cal. 1899).

Results of Analysis

Appellate courts typically took one of four routes to resolving a case that included one or more allegations of prosecutorial misconduct:

1. The court evaluated the petitioner's claim(s) and agreed with the petitioner that the acts of the prosecutor constituted misconduct (i.e., prosecutorial misconduct was coded as "addressed" and "**found**" by the Court) and that the misconduct was of such a nature that the litigant **was entitled to relief** (new trial, application of double jeopardy to bar retrial, etc.);
2. The court evaluated the petitioner's claim(s) and agreed with the petitioner that the acts of the prosecutor constituted misconduct (i.e., prosecutorial misconduct was coded as "addressed" and "**found**" by the Court) but the misconduct **was not sufficient for relief** ("no prejudice, "harmless error," etc.);
3. The court evaluated the petitioner's claim(s) and disagreed that the acts of the prosecutor constituted misconduct (i.e., prosecutorial misconduct was coded as "addressed" and "**not found**"); or

4. The court resolved the case on other grounds and did not address the petitioner's claim(s) of prosecutorial misconduct (i.e., prosecutorial misconduct was coded as "**not addressed**").

The 4,644 opinions in our database contained 7,207 discrete allegations described specifically as prosecutorial misconduct or as *Brady* claims (withholding evidence). Two categories of misconduct were responsible for over half of the identified claims: prosecutors failing to properly disclose exculpatory evidence (2,114, 29.3%) and claims of improper comments during closing (1,915, 26.6%). Other substantial categories of prosecutorial misconduct allegations included making improper remarks during the trial (719, 10%), improper exam questions by the prosecutor (536, 7.4%), and prosecutors gathering or presenting false evidence (422, 5.7%). A catch-all "other" category was also a substantial portion of the allegations (958, 13.3%), demonstrating the wide range of activities that qualify as prosecutorial misconduct. Allegations of other types of prosecutorial misconduct were relatively infrequent, as reflected below in Table 1: Disposition of Misconduct Claims by Category.¹⁰

Prosecutorial Misconduct Opinions: 2000 - 2016



Figure 1: Resolution of Prosecutorial Misconduct Claims in Pennsylvania Court Opinions, 2000-2016

¹⁰ Explanations and examples of each category can be found in the Appendix - Types of Prosecutorial Misconduct. *Commonwealth v. Scher*, 4778 PHL 1997 (Pa. Super. Ct. Mar. 26, 2004), the court specifically noted that the appellant raised 292 separate examples of prosecutorial misconduct. The court described and analyzed the claims as five over-arching categories. This case was coded in our dataset as presenting five claims and is discussed further later in this report (p. 31).

Table 1: Disposition of Misconduct Claims by Category

Claim Type	Total Claims Raised	% of All Claims	Total Addressed	Total Unaddressed	Total Found	Found % of Addressed Claims	Found % of Total Claims
Exculpatory Evidence - Prosecutor	2,114	29.3	1,601	513	70	4.4	3.3
Improper Closing	1,915	26.6	1,630	285	64	4	3.4
Other Misconduct Claim	958	13.3	486	472	13	2.7	1.4
Other Improper Remarks	719	10	562	157	16	2.8	2.2
Improper Examination	536	7.4	446	90	23	5.2	4.3
Gathering/Presenting False Evidence	411	5.7	282	129	3	1	0.7
Discriminatory Jury Selection	169	2.3	108	61	1	1	0.6
Comment on Right to Silence/ Violate 5th A	125	1.7	112	13	7	6.3	5.6
Exculpatory Evidence - Police	88	1.2	78	10	3	3.8	3.4
Shifting Burden	68	0.9	54	14	2	3.7	2.9
Intimidating Witnesses	49	0.7	29	20	0	0	0
Improper Grand Jury	26	0.4	23	3	0	0	0
Impugning Defense	15	0.2	10	5	1	10	6.7
Appeal to Religious Authority	14	0.2	12	2	1	8.3	7.1
Total Claims:	7,207		5,432	1,774	204		

It is difficult to know what to make of the low rates of allegations sustained by courts compared to the larger numbers of allegations made. The simplest explanation would of course be that many allegations of prosecutorial misconduct are not accurate. It is also possible that the infrequency with which such allegations are found reflects a hesitancy on the part of judges to identify prosecutorial misconduct in written judicial opinions. Observers of the criminal justice system have pointed to the higher prevalence of former prosecutors ascending to the bench as potential evidence of a pro-prosecutor bias. Additional research is needed for a full understanding of these issues and how they may relate to judicial review of prosecutorial misconduct allegations. Since the suppression or withholding of exculpatory evidence and improper closing

arguments constituted the majority of allegations of prosecutorial misconduct, it is not surprising that they also make up the majority of instances in which prosecutorial misconduct was found by a court. The most common type of prosecutorial misconduct found in Pennsylvania is prosecutors failing to properly disclose exculpatory evidence (2,114 claims raised, 70 found, 3.3%) followed by improper remarks during closing argument (1,915 claims raised, 64 found, 3.3%), improper examination questions during trial (536 claims raised, 23 found, 4.3%) and the more catch-all categories of "other improper remarks" (719 claims raised, 16 found, 2.2%), and "other misconduct claim" (958 claims raised, 13 found, 1.4%). No other category of misconduct was found by Pennsylvania judges in more than seven cases.

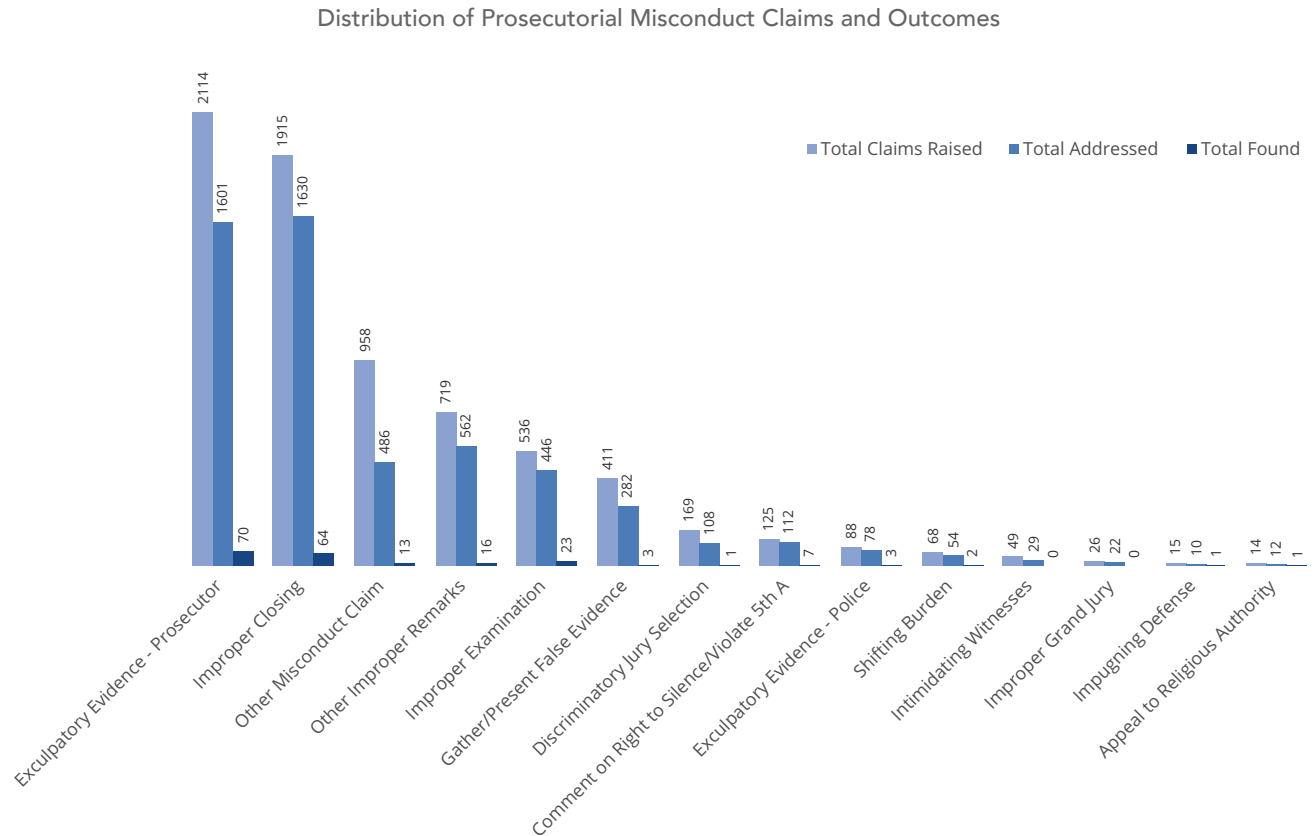


Figure 2: Distribution of Misconduct Claims by Category

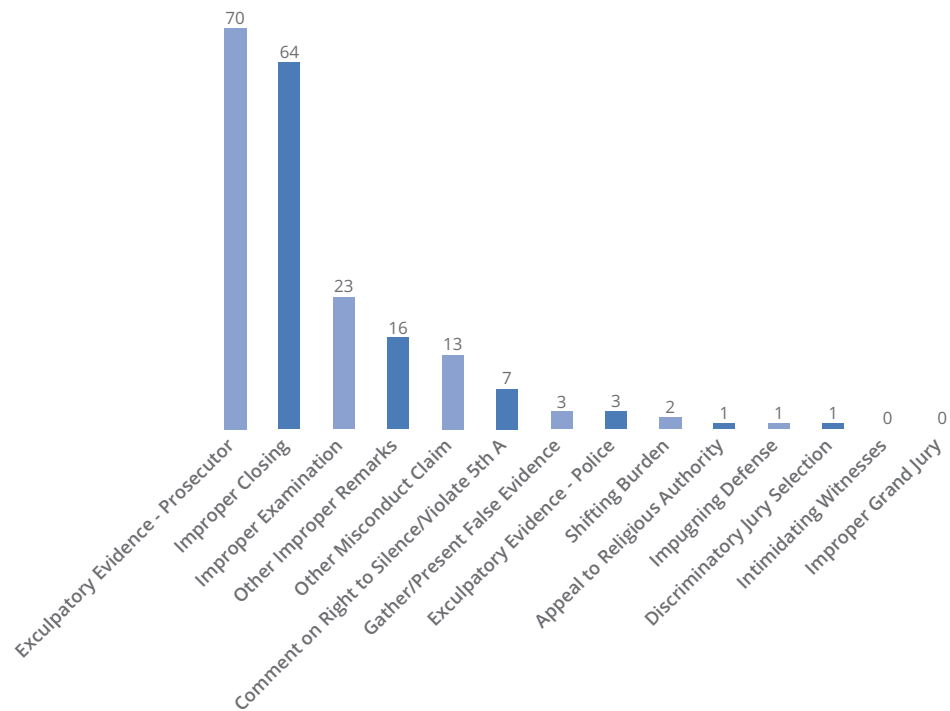


Figure 3: Distribution of "Found" Misconduct Claims by Category

Prosecutorial Misconduct Claims per Opinion

Defendants/petitioners alleging prosecutorial misconduct often identified more than one claim of misconduct related to a single trial, raising additional concerns about prosecutors who are more aggressive about departing from appropriate rules of conduct. Over a quarter (1,252/4,644, 27%) of the opinions in our dataset alleged multiple claims of prosecutorial misconduct, with total claims presented per opinion ranging from 1 to 23.¹¹

No. of Claims Raised	No. of Opinions
23	1
12	1
11	3
10	5
9	6
8	10
7	7
6	27
5	38
4	110
3	278
2	766
1	3,392

Table 2: Number of Misconduct Claims per Opinion

Type of Claim	Total Opinions: PM Found ¹²	Total Opinions: Addressed but not Found ¹³	Total Opinions: Not Addressed ¹⁴
Improper Closing	57	1,271	267
Exculpatory Evidence - Prosecutor	52	1,301	421
Improper Examination	23	336	80
Other Improper Remarks	13	440	129
Other Misconduct Claim	10	418	435
Violate 5th Amendment	7	104	15
Gather/Present False Evidence	3	244	121
Exculpatory Evidence - Police	2	65	9
Shifting Burden	2	50	15
Discriminatory Jury Selection	1	105	59
Appeal to Religious Authority	1	12	3
Impugning Defense	1	10	6
Intimidating Witnesses	0	28	18
Improper Grand Jury	0	21	5

Table 3: Number of Opinions with Claims Found, Addressed and Not Addressed by Claim Category

¹¹ In one opinion, *Commonwealth v. Scher*, 4778 PHL 1997 (Pa. Super. Ct. Mar. 26, 2004), the court specifically noted that the appellant raised 292 separate examples of prosecutorial misconduct. The court described and analyzed the claims as five over-arching categories. This case was coded in our dataset as presenting five claims and is discussed further later in this report (p. 31).

¹² This column indicates the total number of opinions where the specific claim was found by the court. Because more than one claim could be found in a single opinion, the sum of these totals does not reflect the total number of opinions where misconduct was found.

¹³ See n. 12.

¹⁴ See n. 12.

Prosecutorial Misconduct Opinions by County

Pennsylvania has sixty-seven counties, each with its own elected District Attorney, and three federal districts, each managed by an appointed United States Attorney. Each of these offices is responsible for its own training and management of prosecutorial performance, and thus it might be possible to find differences in rates of prosecutorial misconduct from county to county or among federal districts.

We evaluated misconduct claims by county to see whether there were any discernible differences in the rates of misconduct allegations in judicial opinions or in the resolution of those allegations. To standardize rates of identified misconduct throughout the state, we use the statistic of annual incidence of prosecutorial misconduct found per million residents ("Mry"). To do this, we utilized population estimates for each county and for each year between and including 2000 - 2016. These annual estimates were then averaged to establish a mean population estimate for each county for the time period in question, essentially a measure of "per capita" that takes changes in population over time into account. This index allows us to compare observed rates of opinion frequency as well as frequencies of specific dispositions between counties.

The statewide median of total opinions with PM claims per Mry was 9.8. As Figure 4, below shows, these rates varied (for counties with at least 1 opinion) between 1.4 and 70.6. Notably, while Philadelphia and Allegheny County are similar in mean population for the period (Philadelphia = 1.52 M, Allegheny = 1.23 M), there is a significant difference in the frequency of claims of prosecutorial misconduct. In Philadelphia there were 70.6 misconduct allegations per Mry — more than four times the per capital number of

misconduct allegations made in Allegheny County (15.0 per Mry).

Table 4 on page 15 provides a detailed county-by-county breakdown of opinions with prosecutorial misconduct allegations in Pennsylvania, including the number of opinions with claims raised, the number with prosecutorial misconduct found and the percentage of opinions with found claims relative to the number of opinions with claims raised.

Philadelphia, the largest county by population in the Commonwealth, is by far the leading producer of prosecutorial misconduct claims. In the 1,827 opinions in which misconduct was alleged, courts found misconduct in 42 (2.3%). The next highest total was from Pennsylvania's second most populous county, Allegheny County, with claims raised in 316 opinions identified and found in 12 opinions (3.8%). Philadelphia also had more than twice as many instances of found misconduct per capita (1.6 per Mry) than Allegheny (0.6 per Mry).

Generally more populous counties have more criminal prosecutions and more prosecutors. It is not surprising that larger counties (by population) account for a significant proportion of the total allegations of prosecutorial misconduct in Pennsylvania, but these data raise important questions. Are prosecutors actually committing less misconduct in Allegheny County in Philadelphia? Are individuals more or less likely to file claims of prosecutorial misconduct in one county or the other? Do judges in these two counties evaluate claims of misconduct differently? Are local practices in the criminal justice systems of these counties influencing? Additional research will be needed to answer these questions.



Hidden Hazards:

Prosecutorial Misconduct Claims In Pennsylvania, 2000 - 2016

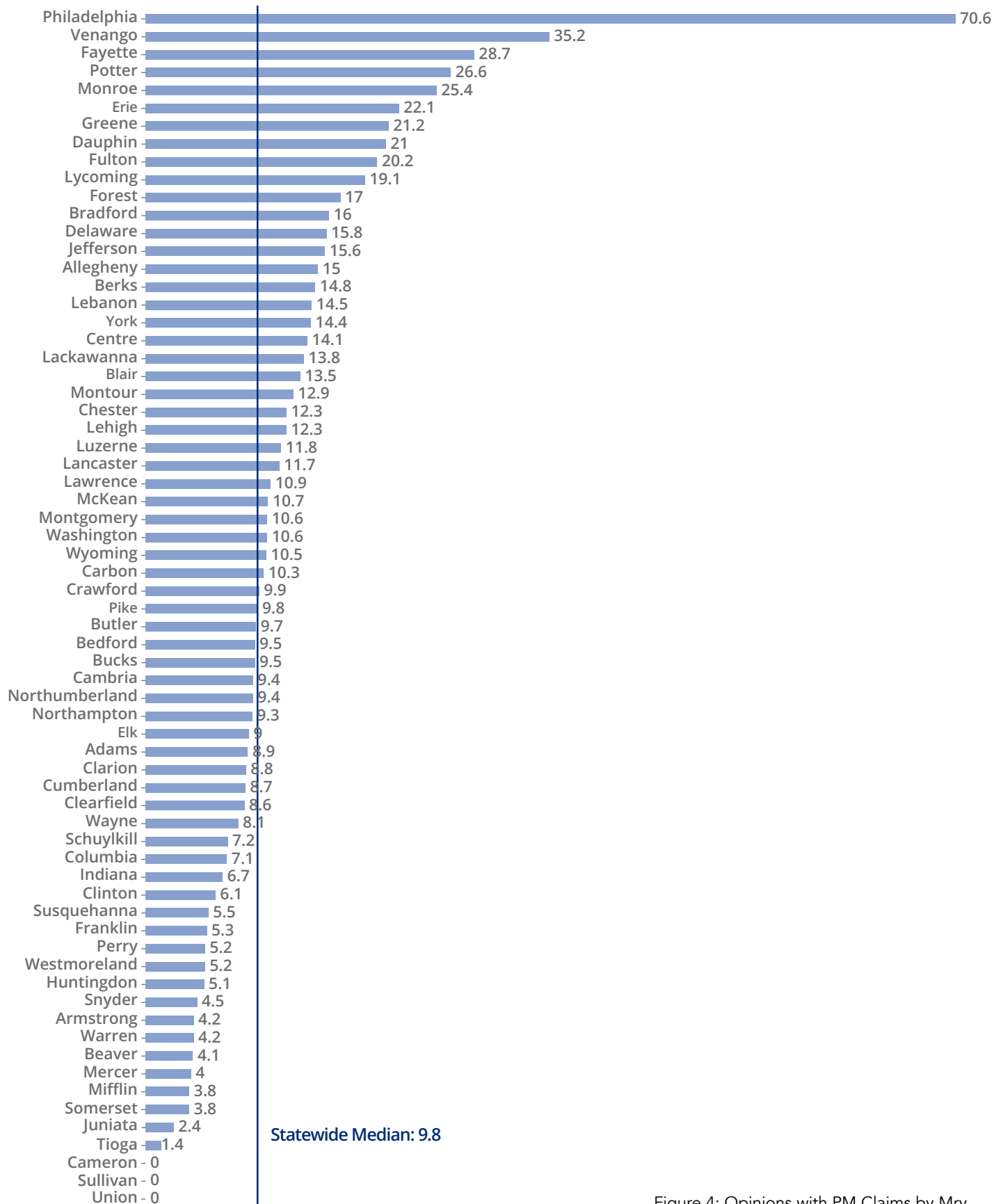


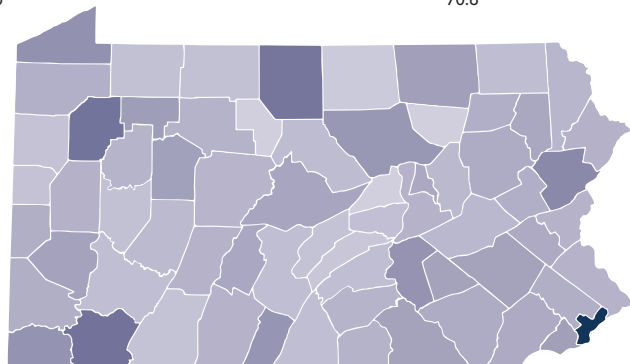
Figure 4: Opinions with PM Claims by Mry

County	Opinions with PM Claims	Opinions PM Found	PM Found %	PM Opinions per Mry	PM Found per Mry
Philadelphia	1,827	42	2.3	70.6	1.6
Allegheny	316	12	3.8	15	0.6
Delaware	150	0	0	15.8	0
Montgomery	142	3	2.1	10.6	0.2
Erie	105	2	1.9	22.1	0.4
York	103	3	2.9	14.4	0.4
Berks	101	5	5.0	14.8	0.7
Chester	101	4	4.0	12.3	0.5
Lancaster	101	1	1.0	11.7	0.1
Bucks	100	1	1.0	9.5	0.1
Dauphin	94	0	0	21	0
Lehigh	71	2	2.8	12.3	0.3
Monroe	70	3	4.3	25.4	1.1
Fayette	68	2	2.9	28.7	0.8
Luzerne	64	2	3.1	11.8	0.4
Lackawanna	50	2	4.0	13.8	0.6
Northampton	46	0	0	9.3	0
Lycoming	38	2	5.3	19.1	1
Washington	37	1	2.7	10.6	0.3
Centre	36	1	2.8	14.1	0.4
Cumberland	34	0	0	8.7	0
Venango	33	7	21.2	35.2	7.5
Westmoreland	32	1	3.1	5.2	0.2
Lebanon	32	0	0	14.5	0
Butler	30	2	6.7	9.7	0.6
Blair	29	3	10.3	13.5	1.4
Cambria	23	5	21.7	9.4	2
Schuylkill	18	1	5.6	7.2	0.4
Bradford	17	0	0	16	0
Lawrence	17	0	0	10.9	0
Crawford	15	1	6.7	9.9	0.7
Adams	15	0	0	8.9	0
Northumberland	15	0	0	9.4	0
Greene	14	0	0	21.2	0

County	Opinions with PM Claims	Opinions PM Found	PM Found %	PM Opinions per Mry	PM Found per Mry
Franklin	13	0	0	5.3	0
Beaver	12	0	0	4.1	0
Clearfield	12	0	0	8.6	0
Jefferson	12	0	0	15.6	0
Carbon	11	0	0	10.3	0
Indiana	10	2	20	6.7	1.3
Pike	9	0	0	9.8	0
Columbia	8	2	25	7.1	1.8
Potter	8	0	0	26.6	0
McKean	8	0	0	10.7	0
Mercer	8	0	0	4	0
Bedford	8	0	0	9.5	0
Wayne	7	0	0	8.1	0
Clarion	6	0	0	8.8	0
Wyoming	5	1	20	10.5	2.1
Armstrong	5	1	20	4.2	0.8
Somerset	5	0	0	3.8	0
Elk	5	0	0	9	0
Fulton	5	0	0	20.2	0
Huntingdon	4	1	25	5.1	1.3
Susquehanna	4	2	50	5.5	2.8
Perry	4	0	0	5.2	0
Clinton	4	0	0	6.1	0
Montour	4	0	0	12.9	0
Warren	3	0	0	4.2	0
Snyder	3	0	0	4.5	0
Mifflin	3	0	0	3.8	0
Forest	2	0	0	17	0
Tioga	1	0	0	1.4	0
Juniata	1	0	0	2.4	0
Union	0	0	0	0	0
Cameron	0	0	0	0	0
Sullivan	0	0	0	0	0

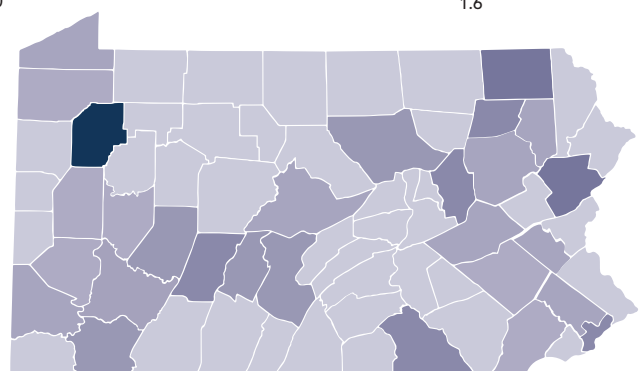
Table 4: Misconduct Claims by County

Opinions with PM Claims per Mry



Prosecutorial Misconduct Opinions per Mry

Opinions with PM Found per Mry



Prosecutorial Misconduct Found per Mry

Prosecutorial Misconduct by Jurisdiction: State and Federal Courts

An understanding of prosecutorial misconduct in Pennsylvania must consider the many differences between federal and state court systems. Pennsylvania's District Attorneys are "local" prosecutors, elected in each of its 67 counties to serve as the county's chief law enforcement official. In addition, the Pennsylvania Attorney General (also elected) has limited state-wide jurisdiction to prosecute crimes related to public corruption, corrupt organizations, health care fraud, or at the request of a local district attorney.¹⁵

Each District Attorney is assisted by a variable number of assistant district attorneys who serve as prosecutors of individual criminal cases involving violations of state law. In more populous counties the norm is for assistant district attorney (ADA) positions to be full-time. In less populous counties, the practice of employing part-time assistant district attorneys is more common, and some attorneys serve as an ADA while maintaining a private practice. By contrast, each federal judicial district is overseen by a United States Attorney appointed by the President of the

United States and confirmed by the United States Senate. Pennsylvania has three federal districts (Western, Middle, and Eastern). These U.S. Attorneys oversee the district's Assistant U.S. Attorneys (AUSAs), who are the trial prosecutors of individual criminal cases involving alleged violations of federal criminal statutes. These positions are all full-time, and AUSAs do not maintain any private practice.

All allegations of prosecutorial misconduct adjudicated by Pennsylvania state courts (e.g., the Court of Common Pleas, Superior Court, or Supreme Court) originate in Pennsylvania state courts. In Pennsylvania federal courts, however, misconduct claims may arise in two ways. The first of these is a case of original federal jurisdiction, where a defendant is charged with federal crimes and prosecuted exclusively in federal court. In the second category, federal courts may review state court criminal convictions brought through the habeas corpus statute.¹⁶ The below table shows the distribution of prosecutorial misconduct claims among the various courts.

Court Type	Opinions with PM Claims	Opinions with an Addressed Claim	Opinions with No Addressed Claims	Opinions with PM Found	% of Total Opinions - Claim Addressed	% of Total Opinions - Claim Not Addressed	% of Opinions with Addressed Claims - PM Found	% of Total Opinions with PM Found
Federal Habeas	1,054	712	342	27	67.6	32.4	3.8	2.6
Federal - Original Jurisdiction	501	432	69	28	86.2	13.8	6.5	5.6
PA State	3,089	2,344	745	90	75.9	24.1	3.8	2.9
State (Westlaw)	1,028	819	209	37	79.7	20.3	4.5	3.6
State (Unpublished)	2,061	1,525	536	53	74.0	26.0	3.5	2.6

Table 5: Misconduct Claim Disposition by Court Jurisdiction Category

¹⁵ 71 P.S. § 732-205.

¹⁶ Typically, the jurisdictional mechanism for defendants to ask federal courts to review state criminal convictions is by way of habeas corpus claims brought under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254.

The majority of claims of prosecutorial misconduct arose in Pennsylvania state courts: of the 3,488 opinions referencing prosecutorial misconduct claims, 1,555 (45%) were federal. Most federal court cases analyzing claims of prosecutorial misconduct involved state prisoners challenging their state convictions in federal court (1,054); only 501 arose from federal prosecutions. Initially, the difference between state and federal cases is not surprising; over 98% of prosecutions nationwide take place in state court.¹⁷ In Pennsylvania,

99% of criminal cases are from state courts. In the 17-year span covered by this study (2000-2016) there were 1,566,572 state criminal cases resolved with specific outcomes in Pennsylvania statewide.¹⁸ In the equivalent period for federal courts in Pennsylvania, a total of only 23,882 criminal cases were resolved, and only 1,178,577 were resolved in all federal courts nationwide.¹⁹

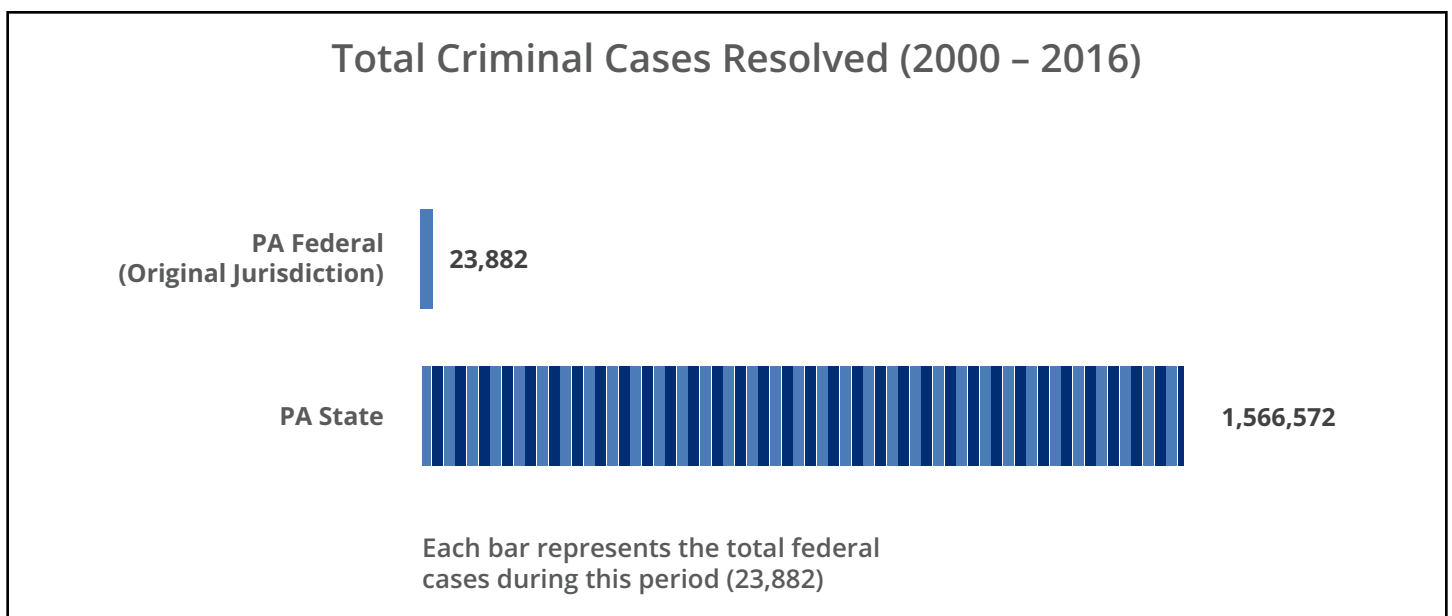


Figure 5: Relative Volume of Pennsylvania Criminal Caseloads in State and Federal Court

¹⁷ For the year 2018, state courts processed 17,000,000 cases (https://www.courtstatistics.org/_data/assets/pdf_file/0014/40820/2018-Digest.pdf), and federal courts processed 195,000 (<https://bjs.ojp.gov/content/pub/pdf/fjs1718.pdf>). See generally, 2019 Caseload statistics of the Unified Judicial System of Pennsylvania, Administrative Office of Pennsylvania Courts, found at <https://www.pacourts.us/Storage/media/pdfs/20210205/174304-caseloadstatisticsreport2019.pdf>; 2018 State Court Caseload Digest Data, National Center for State Courts, found at https://www.courtstatistics.org/_data/assets/pdf_file/0014/40820/2018-Digest.pdf; 2020 Judicial Caseload Indicators - Federal Judicial Caseload Statistics, Administrative Office of the U.S. Courts, found at <https://www.uscourts.gov/statistics-reports/judicial-caseload-indicators-federal-judicial-caseload-statistics-2020>.

¹⁸ See n. 4.

¹⁹ <https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables>

Although the data is insufficient to fully investigate the differences between the state and federal systems, the extreme difference in case volume makes one statistic jump out: using total criminal cases resolved as the denominator rather than population, the ratio of PA federal “found” opinions to total PA federal cases processed is 1 to 853 while in state opinions it is only 1 to 17,406.

While the absolute numbers of claims and opinions are smaller, federal court judges were more likely to substantively address claims of prosecutorial misconduct than state court judges. Misconduct arising out of federal prosecutions was substantively addressed in 86% of opinions where it was raised, as opposed to only 76% in state court opinions. Federal judges were also more likely to uphold allegations of prosecutorial misconduct: federal opinions found that misconduct occurred in 5.6% of opinions where it was raised, while state court opinions only found misconduct in 2.9% of opinions. Additional research is needed to understand the variations between state and federal courts in reviewing these claims.

The Impact of Prosecutorial Misconduct on Known Cases of Wrongful Convictions in Pennsylvania

One subset of cases offers a small (though disheartening) window into unseen prosecutorial misconduct: exoneration or “wrongful conviction” cases.²⁰ The National Registry of Exonerations (NRE) has maintained a record and database of known exonerations in the United States from 1989 to the present day.²¹ As of July 2021, the database contained information on over 3,200 exonerations in the United States, representing more than 25,000 years of wrongful incarceration. According to a special report NRE researchers published in 2020, prosecutors committed misconduct in 30% of the first 2,400 exoneration cases in the database.²² The NRE report echoed a dominant theme seen in our dataset: concealing exculpatory evidence is the most frequent type of misconduct. In the cases reviewed for their study, exculpatory evidence was not disclosed in 44% of the cases (1,064/2,400) and prosecutors (as opposed to police) failed to produce the evidence in 73% (378/520) of those cases.²³

Prosecutors committed other trial-related misconduct in 14% of the exonerations studied.²⁴

Using the NRE data, we evaluated the role of prosecutorial misconduct in Pennsylvania exonerations. To date,²⁵ there have been 106 exonerations in Pennsylvania – Prosecutors committed misconduct in 48 of them. In 22 of those cases, prosecutors committed misconduct in tandem with other official actors; and in 24 of those wrongful convictions prosecutors were the only official actor who committed misconduct.²⁶

Pennsylvania Wrongful Convictions and Prosecutorial Misconduct

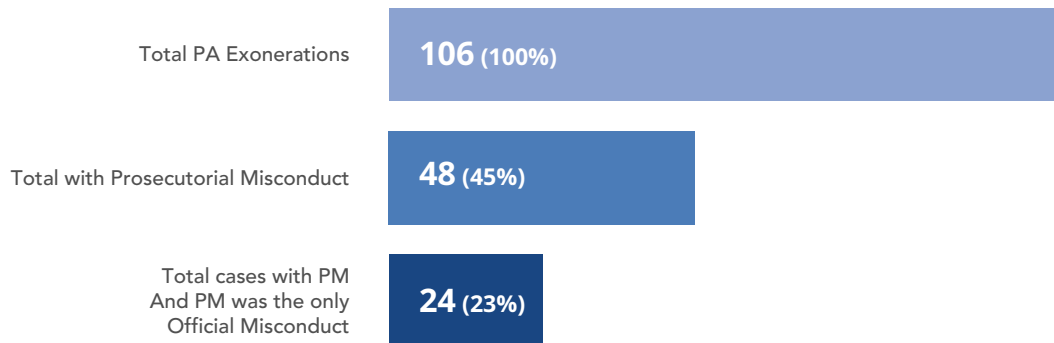


Figure 6: Pennsylvania Prosecutorial Misconduct in the National Registry of Exonerations

20 For this report, we adopt the definition of “exoneration” used by the Registry of Exonerations: “an exoneration occurs when a person who has been convicted of a crime is officially cleared based on new evidence of innocence.” <https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx>.

21 <https://www.law.umich.edu/special/exoneration/Pages/about.aspx>.

22 Gross, Possley, Roll, and Stephens, *supra* note 1, at 4.

23 *Id.* at 82.

24 *Id.* at 33.

25 The Registry includes 101 Pennsylvania state exonerations – see <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> – and five Pennsylvania federal exonerations – <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=ST&FilterValue1=F%2DPA> (both last accessed October 6, 2021).

26 The NRE coding separately identifies misconduct by prosecutors, police, forensic analysts, and child welfare workers.

The failure to properly disclose exculpatory evidence was a factor in 55% of Pennsylvania exonerations (58/106) and of these, the failure rested with prosecutors 71% of the time (41/58). (Remember that while police officers are credited in the NRE with committing misconduct in 42 Pennsylvania cases, the obligation to disclose exculpatory information to the defense still resides solely with the prosecutor.) Prosecutors knowingly allowed perjury in 19 wrongful conviction cases and lied in court in 14 cases.

The NRE data illustrates another manifestation of the “invisibility” of prosecutorial misconduct. To compare our misconduct dataset to the NRE data, we checked each NRE case from Pennsylvania to determine if it appeared in our data.

87 of the 106 exonerations in the NRE database occurred after 1999, and prosecutorial misconduct was a factor in 40 of them. Although our initial batch of opinions contained opinions related to 31 of these cases, four were removed from the set during the primary analysis (see Methodology section in Appendix) because a misconduct claim was not clearly discussed. Another eight cases had no court opinion that would have been captured in our study as these cases were either Philadelphia District Attorney’s Office Conviction Integrity Unit (CIU) cases or were otherwise resolved by the trial court in a PCRA proceeding. Ultimately, there were at least 13 wrongful convictions with identified prosecutorial misconduct resolved after 1999 that were “invisible” to the appellate process.

Rarity of Court Evaluation of Misconduct Claims in Pennsylvania NRE Wrongful Conviction Cases

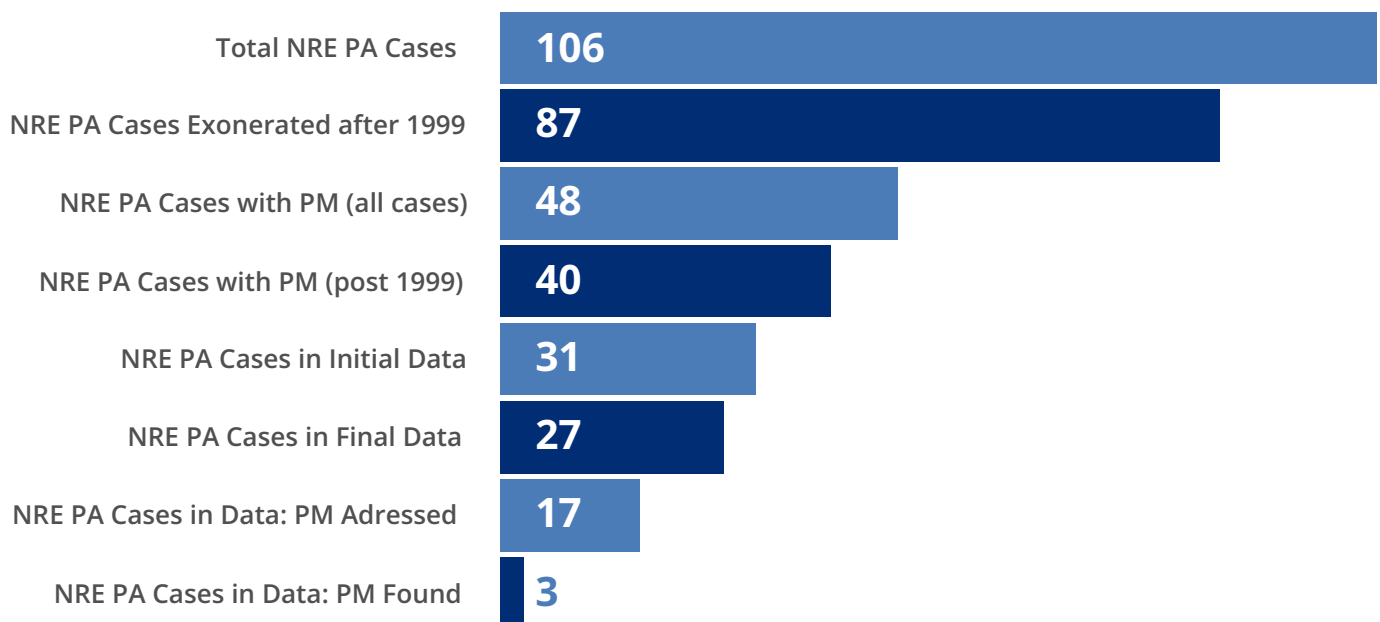


Figure 7: Pennsylvania Wrongful Convictions and Published Opinions

Of the 27 NRE cases in our final dataset, the claims of prosecutorial misconduct that were put before the court were addressed in only 17 cases and found in three. Of the 40 NRE misconduct cases identified in Pennsylvania after 1999, eight were decided without a written opinion, or at least an opinion that did not contain our search terms. Most significantly, out of the 31 cases with related opinions, only three found some form of misconduct – in the other 28 cases the courts, for whatever reason, failed to identify actual instances of misconduct.

Latent Errors: The Exoneration of Crystal Weimer

One Pennsylvania exoneration reviewed by the NRE but not included in our judicial opinion dataset involved Crystal Weimer, who was wrongly convicted of murder in Fayette County. At her trial, three jailhouse witnesses testified that Ms. Weimer admitted killing the victim. The prosecutor told the jury the witnesses had “asked for nothing from the Commonwealth” and so could be trusted. After her conviction, Ms. Weimer’s lawyers got access to the prosecution file. Within the file were letters dated before the trial from the jailhouse witnesses asking the DA for assistance for themselves or family members. Her conviction was vacated soon after those letters were discovered, and Ms. Weimer was released on other grounds after serving over ten years in prison. The reason why Ms. Weimer was not able to raise this claim of withholding evidence and misleading statements to the jury was because she did not have the information until her post-conviction proceedings. In addition, because her conviction was vacated at the trial court level, there is no record of the alleged misconduct in the public record. Her case is a stark example both of the likelihood that our review severely undercounts the prevalence of prosecutorial misconduct claims and of the problems with Pennsylvania’s discovery laws.

The Problem of Invisibility

Numerous factors may prevent an instance of misconduct from being visible or evaluable after a criminal case is resolved: many types of misconduct don't happen in "open court;" the rarity of trials and the more robust records of proceedings they create; the extraordinarily high rate of guilty pleas with little record and limited grounds for review; and the lack of reported or otherwise published opinions which makes post-hoc discovery of prosecutorial misconduct virtually impossible for the general public.

Invisible Prosecutions: Pennsylvania Criminal Caseloads and Dispositions

While we don't know what specific misconduct may be hidden in the environment described above, we at least know its volume. In Pennsylvania trial courts, during the years 2000-2016, 1,566,572 criminal cases were resolved with specific outcomes in Pennsylvania trial courts.²⁷ Of these cases 219,148 were withdrawn or dismissed (14%), 181,294 were resolved by trial (12%)²⁸ and 1,166,130 resulted in either guilty plea (870,500 cases, 55%) or diversion (295,630 cases 19%).

Total PA Criminal Cases with Known Outcomes
2000 – 2016 (n = 1,566,572)

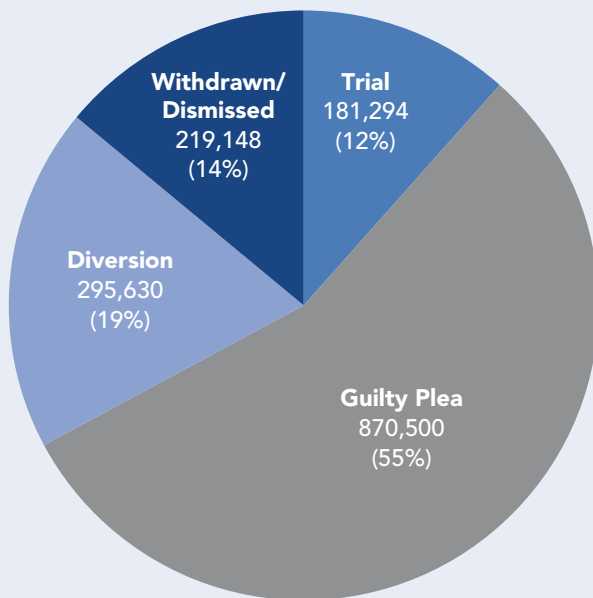


Figure 8: Total Pennsylvania Criminal Cases
Processed 2000-2016

Philadelphia vs. Rest of Pennsylvania

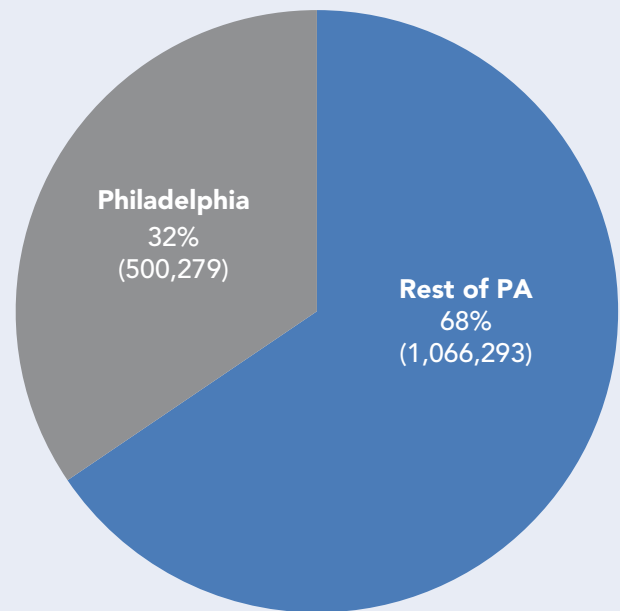


Figure 9: Distribution of Criminal Caseloads Between
Philadelphia and Rest of Pennsylvania, 2000 - 2016

²⁷ See note 4.

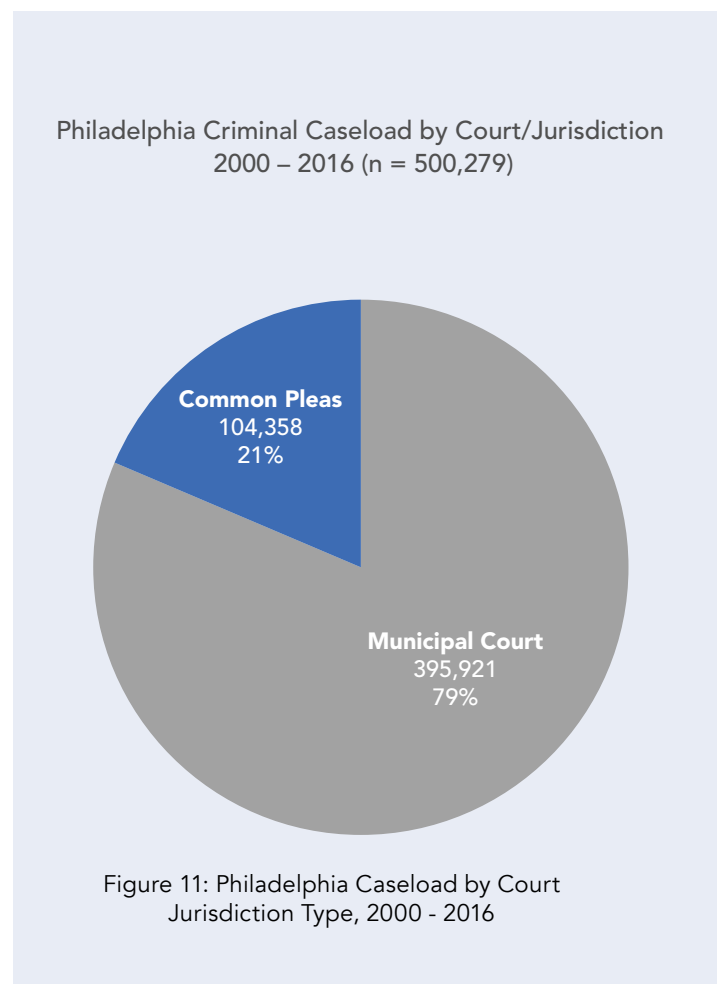
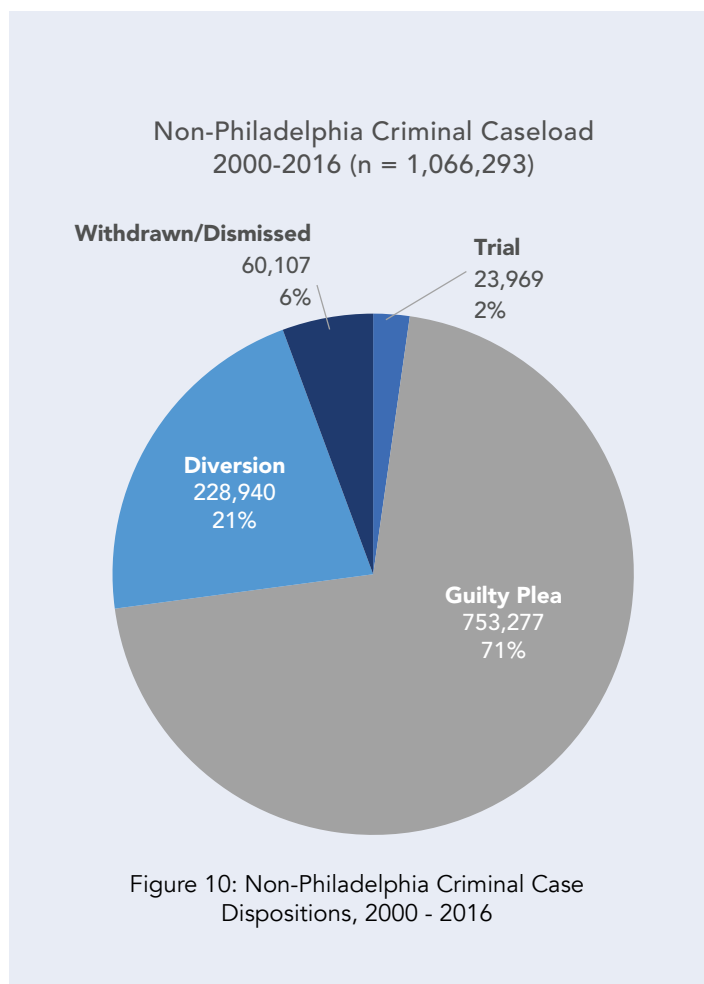
²⁸ There are no jury trials in Municipal Court. As a result, any defendant convicted at trial has the right to a new trial "de novo in the Court of Common Pleas." Pa. R. Crim. P. 1006. For this reason, the rate of trial dispositions is skewed by Philadelphia, as described below the total number of trials statewide with Philadelphia excluded is only 23,969, or 2% of the total cases processed.

Statewide Criminal Case Dispositions (Excluding Philadelphia)

Excluding Philadelphia,²⁹ of the 1,066,293 resolved cases, 60,107 were withdrawn or dismissed. Only 23,969 (2%) were resolved by trial.³⁰ The remaining 982,217 cases resulted in either a guilty plea (753,277 cases, 71%) or a court diversion program (228,940 cases, 21%).³¹

Philadelphia Criminal Case Dispositions

In Philadelphia, of the 561,008 total cases, 104,358 were in the Court of Common Pleas (CP) and 456,650 were in Municipal Court (MC). The Municipal Court is unique to Philadelphia County and has initial jurisdiction over criminal offenses with potential prison terms of 5 years or fewer, which includes all misdemeanors. With a few exceptions, felony offenses go through the preliminary hearing in the Municipal Court and then are transferred to the Court of Common Pleas for trial or other disposition.



29 See note 27. Cases in Philadelphia Municipal Court that are resolved by negotiation typically result in a “stipulated trial,” to preserve the right to a jury trial, rather than a guilty plea. This means that the trial rate for misdemeanor cases is far higher than in any other court or county. For this reason, it is helpful to analyze Philadelphia separately from the rest of the state.

30 There is further distinction between cases resolved by bench trial and jury trial: of the 23,969 trials, only 11,315 (1% of cases) were jury trials and 12,654 (1.1%) cases were resolved by non-jury trial. *Id.*

31 Additionally, 46,083 cases were described as “inactive” and 16,586 described as “other;” as explained above in note 4, these cases were excluded from analysis.

Philadelphia Criminal Case Disposition – Court of Common Pleas

In the Common Pleas group (104,358 cases), 15,844 were withdrawn or dismissed (16%), 16,845 were resolved by trial (16%) and 71,669 resulted in either guilty plea (68,876 cases, 65%) or diversion (2,793 cases, 3%).

Philadelphia Criminal Case Dispositions – Municipal Court

In the Municipal Court group (456,650 cases), 143,197 were withdrawn or dismissed (36%), 140,480 were resolved by trial (36%) and 112,244 resulted in either guilty plea (48,347 cases, 12%) or diversion (63,897 cases, 16%).³²

Philadelphia CP Cases 2000 – 2016 (n = 104,358)

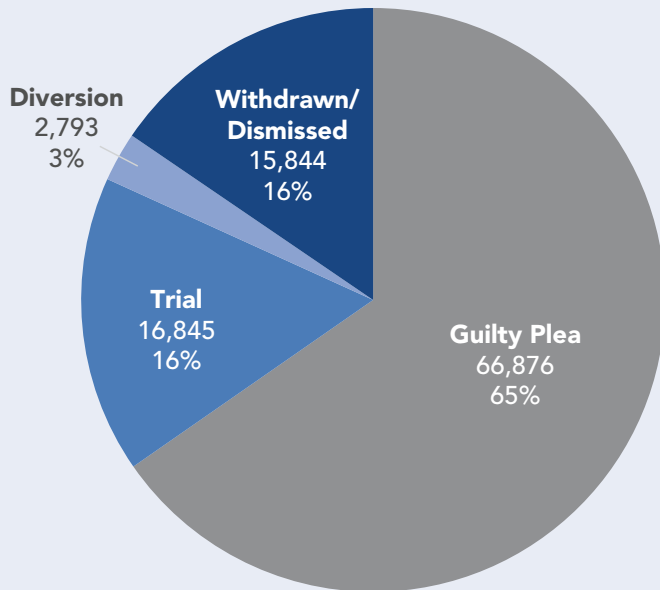


Figure 12: Philadelphia Common Pleas Criminal Case Dispositions, 2000 - 2016

Philadelphia MC Cases 2000 – 2016 (n = 395,921)

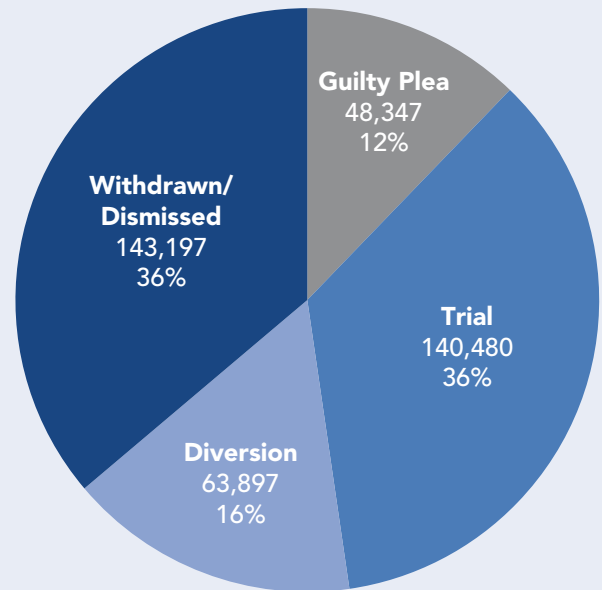


Figure 13: Philadelphia Municipal Court Criminal Case Dispositions, 2000 - 2016

³² See note 27 above re: the nature of the Philadelphia Municipal Court “stipulated trial” procedure and its significant effect on the trial/guilty plea ratio.

The rarity of criminal trials, and the corresponding prevalence of plea bargaining, described above causes the evidence in the overwhelming majority of criminal cases to go untested. It is the few cases that go to trial that provide the only fully visible part of the criminal case universe. In all other cases – those that are withdrawn, dismissed, diverted, or result in a guilty plea – misconduct or other prosecutorial error remain mostly or completely hidden, a critical mass of the criminal justice iceberg that is always beneath the surface, outside public view, and posing the biggest risk of undetected misconduct.

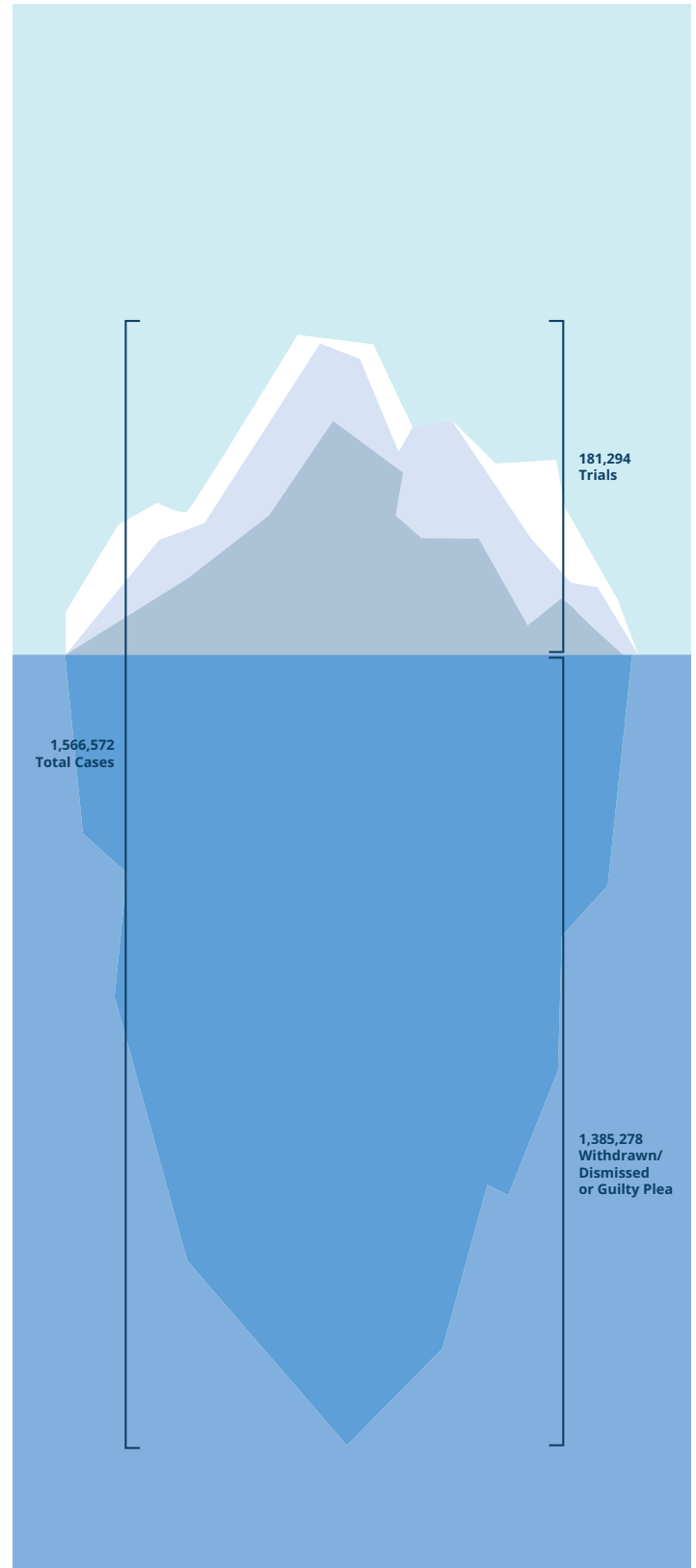


Figure 14. The Full Scope of Prosecutor Behavior is Hidden by the Rarity of Trials

Invisible Record: The Problem of Guilty Pleas

For those cases resolved without trial, (e.g., by means of a guilty plea), there is a greater risk of “invisible” or undetected prosecutorial misconduct. Cases resolved by guilty plea are more difficult to appeal, with bases for appeal limited to the jurisdiction of the court, the voluntariness of the plea, and the legality of the sentence.³³ Moreover, because the obligation of a prosecutor to disclose exculpatory information before negotiating a plea agreement is not clear,³⁴ it is possible for a prosecutor to selectively withhold exculpatory information known to police and prosecutors from a defendant, secure a negotiated plea, and close the case file without revealing the exculpatory information. Such a prosecutorial strategy would be difficult to uncover and could effectively hide any negligent, reckless, or deliberate prosecutorial misconduct.

The truncated and private nature of the plea process contributes to an environment where concealed evidence or other misconduct is simply less likely to come to light. In a state like Pennsylvania where open records laws shield prosecutors’ files or anything to do with a “criminal investigation” from disclosure³⁵ the likelihood of ever discovering withheld evidence is minimal.

A critical mass of the criminal justice iceberg is always beneath the surface, outside public view, and posing the biggest risk of undetected misconduct.

33 *Commonwealth v. Fultz*, 462 A.2d 1340, 1341 (Pa. Super. Ct. 1983).

34 Some jurisdictions have held that exculpatory information relevant to guilt or innocence must be disclosed prior to a plea bargain; others have held that the disclosure obligations set forth in *Brady* and its progeny are rights that only pertain to a trial. See Miriam H. Baer, *Timing Brady*, 115 Colum. L. Rev. 1, 13 (2015) (“*Brady* itself is silent with regard to guilty pleas; lower courts are divided on whether pleading defendants can waive their rights to receive *Brady* material.”). This issue is discussed further below, in The Ongoing Unresolved Issues Posed by *Brady*.

35 See 65 P.S. § 67.708(16) (excluding from production “A record of an agency relating to or resulting in a criminal investigation”).

Invisible Law: Unreported Decisions

The problem of undetected – and undetectable – prosecutorial misconduct becomes even more vexing when one considers the increasingly narrow window for evaluating cases afforded by the appellate process and collateral review. A review of Pennsylvania cases poses particular challenges due to the unavailability of court opinions. In Pennsylvania as in many states, appellate opinions can be precedential or non-precedential. But unlike many other states, before 2019, non-precedential Superior Court opinions in Pennsylvania were referred to as “unpublished memoranda decisions.”³⁶ As the name implies, written opinions were provided directly to and only to the parties in the case. While these opinions were still technically in the public record before 2012, they could only be accessed by requesting a copy directly from the Superior Court.³⁷ In the 17-year span covered by this study,

77,930 criminal appeals were concluded in the Superior Court.³⁸ 57,142 of these appeals resulted in a written opinion and of these, only 2,762 (4.8%) were published while 54,380 (95.2%) were unpublished.³⁹

It is not possible to conclusively identify all instances of prosecutorial misconduct in our criminal courts; any attempt is almost certain to undercount the problem. Trial court judges, and potentially appellate judges, are in a better position to see the practices of individual prosecutors on a repeat basis and therefore may be able to identify prosecutors who may be more prone to committing acts of prosecutorial misconduct. Still, the infrequency with which they may see specific prosecutors and their limited visibility into cases resolved by plea bargain provide substantial challenges here as well.

Invisible Law – The Rarity of Published Opinions

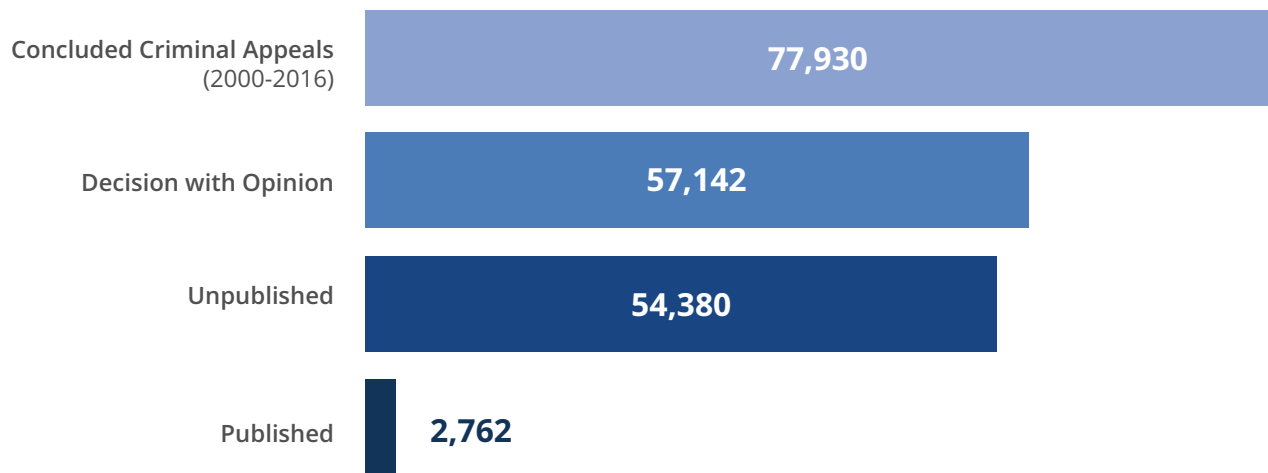


Figure 15: The Rarity of Published Appellate Opinions in Pennsylvania, 2000 - 2016

³⁶ PA ST SUPER CT IOP § 65.37.

³⁷ According to sources in the administrative offices of the Superior Court and Thompson Reuters (Westlaw), these “unpublished” opinions were provided to the Westlaw online database beginning sometime in 2011 and as of 2012 all such opinions were available in the online database. We discuss how we were able to access these opinions in the Appendix - A Note on Unpublished Opinions.

³⁸ Data from Superior Court Statistical Reports, available on the UJS Website at <https://www.pacourts.us/news-and-statistics/reports/superior-court-reports>.

³⁹ This ratio is significantly different than the analogous ratio for civil cases. In the same period, there were 54,826 civil appeals concluded in Superior Court, 28,927 with filed opinions. Of these, 3,217 (11.1%) were published while 25,710 (88.9%) were unpublished, a 131% difference in publication relative to criminal opinions.

Judicial Resolution of Prosecutorial Misconduct Claims in Pennsylvania

Courts adjudicating allegations of prosecutorial misconduct have several steps to their review. First, they analyze the claims with the record to determine whether the alleged prosecutor misconduct occurred. If the misconduct happened, the courts then determine whether the misconduct was illegal/inappropriate (i.e., for our report the PM was Found) or legal/appropriate (i.e., the PM was Not Found). Instances of misconduct that are “found” may still not result in any relief for the petitioner if the court determines the misconduct was “harmless error” that would not have changed the outcome of the case. Finally, courts may choose not to review the specific claim at all for procedural or other reasons (classified also as PM “Not Found”).

Claims Addressed, but Misconduct Not Found

In many cases in our study, courts addressed the alleged misconduct but found no error or even normalized the behavior. One panel failed to condemn a prosecutor’s references to the defendant as “an executioner ... assassin ... [and] cold-blooded killer” terming them only “improper.” In the same opinion, the prosecutor’s derisive description of defense counsel as “fancy lawyers” seeking to “prevent the witness from telling the truth in court” was justified as “fair response.”⁴⁰

Courts can also – and often do – disagree amongst themselves on what is or is not prosecutorial misconduct. For example, in *Commonwealth v. Whitaker*,⁴¹ the Pennsylvania Supreme Court found no misconduct in a prosecutor’s closing argument for an alleged violation of the *Bruton* doctrine.⁴² On the same record, the Third Circuit found the conduct improper, and counsel’s failure to object to it at trial amounted to ineffective assistance of counsel.⁴³

These cases demonstrate the subjective nature of prosecutorial misconduct reviews. Without bright-line tests for courts to apply, the error is truly in the eye of the beholder.

Distribution of Claims Addressed but not Found

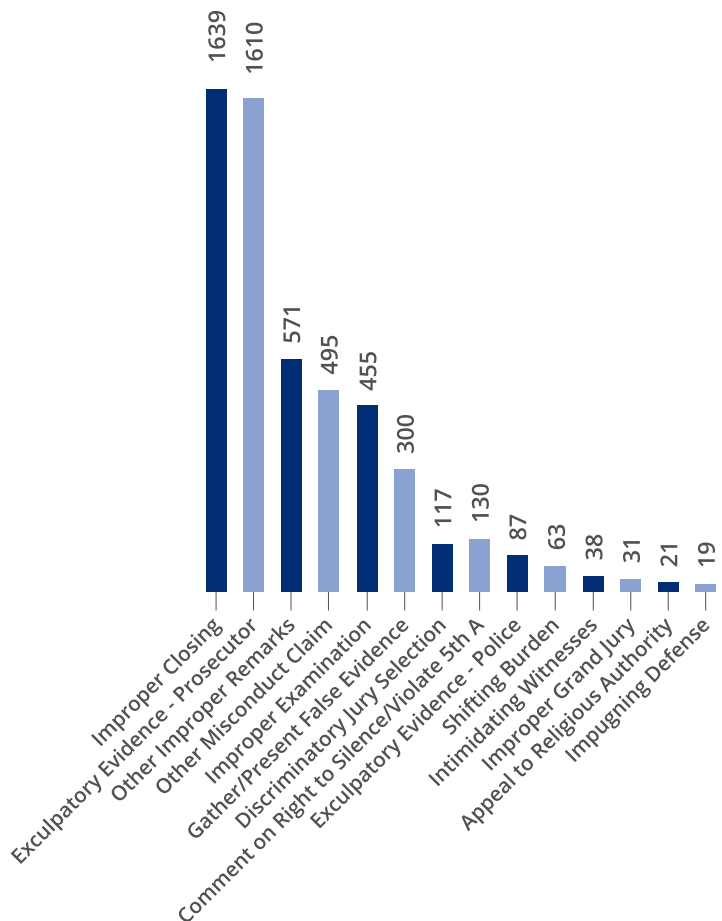


Figure 16: Distribution of Claims that are Addressed but not Found by Claim Category

40 *Commonwealth v. Morefield*, 985 EDA 2011 (Pa. Super. Ct. Nov. 30, 2011).

41 *Commonwealth v. Whitaker*, 878 A.2d 914 (Pa. Super. Ct. 2005).

42 In *Bruton*, the U.S. Supreme Court held that a defendant’s confrontation clause rights are violated when a non-testifying codefendant’s confession naming the defendant as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant. *Bruton v. United States*, 391 U.S. 123, 135-36 (1968). At Whitaker’s trial, prosecutors introduced the non-testifying co-defendant’s statement in evidence at their joint trial which had been redacted to remove any mention of Whitaker when it was read. Nonetheless, the trial prosecutor undid the protection, telling the jury Whitaker was “the other guy” referred to in the co-defendant’s statement. *Whitaker*, 878 A.2d at 920.

43 *Whitaker v. Superintendent Coal Twp. SCI*, 721 Fed.Appx. 196, 204 (3d Cir. 2018).

Claims Not Addressed

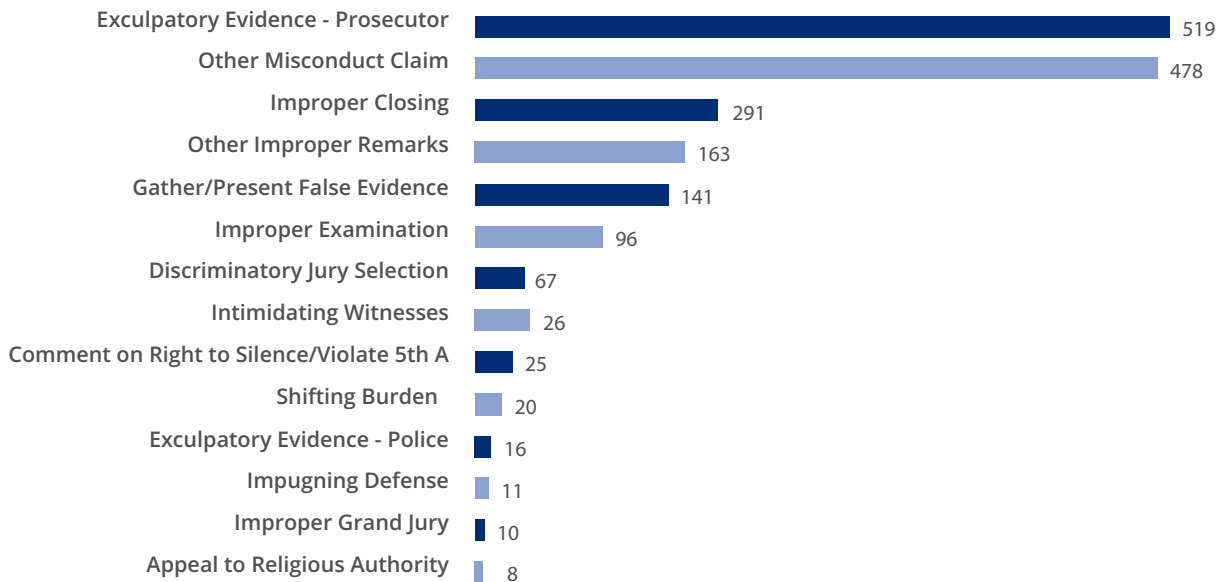


Figure 17: Distribution of Unaddressed Claims by Claim Category

Our dataset consists of 4,644 opinions in which petitioners made 7,207 allegations of prosecutorial misconduct. In 1,156 opinions (25%), judges disposed of the cases without addressing the claims of prosecutorial misconduct, meaning that 1,775 allegations of misconduct went undiscussed. Of these, 370 opinions (9% of the total) included claims that a prosecutor withheld exculpatory evidence.

There are a variety of reasons why this may occur. Cases may be dismissed without evaluating the merits of the claims because the claims were time-barred (i.e., filed after a final filing deadline), or for some other procedural defect. In *Commonwealth v. Roberts*, for example, claims related to suppressed evidence were dismissed initially by a PCRA court in 2011 and then in 2013 by the Superior Court because the “appellant does not indicate where these claims were raised in the PCRA Court” and because “they could have

been raised on direct appeal but were not.”⁴⁴ Four years later in 2017, the same issues were finally addressed by the

**In 1,156 opinions (25%),
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PCRA court which found that there were Brady violations and a new trial was warranted, which was affirmed by the Superior Court in 2018.⁴⁵ A new trial began in 2019, and the previously suppressed evidence was presented to the jury. At the conclusion of the trial, and after ten years of delay caused by the prosecution’s failure to properly disclose evidence, the jury acquitted Mr. Roberts.

⁴⁴ *Commonwealth v. Roberts*, No. 1401 MDA 2012 (Pa. Super. Ct. Mar. 20, 2013).

⁴⁵ *Commonwealth v. Roberts*, No. 1148 MDA 2017 (Pa. Super. Ct. Oct. 10, 2018).

Cases in which misconduct is alleged but not addressed can be resolved in other ways. In some, courts may acknowledge the existence of the misconduct claim but rule on other substantive issues requiring reversal without substantively addressing the misconduct. In others, it appears the courts simply ignore the claims altogether.

For example, the Superior Court chose not to address Rashawn Knox's claim of prosecutorial misconduct, choosing instead to vacate the conviction due to the absence of an interpreter for a non-English speaking witness. The prosecutor in Mr. Knox's case displayed pictures in the closing argument of guns and drugs the trial court had excluded from evidence in a pre-trial ruling. The Superior Court implicitly acknowledged this direct and unaddressed prosecutorial misconduct in a footnote to its opinion noting, "the Commonwealth now has the necessary time and notice to remove the slides from its presentation that contains information previously excluded by the trial court."⁴⁶ This deliberate notice of, and failure to address, prosecutorial misconduct provides no remedy to the defendant and creates no disincentive for repeat misconduct in the future.

Failures to address prosecutorial misconduct relegate claims of misconduct to "less important" status than the other claims, missing opportunities to hold prosecutors accountable for misconduct and to clarify what is or is not misconduct, each of which would provide prosecutors with useful incentives and precedent to improve future behavior.

⁴⁶ *Commonwealth v. Knox*, 142 A.2d 863, n. 7 (Pa. Super. Ct. 2016).

Misconduct Found and Its Impact Is Minimized By the Court

Of the 7,207 claims raised in 4,644 opinions, only 204 claims (145 opinions)⁴⁷ resulted in a finding of prosecutorial misconduct. Claims of improper closing arguments and undisclosed exculpatory evidence once again constitute the majority of the cases and claims in this category. The bar for reversal in a case alleging prosecutorial misconduct in closing argument is high: the court will reverse for improper argument only where the prosecutor deliberately attempted to “destroy the objectivity of the factfinder” such that the jury “could not weigh the evidence and render a true verdict.”⁴⁸ This high bar means a wide range of inappropriate conduct is ignored, leaving prosecutors with nearly unchecked reign in presenting their closing argument.

Despite a strong condemnation of the prosecutor’s conduct, the court elected not to publish its decision in this case, thereby eliminating the possibility that other prosecutors or the public would learn from the opinion.

In the case of *Commonwealth v. Scher*,⁴⁹ the court acknowledged that petitioner raised 292 specific allegations of prosecutorial misconduct. The Court addressed them collectively in five categories and noted the improper techniques used at trial were “likely to arise upon retrial.” The court’s opinion included 27 pages devoted to discussing multiple instances of prosecutorial

misconduct including countless argumentative speaking objections, repeated inappropriate references to the defendant’s atheism, repeated references to evidence previously ruled inadmissible, expressions of the prosecutor’s personal opinion, the use of leading questions on direct examination, and outrageous conduct during the prosecutor’s closing argument:

The actions of the prosecutor in this case, which can only be described as misconduct and a blatant violation of the precepts of professional conduct, are indistinguishable from the conduct we found so offensive in *Commonwealth v. Chmiel*.

We will not separately address each of appellant’s claimed instances of misconduct, nor even a substantial percentage of them, but can state with firm certainty that the record is replete with examples of offensive conduct on the part of the prosecutor, often in glaring defiance of the trial court.

Despite this strong condemnation, the court elected not to publish its decision in this case, thereby eliminating the possibility that other prosecutors or the public would learn from the opinion. Ironically, the court made clear their opinions regarding the stain prosecutorial misconduct has on the entire criminal justice system: “Prosecutors who fail to perform in [a] responsible, dutiful fashion and thereby jeopardize convictions for which there is otherwise firm basis, do not simply reveal themselves as lacking basic adversarial skills and fundamental professionalism, they also fail to fulfill both their duty to the Commonwealth, and their obligation to the family of the victim.”⁵⁰

47 As referenced above in note 12, total claims are greater than total opinions as a single opinion may involve multiple claims.

48 *Commonwealth v. McNeil*, 679 A.2d 1253, 1258 (Pa. 1996); see also *Commonwealth v. Brown*, 711 A.2d 444 (Pa. 1998) (to reverse due to improper closing argument, court must find prosecutor “deliberately attempted to destroy the objectivity of the factfinder” such that the “unavoidable effect” would “create such bias and hostility toward the defendant that the jury could not render a true verdict”) (internal citations omitted).

49 *Commonwealth v. Scher*, 4778 PHL 1997 (Pa. Super. Ct., Mar. 26, 2004).

50 *Id.* at n. 17.

Misconduct Found, but No Relief Granted (“Harmless” Error)

Even if an appellate court finds that an act of prosecutorial misconduct did occur, the petitioner/defendant may not receive any remedy. This is because of the “harmless error” doctrine. If the defendant proves misconduct, then the burden shifts to the prosecution to prove beyond a reasonable doubt that the error did not affect the outcome – that it was “harmless.”

Pennsylvania law includes a harmless error analysis for prosecutorial misconduct, though the specific term is rarely invoked in judicial opinions. Of the 5,206 opinions where misconduct was addressed but not found to be substantiated by the court, only 52 (1%) clearly stated a finding of harmless error

Even so, treating the misconduct as practically irrelevant without explicitly stating whether the misconduct was “harmless” dilutes the effectiveness of written opinions in guiding future conduct. Interpreting judicial opinions related to misconduct claims is often subjective, even for experienced lawyers. It is important to the quality of the criminal justice system that courts reviewing these claims be rigorous in their assessments, articulating clearly whether misconduct occurred and, if so, whether such misconduct was harmless beyond a reasonable doubt. This provides prosecutors and other lawyers with clear direction on how to modify their actions going forward and puts all criminal justice practitioners in a better position to reduce instances of misconduct over time.

“The nature of harmless error review and concomitant limitations on our supervisory authority profoundly limit the reach of a court of appeals when it confronts most claims of prosecutorial misconduct.”⁵¹

— Former U.S. Third Circuit Court of Appeals Judge D. Brooks Smith

51 D. Brooks Smith, *Policing Prosecutors: What Role Can Appellate Courts Play?*, 38 Hofstra L. Rev. 835, 836-840 (2010). Even the Supreme Court, which of course created the rule, admits “harmless-error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one.” *Chapman v. California*, 386 U.S. 18, 22 (1967).

The Ongoing Unresolved Issues of *Brady*

The category of prosecutorial misconduct most frequently raised and most frequently found in judicial opinions is the failure of prosecutors to produce exculpatory information – that is, information that could be used to support the defendant’s acquittal – to the defense in a timely fashion. This information is commonly called “*Brady*” evidence, after *Brady v. Maryland*, the 1963 Supreme Court case that originally described the prosecutor’s obligations of disclosure. In general, prosecutors must disclose to the defense all exculpatory information in the government’s possession that is material to the guilt or punishment of the accused; it is up to the individual prosecutor to determine whether evidence meets the definition of “exculpatory.”⁵² Evidence is exculpatory if it could be used to establish the innocence of the accused, impeach the credibility of a material witness, or attack the thoroughness and the good faith of the police investigation.⁵³ All exculpatory information must be disclosed, whether or not the information is in the prosecutor’s possession or in the possession of another government entity (e.g., the police) involved in the criminal investigation. The prosecutor is responsible for knowing what information is contained within other files and

ensuring all exculpatory evidence in the position of the government – not just the prosecutor’s office - has been provided.⁵⁴ Because *Brady* violations persist, in part, from the failure of prosecutors to follow the rule and courts’ inability to rectify the error, reducing instances of *Brady* violations will take efforts on both prosecutors and judges.

As in many states, the criminal justice system in Pennsylvania provides prosecutors with a great deal of discretion, virtually no oversight, and, thanks to the doctrine of “absolute immunity,” a total lack of systemic or individual accountability for prosecutorial misconduct. As a result, prosecutors who commit misconduct are rarely identified and no comparative data exists to evaluate whether misconduct occurs more frequently in some jurisdictions than others. In the absence of oversight boards and civil litigation, criminal charges against prosecutors and ethics board disciplinary measures are the only means of incentivizing appropriate prosecutorial actions. Unfortunately, a review of these mechanisms shows they are not used for these purposes, leaving the public with no suitable incentives for prosecutors to meet their ethical and professional obligations.

Prosecutors who commit misconduct are rarely identified and no comparative data exists to evaluate whether misconduct occurs more frequently in some jurisdictions than others.

Prosecutors Have Broad Discretion in Providing Discovery

Under Pennsylvania law, the defense has no general right to access prosecution files.⁵⁵ It is, then, up to prosecutors to cull their files for material required to be turned over. Prosecutors choose what information to provide and what to withhold. While many prosecutors err on the side of producing borderline exculpatory evidence, that is neither a universal practice nor a legal standard.⁵⁶ To avoid a situation where fellow prosecutors or police can keep exculpatory evidence from the trial prosecutor, the Supreme Court reinforces the *Brady* obligation as one belonging solely to the prosecutor as an officer of the court.⁵⁷ The U.S. Supreme Court has long held that

52 *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (suppression of such evidence violates due process “irrespective of the good faith or bad faith of the prosecution”).

53 *Kyles v. Whitley*, 514 U.S. at 447; *United States v. Bagley*, 473 U.S. at 676.

54 *Kyles*, 514 U.S. at 447.

55 *Commonwealth v. Edmiston*, 851 A.2d 883, 887 n. 3 (Pa. 2004).

56 *Dennis v. Secretary, Pennsylvania Department of Corrections*, 834 F.3d 269, 296 (3d Cir. 2016).

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

"suppression by the prosecution of [such] evidence . . . violates due process . . . irrespective of the good faith or bad faith of the prosecution."⁵⁸ This violation of due process is not linked to the prosecution's intent – the failure to disclose exculpatory information violates an accused's due process rights whether the prosecutor's failure is unknowing or intentional.⁵⁹

Materiality is an Unworkable Standard for Prosecutors

Many prosecutors – and more than a few courts – interpret the *Brady* standard to mean that only "material" exculpatory information need be disclosed. This "materiality" element creates a dilemma for even well intended prosecutors.

The U.S. Supreme Court has held that suppressed evidence is considered material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."⁶⁰ A "reasonable probability" of a different result is shown when the government's suppression "undermines confidence in the outcome of the trial."⁶¹ Questions of materiality are to be determined "item by item,"⁶² but the overall impact must be viewed cumulatively: "[i]ndividual items of suppressed evidence may not be material on their own, but may, in the aggregate, 'undermine[] confidence in the outcome of the trial.'"⁶³ If a prosecutor takes the position that only "material" information will be disclosed, the *Brady* doctrine would require that prosecutor to evaluate each piece of evidence through a lens that is at once prospective and retrospective.

The prosecutor is looking ahead during pretrial, without knowledge of the trial defense, to determine whether, on a post-conviction appeal, a court looking back at the completed trial will find the evidence to have been enough to "undermine the confidence in the outcome." One academic observer posits the "*Brady brainteaser*" this way:

The prosecutor must first envision the trial: "What do I think the evidence is going to look like once the case plays out?" And in step two of the brain teaser, the prosecutor is asked to hold up this piece of evidence at issue against everything else and say, "Do I think this piece of evidence is sufficient to undermine my confidence in a guilty verdict I haven't yet achieved based on the rest of the evidence?"⁶⁴

Materiality is an Unworkable Standard for Judges

U.S. Supreme Court cases addressing *Brady* have all reviewed whether undisclosed evidence had an impact on the outcome at trial or sentencing.⁶⁵ Lower courts have debated whether this outcome-centric "materiality" test for prejudice determines the scope of the prosecution's disclosure obligation, or whether it is simply the postconviction standard that the appellate court applies to determine whether the remedy of a new trial is warranted.⁶⁶

58 *Brady*, 373 U.S. at 87.

59 *Id.*

60 *Bagley*, 473 U.S. at 682.

61 *Kyles*, 514 U.S. at 434 (citing *Bagley*, 473 U.S. at 678).

62 *Id.* at 436 n. 10.

63 *Johnson v. Folino*, 705 F.3d 117, 129 (3d Cir. 2013) (citing *Bagley*, 473 U.S. at 678).

64 *Alafair Burke*, *Commentary: Brady's Brainteaser: The Accidental Prosecutor and Cognitive Bias*, 57 Case W. Res. L. Rev. 575, 576 (2007).

65 Robert M. Cary, Craig D. Singer & Simon A. Latcovich, *Federal Criminal Discovery*, 45-48 (ABA Criminal Justice Section 2011) (citing cases).

66 Justin Murray, *Prejudice-Based Rights in Criminal Procedure*, 168 U. Pa. L. Rev. 277, 287-88 (2020). See also Janet C. Hoeffel & Stephen I. Singer, *Activating a Brady Pretrial Duty to Disclose Favorable Information: From the Mouths of Supreme Court Justices to Practice*, 38 N.Y.U. Rev. L. & Soc. Change 467, 480-83 (2014) (noting that during the oral argument in *Smith v. Cain*, 132 S. Ct. 627 (2012), "[f]ive Justices . . . individually expressed the view that *Brady* requires a prosecutor to disclose pretrial favorable evidence, regardless of materiality" but that this understanding nevertheless "did not make its way into the written opinion"); *id.* at 475 n.40 (describing Justice Scalia's questions to the government during oral argument in *Kyles v. Whitley*, 514 U.S. 419 (1995)).

The retrospective assessment of materiality conducted by judges is a subjective one. Individual judges may disagree on whether an individual failure to disclose exculpatory evidence was or was not “material.” This can add substantial delays to case resolution as judicial panel after judicial panel debates materiality, putting off final resolution of the case. These delays have serious negative consequences for victims of the underlying crime(s) or their surviving family members, who benefit from a final verdict and closure of their cases and, of course, leave the convicted individual in a perpetual state of uncertainty.

The case of *Commonwealth v. Haskins* illustrates the danger. The prosecutor in *Haskins* conceded that the evidence at issue was impermissibly withheld, but five courts took contradictory positions over 12 years on whether the withholding was “material.”⁶⁷ First, the PCRA court held the information material and ordered a new

trial. The Superior Court reversed that decision, saying the evidence was not material and the evidence against Haskins was “overwhelming.” The federal Magistrate Judge agreed with the Superior Court that the evidence was not material and there was no *Brady* violation, a position adopted by the District Court.⁶⁸ But the Third Circuit Court of Appeals reversed course again, holding the evidence was material and the failure to turn it over prejudiced Haskins. The court ordered Haskins released or retried within 120 days.⁶⁹ As of the writing of this report, the case is on appeal to the Superior Court following the trial judge’s grant of a motion to dismiss on Double Jeopardy grounds – meaning that after 15 years the case remains unresolved, six of them due to the prosecutor’s failure to abide by *Brady*, and the other nine by a judicial inability to either decide whether that failure was “material” or to simply order a retrial that takes the additional evidence into consideration.

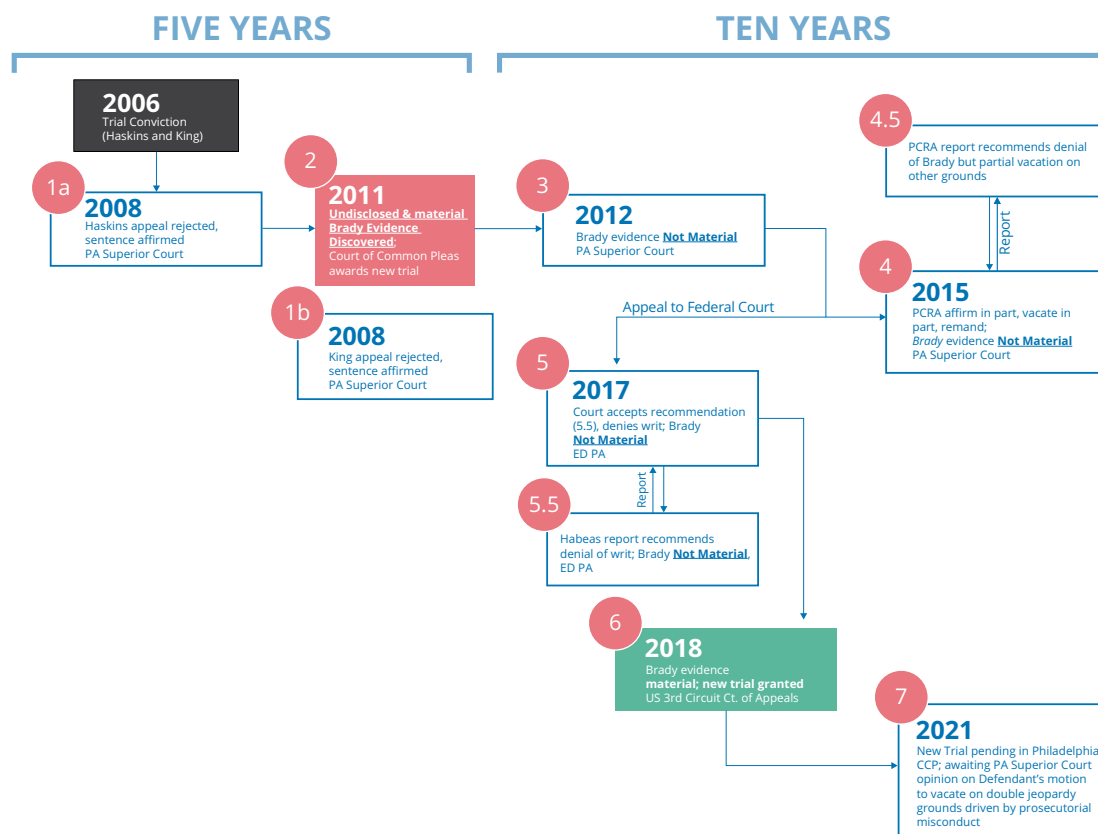


Figure 18: The 15 year (and counting) path of “materiality” in *Commonwealth v. Haskins*.

67 *Commonwealth v. Haskins*, 60 A.3d 538, 552 (Pa. Super. Ct. 2012).

68 *Haskins v. Folino*, CV 13-6901, 2017 WL 1397261 (E.D. Pa. Apr. 19, 2017).

69 *Haskins v. Superintendent Greene SCI*, 755 Fed.Appx. 184 (3d Cir. 2018).

Of the 15 years that Mr. Haskins has been imprisoned, six of them were tainted by a prosecutorial failure to provide exculpatory evidence in his case, and the other nine by a judicial inability to either decide whether that failure was “material.”

In another case, it took over a quarter century for Pennsylvania courts to resolve whether evidence withheld from David Munchinski’s trial counsel was “material.” Twenty-six years after his conviction, the Third Circuit granted Mr. Munchinski’s request to vacate his conviction, finding his conviction “extraordinary” as he suffered from “extreme malfunction” due to the “staggering” scope of *Brady* violations.⁷⁰ The most egregious misconduct – readily admitted by prosecutors before the trial court – was the prosecutors physically edited police reports to remove reference to a “recorded statement” by a witness.⁷¹ The Third Circuit Court of Appeals criticized the Pennsylvania Superior Court panel – Judges Correale Stevens, Frank Montemuro, and Joseph Hudock – for dismissing the allegations in an “opaque . . . confusing, and at times internally inconsistent” memorandum decision.⁷² Mr. Munchinski was released within the month. Despite threatening to retry the case, the Attorney General’s office eventually withdrew all charges.⁷³

When exculpatory evidence must be produced remains unsettled

A final issue with applying the *Brady* doctrine is the question of when prosecutors must provide material exculpatory evidence – if it must be provided at all. While it is clear exculpatory information must be disclosed to a defendant prior to trial, the precise timing requirements for the disclosure remain unsettled. The United States Third Circuit Court of Appeals follows the rule that favorable information must be disclosed in time for the defense to use it “effectively” even if that disclosure comes during a trial.⁷⁴ Other appellate courts have recognized the practical difficulties presented by late or eve-of-trial disclosure and have considered the extent to which a belated disclosure deprives the defense of the opportunity to use the information, fully understand the disclosure’s significance, investigate leads that it generates, and prepare for trial.⁷⁵

What has been made clear is that there is no constitutional requirement for the government to provide material impeachment evidence (i.e., evidence used to undermine the credibility of a witness) in advance of a guilty plea.⁷⁶ Whether that follows for exculpatory evidence (i.e., evidence that goes to the potential guilt or innocence of a defendant) before a guilty plea is still an open, unanswered question.⁷⁷

70 *Munchinski v. Wilson*, 694 F.3d 308, 314 (3d. Cir. 2012).

71 Due to the extent of the alleged prosecutorial misconduct, the Pennsylvania Attorney General’s Office assumed prosecution of the case. *Munchinski*, 694 at 320.

72 *Munchinski*, 694 F.3d at 324.

73 Munchinski sued both prosecutors in federal court alleging civil rights violations under Section 1983. The District Court ruled the defendants were not entitled to absolute immunity from suit, a ruling the Third Circuit affirmed in 2020. See *Munchinski v. Solomon, Warman, et al.*, 2020 WL 4812690 (W.D Pa Apr. 16, 2020). As of this writing, the matter is pending before the district court.

74 *United States v. Johnson*, 816 F.2d 918, 924 (3d Cir. 1987).

75 Cary, Singer, and Latcovich, *supra* note 65, at 45-48.

76 *United States v. Ruiz*, 536 U.S. 622, 633 (2002).

77 See Cary, Singer, and Latcovich, *supra* note 65, at 52-54 (citing cases).

Existing Systems of Accountability Do Not Deter Prosecutorial Misconduct

By its very definition, misconduct on the part of any actor in the criminal justice system should be something that every responsible participant in the system wants to eliminate. Any just system should generate, at a minimum, two responses to instances of misconduct. The first can be seen as “backward-looking accountability” – rectifying the misconduct and restoring an appropriate response in the system. The second is a “forward-looking accountability” that identifies and addresses the circumstances that made the misconduct possible and/or allowed it to avoid detection to prevent the recurrence of misconduct to generate system improvements for the future. Neither of these are evident in Pennsylvania. It is the obligation of just organizations – prosecutors, courts, etc. – to ensure that both models of accountability exist.

DA’s offices, Attorney General’s (AG’s) offices, courts and others must identify the root causes of prosecutorial misconduct including those instances of intentional misconduct. They must then design solutions that ensure individuals are incentivized to play by the rules and that checks and balances are in place to deter, prevent, and identify misconduct in all its forms. One need only review the data and stories in this report to see the great potential for reform of any number and type of prosecutorial misconduct in criminal cases. For some of the instances, punishment of an individual prosecutor may serve a useful purpose. But for many (e.g., unintentional prosecutorial misconduct, or intentional withholding of exculpatory information by a police officer despite multiple good faith requests from the prosecutor), other reforms will be needed.

The Misplaced Protection of Absolute Immunity

Perhaps the largest challenge to reducing prosecutorial misconduct is the lack of structural disincentives for improper prosecutorial acts. Prosecutors have absolute immunity from civil lawsuits, meaning they cannot be sued in their official capacity as prosecutors for even intentional and egregious acts of misconduct.

In general, federal law allows an individual harmed by a state government or its agent to hold the wrongdoer accountable through a federal action filed under Title 42, Section 1983. Section 1983, as it is commonly known, was created over a century ago and holds “every person” acting on behalf of state or federal authority accountable to any citizen for the “deprivation of any rights, privileges, or immunities secured by the Constitution and laws.”⁷⁸ Although the statute on its face appears to include any state actor, courts have created safeguards protecting particular actors from liability – or, some would say, personal accountability – under Section 1983. Judges, legislators, and prosecutors enjoy “absolute” immunity from suit under Section 1983, while police officers have “qualified” immunity, meaning they can only be sued under certain extremely limited circumstances.⁷⁹ These safeguards, created by judicial opinion rather than a legislative process, were justified based on the logic that such immunities were part of the common law that existed at the time of Section 1983’s passage in 1871.⁸⁰

It is particularly ironic that intentional prosecutorial misconduct is absolutely immune from lawsuits under section 1983, as the statute was passed to address the concern that states were deliberately not prosecuting terroristic acts by the Ku Klux Klan being perpetrated against freed black citizens. “It was not the unavailability of

“This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights [t]he prosecutor would fare no better for his willful acts.”

Imbler v. Pachtman, 424 U.S. 409, 429 (1976).

78 42 U.S.C. § 1983.

79 Qualified immunity applies only to acts violating “clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

80 *Tenney v. Brandhove*, 341 U.S. 367, 375 (1951) (“We cannot believe that Congress – itself a staunch advocate of legislative freedom – would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us.”). However, Professor Edwin Chemerinsky points out in his seminal article, *Prosecutorial Immunity*, that dedicated research shows that 13 of the 37 states at the time had statutes providing absolute judicial immunity in 1871 – a far cry from the universality presumed by the Court. Erwin Chemerinsky, *Prosecutorial Immunity*, 15 *Touro L. Rev.* 1643, 1653-56 (1999).

state remedies but the failure of certain States to enforce the laws with an equal hand that furnished the powerful momentum behind this 'force bill.'"⁸¹

Moreover, it has been often observed that the justification for absolute immunity is historically inaccurate in its application to prosecutors. Public prosecutorial functions did not exist in 1871, as criminal prosecution was carried out by private prosecutors rather than state actors.⁸² Furthermore, the decision to provide prosecutors absolute immunity from suit under Section 1983 when carrying out their prosecutorial duties dates back only to 1976,⁸³ when the U.S. Supreme Court worried that subjecting a prosecutor to the risk of civil liability, even in cases of intentional prosecutorial misconduct, "would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution."⁸⁴

The justices were not unaware of the potential damage caused by eliminating the ability of individuals harmed by prosecutorial misconduct to sue offending prosecutors in civil court: "To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty."⁸⁵ But the Court justified this risk of harm by identifying two other potential accountability mechanisms for prosecutorial misconduct: criminal prosecution and disciplinary mechanisms from Bar Associations or other "professional discipline by an association of . . . peers."⁸⁶

As a practical matter, however, neither criminal prosecution nor professional discipline are used to ensure appropriate accountability for, or deterrence of, prosecutorial misconduct in Pennsylvania (or elsewhere in the United States).

In the time period from 2000-2016 we did not identify any criminal prosecution of a prosecutor for acts of misconduct of the types described in this report by any District Attorney, the Attorney General, or any United States Attorney in Pennsylvania. In the same period there were only two cases where the Disciplinary Board of the Supreme Court of Pennsylvania sanctioned prosecutors for prosecutorial misconduct.

81 *Monroe v. Pape*, 365 U.S. 167, 174-75 (1961), overruled on substantive grounds by *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978). Because States were unable (or unwilling) to enforce their own criminal laws to protect formerly enslaved people, Congress created the cause of action to allow those oppressed to seek justice. *Id.* at 176.

82 "Up until the late nineteenth century, when the office of the public prosecutor developed, private lawyers regularly prosecuted criminal cases on behalf of both crime victims and the state. Even well into the twentieth century, many prosecutors (even federal prosecutors) had a hybrid existence, maintaining private practices while prosecuting criminal matters for the government." Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. Davis L. Rev. 411, 413 (2009).

83 *Imbler v. Pachtman*, 424 U.S. 409 (1976). In recognition that prosecutors serve many functions, the Court has held that when serving their "investigative" function prosecutors are only entitled to qualified immunity from suit. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) ("When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.") (internal citations omitted).

84 *Imbler*, 424 U.S. at 424.

85 *Id.* at 427.

86 *Id.* at 429.

Accountability for Misconduct: Criminal Prosecutions

In theory, there is no reason why prosecutors cannot be charged with crimes for misconduct in violation of criminal statutes. The U.S. Supreme Court has expressly noted that it “has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law.”⁸⁷ Threatening a witness with physical force, for example, is a crime in Pennsylvania punishable by up to ten years in prison, and the statute does not exempt prosecutors.⁸⁸ Other situations could be considered criminal as well. New Orleans prosecutors withheld evidence in the 1985 capital murder prosecution of John Thompson, for example – a crime he did not commit. Thompson later said, “I thought [the prosecutors] should have been criminally charged; I thought all of them . . . everything I read about RICO and all these different laws, and I’m trying to figure out why these laws don’t fit them; why attempted murder don’t fit them; why kidnapping don’t fit them.”⁸⁹

To be sure, in Pennsylvania, there have been prosecutions of prosecutors who have abused the tools of their office.⁹⁰ However, we found no cases where a prosecutor faced criminal charges for conduct related to their role in conducting a trial, such as withholding evidence, intimidating witnesses, etc. This suggests that criminal prosecution is not serving the purpose the *Imbler* court imagined.

This is not just a Pennsylvania problem: of the 1,064 cases identified in the National Registry of Exonerations across the United States involving prosecutors withholding exculpatory evidence,⁹¹ not one of those prosecutors was charged with a crime by sitting prosecutors. Across the country only one prosecutor has been held criminally responsible for official prosecutorial misconduct;⁹² that case was initiated not by prosecutors, but by a specially constituted Court of Inquiry in Texas — a rare and unusual process where “an offense has been committed against the state.”⁹³

87 *Imbler*, 424 U.S. at 429.

88 18 Pa.C.S.A. § 4952.

89 John Thompson, *Presentation by John Thompson - Prosecutorial Immunity: Deconstructing Connick v. Thompson*, 13 Loy. J. Pub. Int. L 401, 413 (2012).

90 Some examples include: Kathleen Kane (former Attorney General, convicted in Montgomery County for perjury and misusing grand jury testimony, sentenced to 10 - 23 months); R. Seth Williams (former Philadelphia District Attorney, prosecuted federally for crimes related to misuse of office for personal gain, pled guilty to one count of accepting a bribe, sentenced to five years in prison); Miles Karson (Mercer County District Attorney, convicted of obstruction of justice and official oppression, sentenced to probation term); William Higgins (Bedford County District Attorney, pled guilty to multiple counts of obstruction and corruption related charges, sentenced to eight years of probation); Chad Salsman (Bradford County District Attorney, pled guilty to promoting prostitution, obstruction of law, and witness intimidation for conduct that preceded his term in office). Kane, Williams, Karson, and Higgins were all disbarred following their convictions and Salsman was disbarred by consent.

91 Gross, Possley, Roll, and Stephens, *supra* note 1, at iv.

92 <https://www.kut.org/texas/2013-11-08/ken-anderson-to-serve-9-days-in-jail>.

93 See Chapter 52 of the Texas Code of Criminal Procedure—Arts. 52.01-52.09. Art. 51.01(a).

94 Thompson, John. “The Prosecution Rests, but I Can’t” New York Times, April 9, 2011, p. 11. Op-ed. Available Online at: <https://www.nytimes.com/2011/04/10/opinion/10thompson.html?pagewanted=all>.

“I just want to know why the prosecutors who hid evidence, sent me to prison for something I didn’t do and nearly had me killed are not in jail themselves. There were no ethics charges against them, no criminal charges, no one was fired and now, according to the Supreme Court, no one can be sued.”

- Exoneree John Thompson.⁹⁴

Given the national failure to hold prosecutors criminally liable even for intentional misconduct, the Supreme Court’s assertion that criminal charges can serve as a meaningful deterrent to prosecutorial misconduct is at best an untested assertion, and more likely a fallacy.

Accountability for Misconduct: The Pennsylvania Disciplinary Board

"A prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers."

Imbler v. Pachtman, 424 U.S. 409, 429 (1976)

The Disciplinary Board regularly disciplines attorneys who are not prosecutors for all manner of ethical lapses, and it has also (infrequently) disciplined prosecutors for ethical violations unrelated to their jobs as prosecutors. But the Disciplinary Board almost never disciplines prosecutors for acts committed in their capacity as prosecutors.

The second accountability mechanism counted on by the U.S. Supreme Court to rein in prosecutorial misconduct is the organizations that establish and enforce ethical rules for attorneys in each jurisdiction. In Pennsylvania that organization is the Disciplinary Board of the Pennsylvania Supreme Court ("Disciplinary Board"). The Disciplinary Board, established in 1972, regulates and disciplines attorney conduct in Pennsylvania. Its 13 members are appointed by the Pennsylvania Supreme Court.

The Disciplinary Board's stated mission is to "protect the public, maintain the integrity of the legal profession, and safeguard the reputation of the courts."⁹⁵ Through the Office of Disciplinary Counsel (ODC), it investigates allegations of attorney violations of the Pennsylvania Rules of Professional Conduct and suggests to the Supreme Court what it deems appropriate discipline for any misconduct found.⁹⁶

Investigations of Allegations of Prosecutorial Misconduct

It is not possible to know how frequently prosecutorial misconduct is reported to the Disciplinary Board, since only final decisions resulting in a sanction of public reprimand, probation, suspension, revocation of license, or disbarment are published. In addition, the Disciplinary Board does not currently track the number of complaints and private reprimands against prosecutors, even as an internal metric.⁹⁷

What is known is that when the Disciplinary Board has acted, it virtually never acted to publicly sanction prosecutors. January 2000, and December 2016, the Board imposed discipline in 3,103 cases.⁹⁸ Of these, 1,592 were public sanctions and the remaining 1,511 were private.⁹⁹ Despite the assurances of the Imbler court, we found that professional discipline for prosecutors that commit misconduct in Pennsylvania is exceedingly rare. We searched the publicly available disciplinary opinions and found that of the 1,351 Supreme Court opinions relating to Disciplinary Board action only eight (8) involved prosecutors being disciplined for misconduct that occurred while they were prosecutors. Of those, only two related to misconduct in the handling of a criminal case.¹⁰⁰

⁹⁵ Pennsylvania Disciplinary Board Mission, <https://www.padisciplinaryboard.org/about>.

⁹⁶ Pa.R.D.E. 203(a); Pa.R.D.E. 203(b) also provides discipline on the grounds of (1) Conviction of a crime; (2) Willful failure to appear before the Supreme Court, the Board or Disciplinary Counsel for censure, public or private reprimand, or informal admonition; (3) Willful violation of any other provision of the Enforcement Rules; (4) Failure by a respondent-attorney without good cause to comply with any order under the Enforcement Rules of the Supreme Court, the Board, a hearing committee or special master; (5) Ceasing to meet the requirements for licensure as a foreign legal consultant set forth in Pennsylvania Bar Admission Rule 341(a)(1) or (3); (6) Making a material misrepresentation of fact or deliberately failing to disclose a material fact in connection with an application submitted under the Pennsylvania Bar Admission Rules; and (7) Failure by a respondent-attorney without good cause to respond to Disciplinary Counsel's request or supplemental request under Disciplinary Board Rules, § 87.7(b) for a statement of the respondent attorney's position.

⁹⁷ The Disciplinary Board stated that "identifying data does not exist i.e. disciplinary proceedings against District Attorneys and/or Assistant District Attorneys" in response to a public records request filed by the authors of this report. *Response to Public Access Request Form*, dated May 8, 2019.

⁹⁸ <https://www.padisciplinaryboard.org/news-media/statistics>.

⁹⁹ *Id.*

¹⁰⁰ The other cases involved mishandling estate money, No. 862 *Disciplinary Docket*, No. 3; practicing law while suspended for failing to timely pay the annual attorney license fee, No. 1067, *Disciplinary Docket* No. 3; conviction for indecent assault, No. 893, *Disciplinary Docket* No. 3; conviction for endangering the welfare of a child, No. 1493 *Disciplinary Docket* No. 3; conviction for drug possession, No. 1858 *Disciplinary Docket* No. 3; and conviction for accident involving death or personal injury, No. 1921 *Disciplinary Docket* No.3.

The Marginal Role of the Pennsylvania Disciplinary Process (2000-2016)



Figure 19: Prosecutorial Misconduct and Attorney Discipline 2000-2016

Contrast these numbers to the number of judicial opinions finding prosecutorial misconduct committed by prosecutors in Pennsylvania during this time period, and it is obvious that the Disciplinary Board was not an active watchdog safeguarding the highest ideals of the prosecutorial bar during the period of our review.

During the period reviewed in this report, the ODC would not investigate prosecutorial misconduct claims unless a court determined that a prosecutor had engaged in misconduct as part of an appeal or post-conviction proceeding.¹⁰¹ The Disciplinary Board recently announced a new process for investigating charges of prosecutorial misconduct.¹⁰² As current ODC General Counsel Tom Farrell explains, “this policy on its face prevented investigation of serious misconduct that resulted in a lenient plea offer,

that the court avoided by reversing on other grounds, or that was deemed harmless.”¹⁰³ The ODC adopted a new policy in 2021 that allows investigations to proceed whether the court makes a finding or not.¹⁰⁴ This opens the process for review of allegations stemming from a grand jury proceeding, preliminary hearing, guilty pleas, or convictions resulting in short sentences – situations that generally evade judicial review.¹⁰⁵ Additionally, the change in policy should make decisions about referring prosecutor misconduct cases easier for any individuals – judges, defense lawyers, members of the public and prosecutors themselves – who observe such conduct. While disciplinary sanctions against prosecutors in Pennsylvania are few and far between, we discuss those that have been levied here to illustrate the possible damage that can be done and to help raise the overall quality of the practice of law in Pennsylvania.

101 Thomas Farrell, *The Office of Disciplinary Counsel’s Initiative on Prosecutorial Misconduct*, PACDL - For The Defense, Vol. 6, Issue 1 (Mar. 2021) p. 3. Apparently, this was true even for admitted prosecutorial misconduct performed in front of a judge. In 2005, Lawrence County ADA Brigitta Tolvanen admitted to intentionally trying to “trick” a witness at trial by implying she had evidence she did not and, in fact, could not have had. Although the Lawrence County Bar Association took the unusual step of reporting her misconduct to the Disciplinary Board (Associated Press, *Prosecutorial misconduct leads to dropped charges* (Dec. 2, 2006), https://www.ncnewsonline.com/news/local_news/district-attorney-shakes-up-office-staff/article_0ab617b3-d196-5a94-9d76-ef11a8e3b50d.html), to date there is no record of any disciplinary finding on the misconduct. Nor did the District Attorney’s Office take any action against her for the misconduct: according to press reports, she left the office in 2006 because a grant that had funded her position ran out. *District Attorney Shakes Up Office Staff*, New Castle News (Jan. 18, 2006); https://www.ncnewsonline.com/news/local_news/district-attorney-shakes-up-office-staff/article_0ab617b3-d196-5a94-9d76-ef11a8e3b50d.html.

102 Farrell, *supra*, at 3.

103 *Id.*

104 *Id.*

105 *Id.* at p. 4.

The Disbarment of James Carbone

The only prosecutor in Pennsylvania to be disbarred due to his work as a prosecutor during the period we reviewed is James Carbone, who was an Assistant District Attorney in Venango County. His demonstrated misconduct spanned 11 years and resulted in at least two overturned convictions.¹⁰⁶ He maintained his employment as an Assistant District Attorney notwithstanding being identified by name in multiple Superior Court opinions for committing prosecutorial misconduct. ADA Carbone's first documented instance of prosecutorial misconduct began in 2000, when he charged David Anderson¹⁰⁷ with multiple counts of indecent assault against mentally challenged residents of a group home. Mr. Anderson was convicted after a trial in 2001. The Superior Court reversed his convictions in 2004, finding that Mr. Carbone's misconduct during the trial was significant and prejudicial.¹⁰⁸ Venango County continued to pursue Mr. Anderson. In 2008, on remand and after various procedural issues were litigated, the trial court found ADA Carbone had engaged in additional acts of misconduct, including: disregarding a direct court order to keep a log of meetings he had with the complainants (who had been twice been found incompetent to testify in the case); disregarding a direct court order to keep a log of meetings

he had with the complainants (who had been twice been found incompetent to testify in the case); improperly coaching witnesses on their testimony; and lying to the court about his actions. As a result of ADA Carbone's continued intentional misconduct the court granted Mr. Anderson's pretrial motion to dismiss the cases under the doctrine of double jeopardy.¹⁰⁹ While ADA Carbone appealed this decision, the case was ultimately discharged by the Superior Court in 2011.¹¹⁰ In the opinion dismissing the case, the Superior Court found ADA Carbone had "engaged in a pattern of pervasive misconduct throughout the proceedings."¹¹¹

In 2009, five years after the 2004 Superior Court opinion upholding the allegation of ADA Carbone's misconduct and two years after a Venango County trial court found that he continued to commit misconduct, ADA Carbone charged a Venango County man with multiple offenses against a 3-month-old child. During the trial in March 2010, ADA Carbone's "outrageous behavior" included acts of physical intimidation, yelling, menacing behavior, misrepresenting evidence, "repeated use of hyperbole," and multiple references to the defendant as a "compulsive or pathological liar."¹¹² The defendant was convicted, but

106 *Office of Disciplinary Counsel v. Attorney Registration No. 83246 JAMES PAUL CARBONE* (71 DB 14), Aug. 12, 2015.

107 Information about David Anderson's case is found at the National Registry of Exonerations site: <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4551>.

108 *Commonwealth v. Anderson*, 855 A.2d 127 (Pa. Super. Ct. 2004).

109 Under Pennsylvania law, "the double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial." *Commonwealth v. Smith*, 615 A.2d 321, 325 (Pa. 1992). See also *Anderson*, 38 A.3d at 840 ("The prosecutor engaged in a pattern of pervasive misconduct throughout the proceedings, culminating in the improper meeting with J.L. Despite J.L.'s testimony that the meeting had occurred and the parties rehearsed certain questions and answers, the prosecutor continued to deny any wrongdoing. The prosecutor's disingenuous responses served only to exacerbate the misconduct. Under these circumstances, the prosecutor intentionally acted to prejudice the defendant to the point of the denial of a fair trial.").

110 *Commonwealth v. Anderson*, 38 A.3d 828, 831 (Pa. Super. Ct. 2011).

111 *Id.* at 840.

112 *Commonwealth v. Culver*, 51 A.3d 866, 882 (Pa. Super. Ct. 2012).

ADA Carbone's misconduct led the Superior Court to vacate the conviction in 2012. The Court also took the rare step of naming ADA Carbone in the opinion.¹¹³

In September 2010, while the Culver case was on appeal, ADA Carbone was the prosecutor at the preliminary hearing of a woman charged with burglary, who was represented by counsel. A month later, ADA Carbone transported the burglary defendant from a police station to the county courthouse to testify against her co-defendant in an unrelated violation of probation hearing. During this trip, ADA Carbone discussed the burglary case directly with the defendant. ADA Carbone never told her attorney about the private trip and never disclosed to her the conversations even occurred. Based on this misconduct, the defendant's counsel successfully moved to disqualify ADA Carbone as the prosecutor of the burglary case. With the exception of the ex parte transportation and discussion with the burglary defendant, all of ADA Carbone's misconduct occurred in open court, where they were transcribed. In addition, the ex parte event was detailed under oath by the defense attorney.

In 2011 Carbone stuck again, this time where an appellate court later found that he withheld evidence, bought various gifts for the complainant and her family to secure their testimony and promised the complainant that he would help her mother's fiancé with his parole; he told the defense lawyer and the court that the conversation never occurred, but it was later confirmed in jail phone records.¹¹⁴

Venango District Attorney Marie T. Veon allowed Carbone to continue to prosecute cases for the office until 2012, despite repeated and verified misconduct sufficiently egregious to cause two felony convictions to be vacated.

In keeping with its policy at the time, the Disciplinary Board took no action on ADA Carbone's misconduct until a Petition for Discipline was filed in 2014. (One can infer from this that the judges overseeing ADA Carbone's cases did not file complaints with the Disciplinary Board for ADA Carbone's actions.) The Disciplinary Board did ultimately disbar ADA Carbone, but not until 2015, 15 years after the first public acknowledgement of his misconduct.

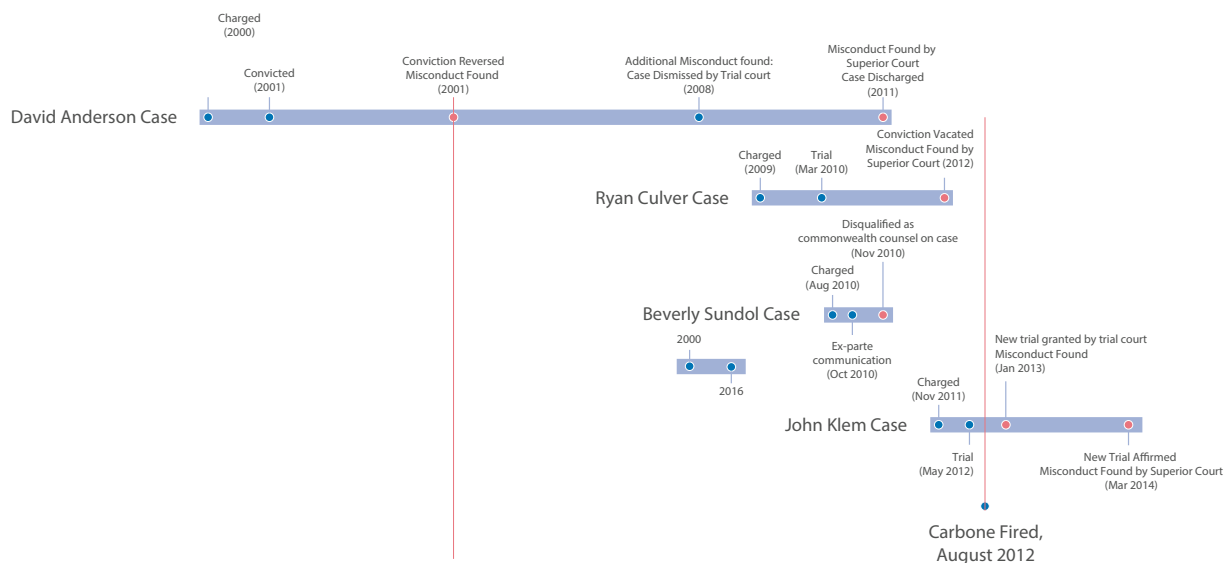


Figure 20: Timeline of Carbone Misconduct

¹¹³ Many scholars have noted the apparent reluctance of courts to identify prosecutors found to have acted improperly. Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. Davis L. Rev. 1059, 1071 (2009) ("there are a variety of reasons why judges might decline to name misbehaving prosecutors. One primary reason may be a judge's belief that this is the prosecutor's first act of misconduct and that reversing the prosecutor's hard-won conviction is penalty enough to deter the prosecutor from committing misconduct in the future. Put simply, the judge might be acting out of compassion because of a belief that the prosecutor was simply misguided in this particular case and does not deserve a public shaming that will harm her reputation."); James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030, 2126 (2000) ("[E]ven in the face of egregious behavior, orders announcing these reversals rarely single out anyone by name to bear the blame"); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. Rev. 125, 172-73 (2004) ("Indeed, few convictions are overturned by virtue of prosecutorial misconduct and, in the rare incidences of reversal, the appellate court opinions invariably neglect to identify the prosecutor by name as a matter of 'professional courtesy.'")

¹¹⁴ *Commonwealth v. Klem*, 2014 WL 10965427 (Pa. Super. Ct. Mar. 18, 2014).

While ADA Carbone's acts appear to be qualitatively and quantitatively more egregious than most in our database, it is important not to dismiss them, or the lack of response from judges, the elected DA and the ODC on the basis that they are unusual or "fringe" behaviors. These acts, and the lack of accountability measures in response, undermine the credibility of all of the prosecutors in the state who say that neither they nor any of their peers would engage in such behavior, and further state that prosecutors can be trusted to "self-police" misconduct without external oversight. It is important to look at ADA Carbone's actions and ask how we can ensure and improve the quality of all prosecutors in Pennsylvania going forward.

The Censure of Charles Aliano

A second case in which the Disciplinary Board found prosecutorial misconduct for case-related activity involved the elected Susquehanna County District Attorney, Charles J. Aliano. The DA position in Susquehanna County was part-time and DA Aliano maintained a private practice while serving as the county prosecutor. When the husband of one of his private practice clients was arrested and charged with drunk driving, DA Aliano instructed the state trooper involved to drop the case. The trooper had the charge withdrawn, writing "Prosecution withdrawn as per the recommendation of Susquehanna County DA Charles Aliano" as the reason. The trooper later reinstated the charges, which DA Aliano reduced from DUI to two summary offenses so his private practice client would not have to pay attorney's fees to another lawyer.¹¹⁵ The Board found these actions were "prejudicial to the administration of justice" in violation of Pennsylvania Rule of Professional Conduct 8.4(d).¹¹⁶ The Board publicly censured DA Aliano but took no further action.

Post-2016 Prosecutor Discipline

Our initial review of disciplinary cases was limited to those published in the years 2000-2016, but in the years following this period there were other prosecutor discipline events. As we discuss throughout, our review is limited to searchable public data and thus may not be exhaustive. The additional instances of prosecutor discipline we found that were published after 2016 (other than those involving criminal prosecutions of the offending prosecutor discussed above on P. 40, n. 90), are discussed in Appendix C.

¹¹⁵ *Office of Disciplinary Counsel v. Aliano*, 889 A.2d 1160, 1160 (Pa. 2005).
¹¹⁶ 204 Pa. Code § 81.4. Rules of Professional Conduct 8.4(d).

Recommendations for Reducing Prosecutorial Misconduct in Pennsylvania

Entity Responsible for Implementation	Prosecutor	Court	Legislature
Recommendations: Preventative Measures			
1. Require Open File Discovery	✓	✓	✓
2. Adopt ABA Model Rules 3.8(g) & (h)	✓	✓	
3. Certify Compliance with <i>Brady</i> Prior to Plea or Trial	✓	✓	
4. Enhance Prosecutorial Self-regulation and Reporting	✓	✓	
5. Formally Review Cases of Prosecutorial Misconduct to Identify Opportunities for Improvement	✓	✓	
Recommendations: Accountability Measures			
6. Require Automatic Reporting of Misconduct	✓	✓	
7. Eliminate Absolute Immunity for Prosecutors			✓
8. Create A Civil Tort Remedy for Individuals Who Are Harmed by Intentional or Grossly Negligent Prosecutorial Misconduct			✓
9. Consider a Criminal Statute Specific to Intentional Suppression of Evidence and Apply Other Statutes Relevant to Prosecutor Misconduct.			✓
10. Establish a Prosecutorial Oversight Commission to Identify and Address Prosecutorial Misconduct		✓	✓

✓ = Entity is sufficient to implement

Figure 21. Options for prosecutorial accountability.

The available information on prosecutorial misconduct in Pennsylvania from 2000 – 2016 suggests that:

- Allegations and findings of prosecutorial misconduct are widespread and varied;
- Misconduct includes both inappropriate actions by prosecutors in open court and, of greater concern, actions taken by prosecutors outside of court suppressing, failing to disclose, or otherwise limiting evidence required to be provided to defendants in criminal cases (e.g., *Brady* material);
- A small but troubling minority of prosecutorial misconduct has been found to be intentional;
- A subset of prosecutorial misconduct includes exculpatory information in the possession of a police officer or other government actor not provided to the prosecutor. While the prosecutor may have been unaware of the police officer or other government actor's failure to disclose the information, the obligation to provide this information to the defendant rests with the prosecutor and the failure to disclose it is prosecutorial misconduct.
- There is a lack of transparency regarding prosecutorial misconduct seen throughout Pennsylvania's criminal justice system. For example:
 - Courts rarely name the prosecutors who have committed the misconduct in published (or even unpublished) opinions, thereby depriving the public of an ability to identify problem prosecutors;
 - Courts do not publish data regarding the number of instances of prosecutorial misconduct identified in their courtrooms, or the number of referrals or complaints for prosecutorial misconduct sent to the Disciplinary Board of the Supreme Court of Pennsylvania ("Disciplinary Board");
 - The Disciplinary Board neither tracks nor publishes complaints alleging ethical violations by prosecutors in their role as prosecutors;
 - Elected prosecutors do not publish data regarding their internal discipline of prosecutors who have committed prosecutorial misconduct; and
 - Disciplinary records of prosecutors are kept confidential, allowing prosecutors who may have been fired for egregious, intentional, and/or repeated misconduct to be hired in other jurisdictions.
- There is an almost complete lack of effective accountability mechanisms or deterrents for prosecutorial misconduct in the Pennsylvania criminal justice system:
 - Courts often ignore allegations of prosecutorial misconduct, deciding cases on alternate grounds rather than addressing real or perceived misconduct in judicial opinions;
 - Even when courts identify prosecutorial misconduct, they often rule that the damage caused by the misconduct was not severe enough to require a remedy for the defendant/ petitioner;
 - There is no public record of Judicial action in directly referring prosecutors for disciplinary sanctions, even when they find egregious acts of prosecutorial misconduct occurred.
 - There appear to be no meaningful internal or external accountability mechanisms in place to identify and/or respond to instances of even egregious prosecutorial misconduct.
 - No prosecutorial offices in Pennsylvania disclose any sanctions levied upon prosecutors in their offices who commit misconduct. As a result, there is no way to know whether there are any effective internal mechanisms to deter or address prosecutorial misconduct;
 - Because prosecutors have absolute immunity from civil suit, meaning that they cannot be sued for even the most egregious intentional prosecutorial misconduct committed as part of the prosecutorial function, there is no external mechanism to assist those injured by prosecutorial misconduct;

- While prosecutors could in theory be held liable for misconduct that violates the Pennsylvania Criminal Code, neither the PA Attorney General nor any District Attorney in Pennsylvania has filed criminal charges against prosecutors in Pennsylvania for acts of professional misconduct that might qualify as crimes in violation of state law; and
- The Supreme Court Disciplinary Board almost never imposes sanctions against prosecutors for ethical violations that have occurred while they are acting as prosecutors. In the absence of these mechanisms for quality improvement, this report proposes a series of reforms presented in two categories: those aimed at preventing error, and those aimed at providing appropriate accountability or assistance for errors when they do occur.

It is important to acknowledge at the outset that punishment for individual prosecutors is likely a limited remedy for prosecutorial misconduct. A growing body of research has shown that, in general, the certainty of “being caught” has proven to have a greater deterrent effect on would-be criminals than punishments themselves, regardless of severity.¹¹⁷ This means the reforms that are more likely to be impactful are those that either prevent the conduct from occurring or create an environment where misconduct is highly likely to be detected and “caught.” With this framework in mind, those reforms that are likely to have the broadest impact on prosecutorial misconduct are listed first.

Although the specific approach varies among these suggested reforms, they are all designed to improve the accuracy of criminal prosecutions by reducing errors and increasing transparency and accountability for the prosecutorial role. In so doing, they would improve the quality of criminal prosecutions throughout the Commonwealth.

117 See generally Nagin, Daniel S. “Deterrence in the Twenty-first Century: A Review of the Evidence,” (2013)

Recommendations: Preventive Measures

The first group of proposed reforms are aimed at preventing misconduct from happening. These are errors that occur during the investigative, trial, or post-conviction phases of a criminal prosecution. We present these measures in order of overall effect on the criminal justice system.

Recommendation 1: Require Open File Discovery

As we have discussed at length most prosecutorial misconduct claims are related to withholding evidence. While many of the instances discovered in our analysis involve inadvertent failure to disclose, these are still errors and are simply more likely to occur in a legal environment where disclosure is discretionary and encumbers prosecutors with the decision about exculpatory value and materiality. An alternative system would require prosecutors to engage in “open file” discovery – where the prosecuting agency must provide files from all investigative agencies and withhold nothing. With open file discovery protocols, discretionary decisions are no longer necessary which allows prosecutors to focus their decision-making on admissibility instead of disclosure.

Pennsylvania’s rules of criminal procedure should be modified to reduce opportunities for prosecutors to withhold information in criminal cases. While in civil trials, discovery is a process both sides engage in and is limited only by what is “reasonably calculated to lead to the discovery of admissible evidence,”¹¹⁸ in criminal matters discovery is much more limited. Under Pennsylvania law, prosecutors are required to turn over specific items within their control and may be ordered to produce others by court order. Mandatory discovery includes: any evidence “favorable to the accused that is material either to guilt or to punishment;” inculpatory statements; prior criminal record of the defendant; circumstances and results of any identification proceedings; results or reports of scientific tests or expert opinions; tangible objects; and any surveillance transcripts.¹¹⁹ Notably, most of these items are limited only to those “in the possession or control of the attorney for the Commonwealth.”¹²⁰

These rules lack important guidance that would help prosecutors meet their obligations under *Brady* and its progeny. Although the U.S. Supreme Court has made clear the obligation for disclosure of exculpatory information falls squarely on the shoulders of the prosecutor, the Pennsylvania Rules do not require prosecutors to inspect police or other investigative agency files, much less turn over any information found there. Further, statements by any witness the Commonwealth intends to call at trial can be withheld by a prosecutor and turned over only upon request. This leaves the prosecutor as the sole determiner of what is or is not exculpatory and material, and the sole person who will (theoretically) be punished if information is not properly disclosed, even though that the prosecutor is, in most cases, dependent upon others to provide that information.

Many jurisdictions are moving toward open file discovery rules. The Texas legislature passed sweeping discovery reform laws after the exoneration of Michael Morton who had been wrongly prosecuted, convicted, and imprisoned for his wife’s murder and where the trial prosecutor withheld evidence that would have established another suspect in the crime. The law now requires that prosecutors “shall produce and permit inspection and the electronic duplication, copying, and photographing” of materials “that are in the possession, custody, or control of the state or any person under contract with the state.”¹²¹ The Pennsylvania Supreme Court has asked their Criminal Procedure Rules Committee to consider a submitted proposal which would greatly expand criminal discovery. The Court asked for a rule requiring prosecutors to provide “the complete files of all law enforcement agencies, investigatory agencies, and prosecutors’ offices involved in the investigation of the crimes committee or the prosecution of the defendant” within 30 days of arraignment. The Rules Committee apparently rejected the proposal for open file discovery but did suggest expanding the discovery obligations by prosecutors further than current law.¹²²

118 Pa. R.Civ. P. 4003.1(b).

119 Pa. R.Cr. P. 573(B)(1).

120 *Id.*

121 Tex. Code Crim. Proc. Art. 39.14 (a).

Pennsylvania should address the inadequate access to information both in pre-trial and post-conviction litigation.

Prosecutors should implement open file policies in their offices, and the Supreme Court should revise the current discovery rules to require prosecutors to provide full access to all records within the prosecution team's possession to the defense.

Recommendation 2: Adopt Rules 3.8(g) & (h) of the ABA Model Rules of Professional Conduct

Pennsylvania's Rules of Professional Conduct apply to all attorneys in a jurisdiction — whether in civil or criminal court. Since prosecutors neither engage in civil practice nor represent individual clients, the majority of the rules are inapplicable to them. But prosecutors are specifically required to follow Rule 3.8 of the Pennsylvania Rules of Professional Conduct – Special Responsibilities of a Prosecutor. These include charging decisions, protecting a defendant's right to counsel, and other ethical obligations.

Pennsylvania's Rule 3.8 is patterned after ABA Model Rule 3.8, with some modifications.¹²³ The requirement that Pennsylvania prosecutors follow the requirements of the *Brady* decision and its progeny is contained within both rules:

The prosecutor in a criminal case shall ... make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.¹²⁴

Thus, the Pennsylvania Rules of Professional Conduct, like *Brady* and its progeny, require prosecutors to disclose any exculpatory evidence to the defense at the time of trial. But many exonerations are based upon evidence uncovered after trial: witnesses who come forward or recant their trial testimony, the discovery of evidence not previously known, even the availability of new forensic testing. The current iteration of Pennsylvania's Rule 3.8 is silent as to a prosecutor's duties when they become aware of exculpatory evidence in the post-conviction setting.

In 2008, the American Bar Association adopted two new clauses for Model Rule 3.8, clauses 3.8(g) and (h):

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.¹²⁵

122 See Proposed Amendment to Pa. R.Cr. P. 573, published Nov. 19, 2019, available at <https://www.pacourts.us/storage/rules/Publication%20Report%20Rule%20573%20Mandatory%20Disclosure%20In%20Discovery%20-%20008207.pdf>.

123 Pennsylvania's rule eliminates the Model Rule's section concerning grand jury proceedings since Pennsylvania courts do not use grand juries for instituting criminal charges. The full text of ABA Model Rule 3.8 can be found on the ABA website: https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor/.

124 Pa. R.Pr. C. 3.8(d), ABA Model Rule 3.8(d). Compare *Brady v. Maryland*, 373 U.S. 83, 88 (1963) ("... the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

125 ABA Model Rule 3.8.

As of 2021, 23 states have adopted these verbatim or with some modifications.¹²⁶ Pennsylvania is not one of these 23.

In 2008, after the ABA adopted the subsections 3.8 (g-h), the Pennsylvania Bar Association ("PBA") sent a letter to then-Chief Justice Ronald Castille of the Pennsylvania Supreme Court, urging their adoption in Pennsylvania. At the time, the Disciplinary Board agreed Pennsylvania should adhere to the heightened standard of 3.8 (g-h). In 2014, the Disciplinary Board quietly withdrew its support for the change, a shift the Pennsylvania Bar Association did not learn about until 2017.¹²⁷

Given that the rules have been "under consideration" for over 13 years, prosecutors could reasonably take the position that the Supreme Court of Pennsylvania and its Disciplinary Board do not believe that prosecutors have obligations to report or seek true integrity in criminal convictions—a sad state of affairs indeed. **To provide prosecutors with appropriate guidance about their post-conviction obligations to justice, and to stay in step with national rules of professional responsibility, prosecutors should independently hold themselves to the requirements of, and the Pennsylvania Supreme Court should formally adopt, the ABA Model Rule 3.8(g) and (h) as drafted.**

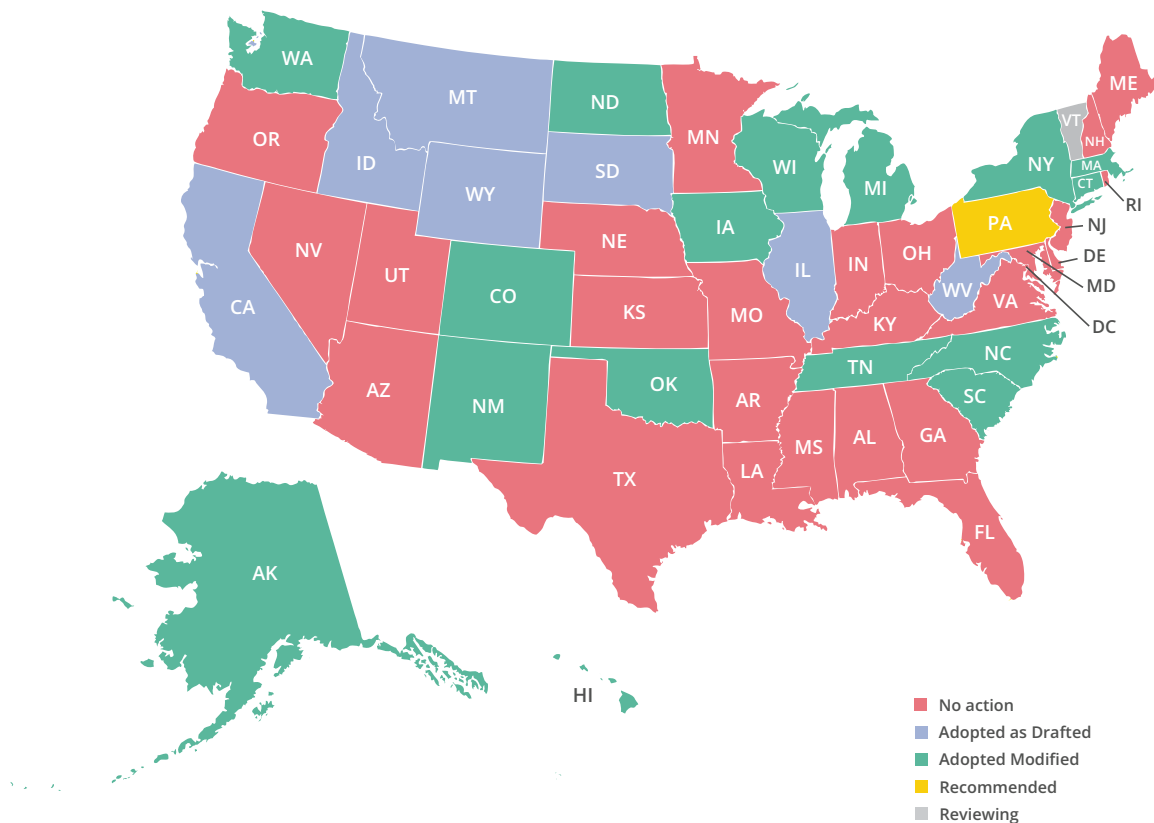


Figure 22: Adoption of ABA Model Rules 3.8(g) and 3.8(h) by state as of 2021

126 States that adopted the rule without modifying: Idaho, Illinois, Montana, South Dakota, West Virginia, and Wyoming. States that adopted a rule based on the model rule: Alaska, Colorado, Connecticut, Hawaii, Iowa, Massachusetts, Michigan, New Mexico, New York, North Carolina, North Dakota, Oklahoma, South Carolina, Tennessee, Washington, and Wisconsin. https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/

127 Correspondence on file with authors.

Recommendation 3: Certify Compliance with *Brady* Prior to Plea or Trial

Although prosecutors alone bear the responsibility of ensuring compliance with *Brady*, there are few mechanisms to hold accountable a prosecutor who disregards that obligation. Requiring a prosecutor to attest in court they have met their full obligations allows for an accountability mechanism should a prosecutor act in bad faith – i.e., the possibility of being held in contempt of court. In addition to directly addressing disclosure requirement early in a prosecution, the procedural checkpoint created by this requirement could serve as a helpful nudge for prosecutors to carefully review each case to not only identify what materials will be disclosed and identify what materials and evidence might be missing or underdeveloped.

This reform is not novel - in response to the rising instances of prosecutors failing to disclose exculpatory evidence, some jurisdictions have begun to require prosecutors to formally certify that all exculpatory evidence has been provided to the defendant prior to the start of trial. The State of New York initiated this practice in 2017, and the requirement was added to the Federal Rules of Criminal Procedure in 2020.¹²⁸

The New York Court of Appeals adopted recommendations from a state-wide study of attorney responsibility in criminal cases – both prosecutor and defense counsel discovery practices – aimed at addressing *Brady* violations by prosecutors as well as ineffectiveness of defense counsel. Its Report on Attorney Responsibility in Criminal Cases was released in February 2017¹²⁹ and adopted by the Court of Appeals in November 2017.¹³⁰

In adopting the report, the Court promulgated a standing order to all New York courts requiring the prosecution to “make timely disclosures of information favorable to the defense as required by *Brady v Maryland*, *Giglio v United*

States, *People v Geaslen*, and their progeny under the United States and New York State constitutions, and by Rule 3.8(b) of the New York State Rules of Professional Conduct.”¹³¹ “Favorable” information includes:

- Impeachment materials;
- Prior inconsistent statements;
- Information that tends to exculpate or “support a potential defense to a charged offense;”
- Information that mitigates a defendant’s culpability or could undermine evidence of the defendant’s identity as a perpetrator of a crime; and
- Information that could affect in the defendant’s favor the ultimate decision on a suppression motion.

In the wake of the New York Court of Appeal’s actions, the Pennsylvania Supreme Court asked the Pennsylvania Criminal Procedural Rules Committee to consider changes to Pennsylvania’s pre- and post-trial discovery procedures. The Committee produced recommended changes to the criminal discovery rules of procedure,¹³² but as of the writing of this report the rules have not been adopted.

In the federal system, in October 2020, Congress passed the Due Process Protections Act (Senate Bill 130).¹³⁰ The Act revised Federal Rule of Criminal Procedure 5 to add a subsection requiring judges to issue an order at first appearance “that confirms the disclosure obligation of the prosecutor under *Brady v. Maryland* ... and the possible consequences of violating such order under applicable law.”¹³⁴ Co-sponsor Senator Dick Durbin (D-III) said the bipartisan bill “will help protect the right of the accused to all evidence that could exonerate him and hold accountable prosecutors who fail to comply.”¹³⁵ Senator Dan Sullivan from Alaska tied the new legislation to the flawed prosecution of former US Senator Ted Stevens:

128 Fed. R. Crim. P. 5(f).

129 Available at <http://www.nyjusticetaskforce.com/pdfs/2017JTF-AttorneyDisciplineReport.pdf>.

130 See press release from Court of Appeals, November 8, 2017 (available at http://ww2.nycourts.gov/sites/default/files/document/files/2018-05/PR17_17.pdf).

131 Internal citations omitted.

132 See note 117.

133 See <https://www.congress.gov/bill/116th-congress/senate-bill/1380>.

134 Fed. R. Cr. P. 5(f) (as amended 10/21/2020).

135 Senator Dick Durbin Statement, available at <https://www.durbin.senate.gov/newsroom/press-releases/durbin-sullivan-due-process-protections-act-signed-into-law>

Despite the constitutional requirement for prosecutors to disclose exculpatory evidence, there continue to be cases in the federal system where this constitutional obligation is ignored. One of the most high-profile examples of this misconduct was the 2008 prosecution of the late Senator Ted Stevens (R-Alaska). The conviction was vacated before sentencing by the federal District Court following revelations of prosecutors and FBI agents conspiring to withhold and conceal favorable evidence from Senator Stevens' defense.¹³⁶

These rules are useful for cases that proceed to trial, but do not address the vast majority of cases in Pennsylvania (71%, excluding Philadelphia)¹³⁷ resolved by guilty plea. In these cases, a prosecutor could negotiate a resolution to the case while intentionally or inadvertently failing to disclose exculpatory information to the defendant. Accordingly, the protections of these rules should be extended to all cases in Pennsylvania.

1) The Pennsylvania Supreme Court should adopt a standing order that all courts in the Commonwealth require prosecutors to certify compliance with the requirements of *Brady*, *Giglio*, and their progeny before accepting a guilty plea or allowing a case to proceed to trial.

2) With or without a Standing Order, Defense attorneys should make formal requests as a matter of course in each criminal case that prosecutors sign declarations stating that all material responsive to *Brady* has been provided to the defense.

Recommendation 4: Enhance Prosecutorial Self-Regulation and Reporting

Perhaps the most direct reform measures are those that merely require changes in individual office policy. Even without action from other stakeholders, prosecutors'

offices are free to adopt their own policies to ensure transparency and promote a just office culture. Prosecutors can announce their **voluntary adoption of Rule 3.8(g)** and (h) and train their attorneys to take action on any postconviction evidence that questions the integrity of that conviction. Similarly, independent offices are free to **adopt an open file discovery policy**, whereby all information within the government's file is provided to the defense. At a minimum, offices should form an interoffice committee to explore how an open file policy would be implemented and how to work with the other government agencies to ensure full disclosure of discovery. Such a committee should include outside stakeholders, such as crime victims, law enforcement, and defense counsel.

A logical accompaniment to an open file discovery policy is the **creation, maintenance and use of *Brady* and *Giglio* lists**: databases maintained by the prosecutor's office of the names of officers (and prosecutors) who have engaged in confirmed misconduct for all prosecutors to access. Such a list ensures that those whose integrity may be compromised are not called to testify in court.

Supporting the open file discovery and *Brady* lists, prosecutors should **develop easy to use checklists and other tools** to make sure steps are taken in every case to access and complete discovery before a plea is entered. Where checklists show a consistent failure, prosecutors can revise their training to confirm the office's commitment to transparency.

Finally, every prosecutor's office should have a **clear policy explaining how it handles credible allegations of prosecutorial misconduct**, whether by current or former members of the office. This policy should account for allegations from any source: other prosecutors, defense counsel, members of the public, court staff, judges, and any instances identified in court proceedings or judicial opinions. Such allegations should not be investigated internally but referred to the Disciplinary Board for investigation.¹³⁸

136 Sen. Dan Sullivan, press statement on signing of Due Process Protections Act 10/22/20, available at <https://www.sullivan.senate.gov/newsroom/press-releases/sullivan-durbin-due-process-protections-act-signed-into-law>

137 See note 3, above.

138 Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 Ohio St. J. Crim. L. 705, 731 (2017).

Recommendation 5: Formally Review Cases of Prosecutorial Misconduct to Identify Opportunities for Improvement

Much of the conversation around reducing prosecutorial misconduct focuses on the most egregious, intentional instances of prosecutorial misconduct and the need for individuals who have violated professional rules to be held accountable. It is essential to address the harm to the criminal justice system resulting from that misconduct, and equally important that prosecutors who intentionally violate the rules be identified and removed from service.

At the same time, punishment of prosecutors is only useful to deter intentional acts of misconduct. Firing the few prosecutors who are deliberately breaking the rules will do nothing to reduce the instances of negligent or reckless misconduct.

In the words of British quality researcher James Reason, countermeasures to quality concerns should be based on the idea that “though we cannot change the human condition, we can change the conditions under which humans work.”¹³⁹ In the context of prosecutors, we must acknowledge that they, like any other person earnestly doing their job, will occasionally make mistakes. Some of those mistakes will be acts of misconduct. While it remains important to maintain functional accountability mechanisms for those individual prosecutors, the obligations of prosecutor offices don’t end there. Conducting full holistic reviews examining all the environmental and decisional factors contributing to those “sentinel event” mistakes yield more comprehensive and lasting interventions and tools for any prosecutors’ offices that are dedicated to quality improvement, accuracy and fair justice.”

It is the responsibility of those attorneys and of their offices to learn from those acts and make changes to policies, practices, and procedures that will put future prosecutors in a better position to avoid such mistakes in the future.

We recommend that prosecutors’ offices throughout the Commonwealth of Pennsylvania conduct Sentinel Event Reviews of identified instances of prosecutorial misconduct and make the results of those reviews and recommendations for improvements public. Sentinel Event Reviews¹⁴⁰ evaluate the impacts of upstream systems and existing policies, procedures, and cultural norms on prosecutorial misconduct while recognizing that prosecutors may often commit acts defined as misconduct unintentionally and/or in good faith pursuit of justice. The obligation for quality improvement in prosecution is broader than the obligation to hold prosecutors personally accountable for their actions; such reviews facilitate careful analysis and improvement across all facets of the prosecutorial environments are a valuable tool for any prosecutors’ offices that are dedicated to quality improvement, accuracy and fair justice.

139 James Reason, Human Error: models and management; BMJ. 2000 Mar 18; 320(7237): 768-70. (<https://www.bmj.com/content/320/7237/768>)

140 See, e.g., Mending Justice: Sentinel Event Reviews, accessible at <https://www.ojp.gov/pdffiles1/nij/247141.pdf>; Hollway, J. and Grunwald, B., *Applying Sentinel Event Reviews to Policing*, 18 Criminology & Pub. Pol’y 705 (2019).

The Emerging Role of CIUs in Identifying Prosecutorial Misconduct

Over the past 10 years, the number of prosecutor offices that have established conviction integrity units (CIUs) has dramatically increased. These specialized units are focused on identifying and rectifying wrongful convictions. In this extra-judicial and non-adversarial process, most CIUs provide applicants with all materials that were collected by prosecuting agencies (e.g., prosecutor, police, medical examiner, or forensics examiners) in the original case investigation and adjudication. According to the NRE, of the 517 cases to date where a CIU was involved in an exoneration, defense counsel discovered that these files contained exculpatory evidence that should have been provided at trial but was not in nearly half (253).¹⁴² In Pennsylvania, the CIU of the Philadelphia District Attorney's Office has exonerated 26 people since 2010 and in 23 of those cases (88.5%) the failure of a prosecutor to disclose evidence was a factor that contributed to the wrongful conviction.¹⁴² Notably, four of those 23 cases were prosecuted by the same prosecutor: Roger King. In addition to those four exonerations, a recent *Philadelphia Inquirer* report found three additional convictions in which King was the lead prosecutor that were reversed, at least in part, because of prosecutorial misconduct. The misconduct in those cases included failure to provide exculpatory evidence, witness manipulation by threats or hidden benefits improper statements, and improper statements.¹⁴³

Conviction integrity units (CIUs) are specialized units within prosecutors' offices which provide an extra-judicial, non-adversarial process to review cases involving potential wrongful convictions. There are over 100 units in operation nationally at local, county, and state levels. In recognition of the prosecutor's role in doing justice no matter when during the process most conviction integrity units do not limit their work to claims of factual innocence, preferring to review claims of "wrongful conviction" even if the convicted individual is not claiming they were uninvolved; often these cases include instances of police or prosecutorial misconduct sufficient for the current prosecutor to lose faith in the conviction.

With all of this infection and cancer and rot, can I put my name on anything upholding what happened in these cases? You are presumed innocent until we give you a fair trial. And if we don't give you a fair trial, I can't stand up and defend that conviction. I just can't.

DA Rachael Rollins as quoted in *One Right, Many Wrongs*, Boston Globe, Dec. 8, 2021, p. B1.

A common practice of CIUs is to promote transparency and conduct collaborative investigations with defense counsel. The first step is most often providing full access to all prosecutorial materials – files held by the prosecutors, police, forensics, and other state agencies – to defense counsel. As we note above in this report, the provision of these materials can be an effective way to identify circumstances where crucial evidence in the possession of prosecutors was never turned over to defense.

141. <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Group&FilterValue1=CIU&FilterField2=OM%5Fx0020%5FTags&FilterValue2=WH>.

142. <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Group&FilterValue1=CIU&FilterField2=ST&FilterValue2=PA&FilterField3=County%5Fx0020%5Fof%5Fx0020%5FCrime&FilterValue3=Philadelphia>.

143. Samantha Malamed, *King of Death Row*, Phila. Inquirer, Nov. 14, 2021, A1 (available at <https://www.inquirer.com/crime/a/roger-king-philadelphia-da-conviction-reversals-20211111.html>).

Recommendations: Accountability Measures

An important step in ensuring public faith in the prosecutorial function is accountability. Where allegations of misconduct are proven, even though the action was unintentional, there should be a level of public reckoning. In those rare cases where a prosecutor's misconduct is intentional and even potentially criminal, holding the individual accountable is necessary to prevent those errors from recurring. The below measures would provide transparency and accountability that are currently missing. Moreover, adopting measures that provide for civil litigation in appropriate cases will likely lead to broader reform and protective measures, as is often the case with civil matters

Recommendation 6: Require Automatic Reporting of Prosecutorial Misconduct

Like every state, Pennsylvania has Professional Conduct Rules applicable to all practicing attorneys. The Supreme Court of Pennsylvania maintains the Pennsylvania Rules of Professional Conduct, which generally mirror the Model Rules maintained by the American Bar Association.¹⁴⁴ These Rules set ethical guidelines for attorney conduct in their practice both in and out of court.

Attorneys in Pennsylvania must follow the Pennsylvania Rules of Professional Conduct, including performing their duties with honesty, and integrity. They may not "engage in conduct that is prejudicial to the administration of justice."¹⁴⁵ If they witness misconduct by a fellow member of the bar, they have a professional obligation to report that misconduct to the Disciplinary Board.¹⁴⁶

Judges are similarly bound by these Rules to report attorney misconduct. In addition, the Pennsylvania Code of Judicial Conduct state that when a judge is aware an attorney has "committed a violation of the Pennsylvania Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer," the judge is required to inform "the appropriate authority."¹⁴⁷

Not all acts of prosecutorial misconduct raise questions about a lawyer's honesty, trustworthiness, or fitness as a lawyer. (There is nothing particularly dishonest about using an improper questioning technique in open court, for example.) But some, withholding exculpatory evidence and gathering or presenting false evidence for example, raise substantial questions about the prosecutor's honesty and trustworthiness (and are violations of Rule 3.8(d) of the Pennsylvania Rules of Professional Conduct). Our dataset includes 55 opinions that identify these categories of misconduct, 52 for withheld evidence and 3 for gathering or presenting false evidence and the Disciplinary Board has only disciplined two prosecutors for ethical violations in their roles as prosecutors.

It is not clear whether this disparity is due to judges not reporting instances of prosecutorial misconduct to the Disciplinary Board, the Disciplinary Board not acting upon those reports, or the Disciplinary Board or Supreme Court electing not to impose a sanction in the other cases. By not publicizing and addressing these acts, our system provides implicit support for them.¹⁴⁸ Moreover, the Disciplinary Board's failure to act on such reports would be contrary to its stated mission.

144 The full text of the ABA Model Rules can be found on the ABA website: https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/

145 Pa. R.P. C. 8.4(d).

146 Pa.R.P.C. 8.3(a) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.").

147 Pa. CJC 2.15. The Code of Judicial Conduct defines "appropriate authority" as the "authority having responsibility for initiation of disciplinary process in connection with the violation to be reported." Pa. CJC Terminology.

148 In addition, judges who do not report instances of intentional *Brady* violations could be subject to discipline themselves under Code of Judicial Conduct Rule 2.15(D). The Rule states, "A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Pennsylvania Rules of Professional Conduct shall take appropriate action."

Both contribute to the overall lack of transparency and lack of accountability for prosecutorial misconduct. California provides an example of an improved model. In July 2020, California changed its rules of professional responsibility to require judges to take action upon a judicial finding of misconduct, even without reference to the Professional Rules of Conduct.¹⁴⁹

Pennsylvania should expressly require prosecutors and judges who are aware of prosecutorial misconduct that raises questions about the prosecutor's honesty or trustworthiness to refer the conduct to the Disciplinary Board for an investigation and require the Disciplinary Board to conduct an appropriate investigation.

When prosecutorial misconduct is raised, Judges should always evaluate the claim to determine if it occurred or if further investigation is necessary. The Code of Judicial Conduct requires action whenever a judge receives "information indicating a substantial likelihood that a lawyer has committed a violation"

so this evaluation should occur in any case where the claim is clearly raised and corroborated by the associated record, regardless of whether the claim is dispositive or is procedurally defaulted.¹⁵⁰

To ensure public confidence in the system, Judges should make specific findings on those claims and make any required referrals. The Judicial Conduct Board should implement a method of tracking those judge referrals for discipline and publicly report, at a minimum, the numbers of referrals made on an annual basis.

The Disciplinary Board should publish its investigatory conclusion(s), including whether discipline is recommended or not recommended. The requirement of such a referral to the Disciplinary Board, without regard for materiality or the prosecutor's intent, would not predetermine a finding of discipline, and would provide an important layer of transparency and oversight into what is currently an opaque system that undermines public confidence.

149 See CA ST J ETHICS Canon 3(D)(2) ("Whenever a judge has personal knowledge, or concludes in a judicial decision, that a lawyer has committed misconduct or has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action, which may include reporting the violation to the appropriate authority.").

150 It is important to note there are many reasons why judicial findings themselves do not, and should not, result in automatic referrals to the Disciplinary Board. For example, the mere fact a conviction may be reversed should not be grounds for a disciplinary referral. Only instances where the judge has reason to believe, based on the information provided in the case, that the relevant conduct may have been grossly negligent, reckless, or intentional should generate a referral to the Disciplinary Board.

Recommendation 7: Eliminate Absolute Immunity for Prosecutors

The Pennsylvania Constitution gives the Legislature the power to determine under what conditions the Commonwealth may be sued for any injury:

All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.¹⁵¹

The Pennsylvania statute allowing for waiver of sovereign immunity does not list prosecutors or prosecutor offices.¹⁵² By amending the sovereign immunity waiver Pennsylvania could allow lawsuits against prosecutors to at least advance to a stage where colorable claims of misconduct could be heard.

The Pennsylvania Legislature should eliminate absolute immunity for prosecutors acting in their capacity as prosecutors, and instead provide qualified immunity for unintentional acts of misconduct.

Recommendation 8: Create a Civil Tort Remedy for Individuals Who Are Harmed by Intentional or Grossly Negligent Prosecutorial Misconduct

In the forthcoming Iowa Law Review article *Qualifying Prosecutorial Immunity Through Brady Claims*,¹⁵³ professors Brian M. Murray, Jon B. Gould, and Paul Heaton propose a universal civil tort statute to hold prosecutors accountable for *Brady* violations:

Every prosecutor who subjects, or causes to be subjected, a person within the jurisdiction of any State or the United States to a criminal conviction

by intentionally withholding from the defense evidence or information that is exculpatory and material to guilt or punishment and known to the prosecutor shall be liable to the injured party for monetary damages.

The authors argue such a remedy “strikes a better balance” than existing absolute immunity doctrine: prosecutors would have the protection they need against frivolous lawsuits as envisioned by *Imbler*, while society is served by providing a means to compensate those harmed by misconduct.

Recommendation 9: Consider a Criminal Statute Specific to Intentional Suppression of Evidence and Apply Other Statutes Relevant to Prosecutor Misconduct

Our review found few cases of intentional or egregious misconduct. Nonetheless, no stakeholder in the criminal justice system should tolerate even these rare instances given the effect of undermining trust and confidence in the system itself.

There should be little disagreement that intentional suppression of *Brady* material cannot be tolerated. An emerging trend in other jurisdictions is the implementation of a criminal statute specific to intentional suppression of discoverable evidence. As we discussed above, the deterrent effect of most criminal sanctions comes from the perceived likelihood of being caught and a clear criminal statute may enhance that perception. North Carolina has criminalized the willful failure to comply with the discovery rules. A prosecutor who “willfully omits or misrepresents evidence or information required to be disclosed” can be charged with a misdemeanor or even a felony.¹⁵⁴ California also recently amended its state penal code to criminalize “[i]ntentional alteration of physical matter, digital image, or video recording with intent to charge person with a crime” whether the actor be a peace officer or prosecutor.¹⁵⁵ Although the statute of limitations was not specifically

151 Pa. Const. Art. I, § 11.

152 See 42 Pa. C.S. § 8522.

153 Murray, Brian and Heaton, Paul S. and Gould, Jon, *Qualifying Prosecutorial Immunity Through Brady Claims* (January 2021). Iowa Law Review, Vol. 107, 2021-22.

154 N.C. Gen. Stat. Ann. § 15A-903.

155 Cal. Penal Code § 141

amended to include the new charge, where the defendant is a public actor the time limitations do not begin to run until the “discovery” of the act.¹⁵⁶ To date, there does not appear to be a case where a prosecutor has been indicted under either of these provisions. It is important to consider, however, that frequency of enforcement is only one metric to evaluate such a statute – clearly stated criminalization of intentional suppression of evidence may motivate a very different and more-risk averse decision-making process that motivates prosecutors to err on the side of disclosure. In addition, such a statute could also serve to make other disclosure related reforms even more tenable as they are all designed to protect individual prosecutors and unburden them from the difficult discretionary discovery decisions. This change shifts the focus for “gray area” evidence to the transparent and less risky in-court relevance litigation.

Additionally, many forms of prosecutorial misconduct — withholding or altering evidence, coaching witnesses in their testimony, pursuing cases the prosecutor knows to be weak or improper — have a matching criminal charge. Yet prosecutors remain outside the criminal legal system for these acts as a rule, primarily because the statute of limitations for pursuing those charges has long passed by the time the actions are discovered.

For existing crimes that relate to misconduct that occurs during investigations and prosecutions – perjury, false statements, tampering with or fabricating evidence,¹⁵⁷ tampering with public information,¹⁵⁸ intimidation of witnesses,¹⁵⁹ retaliating against witnesses,¹⁶⁰ obstructing administration of law or justice,¹⁶¹ abuse of office¹⁶² – the prosecution must be commenced within, at most, five years after the crime is “committed.”¹⁶³ Where the defendant is a public actor the time limitations can be extended, but no more than eight years past the original limit – either 10 or 13 years at most.¹⁶⁴ Given the years involved in appealing a case and raising issues through post-conviction relief, by the time prosecutorial misconduct is discovered or uncovered the time limitation for prosecution has long passed

The Pennsylvania Legislature should address prosecutorial misconduct in a criminal context by extending the statute of limitations for prosecutors’ actions to run from the time of discovery of the misconduct or when the putative plaintiff is fully discharged, whichever is later.¹⁶⁵

156 Cal. Penal Code § 803 (c). (“A limitation of time prescribed in this chapter does not commence to run until the discovery of an offense described in this subdivision. This subdivision applies to an offense punishable by imprisonment in the state prison or imprisonment pursuant to subdivision (h) of Section 1170, a material element of which is fraud or breach of a fiduciary obligation, the commission of the crimes of theft or embezzlement upon an elder or dependent adult, or the basis of which is misconduct in office by a public officer, employee, or appointee, including, but not limited to, the following offenses”). Notably, Section 141 is not enumerated but because the actor would be a “public officer, employee, or appointee” the section would apply to prosecutors who have withheld evidence.

157 18 Pa. C.S. § 4910.

158 18 Pa. C.S. § 4911.

159 18 Pa. C.S. § 4952.

160 18 Pa. C.S. § 4953.

161 18 Pa. C.S. § 5101.

162 18 Pa. C.S. § 5301.

163 42 Pa. C.S. § 5552. This section allows the statute of limitations to be extended to one year after the misconduct is discovered.

164 42 Pa. C.S. § 5552(c)(2) (“Any offense committed by a public officer or employee in the course of or in connection with his office or employment at any time when the defendant is in public office or employment or within five years thereafter, but in no case shall this paragraph extend the period of limitation otherwise applicable by more than eight years.”) (emphasis added).

165 TX GOVT § 81.072(b-1) (“In establishing minimum standards and procedures for the attorney disciplinary and disability system under Subsection (b), the supreme court must ensure that the statute of limitations applicable to a grievance filed against a prosecutor that alleges a violation of the disclosure rule does not begin to run until the date on which a wrongfully imprisoned person is released from a penal institution.”).

Recommendation 10: Establish a Prosecutorial Oversight Commission to Identify and Address Prosecutorial Misconduct

For three years the New York State Legislature worked to create a commission modeled on their Judicial Conduct Commission empowered to review allegations of prosecutorial misconduct.¹⁶⁶ As originally constructed, the Commission was given broad powers to initiate its own investigations, issue public reports, censure, or reprimand prosecutors, and even remove prosecutors for cause. The original enacting legislation explains the need for an independent commission this way:

Prosecutors have an extraordinary amount of discretion regarding investigation and prosecution of charges. They have wide latitude in determining how to prosecute and whether to prosecute certain offenses against certain defendants. It is vitally important there exist in law a tribunal to oversee that discretion, to protect the rights of defendants, and make certain they are not violated. The liberties at stake in criminal prosecutions call for this level of scrutiny.¹⁶⁷

Unlike New York, the Pennsylvania Legislature is powerless to affect the internal conduct of the judiciary including attorney oversight. The Pennsylvania Constitution empowers only the Pennsylvania Supreme Court to oversee the judiciary and attorney discipline.¹⁶⁸

The Court has Boards and Advisory Groups to help conduct its supervisory capacity over Pennsylvania courts generally and can create special groups to investigate particular issues related to statewide access to justice. For example, in 1999 the Court created the Supreme Court Committee on Racial and Gender Bias in the Justice System and charged the committee with conducting a three-year study to determine whether racial or gender bias played a role in the justice system. That report led to the creation of the permanent Interbranch Commission for Gender, Racial and Ethnic Fairness to ensure people of every race, gender, and ethnic background receives fair and respectful treatment throughout all state government offices.¹⁶⁹

The Pennsylvania Supreme Court should create a Committee on Prosecutorial Decision-making and Conduct and the Impact on the Administration of Justice to thoroughly investigate the state of criminal discovery and prosecutorial misconduct in Pennsylvania. That Committee should produce a report recommending actions for the Court to take to identify instances of prosecutorial misconduct, hold miscreant prosecutors accountable, and improve professional responsibility laws to prevent recurrence.

166 Both times the law was enacted, the District Attorneys Association of the State of New York sued to enjoin its formation. Each suit was successful; in 2020, the legislature drafted a new bill to account for the deficiencies found by the courts. (AB10805A, SB8815). Then-Governor Andrew Cuomo signed the bill into law June 17, 2021. As of this publication, no lawsuit has been filed challenging the provisions.

167 2017-2018, AB 05285, Sponsorship Memo, available at https://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=A05285&term=2017&Memo=Y&Text=Y (visited 12/14/2020).

168 See Pa. Const. § 10 (c) ("The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts . . . including . . . for admission to the bar and to practice law").

169 See <http://www.pa-interbranchcommission.com/about.php> (visited Oct. 6, 2021).

Conclusion

This research project began as an effort to understand the landscape of prosecutorial misconduct allegations in state and federal court opinions in Pennsylvania – what kinds of misconduct are described by these claims, how often do they occur, and how are they handled by Pennsylvania’s criminal justice system?

For the most part, allegations of prosecutorial misconduct are handled in ways that contribute to an overall perspective of cynicism and distrust of prosecutors throughout the Commonwealth – a result that ultimately makes the already challenging job of criminal prosecution even harder, and that reduces the legitimacy of the criminal justice system.

It is virtually impossible to catalogue all cases of misconduct – and as this report illustrates, any such cataloguing inevitably undercounts the very conduct it seeks to quantify. In the comparatively few instances where courts agree with defendants or petitioners that misconduct occurred, it is often casually ignored or deemed to be unimportant. And in the few instances where it is observed, addressed, and found to have materially impacted a criminal case, the mechanisms for accountability and deterrence are practically nonexistent. Civil nor criminal courts, nor prosecutors themselves, nor ethics boards review those findings of misconduct, nor do they address identified instances of prosecutorial misconduct in a systematic or transparent manner or take any other steps to reassure a skeptical public that these events are being considered and treated in ways that improve the quality of our criminal justice system.

In this way, Pennsylvania’s criminal justice system resembles the American health care system of 30 years ago, before the publication of “To Err Is Human: Building a Safer Health System” by the Institute of Medicine Committee on Quality of Health Care in America.

That seminal publication noted that 100,000 Americans were dying needlessly each year due to medical errors and set forth recommendations designed to reduce those errors. The parallels between that document and today’s prosecutorial misconduct errors are striking.

The report noted that the “horrific cases that make the headlines are just the tip of the iceberg,”¹⁷⁰ and that despite the significant costs of the errors, “silence surrounds the issue.”¹⁷¹ The authors sought broad and integrated reforms designed to prevent the errors rather than simply blaming doctors (or prosecutors, as applied here) for their mistakes. They noted that “[t]he focus must shift from blaming individuals for past errors to a focus on preventing future errors by designing safety into the system. This does not mean that individuals can be careless. People must still be vigilant and held responsible for their actions. But when an error occurs, blaming an individual does little to make the system safer and prevent someone else from committing the same error.” And, as we have suggested here, the authors stated, “[m]uch can be learned from the analysis of errors. All adverse events resulting in serious injury . . . should be evaluated to assess whether improvements in the delivery system can be made to reduce the likelihood of similar events occurring in the future. . . . Preventing errors means designing the [criminal justice] system at all levels to make it safer. Building safety into processes of care is a more effective way to reduce errors than blaming individuals.”¹⁷²

It is our belief that the criminal justice system of 2021 stands where the health care system did prior to 1998. Just as we learned in medicine, we need not and should not accept that such consequential errors simply “happen” and are an unavoidable part of the landscape where they occur. We can and must come together and do more to prevent instances of prosecutorial misconduct. Doing so will make the system better for all Pennsylvanians.

170 Institute of Medicine (US) Committee on Quality of Health Care in America, *To Err is Human: Building a Safer Health System*, Linda T. Kohn, Janet M. Corrigan, Molla S. Donaldson, editors; National Academies Press (2000), at 1.

171 *Id.* at 3.

172 *Id.* at 5



Appendices

Appendix A. Methodology

Case Selection

Our review analyzed Pennsylvania criminal court opinions issued between January 1, 2000, and December 31, 2016. Rather than select a sample of opinions from the time period, we collected and evaluated all opinions that contained either of the search phrases “prosecutorial misconduct” or “*Brady v. Maryland*.” “At the outset of this project, we recognized that it would be impossible to identify in advance all text combinations that could signify a claim of prosecutorial misconduct. With this in mind, we also chose to include the additional search term “*Brady v. Maryland*” because this citation is the primary and ubiquitous precedent cited in claims related to withheld or otherwise not-provided evidence, a well-known and frequently discussed category of misconduct. Our decision to use these two specific search terms necessarily limits the opinions that were identified to those that contained these phrases and as a result does not capture all claims or other text that possibly describes acts of prosecutorial misconduct. As a result of the inclusion of the *Brady* citation, claims of withheld evidence are more likely to appear in our data and thus the relative frequency of the claims will be higher than if the citation was not included.” We searched the following databases for case opinions:

- The Westlaw electronic legal database (filtered to search only opinions in state and federal courts in Pennsylvania);¹⁷³
- Unpublished memoranda opinions of the Superior Court of Pennsylvania, made available by the court; and
- Published records and opinions of the Disciplinary Board of the Supreme Court of Pennsylvania, made available through the Disciplinary Board’s website,¹⁷⁴ Administrative Office of Pennsylvania Courts (AOPC) website,¹⁷⁵ and the Westlaw database.

We searched and evaluated a total of 5,575 opinions: 3,394 from Westlaw and 2,181 unpublished Superior Court opinions. Of the opinions from Westlaw, 2,178 were from federal courts and 1,216 were from state courts. When combined with the separately obtained unpublished state court memoranda, the total number of state court opinions was 3,397. Of these, 157 opinions were determined to be duplicates or unrelated to our query and were omitted from further analysis.

An additional 774 opinions were removed from the dataset because they contained incidental references to the search terms, were not criminal cases,¹⁷⁶ were not Pennsylvania cases,¹⁷⁷ did not contain a prosecutorial misconduct claim, or were otherwise not substantively related to the query.¹⁷⁸

After the removal of the opinions described above, our dataset contained 4,644 opinions: 3,089 opinions in cases originating in Pennsylvania state courts, 501 opinions in cases originating in federal courts within Pennsylvania, and 1,054 federal court decisions involving constitutional habeas corpus petitions for cases originating in state courts.¹⁷⁹

¹⁷³ <https://www.westlaw.com>.

¹⁷⁴ <https://www.padisiplinaryboard.org/cases/opinions>.

¹⁷⁵ <http://www.pacourts.us/courts/supreme-court/committees/supreme-court-boards/disciplinary-board-opinions/>.

¹⁷⁶ Examples of such opinions include civil rights cases, defamation, or other civil claims.

¹⁷⁷ The three federal districts of Pennsylvania are all within the United States Court of Appeals for the Third Circuit, which also has jurisdiction over Delaware, New Jersey and U.S. Virgin Islands District Courts. Although the Westlaw search was filtered for Pennsylvania “and related Federal,” several cases originating in non-PA district courts were returned.

¹⁷⁸ This was a frequent issue in pro se cases, which were often decided on untimeliness, waiver, or some other procedural default. In such cases the claims are often not described adequately by the petitioner and the resulting opinion contains little if any language about the nature of the claim.

¹⁷⁹ “Habeas corpus,” often shortened to “habeas,” is a commonly used legal term that denotes the traditional writ process allowing a state prisoner to challenge their conviction in federal court. The modern habeas process is statutory. For a general description of habeas corpus procedure, see https://www.law.cornell.edu/wex/habeas_corpus.

A Note on Unpublished Opinions

Pennsylvania has two levels of appellate courts with jurisdiction over criminal cases: the Superior Court, which is the intermediate appellate court and first level of review of trial court proceedings, and the Supreme Court, the court of last resort for all state law matters. Any claim raised in the Superior Court, whether or not it has substantive merit and including those which may be procedurally lacking or are otherwise not viable for review, must be at least procedurally addressed by the Court.

In Pennsylvania as in many states, appellate opinions can be precedential or non-precedential. Prior to 2019, nonprecedential Superior Court opinions in Pennsylvania were referred to as “unpublished memoranda decisions.”¹⁸⁰ As the name implies, such opinions were provided directly to and only to the parties in the case. While these opinions were still technically in the public record before 2012, they could only be accessed by requesting a copy directly from the Superior Court.¹⁸¹ To ensure that our dataset was as complete as possible, we requested from the Office of Legal Systems of the Superior Court of Pennsylvania copies of all unpublished memoranda opinions that satisfied our search criteria but were not in the Westlaw database. We received 2,181 opinions (discussed above) pursuant to this request.¹⁸²

180 PA ST SUPER CT IOP § 65.37

181 According to sources in the administrative offices of the Superior Court and Thompson Reuters (Westlaw), , as of 2012 the court began providing unpublished opinions to Westlaw and, as a result of this change, any such opinions issued after 2012 were available in the online database.”

182 The Superior Court internal database search was conducted using a search tool based on the Lucene text search programming library (<http://lucene.apache.org/core/>).

Cataloguing the Opinions

Each of the opinions in the dataset was reviewed and coded by a group of Research Assistants (RAs) who received training on the background law and the case coding process. RAs were instructed to evaluate each case to determine:

- Whether an actual claim of prosecutorial misconduct was raised in the case.
- The underlying basis of the claim of prosecutorial misconduct.
- Whether the claim of misconduct was substantively addressed by the court.

It is not unusual for appeals to be disposed of and/or dismissed without a judicial evaluation of the merits of the claims. This could occur because the claims were time-barred (i.e., filed after a final filing deadline), or for some other procedural defect, or because the case was resolved on another substantive claim. Where a case is reversed on other grounds, the misconduct claim is often ignored and is not substantively addressed.

- Whether the conduct described in the claim was “found.”

We use the term “found” to mean the court made a statement or clearly implied in the opinion that the acts alleged to be prosecutorial misconduct (1) in fact occurred and (2) were identified as illegal, improper, or otherwise impermissible. Opinions were catalogued as misconduct “found” only when they met the above criteria – the procedural or substantive outcome of the claim or case were not relevant to this coding.

“Found” does not mean the original defendant was given a remedy for the misconduct. Even in a case where a claim of prosecutorial misconduct was coded as found, the court may have ultimately dismissed the claim, minimized its significance or legal effect, or otherwise decided against the litigant raising the claim.

- Whether the court expressly determined that the alleged misconduct was “harmless error.”

If the court determines that misconduct occurred, it then must evaluate whether that misconduct affected the outcome of the trial - in other words, whether the appellant was “prejudiced” by the misconduct. If not, the court can determine that the misconduct was “harmless error” and take no action on the misconduct. In Pennsylvania, the standard needed to demonstrate “harmless error” is different depending on the procedural posture of the case. When the case is on direct appeal (i.e., appeal immediately after a conviction), “prosecutorial misconduct may be harmless error if the prosecutor demonstrates that the error was harmless beyond a reasonable doubt . . . [W] here the properly admitted evidence of guilt is so overwhelming and the prejudicial effect of the error is so insignificant by comparison that it is clear beyond a reasonable doubt that the error could not have contributed to the verdict, then the error is harmless beyond a reasonable doubt.”¹⁸³ In a post-conviction claim the appellant need only show a “reasonable probability” (for withheld evidence)¹⁸⁴ or “reasonable possibility” (for uncorrected false evidence) that the error impacted the integrity of the verdict by a preponderance of evidence.¹⁸⁵

¹⁸³ *Commonwealth v. Miles*, 681 A.2d 1295, 1302 (Pa. 1996).

¹⁸⁴ *Kyles*, 514 U.S. at 433 (vacation is proper “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different”).

To minimize the potential for bias among RAs doing the coding, each case was independently reviewed by two RAs. Each RA shared their coding with the other for comparison. Where RAs came to inconsistent conclusions regarding any of the above questions, the two discussed the issue and either resolved the inconsistency or brought the inconsistent interpretations to their supervisor, a licensed Pennsylvania attorney with criminal law experience, for a final decision.

All opinions in which an allegation of prosecutorial misconduct was addressed and found by the court received an additional verification review from two Pennsylvania attorneys with experience in criminal cases in Pennsylvania courts.

Our analysis of the combined published and unpublished court decisions identified 3,488 opinions in which at least one claim of prosecutorial misconduct was addressed.

Among those 3,488 opinions, claims of prosecutorial misconduct were “found” in 145 (4%).

Limitations

While we sought to identify all allegations of prosecutorial misconduct in Pennsylvania state and federal courts from 2000 – 2016, we found that to be impossible. Our process had the following limitations:

Cataloguing Claims

Our method of cataloguing or classifying opinions and claims inherently relied on the subjective judgments of RAs interpreting judicial opinions. As a result, it is possible that claims of misconduct that were “found” in opinions may have been missed in our review.

“Invisible” instances of prosecutorial misconduct

There is no reliable benchmark for the frequency of misconduct claims and, as a result, no systematic way to know how many relevant cases are “false negatives” that contain instances of prosecutorial misconduct but are not detected by our process. Our dataset does not represent the full universe of prosecutorial misconduct allegations for the time period under review, and is likely to be a substantial undercounting of actual prosecutorial misconduct claims for a number of reasons:

- Cases that include allegations and findings of prosecutorial misconduct may be resolved prior to trial, either because charges are withdrawn or because of a negotiated plea bargain or a case diversion. Such cases would not be identified by our searches of appellate opinions. As of the most recently published report for 2019, only 2.4% of Pennsylvania criminal cases are disposed by trial,¹⁸⁶ meaning that the vast majority of cases (97.6%) are disposed by plea bargaining, diversion programs or other non-trial resolution and are therefore unlikely to be subjected to appellate review. As a result, a considerable number of incidences of misconduct are not identified or alleged by defendants in court filings.
- Many allegations of prosecutorial misconduct are raised orally during the trial phase, resolved in real time by the trial court judge and not appealed. These instances of prosecutorial misconduct would not be identified in our searches.
- Our searches of appellate opinions would not identify prosecutorial misconduct in cases that end in a judgment of acquittal or an unappealed grant of post-conviction relief.

185 42 Pa. C.S. § 9543(a) (noting burden to prove post-conviction allegation is preponderance of the evidence).

186 2019 Caseload statistics of the Unified Judicial System of Pennsylvania, Administrative Office of Pennsylvania Courts, found at: <https://www.pacourts.us/Storage/media/pdfs/20210205/174304-caseloadstatisticsreport2019.pdf>. Pennsylvania caseload statistics are discussed in greater detail *infra*, at p.22.

- Our data is based on opinions, not individual “cases.” While we are able to quantify opinions where misconduct allegations were raised, addressed or found, we note that defendants/petitioners can raise and re-raise claims multiple times in multiple fora and multiple opinions may arise from the same or subsequent criminal prosecutions.

It is likely that the amount of “invisible” prosecutorial misconduct in these cases is significant in scope, though its impact cannot be measured.¹⁸⁷

Potential search term bias

For reasons stated elsewhere in this report, it is impossible to identify all claims of prosecutorial misconduct. Within the subset of identifiable claims, the search terms necessarily impact the data set of identified claims. Our searches used the search term “prosecutorial misconduct” and the additional search term “*Brady v. Maryland*,” a case that is virtually always cited when alleging that prosecutors have failed to properly disclose exculpatory information to the defense, and rarely cited for other purposes, to capture additional claims of prosecutorial misconduct claims that might not have used the specific words “prosecutorial misconduct.” It is possible that this methodology does not capture all allegations of prosecutorial misconduct in Pennsylvania state or federal courts. It is also possible that claims of withheld exculpatory evidence (i.e., *Brady* claims) are disproportionately observed in our data set relative to other types of prosecutorial misconduct.

Lack of data on internal prosecutorial discipline

No public dataset of administrative or hiring decisions related to prosecutorial misconduct is published by any District Attorney’s Office or United States Attorney’s Office in Pennsylvania, even in aggregate fashion. If individual offices subject their attorneys to internal discipline for instances of prosecutorial misconduct, we are unable to measure it.

Such discipline may be useful within the office but unless they are communicated to other attorneys in the office and to the general public, they are unlikely to serve as useful measures of accountability or deterrence and they cannot restore the public’s faith that any DA’s Office is adequately “self-policing” its prosecutors for their misconduct.

Grand jury-related misconduct

In Pennsylvania state proceedings, the use of grand juries is not used as frequently as in other states — rather, prosecutors generally file “informations” with the court laying out the charges against the defendant. Our research found several claims of misconduct before grand juries, although it is not possible to determine the number of incidents overall where prosecutors used grand juries for indictments because grand jury data is not publicly available and is not shared across counties in Pennsylvania. In addition, many of these cases are resolved at the trial level and lack an appellate record suitable to review.

187 The various mechanisms of “invisibility” are discussed at length in the body of the Report at The Problem of Invisibility (pp. 22 – 31).

Appendix B. Types of Prosecutorial Misconduct

Using the judicial interpretation of “prosecutorial misconduct” – any action taken by a prosecutor that does not comport with a law, procedural or ethical rule that governs prosecutorial activity at any point in a criminal

proceeding, regardless of the prosecutor’s intent – we organized the allegations of prosecutorial misconduct in our dataset by the following categories of misconduct, each of which is explained in more detail below:

Type of Claim	No. Claims	% of All Claims
Exculpatory Evidence (Prosecutor)	2,114	29.3
Improper Closing Argument	1,915	26.5
Other Misconduct Claim	958	13.3
Other Improper Remarks	719	10.0
Improper Examination	536	7.4
Gathering/Present False Evidence	411	5.7
Discriminatory Jury Selection	169	2.3
Comment on Right to Silence/Violate 5 th Am.	125	1.7
Exculpatory Evidence (Police)	88	1.2
Shifting Burden	68	0.9
Intimidating Witnesses	49	0.7
Improper Use of or Conduct Before Grand Jury	26	0.4
Impugning Defense	15	0.2
Appeal to Religious Authority	14	0.2
Total Claims:	7,201	100%

Table 6: Misconduct Claim Categories as Percentage of Total Claims

Withholding or Suppressing Exculpatory Evidence

- (2,114 claims raised, 70 found)

As discussed in “The Ongoing Unresolved Issues Posed by *Brady*” above at p.33, prosecutors have a legal obligation to disclose *Brady* information to the defense and the failure of a prosecutor to provide this information is prosecutorial misconduct, even if the prosecutor requested the information from the police or others and those others failed to provide it to the prosecutor.

In *Lambert v. Beard*, the Third Circuit ruled the prosecution’s failure to turn over a Police Activity Sheet containing inconsistent statements from a key witness was error, and the Pennsylvania Supreme Court’s determination the evidence was neither exculpatory nor material to be an unreasonable application of law and fact.¹⁸⁹

¹⁸⁹ *Lambert v. Beard*, 537 Fed.Appx. 78, 87 (3d Cir. 2013).

Improper Closing Argument

- (1,915 claims raised, 64 found)

Juries are expected to render verdicts based on the evidence presented at trial.¹⁹⁰ Attorneys' arguments at trial are not evidence.¹⁹¹ Prosecutors are generally allowed to argue their case vigorously so long as their comments are supported by the evidence, constitute inferences that are fair based on that evidence, or are considered "fair responses" to the defense counsel's argument.¹⁹² Even so, closing arguments (also known as summations) can go beyond the latitude typically provided and, in so doing, prejudice a defendant.¹⁹³ These improper closing arguments are a form of prosecutorial misconduct.

While the specifics of any particular closing argument will depend largely on the facts of each case, some examples of improper closing arguments that have been identified by Pennsylvania courts include: expressing the prosecutor's personal belief about the defendant's guilt or the credibility of a witness;¹⁹⁴ vouching for the credibility of a government

witness by assuring the jury that the witness is credible based on the prosecutor's personal knowledge or information the jury did not know;¹⁹⁵ arguing that the jury must believe that a testifying police officer is lying in order to find the defendant not guilty;¹⁹⁶ referencing facts not in evidence, not supported by the evidence, or excluded from evidence;¹⁹⁷ misstating or misrepresenting evidence;¹⁹⁸ arguments calculated to appeal to the jurors' emotions, such as suggesting that the jury render a verdict based on sympathy for the victim's family;¹⁹⁹ calling a defendant the "most unreliable, unbelievable person that you are ever going to come across" in closing argument;²⁰⁰ and arguments calculated to inflame the passions or prejudices of the jury, such as by exhorting the jury to act as the conscience of the community.²⁰¹ Such appeals divert attention from the jury's duty to decide the case based on the evidence.²⁰²

190 See *Commonwealth v. Revty*, 295 A.2d 300, 312 (Pa. 1972) ("the District Attorney must limit his statements to the facts in evidence and legitimate inferences therefrom"); *Commonwealth v. Toney*, 378 A.2d 310, 312 (Pa. 1977) (prosecutor's remarks improper where not supported by any evidence); *United States v. Young*, 470 U.S. 1, 18-19 (1985) ("[T]he prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence") (citation omitted).

191 *Thomas v. Wynder*, CIV.05-CV-6700, 2007 WL 2085353, at *9 (E.D. Pa. July 19, 2007).

(a court "cannot overturn a conviction on the grounds of a prosecutor's improper closing argument, unless the defendant can demonstrate prejudice sufficient to show that the comments deprived him of a fair trial").

192 *Commonwealth v. Anderson*, Nos. 746 WDA 2001, 375 WDA 2002 (Pa. Super. Ct. Apr. 21, 2004). (citation omitted); see also *United States v. Green*, 25 F.3d 206, 210 (3d Cir. 1994) ("prosecutor is entitled to considerable latitude in summation to argue the evidence and any reasonable inferences that can be drawn from that evidence") (citation omitted).

193 *Commonwealth v. McNeil*, 679 A.2d 1253, 1258 (Pa. 1996) ("Reversible error exists only if the prosecutor has deliberately attempted to destroy the objectivity of the factfinder . . . to create such bias and hostility toward the defendant . . . that [the jury] could not weigh the evidence and render a true verdict").

194 *Commonwealth v. Watts*, 1646 WDA 2011, 2013 WL 11260354, at *5 (Pa. Super. Ct. July 16, 2013).

195 *Commonwealth v. Cousar*, 928 A.2d 1025, 1041 (Pa. 2007) ("Improper bolstering or vouching for a government witness occurs where the prosecutor assures the jury that the witness is credible, and such assurance is based on either the prosecutor's personal knowledge or other information not contained in the record.") (citing *Commonwealth v. Williams*, 896 A.2d 523 (Pa. 2006)).

196 *U.S. v. Jones*, CRIM.A. 12-314-1, 2014 WL 4116961, at *5 (E.D. Pa. Aug. 18, 2014).

197 *Commonwealth v. Leech*, 3459 EDA 2006 (Pa. Super. Ct. Jan. 11, 2008).

198 *Commonwealth v. Galdo*, 1074 EDA 2011, 2013 WL 11282826 (Pa. Super. Ct. Apr. 4, 2013).

199 *Commonwealth v. Morefield*, 985 EDA 2011, S58033-2011 (Pa. Super. Ct. Nov. 30, 2011).

200 *Id.*

201 *Commonwealth v. Grohowski*, 1713 MDA 2014, 2016 WL 562993 (Pa. Super. Ct. Feb. 12, 2016).

202 See *Commonwealth v. Judy*, 978 A.2d 1015, 1019-20 (Pa. Super. Ct. 2009). In defining what constitutes impermissible conduct during closing argument, Pennsylvania follows Section 5.8 of the American Bar Association Standards, See American Bar Association Standards for Criminal Justice: Prosecution and Defense Functions, § 3-5.8 (3d ed. 1993) and commentary. See also, e.g., *United States v. Ford*, 618 F. Supp. 2d 368 (E.D. Pa. 2009); *Commonwealth v. Culver*, 51 A.3d 866 (Pa. Super. Ct. 2012); *Commonwealth v. Rivera*, 939 A.2d 355 (Pa. Super. Ct. 2007); *Commonwealth v. Haggerty*, 1849 WDA 2001 (Pa. Super. Ct. Oct. 30, 2002); *Commonwealth v. Manning*, 1954 EDA 2001 (Pa. Super. Ct. Sept. 10, 2002); *Commonwealth v. Chmiel*, 777 A.2d 459 (Pa. Super. Ct. 2001); *Commonwealth v. Rochester*, 3348 PHL 1998, J-A07045/00 (Pa. Super. Ct. June 5, 2000).

Other Improper Remarks or Comments

- (719 claims raised, 16 found)

Prosecutors can violate the rules of criminal procedure or the rules of evidence with other remarks throughout the trial as well. Examples of remarks or comments made by prosecutors in cases in our database deemed improper by Pennsylvania courts include:

- Introducing or attempting to elicit evidence about uncharged crimes²⁰³ or defendant's prior drug use;²⁰⁴
- Arguing in the opening statement, which is to be confined to laying out the facts to be developed at trial;²⁰⁵
- Improper comments about payments to defense experts;²⁰⁶
- Improperly vouching for the credibility of a government witness during trial;²⁰⁷
- Unnecessarily aggressive or abusive physical treatment of the defendant before the jury;²⁰⁸
- Misrepresenting evidence to the jury during arguments;²⁰⁹
- Discussing in court a topic the judge previously ruled off-limits for the trial; and
- Improperly commenting on the defendant's religious beliefs.²¹⁰

203 *Commonwealth v. Michael Lee Evans*, 2049 WDA 2000 (Pa. Super. Ct. May 16, 2003).

204 *Commonwealth v. Bidwell*, 50 EDA 2014, 2015 WL 7424345 (Pa. Super. Ct. Mar. 6, 2015).

205 *Commonwealth v. Fickle*, 821 WDA 2002, A12011-2003 (Pa. Super. Ct. July 16, 2003).

206 *Al-Ghazali v. Beard*, CIV.A. 04-2122, 2006 WL 1892664, at *13 (E.D. Pa. July 10, 2006).

207 *Glenn v. Wynder*, CIV.A. 06-513, 2012 WL 4107827 (W.D. Pa. Sept. 19, 2012), *aff'd*, 743 F.3d 402 (3d Cir. 2014).

208 *Commonwealth v. Culver*, 51 A.3d 866 (Pa. Super. Ct. 2012).

209 *Commonwealth v. Brown*, 2426, 2853 EDA 2001, A2104-2002 (Pa. Super. Ct. Aug. 26, 2002).

210 *Commonwealth v. Scher*, 4778 PHL 1997 (Pa. Super. Ct. Mar. 26, 2004).

Improper Examination of Witnesses

- (536 claims raised, 23 found)

Although questions posed by attorneys during trial are not evidence, the way in which those questions are posed is important and controlled by the rules of evidence. The substance of certain questions, and their form, can negatively impact the jury's ability to decide questions of credibility, which in turn can deprive the defendant of a fair trial. These improper questions are a form of prosecutorial misconduct, though they occur in open court and provide opposing counsel the opportunity to object and the judge the ability to act upon them at the time.

For example, it is misconduct for a prosecutor to ask a witness to comment on whether another witness is testifying truthfully. It is also misconduct if, when a defendant testifies that he neither committed nor confessed to having committed the crime, a prosecutor asks that defendant whether the police officer who testified that he confessed to the crime is a "liar." Such questioning improperly bolsters the testimony of the officer and infringes on the jury's exclusive role to determine the credibility of witnesses.

Another form of improper questioning occurs when a prosecutor asks a question for which he or she has no good faith basis (for example, "is it true that some people say you beat your wife?" when no evidence of such behavior exists). Prosecutors, like all lawyers, may only ask questions for which they have a good faith basis,

and trying to bolster or harm a witness' credibility by insinuating the existence of non-provable facts is improper. Pennsylvania courts have held that such improper questioning can form the basis for a claim of prosecutorial misconduct even where objections are sustained and the witness does not answer the question, since the impact of the question is felt even without an answer.²¹¹ Other types of improper questioning include: questioning a witness on matters the court has previously ruled to be inadmissible or instructed to be off-limits;²¹² questioning on matters not permitted by the rules of evidence;²¹³ posing leading questions to one's own witnesses;²¹⁴ and continuing to pursue a line of questioning despite sustained objections.²¹⁵

In *Commonwealth v. Jenkins*,²¹⁶ the trial prosecutor elicited testimony from the sole eyewitness to the crime that Jenkins' brother threatened him before the preliminary hearing although there was no evidence Jenkins had a role. The Superior Court vacated the conviction, holding that eliciting the information invaded the jury's exclusive province on determining credibility and the misconduct was not harmless.

211 See, e.g., *Commonwealth v. Brown et al.*, 3282 EDA 2006 & 2694 EDA 2008 (Pa. Super. Ct. Feb. 17, 2012); *United States v. Vitillo*, 490 F.3d 314 (3d Cir. 2007), as amended (Aug. 10, 2007); *Commonwealth v. Miller*, 1411 WDA 2005 (Pa. Super. Ct. Sept. 12, 2006).

212 *Commonwealth v. Mosley*, 514 EDA 2014, 2016 WL 2625278 (Pa. Super. Ct. May 6, 2016).

213 *Commonwealth v. Baez*, 431 A.2d 909, 914 (Pa. 1981).

214 *Davis v. DiGuglielmo*, CIV.A 08-4929, 2009 WL 1274650 (E.D. Pa. May 7, 2009).

215 *Pander v. Coleman*, CV 15-1337, 2016 WL 3011463 (E.D. Pa. May 26, 2016).

216 2015 WL 6168179 (Pa. Super. Ct. Oct. 20, 2015).

Gathering, Presenting or Failing to Correct False Evidence

- (382 claims raised, 3 found)

The U.S. Supreme Court has long held that “a conviction obtained through use of false evidence, known to be such by representatives of the State” violates due process.²¹⁷ A prosecutor’s use of false evidence is misconduct and is a violation of due process regardless of whether the prosecution consciously solicited testimony it knew, or should have known, to be false.²¹⁸ It is also misconduct for a prosecutor to fail to correct false testimony when it is given.²¹⁹ Similarly, prosecutors may not create false evidence or present evidence that was improperly gathered.^{220, 221}

In *Commonwealth v. Bishop*,²²² prosecutors not only suppressed a material witness’ testimonial deal from the defendant, the witness’ lawyer who negotiated the deal later joined the prosecution’s post-conviction team to defend the conviction. The Superior Court reversed the conviction, finding the misconduct “calls into question the integrity of [the] conviction.”

217 *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

218 *Id.* See also *Mooney v. Holohan*, 294 U.S. 103, 112 (1935); *Giglio v. United States*, 405 U.S. 150, 151-55 (1972) (finding *Napue* violation where prosecuting attorney lacked personal knowledge of perjury).

219 *Giglio*, 405 U.S. at 153 (“The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.”) (quoting *Napue*, 360 U.S. at 269); see also *Curran v. Delaware*, 259 F.2d 707, 712-13 (3d Cir. 1958); *Haskell v. Superintendent Greene SCI*, 866 F.3d 139, 152 (3d Cir. 2017) (“Presenting false testimony cuts to the core of a defendant’s right to due process”); *United States v. Agurs*, 427 U.S. 220, 104 (1976) (presenting false testimony “involve[s] a corruption of the truth-seeking function of the trial”).

220 *Stepp v. Mangold*, CIV. A. 94–2108, 1998 WL 309921 (E.D. Pa. June 10, 1998) (“A defendant has a due process right to a fair trial. Government agents may not manufacture evidence and offer it against a criminal defendant.”). See also *Commonwealth v. McCleary*, 193 A.3d 387 (Pa. Super. Ct. 2018) (“the exclusionary rule bars the use of illegally obtained evidence in state prosecutions”).

221 Interestingly, it is typically NOT misconduct for a police officer or prosecutor to present a suspect with fabricated documents indicating their guilt as a way of securing a confession to the crime. Such fabrications (for example, a report created by a prosecutor that purports to show the defendant’s DNA at the scene of the crime when no such evidence exists) would only constitute prosecutorial misconduct if the “ruse report” were actually submitted into evidence.

222 S60012-2001, *9 (Pa. Super. Ct. Mar. 1, 2002).

Racially Discriminatory Jury Selection

- (169 claims raised, 1 found)

During jury selection in criminal cases, the prosecutor and the defense may challenge potential jurors “for cause,” usually stemming from a prospective juror’s conflict of interest or perceived inability to be impartial. In addition, each side is also typically afforded a fixed number of “peremptory challenges” or strikes, which may be used to remove a potential juror for any reason at all.²²³ The use of peremptory strikes, however, is subject to the dictates of the Constitution. In the landmark case *Batson v. Kentucky*, the U.S. Supreme Court ruled that the Equal Protection Clause of the U.S. Constitution prohibits the prosecution from challenging potential jurors on account of their race.²²⁴ All potential jurors have a right not to be excluded on the basis of their race, and a defendant has a right to be tried by a jury whose members are selected pursuant to non-racially discriminatory criteria.²²⁵ The Constitution forbids striking even a single prospective juror based on race; therefore, while a pattern of prosecutorial strikes against Black jurors during jury selection might give rise to an inference of discrimination, a defendant need not base a *Batson* objection on a “pattern” of strikes.

A *Batson* claim can be based on a single strike accompanied by a showing that the prosecutor’s questions and statements during jury examination and in exercising his challenges support an inference of discrimination.²²⁶

In *Commonwealth v. Basemore*,²²⁷ the trial court vacated a first-degree murder conviction and death sentence because trial prosecutor Jack McMahon engaged in a “conscious strategy to exclude African-American jurors” during jury selection.

223 *Flowers v. Mississippi*, 139 S.Ct 2228, 2238 (2019).

224 *Batson v. Kentucky*, 476 U.S. 79, 85 (1986) (“The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors.”) Several years later, the U.S. Supreme Court extended *Batson* to prohibit the striking of jurors on the basis of gender. *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

225 *Batson*, 476 U.S. at 85.

226 See *Batson*, 476 U.S. at 97; *Holloway v. Horn*, 355 F.3d 707 (3d Cir. 2004).

227 744 A.2d 717 (Pa. 2000).

Improper Comment on Defendant's Silence Violation of 5th Amendment Right Not to Self-Incriminate

- (125 claims raised, 7 found)

The Fifth Amendment to the U.S. Constitution guarantees every defendant the absolute right to remain silent from arrest through trial.²²⁸ Accordingly, every defendant has a right not to speak to police or prosecutors, and the defendant has no obligation to take the witness stand at trial to testify on his or her own behalf. In a criminal proceeding, any comment by the prosecution on the defendant's silence (e.g., "why didn't he talk to police?" or "why hasn't the defendant taken the stand to deny these accusations?") violates the Constitution.²²⁹ Similarly, an invitation that the jury draw an unfavorable inference from the defendant's decision not to testify is misconduct.²³⁰ Such commentary would allow the defendant's decision to not speak to police or to not take the stand be used as evidence against him. In addition, it would compromise the defendant's constitutional right against self-incrimination and create the inference that because he did not testify, he must be guilty.²³¹

In *Commonwealth v. Molina*,²³² the trial prosecutor asked a detective to explain why Molina refused to answer questions about a murder, then in closing told the jury they could consider his refusal to talk to the police as evidence of guilt. The Superior Court found that Molina's Fifth Amendment right to remain silent was violated and reversed his conviction.

228 *Commonwealth v. Molina*, 104 A.3d 430 (Pa. 2014).

229 *Commonwealth v. Turner*, 454 A.2d 537 (Pa. 1982).

230 *Commonwealth v. Daniels*, S10018-2002 (Pa. Super. Ct. Apr. 9, 2002).

231 See, e.g., *Peterkin v. Horn*, 176 F. Supp. 2d 342, 365–67 (E.D. Pa. 2001), amended on reconsideration in part, 179 F. Supp. 2d 518 (E.D. Pa. 2002); *Commonwealth v. Randall*, 758 A.2d 669, 681–82 (Pa. Super. Ct. 2000); *Commonwealth v. Molina*, 104 A.3d 430 (Pa. 2014); *Griffin v. California*, 380 U.S. 609 (1965).

232 33 A.3d 51 (Pa. Super. Ct. 2011).

Exculpatory Evidence – Police Withholding: Prosecutorial Obligation

- (88 claims raised, 3 found)

The obligation to provide exculpatory evidence to the defense extends to every investigative agency of the government – including police, forensic interviewers, testing laboratories, and others. The burden of ensuring complete production of all exculpatory evidence within the government’s control lies with prosecutors.²³³ Any other rule could enable prosecutors to be deliberately blind to the existence of exonerating evidence. At the same time, this requirement can place a burden on the prosecutor for actions taken by police or other third parties who do not report to the prosecutor. Indeed, our dataset includes cases where police failed to provide prosecutors with exculpatory information the prosecutor was obligated to disclose to the defense.

Before starting a bench trial, the defense counsel in *Commonwealth v. Burke*²³⁴ requested all discovery including a handwritten statement the juvenile co-defendant gave to police the night of the crime hours before Allegheny County investigators took over. The prosecutor, Margaret Cassidy, told the court “[w]e do not have one.” During trial, Cassidy reviewed police files and found the questioned statement and several other unproduced police investigation reports. The trial court granted the defense motion to dismiss the case, but the Supreme Court reversed on appeal, calling the failure to discover the materials earlier a “miscommunication.”

²³³ *Kyles v. Whitley* 514 U.S. at 437 (“the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police”).

²³⁴ 781 A.2d 1136 (Pa. 2001).

Improper Shifting of the Burden of Proof

- (68 claims raised, 2 found)

In a criminal case, the government has the burden of proving that the defendant committed each and every element of a crime charged beyond a reasonable doubt.²³⁵ It is not the defendant's burden to prove he is not guilty, and the defendant is not required to present any evidence or call any witnesses in their defense.

When a prosecutor informs or suggests to the jury the defense had the ability to, but did not, obtain or present evidence in support of his defense, that is referred to as "shifting the burden of proof." It asks the jury to believe the defendant has a burden to produce evidence in their defense when they have none.

The DA in *Commonwealth v. Morningstar* told the jury during his closing, "[Appellant's attorney] could subpoena people just like I can subpoena people. He has the same subpoena power that I do."²³⁶ The court held this inference improperly and unconstitutionally shifted the burden of proof from the Commonwealth to the defense.

²³⁵ *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993) ("What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged and must persuade the factfinder "beyond a reasonable doubt" of the facts necessary to establish each of those elements.") (internal citations omitted).

²³⁶ 1087 MDA 2014, 2015 WL 6696871 (Pa. Super. Ct. Aug. 13, 2015)

Intimidating Witnesses

- (49 claims raised, 0 found)

No government actor, including but not limited to police, prosecutors, or investigators, may threaten, coerce, or intimidate a witness. Witnesses must be free to cooperate or testify without fear of prosecutorial retaliation. Prosecutors may not: pressure a potential witness into providing testimony for the prosecution; coerce a witness to give a false statement; threaten a witness with criminal prosecution or penalty unless the witness cooperates with the government; or dissuade a potential defense witness from testifying, which interferes with the defendant's constitutional right to call witnesses in his own defense.²³⁷

In *Commonwealth v. Shields*,²³⁸ just before a defense witness testified a detective handcuffed and transported her to a holding area, informing her that "she would be arrested after she finished her business in the courtroom." Due to this intimidation, the witness asserted her Fifth Amendment right and refused to testify. This was held to constitute a violation of the defendant's right to a fair trial and the conviction was reversed.

²³⁷ All examples noted in *Commonwealth v. Holloman*, 621 A.2d 1046, 1053 (Pa. Super. Ct. 1993) (internal citations omitted).
²³⁸ 450 EDA 2002 (Pa. Super. Ct. July 30, 2003).

Improper Use of the Grand Jury

- (26 claims raised, 0 found)

A grand jury is a group of citizens that decides whether an individual should be charged for a specific crime. In Pennsylvania state proceedings, the use of grand juries is not used as frequently as in other states—rather, prosecutors generally file “informations” with the court laying out the charges against the defendant. Prosecutorial misconduct before the grand jury is grounds for dismissal of an indictment. Our research found several cases of misconduct before grand juries, although we were not able to determine the number of cases overall where prosecutors used grand juries for indictments. Misuse of the grand jury process includes, for example, presenting perjured testimony to a grand jury;²³⁹ seeking a grand jury indictment to punish a criminal defendant for doing what the law plainly allows him to do (such as in retaliation for rejecting a guilty plea);²⁴⁰ attempting to taint the grand jury and contaminate the process;²⁴¹ or improper questioning of a witness.²⁴²

239 *US v. Davis*, 02-90, 2003 WL 1064892, at *3 (E.D. Pa. Mar. 10, 2003).

240 *US v. Smith*, 4:05-CR-25 2, 2006 WL 3544715, at *6 (M.D. Pa. Dec. 8, 2006).

241 *Commonwealth v. Piner*, 2015 WL 7575681, at *1 (Pa. Super. Ct. Feb. 9, 2015).

242 *US v. Colon*, CIV.A. 01-CV-2771, 2002 WL 32351175, at *7 (E.D. Pa. Aug. 12, 2002).

Impugning the Defense

- (15 claims raised, 1 found)

The prosecutor is permitted to make comments to the judge or jury directed at defense counsel's arguments or strategy, but it is misconduct for the prosecutor to make personal attacks against or disparage the character or integrity of defense counsel.²⁴³ This principle is rooted in the prohibition against making arguments unsupported by the evidence on record, and the defendant's right to be tried solely on the evidence presented to the jury.²⁴⁴

At trial, the prosecutor in *U.S. v. Ford*²⁴⁵ accused defense counsel of "making something up," "intentionally misstating the testimony," and referred to the defense strategy as one of "last resort." The court held that the prosecutor engaged in misconduct, and that the disparaging statements could not be justified as "comments made in reasonable response to improper attacks by defense counsel."

²⁴³ See, e.g., *United States v. Ford*, 618 F. Supp. 2d 368 (E.D. Pa. 2009); *Commonwealth v. Howard*, 48 WDA 2005 (Pa. Super. Ct. Apr. 26, 2006).

²⁴⁴ See *Commonwealth v. Toney*, 378 A.2d 310, 312 (Pa. 1977) (prosecutor's remarks improper where not supported by any evidence).

²⁴⁵ 618 F. Supp. 2d 368 (E.D. Pa. 2009).

Appeal to Religious Authority

- (14 claims raised, 1 found)

It is improper for the prosecutor to inject religious law into a court proceeding or invoke religious references at trial that invite the jury to substitute their religious beliefs for the law.²⁴⁶

In the death penalty context, the Pennsylvania Supreme Court has held that “reliance in any manner upon the Bible or any other religious writing in support of the imposition of a penalty of death is reversible error per se and may subject violators to disciplinary action.”²⁴⁷ The Court held that this argument “advocates to the jury that an independent source of law exists for the conclusion that the death penalty is the appropriate punishment” and “interject[s] religious law as an additional factor for the jury’s consideration.”²⁴⁸

In *Commonwealth v. Chmiel*,²⁴⁹ the Superior Court found the trial prosecutor engaged in misconduct when he made several religious invocations during closing argument—including telling the jury the Commonwealth’s principal witness spoke “through great pain, but it was God’s own truth,” and that he “saw the light . . . came out, turned from the dark, followed his conscience, a spark of goodness in him, and did something in this courtroom that was kind of a miracle.” The court held these statements elevated the witness’ testimony “to that of God” and improperly interjected religious law for the jury’s consideration.²⁵⁰

246 See, e.g., *Commonwealth v. Stroman*, 2070 EDA 2001, S26033-2002 (Pa. Super. Ct. June 27, 2002).

247 *Commonwealth v. Chambers*, 599 A.2d 630, 644 (Pa. 1991) (vacating death sentence because prosecutor quoted Bible in closing argument during penalty phase, stating, “As the Bible says, ‘and the murderer shall be put to death.’”).

248 *Id.* While the Pennsylvania Supreme Court has declined to extend *Chambers*’ per se rule outside the penalty phase of a death trial, see *Commonwealth v. Natividad*, 938 A.2d 310, 325-26 (Pa. 2007), prior to *Chambers* the Court had “narrowly tolerated” Biblical references, cautioning that such references were a “dangerous practice” and “strongly discourage[d].” 599 A.2d at 644.

249 777 A.2d 459, 467 (Pa. Super. Ct. 2001).

250 *Id.*

Other Misconduct

- (958 claims raised, 13 found)

There are other forms of prosecutorial misconduct that did not fit neatly into the coding categories. The descriptions of prosecutor conduct in these opinions illustrated a variety of allegations and in some cases described conduct that overlapped multiple categories. Rather than attempt to summarize the many unique or allegations, we have summarized the claims in ten opinions where the allegation(s) were “found” as the most succinct representatives of the category.

Commonwealth v. Rochester, A07045-2000 (Pa. Super. Ct. June 5, 2000) (Philadelphia County)

- In a 1995 murder prosecution, although no murder weapon was introduced as evidence, the trial ADA displayed an unrelated shotgun during the cross examination of the defendant. The gun had no relation to the case, was prejudicial, and a new trial was granted.

Commonwealth v. Grabowski, S13004-2000 (Pa. Super. Ct. May 23, 2000) (Allegheny County)

- ADA William Jones had been previously engaged to the girlfriend of the co-defendant in the case. The court noted the case was initially given to another attorney, but ADA Jones took it over specifically to “remove a romantic competitor from his life” and that his conduct “tainted the entire prosecution.” A new trial was granted.

Commonwealth v. English, S15009-2000 (Pa. Super. Ct. June 19, 2000) (Allegheny County)

- The trial court denied a Commonwealth pre-trial motion to add a summary charge of harassment in a misdemeanor assault case, and the ADA requested to nolle prosequi the remaining charges, leading to a dismissal of the case. A few days later, the complainant filed a private criminal complaint and the prosecutor proceeded to secure a conviction on the summary harassment in a bench trial. The defendant appealed for a new trial de novo, which was granted, and moved to quash the complaint which the court also granted. On appeal, the Superior Court found that the prosecution had requested the nolle pros specifically to deny the right to a jury trial.

Commonwealth v. Medrano, 788 A.2d 422 (Pa. Super. Ct. 2001) (Berks County)

- The preliminary hearing judge dismissed drug charges for failure to establish a prima facie case. Prosecutors refiled the case two more times, and each time the court dismissed the charges. In one hearing, the prosecutor tried to admit evidence that had been suppressed in a prior hearing and claimed ignorance of the suppression. On a Commonwealth appeal following the third dismissal of the charges, the Superior Court found that the actions of the prosecutors were prejudicial and denied the defendant his due process rights.

Commonwealth v. Wood, 803 A.2d 217 (Pa. Super. Ct. 2002) (Allegheny County)

- In addition to withholding evidence, ADA Todd Goodwin participated in a “clearly unconstitutional identification procedure” of the defendant wherein he showed a witness two photos of the defendant and asked if he looked “familiar” to which the witness said no. Later that day ADA Goodwin met the witness in the hall outside of the courtroom and asked, “would you be able to identify him if you saw him in the hall?” just as the sheriffs brought the defendant into the courtroom in handcuffs. The witness then said, “that’s him.”

Commonwealth v. Williams, 367 EDA 2006 (Pa. Super. Ct. Dec. 21, 2006) (Montgomery County)

- Montgomery County ADA W. Todd Stephens was prosecuting a drug case but moved for a nolle pros when federal charges were filed. In the subsequent federal prosecution, ADA Stephens was specially assigned to prosecute the federal case as a Special Assistant US Attorney. After critical drug evidence was suppressed, ADA Stephens asked the defendant on cross-examination about prior drug charges, in direct violation of a prior court instruction. The federal judge granted a mistrial and barred retrial under double jeopardy, finding that ADA Stephens had deliberately provoked the mistrial to avoid an acquittal. Stephens then refiled state charges against the defendant and the Superior Court held that double jeopardy was a bar to the refiled state prosecution as well.

Reid v. Beard, 420 F. App'x 156 (3d Cir. 2011) (Philadelphia County)

- The court does not describe the specifically misconduct, but in affirming the district court's denial of habeas the court stated: "the prosecutorial misconduct in this case—and there was clearly misconduct." ADA Barbara Christie²⁵¹ was the subject of the claims in the case.

Commonwealth vs. David Anderson, 38 A3d 828 (Pa. Super. Ct. 2011) (Venango County)

- The Superior Court found that ADA James Carbone "engaged in a pattern of pervasive misconduct throughout the proceedings, culminating in the improper meeting with [a complainant]. Despite [the complainant's] testimony that the meeting had occurred and the parties rehearsed certain questions and answers, the prosecutor continued to deny any wrongdoing. The prosecutor's disingenuous responses served only to exacerbate the misconduct." ADA Carbone was later fired, but almost a year after the publication of this opinion.

There is more discussion of the misconduct and ultimate disbarment of James Carbone in the Accountability for Prosecutorial Misconduct section of this report, above.

Commonwealth v. Culver, 51 A3d 866 (Pa. Super. Ct. 2012) (Allegheny County)

- Another James Carbone case with various allegations of misconduct. The claims that were coded as "other" involved various "menacing" behaviors during the trial and numerous instances of lying to the defense attorney and the court.

Commonwealth v. Klem, 2014 WL 10965427 (Pa. Super. Ct. Mar. 18, 2014) (Venango County)

- In this case, in addition to withholding evidence and buying various gifts for the complainant and her family to secure their testimony, ADA Carbone promised the complainant that he would help her mother's fiancé with his parole. Carbone told the defense lawyer and the court that the conversation never occurred, but it was later confirmed in jail phone records.

²⁵¹ Barbara Christie has been the subject of other misconduct complaints as well, as in this excerpt from a 1995 *New York Times* profile of Philadelphia District Attorney Lynn Abraham:

Barbara Christie, who was chief of homicide before Dave Webb, frequently had her convictions reversed by higher courts for hiding evidence that indicated a defendant's innocence, and for knocking blacks off juries. Abraham demoted Christie, who had become a magnet for criticism. In 1992, Vincent Cirillo, a Superior Court judge, wrote in reversing a Philadelphia homicide conviction: "We are especially concerned that prosecutorial misconduct seems to arise in Philadelphia County more so than in any other county in this Commonwealth." He admonished prosecutors "to understand that the Commonwealth's client is justice."
<https://www.nytimes.com/1995/07/16/magazine/the-deadliest-da.html>.

Appendix C. Post-2016 Prosecutor Discipline

Frank Fina²⁵²

While Carbone is certainly a cautionary tale, perhaps the most notorious case-related misconduct matter in Pennsylvania is also the most recent. When the Attorney General of Pennsylvania prosecuted former Penn State assistant football coach Jerry Sandusky in 2012 on 45 criminal counts for abuse of 10 boys, the office hired veteran prosecutor Frank Fina to lead the prosecution team. An offshoot of that successful prosecution was the attempted prosecution of members of the Penn State University administration including former university president Graham Spanier. During the grand jury proceedings, Fina improperly questioned a witness in violation of professional responsibility rules. The violation was so severe it caused the Pennsylvania Supreme Court to vacate two separate convictions. Fina was suspended from legal practice for one year.

Stacy Parks Miller²⁵³

Another discipline case involves Stacy Parks Miller, who served two terms as the elected District Attorney for Centre County Pennsylvania from 2010 through 2016. During her tenure, Parks Miller engaged in various activities that led to her disciplinary suspension, including sending private emails and texts to judges during proceedings and asking them to rule in the Commonwealth's favor. She also authorized the creation a fake Facebook account to track potential defendants which was used to get defendants to incriminate themselves. The Disciplinary Board found Ms. Parks Miller in violation of, among others, rules 3.5 (prohibition against ex parte communication and improperly influencing a judge) and 8.4(d) ("conduct prejudicial to the administration of justice"). She was suspended for one year plus a day.

The other disciplinary cases with prosecutors involved ethical violations of the rules of professional responsibility by prosecutors that were unrelated to their prosecutorial duties in a specific case, including instances of substance abuse (i.e., theft of drugs from evidence bags in criminal cases), driving under the influence,²⁵⁴ practicing law while on inactive status,²⁵⁵ and physical assault of opposing counsel.²⁵⁶

252 <https://www.pacourts.us/assets/opinions/DisciplinaryBoard/out/166DB2017-Fina.pdf>

253 <https://www.pacourts.us/assets/opinions/DisciplinaryBoard/out/32DB2017-Miller.pdf>

254 Office of Disciplinary Counsel v. Donohue, 2014 Pa. LEXIS 851, at *1 (Mar. 31, 2014).

255 The prosecutor in question had failed to pay his annual fee to the Disciplinary Board necessary to be a member of the bar in good standing. Office of Disciplinary Counsel v. Burd, 866 A.2d 367, 367 (Pa. 2005).

256 Office of Disciplinary Counsel v. Yanoff, 2012 Pa. LEXIS 2354, at *1 (Oct. 4, 2012).

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