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Chapter 467: Re-discovering Brady, Shifting the Balance of Power in Criminal Discovery

Virginia Martucci

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Chapter 467: Re-discovering *Brady*, Shifting the Balance of Power in Criminal Discovery

Virginia Martucci

Code Sections Affected

Business and Professions Code § 6086.7 (amended); Penal Code § 1424.5 (new).
AB 1328 (Weber); 2015 STAT. Ch. 467.

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I. INTRODUCTION

On March 27, 1994, two men shot and murdered Felipe Angeles outside of a Los Angeles apartment.¹ The apartment was being used as a brothel at the time.² John Jones, the building owner and brothel operator, told police that he saw the

1. Michael S. Perry, *Obie Anthony*, NAT’L REGISTRY OF EXONERATIONS (Apr. 13, 2015), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3824> (on file with *The University of the Pacific Law Review*).

2. *Id.*

shooter running away from the scene with an injured leg.³ Weeks later, police arrested Obie Anthony and Reggie Cole, two teenage black men, for a carjacking unrelated to the murder of Felipe Angeles.⁴

Jones later identified Anthony and Cole in a police lineup as the shooters he saw run away from the scene of Felipe Angeles' murder.⁵ Jones testified against both men at trial, claiming he saw them clearly at the scene and that he had not received benefits for his testimony.⁶ No physical or forensic evidence linked Anthony to the murder.⁷ In 1995, a jury convicted both Cole and Anthony of first-degree murder, and sentenced them to life without parole.⁸

Anthony requested assistance from the California Innocence Project after the Innocence Project successfully overturned Cole's conviction for prosecutorial misconduct.⁹ The Northern California Innocence Project assumed Anthony's case in 2008.¹⁰ In 2010, Anthony filed a writ of habeas corpus for ineffective assistance of counsel, actual innocence, and prosecutorial misconduct.¹¹ The court subsequently found that the prosecution's key witness, Jones, perjured himself and later recanted identifying Anthony as the second shooter.¹² The court also found that the district attorney acted improperly when he failed to correct Jones' false statement that he did not receive special treatment for his testimony, withheld witness statements from defense counsel, and failed to notify defense counsel that another trial witness "incorrectly picked a 'filler'"¹³ when shown a suspect lineup for the first time.¹⁴ The judge subsequently vacated Anthony's

3. Christina Kyriacou, *Friends Wrongfully Imprisoned for Nearly Two Decades—Until the Innocence Project Won Their Freedom*, L.A. WEEKLY (Oct. 18, 2012), <http://www.laweekly.com/news/friends-wrongfully-imprisoned-for-nearly-two-decades-until-the-innocence-project-won-their-freedom-2611790> (on file with *The University of the Pacific Law Review*).

4. *Id.*

5. *Id.*

6. Jack Dolan, *Judge Overturns Murder Conviction in 1994 Slaying*, L.A. TIMES (Oct. 1, 2011), <http://articles.latimes.com/2011/oct/01/local/la-me-conviction-overturned-20111001> (on file with *The University of the Pacific Law Review*).

7. Frank Stoltze, *Obie Anthony Released after 1995 Murder Conviction Overturned*, S. CAL. PUB. RADIO (Oct. 5, 2011), <http://www.scpr.org/news/2011/10/05/29261/obie-anthony-released-after-murder-conviction-over/> (on file with *The University of the Pacific Law Review*).

8. Kyriacou, *supra* note 3.

9. *Reggie Cole*, CAL. INNOCENCE PROJECT, <http://californiainnocenceproject.org/read-their-stories/reggie-cole/> (last visited Mar. 6, 2016) (on file with *The University of the Pacific Law Review*).

10. *Id.*

11. *In re Anthony*, 236 Cal. App. 4th 204, 207 (2015).

12. *Id.*

13. In either a live or photograph lineup, police may insert "fillers," or people who do not match the witness description of the suspect, in order to help the suspect stand out to the victim. *Eyewitness Identification Reform*, INNOCENCE PROJECT (June 10, 2015), <http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/eyewitness-identification-reform> (on file with *The University of the Pacific Law Review*).

14. *In re Anthony*, 236 Cal. App. 4th at 207.

conviction due to prosecutorial misconduct.¹⁵ Anthony was released from prison after serving seventeen years for a crime he did not commit.¹⁶

Anthony sued the City of Los Angeles seeking damages for civil rights violations.¹⁷ Anthony settled with the City of Los Angeles for \$8.3 million dollars in April 2015.¹⁸ The City of Los Angeles has admitted no wrongdoing.¹⁹ Both Anthony and Cole have lawsuits pending against Los Angeles County seeking compensation for their time in prison.²⁰

The prosecutor plays a crucial role in affecting incarceration rates because prosecutors have “more control of life, liberty, and reputation than any other person in America.”²¹ The United States currently has the largest prison population of any country in the world.²² Violent crime in the United States peaked in the early 1990s.²³ The incarceration rate continues to increase despite a significant decrease in violent crimes since 1991.²⁴ Although wrongful convictions were once viewed as rare or even nonexistent, technological advancements continue to shed light on the wrongly convicted, either through exculpatory DNA evidence or the discovery of prosecutorial misconduct.²⁵

Not only do wrongful convictions resulting from prosecutorial misconduct represent an affront to constitutionally guaranteed rights of due process, such wrongful convictions also cost taxpayers millions of dollars.²⁶ Wrongful convictions result in “an appeal, an appellate reversal, a retrial, investigational

15. Pery, *supra* note 1.

16. *LA to Pay \$8.3 Million Settlement to Obie Anthony, Wrongly Convicted Man*, ABC7 NEWS (Apr. 13, 2015), [http://abc7.com/news/la-to-pay-\\$83-million-settlement-to-wrongly-convicted-man/656569/](http://abc7.com/news/la-to-pay-$83-million-settlement-to-wrongly-convicted-man/656569/) (on file with *The University of the Pacific Law Review*).

17. *Id.*

18. *Id.*

19. Asher Klein & Ted Chen, *Man Wrongfully Convicted for Murder gets \$8M Settlement from Los Angeles*, NBC L.A. (Apr. 13, 2015), <http://www.nbclosangeles.com/news/local/Obie-Anthony-Wrongfully-Convicted-Murder-8M-Settlement-Los-Angeles-299605691.html> (on file with *The University of the Pacific Law Review*) (describing the State Bar’s prosecution of a Santa Clara County prosecutor after the discovery that he concealed existence of a video tape of a rape victim, and denied concealing it while under oath).

20. Pery, *supra* note 1.

21. CTR. FOR PROSECUTOR INTEGRITY, AN EPIDEMIC OF PROSECUTOR MISCONDUCT 10 (2013), available at <http://www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf> (on file with *The University of the Pacific Law Review*).

22. *Id.*

23. *Crime in California, 1984–2014*, CAL. DEP’T OF JUSTICE, OFFICE OF THE ATTORNEY GEN., available at <https://oag.ca.gov/crime> (last visited Mar. 6, 2016) (on file with *The University of the Pacific Law Review*).

24. Lauren-Brooke Eisen, *Prosecutors Can Play Role in Ending Mass Incarceration*, HUFFINGTON POST (Sept. 30, 2014), http://www.huffingtonpost.com/laurenbrooke-eisen/prosecutors-can-play-role_b_5908010.html (on file with *The University of the Pacific Law Review*).

25. *Id.*; see also Tracey Kaplan, *State Bar Charges Santa Clara Prosecutor with Misconduct; Disbarment Possible*, SAN JOSE MERCURY NEWS (May 17, 2013, 11:43 AM), http://www.mercurynews.com/ci_20646441/state-bar-charges-santa-clara-county-prosecutor-misconduct (on file with *The University of the Pacific Law Review*).

26. *Brady v. Maryland*, 373 U.S. 83, 84 (1963); CTR. FOR PROSECUTOR INTEGRITY, *supra* note 21.

efforts to trace the real offender, possible civil lawsuits, and compensatory payments.²⁷ For example, forty-five wrongful convictions in Texas cost taxpayers an estimated \$8.6 million.²⁸ Society has a vested interest in fair trials, not only to reduce such costs, but also because the “system of administration of justice suffers when any accused is treated unfairly.”²⁹

II. LEGAL BACKGROUND

The criminal discovery process developed on both a national level and in California over the last fifty years.³⁰ In *Brady v. Maryland* and subsequent cases, the Supreme Court held that prosecutors have a constitutional duty to disclose exculpatory information that is material to the criminal defendant.³¹ California responded to these developments in the law and implemented Penal Code sections 1054.00-.10 in order to strengthen victims’ rights and increase judicial efficiency.³² Because of this strengthening of the law, subsequent attempts to amend it have failed; Governor Brown believes that California law provides enough statutory and criminal procedure safeguards to prevent and address prosecutorial misconduct.³³

A. *Brady v. Maryland*

Brady v. Maryland is the seminal case that established that prosecutors have a constitutional duty to divulge exculpatory evidence to defendant’s counsel in criminal prosecutions.³⁴ *Brady* established that the right to due process is just as important as successful criminal prosecutions.³⁵

27. CTR. FOR PROSECUTOR INTEGRITY, *supra* note 21, at 2.

28. *Id.*

29. *Id.*

30. *See Brady*, 373 U.S. at 87–88 (holding that the “suppression by the prosecution of evidence favorable to an accused violates due process when the evidence is material to either guilt or punishment, irrespective of good faith or bad faith of the prosecutor”); *People v. Robinson*, 31 Cal. App. 4th 494, 499 (1995) (describing that a prosecutor’s duty to disclose includes not just the exculpatory information in his possession, but the evidence possessed by the investigative agencies that he has access to).

31. *Id.* at 83–84.

32. *Supra* Part II.B.

33. *See supra* Part II.C (discussing Governor Brown’s veto of attempts to strengthen California’s criminal discovery laws).

34. *Brady*, 373 U.S. at 86.

35. *Id.*

1. *The Brady Decision*

The Supreme Court's holding in *Brady* requires prosecutors to produce any exculpatory evidence that could "materially affect a verdict."³⁶ The prosecutor intentionally withheld exculpatory information that did not surface until petitioner had been convicted for murder and sentenced to death.³⁷ The Court held that suppressing evidence favorable to the accused violates due process, no matter whether the prosecutor acted in good faith or bad faith.³⁸ *Brady* strengthened the idea that society benefits not only when the justice system convicts the guilty, but also when criminal trials are conducted fairly.³⁹ Otherwise, prosecutors take on the role of an "architect" who shapes the proceeding in a way that does not "comport with standards of justice."

2. *Brady's Legacy*

Brady attempted to level the playing field between prosecutors and criminal defendants.⁴⁰ Although the Constitution does not guarantee the accused a right to criminal discovery, *Brady* established withholding of evidence favorable to the accused amounts to a violation of a criminal defendant's due process rights.⁴¹ The Supreme Court held as early as 1935 that deliberate deception of either the court or jurors through the "presentation of known false evidence is incompatible with 'rudimentary demands of justice,'" but it was not until *Brady* that the court imposed a constitutional duty on prosecutors.⁴² *Brady* and its progeny case, *Giglio v. U.S.*, established that a prosecutor's withholding of material and exculpatory information results in a new trial for the defendant.⁴³ *Brady's* legacy can be seen in subsequent California case law, the development of which led to the codification of a criminal discovery statutory scheme with Penal Code section 1054.

36. Editorial Board, *Rampant Prosecutorial Misconduct*, N.Y. TIMES (Jan. 15, 2014), http://www.nytimes.com/2014/01/05/opinion/sunday/rampant-prosecutorial-misconduct.html?_r=0 (on file with *The University of the Pacific Law Review*); see also *Brady*, 373 U.S. at 87 (holding that suppression of evidence favorable to the accused violates due process when that evidence is material to "either guilt or punishment, irrespective of the good faith or bad faith of the prosecution").

37. *Brady*, 373 U.S. at 84.

38. *Id.* at 87.

39. *Id.*

40. Cynthia Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 422 (2010).

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

42. *Giglio v. United States*, 405 U.S. 150, 153 (1972).

43. *Id.* at 150.

B. California Penal Code § 1054.1

California responded to perceptions that the law favored the criminally accused over crime victims after *Brady* and enacted Penal Code sections 1054–1054.10.⁴⁴ California added section 1054 by initiative in June 1990 after voters passed Proposition 115 (Prop. 115), the Crime Victims Justice Reform Act.⁴⁵ Prior to Prop. 115’s passage, California courts decided several notable cases in favor of criminal defendants.⁴⁶ For example, *People v. Bolton* eliminated the requirement that a defendant must prove that a prosecutor acted in bad faith in order to prove prosecutorial misconduct occurred.⁴⁷ Anthony Rackauckas, a former Deputy District Attorney and Superior Court Judge, helped author Prop. 115 with other California prosecutors in response to the perception that the California Supreme Court “unnecessarily expanded the rights of accused criminals far beyond that which is required by the United States Constitution.”⁴⁸

In addition to shifting the balance of power in criminal proceedings back towards the accused, Penal Code sections 1054–1054.10 also served to “promote the ascertainment of truth in trials by requiring timely pretrial discovery,” and required informal discovery between parties.⁴⁹ Prop. 115 codified criminal discovery into a “single statutory scheme.”⁵⁰ Penal Code section 1054.1 requires a prosecuting attorney to disclose a variety of evidence, including: names and addresses of witnesses the prosecutor intends to call at trial, defendants’ statements, all relevant evidence seized as part of an investigation of the charges, whether any material witness has a previous felony conviction if that witness will be critical to the trial, and various other relevant witness statements or reports.⁵¹

Most importantly, this section requires a prosecutor to disclose any exculpatory evidence.⁵² Required disclosures must be made thirty days prior to trial, unless a party presents a good cause reason for denying, restricting, or deferring disclosure.⁵³ Good cause exists only in cases of threats or danger to a

44. Crime Victims Justice Reform Act, Prop. 115, § 1(b) (Cal. 1990).

45. *Id.*

46. *Id.*

47. *People v. Bolton*, 23 Cal. 3d 208, 214 (1979) (holding that misconduct does not have to be intentional in order to result in reversible error).

48. Crime Victims Justice Reform Act, Prop. 115, § 1(b) (Cal. 1990); Jerry Hicks, *California Elections/Proposition 115: Court Reform Measure Raises Controversy*, L.A. TIMES (May 28, 1990), http://articles.latimes.com/1990-05-28/local/me-243_1_court-reform (on file with *The University of the Pacific Law Review*).

49. *Id.*

50. Laura Berend, *Less Reliable Preliminary Hearings and Plea Bargains in Criminal Cases in California: Discovery Before and After Proposition 115*, 48 AM. U. L. REV. 465, 496 (1998).

51. CAL. PENAL CODE § 1054.1 (West 2014).

52. *Id.*

53. *Id.* § 1054.7.

victim or witness's safety, potential loss of evidence, or the possibility of compromising other law enforcement investigations.⁵⁴

California Penal Code section 1054.5 requires a party seeking information to make an informal request to opposing counsel.⁵⁵ If opposing counsel fails to disclose within fifteen days, the requesting party may then seek a court order.⁵⁶ Courts may prohibit witness testimony upon finding that the party failed to disclose required materials, but only after exhausting other sanctions.⁵⁷ Additionally, the court may advise the jury when a party fails, refuses, or untimely discloses required evidence.⁵⁸

Despite Prop. 115's seemingly positive benefits for the accused, it actually aimed to restrict benefits for the criminally accused.⁵⁹ Specifically, Prop. 115 amended the California Constitution to clarify that the "Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States."⁶⁰

California Criminal Jury Instruction 306 (CALCRIM 306) works in conjunction with Penal Code section 1054.1 to address failures to comply with disclosure requirements; it also provides courts with the jury instructions to enforce the requirements of Penal Code section 1054.5.⁶¹ CALCRIM 306 allows a judge to instruct the jury that it can consider a prejudicial discovery violation when evaluating the evidence.⁶² CALCRIM 306 remains an important tool to implement the Penal Code's criminal discovery requirements.

C. *Governor Brown's Veto of AB 885*

In 2014, Governor Brown vetoed AB 885, authored by Assembly Member Tom Ammiano.⁶³ Assembly Member Ammiano introduced the bill in response to publicized cases of prosecutorial failure to produce exculpatory evidence leading to wrongful convictions and long sentences.⁶⁴ AB 885 would have given courts discretion to instruct the jury under either Penal Code section 1054.1 or *Brady*

54. *Id.*

55. *Id.* § 1054.5.

56. *Id.*

57. *Id.*

58. *Id.*

59. CAL. CONST. art. I, § 24 (codifying Proposition 115).

60. *Id.*

61. JUD. COUNCIL OF CAL. ADVISORY COMM. ON CRIM. JURY INSTRUCTIONS, JUDICIAL COUNCIL OF CALIFORNIA CRIMINAL JURY INSTRUCTION 306 (2006).

62. *Id.*

63. Steven T. Jones, *Ammiano "Angry" as Brown Vetoes Prosecutor Misconduct Bill*, S.F. BAY GUARDIAN (Sept. 29, 2014), <http://www.sfbg.com/politics/2014/09/29/ammiano-angry-brown-vetoes-prosecutor-misconduct-bill> (on file with *The University of the Pacific Law Review*).

64. *Id.*

after an intentional or knowing failure to disclose materials.⁶⁵ It would have allowed the judge to instruct the jury to consider the failure to disclose when determining reasonable doubt as to the defendant's guilt.⁶⁶

The bill ultimately failed because it provided too much of a departure from current practice, which allowed the judiciary to make decisions on how the jury should be instructed, and the belief among politicians that the law already provided enough protection against such misconduct.⁶⁷

III. CHAPTER 467

Chapter 467 amends section 6086.7 of the Business and Professions Code and adds section 1424.5 to the Penal Code.⁶⁸ Chapter 467 requires courts to inform the State Bar when a prosecuting attorney deliberately and intentionally withholds exculpatory information in violation of the law, and when that failure to disclose amounts to bad faith, contributes to a defendant's guilty verdict or "no contest" plea, or otherwise seriously limits the defendant's ability to present his or her defense.⁶⁹ The court may initiate a hearing to consider whether a prosecutor or the prosecutor's office should be disqualified from a case.⁷⁰ The court may directly disqualify a prosecutor upon its own motion after finding that the prosecutor deliberately and intentionally withheld relevant materials while acting in bad faith, or when the prosecutor's office knowingly participated in that withholding as part of a larger pattern of misconduct.⁷¹ Chapter 467 in no way limits any remedy for such failures to disclose under other applicable law.⁷²

IV. ANALYSIS

Inspired by *Brady*, Assembly Member Shirley Weber introduced Chapter 467 because prosecutors have an "exclusive obligation to the truth and due process," but reports of consistent violations of that duty plagued the criminal justice system.⁷³ Chapter 467 aims to ensure fair trials for the accused and

65. AB 885, 2014 Leg., 2013–2014 Sess. (Cal. 2014).

66. *Id.*

67. Bob Egelko, *Brown Vetoes Bills on Prosecution Misconduct, Drones, OKs Lower Crack Sentences*, S.F. CHRONICLE (Sept. 29, 2014), <http://blog.sfgate.com/crime/2014/09/29/brown-vetoes-bills-on-prosecution-misconduct-drones-oks-lower-crack-sentences/> (on file with *The University of the Pacific Law Review*).

68. CAL. BUS. & PROF. CODE § 6086.7 (amended by Chapter 467); PENAL § 1424.5 (enacted by Chapter 467).

69. PENAL § 1424.5 (enacted by Chapter 467).

70. *Id.*

71. *Id.*

72. *Id.*

73. Press Release, Off. of Assemb. Member Shirley Weber, *Historic Bill on Prosecutor Misconduct Passes the California State Assembly* (Jun. 2, 2015), available at <http://asmdc.org/members/a79/news->

provides mechanisms that should improve the integrity of California's criminal justice system by shifting the balance of power back towards a neutral ground between the accused and the prosecution.⁷⁴ However, Chapter 467 may prove difficult to implement due to the practical challenges of discovering prosecutorial misconduct, influencing the behavior of prosecutors, and disciplining prosecutors for alleged misconduct.⁷⁵

A. *Ensuring Fair Trials*

Chapter 467 will help to ensure fair trials for criminal defendants and reduce the number of post-conviction appeals.⁷⁶ Under prior law, criminal defendants could seek an appeal if they suspected that prosecutorial misconduct materially affected their convictions.⁷⁷ However, these appeals take years, and a successful appeal only corrects a deficiency post-conviction, rather than addressing it when it materializes.⁷⁸ Chapter 467 provides California courts with the tools to remove prosecutors at the trial level when discovery violations come to light.⁷⁹ This gives innocent defendants the fair chance that the Supreme Court determined all criminal defendants deserve under *Brady*.⁸⁰

Thus, Chapter 467 will provide a “fair trial remedy” for criminal defendants, rather than forcing them to appeal their convictions based on prosecutorial misconduct.⁸¹ When courts actually discover prosecutorial misconduct at the trial level, Chapter 467 allows the court to remove a prosecutor prior to sentencing.⁸² This remedy will provide faster relief for defendants than a post-conviction reversal on appeal.⁸³ The Orange County District Attorney's Office's recent disqualification in the major death penalty case of mass murderer Scott Dekraai provides an example of how Chapter 467 will work in conjunction with current

room/press-releases/historic-bill-on-prosecutor-misconduct-passes-the-california-state-assembly (on file with *The University of the Pacific Law Review*) [hereinafter “Historic Bill”].

74. See *infra* Part IV.A (noting that Chapter 467 seeks to protect the right to a fair trial).

75. See *infra* Part IV.C (discussing Chapter 467's attempt to reduce prosecutorial misconduct).

76. Burke E. Strunsky, *Why Good Prosecutors Do Bad Things: Pending California Legislation on Prosecutorial Misconduct*, HUFFINGTON POST (Nov. 22, 2014), http://www.huffingtonpost.com/burke-e-strunsky/why-good-prosecutors-do-b_b_5855684.html (on file with *The University of the Pacific Law Review*).

77. David M. Greenwald, *Governor Signs Bill to Aid Wrongly Convicted, But Vetoes Ammiano's Prosecutorial Misconduct Bill*, PEOPLE'S VANGUARD OF DAVIS (Oct. 2, 2014), <http://www.davisvanguard.org/2014/10/governor-signs-bill-to-aid-wrongly-convicted-but-vetoes-ammiano-prosecutorial-misconduct-bill/> (on file with *The University of the Pacific Law Review*).

78. *Id.*

79. CAL. PENAL CODE § 1424.5 (enacted by Chapter 467).

80. Greenwald, *supra* note 77.

81. Elizabeth Napier Dewar, Note, *A Fair Trial Remedy for Brady Violations*, 115 YALE L. J. 1450, 1456 (2006).

82. *Id.* at 1455.

83. *Id.* at 1457.

law.⁸⁴ The Orange County District Attorney's Office was disqualified after the discovery of a systematic, decades-old practice of hiding evidence and colluding with jailhouse informants for false testimony.⁸⁵ Under Chapter 467, Judge Goethals would be required to refer the prosecutors involved in the misconduct to the State Bar.⁸⁶ Chapter 467 provides an added layer of protection against misconduct because it requires courts to refer attorneys to the State Bar when misconduct is discovered.⁸⁷ Chapter 467 will not only help to ensure fair trials for the criminally accused, but its effects will likely improve the integrity of the criminal justice system if it is widely implemented.

B. Improving the Integrity of the Criminal Justice System

Chapter 467 has the potential to improve the overall integrity of the criminal justice system.⁸⁸ There is a growing concern of how cognitive biases can create tunnel vision in prosecutors.⁸⁹ Prosecutors face a dilemma due to the inherent tension in a prosecutor's divided loyalties: the duty to be an objective officer of the court and minister of justice, versus the duty to be a zealous advocate for victims.⁹⁰ More than half of the people asked to rate the criminal justice system on how well it ensures "the right people are in prison" responded with "just fair" or "poor."⁹¹

The advent of new technology has shed light on these divided loyalties and influenced the perception of unfairness in the criminal justice system.⁹² Post-conviction DNA testing has led to the exoneration of 280 people since 1989.⁹³ When courts fail to hold prosecutors accountable for their duty to produce exculpatory evidence, then there is "nothing stopping them from abandoning" the duty altogether.⁹⁴

84. Strunsky, *supra* note 76.

85. Dahlia Lithwick, *You're all Out*, SLATE (May 28, 2015), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/05/orange_county_prosecutor_misconduct_judge_goethals_takes_district_attorney.html (on file with *The University of the Pacific Law Review*) (discussing that California Attorney General Kamala Harris announced she will investigate the allegations against the County).

86. CAL. PENAL CODE § 1424.5(a)(1) (enacted by Chapter 467).

87. BUS. & PROF. § 6086.7 (amended by Chapter 467).

88. Historic Bill, *supra* note 73.

89. Strunsky, *supra* note 76.

90. *Id.*

91. JILL MIZELL & LOREN SIEGEL, AN OVERVIEW OF PUBLIC OPINION AND DISCOURSE ON CRIMINAL JUSTICE ISSUES 23 (2014), available at http://opportunityagenda.org/files/field_file/2014.08.23-CriminalJusticeReport-FINAL_0.pdf (on file with *The University of the Pacific Law Review*).

92. *Id.* at 36.

93. Strunsky, *supra* note 76.

94. Historic Bill, *supra* note 73.

Chapter 467 may help to strengthen the integrity of the criminal justice system, thus improving public perception, since a bad faith failure to produce required exculpatory information must be reported to the State Bar.⁹⁵ However, it remains unclear whether Chapter 467 will have any effect on the behavior of prosecutors, considering that Chapter 467 only reinforces what prosecutors already have a legal and constitutional duty to do—disclose exculpatory evidence.⁹⁶

C. Reducing Prosecutorial Misconduct

Although Chapter 467 aims to reduce prosecutorial misconduct, it remains unclear whether it will actually affect the behavior of prosecutors.⁹⁷ Discovery violations are difficult to detect because they occur without the court or the defense counsel knowing.⁹⁸ Chapter 467 may prove ineffective if courts cannot uncover attempts to undermine the discovery requirements.⁹⁹ In addition, Chapter 467 will fail to affect the system if the State Bar is reluctant to punish violations.¹⁰⁰

1. Concealment of Misconduct Makes it Difficult to Address

A major concern with Chapter 467 is that it will have little effect on reducing prosecutorial misconduct due to the difficulty of discovering it.¹⁰¹ Prosecutorial abuses often happen covertly and Chapter 467 does not provide any new means to help those secrets come to light.¹⁰² Concealment efforts and refusal to comply with discovery orders also prevent discovery of violations.¹⁰³

The previously mentioned Scott Dekraai trial provides an egregious example of how concealment prevents misconduct from being discovered by courts for decades.¹⁰⁴ Elaborate coordination amongst prosecutors, jailhouse informants, and

95. CAL. BUS. & PROF. CODE § 6086.7 (amended by Chapter 467).

96. PENAL § 1424.5 (enacted by Chapter 467).

97. See *infra* Part IV.C.1–2 (analyzing the difficulties of implementing Chapter 467 due to the potential that misconduct will not be discovered or violations will go unpunished).

98. Lithwick, *supra* note 85.

99. See *infra* Part IV.C.1 (discussing how the covert nature of misconduct makes it difficult to discover and address).

100. See *infra* Part IV.C.2 (discussing whether Chapter 467 will be ineffective if the State Bar does not penalize prosecutors who break the law).

101. Lithwick, *supra* note 85.

102. *Id.*

103. *Id.*

104. *Id.* (describing that the Orange County District Attorney's Office maintained a twenty-five-year-old database full of potential exculpatory information, the existence of which was never known to defense counsels).

the police to improperly elicit confessions from defendants occurred for decades without discovery.¹⁰⁵ The *Dekraai* Court also uncovered a secret computer database the Orange County District Attorney's Office maintained for more than twenty-five years that contained exculpatory data that government officials refused to produce, despite numerous discovery orders to do so.¹⁰⁶ This ongoing misconduct shows how long it can go undiscovered.¹⁰⁷ If misconduct cannot be discovered in a timely manner, then Chapter 467 will be obsolete because it hinges on the discovery of misconduct during trial.¹⁰⁸ Even if courts discover misconduct on a timely basis, it remains unclear whether the State Bar will be to impose meaningful punishments for violations.¹⁰⁹ In addition, Chapter 467 may not lead to an increase in court referrals to the State bar due to the requirement that prosecutors must act in bad faith in order to be referred for discipline.¹¹⁰

2. *Whether Chapter 467 Will Increase the Number of Meaningful Disciplinary Actions*

It is unclear whether Chapter 467 will increase the number of disciplinary actions against prosecutors due to the apparent unwillingness of the State Bar to punish prosecutors, and the difficulty of proving that prosecutors acted in bad faith.¹¹¹ Governor Brown vetoed AB 885—a previous attempt to address prosecutorial misconduct—based on the rationale that judges have a variety of remedies at their disposal if the court discovers a *Brady* violation during trial.¹¹² However, concerns exist that courts rarely apply those remedies because many judges appointed during tough-on-crime eras are “biased in favor of police and prosecutors.”¹¹³ A 2010 Northern California Innocence Project report found 707 cases involving prosecutorial misconduct over an eleven-year period.¹¹⁴ Only six out of the 707 prosecutors were disciplined, and courts upheld eighty percent of the convictions despite improprieties.¹¹⁵

105. *Id.*

106. *Id.*

107. *Id.*

108. CAL. PENAL CODE § 1424.5 (enacted by Chapter 467).

109. *See supra* Part IV.C.2 (noting that it remains unclear whether Chapter 467 will lead to more disciplinary actions against prosecutors for misconduct)

110. *See supra* Part IV.C.2 (noting that Chapter 476 may not lead to an increase in State Bar referrals due to the requirement that prosecutors must act in bad faith in order for courts to refer them for discipline).

111. Maura Dolan, *U.S. Judges See “Epidemic” of Prosecutorial Misconduct in State*, L.A. TIMES (Jan. 31, 2015), <http://www.latimes.com/local/politics/la-me-lying-prosecutors-20150201-story.html#page=1> (on file with *The University of the Pacific Law Review*).

112. Jones, *supra* note 63.

113. *Id.*

114. Dolan, *supra* note 111.

115. *Id.*

Furthermore, Chapter 467 may not lead to an increase in meaningful State Bar disciplinary actions due to the difficulty in demonstrating that a prosecutor acted in bad faith.¹¹⁶ To demonstrate bad faith, a defendant must show that the prosecutor was not simply negligent with evidence, but that the prosecutor acted willfully, deceitfully, or with malicious intent.¹¹⁷

Assembly Member Weber authored Chapter 467 in response to the growing concern that prosecutors seek to “convict at all costs” and “prioritize convictions over the truth.”¹¹⁸ Several high profile situations involving prosecutorial misconduct also prompted Chapter 467.¹¹⁹ Most notably, in Santa Clara County, a prosecutor, Troy Benson, was charged with five counts of misconduct for suppressing evidence of a concealed videotaped medical exam of an alleged victim in a 2006 child molestation case and subsequently denied doing so under oath.¹²⁰ The State Bar undertook disciplinary proceedings against Benson, concluded that he had not committed any act of “moral turpitude, dishonesty, or corruption,” and ordered him to be “publicly reprovved.”¹²¹ However, in *People v. Uribe*—the underlying case that led to Benson’s disciplinary action—the trial court dismissed the action with prejudice and held that Benson committed “outrageous prosecutorial misconduct.”¹²² Although the Court of Appeal overturned the dismissal as an improper remedy for the misconduct, it acknowledged that the violations were “flagrant.”¹²³

The State Bar’s standard of proof for discipline is higher than the court’s, and the State Bar failed to find that Benson misled the court by clear and convincing evidence.¹²⁴ Nine studies analyzing the professional consequences imposed on prosecutors for misconduct revealed that out of 3,625 instances of misconduct from 1963 to 2013, public sanctions were imposed in only sixty-three—a mere two percent—of those cases.¹²⁵

116. CAL. PENAL CODE § 1424.5 (enacted by Chapter 467).

117. Celeste Bacchi, *Preservation of Evidence in Criminal Cases*, NOLO, available at <http://www.nolo.com/legal-encyclopedia/preservation-evidence-criminal-cases.html> (last visited Sept. 27, 2015) (on file with *The University of the Pacific Law Review*).

118. Historic Bill, *supra* note 73.

119. *In re Troy Alexander Benson*, Case No. 09-O-12538-PEM (Cal. State Bar Jan. 17, 2013), available at <http://members.calbar.ca.gov/courtDocs/08-O-12538-2.pdf> (on file with *The University of the Pacific Law Review*).

120. *Id.*; see also Press Release, Off. of Assemb. Member Shirley Weber, Public Safety Committee Passes Weber Body-Camera Bill (Apr. 15, 2015), available at <http://asmdc.org/members/a79/news-room/press-releases/public-safety-committee-passes-weber-body-camera-bill> (on file with *The University of the Pacific Law Review*) (noting that the misconduct of a Santa Clara County prosecutor inspired her to author AB 1328).

121. *In re Troy Alexander Benson*, *supra* note 119, at 24, 26.

122. *Id.* at 12.

123. *People v. Uribe*, 199 Cal. App. 4th 836, 881 (2011)

124. *In re Troy Alexander Benson*, *supra* note 119, at 24.

125. CTR. FOR PROSECUTOR INTEGRITY, *supra* note 21, at 8.

Although a case can be remanded or thrown out due to prosecutorial misconduct, in the absence of bad faith, that same case may not be referable to the State Bar under Chapter 467.¹²⁶ Furthermore, it is unclear whether State Bar referrals will lead to any meaningful sanctions due to the State Bar's even higher "clear and convincing" standard.¹²⁷

V. CONCLUSION

A prosecutor in the American criminal justice system has more discretion and power over life and liberty than perhaps any other person in the country.¹²⁸ District attorneys play the role of both the victim's advocate and minister of justice.¹²⁹ Prosecutorial misconduct, once thought to be anomalous, has become a problem that threatens the right to a fair trial and due process guaranteed by the Constitution and *Brady*.¹³⁰ Although Chapter 467 seeks to redress this problem by providing additional safeguards beyond the power courts already have to enforce *Brady*, Chapter 467's effectiveness hinges on court's ability to identify prosecutorial misconduct.¹³¹

Prosecutors were under a duty to disclose exculpatory evidence before Chapter 467, and Chapter 467 does not change or increase prosecutors' duties in any way.¹³² Moreover, courts had the power to instruct the jury about prosecutorial misconduct before Chapter 467.¹³³ Thus, it remains unclear whether Chapter 467 will help courts uncover more prosecutorial misconduct compared to prior law or whether it will actually influence prosecutorial behavior.¹³⁴ However, Chapter 467 will require that courts to refer prosecutors to the State Bar upon discovering a violation.¹³⁵ This should, in the long-term, affect a prosecutor's behavior if the requirement is properly enforced.¹³⁶

126. CAL. PENAL CODE § 1424.5 (enacted by Chapter 467).

127. *In re Troy Alexander Benson*, *supra* note 119, at 24.

127. CTR. FOR PROSECUTOR INTEGRITY, *supra* note 21, at 8.

128. *Id.*

129. *Id.*

130. *Id.* at 2.

131. CAL. PENAL CODE § 1424.5 (enacted by Chapter 467).

132. PENAL § 1424.5 (enacted by Chapter 467); BUS. & PROF. § 6086.7 (amended by Chapter 467).

133. PENAL § 1054.5.

134. *Id.* § 1424.5 (enacted by Chapter 467).

135. *Id.* § 1424.5 (enacted by Chapter 467); BUS. & PROF. § 6086.7 (amended by Chapter 467).

136. PENAL § 1424.5 (enacted by Chapter 467); BUS. & PROF. § 6086.7 (amended by Chapter 467).