2025

Understanding Brady Violations

Jennifer Mason McAward

Vanderbilt Law Review

Volume 78 | Issue 3 Article 3

4-2025

Understanding Brady Violations

Jennifer M. McAward

Understanding *Brady* Violations

*Jennifer Mason McAward**

This largest-ever study of adjudicated violations of Brady v. Maryland *provides a detailed and nuanced understanding of who suppresses material evidence in criminal cases, as well as why, how, where, and how often. Its findings complicate the conventional wisdom that* Brady *violations are the work of nefarious prosecutors who intentionally withhold material evidence from criminal defendants. While it is true that "bad faith" permeates this area of constitutional noncompliance, a substantial minority of* Brady *cases stem from "good faith" errors by prosecutors and suppression by law enforcement officers. Most* Brady *violations occur in a small number of states, and most often, state courts provide relief. And while there is not quantitative evidence of an epidemic, the individual effects of* Brady *violations are severe. On average, a defendant whose* Brady *rights are violated spends more time in prison than a defendant who is later exonerated.*

When government officials routinely violate a clearly established constitutional right like Brady *with such negative consequences to the injured parties, the time is ripe for evidence-based interventions to enhance constitutional compliance. The insights from this study point to a new range of strategies. For example, focusing on preventing "good faith"* Brady *errors, especially in non-homicide cases, may be substantially more productive than solely focusing on punishing "bad faith"* Brady *violations—a tactic that has proven to be frustratingly unsuccessful. Relatedly, working with law enforcement officers to better identify and submit potential* Brady *evidence to prosecutors may create a smoother pipeline for the eventual production of material evidence to defendants. Ultimately, by providing unprecedented detail about historical* Brady *violations, this study will serve the cause of future overall* Brady *compliance.*

* Associate Professor of Law, University of Notre Dame Law School; Director, Klau Institute for Civil and Human Rights. I extend my deepest gratitude to the army of research assistants who helped with this paper, especially Connor McCumber. Thank you to Adam Gershowitz, Jon Gould, Bruce Green, Dan McConkie, Rachel Moran, Allison Redlich, Stephen Smith, and Jenia Turner for their thoughtful comments.

INTRODUCTION

The rule is simple on its face: The government must disclose any evidence favorable to a criminal defendant prior to trial if that evidence is material to the defendant's guilt or punishment.[1] However, despite over sixty years of practice, the holding of *Brady v. Maryland* is a rule that "simply hasn't worked."[2] Judges and lawyers alike bemoan an "epidemic of *Brady* violations abroad in the land."[3]

High-profile cases occasionally catapult *Brady* violations into the spotlight. In 2024, a judge dismissed involuntary manslaughter charges against actor Alec Baldwin with prejudice after the court learned that law enforcement and the prosecutor had withheld key evidence.[4] In 2018, the Netflix true crime documentary *The Innocent Man*[5] chronicled the experiences of multiple defendants, including Karl Fontenot, who was convicted of murder and later learned that the prosecutor and police had not disclosed over 800 pages of exculpatory documents and witness interviews.[6] Fontenot was released after thirty-

1. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963).

2. Radley Balko, *Brady v. Maryland Turns 50, but Defense Attorneys Aren't Celebrating*, HUFFPOST (May 13, 2013), http://www.huffingtonpost.com/2013/05/13/brady-v-maryland-50_n_3268000.html [https://perma.cc/Z99Y-J24Y] (quoting Steven Benjamin, president of the National Association of Criminal Defense Lawyers).

3. United States v. Olsen, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of rehearing en banc); *see* Balko, *supra* note 2 (noting "a number of studies conducted since the onset of DNA testing" suggest that *Brady* "may have been mostly symbolic and had little practical effect on the day-to-day justice system"); Editorial, *Rampant Prosecutorial Misconduct*, N.Y. TIMES (Jan. 4, 2014), https://www.nytimes.com/2014/01/05/opinion/sunday/rampant-prosecutorial-misconduct.html [https://perma.cc/6D9X-4SDK]. *But see* Jerry P. Coleman & Jordan Lockey, Brady *"Epidemic" Misdiagnosis: Claims of Prosecutorial Misconduct and the Sanctions to Deter It*, 50 U.S.F. L. REV. 199, 224 (2016) (arguing that intentional prosecutorial misconduct leading to wrongful convictions is rare and that "it is time to move from overblown diagnoses of national 'epidemics' of prosecutorial misconduct").

4. *See* Julia Jacobs, *'Rust' Case Against Alec Baldwin Is Dismissed over Withheld Evidence,* N.Y. TIMES (July 12, 2024), https://www.nytimes.com/2024/07/12/arts/rust-trial-pause-alec-baldwin-shooting.html [https://perma.cc/3G6P-XW7A] ("The state's willful withholding of this information was intentional and deliberate. If this conduct does not rise to the level of bad faith, it certainly comes so near to bad faith as to show signs of scorching prejudice.").

5. The documentary was based on a John Grisham book of the same name. *See* JOHN GRISHAM, THE INNOCENT MAN (2006) (focusing mostly on the dubious conviction of Ron Williamson but also on Karl Fontenot's conviction).

6. *See* Fontenot v. Crow, 4 F.4th 982, 1012–14 (10th Cir. 2021) (describing how the Oklahoma State Bureau of Investigation withheld witness testimony recanting identification of Fontenot as the murderer and establishing Fontenot's alibi).

three years in prison.[7] In 2015, Richard Lapointe was exonerated after twenty-three years in prison[8] for murder, rape, and arson. Investigations by the *Hartford Courant*, Connecticut Public Television, and *60 Minutes* raised the profile of his case and ultimately led to the discovery of hidden evidence that undermined his role in the crime.[9]

Brady violations do not just happen in high-profile murder and rape cases, however. They happen in every type of felony case, from drug crimes to robbery to arson to white collar financial crimes. They also happen in misdemeanor cases, from driving under the influence to peddling counterfeit DVDs. They happen in cases of defendants who are actually innocent, and in cases of defendants who are actually guilty. Just as the *Brady* rule applies in all criminal cases, it is violated in every type of criminal case, from the highest-profile to the run-of-the-mill.

Brady is a rule grounded in the Due Process Clause, premised on safeguarding fundamental fairness in criminal proceedings.[10] A constitutional disclosure requirement is meant to ensure that a prosecutor treats criminal defendants fairly and serves as "an architect of a proceeding that . . . comport[s] with standards of justice."[11] Prominent *Brady* violations like those in the Baldwin, Fontenot, and Lapointe cases contribute to the popular narrative that nefarious

---

7. The State of Oklahoma maintains that Fontenot is guilty, and it is seeking a new trial. *See* Clifton Adcock, *Judge in Innocent Man Case Agrees to Suppress Original Confession by Karl Fontenot*, FRONTIER (Feb. 22, 2024), https://www.readfrontier.org/stories/judge-in-innocent-man-case-agrees-to-suppress-original-confession-by-karl-fontenot/ [https://perma.cc/6UV8-LPUB] (noting that prosecutors refiled charges against Fontenot even after his release from prison after a successful appeal).

8. Lapointe spent three years in jail before his conviction, which equals a total of twenty-six years incarcerated. Neil Genzlinger, *Richard Lapointe, Exonerated in a Murder Case, Dies at 74*, N.Y. TIMES (Aug. 8, 2020), https://www.nytimes.com/2020/08/08/nyregion/richard-lapointe-dead.html [https://perma.cc/49PM-CGSX].

9. *See* Lapointe v. Comm'r of Corr., 316 Conn. 225, 241 (2015). The list of high-profile cases could go on. Two other high-profile *Brady* violations predate the time period of this study. In 2007, the country was captivated by an alleged rape committed by Duke lacrosse players, only to find the criminal charges dropped after it was revealed that the prosecutor had intentionally withheld exculpatory evidence, including DNA testing. That same year, the New Orleans District Attorney's Office ("DA's office"), led by the infamous Harry Connick, Sr., was ordered to pay $14 million in damages to an exoneree who showed not only that prosecutors in his case had hidden exculpatory information from him for over eighteen years but also that such disregard for *Brady* was "neither isolated nor atypical" in the office as a whole. Connick v. Thompson, 563 U.S. 51, 79 (2011) (Ginsburg, J., dissenting). The Supreme Court overturned the damages award, ruling that the exoneree Thompson had not made out a sufficient basis for municipal liability. *Id.* at 71–72. The DA's office has had longstanding disregard for *Brady* rights, however, and it is well documented. *See, e.g.*, Ellen Yaroshefsky, *New Orleans Prosecutorial Disclosure in Practice after* Connick v. Thompson, 25 GEO. J. LEGAL ETHICS 913, 915 (2012) (describing the DA's office as "renowned for its *Brady* violations").

10. *See* Brady v. Maryland, 373 U.S. 83, 86 (1963).

11. *See id.* at 88.

prosecutors routinely and deliberately withhold critical information to gain convictions.[12] Judicial review of *Brady* violations, it is said, sends a message to prosecutors—particularly state prosecutors—about the importance of complying with their disclosure obligations.[13]

This narrative, while partially true, fails to capture completely the dynamics of many *Brady* violations. There are indeed cases that involve intentional prosecutorial suppression of evidence. Disturbingly high numbers of them, in fact.[14] However, a substantial number of *Brady* violations revolve around other factors, from prosecutorial negligence to police misconduct to ignorance of the law.[15] To meaningfully attack the epidemic of *Brady* violations, it is first essential to understand its etiology. This Article provides an unprecedented look at the where, who, why, and how of *Brady* noncompliance and, as a result, suggests that redirected efforts to enhance *Brady* compliance could be highly effective.

Part I of this Article provides a brief overview of *Brady* doctrine and the process of collecting, evaluating, and disclosing evidence that necessarily follows. Each step in the process is a pressure point where *Brady* violations can happen and where current efforts have proven inadequate to protect defendants' rights.

Part II presents the findings of an empirical study of *Brady* violations that is unprecedented in its scope and depth. It examines 386 state and federal cases in which a court has ruled that the government violated *Brady*. Those cases were decided over an eighteen-year span (2004–2022) but covered convictions entered over a fifty-one-year span (1969–2020). The study examines key aspects of each case, including the type of evidence that was suppressed, the identity of the suppressor, and the motive behind the suppression. It catalogs key information about each case, including the type of crime involved, the procedural

12. *See, e.g.*, Walter Dellinger, *What to Do About the Problem of Overzealous Prosecutors*, SLATE (June 22, 2017, 8:06 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2017/supreme_court_june_2017/what_to_do_about_the_problem_of_overzealous_prosecutors.html [https://perma.cc/WDM5-D2AK] ("Too many prosecutors . . . too often fail to comply with *Brady* . . . ."). *But see* AM. COLL. OF TRIAL LAWS., BRADY-GIGLIO GUIDE FOR PROSECUTORS 1 (2021), https://www.actl.com/docs/default-source/default-document-library/position-statements-and-white-papers/brady-giglio-guide-for-prosecutors.pdf?sfvrsn=c1df747_4 (last visited Jan. 10, 2025) [https://perma.cc/R22S-Z96S] ("While some prosecutors have committed intentional Brady/Giglio violations, most violations are unintentional.").

13. *See* AM. COLL. OF TRIAL LAWS., *supra* note 12, at 1 (creating a guide to help prosecutors comply with their *Brady* obligations); *see also* United States v. Olsen, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, J., dissenting from the order denying the petition for rehearing en banc) (arguing that only judges can stop *Brady* violations and lamenting the infrequency of judicial remedies).

14. *See infra* Subsection II.C.2.

15. *See infra* Subsection II.C.2.

posture of the case when the *Brady* claim prevailed, and the remedy provided. It looks for commonalities and trends among cases.

The picture of *Brady* noncompliance that emerges from this study is unique and multidimensional. The longitudinal data challenge some of the conventional wisdom about *Brady* violations and yield critical insights that begin to light the path toward more effective strategies for greater constitutional compliance. Part III of the Article suggests potential next steps.

The cases confirm that *Brady* violations do, in fact, happen everywhere and in all types of criminal cases. But *Brady* adjudications happen more often in some states (Texas, California, New York, Pennsylvania, and Ohio) and in certain types of criminal cases (homicide). While there could be multiple explanations for this, it seems apparent that efforts to enhance *Brady* compliance might fairly begin by focusing on these jurisdictions and on homicide cases because they are fertile ground, either for necessary course correction or for continued dedication to rooting out *Brady* violations.

Even more critically, these decisions provide important insights into who is suppressing evidence and why. Prosecutors, prosecutors' offices, and law enforcement officers account for well over 90% of *Brady* suppressions,[16] and their suppressions are in "bad faith" most of the time (i.e., a deliberate choice not to disclose evidence despite understanding that disclosure was required under *Brady* and its progeny). However, a substantial minority (42%) of *Brady* violations are *not* "bad faith" constitutional violations. Rather, they are the product of mistaken understandings of the law, mistaken assessments of evidence, or negligent handling of investigatory files. This statistic holds true for federal prosecutions as well as state prosecutions.

Finally, this collection of *Brady* decisions also reveals that state courts do the bulk of the work in enforcing the constitutional right articulated in *Brady*. State court judges, therefore, deserve both praise as the primary enforcers of this constitutional right and resources to continue performing that role well. There is an important subset of state criminal cases, however, where federal courts play a more active role. In state cases where the suppression is the product of willful misconduct, federal habeas is the most common posture in which a defendant receives *Brady* relief. Thus, the data demonstrate that federal habeas provides an essential backstop in certain *Brady* cases.

These numbers give rise to two important insights: First, *Brady* noncompliance is, and may always be, an intractable problem. Because

16. There are other government actors that occasionally suppress *Brady* evidence, like forensic and medical examiners.

the majority of *Brady* violations involve the knowing and intentional suppression of evidence, they reflect the worst excesses of the adversarial system. Despite the U.S. Supreme Court's hope articulated in *Brady* that the government will sublimate a desire for victory to a commitment to fairness and justice, it is clear that there are and will always be some government officials who are willing to skirt the Constitution in order to secure a conviction.

Second, there is cause for hope that it is possible to limit the extent of *Brady* noncompliance. When 42% of *Brady* violations are the result of mistakes rather than nefarious intent, there is a significant opportunity to identify the pressure points where those errors happen and adopt compliance practices that prevent similar mistakes. Human mistakes are easier to fix than human nature. Even if *Brady* violations are endemic to our criminal justice system, the prospect of limiting them substantially is a hopeful one. This key finding invites engagement with "good faith" *Brady* violations, especially in non-homicide cases, as a way to meaningfully reduce the overall number of *Brady* violations.

Indeed, it is essential that we work hard to limit *Brady* violations. The defendants convicted in the 386 cases studied here collectively spent more than 3,809 years in prison before receiving relief on their *Brady* claims.[17] That is an average of 10.4 years lost per case.[18] (For perspective, the average criminal exoneree spends 9.1 years in prison before exoneration.[19]) Of the *Brady* defendants in this study, fifty-seven spent time on death row. The National Registry of Exonerations lists 106 of the *Brady* defendants as having been exonerated.[20] In these cases, it means that the actual perpetrator continued to live freely and endanger the community.

---

17. This total excludes the jail time in twenty-one cases in which the *Brady* relief was granted before conviction, either pretrial or after a mistrial, as well as preconviction jail time in every case in the data set.

18. This average was calculated excluding the twenty-one cases in which the *Brady* relief was granted before conviction, either pretrial or after a mistrial.

19. *See* Dustin Cabral*, Exonerations in the United States Map,* NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (last visited Jan. 10, 2025) [https://perma.cc/2X38-FZ3F].

20. We know that official misconduct, including but not limited to *Brady* violations, is common in wrongful conviction cases. The National Registry of Exonerations has counted 2,448 exonerations from 2004 to 2022, the time period covered by this study. Of those 2,448, 1,428 involved "Official Misconduct," defined as a situation where "[p]olice, prosecutors, or other government officials significantly abused their authority or the judicial process in a manner that contributed to the exoneree's conviction." *Glossary,* NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx#OM (last visited Jan. 10, 2025) [https://perma.cc/28ZN-VYT5]. "Official Misconduct" encompasses far more conduct than just *Brady* violations, including corruption and coercion by a range of government officials (e.g.,

Brady violations incur costs not only for defendants but also for the government and the public. Substantial resources went into investigating, prosecuting, and deciding these 386 cases. Because the remedy for a *Brady* violation is to vacate the conviction, prosecutors must face the daunting prospect of a new trial years after the original one in cases where they continue to maintain the defendant's guilt. Indeed, many defendants in the cases studied here ultimately pled guilty or were retried and reconvicted.

We can do better. We must do better. Especially where the constitutional rule at issue is so well established and where compliance should be relatively easy, it is imperative that we understand the dynamics surrounding *Brady* violations in order to minimize them. The data set compiled and analyzed in this Article yields important insights into how and why these constitutional violations occur and how they are remedied judicially, and thus points the way to thinking about how they might be prevented in future cases.[21] The ultimate goal of this project is to promote compliance with the constitutional rule of *Brady*. Such an inquiry is of obvious benefit to every actor in the criminal system.

I. *BRADY* COMPLIANCE: CHALLENGES

A. The Brady *Basics*

In *Brady v. Maryland*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused . . . 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."[22] *Brady* was one of several important criminal law decisions from the Supreme Court's October 1962 Term. Indeed, it initially was "partially concealed beneath the surface of a busy and turbulent term"[23] that also saw rulings constitutionalizing the right to

---

the cases of Cinque Abbott and Eruby Abrego), as well as cases where there was an allegation of suppressed evidence that was not resolved in court (e.g., the case of Joseph Allen).

21. Where there is an ascertainable set of cases involving clear constitutional violations, it is responsible to study those cases in order to determine what led to the constitutional violations and therefore how we might prevent future violations. *Cf.* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 59–60 (2008) (studying cases of wrongful convictions, while recognizing that many more such cases are still unknown).

22. 373 U.S. 83, 87 (1963); *cf.* Jencks Act, 18 U.S.C. § 3500(b) (obligating the government, after a witness testifies, to provide the defendant with "any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified").

23. Herald Price Fahringer, *The* Brady *Rule: Has Anyone Here Seen* Brady*?*, 6 JOHN MARSHALL J. PRAC. & PROC. 77, 77 (1972).

counsel in *Gideon v. Wainright*,[24] liberalizing federal habeas procedure in *Fay v. Noia*,[25] and expanding the Fourth Amendment exclusionary rule in *Wong Sun v. United States*.[26] Over time, however, *Brady* has come to be viewed as "a landmark Supreme Court case"[27] and "one of the most significant developments in criminal justice law."[28] Some, though, critique *Brady* as a "mostly symbolic" rule that has "little practical effect on the day-to-day justice system."[29]

As the bar came to focus on *Brady*, it became clear that the Court's opinion left open a raft of doctrinal questions. Over the following decades, the Court clarified that the rule requires disclosure of both exculpatory and impeachment evidence,[30] that the state must disclose *Brady* evidence whether or not the defense requests it,[31] and that the state is accountable for evidence of which the prosecutor has actual or constructive knowledge.[32]

---

24. *See* 372 U.S. 335, 337–39 (1963) (overruling precedent that held failure to provide counsel to indigent defendant did not necessarily violate the Constitution under facts where petitioner had committed a felony).

25. *See* 372 U.S. 391, 398–99 (1963).

26. *See* 371 U.S. 471, 488 (1963).

27. Carrie Johnson, *Report: Prosecutors Hid Evidence in Ted Stevens Case*, NPR (Mar. 15, 2012, 5:56 PM), https://www.npr.org/2012/03/15/148687717/report-prosecutors-hid-evidence-in-ted-stevens-case [https://perma.cc/YM22-KN68]; *see* Lincoln Caplan, *The D.A. Stole His Life, Justices Took His Money*, N.Y. TIMES (July 2, 2011), https://www.nytimes.com/2011/07/03/opinion/sunday/03sun5.html [https://perma.cc/6UUX-GTC9].

28. Doug Donovan & Jacques Kelly, *Attorney Fought for the Legal Rights of the Poor*, BALT. SUN, Feb. 14, 2017, at A1 [https://perma.cc/EG3Y-WJJ2].

29. Balko, *supra* note 2.

30. *See* Giglio v. United States, 405 U.S. 150, 151 (1972) (holding that the government must disclose promises to a witness or expectations of leniency). Further, the state retains an ongoing obligation to set the record straight if it becomes clear that police or prosecutors have concealed exculpatory or impeachment evidence. *See* Banks v. Dretke, 450 U.S. 668, 675–76 (2004). In *United States v. Ruiz*, 536 U.S. 622, 630 (2002), the Court held that the government need not disclose impeachment evidence prior to a guilty plea. The question of pre-plea disclosure of exculpatory evidence is an open one. *See* Brian Sanders, *Exculpatory Evidence Pre-plea Without Extending* Brady, 86 U. CHI. L. REV. 2243, 2246 (2019).

31. *See* United States v. Agurs, 427 U.S. 97, 102 (1976).

32. *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."). Prosecutors are responsible for evidence held by anyone working on the defendant's case. *See* United States v. Bin Laden, 397 F. Supp. 2d 465, 481–82 (S.D.N.Y. 2005) ("[T]he investigating case agents on a particular prosecution are part of the prosecution team; their possession of producible material is imputed to the prosecutor regardless of his actual knowledge."); Perez v. United States, 502 F. Supp. 2d 301, 311 (N.D.N.Y. 2006) ("An 'arm of the prosecution' is any government agent or agency that investigates and provides information specifically aimed at prosecuting a particular accused."); *cf.* United States v. Eley, 335 F. Supp. 353, 358 (N.D. Ga. 1972) (holding that while the prosecutor must disclose evidence gathered by law enforcement agencies that participated in the case against the accused, "the prosecutor has no duty to disclose information in the possession of governmental agencies which are not investigative arms of the prosecution and have not participated in the case, even if such information might be helpful to the accused").

To prevail on a *Brady* claim, the defendant must demonstrate not only that the government suppressed exculpatory or impeachment evidence but also that the evidence was material.[33] Materiality requires a showing that there is a "reasonable probability" that disclosure of the evidence would have led to a different result in trial or sentencing.[34] The Supreme Court has attempted to clarify this standard, stating that a defendant need show only that the undisclosed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict" or sentence.[35]

In the most typical *Brady* case, a defendant learns after she has been convicted at trial that the government has suppressed evidence in her case.[36] In this situation, the defendant can bring the appropriate posttrial or postconviction motion to raise the *Brady* claim.[37] If the defendant demonstrates both suppression and materiality, the standard relief is to vacate the conviction.[38] The prosecution can then decide whether to retry the case, offer a plea bargain, or dismiss the charges.[39]

Of course, well over 90% of criminal convictions result from a plea bargain.[40] After a defendant pleads guilty and uncovers a *Brady*

---

33. *See* United States v. Bagley, 473 U.S. 667, 678 (1985).

34. *See id.* at 682.

35. *Kyles*, 514 U.S. at 434 ("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

36. Sometimes, defendants learn that the government has suppressed evidence before or during trial. In those situations, a defendant can bring a pretrial or midtrial *Brady* claim. Courts give a range of remedies in these circumstances, from granting additional discovery to dismissing the indictment typically when there is flagrant prosecutorial misconduct. For example, a court granted additional discovery in *People v. Waters*, 35 Misc. 3d 855, 862 (N.Y. Sup. Ct. 2012), declining to dismiss the case and instead sanctioning the prosecutor by requiring additional document production. In *United States v. Chapman*, 524 F.3d 1073, 1077 (9th Cir. 2008), a court affirmed a mistrial and dismissal of an indictment after a *Brady* violation. Other courts have done the same. *See, e.g.*, *State v. Herrera*, 866 So. 2d 151, 152 (Fla. Dist. Ct. App. 2004) (dismissing the case).

37. *See, e.g.*, Strickler v. Greene, 527 U.S. 263 (1999) (finding cause and prejudice sufficient to excuse a procedurally defaulted *Brady* claim that was not raised in state postconviction proceedings).

38. *See Kyles*, 514 U.S. at 435–46. In some egregious cases, courts have dismissed the case with prejudice. *See, e.g.*, United States v. Lyons, 352 F. Supp. 2d 1231, 1251 (M.D. Fla. 2004) (invoking the federal district court's inherent power to dismiss an indictment on grounds of prosecutorial misconduct); Pitman v. Ottehberg, No. 10–2538, 2011 WL 6935274, at *2 (D.N.J. Dec. 30, 2011) (describing a case where the prosecutor's office filed a motion for dismissal of indictment and the municipal court issued an order of nolle pros).

39. *See* DONALD E. WILKES, JR., FEDERAL POSTCONVICTION REMEDIES AND RELIEF HANDBOOK WITH FORMS § 1.37 (noting that when habeas relief is granted, "the convicted person is ordered released unless within a specified period of time the person is first retried or resentenced or otherwise appropriately reprosecuted on the same charges").

40. *See* Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms,* 126 HARV. L. REV. 150, 150 (2012) ("[G]uilty pleas resolve roughly ninety-five percent of adjudicated criminal

violation, her ability to bring a claim depends on where she lives and the type of evidence that was suppressed. In *United States v. Ruiz*, the Supreme Court held that the prosecution is not constitutionally required to disclose material impeachment evidence prior to a plea, reasoning that "impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary*."[41] Since *Ruiz*, courts have split on whether the prosecution is constitutionally required to disclose exculpatory evidence prior to a plea.[42] As of now, however, the suppression of material, exculpatory evidence prior to a plea does give rise to a *Brady* claim in at least some portions of the country.[43]

One might say that 386 adjudicated *Brady* violations in eighteen years is not necessarily evidence of an epidemic. On one hand, that is entirely true. Each year, on average, there are approximately 8.6 million criminal cases (including over 1.8 million felony cases) with dispositions in state courts[44] and roughly 70,000 criminal cases disposed of in federal courts.[45] Even focusing on the subset of felony

---

cases . . . ."); *see also* United States v. Ruiz, 536 U.S. 622, 632 (2002) (noting the federal government's "heavy reliance upon plea bargaining in a vast number—90% or more—of federal criminal cases").

41. *Ruiz*, 536 U.S. at 629.

42. *Compare, e.g.*, Alvarez v. City of Brownsville, 904 F.3d 382, 392 (5th Cir. 2018) (declining to overturn circuit precedent that finds "no constitutional right to *Brady* material [including exculpatory evidence] prior to a guilty plea"), *with* United States v. Dahl, 597 F. App'x 489, 490 (10th Cir. 2015) ("While we have recognized that 'under certain limited circumstances, the prosecution's violation of *Brady* can render a defendant's plea involuntary,' the government's duty to disclose in the context of a guilty plea extends only to material exculpatory evidence." (internal citations omitted)). Other circuits have declined to rule on the question, but some have indicated skepticism that the Constitution requires the pre-plea disclosure of exculpatory evidence. *See* United States v. Mathur, 624 F.3d 498, 507 (1st Cir. 2010); Friedman v. Rehal, 618 F.3d 142, 154 (2d Cir. 2010); United States v. Moussaoui, 591 F.3d 263, 286 (4th Cir. 2010). Others have suggested that it does. *See* McCann v. Mangialardi, 337 F.3d 782, 788 (7th Cir. 2003); Smith v. Baldwin, 510 F.3d 1127, 1148 (9th Cir. 2007) (en banc). At least one state supreme court has held that *Brady* requires the State "to disclose material exculpatory evidence within its possession to the defense before the entry of a guilty plea." *See* State v. Huebler, 128 Nev. 192, 195 (2012).

43. *See, e.g.*, United States v. Ohiri, 133 F. App'x 555, 562 (10th Cir. 2005) (allowing amendment of § 2255 motion to include a *Brady* claim because "the government should have disclosed all known exculpatory information" prior to a plea in a federal prosecution in New Mexico).

44. *See Trial Court Caseload Overview*, CT. STATS. PROJECT, https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-criminal (last updated Oct. 2024) [https://perma.cc/H9RC-4AC6] (providing total criminal dispositions and total felony dispositions in state courts from 2019 to 2023).

45. *U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending September 30, 2022*, U.S. CTS. 1, https://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2022.pdf (last visited Jan. 10, 2025) [https://perma.cc/5B4S-QSLS].

convictions at trial (roughly 6% of state and 3% of federal cases),[46] 386 is a very small drop in a very big bucket. Compared to an average of 136 exonerations per year over the same time period,[47] it is hard at first glance to agree that an average of twenty-one adjudicated *Brady* violations per year evidences an epidemic.[48]

On the other hand, the number of criminal cases in which evidence is suppressed by the government almost certainly far exceeds those highlighted in publicly available judicial opinions. Because *Brady* violations involve the suppression of evidence, it is necessarily the case that some (and likely many) violations will go uncovered by the defendant.[49] Investigatory resources and luck often play important roles in bringing this hidden information to light[50]—resources that are often in short supply for convicted defendants.

Moreover, there are many cases in which evidence has been suppressed, even purposefully, but a court rules that the materiality requirement is not satisfied and thus that the Constitution has not been violated.[51] The relatively low incidence of successful *Brady* claims may tell us far more about the power of the materiality standard than it does about the propriety of state actors in producing the evidence they are required to produce.

---

46. *The Truth About Trials*, MARSHALL PROJECT, https://www.themarshallproject.org/2020/11/04/the-truth-about-trials (last updated Nov. 4, 2020) [https://perma.cc/FEH6-B2V4] ("About 94 percent of felony convictions at the state level and about 97 percent at the federal level are the result of plea bargains.").

47. *See Exonerations by Year: DNA and Non-DNA*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx (last updated Nov. 2, 2024) [https://perma.cc/GU9G-UDLS] (providing the number of exonerations annually from 1989 to 2023).

48. *See* Coleman & Lockey*, supra* note 3, at 224 (arguing that *Brady* violations occur in only a small proportion of the overall number of prosecutions in the United States).

49. *See* Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE. L. REV. 1533, 1540 (2010) ("[P]roven *Brady* errors hint at a larger problem because the vast majority of suspect disclosure choices occur in the inner sanctuaries of prosecutorial offices and never see the light of day.").

50. *See infra* notes 206–209 and accompanying text.

51. *See* Brandon L. Garrett, Adam M. Gershowitz & Jennifer Teitcher, *The* Brady *Database*, 114 J. CRIM. L. & CRIMINOLOGY 184, 228–31 (2024) (documenting and analyzing cases in which a court found evidence to be favorable but not material); INNOCENCE PROJECT, PROSECUTORIAL OVERSIGHT: A NATIONAL DIALOGUE IN THE WAKE OF *CONNICK V. THOMPSON* 4, 12–13, 15–16 (2001), https://www.innocenceproject.org/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report_09.pdf [https://perma.cc/K97K-R83F] (examining 660 cases from 2004 to 2008 in five states in which prosecutors had committed misconduct and finding that courts upheld the convictions in approximately 80% of those cases (527 cases) because the constitutional violation had been harmless); *see also* Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 647 (2002) (discussing the Court's increasingly strict materiality standard).

Sometimes, courts will grant relief based on local evidentiary rules instead of *Brady*,[52] and sometimes, even written court rulings premised on *Brady* are not available on Westlaw or Lexis.[53] Further, because the vast majority of criminal cases are resolved by plea bargain, many alleged *Brady* violations go unlitigated.[54] Moreover, some *Brady* violations are acknowledged and remedied without a written court opinion.[55]

Thus, the data set compiled here is almost certainly a substantial undercount of cases involving the suppression of evidence generally and *Brady* violations specifically. Even if 386 were the complete number of *Brady* violations in the timespan covered by this study, however, those constitutional violations would still warrant our attention because of the substantial consequences they carry for criminal defendants.[56]

The state's compliance with disclosure obligations under *Brady* and its progeny has obvious benefit to the accused but also to society as a whole. Greater transparency yields more accurate convictions ab initio, avoiding the costs of retrying stale cases after a *Brady* violation.

---

52. *See, e.g.*, United States v. Adan, 913 F. Supp. 2d 555 (M.D. Tenn. 2012).

53. *See, e.g.*, Ward v. Oklahoma, Case No. CRF 1988-208 (Okla. Pontotoc Dist. Ct. Dec. 18, 2020), https://drive.google.com/file/d/1Spz6t_BrAl1kgFA4LkxFKL-M0GgP4Wnb/view (last visited Jan. 10, 2025) [https://perma.cc/Z64Q-S7FN]. This opinion was overturned in 2022 by the Oklahoma Court of Criminal Appeals in an opinion that is also not available on Westlaw or Lexis. Ward's codefendant was Karl Fontenot, whose case—a final decision granting relief on *Brady* grounds—is included in this study. *See* Fontenot v. Crow, 4 F.4th 982 (10th Cir. 2021).

54. *See* United States v. Ruiz, 536 U.S. 622, 625 (2002) (holding that the Constitution does not require the government to disclose material impeachment evidence before a defendant enters a plea agreement).

55. This may happen because the court issues only an oral finding and order. *See, e.g.*, *In Granting New Trial, Judge Questions Prosecution "Tactic"*, BLOG OF LEGAL TIMES (Apr. 17, 2009), https://legaltimes.typepad.com/blt/2009/04/in-granting-new-trial-judge-questions-prosecution-tactic.html [https://perma.cc/Y2J4-KJZ9] (noting bench ruling in which judge granted new trial after finding a *Brady* violation). Another possible scenario is where the prosecutor's office, upon discovering a *Brady* violation, concedes that a defendant's conviction should be vacated. *See, e.g.*, Commonwealth's Response to Petition for Collateral Relief, Commonwealth v. Brown, CP-51-CR-0407441-2004 (Nov. 1, 2021), https://www.documentcloud.org/documents/21102615-commonwealth-answer-to-lavar-browns-pcra-petition [https://perma.cc/2CZY-5GLH]. A codefendant's case was also remanded in light of the DA's concession. *See* Commonwealth v. Richardson, No. 1275 EDA 2021, 2022 WL 2047590 (Pa. Super. June 7, 2022) (granting request for remand stemming from a *Brady* violation). To date, there is no published opinion granting relief in either case. *See* Taylor v. City of Chicago, No. 14 C 737, 2021 WL 4401528 (N.D. Ill. Sept. 27, 2021) (describing a case in which a man convicted of murder and sentenced to life received a certificate of innocence after a *Brady* violation was discovered); Maurice Possley, *Daniel Taylor*, NAT'L REGISTRY OF EXONERATIONS, (June 28, 2013), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4212 [https://perma.cc/YNG5-4Z9S] (describing how a man was wrongfully convicted of murder based on coerced confessions and misconduct by the police but was later exonerated).

56. *Brady* violations result in an average of 10.4 years in prison per case. *See infra* Section II.D (calculating average time in prison for cases in data set).

More critically, accurate convictions enhance the safety of the community and the integrity of criminal judgments. As the Supreme Court has stated, the rule's "overriding concern [is] with the justice of the finding of guilt."[57] "Society wins not only when the guilty are convicted but when criminal trials are fair,"[58] because the government's "interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."[59]

B. Brady *Pressure Points*

There are three distinct steps in the *Brady* compliance process: gathering evidence from all government officials who have worked on the case, assessing which evidence is material, and disclosing material evidence to the defense. These steps are also the pressure points where *Brady* violations occur. While the case prosecutor is ultimately responsible for each of these tasks, the entire process requires the active and conscientious collaboration of a range of other government officials, especially law enforcement. Understanding the *Brady* process and *Brady* error will help to inform more effective mechanisms for *Brady* compliance.

1. Gathering *Brady* Material

The Supreme Court has instructed that a prosecutor's office should establish "procedures and regulations . . . to [e]nsure communication of all relevant information on each case to every lawyer who deals with it."[60] Because *Brady* material may be in the possession of a wide range of government officials who work on a criminal case—from police officers and detectives, to prosecutors, to forensic experts, and so forth—the prosecutor's collection of *Brady* material is a critical and potentially complex task.[61]

---

57. United States v. Agurs, 427 U.S. 97, 112 (1976).

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

59. Kyles v. Whitley, 514 U.S. 419, 439 (1995) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

60. Giglio v. United States, 405 U.S. 150, 154 (1972).

61. *See, e.g.*, State v. Williams, 896 A.2d 973 (Md. 2006) (holding that *Brady* requires disclosure of evidence from the entire prosecutor's office as well as from actors outside that office participating in the case); Parker v. Herbert, No. 02-CV-0373(RJA)(VEB), 2009 WL 2971575, at *2 (W.D.N.Y. May 28, 2009) (finding suppression of U.S. Drug Enforcement Administration ("DEA") records by the Buffalo Police Department where the police department and the DEA had formed a joint task force to investigate a cocaine distribution ring). In federal prosecutions and in some states, the prosecution has a duty to review the personnel files of law enforcement officers who have worked on the case. *See, e.g.*, Stacy v. State, 500 P.3d 1023 (Alaska 2021); United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991); United States v. Quinn, 123 F.3d 1415, 1422 (11th Cir. 1997); U.S. DEP'T OF JUST., JUST. MANUAL § 9-5.001(B) (2018), https://www.justice.gov/jm/jm-9-

The process of channeling evidence to the case prosecutor requires the active participation of a range of actors from police officers to other prosecutors in the office. Not only must those actors have good intentions, they also must be trained to understand *Brady*, to properly identify *Brady* material, and to comprehend their role in the legal process. There must be established document-collection systems and information-sharing protocols to ensure that all *Brady* material is accessible to the case prosecutor who is obligated to disclose it.[62]

Different jurisdictions take different approaches to *Brady* information collection.[63] Some jurisdictions have robust systems and policies in place, at least on paper.[64] Historically, however, some have not trained their agents on *Brady* obligations[65] or utilized any information-collection and management systems at all in the prosecutor's office—much less in law enforcement offices.[66] Even the American College of Trial Lawyers ("ACTL"), which offered best *Brady* practices in a 2021 manual, suggested only spreadsheets and commercial software programs, acknowledging that the latter may be

---

5000-issues-related-trials-and-other-court-proceedings#9-5.001 [https://perma.cc/QN3Q-Y8JK] (requiring "federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all the members of the prosecution team," which includes "federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution"). *See* Jonathan Abel, Brady*'s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 747 (2015) ("Wide variations in *Brady*'s application to [police personnel] files stem from a multiplicity of state laws and local policies protecting personnel files . . . .").

62. *Cf.* Brief for the National District Attorneys Association & California District Attorneys Association et al. as Amici Curiae Supporting Petitioners, at 14–16, Van de Kamp v. Goldstein, 555 U.S. 335 (2009) (No. 07-854) (noting that law enforcement departments are independent of prosecutors' offices and arguing that prosecutors' offices should not be legally responsible for failing to train law enforcement on their *Brady* obligations).

63. *See* AM. COLL. OF TRIAL LAWS., *supra* note 12, at 2 n.3 (recommending best practices for *Brady* compliance but recognizing that most prosecutors' offices "are small . . . [and] each office will have to consider how to create and adapt practices to meet its own circumstances").

64. A company called Lexipol serves 3,500 police agencies nationwide with a variety of best-practice policies and trainings. For example, Policy 605 has been adopted in a range of jurisdictions that pledge they will "assist the prosecution by complying with its obligation to disclose information that is both favorable and material to the defense" and will "identify and disclose to the prosecution potentially exculpatory information." *See, e.g.*, *Policy 605*, KALAMAZOO DEP'T OF PUB. SAFETY, www.kalamazoocity.org/files/assets/public/v/1/kdps-transparency/policies/605-brady-information.pdf (last visited May 23, 2025) [https://perma.cc/5DWX-62XK]. *See generally* Jessica Cohen, *New $12,000 Program to Keep Police up to Date*, TIMES HERALD-RECORD (July 17, 2020), https://www.recordonline.com/story/news/local/port-jervis/2020/07/17/new-12000-program-to-keep-police-up-to-date/112122014/ [https://perma.cc/HS8T-MF6Y] (describing the process and benefits of contracting with Lexipol for policies and training). Omnigo is another corporation that provides document-retention assistance.

65. *See* Connick v. Thompson, 563 U.S. 51 (2011) (denying municipal liability despite failure to train prosecutors about *Brady* obligations).

66. *See* Van de Kamp v. Goldstein, 555 U.S. 335 (2009) (granting absolute immunity to supervisory prosecutors who had failed to establish any information system to track jailhouse informants).

more costly than a jurisdiction can afford.[67] With respect to police officers' dashcam and body-cam videos, ACTL simply suggested only that prosecutors "need to be sure that they have all of them"[68]—meager advice for such a critical step in ensuring constitutional compliance.

The cases in this study confirm that many things can go wrong at this first step. Police officers or other government agents (e.g., forensic and medical experts) may deliberately hide evidence.[69] They may accidentally misplace evidence,[70] make typographical errors,[71] or fail to search relevant databases.[72] They may misunderstand the import of evidence[73] or fail to share it with all relevant actors within their office.[74] Even within the prosecutor's office, there is knowledge in the hands of other prosecutors or investigators that sometimes does not make its way to the case prosecutor.[75]

2. Assessing Materiality

Once the prosecutor is in possession of potential *Brady* material, she must evaluate it and decide what information to disclose to the defense. The Supreme Court has stated that the materiality standard—developed to guide courts in postconviction rulings—guides this pretrial decision. The prosecutor has "discretion" to "gauge the likely net effect of all [favorable] evidence" and is required to disclose that evidence only when it cumulatively "ris[es] to a material level of importance."[76] In

67. *See* AM. COLL. OF TRIAL LAWS., *supra* note 12, at 2 (suggesting spreadsheets and software programs as tracking tools).

68. *Id.* at 3.

69. *See, e.g.*, Arnold v. McNeil, 622 F. Supp. 2d 1294 (M.D. Fla. 2009) (stating that police officer did not disclose evidence that he himself was committing multiple felonies while he was the lead investigator in defendant's case).

70. *See, e.g.*, State v. Panet, 139 Wash. App. 1006 (2007) (observing that tape of defendant's interrogation was accidentally misplaced).

71. *See, e.g.*, United States v. Bagcho, 151 F. Supp. 3d 60 (D.C. Cir. 2015) (stating that prosecution asked for search of government records, but defendant's last name was misspelled, so records did not show up).

72. *See, e.g.*, State v. Julian, 868 N.E.2d 73 (Ind. Ct. App. 2007) (noting that officer searched the wrong database or did not exhaust all database sources).

73. *See, e.g.*, People v. Gambaiani, No. 2-10-1246, 2012 WL 6967061 (Ill. App. Ct. June 21, 2012) (noting that investigator did not regard evidence as relevant and forgot to mention it in her reports to the prosecutor).

74. *See, e.g.*, *In re* McCoy, No. 61853-9-I, 2014 WL 953756 (Wash. Ct. App. Mar. 10, 2014) (stating that defendant was never told that a witness had acted as an informant for the FBI in prior cases).

75. *See, e.g.*, State v. Johnson, 444 S.W.3d 554 (Tenn. 2014) (observing that prosecutor forgot to tell the lead trial prosecutor about evidence until after trial started); Hancox v. State, No. HHDCV094044038S, 2009 WL 3738168 (Conn. Super. Ct. Sept. 25, 2009) (stating that non-case prosecutor misunderstood requirement to disclose conversations with witnesses to prosecutor).

76. Kyles v. Whitley, 514 U.S. 419, 437–39 (1995).

most jurisdictions, if the prosecutor also determines that the information is reasonably available to the defendant, the prosecutor need not disclose that information.[77]

Asking the prosecutor to assess materiality, however, is like putting the fox in charge of the henhouse. The prosecutor has already developed a theory of the defendant's guilt by the time *Brady* disclosures are due. Even when a prosecutor is acting in utmost good faith, she may well underestimate the value of exculpatory evidence or fail to see how a piece of evidence might support the defendant's (as-of-yet-undisclosed) theory of the case.[78] As Steven Benjamin, former president of the National Association of Criminal Defense Lawyers, has explained, "You can have a piece of evidence that is pivotal to establishing someone's innocence, and police and prosecutors could interpret that same piece of evidence as further proof of the same person's guilt."[79] Professor Alafair Burke has observed that "[b]y expecting prosecutors to serve as discretionary gatekeepers of their own disclosure, *Brady* places prosecutors in the untenable position of trying to serve competing and sometimes inconsistent goals."[80]

Brady cases show that what may look clearly exculpatory in hindsight is not always as clear in the moment that a prosecutor assesses materiality.[81] Sometimes prosecutors misunderstand their own *Brady* obligations.[82] And, of course, sometimes prosecutors

77. *See* Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of* Brady *Through the Defendant Due Diligence Rule*, 60 UCLA L. REV. 138, 154 (2012) (stating that the rule in most jurisdictions is that "[t]he government has no *Brady* burden when the necessary facts for impeachment are readily available to a diligent defendant" (quoting United States v. Rodriguez, 162 F.3d 135, 147 (1st Cir. 1998))). This due-diligence rule is not followed in the Tenth and D.C. Circuits. *See id.* at 153; *see also* Leslie Kuhn Thayer, *The Exclusive Control Requirement: Striking Another Blow to the* Brady *Doctrine*, 2011 WIS. L. REV. 1027, 1031 (2011) (discussing how lower courts have not required disclosure of evidence that is not within the exclusive control of the prosecution).

78. *See* Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 495 (2009) (describing "the well-documented tendency to favor evidence that confirms one's working hypothesis"); Keith R. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292 (noting how tunnel vision leads prosecutors "to focus on a particular conclusion and then filter all evidence in a case through the lens provided by that conclusion").

79. Balko, *supra* note 2.

80. Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2132 (2010); *see* Lewis v. United States, 408 A.2d 303, 309 (D.C. 1979) (stating that "[t]he government is not in a position to be a perfect arbiter of defense strategy"); United States v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005) (explaining that "[m]ost prosecutors are neither neutral (nor should they be) nor prescient").

81. *See, e.g.*, Jells v. Mitchell 538 F.3d 478 (6th Cir. 2008) (prosecutor did not think police interviews were relevant to the crime).

82. *See, e.g.*, DiSimone v. Phillips, 461 F.3d 181, 194–95 (2d Cir. 2006) (explaining that the prosecutor did not turn over a witness statement to the defendant because the prosecutor incorrectly believed that he was not required to turn over what he believed was a false witness

intentionally decide to hide clearly material evidence from the defense.[83]

3. Disclosing to the Defense

The production of *Brady* material to the defense may occur in different modes and timelines depending on the jurisdiction. A few states (and the federal government) use a "closed-file" model in which disclosure occurs just before trial and encompasses just the material that the prosecutor deems to be covered by *Brady* and any local rules.[84] In these jurisdictions, the prosecutor's own assessment of the materiality of a piece of evidence is critical to the decision to produce that evidence to the defendant.

A plurality of states utilize a middle approach, mandating the disclosure of some types of evidence (for example, witness names but not witness statements) but stopping short of making the full investigatory file available.[85] This approach gives more information to the defendant as a matter of course, but it still relies on the prosecutor's own sense of materiality to determine what to produce beyond that. Interestingly, some federal district courts have begun to use local discovery rules as a vehicle to enhance *Brady* compliance.[86] Courts will expand the scope of discovery beyond just material evidence and require the government to provide it sooner and regardless of defense request.[87]

An increasing number of states now provide for open-file discovery, where the prosecutor discloses the entire case file, minus work product, early in the criminal process.[88] While open-file discovery

---

statement). *But see* Ellen Yaroshefsky, *Foreword: New Perspectives on* Brady *and Other Disclosure Obligations: What Really Works,* 31 CARDOZO L. REV. 1943, 1951–52 (2010) (recounting the practice in the Dallas County DA's office of sending *Brady* training material to potential hires and asking them to come prepared to discuss it).

83. *See, e.g.*, Wolfe v. Clarke, 691 F.3d 410, 423 (4th Cir. 2012) (calling prosecutor's suppression "entirely intentional" and his attempted justifications "flabbergasting").

84. *See* Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285, 303 (2016) (citing two state examples plus the federal government); *see also* Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 HASTINGS L.J. 1321 (2011) (discussing federal and state laws governing prosecutorial disclosure).

85. *See* Turner & Redlich, *supra* note 84, at 305 (citing twenty-three state examples).

86. *See* Daniel S. McConkie, *The Local Rules Revolution in Criminal Discovery*, 39 CARDOZO L. REV. 59, 78–81 (2017) ("[L]ocal rule reforms aim to strengthen prosecutorial obligations to disclose more discovery to the defense earlier in the case").

87. *See id.* at 80 ("Many districts have broadened the scope of discovery by . . . adding several categories of evidence that must be turned over, regardless of whether they are material to the preparation of the defense").

88. *See* Turner & Redlich, *supra* note 84, at 304 (citing seventeen state examples). For a good discussion of the costs and benefits of such an approach, see *id.* at 306–13 and Ben Grunwald, *The Fragile Promise of Open-File Discovery*, 49 CONN. L. REV. 771 (2017).

makes the prosecutor's assessment of evidence less critical, it also increases the workload of defense lawyers who now must review the entire file for potential *Brady* material.[89] The success of the open-file model makes it even more important that the case prosecutor collect all relevant information from the investigative team and include it in the file turned over to the defense.

"Open-file" discovery is not a perfect system. It still allows the prosecutor to withhold some information subject to in camera review. The data set includes cases where the trial court itself becomes the suppressor, ruling incorrectly that the evidence in question is not discoverable.[90] Moreover, some nondocumentary information just will not appear in files if the suppressor is determined to withhold information.[91]

C. Brady *Opacity and Impunity*

Brady is, in many ways, a strict liability rule.[92] It does not matter whether the prosecutor personally knew of the suppressed information.[93] It does not matter if the suppressor acted in good or bad faith.[94] The nature of a *Brady* claim therefore often leads to judicial decisions that grant *Brady* relief but do not provide a complete picture of the suppression of evidence.[95] A court's decision to write nondetailed

89. *See* Turner & Redlich, *supra* note 84, at 361 (describing how North Carolina prosecutors have stated that the most common disadvantage was the "resource and logistical burden of open-file discovery"). Another downside of open-file discovery is that it creates the risk of witness intimidation or manipulation. *See id.* at 359 ("The most common disadvantage mentioned by Virginia prosecutors was the risk of witness intimidation or manipulation.").

90. *See, e.g.*, People v. Mendoza, No. G041401, 2010 WL 1931748 (Cal. Ct. App. May 13, 2010) (trial judge overlooked some *Brady* material while reviewing state's submission in camera); State v. Hill, 597 S.E.2d 822 (S.C. Ct. App. 2004) (trial court ruled incorrectly that law enforcement did not have to produce evidence in parole revocation hearing as a matter of law).

91. *See, e.g.*, United States v. Hampton, 109 F. Supp. 3d 431 (D. Mass. 2015) (state forensic-lab chemist's misconduct was undocumented and not disclosed).

92. *See* Michael D. Ricciuti, Caroline E. Conti & Paolo G. Corso, *Criminal Discovery: The Clash Between* Brady *and Ethical Obligations*, 51 SUFFOLK U. L. REV. 399, 405 (2018) ("*Brady* essentially imposes a strict liability standard of performance on the government, not the prosecutor personally.").

93. *See* Kyles v. Whitley, 514 U.S. 419, 437–38 (1995):

> [T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation . . . the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

94. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

95. *See infra* Subsection I.C.1 (discussing the effects of unreported facts).

Brady opinions may not affect the parties themselves, but it does pose an obstacle to future study and the ability to identify trends across cases. Similarly, the relative lack of consequences for government officials who violate *Brady*[96] results in a limited record of how and why violations occur.

1. Unreported Facts

The Supreme Court has made clear the two elements of a *Brady* claim: suppression and materiality.[97] Just as clearly, the Court has stated that the viability of a *Brady* claim does not depend on the identity or state of mind of the suppressor.[98] Courts that grant relief on a *Brady* claim therefore need not delineate or analyze these issues.

The contours of the *Brady* right accordingly impact how judges write their *Brady* opinions. Often, opinions are simply opaque. For example, an opinion might state that there is no dispute about suppression and move straight to the materiality discussion, bypassing a description of who suppressed the information and why.[99] If an opinion does mention facts of the suppression itself, it often does so by saying that the "government" was the suppressor without specifying who actually had control of the information.[100] On occasion, the government concedes that it violated *Brady*. In these types of situations, judges need not, and therefore do not, resolve identity and motive questions in ruling on a *Brady* motion, or even provide facts about the suppression.[101]

Of course, some opinions do provide detailed facts about the circumstances surrounding suppression, identifying the suppressor by name and position and specifying the decisionmaking process and

96. *See infra* Subsection I.C.2 (discussing the effects and infrequency of sanctions for *Brady* violations).

97. *See Brady*, 373 U.S. at 87 (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

98. *See Kyles*, 514 U.S. at 437–38 (finding "good faith" or "bad faith" does not alter the prosecution's responsibility for failing to disclose favorable evidence of material importance).

99. *See, e.g.*, People v. Rugante, No. CRA17-009, 2019 WL 7373694, at *2 (Guam Dec. 18, 2019) (noting that "the People do not argue that they did not suppress" the evidence in question and focusing on whether the evidence in question was impeaching and prejudicial).

100. *See, e.g.*, State v. Best, 852 S.E.2d 191, 196 (N.C. 2020) (finding that "the State did not disclose" various types of evidence).

101. *See, e.g.*, *Ex parte* Cohen, No. WR-83,166-01, 2015 WL 13388314, at *1 (Tex. Crim. App. Sept. 16, 2015) (granting *Brady* relief after the State notified defendant that potentially exculpatory information had been suppressed, but not specifying the nature of the evidence, the identity of the suppressor, or the suppressor's motive).

intention around the suppression.[102] Many do not, however. Ironically, then, *Brady* doctrine leads to a body of *Brady* case law that does not provide fulsome information about acknowledged constitutional violations.

2. Infrequent Sanctions

While *Brady* itself sets out a judicial remedy for violating its standards, that remedy is relatively infrequent even though we have good reason to believe that violations occur with regularity. Consider this study, which has identified 386 cases in which judicial relief was ordered over an eighteen-year period—an average of just over twenty-one decisions per year in all jurisdictions combined. One could imagine a cynical prosecutor determining that the reward of suppressing evidence outweighs the risk.

There are, at least on paper, other civil, criminal, and professional penalties that could incentivize compliance with *Brady* obligations. In practice, though, these penalties are so infrequent that they do not provide any meaningful chance of sanction or relief.

For example, there is a civil cause of action for damages under 42 U.S.C. § 1983 against anyone who, under color of state law, violates the Constitution.[103] In addition, there is a criminal remedy under 18 U.S.C. § 242 when a state officer willfully violates a person's constitutional rights. As applied to *Brady* violations, however, neither provides a viable means of compensation or deterrence. Prosecutors are absolutely immune from federal civil liability for *Brady* violations and other actions taken within the scope of their duties in bringing and pursuing a criminal prosecution.[104] In extending absolute immunity to

---

102. *See, e.g.*, Commonwealth v. Williams, 168 A.3d 97, 98 (Pa. 2017) (mem.) (finding that prosecutor Andrea Foulkes intentionally and falsely told the jury in the penalty phase of a capital case that the decedent was a "kind" and "innocent" man while knowing "that the Commonwealth's files contained multiple documents, some in her own handwriting, demonstrating that" the decedent was in fact a sexual predator who may have abused the defendant). Ms. Foulkes went on to a thirty-year career with the U.S. Attorney's Office for the Eastern District of Pennsylvania. She retired in 2021 and now provides pro bono assistance to the Pennsylvania Innocence Project. *Andrea Foulkes, J.D.*, INT'L ASSOC. OF CHIEFS OF POLICE, https://www.eventscribe.net/2022/IACP2022/fsPopup.asp?Mode=presenterInfo&PresenterID=1363261 (last visited Jan. 10, 2025) [https://perma.cc/D26E-4N97].

103. The Supreme Court has implied a similar cause of action against federal actors, although it is increasingly limited in scope. *See* Egbert v. Boule, 596 U.S. 482 (2022) (declining to extend civil cause of action established in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)). This has never been applied to a federal prosecutor.

104. *See* Imbler v. Pachtman, 424 U.S. 409, 427 (1976) (finding prosecutors enjoy the same absolute immunity under 42 U.S.C. § 1983 that they do under common law). The way the Court has applied absolute prosecutorial immunity has resulted in a doctrine that is "overprotective of prosecutors." *See* Brian M. Murray, Jon B. Gould & Paul Heaton, *Qualifying Prosecutorial Immunity Through* Brady *Claims*, 107 IOWA L. REV. 1107, 1121 (2022) (analyzing the effect of

prosecutors, the Supreme Court reasoned that alternative sanctions like criminal liability and disbarment would incentivize compliance.[105] In fact, however, it is very rare for a prosecutor to face meaningful consequences stemming from a *Brady* violation. Although criminal liability under § 242 or state law is a theoretical possibility, only two prosecutors have ever been convicted for misconduct,[106] and only seven have ever been charged.[107] Notably, state law has been the basis for each of those charges and convictions, which suggests that federal criminal liability for prosecutors under § 242 is particularly difficult to obtain.

State bar associations and even criminal courts themselves have the power to sanction prosecutors.[108] Disbarment or other professional sanctions, however, are infrequent at best.[109] Even more informal types

---

immunity on *Brady* compliance). It is also exceedingly difficult to sue a municipal government for a policy or practice of *Brady* violations. *See* Connick v. Thompson, 563 U.S. 51, 53 (2011) (holding that "single-incident liability [under 42 U.S.C. § 1983] does not . . . encompass failure to train prosecutors in their *Brady* obligation[s]").

105. *See Imbler*, 424 U.S. at 429 (finding the public is not "powerless to deter [prosecutorial] misconduct or to punish that which occurs").

106. *See In re* Brophy, 442 N.Y.S.2d 818, 819 (N.Y. App. Div. 1981) (finding a censure was the appropriate level of discipline for the convicted prosecutor); Jordan Smith, *Former DA Anderson Pleads Guilty to Withholding Evidence in Morton Case*, AUSTIN CHRON. (Nov. 8, 2013), https://www.austinchronicle.com/daily/news/2013-11-08/former-da-anderson-pleads-guilty-to-withholding-evidence-in-morton-case/ [https://perma.cc/9T25-2DT2] (reporting disbarment of and guilty plea to contempt of court by Ken Anderson for misconduct in the Michael Morton murder case).

107. *See* Maurice Possley & Ken Armstrong, *Prosecution on Trial in DuPage*, CHI. TRIB. (Jan. 12, 1999), https://www.chicagotribune.com/news/ct-xpm-1999-01-12-9901120171-story.html [https://perma.cc/8TBT-8UNH] (noting six cases); Smith, *supra* note 106 (reporting guilty plea by DA Ken Anderson to state law contempt of court charge).

108. *See, e.g.*, Barry Scheck & Nancy Gertner, *Combatting* Brady *Violations with an 'Ethical Rule' Order for the Disclosure of Favorable Evidence*, THE CHAMPION (May 2013), https://www.nacdl.org/Article/May2013-CombattingBradyViolationsWithA [https://perma.cc/44N8-CQYK] (recommending that criminal judges enter "ethical orders" based on ABA Model Rule of Professional Conduct 3.8 that would require prosecutors to disclose all evidence that "tends to negate the guilt of the accused or mitigates the offense," and to punish "willful and deliberate failure to comply" with a contempt sanction).

109. *See, e.g.*, Joaquin Sapien & Sergio Hernandez, *NYC Prosecutors Who Abuse Their Authority Almost Always Evade Punishment*, HUFFPOST (Apr. 3, 2013), https://www.huffpost.com/entry/nyc-prosecutors-who-abuse-authority-evade-punishment_n_3008438?1368471071 [https://perma.cc/SM5H-MTDQ] (finding that New York City prosecutors who committed harmful misconduct were rarely, if ever, reported to the state bar or punished by their superiors in the city's district attorneys' offices); KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT 1997–2009 at 3 (Oct. 2010), https://www.nacdl.org/getattachment/613c709f-b20c-4390-a8cd-856c2ee53cb6/preventableerror.pdf [https://perma.cc/F2XT-QHJ6] (finding that the California state bar publicly disciplined 1% of prosecutors in six hundred cases in which a court found that there was prosecutorial misconduct (including but not limited to *Brady* violations) and the prosecutor could be identified); Neil Gordon, *Harmful Error: Misconduct and Punishment*, CTR. PUB. INTEGRITY (June 26, 2003), https://publicintegrity.org/politics/state-politics/harmful-error/misconduct-and-punishment/ [https://perma.cc/385N-ETVD] (finding only forty-four instances of discipline in cases of prejudicial

of discipline, like being named specifically in court opinions adjudicating the *Brady* claim, are uncommon.[110] In the words of respected defense attorney Marvin Schechter, "It's an insidious system. . . . Prosecutors engage in misconduct because they know they can get away with it."[111]

Police officers and other government investigators may also violate *Brady*, and, unlike prosecutors, they are not shielded by absolute immunity in § 1983 cases.[112] It is still difficult, however, to prove liability for a *Brady* violation. Not only can police officers invoke the qualified immunity defense when sued for damages,[113] but courts also have held that civil liability may only attach to police officers who violate *Brady* upon heightened proof of scienter. Some courts have held that police officers can be liable when they act with "deliberate indifference to or reckless disregard for an accused's rights or for the truth."[114] Others require a showing of bad faith.[115]

Some defendants have been able to recover under § 1983 after a *Brady* violation by a nonprosecutor. For example, after Massachusetts state forensic scientist Annie Dookhan lied about her credentials and scientific methods, exoneree Leonardo Johnson sued Dookhan under § 1983 and received a $2 million settlement (as well as $250,000 under the state's wrongful conviction compensation statute).[116] Such awards, though, are exceedingly rare.

---

prosecutorial misconduct from 1970 to 2003, including but not limited to *Brady* violations). Since these studies, there have been at least two disbarments in response to *Brady* violations. *See* Smith, *supra* note 106 (reporting disbarment of and guilty plea to contempt of court by Ken Anderson for misconduct in Michael Morton murder case); Johnathan Silver, *Disbarment of Former District Attorney Upheld*, TEX. TRIB. (Feb. 8, 2016), https://www.texastribune.org/2016/02/08/board-upholds-disbarment-former-da-wrongful-convic/ [https://perma.cc/DJM8-EK23] (reporting disbarment of Charles Sebesta, Jr., for misconduct in capital murder case).

110. *See* Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059 (2009) (analyzing the frequency with which appellate courts reversed convictions for serious prosecutorial misconduct without naming the prosecutor responsible).

111. Sapien & Hernandez, *supra* note 109 (quoting Marvin Schechter, a defense attorney and chairman of the criminal justice section of the New York State Bar Association).

112. *See* Gilliam v. Sealey, 932 F.3d 216, 238–41 (4th Cir. 2019) (ruling that a genuine issue of material fact precluded qualified immunity for police officers sued for suppressing evidence in violation of *Brady*).

113. *See id.* at 229 (conceding that "qualified immunity is a defense for individual defendants").

114. Tennison v. City & County of San Francisco, 570 F.3d 1078, 1089 (9th Cir. 2009) (emphasis added).

115. *Gilliam*, 932 F.3d at 238.

116. *See* Shawn Musgrave, *Judge Orders Dookhan to Pay $2m to Wrongly Convicted Man*, BOS. GLOB. (June 21, 2017), https://www.bostonglobe.com/metro/2017/06/21/judge-orders-dookhan-pay-million-wrongly-convicted-man/kkSJCH6V0sLgYRAg32hO6I/story.html [https://perma.cc/WAA3-M9WG] (noting that in 2017, Johnson received an award of $2 million against Dookhan pursuant to a suit brought under 42 U.S.C. § 1983); *see also Leonardo Johnson Settlement Agreement Re: Hinton*, MUCKROCK (Apr. 25, 2017), https://www.muckrock.com/foi/massachusetts-1/leonardo-

Municipal governments, including district attorneys' offices, may also be sued under § 1983 and do not have an immunity defense. The Supreme Court in *Connick v. Thompson*,[117] however, made it virtually impossible to sue a district attorney's office after one of its prosecutors violates *Brady*. Plaintiffs must show that the *Brady* violation is due to an "official municipal policy,"[118] but the Court held that inadequate prosecutor training on disclosure obligations, even after a series of *Brady* violations, is not enough to meet this burden.[119]

On occasion, courts themselves have pressed for consequences for rogue prosecutors, although the effect of those entreaties is unclear. For example, upon finding that prosecutors in the U.S. Attorney's Office in the Southern District of New York had systematically violated *Brady* in a prosecution, a federal district court judge dismissed the charges, excoriated the office's leadership in a written opinion, urged the Justice Department's Office of Professional Responsibility to investigate the government's actions, and ordered "that the Acting United States Attorney ensure that all current AUSAs and SAUSAs read this Opinion."[120] Still, all prosecutors in that case, save one, remain in the U.S. Attorney's Office.[121] Similarly, in *United States v. Tavera*, the U.S. Court of Appeals for the Sixth Circuit recommended that the U.S. Attorney's Office for the Eastern District of Tennessee investigate a prosecutor who knowingly failed to disclose exculpatory evidence.[122] The Court also recommended that the office "make sure that such *Brady* violations do not continue."[123] There is no public information

johnson-settlement-agreement-re-hinton-36811/#file-132833 [https://perma.cc/FK9C-S6DK] (showing a response to a public records request by Shawn Musgrave, containing a Mutual Release dated July 7, 2016, that settled a claim under Massachusetts MGL 258D for $250,000).

117. 563 U.S. 51 (2011).

118. *See id*. at 60 (quoting Monell v. Dep't of Soc. Servs. of New York, 436 U.S. 658, 691 (1978)).

119. *See id*. at 62–63 (prior violations that are "not similar to the violation at issue" are not sufficient for notice); *id.* at 64 (finding that the failure to train prosecutors in their *Brady* obligations does not fall in the range of single-incident liability).

120. United States v. Nejad, 487 F.Supp.3d 206, 226 (S.D.N.Y 2020); *see* United States v. Nejad, 521 F.Supp.3d 438, 454 (S.D.N.Y. 2021) (making additional findings of fact regarding intent and circumstances of *Brady* violations); Benjamin Weiser, *U.S. Prosecutors' Bid to 'Bury' Evidence Draws Judge's Wrath*, N.Y. TIMES (Sept. 17, 2020), https://www.nytimes.com/2020/09/16/nyregion/manhattan-us-attorney-evidence-bury.html [https://perma.cc/9MJK-E4TC] (detailing case).

121. *See* Carrie Johnson, *'Yeah, We Lied': Messages Show Prosecutors' Panic over Missteps in Federal Case*, NAT'L PUB. RADIO (Feb. 25, 2021), https://www.npr.org/2021/02/25/971003739/yeah-we-lied-messages-show-prosecutors-panic-over-missteps-in-federal-case [https://perma.cc/7JK7-BE9H] ("With the exception of one supervisor who has left the government for private law practice, the other prosecutors remain in the U.S. attorney's office.").

122. *See* 719 F.3d 705, 708 (6th Cir. 2013) (recommending that the Eastern District of Tennessee's U.S. Attorney's Office "conduct an investigation of why this prosecutorial error occurred").

123. *Id.*

about the office's response, although it is clear that the prosecutor in question went on to hold a supervisory role in the office.[124]

The relative infrequency and inefficacy of civil, criminal, and professional sanctions undermine any deterrent effect and underscore the need for ex ante solutions. While we should continue to advocate for meaningful punishments for those who violate *Brady*, such reform faces a strong headwind. In the meantime, it is critical to consider other ways to incentivize and encourage compliance with *Brady*'s due process rule in the pretrial phase.

3. Unstudied Cases

By all accounts, we have a constitutional right that is routinely being violated. Assuming we view constitutional compliance as a public good, particularly in the criminal justice space, then it is important to understand *Brady* violations in a broad-scaled and detailed way so that we can determine the best strategies for enhancing compliance with *Brady*. While there have been some efforts to compile and analyze *Brady* violations, this study is by far the most expansive of its kind both in terms of the number of cases studied and in terms of the information collected. It attempts to fill the knowledge gap in order to support informed policymaking.

The *Brady* information deficit is beginning to receive scholarly attention. Most recently, Professors Brandon Garrett and Adam Gershowitz, with postdoctoral researcher Jennifer Teitcher, analyzed five years of *Brady* claims, identifying eighty-one adjudicated *Brady* violations and 712 unsuccessful *Brady* claims.[125] The authors coded cases using similar attributes and analyzed both successful *Brady* claims and, critically, cases where courts found information was withheld but denied relief due to lack of materiality.[126] While the complexion of the eighty-one adjudicated *Brady* violations in that study differs somewhat from that of the set of *Brady* violations studied here,[127] the differences in our findings only emphasize the idea that lies

124. Press Release, U.S. Att'y's Office, E. Dist. of Tenn., United States Attorney J. Douglas Overbey Announces Management and Supervisory Staff Changes (Jan. 4, 2021), https://www.justice.gov/usao-edtn/pr/united-states-attorney-j-douglas-overbey-announces-management-and-supervisory-staff [https://perma.cc/ZMN6-JGC8] ("The Greeneville branch office [continues] to be supervised by Branch Chief Donald Wayne Taylor.").

125. Garrett et al., *supra* note 51, at 190, 204.

126. *See id.* at 190, 202–05 (describing the methodology, in which they coded for more than forty variables, and the finding that there were 114 cases where courts found prosecutors suppressed evidence but did not find a *Brady* violation because there was insufficiently material evidence).

127. *Compare id.* at 210 (finding that police were responsible for suppression in 9% of cases), *and id.* at 211 (finding "accidental" suppression (versus intentional misconduct) in 14% of cases),

at the heart of both studies: that there is a "gap in the data and literature"[128] and that the more *Brady* violations we study, the better positioned litigators, scholars, and policymakers will be to advance meaningful reform.

Another recent article by Professors Brian Murray, Jon Gould, and Paul Heaton examined thirty-eight *Brady* violations in an effort to consider possible tort actions that could punish those who violate *Brady*.[129] These authors tracked some of the same factors that I use in this study, such as how often and why prosecutors and police officers suppress evidence.[130] As with the Garrett, Gershowitz, and Teitcher study, the smaller data set (and some definitional differences) provided a different portrait of *Brady* violations than the one offered here.[131] As above, though, we agree that it is important "to better model the realities of *Brady* violations rather than simply hypothesize or assume the parameters of nondisclosure in considering how to respond to known failures to disclose."[132] Ultimately, Murray, Gould, and Heaton proposed a statutory tort action against any prosecutor who purposely, knowingly, or recklessly withheld information from the defense if the

---

with infra Subsection II.C.1 (finding police responsibility in roughly one-third of cases), *and infra* Section III.A (finding "good faith" suppression (versus intentional misconduct) in 42% of cases). These differences may be attributable simply to the different temporal timeframes of each study.

128. Garrett et al., *supra* note 51, at 189–90.

129. *See* Murray et al., *supra* note 104, at 1134 (studying thirty-eight *Brady* violations adjudicated between 2008 and 2012). Professor Gould published another study that analyzed *Brady* violations in twenty-two cases to trace the effect of such violations on wrongful conviction cases. *See* Jon B. Gould, Samantha L. Senn, Belén Lowrey-Kinberg & Linda Phiri, *Mapping the Path of* Brady *Violations: Typologies, Causes & Consequences in Erroneous Conviction Cases*, 71 SYRACUSE L. REV. 1061, 1074 (2021) (noting that the set of twenty-two cases studied was "arguably the most comprehensive compilation currently available for analysis")*; see also* Stephanos Bibas, *The Story of* Brady v. Maryland*: From Adversarial Gamesmanship Toward the Search for Innocence?*, *in* CRIMINAL PROCEDURE STORIES (Carol Steiker ed., 2005) (analyzing twenty-five successful *Brady* claims from a single year).

130. *See* Murray et al., *supra* note 104, at 1136 (noting the variables coded).

131. For example, in their thirty-eight cases, police officers and prosecutors were equally as likely to withhold material information from the defense, but "[p]rosecutors were more likely to act intentionally, and not at all negligently, whereas police failures were more likely to be negligent." *Id.* at 1138. *Compare, e.g., id.*, at 1137 (positing that prosecutors and police were equally likely to be the suppressor), *and id.* at 1138 (positing that prosecutors are more likely to suppress intentionally while law enforcement is more likely to suppress negligently), *with infra* Subsection II.C.1 (finding that prosecutors are more likely to be the suppressor), *and infra* Subsection II.C.2.A.1 (finding that both prosecutors and law enforcement act in "bad faith"—intentionally withholding information they know to be material—in roughly equal numbers). These differences may well be attributable in large part to the fact that we used different coding definitions. For example, where I use "bad faith" and "good faith," Murray et al. coded for "intentional" versus "negligent" suppressions. It is not clear that Murray et. al use "intentional" suppression as a synonym for a "bad faith" suppression. *See* Murray et al., *supra* note 104, at 1141 (mentioning "an intentional (although perhaps good faith) decision").

132. Murray et al., *supra* note 104, at 1142.

prosecutor believed that the evidence was exculpatory and material or unreasonably determined that the evidence was not material.[133]

Other studies have identified significant numbers of *Brady* violations in particular criminal contexts, like murder convictions and exonerations, but have not examined the particulars of each case.[134] Still others have collected large numbers of *Brady* cases but have not delved into their facts and circumstances.[135] And even more studies have examined prosecutorial misconduct generally but have not focused on *Brady* violations in particular.[136]

This study builds on its predecessors, attempting to be both broader and deeper by collecting the largest-ever set of *Brady* adjudications and examining in greater detail the facts and circumstances of the underlying *Brady* violations. The goal is to provide the best possible set of knowledge to support better policymaking and reform efforts.

II. UNDERSTANDING *BRADY*: EIGHTEEN YEARS OF VIOLATIONS

This study examines 386 final rulings, issued between 2004 and 2022, in which a state or federal court granted relief on a *Brady* claim. The 386 convictions upended by these rulings span an even greater

133. *See id.* at 1145–46 (recommending a statutory cause of action for purposely or knowingly withholding evidence or "acting with conscious disregard of a substantial and unjustifiable risk of circumstances that will result in the withholding of evidence").

134. *See, e.g.*, James S. Liebman, Jeffrey Fagan, Valerie West & Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1850 (2000) (finding that approximately 16% to 19% of reversed death sentences were reversed because of suppression of evidence); NAT'L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 1, 5–6 (Samuel R. Gross ed., 2017), https://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf [https://perma.cc/6BWX-89L5] (finding that *Brady* violations occurred in just over half of 762 murder cases that led to exonerations); NAT'L REGISTRY OF EXONERATIONS, GOVERNMENT MISCONDUCT AND CONVICTING THE INNOCENT 81 (Samuel R. Gross ed., 2020), https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf [https://perma.cc/5B8J-383F] (finding that concealed exculpatory evidence contributed to the convictions of 44% of exonerees).

135. *See, e.g.*, KATHLEEN "COOKIE" RIDOLFI, TIFFANY M. JOSLYN & TODD. H. FRIES, MATERIAL INDIFFERENCE: HOW COURTS ARE IMPEDING FAIR DISCLOSURE IN CRIMINAL CASES xi, 14 (2014), https://www.nacdl.org/getattachment/d344e8af-8528-463c-bba4-02e80dfced00/material-indifference-how-courts-are-impeding-fair-disclosure-in-criminal-cases.pdf [https://perma.cc/5L9V-HUP5] (reviewing 145 decisions where the government failed to disclose favorable information and finding that courts found materiality and granted relief in only twenty-one); *see also Successful* Brady/Napue *Cases*, CAP. DEF. NETWORK (2017), https://hat.capdefnet.org/sites/cdn_hat/files/Assets/public/helpful_cases/suppression_of_evidencefalse_testimony/successful_brady_and_napue_cases_090617.pdf [https://perma.cc/G76H-W5MF] (providing a brief synopsis of successful *Brady*/*Napue* cases through September 2017).

136. *See, e.g.*, QUATTRONE CENTER, HIDDEN HAZARDS: PROSECUTORIAL MISCONDUCT CLAIMS IN PENNSYLVANIA, 2000-2016, at 9–10 (2020), https://www.law.upenn.edu/institutes/quattronecenter/reports/hidden-hazards.php [https://perma.cc/B2KP-Y8YG] (finding that *Brady* claims are the most commonly litigated of prosecutorial misconduct claims in Pennsylvania).

period of time—fifty-one years from 1969 through 2020. By a "final *Brady* ruling," I mean a case in which a court granted final relief on the merits of a *Brady* claim in a criminal case and where appeal was unavailable, denied, or not pursued.[137] Typically, final *Brady* rulings come at the conclusion of contested proceedings,[138] but on occasion they arise after the government has conceded that relief is appropriate and the court grants a motion to vacate the conviction on that basis.[139] Courts at every level in the state and federal judiciaries have issued the final *Brady* rulings considered in this study, from the U.S. Supreme Court to local municipal courts.[140] *Brady* compliance is an issue that can arise in any criminal case and is within the domain of all courts that try those cases and review the resulting convictions.

A. Overview of Case Collection Process

1. What Is Included

This study identified final *Brady* rulings by collecting opinions that are publicly available on Westlaw or Lexis.[141] The data set also includes cases in which the final *Brady* ruling itself was not published, but the existence of such a ruling was referenced in a subsequent opinion in the case.[142] While there may be some additional *Brady* rulings or concessions of *Brady* error that were not publicly referenced or published during this time frame,[143] this set of cases is, at the very least, quite a robust sample.

For each of the 386 cases in the data set, I logged and coded a wide range of information, beginning with basic information like state

137. I did not include cases in which a lower court's holding of a *Brady* violation was overturned on appeal. *See, e.g.*, State v. Brown, 307 S.W.3d 587, 595 (Ark. 2009) (reversing trial court's ruling granting relief on *Brady* grounds).

138. The vast majority of cases in this study are full merits rulings on the *Brady* issue. A few are appellate court rulings that affirm a prior *Brady* ruling without reexamining the facts. *See, e.g.*, People v. Gutierrez, 214 Cal. App. 4th 343, 356 (Cal. Ct. App. 2013) (affirming lower court's *Brady* holding that was challenged only on the purely legal question of whether *Brady* obligation applies to preliminary hearings).

139. *See, e.g.*, United States v. Nejad, 487 F.Supp.3d 206 (S.D.N.Y. 2020) (considering remedies after government conceded *Brady* violations and the court dismissed the case).

140. *See, e.g.*, *infra* notes 170–176 (citing cases from local, state, and federal courts). Three U.S. Supreme Court cases are in the data set as well: *Banks v. Dretke*, 450 U.S. 668 (2004), *Smith v. Cain*, 565 U.S. 73, 75 (2012), and *Wearry v. Cain*, 577 U.S. 385 (2016).

141. Assisted by a group of terrific research assistants, I reviewed every case that cited *Brady v. Maryland*—thousands in number.

142. *See, e.g.*, Carrillo v. County of L.A., 798 F.3d 1210 (9th Cir. 2015) (recounting an unpublished *Brady* ruling from 2010).

143. *See* Ward v. Oklahoma, Case No. CRF 1988-208 (Okla. Pontotoc Dist. Ct. Dec. 18, 2020), https://drive.google.com/file/d/1Spz6t_BrAl1kgFA4LkxFKL-M0GgP4Wnb/view) (last visited Jan. 10, 2025) [https://perma.cc/Z64Q-S7FN] (discussing rulings in the case of Thomas Jesse Ward).

of origin, crime of conviction, dates of conviction and final ruling, procedural posture at final ruling, and type of court that issued the final ruling. Beyond that information, I logged and coded information about the *Brady* violation itself, like the nature of the suppressed information, how it was discovered, and, where possible, the identity and intention of the suppressor.

2. What Is Excluded

Brady claims are far more common than final *Brady* rulings granting relief. This set of 386 cases does not include cases where the state suppressed information but the information was held not to be material within the meaning of *Brady*.[144] As the Supreme Court stated in *Strickler v. Greene*, "strictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."[145] For this reason, I also did not include cases in which a court held that suppression had occurred and remanded for a finding of materiality or prejudice unless I was able to confirm the ultimate success of the *Brady* claim.[146]

---

144. *See., e.g.*, United States v. French, No. 1:12-cr-00160-JAW, 2015 U.S. Dist. LEXIS 54537, at *82 (D. Me. Apr. 27, 2015) (denying motion for new trial because there was no reasonable probability of a different result had the suppressed information been disclosed); State v. Gaillard-Taylor, 229 P.3d 420 (Kan. Ct. App. 2010) (holding that Brady was not violated because suppressed witness interviews were not material); People v. Monroe, 17 A.D.3d 863, 864 (N.Y. App. Div. 2005) (calling suppression a "*Brady* violation" but finding that there was no reasonable probability of a different result); State v. Galindo, No. E2009-00549-CCA-R3-CD, 2010 WL 4684469, at *19 (Tenn. Crim. App. Nov. 19, 2010) (admonishing prosecution for repeated failures to produce *Brady* material but finding no prejudice).

145. 527 U.S. 263, 281 (1999).

146. *See, e.g.*, United States v. Blanco, 392 F.3d 382, 395 (9th Cir. 2004) (holding that the government wrongly suppressed impeachment evidence in violation of *Brady* and remanding to district court for a hearing to determine remedy, noting that one possible remedy was "simply leav[ing] the judgment of conviction in place"); State v. Green, No. A-2507-09T4, 2011 WL 709726, at *5 (N.J. Super. Ct. App. Div. Mar. 2, 2011) (finding suppression of *Brady* material and remanding for assessment of prejudice); Boyd v. United States, 908 A.2d 39, 41 (D.C. 2006) (ordering production of suppressed evidence and remanding for a consideration of materiality). Some of these cases fizzle on remand. *Compare, e.g.*, State v. Durmer, No. A-2803-08T4, 2010 WL 6093, at *2 (N.J. Super. Ct. App. Div. Jan. 4, 2010) (remanding for discovery on possible *Brady* violation), *with* State v. Durmer, A-0915-12T3, 2014 WL 9967346, at *4 (N.J. Super. Ct. App. Div. July 1, 2015) (noting on remand that defendant had failed to prove authenticity of evidence). That said, some of these cases are successful. *Compare* Buckley v. State, No. CR 01–644, 2010 WL 1255763 (Ark. Apr. 1, 2010) (remanding for adjudication of *Brady* claim), *with* Buckley v. Norris, No. 5:08CV00157 JLH/JTR, 2010 WL 4788030, at *1 (E.D. Ark. Nov. 16, 2010) (dismissing habeas petition in light of unpublished favorable *Brady* ruling). The *Buckley* case is, accordingly, included in this study.

There are some cases in which an appellate court held that *Brady* had been violated but the violation had been adequately remedied by the trial judge such that a new trial was unnecessary. *See* Cruz-Martinez, No. 56717, 2012 WL 119894, at *1 (Nev. Jan. 12, 2012) (noting that when the

The goal was to identify cases in which courts applied the same constitutional standard. For this reason, the set of cases in this study does not include suppression rulings predicated on state statutes[147] or state constitutional rules similar to *Brady*[148] unless those state rules fully incorporate *Brady* principles into state law.[149]

This study also does not include claims decided pursuant to *Napue v. Illinois* or *Giglio v. United States*. *Napue* held that a prosecutor's knowing failure to correct a witness's false testimony violates due process.[150] *Giglio* held that a prosecutor's unwitting failure to disclose a promise of leniency to a witness violates due process.[151] Although the *Napue* and *Giglio* cases are close cousins to *Brady*,[152] they

---

district court remedied the *Brady* violation by allowing the defendant to recall a State witness about the evidence in question, the district court provided an adequate remedy and the *Brady* violation was harmless); Rudin v. State, 86 P.3d 572, 584 (Nev. 2004) (finding that though the State acted improperly when it failed to disclose certain statements, the district court remedied this when it allowed the defendant to reopen her case and let the jury know the State failed to provide evidence to the defense). I have included those cases because the courts clearly held that *Brady* had been violated, even though the timing and atypical nature of the remedy might call into question whether materiality had sufficiently been demonstrated.

147. For evidence suppression cases decided under state rules or statutes, see, for example, People v. Blackman, 836 N.E.2d 101, 105–110 (Ill. App. Ct. 2005) (ordering a new trial under Illinois Supreme Court Rule 412(c) where prosecutor failed to disclose impeachment evidence); State v. Grabinski, No. 1 CA–CR 06–0835, 2009 WL 1531020, at *3 (Ariz. Ct. App. June 2, 2009) (reversing trial court finding of *Brady* violation because evidence was revealed at trial but holding that the State failed to comply with its continuing disclosure obligation under Ariz. R. Crim. P. 15); State v. Larkins, No. 85877, 2006 WL 60778, at *10 (Ohio Ct. App. Jan. 12. 2006) (holding that dismissal of indictment was appropriate remedy when state violated state criminal rule 16(B)(1)(f) by refusing to divulge exculpatory evidence).

148. For evidence suppression cases decided under state constitutional law, see, for example, Toro v. State, No. P1/1997-3049A, 2004 WL 1541917, at *3 (R.I. Super. Ct. June 30, 2004) (holding that the deliberate failure to disclose evidence warrants automatic reversal under state constitution); Commonwealth v. Murray, 957 N.E.2d 1079, 1087 (Mass. 2011) (ruling that when information not specifically requested is suppressed, prejudice is measured by asking "whether there is a substantial risk that the jury would have reached a different conclusion if the evidence had been admitted at trial"); State v. Shepherd, 977 A.2d 1029, 1035 (N.H. 2009) (articulating state constitutional rule different from *Brady*—namely, that where the State knowingly withheld evidence, the State must prove beyond a reasonable doubt that the undisclosed evidence would not have affected the verdict).

149. The State of Washington, for example, applies *Brady* jot-for-jot in cases brought under its own constitution. *See, e.g.*, State v. Martinez, 86 P.3d 1210, 1215 (Wash. Ct. App. 2004) (relying on state case, *In re Pers. Restraint of Gentry*, which applies *Brady* in all relevant respects).

150. Napue v. Illinois, 360 U.S. 264, 270 (1959) (holding that a prosecutor violates due process by failing to correct the testimony of a witness which the prosecutor knows to be false).

151. Giglio v. United States, 405 U.S. 150, 154 (1972).

152. *See* United States v. Agurs, 427 U.S. 97, 103–04 (1976) (noting that *Brady* "arguably applies" in cases where undisclosed evidence shows that the prosecution included perjured testimony and that the "prosecution knew, or should have known, of the perjury"). Another relative of *Brady* is *Youngblood v. Arizona*, which held that the failure to preserve potentially useful evidence violates due process upon a showing of "bad faith." *See* 488 U.S. 51, 58 (1988) (holding that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law"). Because the "bad

are distinct from *Brady* cases because they utilize different materiality standards. Both *Napue* and *Giglio* permit relief if there is a "reasonable *likelihood*" that the nondisclosure "*could*" have affected the outcome.[153] In *Brady*, evidence is material only if there is a "reasonable *probability* that . . . the result of the proceeding *would* have been different."[154] Multiple courts of appeals have recognized the important difference between these standards.[155] In light of this distinction, I have not included any cases decided solely on the basis of *Napue* or *Giglio*.[156] That said, there are many cases in which suppression of material evidence in violation of *Brady* coincides with false testimony per *Napue* or involves promises of leniency per *Giglio*. Where a court has evaluated a *Napue*- or *Giglio*-type claim under the *Brady* materiality standard, I have included those cases.[157]

3. Coding for "Good Faith" and "Bad Faith"

This study codes *Brady* violations as either "bad faith" or "good faith." Categorizing the suppression of evidence in this dichotomous way is well established in law. While *Brady* itself stated that the due process right did not depend on the "good faith" or "bad faith" of the prosecution,[158] it is not uncommon for a court granting relief on *Brady*

---

faith" requirement is distinct from *Brady* itself, I also did not include *Youngblood* claims in this study.

153. *Napue*, 360 U.S. at 271; *Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 271).

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

155. *See, e.g.*, Sivak v. Hardison, 658 F.3d 898, 911–12 (9th Cir. 2011); Trepal v. Secretary, 684 F.3d 1088, 1108 (11th Cir. 2012) ("The *Giglio* materiality standard is 'different and more defense-friendly' than the *Brady* materiality standard . . . .") (citing United States v. Alzate, 47 F.3d 1103, 1110 (11th Cir. 1995)); United States v. Ausby, 916 F.3d 1089, 1093 n.1 (D.C. Cir. 2019) (contrasting *Brady* and *Napue* materiality standards) (citing Smith v. Cain, 565 U.S. 73, 75 (2012)); United States v. Cargill, 17 Fed. Appx. 214, 227 (4th Cir. 2001) ("The district court is also correct when it notes that the *Giglio* standard is less onerous than the *Brady* one.").

156. For example, I did not include *Jackson v. Brown*, 513 F.3d 1057, 1075–79 (9th Cir. 2008) (finding that *Brady* and *Napue* material was suppressed, but ruling only on *Napue* with respect to materiality). *See* Harris v. Virgin Islands, 55 V.I. 1102, 1121, 1125, 1128–29, (D.V.I. 2011) (finding that prosecutor had suppressed *Brady* material in "bad faith," but evaluating the suppression and other misconduct under the *Napue* and *Giglio* standards); People v. Brown, No. B211202, 2010 WL 256462, at *10–11 (Cal. Ct. App. Jan. 25, 2010) (reversing conviction based on uncorrected false testimony under *Napue*); State v. Humiston, No. 90,910, 2004 Kan. App. Unpub. LEXIS 488, at *5–7, *18–19 (Kan. Ct. App. July 2, 2004) (same, under state due process ruling based on *Napue*).

157. *See, e.g.*, Danforth v. Chapman, 771 S.E.2d 887, 887 (Ga. 2015) (affirming grant of state habeas relief on "three *Brady*/*Giglio* violations" and applying materiality standard asking whether "a reasonable probability exists that the outcome of the trial would have been different" (quoting Walker v. Johnson, 646 S.E.2d 44, 46 (Ga. 2007))); Tassin v. Cain, 517 F.3d 770, 780–81 (5th Cir. 2008) (granting federal habeas relief where the facts supported a "Fourteenth Amendment violation under the clear precedent of *Giglio*, *Napue*, and *Brady*" and applying the *Brady* materiality standard).

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

grounds to specify that the government acted in "bad faith."[159] In cases since *Brady*, the Supreme Court has singled out suppression and destruction of evidence motivated by "official animus,"[160] "a conscious effort to suppress exculpatory evidence,"[161] "guile,"[162] and "a desire to prejudice."[163] "Bad faith" suppression is an operative concept in related cases as well. For example, in § 1983 actions against police officers brought subsequent to a successful *Brady* claim, many courts limit relief to cases where there has been a showing of intentional or "bad faith" suppression by the officer.[164] Also, the double jeopardy clause of some state constitutions has been read to bar retrial after dismissal of a case for a "bad faith" *Brady* violation by a prosecutor.[165]

In coding this data set of adjudicated *Brady* violations, "bad faith" refers to an affirmative decision to suppress evidence despite

---

159. *See, e.g.*, Commonwealth v. Williams, 168 A.3d 97, 97, 99–100, 109–10 (Pa. 2017) (plurality opinion) (finding that prosecutor acted intentionally and in "bad faith"); Long v. Hooks, 972 F.3d 442, 446 (4th Cir. 2020) (finding that case was part of a "troubling and striking pattern of deliberate police suppression of material evidence").

160. California v. Trombetta, 467 U.S. 479, 488 (1984).

161. *Id.*

162. Napue v. Illinois, 360 U.S. 264, 270 (1959) (quoting People v. Savvides, 136 N.E.2d 853, 854–55 (N.Y. 1956)).

163. *Id.*

164. *See* Gilliam v. Sealey, 932 F.3d 216, 238 (4th Cir. 2019) ("Unlike prosecutors, however, police officers commit a constitutional violation only when they suppress exculpatory evidence in bad faith.") (citing Owens v. Balt. City State's Att'y's Off., 767 F.3d 379, 396 & n.6, 401 (4th Cir. 2014)); Villasana v. Wilhoit, 368 F.3d 976, 980 (8th Cir. 2004) ("We conclude this bad faith standard should likewise apply to due process claims that law enforcement officers preserved evidence favorable to the defense but failed to disclose it."). Other courts have permitted § 1983 actions where the government official acted with deliberate indifference or reckless disregard for the accused's rights. *See* Tennison v. San Francisco, 570 F.3d 1078, 1089 (9th Cir. 2009) ("[A] § 1983 plaintiff must show that police officers acted with deliberate indifference to or reckless disregard for an accused's rights or for the truth in withholding evidence from prosecutors."); Johnson v. Balt. Police Dep't, No. ELH-19-00698, 2020 WL 1169739, at *24 (D. Md. Mar. 10, 2020) (first citing Mellen v. Winn, 900 F.3d 1085, 1104 (9th Cir. 2018); and then citing Jimenez v. Chicago, 732 F.3d 710, 721–22 (7th Cir. 2013)) ("A plaintiff need not demonstrate bad faith directly; it can be inferred through gross deviations from routine police conduct."). *But see* Moldowan v. City of Warren, 578 F.3d 351, 386 (6th Cir. 2009) (declining to impose a state-of-mind requirement for § 1983/*Brady* claims).

165. *See* Commonwealth v. Smith, 615 A.2d 321, 325 (Pa. 1992):

> [T]he 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.

A similar rule applied to the federal constitution under *United States v. Dinitz*, 424 U.S. 600, 611 (1976) (stating that the Double Jeopardy Clause "bars retrials where 'bad-faith conduct by judge or prosecutor' threatens the '(h)arassment of an accused' " (citation omitted) (quoting United States v. Jorn, 400 U.S. 470, 485 (1971))). While that case has been overruled as a matter of Double Jeopardy law, *see* Oregon v. Kennedy, 456 U.S. 667, 675–79 (1982) (adopting the narrower intent-based requirement on behalf of the prosecutor to bar retrial of the defendant, as opposed to the broader standard based on "[p]rosecutorial conduct that might be viewed as harassment or overreaching"), *Dinitz* remains an example of "bad faith" as a legally operative concept.

appreciation of its impeachment or exculpatory value and understanding of its required production under *Brady* and its progeny. This is an intentionally narrow definition,[166] meant to identify government actors who deliberately subverted the Constitution in order to secure a conviction and who were not constrained by existing compliance mechanisms.[167]

"Good faith" is a catch-all to describe everything that is not a "bad faith" suppression. "Good faith" suppressions may well stem from negligence and mistakes,[168] and even recklessness or gross negligence.[169] Labeling a suppression "good faith" is not a value

166. One might reasonably ask whether my narrow definition of "bad faith" might result in an overestimate of the proportion of "good faith" *Brady* violations or an underestimate of "bad faith" *Brady* violations. Cognizant of this concern, I compared my own assessments to judicial findings of "good" and "bad" faith. When courts did make such a finding (which they did only in 21% of cases), they found "good faith" more often than "bad faith" (54% compared to 46% of the time). By comparison, in cases where there was *no* judicial finding but sufficient information to make my own assessment (about two-thirds of the remaining cases), I found "probably good faith" less often than "probably bad faith" (37% compared to 63% of the time). It is not clear that the judicial findings should serve as a control, as studies have shown that courts are reluctant to call out misconduct of those who appear regularly before them. *Cf.* Gershowitz, *supra* note 110, at 1067. But the comparison, at least, indicates that my findings do not overestimate "good faith" or underestimate "bad faith" relative to judicial findings. If anything, the opposite might be true, which would only further emphasize one of the principal findings of this study: that, in addition to unacceptable "bad faith" *Brady* violations, there are also a substantial number of "good faith" *Brady* violations.

167. One study consulted prosecutors about how to code the reason for suppression of evidence, and those prosecutors emphasized the need to "distinguish between good faith and malicious intentional actions." Murray et al., *supra* note 104, at 1140–41.

168. *See id.* at 1136 ("Although these decisions [to suppress] are necessarily intentional, in the sense that they involve a purposeful attempt to delineate what must be disclosed, the judgments behind them may reflect an honest but incorrect judgment rather than a malicious or malevolent act.").

169. *Cf.* Coleman & Lockey, *supra* note 3, at 207–08, 226 (arguing that *Brady* violations are more likely to be the result of reckless or negligent conduct rather than intent); Scheck & Gertner, *supra* note 108 (suggesting contempt sanctions for prosecutors who commit "willful and deliberate" suppression but not for "negligent, inexperienced, stupid, even reckless prosecutors"). In a few cases collected in this study, courts characterized the government's conduct as reckless or grossly negligent. Rather than create a separate, intermediate category for these cases, I fit them into the "good faith"/"bad faith" binary based on the facts of each case, reserving "bad faith" for the clearest cases. For example, in *United States v. Hector*, No. CR 04-00860 DDP, 2008 WL 2025069, at *16 (C.D. Cal. May 5, 2008), the court said that the government "persistently and recklessly[ ] failed to conduct a reasonable investigation" to ensure it turned over all *Brady* material. Based on the sheer number of failures and falsehoods presented by the government in that case, I characterized it as "probably bad faith." *See also* People v. Gilman, No. 4800-2009, 2010 WL 3036983, at *8 (N.Y. Sup. Ct. July 2, 2010) (accusing State of "a want of due diligence bordering on willful blindness"). By contrast, in *United States v. Fitzgerald*, 615 F. Supp. 2d 1156, 1159–60 (S.D. Cal. 2009), the court stated that the government "recklessly disregarded its discovery obligations" but also stated that "had the Government simply kept a thorough discovery log, this issue might have been avoided." Because of this latter statement, plus the fact that the government stated that they did not believe at the time that the suppressed evidence was material under *Brady*, I characterized it as "probably good faith." *See also Ex parte* Jaile, No. WR-89,729-01, 2019 WL 2870946 (Tex. Crim. App. July 3, 2019) (the State's attorney's "grossly negligent" failure to learn about evidence in

judgment and is not meant to indicate that the relevant actor behaved well or did the best that she could have in the situation. Indeed, some of these errors may look unreasonable in hindsight. But there is value in collecting cases where some form of error—as opposed to nefarious intent—explains the *Brady* violation at the time of nondisclosure.

The idea of "good faith" covers many different reasons for suppression of evidence, all of which boil down to human error of some sort.[170] It includes situations where (a) evidence was not produced because of errors in recordkeeping;[171] or where the relevant actor (b) performed an incomplete search for evidence,[172] (c) did not know about or remember the existence of the evidence,[173] (d) did not appreciate the relevance or materiality of evidence,[174] (e) appreciated the evidence's materiality but mistakenly believed the defendant had other means of accessing that evidence,[175] or (f) misunderstood the law governing disclosure.[176]

---

possession of the El Paso Police Department does not demonstrate intent and therefore coded as "good faith").

170. *See* Adam M. Gershowitz, *Accidental Brady Violations*, 12 TEX. A&M L. REV. 533, 551–76 (2025) (discussing "accidental" *Brady* violations caused by prosecutors' failure to understand what constitutes impeachment evidence, prosecutors' negligent pretrial preparation, and failures in communication between prosecutors and the prosecution team).

171. *See, e.g.*, United States v. Bagcho, 151 F. Supp. 3d 60, 71–72, (D.D.C. 2015), *aff'd*, 923 F.3d 1131 (D.C. Cir. 2019) (key witness's name was misspelled, and so searches did not reveal relevant evidence about witness); Bies v. Sheldon, 775 F.3d 386, 393 (6th Cir. 2014) (police had policy of only putting inculpatory evidence in the homicide book to ease burden on prosecutor).

172. *See, e.g.*, State v. Julian, No. 48A05–0608–PC–445, 2007 WL 1576354, at *4 (Ind. Ct. App. May 31, 2007) (officer searched the wrong database or did not exhaust all database sources).

173. *See, e.g.*, People v. Gambaiani, No. 2-10-1246, 2012 WL 6967061, at *6–7 (Ill. App. Ct. June 21, 2012) (law enforcement officer forgot to tell prosecutor about a search that had turned up no forensic evidence); People v. Bellamy, No. 2194/94, 2010 WL 143462, at *7–8 (N.Y. Sup. Ct. Jan. 14, 2010), *aff'd*, 923 N.Y.S.2d 681 (N.Y. App. Div. 2011) (after lead detective fell ill, an unorganized, rotating group of detectives worked on the case).

174. *See, e.g.*, *Ex parte* Nicholson, No. WR-92 799-02, 2021 WL 5229424, at *1 (Tex. Crim. App. Nov. 10, 2021) (prosecutor believed that exculpatory witness statements were not relevant given eyewitness identification of defendant); State v. Johnson, 599 S.E.2d 599, 600–02 (N.C. Ct. App. 2004) (trial judge reviewed evidence in camera, released some and suppressed some, incorrectly deeming it irrelevant); Rudin v. Nevada, 86 P.3d 572, 584, 587 (Nev. 2004) (trial court found *Brady* violation after investigator withheld information believing it was not material, although the error was held harmless).

175. *See, e.g.*, United States v. Nelson, 979 F. Supp. 2d 123, 132–34 (D.D.C. 2013) (government assumed that defendant had possession of an email).

176. *See, e.g.*, Bunch v. State, 964 N.E.2d 274, 301–02 (Ind. Ct. App. 2012) (Bureau of Alcohol, Tobacco, Firearms and Explosives agent did not understand that report had to be turned over to prosecutors); Hancox v. State, No. HHDCV094044038S, 2009 WL 3738168, at *1, *11–12 (Conn. Super. Ct. Sept. 25, 2009) (prosecutors misunderstood the scope of their *Brady* obligations and therefore failed to disclose conversations with witness about a deal). There are also cases in which a government official suppressed evidence in an effort to comply with local or state law which was later held to be unconstitutional. *See, e.g.*, Commonwealth v. Adams, No. 74652, 2004 WL 1588108, at *2–8 (Mass. Super. Ct. May 20, 2004).

As important as it is to understand which government official violated *Brady* and what their motivations were, courts do not always address questions of identity and motivation in their *Brady* opinions. As discussed above, *Brady* doctrine has developed in some ways that are defendant protective and make it a strict liability rule.[177] For example, the prosecutor's own knowledge of the evidence is irrelevant. The prosecutor is deemed to have constructive knowledge of any information within the control of any actor working on the case.[178] Thus, courts sometimes do not specify the precise identity of the suppressor, relying instead on a formulaic assertion that the "State" suppressed the evidence.[179]

Similarly, the intent of the suppressor is not essential to the legal *Brady* analysis. Failure to produce material exculpatory or impeachment evidence, whether it is a mistake or an intentional omission, is suppression as a matter of law for *Brady* purposes.[180] Thus, courts often leave out of their analysis any evaluation of why the evidence was withheld from the defendant, finding it sufficient simply to determine that the evidence was in fact withheld and moving on to consider the question of materiality.[181]

Courts made a definitive finding regarding the identity and motivation of the suppressor in only 21% of the cases in this study (81 of 386). In cases where an opinion did not make an explicit finding on identity and intent, I attempted to make an independent informed assessment of those issues. Sometimes it was possible to read between the lines of an opinion.[182] I also turned to lower court opinions, parties'

177. *Supra* Section I.C.

178. *See* Kyles v. Whitley, 514 U.S. 419, 437–38 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.").

179. *See, e.g.*, Acker v. State, No. 27081, 2007 WL 2800803, at *2 (Haw. Ct. App. Sept. 27, 2007) (noting that "[t]he State did not disclose" that witness in murder trial had already pleaded nolo contendere to the same murder).

180. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

181. *See, e.g.*, State v. Ferguson, 335 S.W.3d 692, 695 (Tex. App. 2011) ("The evidence was undisclosed. It is apparent from the testimony at the hearing on new trial that it was favorable to the accused. The closest question is whether the evidence creates a probability sufficient to undermine the confidence in the outcome of the proceeding . . . .").

182. *See, e.g.*, Robinson v. Cain, 510 F. Supp. 2d 399, 407 (E.D. La. 2007) (noting that the "selective excerpting of [a police report] certainly raises the Court's suspicion that the [report] was withheld intentionally"); People v. Butsinas, No. 327796, 2018 WL 521819, at *2, *7 (Mich. Ct. App. Jan. 23, 2018) (noting that a child protective services worker was required by law to give the prosecutor reports of witness interviews that contained clear exculpatory or impeachment evidence, and finding that prosecutor either knew of the exculpatory evidence or engaged in an "ostrich approach" by electing to forego review of the interview reports); Schofield v. Palmer, 621

filings,[183] news articles, and other publicly available narratives (for example, those from the National Exoneration Registry) to flesh out the record. I was conservative in attaching a "probably good faith" or "probably bad faith" label to a case unless there was strong evidence to support my assessment. Ultimately, between court findings and my own assessments, I was able to classify the intent of 284 suppressors, 70% of all suppressors across the cases gathered here.[184] This smaller but still sizeable pool forms the basis for the discussions of motivation below.

B. The Demographics of Brady *Violations*

The set of 386 final *Brady* adjudications studied here tells a multilayered story about how the government violates and how the judiciary enforces a well-established constitutional rule. Rather than simply bemoan the received wisdom that *Brady* is more honored in the breach than the observance, this Article focuses on the known universe of breaches and uses it to further our understanding of *Brady* violations in order to move toward greater *Brady* observance.

1. Where Do *Brady* Violations Occur?

Of the 386 *Brady* adjudications identified, a substantial majority—325, or 84%—occurred in state criminal prosecutions. Only 16% of *Brady* violations happened in federal prosecutions. This overall proportion is unsurprising, as it mirrors the fact that the overwhelming majority of criminal felony trials in any given year occur at the state level.[185]

S.E.2d 726, 731 (Ga. 2005) ("We cannot countenance the deliberate suppression by the State of a payment to a key witness . . . ."); Prewitt v. State, 819 N.E.2d 393, 406–07 (Ind. Ct. App. 2004):

> [W]hat . . . defense counsel actually knew before trial was dramatically different—and far less exculpatory—than what the witnesses had, in fact, shared with the State prior to trial. . . . And, as the circumstances indicate, the police misrepresented whether they had spoken to these witnesses, and the prosecutor did nothing to correct those misrepresentations.

183. *See, e.g.*, Motion for New Trial (Penal Code Section 1181) & Memorandum of Points and Authorities, People v. Sierra, No. H029790, 2007 WL 2052124 (Cal. Ct. App. July 17, 2007) (defendant's motion for a new trial states that he is not alleging intentional withholding by the prosecution).

184. There were 407 total suppressors in the 386-case data set because some cases involved multiple types of suppressed evidence and multiple suppressors. Of those, there were 81 suppressors about whom the court itself made a finding of "good faith" or "bad faith," and an additional 203 about whom I had sufficient information to assess motive.

185. *See supra* notes 44–46 and accompanying text.

a. State Prosecutions

Almost one-quarter of all state *Brady* adjudications occurred in two states:[186] Texas (40) and California (34).[187] Adding in New York,[188] Pennsylvania, and Ohio, these five states account for almost 40% of all adjudicated *Brady* violations. And if we include the next six "leading" states (Louisiana, Missouri, Florida, Georgia, Tennessee, and Virginia), we find that eleven states account for 61% of all adjudicated *Brady* violations in state criminal cases.

On the other end of the spectrum, six states have no adjudicated *Brady* violations in the time period of this study: Maine, Montana, Nebraska, New Hampshire, Vermont, and Wyoming. The rest of the states all have at least one adjudicated *Brady* violation.

How should we think about the disproportion on both ends of the spectrum? Perhaps there are more adjudicated violations in the "top" eleven states because there are, in fact, more *Brady* violations. Perhaps there really were no *Brady* violations at all in the "bottom" six states. There could, however, be other explanations. Perhaps the defense bars in those states are particularly proactive (or not) in seeking out suppressed information. Perhaps there are active conviction integrity units in local prosecutors' offices (or a lack thereof) that are identifying and disclosing long-suppressed evidence. Perhaps courts in those jurisdictions are more (or less) receptive to *Brady* claims and thus more (or less) likely to grant relief.

186. This includes all fifty states, plus the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and Guam.

187. The top *Brady*-violating counties in Texas and California are Dallas County (12 adjudicated violations) and Los Angeles County (14 adjudicated violations).

188. This number is almost certainly an undercount of *Brady* violations in New York. New York has held as a matter of state constitutional law that in cases where the defense has made a specific request for the suppressed evidence, the proper prejudice inquiry is whether there is a "reasonable possibility" of a different result. *See* People v. Vilardi, 555 N.E.2d 915, 920 (N.Y. 1990). Because that standard is distinct from *Brady*'s "reasonable probability" standard, I have not included these New York state cases in the study. In cases in which there has not been a specific request for the evidence, however, New York courts use the *Brady*/*Bagley* "reasonable probability" standard, routinely cite *Brady*, and indicate that their rulings are a matter of federal due process. Accordingly, I have included that subset of New York cases in the data set. It may well be that at least some New York cases decided under *Vilardi* would also satisfy the "reasonable probability" standard. Because I cannot be certain, however, they are not included in this study.

FIGURE 1: *BRADY* VIOLATIONS IN STATE CRIMINAL CASES

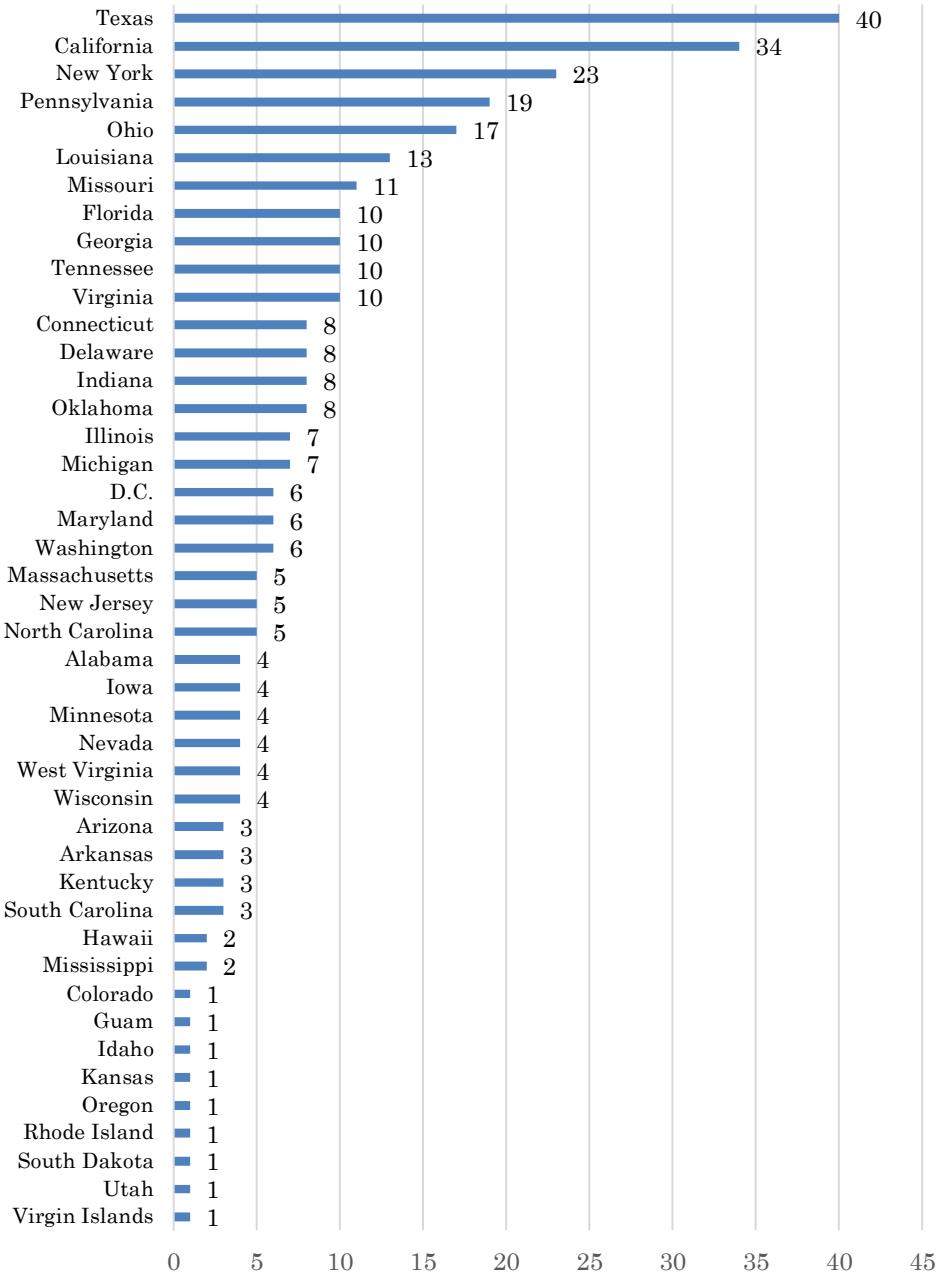
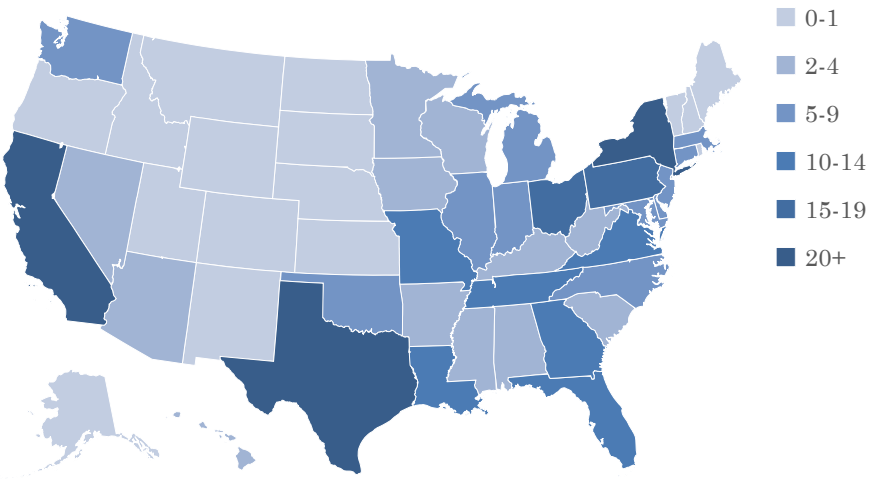
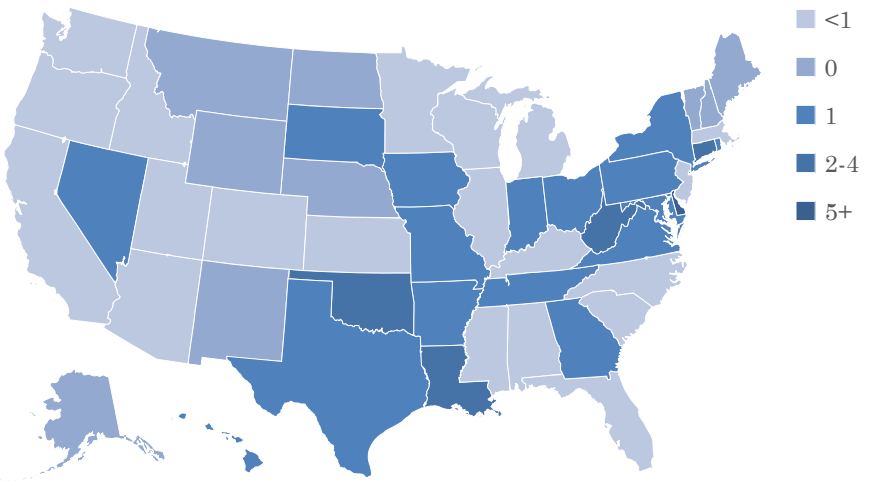


FIGURE 2: MAP OF *BRADY* VIOLATIONS IN STATE CRIMINAL CASES



Adjusting the data to consider the number of *Brady* violations per capita in each state draws attention to different jurisdictions: The top per capita *Brady*-violating states are Delaware, Louisiana, West Virginia, Connecticut, Oklahoma, and the District of Columbia. It is notable that, under either measure, Louisiana stands out as a place that has a notable number of adjudicated *Brady* violations.

FIGURE 3: MAP OF *BRADY* VIOLATIONS IN STATE CRIMINAL CASES PER MILLION RESIDENTS (2024 CENSUS DATA)



States do not violate *Brady*, of course. *Brady* violations are specific to particular local jurisdictions. Looking at state-level data, though, invites a deeper look within the states that host the most *Brady* violators. Within the "top" states, are there particular prosecutors or prosecutors' offices that have been found to violate *Brady* repeatedly?[189] (For example, in Texas, Dallas County has the greatest number of adjudicated *Brady* violations. In California, it is Los Angeles County.) What are the culture and practices surrounding *Brady* compliance that offices use in both the "top" and "bottom" tiers of states? What are the mechanisms by which suppressed evidence has been located in the "top" states? The relatively high (and low) incidence of adjudicated *Brady* violations in a relatively small number of states suggests that these places in particular may be ripe for further study and policy interventions to improve *Brady* compliance.

b. Federal Prosecutions

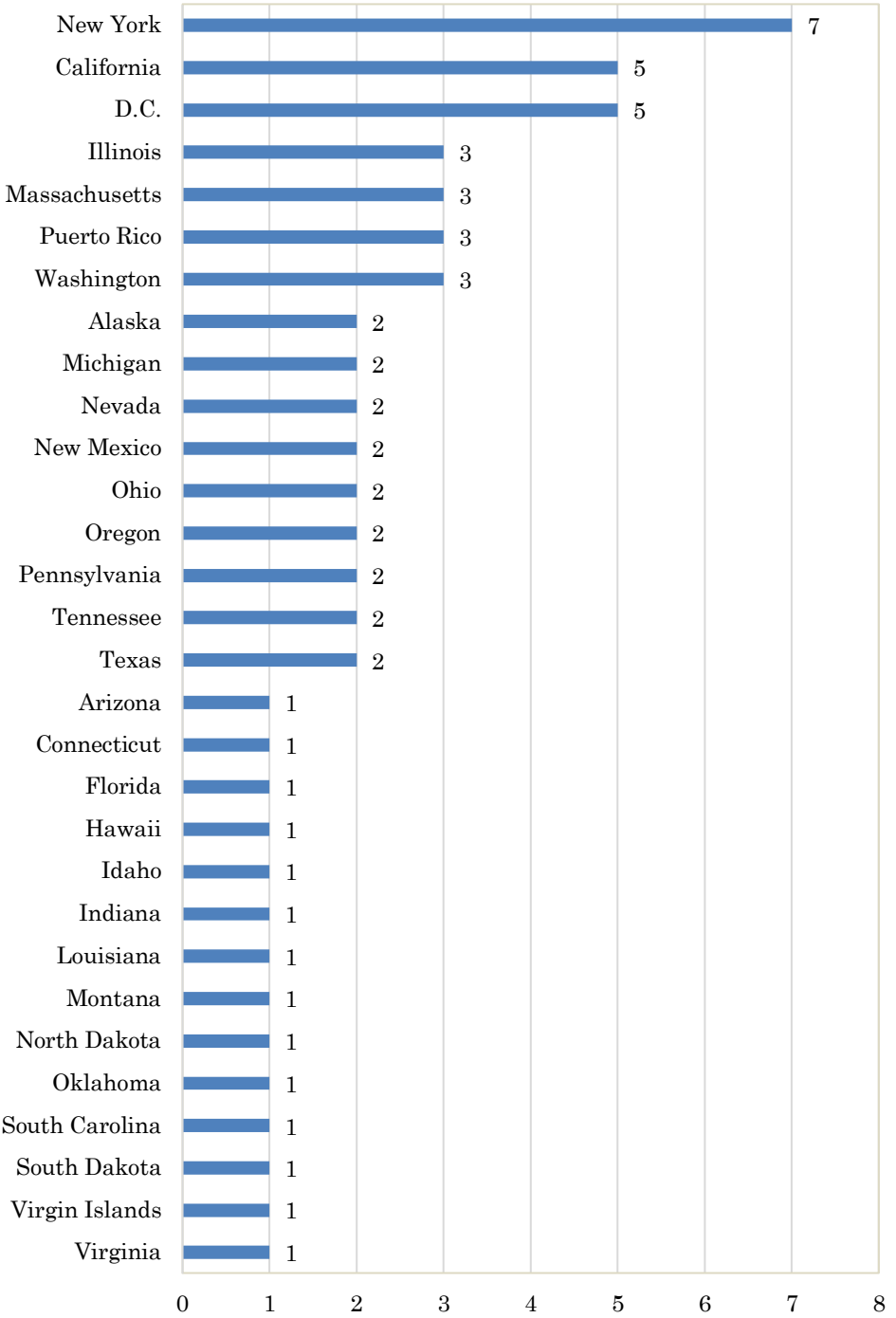
There were sixty-one *Brady* adjudications arising from federal prosecutions over the eighteen-year period studied here. New York (7) had the most, with California (5) and the District of Columbia (5)[190] next in line. These three jurisdictions account for more than one-quarter of *Brady* adjudications for federal crimes. There were no *Brady* adjudications arising from federal prosecutions in twenty-four states.[191] The rest of the states had between one and three *Brady* adjudications.

189. *See* Symposium, *Voices from the Field: An Inter-Professional Approach to Managing Critical Information*, 31 CARDOZO L. REV. 2037, 2069 (2010) (describing how the Dallas County District Attorney's Office went from being the leading source of *Brady* violations to having the first-ever conviction integrity unit and a range of training and compliance programs).

190. While almost all crimes in the District of Columbia are prosecuted by the U.S. Attorney's Office, I have counted as federal crimes those cases prosecuted under the U.S. Code, and as state crimes those cases prosecuted under the D.C. Code.

191. These states are Alabama, Arkansas, Colorado, Delaware, Georgia, Hawaii, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, North Carolina, Rhode Island, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

FIGURE 4: *BRADY* VIOLATIONS IN FEDERAL CRIMINAL CASES



Examining the federal criminal cases from New York, California, and the District of Columbia more closely, it becomes clear that three U.S. attorneys' offices are responsible for almost one-quarter of adjudicated federal *Brady* violations: the Criminal Division of the U.S. Attorney for the District of Columbia (5), the Southern District of New York (5), and the Central District of California (4). As with the discussion of state statistics above, this does not necessarily mean that there are disproportionately more actual *Brady* violations in these districts. These districts contain three major metropolitan areas (Washington, D.C., Manhattan, and Los Angeles), and therefore have heavier caseloads than other jurisdictions. But, also as above, these statistics suggest that these districts may be appropriate places to start to understand the culture of *Brady* compliance.

The rules and guidelines controlling U.S. attorneys' compliance with *Brady* were significantly strengthened in 2009 after the vacation of the felony corruption conviction of Senator Ted Stevens. In that case, an FBI whistleblower revealed a conspiracy between the FBI and federal prosecutors to suppress exculpatory evidence.[192] The Department of Justice responded in 2010 with a series of directives written into the U.S. Attorneys' Manual, instructing federal prosecutors to standardize discovery practice in each federal district, appoint discovery coordinators, provide annual training, and consult with judges in close cases.[193] In 2020, the Due Process Protections Act was signed into law, which required district courts to enter an order confirming the prosecution's obligations under *Brady* and setting out the consequences of noncompliance.[194]

These reforms appear to be making an impact. There have been twenty-two adjudicated *Brady* violations in federal convictions entered in 2011 or later (i.e., after the 2010 reforms)—an average of 1.8 per year.[195] Before the federal reforms, there were thirty-nine *Brady* adjudications over the remaining seven years covered by this study—an average of 5.6 per year. Even though correlation does not prove causation, these numbers at least suggest that the federal reforms have been effective, even if they have not ended *Brady* violations altogether. These reforms may well be an excellent resource for other jurisdictions.

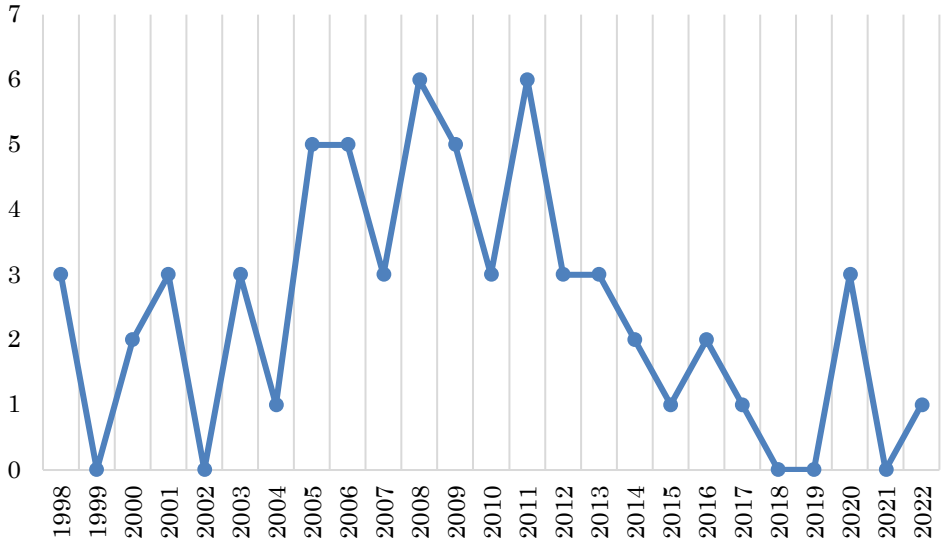
192. *See Prosecution of Senator Ted Stevens*, NAT'L ASS'N OF CRIM. DEF. LAWS. (July 14, 2022), https://www.nacdl.org/criminaldefense.aspx?id=23885 [https://perma.cc/AQY9-YKRZ] (providing overview of prosecution and exoneration of Senator Ted Stevens as well as links to key documents).

193. *See* David E. Roth, Stephen R. Spivack & Daniel P. Golden, *Memo to Prosecutors: DOJ Focuses on Discovery Obligations*, 25 CRIM. JUST. 4, 5–6 (2010) (summarizing post-Stevens case developments).

194. *See* Due Process Protections Act, Pub. L. No. 116-182, § 1, 134 Stat. 894, 894–95 (2020).

195. Of these twenty-two adjudicated suppressions, nine were in "bad faith."

FIGURE 5: *BRADY* VIOLATIONS PER YEAR IN FEDERAL CRIMINAL CASES



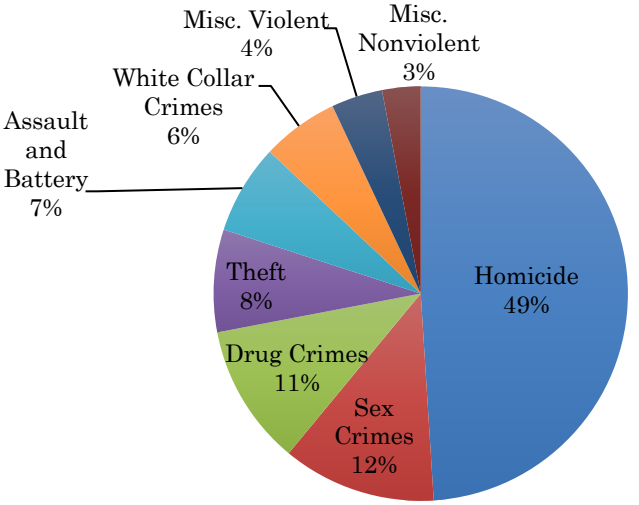
2. In What Types of Cases Is *Brady* Violated?

The government violates *Brady* in virtually every type of criminal case, from misdemeanors like DUIs and selling counterfeit DVDs, to typically nonviolent offenses like perjury, bribery, fraud, theft, and drug crimes, to violent felonies like arson, rape, kidnapping, assault, and terrorism. The vast majority of adjudicated *Brady* violations arise out of felony charges that went to trial, although a small number of misdemeanor cases and felony plea bargains are also represented in the data set.

The largest single category of criminal cases in which *Brady* is violated is homicide. Indeed, almost half of all the adjudicated *Brady* violations studied here occurred in homicide cases (49%), and those violations are equally distributed among the three sentencing categories in homicide prosecutions: death, life in prison, and a term of years. The next most common underlying crimes are sexual assault and sex crimes (12%), drug crimes (11%), and theft crimes (8%).[196]

196. This category includes burglary, robbery, and carjacking.

FIGURE 6: *BRADY* VIOLATIONS BY MOST SERIOUS CRIME CHARGED



What accounts for the high proportion of homicide cases among adjudicated *Brady* violations? Historically, murder cases are more likely to go to trial than other categories of crimes,[197] and thus it makes sense that these cases are overrepresented in the pool of publicly available *Brady* opinions. Also, it is plausible that the government really does violate *Brady* more often in homicide cases. These cases are highly politicized, with high visibility and high stakes. Does the pressure that accompanies homicide cases lead to more *Brady* violations (or "bad faith" *Brady* violations in particular)? If so, it is important to focus reform efforts specifically on those prosecutors and law enforcement officers working on homicide cases, creating new mechanisms to prevent or deter this conduct.

It is also plausible, however, that the high proportion of homicide cases in the data set really speaks to the resources and attention that these cases garner—at least relative to other crimes—from the bar and bench. Postconviction legal representation is more common in homicide cases than in other types of criminal cases. The investigatory resources that often accompany legal representation may lead to the discovery of suppressed evidence, just as the fact of having a lawyer increases the chances of success on postconviction claims. From the perspective of the judiciary, at least with death penalty cases,

197. *See* BRIAN A. REAVES & PHENY Z. SMITH, U.S. DEPT. OF JUST., BUREAU OF JUST. STATS., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 1992, at iv (1995) ("Murder defendants (27%) were the most likely to have their case adjudicated by trial.").

we know that courts regard death as "different"[198] and typically give more scrutiny to these types of cases. Thus, there are many possible explanations for the high proportion of murder cases among adjudicated *Brady* cases.

If the overrepresentation of murder convictions in the data set relative to other crimes signals that postconviction representation and judicial review of *Brady* claims in homicide cases are robust and effective, then the appropriate policy response should be to prioritize increasing resources for investigating and litigating *Brady* claims in other criminal contexts. It would be helpful to consult crime data and assess what categories of crime are under- and overrepresented in the *Brady* data relative to crime numbers generally.

3. What Types of Evidence Are Suppressed?

Just as the range of crimes involving *Brady* violations is wide, so too is the range of evidence that is suppressed. By far, however, the largest category of suppressed evidence is witness statements (27%), which are typically recorded.[199] Prosecutors are the most likely actors to suppress witness statements, followed by law enforcement officers.[200]

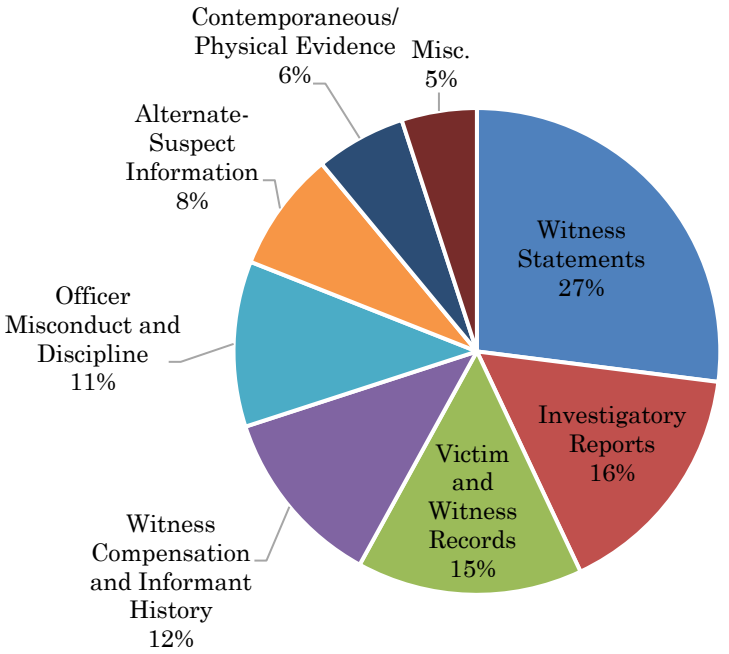
After witness statements, there is a wide range of types of suppressed evidence, including police reports and other expert or agency reports (16% of suppressions combined), prior records about witnesses and victims (15%), promises or compensation to witnesses and witness informant history (12% combined), evidence of in-case investigatory misconduct or police discipline (11%), alternate-suspect information (8%), and contemporaneous recordings and physical evidence (6%).

198. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 276–77 (1972) (Brennan, J. concurring) ("If, however, the infliction of a severe punishment is 'something different from that which is generally done' in such cases . . . there is a substantial likelihood that the State, contrary to the requirements of regularity and fairness embodied in the Clause, is inflicting the punishment arbitrarily.").

199. Recorded witness statements account for 23% of suppressions, and unrecorded witness statements account for 4%.

200. Prosecutors suppress 54% of witness statements, and law enforcement officers suppress 35% of witness statements. Viewed as a whole, prosecutors' offices (line prosecutors, other attorneys, and investigators) suppress 62% of witness statements.

FIGURE 7: *BRADY* VIOLATIONS BY TYPE OF SUPPRESSED EVIDENCE



Courts granting relief on *Brady* typically describe the suppressed evidence and characterize it as either impeachment evidence, exculpatory evidence, or both. Non-exculpatory impeachment evidence is the single largest category of suppressed evidence (45%), followed by evidence that the court viewed as having both impeachment and exculpatory value (34%). Non-impeachment exculpatory evidence is the smallest category (21%). These numbers underscore the importance of *Giglio v. United States*, which expanded the exculpatory-evidence-focused holding of *Brady* to cover disclosure of impeachment evidence.[201] The primary forms of undisclosed impeachment evidence were witness statements, records about witnesses, and information about promises or compensation to witnesses.

Many of these categories of suppressed evidence are umbrella categories that require review and classification of each piece of evidence. For every witness statement, for example, someone must evaluate its materiality and decide whether to disclose it. This process

201. *See, e.g.*, Giglio v. United States, 405 U.S. 150, 154 (1972).

creates the potential for *Brady* error, and therefore it is understandable that witness statements are often suppressed erroneously.

Some categories of evidence, however, are per se material under *Brady*. Promises or compensation to witnesses, for example, is such a category.[202] If they exist, then they must be disclosed. It is quite surprising that failure to disclose such deals represents one of every ten *Brady* violations.[203]

There are sixty-five instances in this study in which the government suppressed the fact of a promise or compensation to a witness.[204] Looking at those cases—which accounted for 860 years in prison—we see that the vast majority of such suppressions are the fault of prosecutors acting in "bad faith." There are many cases, like *Harshman v. Superintendent*, that involve a prosecutor arguing that a witness had no incentive to lie despite the undisclosed existence of a government promise to help the witness in an ongoing criminal case.[205]

Taking a granular look at specific types of *Brady* violations will provide actionable information. For example, if we empower case prosecutors to make these sorts of promises, and if we know we can't rely on them to disclose the offers, how should we rethink the processes here? Who should have the power to make such an offer? Must supervisors be involved? What documentation of such an offer must be created? If policymakers focus on learning lessons from this subset of cases, it could reduce *Brady* violations by 10%. This is a worthy goal.

4. Discovering Suppressed Evidence

The story of how the defendant discovered suppressed evidence is not a necessary part of the *Brady* legal analysis. Thus, only about two-thirds of *Brady* adjudications mention this part of the story, and often only with minimal detail. From that subset of cases, though, we know that defendants learn of suppressed evidence through a wide variety of mechanisms. Sometimes they are simply lucky[206] or are

202. *See id.*

203. Figure 7 above combines witness compensation deals with information regarding a witness's prior work as an informant. The latter is suppressed in about 2% of cases.

204. Across the 386 cases in this study, I tallied 621 separate pieces of evidence that were suppressed. The sixty-five suppressed instances of witness compensation thus constitute about 10% of the overall number of pieces of suppressed evidence.

205. Harshman v. Superintendent, State Corr. Inst. Rockview, 368 F. Supp. 3d 776, 798 (M.D. Pa. 2019).

206. *See, e.g.*, Danforth v. Chapman, 771 S.E.2d 886, 888 (Ga. 2015) (a missing page was found during habeas discovery); State v. Jones, No. 1:13-CV-00132, 2012 WL 2505714, at *1 (N.J. Super. Ct. App. Div. July 2, 2012) (describing that at trial, during cross of detective, defense counsel found *Brady* material in detective's file marked "not for discovery").

approached by witnesses[207] or other actors.[208] Sometimes they become aware of misconduct in an unrelated criminal case and pursue similar claims in their own case.[209] Many times, prosecutors—either during the case or subsequent to it—will disclose the evidence.[210] In recent years, this includes disclosure by conviction integrity units, divisions in some prosecutors' offices that work to identify and remedy wrongful convictions.[211]

The primary story told by the cases in this study, though, is the importance of diligent postconviction investigation. Some defendants are fortunate enough to have lawyers with substantial investigatory resources, as in the case of Debra Jean Milke, whose appellate defense team spent 7,000 hours reviewing case records,[212] and in the case of Norfolk Junior Best, whose postconviction counsel found evidence in the attic of the city hall.[213] Some defendants, operating pro se, did their own investigations or filed Freedom of Information Act requests.[214] Some

207. *See, e.g.*, State *ex rel.* Clemons v. Larkins, 475 S.W.3d 60, 82–84 (Mo. 2015) (en banc) (detailing that a police officer who saw evidence of a coerced confession contacted defense after learning that the state was denying allegations of abuse).

208. *See, e.g.*, Parker v. Herbert, No. 02-CV-0373, 2009 WL 2971575, at *32–34 (W.D.N.Y. May 29, 2009) (a contact told defense counsel about a prior investigation of a key witness).

209. *See, e.g.*, United States v. Kott, 423 F. App'x 736 (9th Cir. 2011) (describing that after the government's misconduct in Senator Ted Stevens's trial was uncovered, defendant made *Brady* motion, and prosecutors reviewed the case and found that evidence was suppressed); *cf.* Shortt v. Roe, 342 F. App'x 331, 332 (9th Cir. 2009) (finding that after a scandal in Los Angeles about lies told by jailhouse informants, a jailhouse witness against defendant confessed that he made up his testimony in exchange for leniency).

210. *See, e.g.*, United States v. McDuffie, 454 F. App'x 624, 737 (9th Cir. 2011) (finding that a prosecutor learned of *Brady* material five days before trial but did not disclose it until direct exam of government witness); People v. Williams, 849 N.E.2d 962, 964 (N.Y. 2006) (stating that a prosecutor's office disclosed disciplinary records of police officer who was sole witness at suppression hearing during trial when defense counsel called that officer to testify); *Ex parte* Chaney, 563 S.W.3d 239, 267 (Tex. Crim. App. 2018) (stating that after the DA's office switched to open-file discovery, prosecutors reviewed files and disclosed exculpatory and impeachment evidence to defense).

211. *See, e.g.*, *Ex parte* Nolley, No. WR–46,177–03, 2018 WL 2126318 (Tex. Crim. App. May 9, 2018); *Ex parte* Nicholson, NOS WR-92 799-1, 2021 WL 5229424 (Tex. Crim. App. Nov. 10, 2021). *See generally Conviction Integrity Unit Best Practices*, INNOCENCE PROJECT (Oct. 15, 2015), https://www.innocenceproject.org/wp-content/uploads/2016/09/Conviction-Integrity-Unit.pdf. [https://perma.cc/QHY2-V279].

212. *See* Milke v. Ryan, 711 F.3d 998, 1018 (9th Cir. 2013) ("Milke was able to discover the court documents detailing Saldate's misconduct only after a team of approximately ten researchers in post-conviction proceedings spent nearly 7000 hours sifting through court records.").

213. *See* State v. Best, 852 S.E.2d 191, 193 (N.C. 2020) ("Later that year, postconviction counsel located additional evidence in the attic of Whiteville City Hall.").

214. *See* Carmon v. Connecticut, NNH CV20-610792, 2022 WL 17423683, at *16 (Conn. Super. Ct. Nov. 30, 2022) (describing that the defendant filed FOIA request pro se and turned over records to postconviction counsel); People v. Ulett, 129 N.E.3d 909, 912 (2d Cir. 2019) (stating that the defendant filed FOIA request and received *Brady* information from prosecutor); Drake v. Portuondo, 553 F.3d 230, 237 (2d Cir. 2009) (defendant did research from prison about witness's background).

had families investigating on their behalf.[215] While the expectation is that prosecutors will disclose *Brady* material at any point at which they become aware of it, the reality is that defendants must continue to search and press the issue. As with so many elements of criminal defense generally, and postconviction litigation specifically, investigation resources and the assistance of counsel are vitally important in identifying and litigating *Brady* claims.

C. Brady *Suppressors: Who and Why?*

Which government actors frequently suppress evidence, and why do they do so in any particular case? Answers to these questions may be constitutionally irrelevant,[216] but on a systemic level, they are vitally important because they provide focus for efforts to enhance and incentivize compliance with *Brady* obligations. Police officers and prosecutors may have different types of motivations for disclosing or suppressing evidence, and they are subject to different sorts of incentives that inform *Brady* compliance. The way to deal with a prosecutor or law enforcement officer who engages in an intentional plot to hide evidence in order to secure a conviction differs from how we would deal with a police officer who misapprehends his duty to disclose a witness statement, a prosecutor who incorrectly assesses the relevance of a piece of evidence, or a prosecutor's office or police department that has an ineffective internal record-keeping system.

1. Who Suppresses *Brady* Material?

This Subsection describes the identity (i.e., position) of the suppressor in the cases in which that information can be ascertained. Suppression here means that a government official has actual knowledge or possession of exculpatory or impeachment evidence and fails to give it to the line prosecutor[217] or disclose it to the defense. Suppressors fall into five main categories: the prosecutor in the case at bar, others within the prosecutor's office (i.e., attorneys and investigators), law enforcement officers (i.e., police officers and detectives), forensic experts (i.e., crime-lab technicians, medical examiners, and coroners), and trial court judges (who sometimes review

215. *See* People v. Christian, 987 N.W.2d 29, 31 (Mich. 2022) (stating that the defendant's family filed Michigan FOIA request years after trial and received *Brady* material).

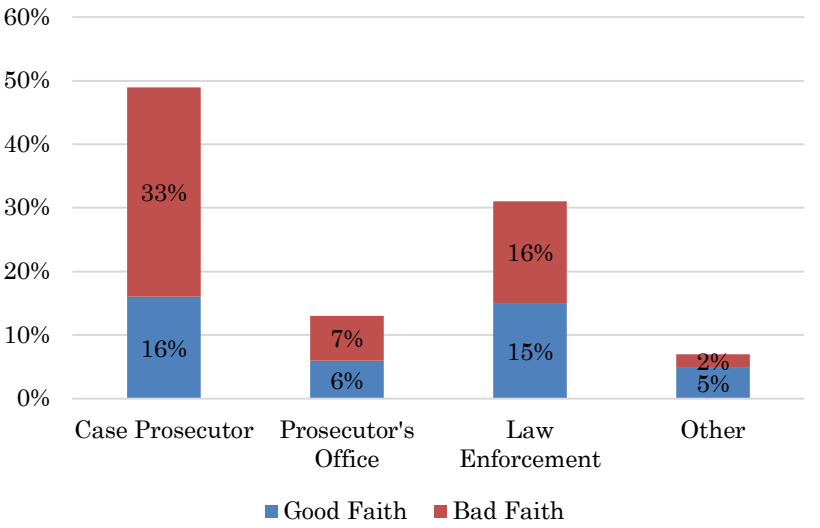
216. *See supra* notes 22, 32 and accompanying text.

217. I use "line prosecutor" and "case prosecutor" interchangeably throughout this Article.

evidence in camera and erroneously decide not to disclose it to the defense).[218]

This Subsection separates out *Brady* violations in state and federal criminal cases. To start, though, Figure 8 is an overall breakdown of suppressors across both types of *Brady* cases.[219] We see that case prosecutors are the most common suppressor, suppressing evidence in 49% of cases, followed by police officers in 31% of cases. And we see that, all told, "bad faith" suppressions outnumber "good faith" suppressions. However, law enforcement officers act in "good faith" almost as often as they act in "bad faith."

FIGURE 8: SUPPRESSORS IN ALL CASES (STATE AND FEDERAL CRIMES)



a. State Prosecutions

Unsurprisingly, the most common suppressor of *Brady* material is the prosecutor in the case at bar. As the person responsible for collecting and disclosing *Brady* material to the defense, the prosecutor has the greatest access to and discretion over this category of evidence.

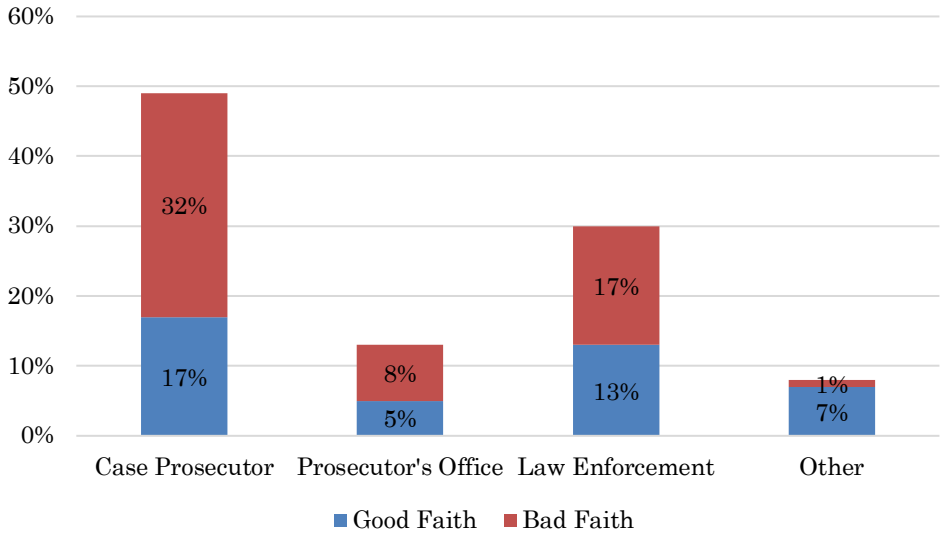
218. Sometimes the information is known to only one actor in one category; sometimes it is known to actors in more than one category. If the case prosecutor knows about the material, I have deemed that person the suppressor even if others know about it as well, because it is ultimately the prosecutor's duty to produce *Brady* material in any criminal case.

219. As explained in note 184, there are 407 total suppressors across the 386 cases in this study. However, I was only able to ascertain both the identity and motivation of 284. The statistics in this Section are based on this pool of 284 suppressors.

Thus, the prosecutor in the case at bar, acting alone, is the suppressor in almost half (49%) of cases. When you add in other attorneys and investigators within the prosecutor's office, the prosecutor's office as a whole is responsible for suppression in 62% of cases.[220]

The most common *Brady* suppressors other than prosecutors are law enforcement agents, who are the suppressors in 30% of cases. Beyond that, forensic experts suppress in 4% of cases.[221] Trial courts also suppress in 4% of cases, typically by viewing the evidence in camera and withholding it from the defense.

FIGURE 9: SUPPRESSORS IN STATE CRIMINAL CASES



In some ways, the most surprising thing about these statistics is the frequency with which someone *other* than the line prosecutor is the suppressor. In 51% of successful *Brady* claims, *Brady* material never even made its way to the line prosecutor to be disclosed to the defense. Indeed, in 13% of cases, someone in the prosecutor's office itself—other attorneys or investigators—had the information and failed to give it to the line prosecutor. In light of the clearly established rule that line prosecutors bear the ultimate responsibility for collecting and disclosing *Brady* material, these glaring statistics strongly suggest that the information pipeline is not working as it should. They also point toward the evidence-collection pipeline as a possible focus for reform

220. Taken alone, attorneys in the prosecutor's office other than the line prosecutor are suppressors in 7% of cases, and prosecution investigators are suppressors in 6% of cases.

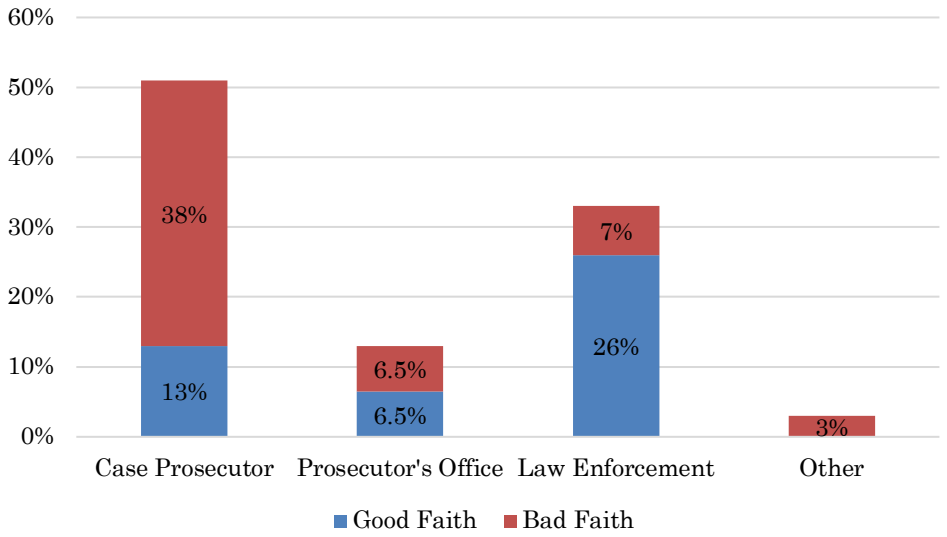
221. Medical examiners or coroners suppress in 3% of cases, and forensic experts in 1%.

efforts. Improving ways to get potential *Brady* evidence to the prosecutor for evaluation and disclosure could make a meaningful difference in overall *Brady* compliance.

b. Federal Prosecutions

While the total number of federal prosecutions in the study is relatively small, there are forty-five suppressors whose identity and motivation we can evaluate. Assistant U.S. attorneys ("AUSAs"), the federal line prosecutors, are the suppressors 51% of the time. When you add in other AUSAs and investigators, the U.S. attorney's office as a whole is the suppressor 64% of the time. Federal law enforcement—typically the FBI—is the suppressor 33% of the time. In 3% of cases, a medical examiner or coroner is the suppressor.[222] Thus, as with state prosecutions in roughly equal measure, the line prosecutor and law enforcement agents are the two biggest categories of suppressors.

FIGURE 10: SUPPRESSORS IN FEDERAL CRIMINAL CASES



2. Why Do They Suppress *Brady* Evidence?

Identifying and separating out cases where the facts strongly support that intentional constitutional misconduct—"bad faith"—has

222. There are no federal criminal cases involving suppression by any other type of forensic expert or by a trial court.

occurred serves multiple purposes. First, the data confirm that a majority of *Brady* cases involve intentional constitutional violations. Further, it illustrates that existing *Brady* mechanisms have proven to be inadequate to prevent intentional misconduct. By drawing attention to specific cases, jurisdictions, and government officials, it invites further study about where the risks of misconduct arise and about what additional measures might be needed to deter or circumvent "bad faith" suppressors. Presumably, the strategies for doing so are distinct from the methods for remedying "good faith" *Brady* violations.

Identifying and separating out "good faith" suppressions also serves multiple purposes. First, it reveals that a substantial minority of *Brady* violations are the product of mistake. Second, it invites a creative response to these unintentional constitutional violations. This category of cases does not necessarily warrant the same types of interventions as intentional *Brady* violations. Mistakes can be fixed, and discretion can be channeled, in a way that may enhance compliance with constitutional obligations. Indeed, this is a category of cases that invites further study and that might warrant greater priority in thinking about how to promote compliance with *Brady*.

a. State Prosecutions

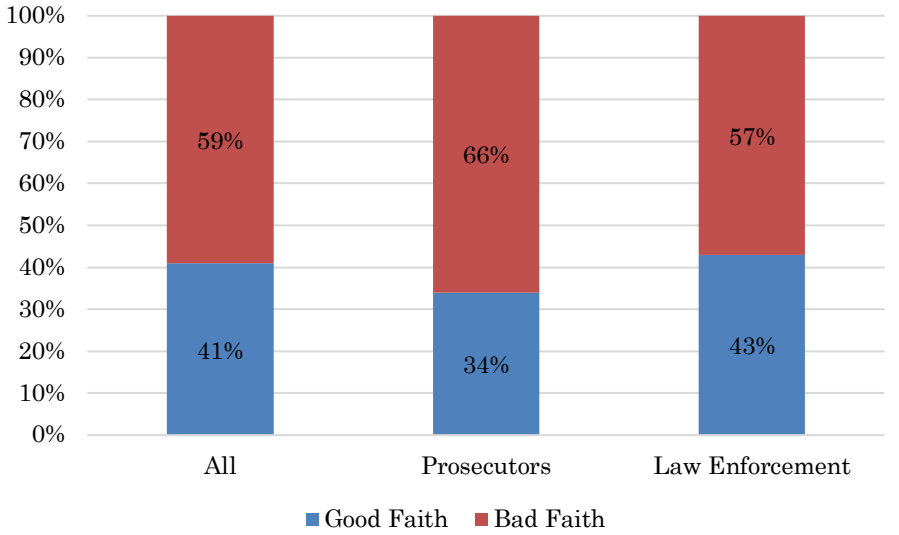
i. Overall

At first glance, the news is not good. Of all the suppressors in state criminal cases whose motives I've been able to assess, a disconcerting 59% acted in "bad faith." In other words, when a government official failed to disclose evidence, the odds are that she intentionally violated the Constitution. Sixty years into the *Brady* rule, this is simply unacceptable.

Focusing on cases in which the case prosecutor suppresses evidence, the results are even more upsetting: The prosecutor who violates *Brady* does so in "bad faith" in two of every three cases—66% of the time.[223] When state law enforcement officers suppress *Brady* evidence, they act in "bad faith" 57% of the time.

223. Within the prosecutor's office as a whole, when prosecutors suppress evidence, they act in "bad faith" 59% of the time, and when prosecution investigators suppress, they act in "bad faith" 57% of the time.

FIGURE 11: SUPPRESSION MOTIVE IN STATE CRIMINAL CASES

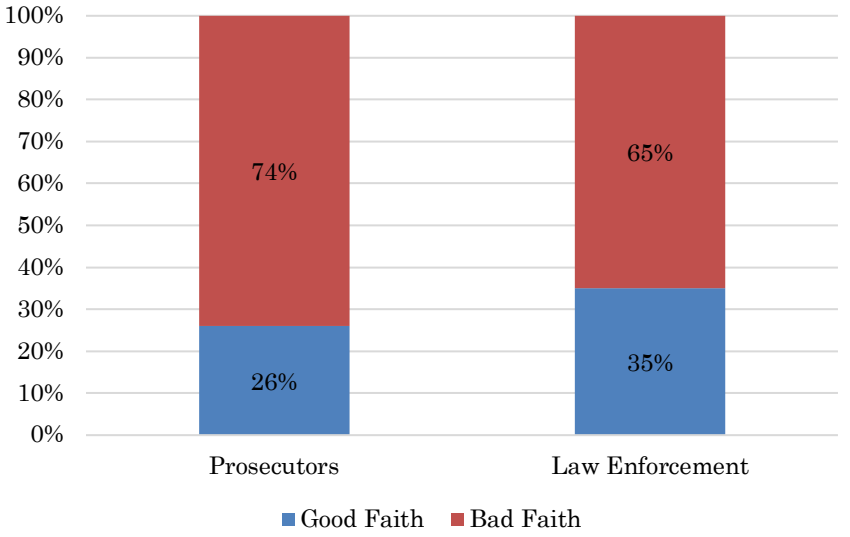


ii. Homicide Cases

It gets worse. When we look at state homicide cases (which, as discussed above, give rise to almost half of *Brady* violations),[224] we see the highest rates of intentional misconduct of any category of crime, particularly by prosecutors. Prosecutors are the largest single category of suppressors, followed by law enforcement. When the prosecutor is the suppressor in a homicide case (which she is in 59% of cases—ten points above average), she acts in "bad faith" 74% of the time. When a law enforcement officer suppresses *Brady* evidence in a homicide case (which she does in 22% of cases—eight points *below* average), it is done in "bad faith" 65% of the time. In other words, in homicide cases, *Brady* misconduct is particularly rampant and insidious.

224. There are two homicide cases prosecuted under federal law in the data set. In both cases, the prosecutor suppressed evidence apparently in "bad faith." The statistics here focus on homicide cases prosecuted under state law. There are 187 state homicide cases, with a total of 202 suppressors in the data set. Of those 202, I have been able to assess the motivation of 138 suppressors. The conduct of those 138 forms the basis for the findings in this Section.

FIGURE 12: SUPPRESSION MOTIVE IN STATE HOMICIDE CASES



This statistic is disappointing but not really surprising. One would think that intentional suppression might be more common in homicide cases where the stakes are high and there is a high level of pretrial buy-in among government actors regarding the accused's guilt. Similarly, one would think that mistaken suppressions would be less likely in homicide cases because there is every incentive to "dot the 'i's and cross the 't's." As experience has shown, current enforcement mechanisms are not strong and certainly not adequate to prevent or deter intentional misconduct.

Consider Tyler Thomas, convicted of malice murder and sentenced to life in prison.[225] After his conviction, he learned that the prosecutor on his case, Fulton County Assistant District Attorney Adam Abbate, had offered a key witness "help" with a pending felony charge if she testified against Thomas.[226] Abbate did not disclose that agreement to the defense, but a month and a half after the trial, the Fulton County District Attorney's Office requested a nolle prosequi in the witness's felony case, citing her testimony against Thomas.[227] Abbate repeatedly denied that he had made any deal with the witness,

225. State v. Thomas, 858 S.E.2d 52, 54 n.1 (Ga. 2021).

226. *See id.* at 57–60 (discussing facts of Abbate's conversation with the witness).

227. *Id.* at 58.

and the state court found him not to be credible.[228] The Georgia Supreme Court affirmed the *Brady* ruling in Thomas's favor and granted him a new trial.[229] Abbate has since been promoted to Chief Deputy District Attorney of the Major Crimes Division.[230]

What would have averted this *Brady* violation? It is hard to imagine, since the prosecutor and witness alone knew of their agreement, of which there was no documentation before trial. What would deter a similar *Brady* violation in the future? While it is not known publicly what, if any, consequences Abbate faced within the Fulton County prosecutor's office after the Thomas case, Abbate's career trajectory suggests that the court's ruling finding him not to be credible was not an impediment to his long-term career growth.[231] The type of *Brady* violation we see in the Thomas case, one that involves undocumented evidence suppressed in "bad faith" in a homicide case, is particularly difficult to prevent. And where there is no political will to punish, potential sanctions have no deterrent effect.

iii. Non-homicide Cases

In non-homicide cases brought under state law,[232] the *Brady* data flips entirely: Law enforcement is the primary suppressor (41% of non-homicide cases), followed by prosecutors in 33% of cases. When law enforcement officers suppress *Brady* material in non-homicide cases, they do so in "good faith" 51% of the time. When prosecutors suppress, they do so in "good faith" 52% of the time. Thus, homing in on non-homicide cases—also half of all *Brady* cases—we learn that the biggest category of *Brady* violations is "good faith" *Brady* error by law enforcement. Strategies to deal with this category of *Brady* error will be quite distinct and warrant separate attention and policymaking.

---

228. *Id.* I counted this case as "probably bad faith," given the prosecutor's repeated denials and the state court's specific ruling that his testimony contradicted the evidence and was not credible.

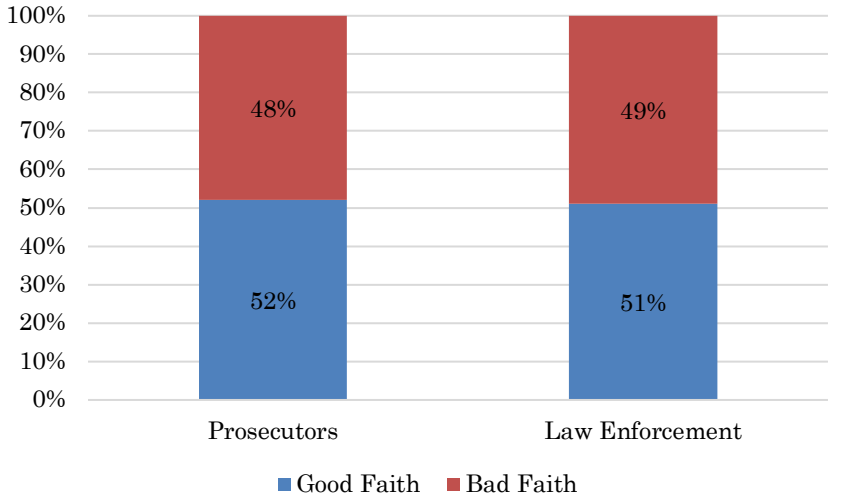
229. *Id.* at 62–63. At the time this Article went to press, Thomas's retrial was still pending. *See* Thomas v. State, 902 S.E.2d 566 (Ga. 2024) (ruling on Thomas's application for interlocutory review, which was filed after remand for new trial regarding suppression of evidence in retrial). There were no further public reports about whether Thomas's retrial had occurred.

230. *Major Crimes Division*, FULTON COUNTY, https://fultoncountyga.gov/inside-fulton-county/fulton-county-departments/district-attorney/da-executive-team/major-crimes-division (last visited Jan. 10, 2025) [https://perma.cc/MH2L-4JNT].

231. It would be very illuminating to learn from prosecutors if there are internal consequences for *Brady* violations that are effective and yet do not derail a person's career, such as internal processes that monitor subsequent cases to ensure *Brady* compliance. Such consequences would in many ways be ideal.

232. There are one hundred suppressors in state non-homicide cases whose motivation I have been able to assess. Their conduct forms the basis for the findings in this Section.

FIGURE 13: SUPPRESSION MOTIVE IN STATE NON-HOMICIDE CASES



Consider Clinton Turner, who spent sixteen years in prison for robbery before his conviction was overturned on *Brady* grounds.[233] At trial, the victim (the only source of evidence that a crime had been committed) testified falsely that he did not have a criminal record.[234] Despite a defense request for the witness's criminal records, the case prosecutor never ran a rap sheet because the victim had denied having any criminal record and state law did not require prosecutors to run rap sheets for all witnesses.[235] A "modest effort" would have revealed the victim's record, but the prosecutor was "insufficiently diligent" in pursuing the issue of the victim's criminal record.[236]

What would have averted this *Brady* violation? How do you solve a problem like a naive and overworked prosecutor? A state law requiring prosecutors to run and disclose all witnesses' rap sheets? Resources within the prosecutor's office to make such work routine and to take it off the plate of line prosecutors? Mistakes like this are preventable. There may well be systemic reforms that could prevent future, similar *Brady* errors.

233. *See* Turner v. Schriver, 327 F. Supp. 2d 174, 185–87 (E.D.N.Y. 2004) (vacating 1988 conviction for robbery and grand larceny).

234. *See id.* at 177–78 (recounting witness's testimony), 186 (noting that perjured testimony was presented to the jury).

235. *Id.* at 180–81.

236. *Id.* at 185.

William Serrano was convicted of home invasion in 2008 and sentenced to twenty to twenty-two years in prison.[237] Serrano and the purported victim presented very different stories at trial, with the victim claiming home invasion, and Serrano testifying that the victim had assaulted him during the course of a marijuana sale.[238] An injured Serrano called 911 and, before trial, sought the recording of that call to bolster his story.[239] The Worcester, Massachusetts Police Department could not find a record of it and sent an officer to testify that there was no such call.[240] The prosecutor used the absence of the recording to question Serrano's credibility.[241]

After the trial, Serrano made a public records request, and the recording of the 911 call was found.[242] Serrano pursued a *Brady* claim. A state court denied relief, finding that the police department did not intentionally suppress the 911 call and that the recording was not exculpatory.[243] In 2018, the federal habeas court found that the call was indeed exculpatory and that it was material because it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[244] After a decade in prison, Serrano subsequently pled guilty and agreed to a sentence of time served.[245]

What would have averted this *Brady* violation? While only two of the 386 *Brady* violations in this study involved 911 records, many more involved the suppression of other types of recordings in the government's possession. However genuine the police department's mistake was, the fact that a standard public records request uncovered the 911 recording indicates that the recording was not hard to find. Could the City of Worcester change its protocol for how 911 records are stored and searched? Could such a protocol cover other types of recordings as well? Could that protocol be implemented in other jurisdictions? Again, dealing with the category of "good faith"

237. Serrano v. Medeiros, No. CV 16-11808-NMG, 2018 WL 2170322, at *1 (D. Mass. May 9, 2018).

238. *Id.*

239. *See id.* A week after the incident, Serrano went to the hospital for his injuries, learned that a warrant was out for his arrest, and called 911 to self-surrender; a police officer then came to the hospital to speak with Serrano. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* at *2.

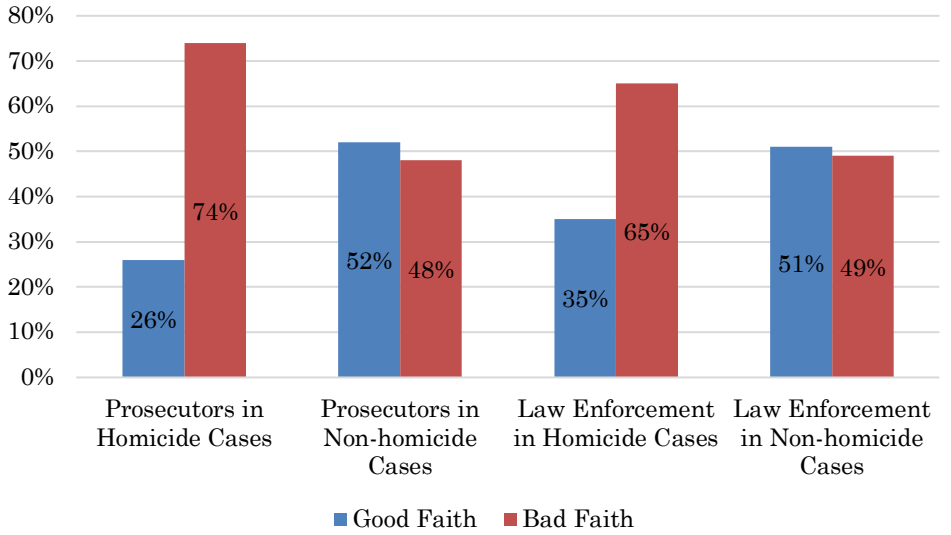
243. *Id.* at *3.

244. *Id.* at *4 (citing Strickler v. Greene, 527 U.S. 263, 291 (1999)).

245. Gary V. Murray, *Worcester Man Sentenced to Time Served for 2007 Home Invasion*, TELEGRAM & GAZETTE (Aug. 1, 2018, 4:30 PM), https://www.telegram.com/story/news/local/worcester/2018/08/01/worcester-man-sentenced-to-time-served-for-2007-home-invasion/11077493007/ [https://perma.cc/7PZS-3E8L].

suppressions in non-homicide cases, there are both incentives and potential mechanisms for systemic change. A granular understanding of *Brady* violations, like this study provides, can lead to informed and effective policymaking.

FIGURE 14: COMPARING SUPPRESSORS AND MOTIVES IN STATE HOMICIDE AND NON-HOMICIDE CASES



iv. Reflections

Despite these dreary findings, it is both possible and important to posit a "glass half full" interpretation of the same numbers. Overall, even though there are high rates of deliberate suppression in violation of *Brady*, there are significant numbers of "good faith" suppression as well. In state criminal prosecutions, 41% of all suppressions are "good faith" suppressions.[246]

Who is suppressing evidence "in good faith"? Typically, not the prosecutor. Indeed, a surprising 61% of all "good faith" suppressions are done by actors *other* than the case prosecutor, such as law enforcement, other attorneys and investigators in the prosecutor's office, and other experts (e.g., forensic, medical) working on the case. When a prosecutor suppresses, she does so in "good faith" in 34% of cases. When a law enforcement officer suppresses, it is in "good faith" in 43% of cases. In non-homicide cases, "good faith" suppressions are even more prevalent.

246. Across all cases in this study, 42% of suppressors act in error.

Imagine if we expanded *Brady* reform efforts to include eradicating, or at least reducing, these "good faith," erroneous suppressions in non-homicide cases. This might substantially enhance *Brady* compliance by fixing mistakes or creating systems that work around and therefore avoid human error. This is not easy work: *Brady* errors are myriad and complex. But the data point us in an important direction and invite more detailed study of precisely what errors are happening. This increased knowledge has the potential to yield responsive, targeted reforms.

Overall, the data confirm that the number of "bad faith" *Brady* violations is unacceptably high and requires continued, sustained attention from judges, legislators, and policymakers within prosecutors' offices and law enforcement departments. There are many tools that could be immediately deployed to disincentivize *Brady* violations and hold *Brady* violators accountable.[247] There are legislative proposals that, if enacted, could lead to greater prosecutorial accountability.[248] My hope is that the findings of this study re-emphasize the need for such reforms.

We know, however, that there are strong headwinds.[249] In addition to seeking to eradicate "bad faith" *Brady* violations, this study suggests that there is an opportunity also to focus on unintentional *Brady* violations, aiming to understand them better and respond with creative, informed policymaking. *Brady* violations are constitutional violations, no matter the motive behind them. The full range of *Brady* violations thus deserves our concerted attention.

b. Federal Prosecutions

As noted above, there are only forty-five suppressors in federal prosecutions whose identity and motivation we can evaluate. When an assistant U.S. attorney on a case suppresses evidence, she is intentionally violating the Constitution a shocking 74% of the time. Since the Justice Department's 2010 reforms after the Ted Stevens prosecution, there appears to have been a reduction in "bad faith" violations. Before that point, there was an average of 1.7 "bad faith"

247. *See supra* notes 103–111 and accompanying text (discussing possibility of civil and criminal liability and bar sanctions).

248. *See, e.g.*, Murray et al., *supra* note 104, at 1145–46 (proposing a statutory tort action against prosecutors who purposely, knowingly, or recklessly withhold information from the defense while believing that the evidence is exculpatory and material, or unreasonably determine that the evidence is not material). With respect to law enforcement officers who violate *Brady* in "bad faith," there could be a push for greater criminal or civil liability under federal law.

249. *See supra* notes 103–111 and accompanying text (discussing infrequency of civil and criminal liability and bar sanctions).

Brady violations per year. Since then, there is an average of 0.8 "bad faith" violations per year.

While the behavior of assistant U.S. attorneys over time has been notably more problematic than that of their state and local counterparts, the behavior of federal law enforcement officers is substantially better than their state and local counterparts. When federal law enforcement officers suppress evidence, they act in "bad faith" only 20% of the time. This means that federal law enforcement has the highest rate of "good faith" *Brady* violations of any category of actor in any type of case (80%). The category of "federal law enforcement" includes not only the FBI but other agencies like the Drug Enforcement Administration and U.S. Immigration and Customs Enforcement.

It is important to note that the actual numbers of *Brady* violations caused by federal law enforcement are low (fifteen total, twelve of which were in "good faith"). Still, these statistics suggest that federal law enforcement might be a model for some *Brady* best practices and could be fertile ground to even further enhance *Brady* compliance.

D. Judicial Enforcement of Brady

In the *Brady* cases studied here for which convictions were entered,[250] defendants spent an average of 10.4 years in prison after their convictions and up to the time of the final resolution of their claims. Those convicted of state crimes in violation of *Brady* averaged 11.8 years in prison. Under either calculation, remarkably, this is longer than the 9.1 years that the average exoneree spends in prison.[251] This illuminates how particularly insidious *Brady* violations are. Suppressing any evidence is damaging because it not only denies the trier of fact full information but also necessarily delays a full and fair proceeding by the amount of time it takes to uncover and assess the information. Suppressing *material* evidence is not just damaging but unconstitutional, because material evidence is, by definition, evidence

250. One would not usually expect *Brady* to apply prior to conviction, as the materiality test requires a court to find a "reasonable probability" of a different result had the evidence been disclosed. *See* United States v. Bagley, 473 U.S. 667, 682 (1985). However, a small number of *Brady* claims are raised and decided prior to conviction through motions for a mistrial and/or for dismissal of the indictment. *See, e.g.*, State v. Williams, 660 S.E.2d 189, 190 (N.C. Ct. App. 2008); State v. Herrera, 866 So. 2d 151, 152 (Fla. Dist. Ct. App. 2004). There are twenty-three such cases in the data set compiled for this Article.

251. NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (last visited Jan. 10, 2025) [https://perma.cc/A5JB-TJPT].

that undermines the confidence in a conviction.[252] The sheer amount of time it takes to identify and favorably resolve the average *Brady* claim confirms the importance that our criminal justice system must place on prompt and accurate *Brady* compliance.

Keeping in mind the average prison time caused by a *Brady* violation, it is illuminating to consider the range of procedural mechanisms that defendants used to raise their *Brady* claims, and the forum and procedural posture in which a court finally granted relief. This Section will focus on *Brady* claims arising from state criminal cases, as federal crimes are a small proportion of the overall data set and always remain in federal court.

1. What Forum?

One finding deserves to be highlighted up front: State courts are doing the bulk of the work in remedying *Brady* violations, granting relief in 71% of the 325 *Brady* cases that arise from state prosecutions.[253] Federal courts, generally using the writ of habeas corpus, granted relief in 29% of state *Brady* cases.

State courts are thus the primary enforcers of the due process right articulated in *Brady* and its progeny and deserve praise for that role. In light of the general debate regarding parity between state and federal courts,[254] the effectiveness of state courts in promoting compliance with the constitutional *Brady* rule is an important fact that should not be overlooked. State courts deserve the resources to continue to do this job well. As we consider how to enhance *Brady* compliance, state judges will be valuable partners in light of their experience and expertise in adjudicating these claims.

A closer examination of the cases in which federal courts are vindicating *Brady*, however, yields interesting insights. In cases where the suppression was in "good faith," state courts were active in providing relief (in an above-average 76% of cases), and federal courts were the successful forum in 24% of cases. Where the suppression was in "bad faith," however, state courts granted relief in a below-average 65% of cases, and defendants found success in federal courts in 35% of cases. This notable difference in federal court activity points to an

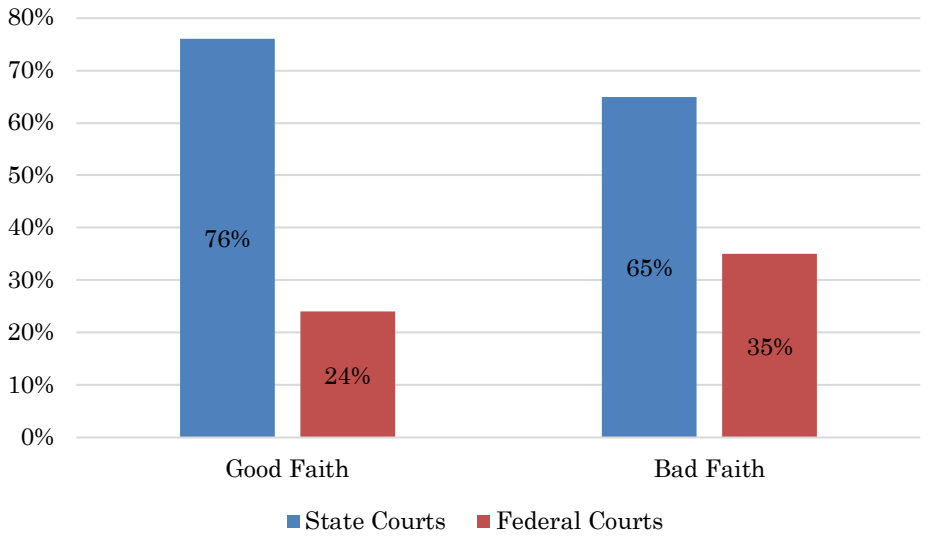
252. *See Bagley*, 473 U.S. at 678 (explaining that a "reasonable probability" of a different result is shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial").

253. Looking at the entire set of 386 cases, state courts grant relief in 60% of all *Brady* cases.

254. *See, e.g.*, Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing that federal courts are institutionally superior to state courts for handling federal constitutional claims).

interesting, and somewhat counterintuitive, fact: State courts grant *Brady* relief in significantly fewer cases where there appears to have been intentional misconduct and suppression of evidence. One would think that such misconduct would provide a more clear-cut case for early judicial intervention, and yet these cases are taking longer and moving to federal court before a final affirmative resolution of the *Brady* claim.

FIGURE 15: FORUM FOR REMEDIES IN STATE CRIMINAL CASES



What might account for the outsized role of federal courts in granting *Brady* relief in cases involving intentional suppression? Is this a product of state political dynamics that makes state court judges reluctant to call out other political actors within the state? Are federal courts more sensitive to claims involving "bad faith"? Even if they are, the constraint on federal habeas courts—that they may only displace a state court merits decision when that decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"[255]—is stringent and substantial. Given this constraint, the uptick of activity of federal courts in this arena is even more surprising.

255. 28 U.S.C. § 2254(d)(1); *see* Williams v. Taylor, 529 U.S. 362, 379 (2000) (setting out standard of review under § 2254(d)(1)); Larry Yackle, *Federal Habeas Corpus in a Nutshell*, 28 HUM. RTS. 7, 8 (2001) ("[T]he federal court can save the prisoner from execution only if the state court decision against the prisoner was not only wrong but unreasonably wrong.").

Whatever the explanation, it is clear that federal courts are doing important work, particularly in the subset of *Brady* cases involving "bad faith" suppression. While a defendant might wait a considerable time to receive federal relief on a *Brady* claim, federal courts are providing an important backstop in these types of cases.

2. What Procedural Posture?

Brady challenges arise and succeed in all sorts of procedural postures, from pre-, mid-, and posttrial motions to postconviction challenges. Over one-third of all adjudicated *Brady* violations in state criminal cases are resolved by conclusion of direct appeal (35%). For those defendants, the average time from conviction to final *Brady* resolution is 4.5 years.[256]

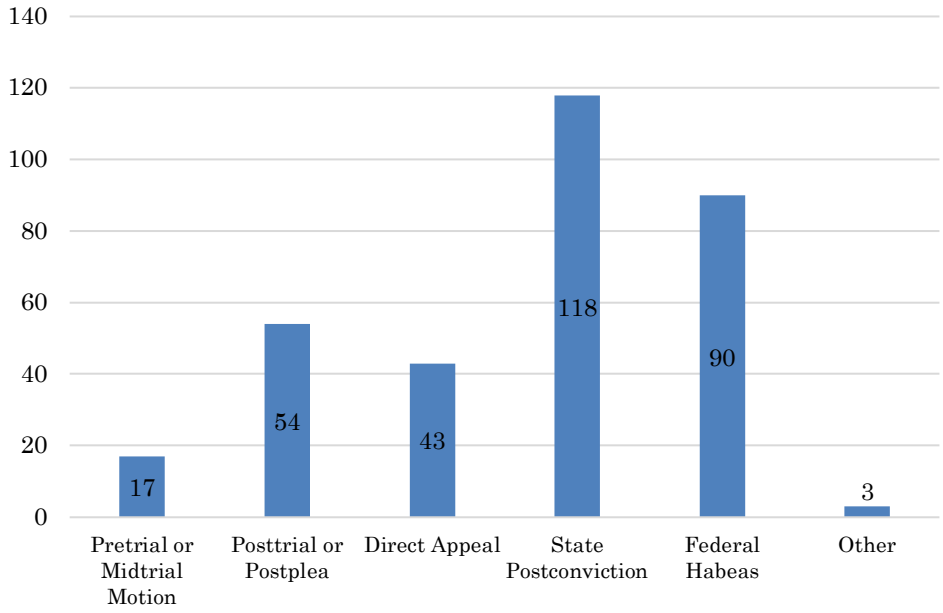
Roughly two-thirds of successful *Brady* adjudications in state criminal cases are rendered in state postconviction relief (36%)[257] and federal habeas relief (28%)—the two most common procedural postures for final, favorable *Brady* rulings. As noted above, the average wait for a state defendant to receive *Brady* relief is 11.8 years.[258] This now makes sense, as postconviction relief is the most temporally removed from the conviction. Indeed, those who receive *Brady* relief in postconviction proceedings fare worse than the average defendant: Those who won on *Brady* during state postconviction relief spent, on average, 13.9 years in prison. Those who received federal habeas relief spent, on average, 17.2 years in prison. These long waits for relief emphasize the importance of postconviction relief generally as a procedural mechanism, but they also point to the unique harm of extended incarceration that flows from the suppression of evidence.

256. This number excludes the fifteen defendants who successfully raised a pre- or midtrial *Brady* motion.

257. This statistic includes relief under state writs of coram nobis, but the vast majority of decisions were rendered in state postconviction proceedings.

258. Of the *Brady* adjudications that occurred after the entry of conviction, direct appeal was, unsurprisingly, the most efficient, leading to an average of 2.9 years from conviction to entry of the final *Brady* order.

FIGURE 16: PROCEDURAL POSTURE OF STATE CRIMINAL CASES AT FINAL RULING GRANTING RELIEF ON *BRADY* VIOLATION



3. A Tale of Two States: Texas and Louisiana

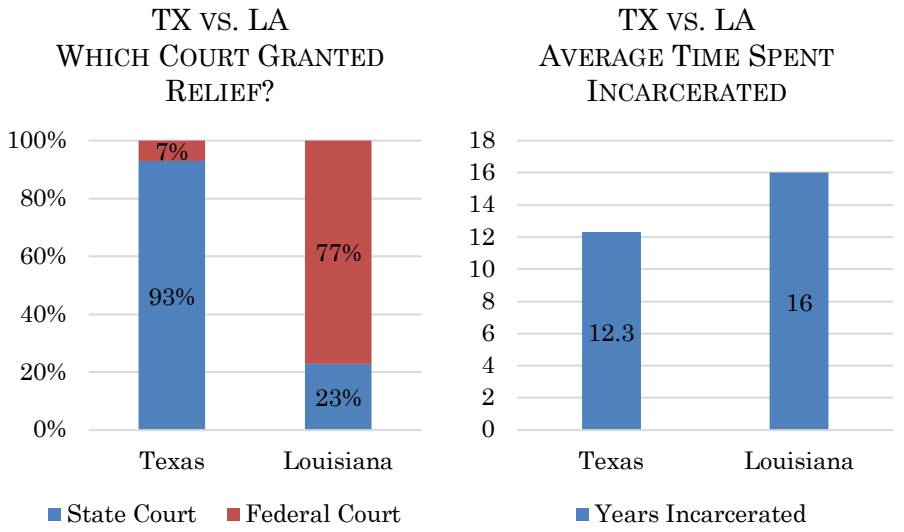
In some states, state courts are doing the vast bulk of the work on *Brady* claims. Texas, the state with the highest number of successful *Brady* adjudications, is the most notable in this regard.[259] In the period of this study, the Texas state courts provided relief in 93% of all successful *Brady* cases (37 of 40). The Texas courts granted relief in every case where the government acted in "good faith." Where the government acted in "bad faith," the Texas courts granted relief in 84% of cases, with the rest granted in federal habeas. Relief does not come quickly in Texas, though. The average time in prison before *Brady* relief is slightly above average: 12.3 years.

Conversely, there are states where the state courts are not particularly active in granting *Brady* relief. Instead, federal courts are playing an outsized role in adjudicating *Brady* claims. In Louisiana, for example, state courts denied, and federal courts granted, relief in 77%

259. Other states have far smaller numbers of *Brady* adjudications, but their state courts have provided 100% of the *Brady* relief: Missouri (11), Washington (6), New Jersey (5), Minnesota (4), West Virginia (4), Arkansas (3), Mississippi (2), Hawaii (2), Colorado (1), Guam (1), Utah (1), South Dakota (1), South Carolina (1), and Rhode Island (1).

of all successful *Brady* cases. Focusing on cases that involve intentional misconduct, the federal courts granted relief in 86% of those cases. The fact that most Louisiana defendants waited until federal habeas to receive relief impacted their average time in jail—16 years.

FIGURE 17: COMPARISON OF *BRADY* VIOLATIONS IN TEXAS AND LOUISIANA



While doing an in-depth review of *Brady* cases and relief mechanisms in each state is beyond the scope of this study, this glance at Texas and Louisiana indicates that such a review would be beneficial. In some states, like Texas, the state courts will be important allies in *Brady* compliance efforts. In others, like Louisiana, strategies might focus on increasing the receptivity of state courts to *Brady* claims.

III. EVIDENCE-BASED *BRADY* REFORM

In many ways, the data presented here confirm the conventional wisdom surrounding *Brady* violations: Government officials are withholding evidence to secure criminal convictions. In a majority of cases, this withholding is intentional and in "bad faith." In a substantial minority of cases, the withholding is the product of error. Either way, this misconduct flouts the Due Process Clause and the longstanding constitutional rule of *Brady*. The human cost is high. Existing compliance systems are clearly insufficient to deter or prevent this conduct.

Thus, a clear imperative comes from this data: We must prioritize and implement new ways to ensure adherence to *Brady*. But how? Much of the *Brady* compliance literature understandably focuses on the conduct of prosecutors, especially prosecutors who act in "bad faith."[260] But "bad faith" prosecutors account for less than one-third of all *Brady* violations. Having this data invites us to think more creatively about how we might enhance *Brady* compliance by addressing nonprosecutor suppressors, minimizing "good faith" suppressions, and focusing on supporting state judges in states with high numbers of *Brady* violations.

A. Focus on "Good Faith" Suppressions

Perhaps the most significant finding of this study is that 42% of *Brady* violations are not committed in "bad faith," but rather are the product of some sort of error. "Good faith" suppressions cover a wide swath of conduct and do not equate to "good" conduct. But this entire category of error is distinct from "bad faith" suppressions—knowing, intentional suppression of material evidence.

In addition to continued efforts to enhance punishment, and thus deterrence, for "bad faith" *Brady* violations, there is an opportunity also to focus efforts on preventing "good faith" *Brady* violations. There are many government officials who are oriented toward constitutional compliance—or at least not oriented away from it. They deserve support, and policymakers would do well to emphasize solutions that will prevent those officials from violating *Brady* in error.

With respect to prosecutors, some scholars have suggested modeling *Brady* compliance systems on corporate compliance programs.[261] Others have focused on enhancing training and providing checklists to guide prosecutors' efforts to collect relevant information.[262] Other scholars have suggested that expanding prosecutors' discovery obligations beyond the constitutional confines of *Brady* could be beneficial. Indeed, many federal district judges "are requiring prosecutors to turn over more discovery earlier in the case than federal law requires, and . . . are taking an active role in managing pretrial and pre-plea discovery."[263] Such requirements not only push prosecutors to reveal more evidence but also insert the courts as a supervisor and

260. *See, e.g.*, Murray et al., *supra* note 104 (proposing tort relief against prosecutors who violate *Brady*).

261. Yaroshefsky, *supra* note 82, at 1952 (reporting on proposal by Professor Rachel Barkow).

262. *See* Gershowitz, *Accidental Brady Violations*, *supra* note 170, at 582–89.

263. McConkie, *supra* note 86, at 61.

arbiter of discovery.[264] For the group of prosecutors that is acting in "good faith," court-driven discovery reform and interventions drawn from corporate compliance settings may be the type of interventions that could lead to enhanced *Brady* compliance.

This study indicates that we would do well to look beyond prosecutors when it comes to *Brady* compliance efforts. Indeed, 61% of "good faith" *Brady* violations involve suppressors *other* than the case prosecutor: law enforcement, other prosecutor's office attorneys and investigators, forensic experts, and trial courts. The cases in this study demonstrate that there are many different types of "good faith" suppressions but three principal categories:

- Negligent tracking and handling of evidence
- Mistaken evaluation of materiality
- Misunderstanding of *Brady* obligations

Existing policies, trainings, and document management systems are a great start. It is clear that as currently constituted, however, they are not sufficient. Good intentions and general guidance are no substitute for in-the-moment course correction during the case investigation process. This study invites policymakers to consider how nonprosecutorial errors might be averted or caught before they ripen into a *Brady* violation. This is particularly true in non-homicide cases, where "good faith" *Brady* violations are prevalent.

B. Focus on Law Enforcement Officers

As discussed in Section I.B., the first pressure point in *Brady* compliance is when law enforcement channels evidence to the prosecutor. The cases in this study show that this first pressure point is the most critical: The majority of successful *Brady* claims involved *Brady* material that never even made its way to the case prosecutor to be disclosed to the defense (51%). Law enforcement officers are responsible for 31% of all *Brady* violations, and 43% of those suppressions are in "good faith." Therefore, law enforcement officers should be an important focus for efforts to fix the *Brady* pipeline. Improving ways to get potential *Brady* evidence to the prosecutor for evaluation and disclosure could make a meaningful difference.

Brady compliance mechanisms focused on law enforcement officers are undertheorized and understudied. It is easy to say that *Brady* training for law enforcement officers in particular should be

264. *See id.*

required, repeated, and standardized. There are already many sources of *Brady* training available and provided to police[265] (although one available online training—which starts with a section entitled "What the Heck is Brady?"[266]—does not inspire confidence). However, it is unclear how uniformly well trained law enforcement officers are with respect to this constitutional obligation. Is there a way to enhance trainings, incorporating lessons learned from recently adjudicated *Brady* violations? Beyond training, is there a way to provide *Brady* compliance support to law enforcement officers who are in the process of investigating a case? This might include not only document and evidence management systems but also access to impartial advisors whom officers can consult for questions about the discoverability of certain pieces of material.

Law enforcement officers who violate *Brady* face potential legal liability under § 1983.[267] Apart from that, however, it might be productive to consider other professional consequences for law enforcement officers who intentionally violate *Brady*. For example, perhaps the concept of "*Brady* lists" could expand. *Brady* lists are compiled either by a prosecutor's office or a police department and name law enforcement officers whose credibility has been called into question.[268] Such lists are a relatively new phenomenon, and different jurisdictions are still working to hone their operation.[269] One might consider whether a consequence of any *Brady* violation by a law enforcement officer might be inclusion on a *Brady* list. Again, the basic insight that law enforcement could be a fertile ground for enhanced

265. *See supra* note 64 (describing Lexipol system); *see also* Jonathan Abel, *Cop-"Like": The First Amendment, Criminal Procedure, and the Regulation of Police Social Media Speech*, 74 STAN. L. REV. 1199, 1237 (2022) (noting "trade publications, trainings, and advisory statements" help police officers understand how their social media posts may constitute *Brady* material); Kristine Hamann & Rebecca Rader Brown, *Best Practices for Prosecutors: A Nationwide Movement*, 33 No.5 GP SOLO 62, (American Bar Ass'n Sept./Oct. 2016) (recounting that in 2009, a New York best practices committee "developed a training program for police to explain the concepts of *Brady*").

266. Bill Amato & Captain Aaron Jones, Brady/Giglio *and Officer Integrity*, https://www.theiacp.org/sites/default/files/Brady-Giglio.pdf (last visited May 25, 2025) [https://perma.cc/QX6P-PXKA].

267. *See supra* notes 112–115.

268. *See, e.g.*, Rachel Moran, Brady *Lists*, 107 MINN. L. REV. 657 (2022) ("*Brady* lists . . . are lists some prosecutors maintain of law enforcement officers with histories of misconduct that could impact the officers' credibility in criminal cases."); Amato & Jones, *supra* note 266; BRADY LIST, https://giglio-bradylist.com/ (last visited Jan. 10, 2025) [https://perma.cc/67Z5-GJDR].

269. *See, e.g.*, Jacob Resneck, Brady *Lists: Here's What to Know About Wisconsin's Inconsistent System for Tracking Police Caught Lying*, WIS. WATCH (May 9, 2024), https://wisconsinwatch.org/2024/05/wisconsin-brady-list-police-officers-county-dishonesty-colorado/ [https://perma.cc/FR7N-NA77] (noting that reports of police officer lies are inconsistently distributed to the public in Wisconsin).

Brady compliance invites policymakers to consider the best paths forward.

C. Focus on Particular States and State Judges

This study points to a small handful of states that are home to the bulk of *Brady* violations—especially Texas and California—and to Louisiana, which has high per capita rates of *Brady* violations and especially high numbers of "bad faith" violations. It makes eminent sense to target *Brady* reform efforts to these high-*Brady*-violation states.

The data also show that state court judges are the primary enforcers of *Brady* in this country. They need resources and support to continue doing this job well. In addition to general ideals like increasing staffing and lowering criminal dockets, it surely would help judges to have continuing education opportunities specifically around *Brady* violations. How does one assess materiality? What is it about "bad faith" suppressions that make state court a less amenable forum for this subset of *Brady* claims? What is the track record regarding *Brady* compliance of the prosecutors and law enforcement officers who typically appear in a particular court? Would providing a nonpublic "*Brady* list" to judges about local prosecutors and law enforcement who have violated *Brady* be viable and helpful?

It would also be helpful to suggest to judges some best practices in *Brady* decision writing. The more information the court includes in its opinion, the more public knowledge about *Brady* violations. It would be useful to survey state court judges to understand what factors currently dissuade courts from including detailed and identifiable information in some of their *Brady* opinions. State court judges are important allies in the work of enhancing *Brady* compliance.

D. Continue Studying Brady *Cases*

Finally, it is important to regard this study as only a beginning. There is much more information to learn, even about the 386 cases in this data set, that will contribute to our understanding of *Brady* violations. And as more *Brady* violations are adjudicated, they should be logged and studied. There is promising news on this front—namely, the creation of a *Brady* database, housed in Duke Law School's Wilson Center for Science and Justice.[270]

270. *See The Brady Database*, WILSON CTR. FOR SCI. & JUST. AT DUKE UNIV. SCH. OF L., https://bradydatabase.law.duke.edu/database (last visited May 22, 2025) [https://perma.cc/LV44-84PB]. *See also* Garrett et al., *supra* note 51 (announcing creation of database).

As study of these cases continues, it would be useful to examine "good faith" suppressions in more detail.[271] Because that category is a catch-all, it would be helpful to speak to suppressors to understand the various reasons they mistakenly did not disclose evidence. Receiving more detail from the actors themselves about errors in the *Brady* disclosure process will be immensely useful for targeted interventions.

One thing this study has highlighted is that many judicial decisions granting *Brady* relief do not provide a full description of the circumstances surrounding the suppression or its discovery. In particular, learning more about how *Brady* violations are discovered would be very valuable information. In the occasional judicial decision that tells this part of the *Brady* story, we see that some information is supplied by remorseful prosecutors or witnesses. Some is provided by new postconviction prosecutors or conviction integrity units. Some is discovered by postconviction defense counsel or investigators. Some is discovered by happenstance. Digging into each case and looking for trends across cases may well help in an assessment of the importance of the roles of various postconviction actors.

CONCLUSION

Studying *Brady* violations in a detailed way leads not only to a richer understanding of prior violations but also lays the groundwork for a more innovative and evidence-based approach to preventing future violations. Conventional wisdom only gets us so far: It is true that far too many prosecutors intentionally withhold material evidence from defendants with terrible consequences. We should continue efforts to prevent and punish "bad faith" *Brady* violations. But it is hard to change human nature. Some government officials will break the rules to win at all costs.

It will be productive also to focus on preventing the *Brady* violations that stem from "good faith" error as opposed to "bad faith" malfeasance. The data from this unprecedented study indicate that there are many such *Brady* violations. There are many law enforcement officers who violate *Brady* in addition to prosecutors. There are many state court judges who are actively policing *Brady* violations. These insights, the product of the detailed and nuanced portrait of *Brady* violations developed here, point to new allies and invite new pathways and effective interventions to enhance *Brady* compliance.

271. Adam Gershowitz's piece, *Accidental Brady Violations*, *supra* note 170, is an excellent contribution.