Does *Brady* Have Byte? Adapting Constitutional Disclosure for the Digital Age

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Under Brady v. Maryland *and its progeny, prosecutors have a constitutional obligation to disclose any material evidence that may be favorable to the defendant. Despite a prosecutor's best efforts to comply, there are inherent difficulties associated with identifying such documents. For instance, discerning what is "material" requires anticipating, before trial, how all the evidence will come together during trial. Further, finding this evidence may resemble the proverbial search for a "needle in a haystack" when the amount of evidence becomes copious. This search becomes even more daunting in an age of voluminous electronic discovery that spans from digital files to social media to e-mails, potentially amounting to over a million pages of documents.*

This category of discovery was foreign to the judicial system at the time of Brady*'s 1963 decision. However, despite the transformation of discovery since then, prosecutors' constitutional disclosure obligations remain unchanged. Accordingly, there is currently no uniform approach to assess potential* Brady *violations premised on high volume electronic discovery. This Note will explore the current practices for adapting* Brady *for the digital age. Ultimately, this Note advocates for a new standard that requires prosecutors to adhere to recognized, minimum requirements when divulging a case file, but provides for circumstances in which a defendant's limited resources require the prosecution to surpass this benchmark in order to fulfill its constitutional obligation.*

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I. INTRODUCTION

The strength of a prosecutor's case is tethered to the strength of the case's evidence. The more details and facts in a prosecutor's arsenal of information, the more equipped she is to support her arguments. However, given current case law and rules of criminal procedure, a defendant may also benefit from this wealth of information. Under *Brady v. Maryland*[1] and its progeny, due process requires a prosecutor to disclose any material evidence that may be favorable to the defendant. Accordingly, if there is more information at a prosecutor's disposal, there are more opportunities to discover potential *Brady* material.

However, finding this material may resemble the proverbial search for a "needle in a haystack" when the amount of evidence becomes copious. This potential difficult search has troubling implications for *Brady* compliance. Adherence to *Brady*'s mandate can be achieved either by handing over the specific, relevant information, or, in some instances,[2] by disclosing the full case file containing both exculpatory and inculpatory material.[3] While there are benefits and drawbacks to each approach,[4] a large case file presents challenges for *Brady* compliance, irrespective of the disclosure method used.

The prosecutor who wants to disclose only precisely that which the Constitution requires will have to review every case file document to locate *Brady* material. A criminal defendant's right to the favorable evidence exists whether the prosecutor actually

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

2. *See infra* Part II.B and Part III.B.

3. *See* Kathleen M. Ridolfi et al., *Material Indifference: How Courts are Impeding Fair Disclosure in Criminal Cases*, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS (2014), www.nacdl.org/discoveryreform/materialindifference [https://perma.cc/P8EV-MMAC].

4. Supporting factors in favor of open file policies include efficiency for the prosecution, as it saves prosecutors time and resources from sifting through each file, and fairness for the defendant, as having the full body of evidence levels the playing field. *See* Strickler v. Greene, 527 U.S. 263, 283 n.23 (1999) ("We certainly do not criticize the prosecution's use of an open file policy. We recognize that this process may increase the efficiency and the fairness of the criminal process."). Further, full disclosure eliminates a prosecutor's subjective choice to decide what should or should not be disclosed to the defense. *See* Robert P. Mosteler, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 309 (2008). However, opponents of open file policies believe that full disclosure "goes too far" and that providing the defendant with broad access to the prosecution's case file raises concerns about potential evidence tampering. *See* Daniel S. Medwed, Brady's *Bunch of Flaws*, 67 WASH. & LEE. L. REV. 1533, 1559–60 (2010).

knows, or simply should have known, that it is in her files.[5] Therefore, the prosecutor who opts for this method of disclosure must diligently examine every piece of information in the case file, or else run the risk of unintentionally violating *Brady*. This risk is compounded in an age of voluminous electronic discovery: with case files potentially containing thousands if not millions of pages,[6] the necessary task of reviewing every individual document becomes formidable, if not impossible. This difficulty results in a high risk that the prosecutor will miss documents that she is constitutionally required to disclose.

On the other hand, a prosecutor might aim to comply with *Brady* by prophylactically disclosing *all* case file documents. But for this prosecutor, the risk of a constitutional violation remains as some courts have held that this sort of "data dump," given the overwhelming amount of information a defendant must comb through, will not fully discharge the prosecutor's *Brady* obligation.[7] Accordingly, when confronted with high volume electronic discovery files, either attempt to comply with *Brady* poses a risk of a constitutional violation.

Electronic discovery was foreign to the judicial system at the time of *Brady*'s 1963 decision. Take hypothetical Assistant United States Attorney (AUSA) Andrea and the evidence from her typical criminal investigation in 1963. Her evidence was likely exclusively physical or limited to a paper trail.[8] As she prepared her case, she pored over her files, flipping through each page and pulling out documents deemed relevant under *Brady* to turn over to the defense. By contrast, in 2016 the scope of hypothetical AUSA Eli's investigation is broader, and likely includes some evidence only discoverable with the advent of electronic communications, the Internet, and computers.[9] The digital age has ushered in a wave of new access, processes, and opportunity for discovery. Now, a prosecutor's body of evidence may span from digi-

5. *See* United States v. Agurs, 427 U.S. 97, 103 (1976).

6. *See infra* note 12.

7. *See infra* Part II.B, III.B.

8. *See, e.g.*, Giglio v. United States, 405 U.S. 150, 153–54 (1972) (referencing the prosecutor's paper files); Brady v. Maryland, 373 U.S. 83, 86 (1963) (discussing statements).

9. *See, e.g.*, Daniel B. Garrie, Esq., et al., *"Criminal Cases Gone Paperless": Hanging with the Wrong Crowd*, 47 SAN DIEGO L. REV. 521, 522 (2010) (noting the increased likelihood of electronic discovery in criminal cases); Ken Strutin, *Databases, E-Discovery and Criminal Law*, 15 RICH. J.L. & TECH. 6, *1 (2009) ("At some point, the accumulation of information surpassed the boundaries of living witnesses and paper records.").

tal files to social media to e-mails, known collectively as electronic discovery or electronically stored information (ESI).[10] It is unsurprising, then, that AUSA Eli's document review process is starkly different from that of AUSA Andrea. Unlike his 1960's counterpart, AUSA Eli does not physically handle evidence; rather, he clicks through documents on a computer screen. While AUSA Andrea certainly could have thousands of documents to search through,[11] today, prosecutors like AUSA Eli must potentially view multiple gigabytes of information, equivalent to several million documents.[12]

To manage this volume, prosecutors may borrow tools commonly employed in civil discovery,[13] such as predictive coding,[14] a method comprised of algorithms and sophisticated key word searches used to discern which documents within the copious case file will be relevant to their investigation.[15] Using this technology, a prosecutor need only review those portions selected by the program, rather than read through each document in the file.[16] While this method decreases the time and expense associated with scrutinizing electronic discovery, the influx of ESI has con-

10. Andrew D. Goldsmith, *Trends — Or Lack Thereof — in Criminal E-Discovery: A Pragmatic Survey of Recent Case Law*, 59 UNITED STATES ATTORNEY'S BULLETIN 2, 5–8 (May 2011), http://www.justice.gov/sites/default/files/usao/legacy/2011/07/08/usab5903.pdf [https://perma.cc/J6NU-7JSB].

11. *See, e.g.*, United States v. Hsia, 24 F. Supp. 2d 14, 29 (D.D.C. 1998) (citing a discovery file of approximately 600,000 documents).

12. *See, e.g.*, United States v. Warshak, 631 F.3d 266, 295 (6th Cir. 2010) (discussing the 17 million documents comprising the prosecutor's file); United States v. Skilling, 554 F.3d 529, 577 (5th Cir. 2009), *aff'd in part and vacated on other grounds*, 561 U.S. 358 (2010) (quantifying the prosecutor's case file as "several hundred million pages of documents"); United States v. W.R. Grace, 401 F. Supp. 2d 1069, 1080 (D. Mont. 2005) (referencing over 2 million documents in the prosecution's file).

13. *See, e.g.*, Panel Transcript, *E-Discovery: Where We've Been, Where We Are, Where We're Going*, 12 AVE MARIA L. REV. 1, 66 (2014) (providing examples of recent litigation involving predictive coding searches); *Hsia*, 24 F. Supp. 2d at 29 (citing a discovery file of approximately 600,000 documents).

14. Predictive coding is defined as a mechanism that "matches human judgment and hands-on training with computer learning and iterative skill to teach software to quickly and accurately search and categorize documents, much like human-only review." Christina T. Nastui, *Shaping the Technology of the Future: Predictive Coding in Discovery Case Law and Regulatory Disclosure Requirements*, 93 N.C.L. REV. 222, 230–31 (2014).

15. *See id.* at 228–29 (describing benefits of using algorithms and predictive coding, such as efficiency and cost savings); Elle Byram, *The Collision of the Courts and Predictive Coding: Defining Best Practices and Guidelines in Predictive Coding for Electronic Discovery*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 675, 676–77 (2013) (discussing litigators' use of technology-assisted review, such as predictive coding, as a mechanism to cope with massive amounts of discovery and as a way to adequately identify the necessary documents).

16. *See* Byram, *supra* note 15, at 678.

tributed to an overall increased cost of reviewing relevant documents.[17]

This growing expense does not unilaterally burden the prosecution; a corollary problem exists on the defense side. As noted, some prosecutors attempt to discharge their *Brady* obligations by providing the full case file to the defense.[18] When the court permits this approach, the defense must conduct its own exhaustive search, or risk overlooking potential evidence important to its case.[19] In some, though surely not all, instances, the defendant may not have the financial means necessary to adequately search the vast case file.[20] The overwhelming volume of electronic evidence therefore presents challenges for both the prosecutor and the defendant. Indeed, as noted by former Attorney General Eric Holder, the shift from a mostly physical and paper discovery regime to one in which "[t]he overwhelming majority of information . . . is created and stored electronically . . . dramatically alter[s] the landscape of the criminal justice system."[21]

As the use and volume of electronic discovery increases in criminal cases, there has been a call to revise the federal rules of criminal procedure to adapt to this evolution.[22] However, it is not only the current criminal procedure rules that are incompatible with this newer discovery practice. Despite this transformation, *Brady* doctrine has not evolved. As a result, current judicial evaluations of potential *Brady* violations premised on voluminous

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17. *See id.* (describing challenges associated with reviewing electronic discovery, such as increased volume and complexity that demand more resources than paper discovery review).

18. *See supra* note 3 and accompanying text.

19. *See infra* Part III.B.1 for a discussion of those courts requiring the defense, rather than the prosecution, to search the case file; *see also infra* note 149 and accompanying text noting the potentially damaging repercussions of the defendant's inability to adequately search the file.

20. *See, e.g.*, United States v. Salyer, 2010 WL 3036444 (E.D. Cal. Aug. 2, 2010).

21. Hon. Eric H. Holder, Jr., *In the Digital Age, Ensuring that the Department Does Justice*, 41 GEO. L.J. ANN. REV. CRIM. PROC. iii, vi (2012).

22. *See, e.g.*, Brandon L. Garrett, *Big Data and Due Process*, 99 CORNELL L. REV. ONLINE 207 (2014), (surveying electronic discovery's prevalence in criminal adjudications and highlighting the necessity of criminal procedure rules to adapt to the digital age); Daniel B. Garrie, Esq., & Daniel K. Gelb, Esq., *E-Discovery in Criminal Cases: A Need for Specific Rules*, 43 SUFFOLK U.L. REV. 393 (2010) (describing the need to create rules of criminal procedure that address issues surrounding e-discovery and electronically stored information); Holder, *supra* note 21 (discussing the Department of Justice's recognition of the need for discovery protocol to be adapted in a digital age); Tina Miller, *Electronic Discovery in Criminal Cases: The Need For Rules*, 14 LAW. J. 3 (2012) (analogizing to the use of electronic discovery in civil cases and the rules governing that discovery procedure to advocate for the implementation of similar rules in criminal procedure).

electronic discovery files are splintered. While some courts evaluate this breed of *Brady* violations under a standard centered on the nature of the government's actions and the defense's feasibility of searching through the files, other courts hold prosecutors to a more stringent standard of review and require prosecutors to furnish defendants with specific pieces of favorable evidence.[23] As electronic discovery becomes more prevalent, these standards become more crucial as *Brady* "is in many ways the ultimate guarantor of fairness in our criminal justice system."[24] Indeed, *Brady* doctrine serves both as a uniform constitutional backstop to the diverse approaches taken to discovery by different jurisdictions, and as the bare minimum of a prosecutor's disclosure requirements.[25] Accordingly, ensuring that a criminal defendant has been afforded due process of law may be contingent on adequately determining whether a *Brady* violation occurred.

This Note will explore the two standards used to assess *Brady* violations, and discuss how in a digital age, judges can better determine whether there has been a *Brady* violation in cases involving large amounts of electronic evidence.[26] Part II reviews the evolution of *Brady* doctrine and its application to traditional paper discovery cases. Part III explores the emerging practice in federal criminal prosecution of obtaining high volume electronic discovery, the role of this electronic discovery in criminal adjudications, and its relationship to *Brady*'s mandate. Part III will also describe the competing standards used to evaluate whether *Brady* violations occurred. After weighing considerations of the doctrine's goals, case law, values of criminal procedure, and the practical realities of discharging the disclosure obligation with high volume electronic discovery, Part IV advocates for a new standard requiring prosecutors to adhere to recognized, minimum

23. *See infra* Part III.

24. Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM PROC. iii, xxxiii (2015).

25. *See* Garrett, *supra* note 22, at 207. Statutory regimes, rather than *Brady* doctrine, are the primary source of discovery disclosure obligations. *See* Christopher Deal, Note, Brady *Materiality Before Trial: The Scope of the Duty to Disclosure and the Right to a Jury Trial*, 82 N.Y.U.L. REV. 1780, 1797 (2007). Fed. R. Crim. P. 16 governs discovery requirements in federal courts, with states creating their own, varied counterparts. *See* Ellen Yaroshefsky, *A Discourse on the ABA's Criminal Justice Standards: Prosecution and Defense Functions Article: Prosecutorial Disclosure Obligations* 62 HASTINGS L.J. 1321, 1325–26 (2011) [hereinafter Yaroshefsky, *Prosecutorial Disclosure Obligations*]. Accordingly, *Brady* violations are assessed against a backdrop of different discovery practices.

26. The high volume of evidence at issue here is typically seen in white collar and fraud cases. *See* Garrett, *supra* note 22, at 209.

requirements when divulging a case file, but provides for circumstances in which a defendant's limited resources require the prosecution to surpass this benchmark in order to fulfill its constitutional obligation.

II. THE DISCLOSURE MANDATE AND THE DEVELOPMENT OF *BRADY* DOCTRINE

Under *Brady* and its progeny,[27] prosecutors must disclose "material evidence" to the defense.[28] Suppression of such evidence is deemed to infringe upon a defendant's right to a fair trial and to due process of law.[29] Accordingly, although criminal discovery is largely defined and dictated by statute,[30] *Brady* doctrine provides a critical constitutional backstop to preserve these fundamental constitutional rights. Part II.A discusses the origin and evolution of this doctrine. Part II.B focuses on how the disclosure requirement was executed and evaluated with regard to "traditional"[31] discovery, with emphasis placed on "open file," or full disclosure, policies.

A. THE *BRADY* BUNCH: *BRADY* AND ITS PROGENY

"*Brady* doctrine" encompasses a string of cases outlining the prosecution's disclosure mandate.[32] The doctrine's namesake and founding principle emerged from *Brady v. Maryland*. There, Brady and his accomplice, Boblit, were convicted of murder in the perpetration of a robbery.[33] Under Maryland law, this charge carried a sentence of either life imprisonment or death, and Brady received the death penalty.[34] At trial, Brady admitted his

27. *See* Strickler v. Greene, 527 U.S. 263 (1999) (elaborating on the "material" evidence standard); Kyles v. Whitley, 514 U.S. 419 (1995) (clarifying the test for "reasonable probability"); United States v. Bagley, 473 U.S. 667 (1985) (enumerating what types of information could be *Brady* material); United States v. Agurs, 427 U.S. 97 (1976) (holding the defense need not request material evidence to trigger the prosecution's *Brady* obligation); Giglio v. United States, 405 U.S. 150 (1972) (explaining "favorable" evidence also includes that which could be used for impeachment purposes).

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

29. *Id.*

30. Fed. R. Crim. P. 16 and its counterparts on the state level primarily govern discovery procedures. *See supra* note 25.

31. In this Note, "traditional" discovery refers to all forms of non-electronic discovery.

32. *See supra* note 27.

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

34. *Id.* at 84–85.

complicity but claimed Boblit was the one who actually killed their victim.[35] Despite Brady's attorney's request for Boblit's extrajudicial statements prior to Brady's trial, the prosecution withheld Boblit's confession that he was the killer until after Brady's conviction.[36] According to the Court, including this statement as evidence at Brady's trial may have persuaded the jury to restrict his punishment to imprisonment.[37] Therefore, Brady appealed his conviction claiming that the suppressed evidence was a violation of the Fourteenth Amendment guarantee of due process of law.[38] The Supreme Court agreed and announced a mandatory disclosure obligation, now known as the *Brady* rule.

Specifically, the Court held: "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."[39] It is "universally recognized" that the Court announced this standard to safeguard fairness within the criminal adjudication system.[40] As Professor Bennett Gershman commented, "[m]ore than any other rule of criminal procedure, *Brady* has illuminated the prosecutor's constitutional and ethical obligations to ensure that defendants receive fair trials."[41] This conclusion rests on the presumption that unfairness stems from the possibility that the suppressed evidence could influence a trial's outcome, which in turn, would undermine the defendant's constitutional right to a fair trial.[42]

A related assumption is that suppression of such evidence also hinders the ability to elicit the truth.[43] A meaningful adversarial

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35. *Id.* at 84.
36. *Id.*
37. *Id.* at 89.
38. *Id.* at 85.
39. *Id.* at 87.
40. Steve Williams, Note, *Implementing* Brady v. Maryland*: An Argument for Pretrial Open File Policy*, 43 U. CIN. L. REV. 889, 889 (1974).
41. Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 686 (2006).
42. *See* Strickland v. Washington, 466 U.S. 668, 696 (1984) (noting fundamental fairness is contingent on the reliability of a proceeding's results); *see also* Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the* Argus *Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391, 392, 392 n.12 (1984).
43. *See* Capra, *supra* note 42, at 394 ("[D]efense counsel can use exculpatory evidence to present affirmative favorable proof, helping to ensure the reliability of the verdict."); *see also* United States v. Bagley, 473 U.S. 667, 698 (1985) (Marshall, J., dissenting) ("[F]avorable evidence indisputably enhances the truth-seeking process at trial.").

process requires that both sides are equipped with the requisite information to make their cases.[44] Central to this principle is that justice is best served when opposing parties "fight as hard they can" to present their evidence and counterarguments, which in turn permits the trier of fact to arrive at the truth.[45] As Professor Keith Findley commented, "[e]nabling adversaries to effectively advocate for their version of the truth means, at a minimum, that there must be full sharing of information."[46] Therefore, by mandating disclosure of material evidence to the defense, "[t]he promise of *Brady v. Maryland* was to make the adversary system . . . less like a sporting event and more like a search for the truth."[47]

Both truth-seeking and maintaining a criminal defendant's right to a fair trial are central goals of an adversarial system.[48] However, in its quest to enhance this objective, *Brady* is an incursion into the system itself.[49] Requiring the prosecution to assist its opposition places it in an unfamiliar position, one that is at odds with the general goal of winning a case.[50] To be sure, the cooperation between prosecutor and defendant that *Brady* requires is in tension with the adversarial system. In this regard, "the *Brady* rule represents a limited departure from a pure adversary model."[51] This departure is viewed as a necessary cost to ensuring that the process is fair and culminates in an accurate result; while the combative aspects of the system are minimized,

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44. *See* Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of Brady Through The Defendant Due Diligence Rule*, 60 UCLA L. REV. 138, 147 (2012) ("'[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence.' Withholding exculpatory evidence does not further this goal; instead, it undermines it." (citing Neder v. United States, 527 U.S. 1, 18 (1999))).

45. *See* Edward F. Barrett, *The Adversary System and the Ethics of Advocacy*, 37 NOTRE DAME L. REV. 479, 480 (1962).

46. Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. SCH. L. REV. 911, 937 (2011–12).

47. Gershman, *supra* note 41, at 708.

48. *See* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 56 (1991) (writing the adversary system seeks to promote justice by ascertaining the truth, conducting efficient fact-finding, and ensuring fairness); *see also* Findley, *supra* note 46, at 914 ("The adversary system operates on the fundamental belief that the best way to ascertain the truth is to permit the adversaries to do their best to prove their competing version of the facts.").

49. *See* United States v. Bagley, 473 U.S. 667, 696 (1985) (Marshall, J., concurring) (suggesting the adversary model is "seemingly incompatible" with *Brady*); Laurie L. Levenson, *Discovery from the Trenches: The Future of Brady*, 60 UCLA L. REV. DISC. 74, 79 (2013).

50. *See* Levenson, *supra* note 49, at 79 n.18 (citation omitted).

51. *Bagley*, 473 U.S. at 675 n.6.

the adversarial system's twin objectives of truth and fairness are ultimately enhanced.[52]

While *Brady* announced explicitly that there *is* a disclosure mandate, its holding has raised "difficult questions of interpretation."[53] Such questions arose because the Court did not define the scope of the right or clearly articulate the standard to which prosecutors should be held if confronted with a *Brady* claim.[54] Therefore, judges must look to *Brady*'s progeny for the appropriate standard in determining whether a *Brady* violation occurred. Specifically, later cases elaborated on what evidence is considered "favorable"[55] and "material,"[56] and when such evidence is considered "suppressed."[57]

In *Brady*, the withheld information at issue was exculpatory evidence — evidence that could potentially exonerate the defendant.[58] Therefore, when the disclosure rule was announced, "evidence favorable to an accused"[59] did not clearly extend beyond information explicitly indicative of innocence. It was not until *United States v. Bagley* that the Court affirmed that, in accordance with the doctrine's concern for fairness and justice, "favorable evidence" encapsulates exculpatory evidence, impeachment material, and information that may be helpful to the defendant.[60] "Helpful" in this context means: "evidence that has some relevance to an issue in the case and could reasonably assist a defendant in presenting his case."[61] This definition lends itself to a broad range of evidence that could be deemed "favorable" under *Brady*. For example, "helpful" could include evidence such as: forensic reports that undermine the prosecution's theory of the case,[62] information that challenges a witness's credibility,[63] and

52. *See* Kyles v. Whitley, 514 U.S. 419, 439 (1995) (noting such a cost is warranted, or else the "adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of the truth.").
53. Gershman, *supra* note 41, at 694.
54. *See id.* at 692–708 (describing the interpretive problems caused by each key phrase in *Brady*'s holding).
55. *See Bagley*, 473 U.S. at 678; Giglio v. United States, 405 U.S. 150, 154 (1972).
56. *See Kyles*, 514 U.S. at 434.
57. *See* United States v. Agurs, 427 U.S. 97 (1976).
58. Brady v. Maryland, 373 U.S. 83, 87 (1963).
59. *Id.*
60. *See Bagley*, 473 U.S. at 676, 678.
61. Gershman, *supra* note 41, at 703.
62. *See, e.g.*, People v. Pilotti, 511 N.Y.S.2d 248, 253 (N.Y. App. Div. 1987).
63. *See, e.g.*, Carter v. Rafferty, 621 F. Supp. 533, 550 (D.N.J. 1985).

findings that invalidate a victim's claim.[64] However, what is helpful to the defense is not always obvious. For instance, a superficially innocuous letter may be deemed favorable if it contradicts a witness's testimony. For example, a note stating the witness left for the grocery store at noon will only become potential impeachment evidence if the witness later testifies he left for the store at two o'clock. Similarly, failure to disclose that a victim was taking steroids has been considered favorable to a defendant arguing that an attack was in self-defense.[65] Without knowing that the defendant would pursue a theory of self-defense, it could be difficult for the prosecutor to identify the steroid use, and its potential connection to aggressiveness, as *Brady* material. Thus, prosecutors often face a challenging task when determining what evidence may be considered favorable.

Though a wide range of evidence may meet the "favorable" threshold, evidence also must be material within the meaning of the *Brady* doctrine to trigger a claim.[66] Contested evidence is material if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[67] The "reasonable probability" standard is met where the suppressed evidence "undermines confidence in the outcome of the trial," and thereby creates enough uncertainty that the defendant is not guilty beyond a reasonable doubt.[68]

Other key phrases from *Brady* also required clarification: "suppression," "by the prosecution," "upon request," and "irrespective of good or bad faith."[69] While a straightforward reading of "by the prosecution" suggests that only the prosecutor can suppress evidence in violation of *Brady*, the Supreme Court has tak-

64. *See, e.g.*, United States v. Poole, 379 F.2d 645, 647–48 (7th Cir. 1967).

65. *See Ex Parte* Masonheimer, 220 S.W.3d, 494, 495, 495 n.1 (Tex. Crim. App. 2007).

66. *See* Kyles v. Whitley, 514 U.S. 419, 461 (1995) (Scalia, J., dissenting) (arguing no *Brady* violation occurred because the suppressed evidence was immaterial); Deal, *supra* note 25, at 1786 (noting under *Brady*, a criminal defendant is only entitled to a remedy if the suppressed evidence was material).

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

68. *Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678). The Court is clear that this standard is not a sufficiency of the evidence test, and does not require the defendant to show that, more likely than not, the verdict would have been different. *Id.* at 434–36. Further, this determination requires considering the effect of the suppressed evidence collectively, rather than item by item. *Id.* at 436.

69. *See* Gershman, *supra* note 41, at 694–700, 704, 707 (reviewing the evolution of these components and relevant case law).

en a broader reading.[70] Under this interpretation, a prosecutor is not only responsible for turning over all favorable evidence of which he or she is actually aware, but also that which he or she "should have known,"[71] and that which is known to "others acting on the government's behalf,"[72] such as the police. The net effect is that a defendant has a right to material evidence whether or not the prosecution has knowledge of it.[73] "Upon request" is another misleading phrase. Although the doctrine's foundational language suggests that a *Brady* claim is only triggered when the prosecution ignores a defendant's request for material evidence, the Court rejected this interpretation.[74] Instead, there is an affirmative duty for prosecutors to divulge *Brady* material.[75]

Courts have also interpreted what constitutes "suppression," and established two caveats. The first is that evidence may not be considered suppressed if the defendant already knew about the withheld material evidence.[76] The second exception, known as the "due diligence rule," emerged through lower court cases, rather than any Supreme Court decision.[77] Under this rule, a prosecutor will not have violated *Brady* if the defense could have obtained the evidence or relevant information in question without the prosecutor's assistance.[78] To make this determination, a court will evaluate whether the defense conducted a diligent search of the evidence.[79] If the defense failed to find material evidence that was readily discoverable by them, there has been no

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70. *See Kyles*, 514 U.S. at 437.

71. United States v. Agurs, 427 U.S. 97, 103 (1976).

72. *Kyles*, 514 U.S. at 437; *see also* Giglio v. United States, 405 U.S. 150 (1972) ("The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government.").

73. *Agurs*, 427 U.S. at 103.

74. *Id.* at 110.

75. *See id.* at 111–13 (describing a prosecutor's obligation to voluntarily turn over material evidence). As the Court highlights, the disclosure mandate is only violated if the suppressed evidence is *material*. *See id.* at 111. Accordingly, failure to share evidence that does not ultimately "undermine confidence in the outcome" is not a violation of the prosecutor's affirmative duty. *See* United States v. Bagley, 473 U.S. 667, 678 (1985).

76. *Agurs*, 427 U.S. at 103.

77. This standard is the byproduct of lower court's interpretation of the Supreme Court's language in *Agurs* and *Kyles*, referencing evidence "unknown to the defense." Weisburd, *supra* note 44, at 148 (citing *Kyles*, 514 U.S. at 419; *Agurs*, 427 U.S. at 103). However, the Supreme Court has never directly held that, in assessing *Brady* violations, the defense's effort in locating the exculpatory evidence warrants consideration. *Id.* at 147.

78. *See id.* at 141 (discussing the rationale of the due diligence rule).

79. *See id.* at 154–56 (describing the application of the due diligence rule).

diligent effort.[80] For instance, if such evidence is publically available,[81] or if the defendant knew or should have known about the withheld evidence,[82] courts following the due diligence rule[83] will excuse a prosecutor's affirmative duty to disclose that evidence.[84] A defendant will only be able to establish a *Brady* claim if he can prove his diligence.[85]

While courts following the "due diligence rule" consider the defense's efforts in determining whether a *Brady* violation has taken place, no courts give that same consideration to a prosecutor. Under the "irrespective of good or bad faith" principle, the Supreme Court has consistently held that the good or bad faith of a prosecutor's efforts to disclose exculpatory information is irrelevant. Instead, it is constitutionally required that the defense know of all material evidence both when a prosecutor believes he has complied with *Brady* as well as when he intentionally conceals the evidence.[86] Therefore, as the Court has acknowledged, *Brady* and its progeny created an incentive for prosecutors to err on the side of caution and disclose all evidence they believe could be relevant.[87] Notably, the Court explained, "a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence."[88] This advice suggests that prosecutors should be generous in their interpretation of what constitutes *Brady* material.[89]

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80. *Id.*

81. *See, e.g.*, Lugo v. Munoz, 682 F.2d 7 (1st Cir. 1982).

82. *See, e.g.*, Occhicone v. Moore, 2005 WL 1073936 (M.D. Fla. Mar. 31, 2005).

83. Currently, all federal courts of appeal follow the due diligence rule, with the exception of the Tenth Circuit and the D.C. Circuit. Weisburd, *supra* note 44, at 153. However, even within those circuits that will apply the rule, some do not do so consistently. *See id.* at 154 ("With no explanation or citation to other diligence cases, however, the Third, Seventh, and Ninth Circuits vacillate between applying and not applying some form of the defendant due diligence rule.").

84. *Id.* at 143.

85. *Id.* at 156.

86. *See, e.g.*, United States v. Agurs, 427 U.S. 97, 110 (1976) ("Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness of the prosecutor."). However, there is one exception: if evidence is lost or destroyed, the court will evaluate the prosecutor's intent, and will only find a *Brady* violation if the prosecutor committed the destruction in bad faith. Arizona v. Youngblood, 488 U.S. 51, 58 (1988).

87. *See Agurs*, 427 U.S. at 108 ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure.").

88. Kyles v. Whitley, 514 U.S. 419, 439 (1995).

89. This guidance may lead to a prosecutor's disclosure of her full file. While there are benefits to dispensing of the disclosure obligation in this manner, in the realm of electronic discovery, it poses unique problems for the defense. For a discussion of these issues, see Part III.B and Part IV.

As the doctrine developed, and the aforementioned aspects of the rule crystallized, what became clear is that compliance with *Brady* requires that the prosecution engage in an "anticipatory hindsight review" of a nonexistent trial record, a daunting and speculative task.[90] Prosecutors must discern, *before* trial, what information may ultimately be considered helpful *during* the trial.[91] A prosecutor must also engage in this type of evaluation when considering the materiality of a piece of evidence. The materiality standard requires the court to consider the suppressed evidence's cumulative effect on the trial outcome, rather than the influence of each individual item.[92] Therefore, whether withheld evidence is material depends on the court's "confidence" that the verdict would be different had the jury received the evidence in question, in addition to that which was presented.[93] Similarly, *Brady* doctrine's definition of "suppression" requires that the prosecutor be familiar with the entire case file[94] to conduct the requisite *ex ante* analysis of what a court may consider *ex post* to be material.[95] As a result, the dynamics of the refined doctrine and the need to make pre-trial determinations about the influence of evidence make *Brady* compliance difficult, even for the well-intentioned prosecutor.[96]

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90. *See* Alafair Burke, *Improving Prosecutorial Decision-Making: Some Lessons from Cognitive Science*, 47 WM. & MARY. L. REV. 1587, 1610 (2006).

91. *See* Levenson, *supra* note 49, at 86 (noting a prosecutor's responsibility to identify "helpful" information is a hurdle, as it requires the prosecution to overcome a sense of "distrust and gamesmanship").

92. *See Kyles*, 514 U.S. at 437 ("[T]he prosecution . . . must be assigned the consequent responsibility to gauge the likely net effect of all . . . evidence.").

93. *See id.* at 453–54 (finding the prosecution's suppression of inconsistent eyewitness statements were material, as considering all evidence collectively with this information undermined the Court's confidence in the verdict.).

94. *See* United States v. Agurs, 427 U.S. 97, 110 (1976) ("If evidence highly probative of innocence is in [a prosecutor's] file, he should be presumed to recognize its significance even if he has actually overlooked it.").

95. *See* Burke, *supra* note 90, at 1610 ("[Prosecutors] must anticipate what the other evidence against the defendant will be by the end of the trial, and then speculate in hypothetical hindsight whether the evidence at issue would place 'the whole case' in different light."). In addition to the difficulty of engaging in this guesswork, studies have shown that attorneys generally tend, even outside of the *Brady* context, to overestimate how accurate they are in their ability to identify relevant discovery documents. *See* David C. Blair & M.E. Maron, *An Evaluation of Retrieval Effectiveness for a Full-Text Document-Retrieval System*, 28 COMM. OF THE ACM 289, 293 (1985) (finding, upon searching through 40,000 documents, only 20% of relevant documents were identified, while the searchers believed they had found 75% of the responsive documents).

96. *See* United States v. Olsen, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, J., dissenting) (lamenting the failure of prosecutors to adhere to *Brady*'s mandate, prompting "an epidemic of *Brady* violations abroad in the land").

B. THE PROGENY IN PRACTICE: *BRADY* CLAIMS AND "TRADITIONAL" DISCOVERY

The application of *Brady* and its progeny reveals two major concerns with the doctrine: (1) the discretion and subjectivity involved in a prosecutor's disclosure decision and (2) the prosecutor's difficulty in predicting what the court will later classify as material evidence.[97] This Section illustrates these concerns and describes *Brady* doctrine's application in a pre-electronic discovery era. These examples will inform the discussion in Part III and serve as a comparison to further illustrate how electronic discovery does not comfortably fit within the parameters of the Court's original vision for disclosure.

To begin with a simple example, assume a defendant claims that a *Brady* violation occurred based on the suppression of a singular piece of material "traditional" evidence. Here, the suppressed evidence may be a hearing transcript,[98] microscope slides containing genetic evidence,[99] notes exchanged between a victim's advocate and the prosecution,[100] or police records.[101] To assess this alleged violation, a judge would use the "reasonable probability" standard to determine whether the outcome of the trial would have been different had the suppressed evidence been admitted.[102] If the court found that the suppressed evidence did cast some doubt, there would be a *Brady* violation;[103] if the withheld evidence did not undermine the "confidence in the outcome," then no *Brady* violation would be found.[104]

Another instance in which *Brady* claims may arise is if the prosecution decides to give the defense its whole file.[105] In these

97. *See* Capra, *supra* note 42, at 394 (describing two "major" problems implementing the *Brady* rule: (1) affording the prosecution, an "understandably biased party," the discretion to determine what information it believes will be favorable to its opposing party, and (2) subjecting the prosecution to a "speculative post-trial review" to conclude what, if any, of the suppressed evidence, would have cast sufficient doubt on the verdict).

98. *See, e.g.*, United States v. Bowie, 198 F.3d 905, 909 (D.C. Cir. 1999).

99. *See, e.g.*, State v. Roughton, 132 Ohio App. 3d 268, 299 (1999).

100. *See, e.g.*, State v. Wilcox, 254 Conn. 441, 450 (2000).

101. *See, e.g.*, Mazzan v. Warden, Ely State Prison, 116 Nev. 48 (2000).

102. *See supra* notes 67–68 and accompanying text.

103. *See, e.g.*, *Mazzan*, 116 Nev. at 71; *Roughton*, 132 Ohio App. 3d at 268.

104. *See, e.g.*, *Bowie*, 198 F.3d at 912; *Wilcox*, 254 Conn. at 462.

105. The Supreme Court has been clear that *Brady* does not require full disclosure, and therefore a prosecutor has discretion whether to have an open file policy. *See* United States v. Bagley, 473 U.S. 667, 675 (1985) ("[T]he prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if

circumstances, known as "open file" disclosure, the prosecution provides all of its non-privileged evidence against the defendant, regardless of whether that evidence is exculpatory or inculpatory.[106] Here, the prosecutor seeks to discharge her *Brady* obligation without the burden of assessing each file, and without a concern that something has been overlooked or incorrectly deemed immaterial.[107] In this regard, on its face, an open file policy may seemingly act as a safeguard against potential *Brady* violations, as it eliminates the need for a prosecutor's guesswork and the risk that a material piece of evidence will be excluded from disclosure.[108]

However, this approach does not completely shield prosecutors from potential *Brady* violations. Claims involving "open file" disclosure are not evaluated under a uniform standard, and even in the realm of traditional discovery, courts disagree on whether such policies are compatible with *Brady*.[109] In these instances, the relevant portion of doctrine is the "suppression of the evidence." In particular, the question centers on whether the manner of disclosure constitutes suppression within the meaning of *Brady*; that is, whether, given the volume of evidence presented to the defense, the prosecution has functionally suppressed *Brady* material. As the subsequent examples indicate, a court's beliefs about the defense's responsibility in reviewing the case file is the chief determinant of whether material evidence included in a large case file — given to the defense under an open file policy — is deemed "suppressed" under *Brady*. While some courts believe that the defense has the burden to locate the *Brady* material

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suppressed, would deprive the defendant of a fair trial."); *see also* Kyles v. Whitley, 514 U.S. 419, 437 ("We have never held that the Constitution demands an open file policy.").

106. Yaroshefsky, *Prosecutorial Disclosure Obligations*, *supra* note 25, 1330–31 (citation omitted). Despite a uniform term, the definitions of "open file policy" "vary considerably." Ellen Yaroshefsky, *New Orleans Prosecutorial Disclosure in Practice After* Connick v. Thompson, 25 GEO. J. LEGAL ETHICS 913, 939 n.167 (2012) [hereinafter Yaroshefsky, *After* Connick]. This Note defines "open file policies" as disclosure of everything that the prosecutor has within his or her case file.

107. *See* Mosteler, *supra* note 4, at 310. *Kyles* confirmed that when in doubt, the prosecution should err on the side of disclosure. *Kyles*, 514 U.S. at 439. For a further discussion on the advantages and disadvantages of an open file policy, see *supra* note 4.

108. Although open file policies may promote *Brady* compliance, such policies are only sufficient to comply with the disclosure mandate if files do in fact contain all of the favorable evidence. *See* Strickler v. Greene, 527 U.S. 263, 283 n.23 (1999). Further, as Judge Kozinski, a supporter of open file policies, noted, open file policies will go a long way, but "not far enough" without ensuring that prosecutors comply with such policies. *See* Kozinski, *supra* note 24, at xxvii–iii.

109. *See infra* Part II.B.

within the case file,[110] others hold this obligation rests with the prosecution.[111]

Some courts have held that prosecutors disclosing "traditional" evidence through open file polices have not violated *Brady*. These courts tethered their decisions to the defendant's access to the material information and to their perceptions on the scope of a prosecutor's *Brady* obligation.[112] *United States v. Mmahat*[113] is an example of an open file disclosure the court determined was compliant with *Brady*.[114] There, the prosecution provided the defense with a "500,000 cache of documents" with the important portions indexed.[115] Following a post-conviction discovery of critical documents within the trenches of the cache, defendants brought a *Brady* claim asserting that the prosecution's failure to notify the defense of the existence of those specific documents violated the disclosure obligation.[116] The court rejected the defendant's *Brady* claim, casting blame on the defense for not diligently searching through the provided files.[117] The court held that "there is no authority for the proposition that the government's *Brady* obligations require it to point the defense to specific documents within a larger mass of material that it has already turned over."[118] In other cases featuring large amounts of paper discovery, courts reaching the same outcome announced a similar rationale for their decisions.[119]

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110. *See, e.g.*, United States v. Pellullo, 399 F.3d 197 (3d Cir. 2005); United States v. Parks, 100 F.3d 1300 (7th Cir. 1996).

111. *See, e.g.*, United States v. Hsia, 24 F. Supp. 2d 14 (D.D.C. 1998); Emmett v. Ricketts, 397 F. Supp. 1025 (N.D. Ga. 1975).

112. The alleged *Brady* violation at issue here is that, given the high volume of evidence, the material evidence was effectively suppressed and therefore could not be found. This is distinct from a claim that *Brady* material was not within the mass of information. For a discussion of on an "incomplete" open file, see Banks v. Dretke, 540 U.S. 668 (2004).

113. 106 F.3d 89 (5th Cir. 1997), *abrogated on other grounds by* United States v. Estate of Parsons, 467 F.3d 409 (5th Cir. 2004).

114. *Id.* at 94.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *See, e.g.*, United States v. Pellullo, 399 F.3d 197 (3d Cir. 2005). There, the Third Circuit supported the disclosure of an open file, without more, on the grounds that the defense had access to the prosecution's material for inspection and for copying. *Id.* at 212. In the court's view, this disclosure reflected the extent of the *Brady* requirement. *Id.* ("Brady and its progeny permit the government to make information within its control available for inspection by the defense, and impose no additional duty on the prosecution team members to ferret out any potentially defense-favorable information from materials that are so disclosed." (citations omitted)).

While "traditional discovery" often refers to boxes of paper documents, it can also include other forms of evidence, and courts conduct the same assessment of *Brady* claims for these types of evidence as for those cases involving paper discovery. For example, in *United States v. Parks*[120] the defense argued that the prosecution failed to comply with *Brady* when it provided, but did not transcribe, sixty-five hours of recorded conversations.[121] The court rejected this contention, and held that the defendants' access to the tapes and chance to discover the relevant information on its own precluded a *Brady* violation.[122]

While some courts have held that a prosecutor merely handing over all of his files discharges his *Brady* obligation, other courts have held that compliance requires more specificity. For instance, in *United States v. Hsia*,[123] the court held that by providing the defense with access to its full file of evidence, without more, the prosecution did not comply with *Brady*.[124] Specifically, the court asserted that:

> The government cannot meet its *Brady* obligations by providing Ms. Hsia with access to 600,000 documents and then claiming that she should have been able to find the exculpatory information in the haystack. To the extent that the government knows of any documents or statements that constitute *Brady* material, it must identify that material.[125]

Emmett v. Ricketts[126] echoes this concern. There, the court held that the prosecution's delivery of its complete, but massive, file, without first screening it, was not sufficient for *Brady* compliance.[127] Further, the court rejected the prosecution's assertion that it had discharged its disclosure requirement simply because the defense could have discovered the exculpatory material on its own.[128]

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120. United States v. Parks, 100 F.3d 1300 (7th Cir. 1996).
121. *Id.* at 1307.
122. *See id.*
123. 24 F. Supp. 2d 14 (D.D.C. 1998).
124. *Id.* at 29.
125. *Id.* at 29–30.
126. Emmett v. Ricketts, 397 F. Supp. 1025 (N.D. Ga. 1975).
127. *See id.* at 1043 ("[T]he prosecutorial duty to produce exculpatory evidence imposed by *Brady* may not be discharged by 'dumping' (even in good faith) a voluminous mass of [various types of evidence].").
128. *Id.*

There is no consensus on how an equal chance to inspect the case file should be factored into a *Brady* inquiry based on traditional discovery. As the preceding examples demonstrate, the permissibility of a large-scale open file policy may depend on which court hears the case.[129] As noted, the decisions rejecting a *Brady* claim on the basis of the prosecution's open file policy emphasized the defendant's ability to find the documents: if the file was sufficiently accessible, no *Brady* violation occurred. In contrast, courts finding a *Brady* violation found that mere access to the information was insufficient. These differences may also be attributed to the differing weights courts accord the "due diligence rule." Some courts, but not others, adhere to the notion that the defendant's effort in searching the voluminous file to find the relevant documents is a relevant consideration in a *Brady* claim.[130] Therefore, even with "traditional discovery," courts are divided on how to evaluate *Brady* in light of open file policies with regard to files containing high volumes of documents. This lack of uniformity creates an already unstable foundation for evaluating *Brady* claims, and this foundation becomes even more fractured when the open files contain electronic evidence, which may include over twenty times more documents.[131] The following Part explores this in detail.

III. NEW MEDIUM, SAME RULES: *BRADY* DOCTRINE AND THE DIGITAL AGE

Despite its narrow mandate, *Brady* established a sweeping obligation on prosecutors. As noted, the doctrine requires prosecutors to shoulder the responsibility of providing the defense with all favorable evidence they know of, or should know of, that could

129. As one court confronted with a *Brady* violation noted, courts have "discretionary authority to manage the cases before them," and some, but not all, "required prosecutors to identify *Brady* material contained in a previously disclosed but 'voluminous' production of documents and data." United States v. Rubin/Chambers, Dunhill Ins. Servs., 825 F. Supp. 2d 451, 454 (S.D.N.Y. 2011).

130. *Compare* United States v. Mmahat, 106 F.3d 89, 94 (5th Cir. 1997) *abrogated on other grounds by* United States v. Estate of Parsons, 467 F.3d 409 (5th Cir. 2004) (finding the lack of the defense's due diligence in searching the case file barred it from relief), *with* Emmett v. Ricketts, 397 F. Supp. 1043 (N.D. Ga. 1975) (noting even an unfruitful, diligent search by the defense does not alleviate the prosecution's disclosure duty simply because the defense *could* have "by luck or intuition" discovered the suppressed material evidence).

131. *See supra* notes 11, 12 and accompanying text.

"undermine the confidence" in a trial's outcome.[132] It is against this backdrop that a judge must evaluate the materiality of suppressed evidence to determine whether a *Brady* violation occurred. With the emerging practice of high volume electronic discovery, the size of the prosecutor's evidence file has swelled, but the requirements of *Brady* have remained stagnant. Given this incongruity and lack of clear precedent from traditional discovery cases, courts currently assess violations with regard to withheld electronic evidence in different ways. Part III.A will describe why the difference between traditional and electronic discovery complicates the typical *Brady* judicial standard of review. Part III.B focuses on the current landscape for assessing these violations, and introduces two different standards judges employ to determine whether a prosecutor violated *Brady* doctrine. This Part focuses on open file cases composed of a high volume of electronic discovery — or "data dumps," as they are sometimes referred to in the digital age.

A. THE IMPLICATIONS OF ELECTRONIC DISCOVERY FOR *BRADY*

Disclosure requirements under *Brady* do not vary by the nature of the evidence; the mandate is the same whether the source of the information is from a digital or traditional medium.[133] However, as this Section will describe, electronic evidence has distinct difficulties and practicalities associated with *Brady* compliance.

Practitioners,[134] scholars,[135] and judges[136] alike are grappling with the repercussions of a digital discovery regime for criminal litigation. Their concern centers on the recognition that the mechanics of *Brady* doctrine, established in an age of paper discov-

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132. *See supra* Part II.A.

133. *See* Goldsmith, *supra* note 10, at 2 ("[T]he same disclosure requirements and procedures for 'traditional' discovery generally apply to ESI.").

134. *See, e.g.*, Holder, *supra* note 21 (recognizing the increased role and importance of electronic discovery in criminal matters, this article discusses the Department of Justice's role in promoting appropriate ESI discovery production); Garrie & Gelb, *supra* note 22 (addressing the lack of guidance for electronic discovery production in criminal cases, and the associated consequences).

135. *See, e.g.*, Garrett, *supra* note 22 (noting the intersection between issues of electronic discovery and due process, and arguing that rules of criminal procedure must better adapt to the digital age).

136. *See, e.g.*, Kozinski, *supra* note 24, at xxxiii (reviewing *Brady* doctrine and advocating for change).

ery, do not align with the demands of electronic discovery.[137] However, the presence of electronic discovery alone does not mean that the current standard can never work; rather, it is only the category of cases with *high volume electronic discovery* that are incompatible. An increase in documents increases the risk that *Brady* material will be functionally suppressed — though not intentionally concealed, a document buried in a file of millions of documents may never be found. While there is no quantitative standard for when the amount of electronic discovery becomes "high volume," indicators include instances when the size of the discovery files becomes oppressive, escalates the case's complexity, and creates serious docket management issues.[138] As exemplified by the cases discussed in this Section, this magnitude of documents is found primarily in white collar, fraud, and other types of corporate prosecutions.[139] However, increasingly even bank robbery and drug case files can become inundated with large quantities of electronic data, such as cell phone records, GPS data, social media files, and information stored on the defendant's computers.[140] Irrespective of the charge, the concerns regarding high volume electronic discovery, and the standards used to evaluate *Brady* violations that stem from them, are the same.

The chief source of incongruity between *Brady* doctrine and this new electronic discovery regime is the sheer volume of evidence produced by electronic discovery. Electronic data and information is incessantly produced, contributing to the vast size and scope of the data files.[141] Further, in the digital age, there are more sources of discovery from which evidence can multiply.[142] In addition to digitized versions of traditional evidence, such as paper documents, evidence is also obtained from social

137. *See infra* notes 141, 142 and accompanying text.

138. *See* DEPT. OF JUSTICE & ADMIN. OFFICE OF THE U.S. COURTS JOINT WORKING GRP. ON ELEC. TECH. IN THE CRIM. JUSTICE SYS., RECOMMENDATIONS FOR ELECTRONICALLY STORED INFORMATION (ESI) DISCOVERY PRODUCTION IN FEDERAL CRIMINAL CASES (2012), Recommendations at 2 n.3, https://www.fd.org/docs/litigation-support/final-esi-protocol.pdf [https://perma.cc/E45D-JYZL] [hereinafter Protocol].

139. *See* Garrett, *supra* note 22, at 209.

140. *See* SEAN BRODERICK ET AL., CRIMINAL E-DISCOVERY: A POCKET GUIDE FOR JUDGES, 6, 6 n.13 (2015), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/Criminal-e-Discovery.pdf/$file/Criminal-e-Discovery.pdf [https://perma.cc/D98H-TD4J].

141. Garrett, *supra* note 22, at 207.

142. *See* United States v. Quinones, 2015 WL 6696484, at *2 (W.D.N.Y. Nov. 2, 2015) (using video files as an example of electronic discovery that was "not possible as recently as 10–15 years ago.").

media, databases, image files, audio and video files, and electronic communications.[143] While having more information accords with the justice system's value of truth-seeking, in the realm of disclosure obligations, it is also in tension with principles of fairness. Indeed, a high volume of information may overwhelm, rather than inform, the defense.[144]

A derivative concern is the ability to sort through this high volume of evidence.[145] Many judges attach significant weight to an electronic file's "searchability" when assessing whether evidence disclosed by an open file policy is "suppressed" within the meaning of *Brady*.[146] Electronic files may be so large that, rather than flipping through a paper file, some parties may rely on systematic searches in the form of algorithms, predictive coding, and search terms to find the relevant material.[147] The inability to check each document for potentially exculpatory information heightens the importance of the defense's available resources.[148] If the defense lacks the ability, knowledge, or resources to conduct such a search, it may never discover the *Brady* material.[149] A recent defense motion requesting an organized and searchable open file of electronic evidence quoted two-million dollars as the expected expense to transform the 20 terabytes — or 200 million single-spaced typed pages — into a usable format.[150] While the cost or volume may not always be this high, all defendants have a need for file "searchability." The value of *Brady* for a defendant rests on his ability to use the information; if he cannot locate the information because the file is too big, or he does not have the

143. *See* Garrett, *supra* note 22, at 207–08; Holder, *supra* note 21, at viii.

144. *See* United States v. Modi, 197 F. Supp. 2d 525, 530 (W.D. Va. 2002) ("[T]he volume of discovery in a complex case may itself impede rather than assist the defense in its understanding of the government's case. Merely to be shown thousands of documents without any direction as to the significance of the various pieces of paper may not comport with fairness.").

145. *See, e.g.*, United States v. O'Keefe, 537 F. Supp. 2d 14, 19–20 (D.D.C. 2008) (recognizing for discovery files to be usable, they must be searchable).

146. *See infra* Part III.B; *see also* United States v. Briggs, 2011 WL 4017886, at *9 (W.D.N.Y. Sept. 8, 2011) (compelling the government to reformat its evidence to make it more searchable to comply with *Brady*).

147. *See supra* notes 14–16 and accompanying text.

148. *See* Daniel K. Gelb, *Defending a Criminal Case from the Ground to the Cloud*, 27-SUM CRIM. JUST. 28, 34 (2010) (noting without access to ESI, a defendant lacks the ability to determine the "exculpatory nature of certain electronic evidence").

149. *See* Garrie & Gelb, *supra* note 22, at 413.

150. Joint Defendants' Motion to Compel *Brady* Materials at 2, 4, United States v. Bahram Mechanic, 2015 WL 6502748, No. 15-CR-204 (S.D. Tex. Oct. 23, 2015) (Docket No. 157).

resources to adequately search through the file, the evidence's usefulness is diminished.

However, concerns about resources exist on both sides, and the prosecution may similarly be a victim of the overflowing fountain of information, unable to adequately search through its own file.[151] Given its exceptional volume, "ESI may contain exculpatory evidence that may not be readily apparent to the prosecution."[152] While the prosecution is generally better equipped to tackle electronic files,[153] the prosecution and defense at times may be equally-matched in terms of resources.[154] For either party, electronic discovery and its corresponding issues of embedded data, volume, and formatting,[155] may complicate trial preparation, but "the lack of resources — money, personal, and training — overshadow all other problems."[156]

Critical differences between traditional and electronic evidence have animated the discussion about the need for new criminal discovery rules.[157] Recognizing the value of guidance in this area, the Department of Justice released electronic discovery protocol (the "Protocol") for criminal cases in February 2012.[158] According to former Attorney General Eric Holder, the Protocol was driven in part by the challenges the digital age presents for compliance with *Brady*'s disclosure mandate.[159] To address these

151. *See* Holder, *supra* note 21, at x ("[T]he government usually has no advantage in terms of being able to locate potential *Brady* material within a large quantity of ESI (and may actually be in [a] worse position)."); *see also* Justin P. Murphy & Matthew A.S. Esworthy, *The ESI Tsunami: A Compressive Discussion about Electronically Stored Information in Government Investigations and Criminal Cases*, 27-SPG CRIM. JUST. 31, 42 (2012) ("Both defense counsel and the government are faced with skyrocketing volumes of data [and] the costs and resources associated with handling those extraordinary volumes.").

152. Garrie & Gelb, *supra* note 22, at 394.

153. *See* Strutin, *supra* note 9, at 71 ("The defense is not in the same position as the state when it comes to marshaling electronic resources.").

154. *See infra* note 206 and accompanying text.

155. For a discussion of these unique issues presented by electronic discovery, see Hon. Lee H. Rosenthal & Hon. James C. Francis IV, Panel Discussion, *Managing Electronic Discovery: Views from the Judges*, 76 FORDHAM L. REV. 1 (2007).

156. Broderick et al., *supra* note 140, at 5.

157. *See, e.g.*, Garrie & Gelb, *supra* note 22, at 411 (noting, given its nuances, electronic discovery is a wholly distinct category of evidence from traditional paper discovery, rather than merely "evidence that is electronic"); Hon. Rosenthal & Hon. Francis IV, *supra* note 155, at 4 ("Electronic discovery is more expensive, more time-consuming, more difficult, and more anxiety producing than paper discovery.").

158. Protocol, *supra* note 138.

159. *See* Holder, *supra* note 21, at iii (crediting *Brady* and the "impact of technological advancements" as the motivation for creating the Protocol).

challenges, the Protocol recommends that the government provide a searchable file, and that it create a table of contents for its electronic evidence complete with a high-level description of the "general categories of information" available within the material.[160] However, despite the DOJ's recognition of this problem and advocating for *future* change for disclosure requirement rules, there is no uniform standard for how to assess *current* disclosure violations.[161] As Professor Brandon Garrett notes, the need for such a standard is especially great when there are no prescribed rules: "[w]here discovery rules themselves remain so thin in criminal cases, due process rules may be important as a backstop to safeguard the fairness of criminal trials."[162] To this end, given the decentralized and state-law-driven criminal justice system, it is unlikely that widespread, effective rules will be readily adopted. Accordingly, compliance with *Brady* doctrine is crucial to ensure that a bare minimum of fairness is maintained.

B. HOW DO JUDGES EVALUATE *BRADY* CLAIMS INVOLVING VOLUMINOUS ELECTRONIC DISCOVERY?

This Section will review *Brady* claims premised on open files containing large volumes of electronic discovery to explain why electronic discovery poses unique issues for *Brady* doctrine. As in large file "traditional discovery" cases, the prong of the *Brady* standard implicated here is the "suppress[ion]" of evidence and, particularly, at what point an open file policy becomes a "data dump" — a file size so massive that it conceals the material evidence to a degree that is functionally equivalent to withholding the information.[163] To evaluate these claims, judges employ one of two standards. Part II.B.1 will address what this Note refers to as the *Skilling* standard, the predominant approach. Part

160. Protocol, *supra* note 138, at Strategies & Commentary at 2, 2 n.1, 6 n.9, 7, 9, 10, 13.

161. *See infra* Part III.B; *see also* Garrett, *supra* note 22, at 209 (arguing a consequence of the absence of explicit electronic discovery rules for criminal litigation is that there is no standard by which judges can assess whether the government has provided the defense with its electronic evidence in an appropriate format).

162. Garrett, *supra* note 22, at 210.

163. *See* Murphy & Esworthy, *supra* note 151, at 41 ("[T]he line between an impermissible 'data dump' and a permissible 'open file' production for the defense counsel remains unclear.").

II.B.2 explores what this Note deems the *Blankenship* standard, an outlier among these cases.[164]

1. *The* Skilling *Standard*

United States v. Skilling[165] exemplifies the principal standard used to evaluate the prosecution's disclosure obligation when it provides the defense with a high volume electronic discovery file.[166] The *Skilling* standard requires that the prosecution provide the defendant with sufficient access to the electronically-stored discovery, but the prosecution need not search for the exculpatory material itself.[167] However, providing the defense with access to the file is the baseline; whether there is a *Brady* violation turns on the government's actions *in addition* to supplying the defendant with the open file of evidence.[168] To shield a prosecution from a *Brady* violation, such additional steps must be indicative of good faith.[169] For instance, indexing the documents,[170] providing the files in a searchable format,[171] and specifying key documents or known exculpatory evidence within the file[172] have been deemed sufficient evidence of good faith. A *Brady* violation may be found in instances of bad faith, such as if the prosecution intentionally "padded" the file with superfluous information,[173] or if it created a "voluminous file that is unduly onerous to access."[174]

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164. The *Skilling* and *Blankenship* standards are not names given by case law — this Note groups two approaches under these titles for clarity and distinction purposes.

165. United States v. Skilling, 554 F.3d 529 (5th Cir. 2009), *aff'd in part and vacated in part on other grounds*, 561 U.S. 358 (2010).

166. *See infra* Part III.B.1 for a discussion of the standard's use in several other cases; *see also* Goldsmith, *supra* note 10, at 10 ("[A] growing number of cases support the idea [from *Skilling*] that if prosecutors in good faith provide the defense with a searchable database, they need not search for and then identify any potential *Brady* material within that database, regardless of how voluminous it may be.").

167. *See Skilling*, 554 F.3d at 577.

168. *See id.*

169. *See id.*

170. *See, e.g.*, *id.*; United States v. Rubin/Chambers, Dunhill Ins. Servs., 825 F. Supp. 2d 451, 457 (S.D.N.Y. 2011).

171. *See, e.g.*, *Skilling*, 554 F.3d at 577; United States v. Ohle, 2011 WL 651849, at *4 (S.D.N.Y. Feb. 7, 2011), *aff'd*, 441 F. App'x 798 (2d Cir. 2011); *Rubin/Chambers*, 825 F. Supp. 2d at 457; United States v. W.R. Grace, 401 F. Supp. 2d 1069, 1080 (D. Mont. 2005).

172. *See, e.g.*, *Skilling*, 554 F.3d at 577; United States v. Ferguson, 478 F. Supp. 2d 220, 226–27 (D. Conn. 2007).

173. *Skilling*, 554 F.3d at 577.

174. *Id.*

The *Skilling* court applied this standard to the prosecutor's disclosure of "several hundred million pages of documents"[175] as an open file, and finding that the evidence was not effectively suppressed, held that no *Brady* violation occurred.[176] Here, that the file was searchable and indexed was evidence of the prosecution's "good faith."[177] Further, the prosecution flagged "hot documents" — evidence it believed would be helpful or relevant to Skilling's defense.[178] According to the court, these "additional steps" demonstrated that the government did not act in bad faith or engage in improper conduct.[179] The court also noted that the government "was in no better position [than the defendant] to locate any potentially exculpatory evidence" within the extensive file.[180] Despite the defense's claim that "it would have taken scores of attorneys, working *around-the-clock* for several *years*" to review the government's full file, the court rejected the notion that the *Brady* material was functionally suppressed.[181]

United States v. Ohle[182] provides an example of the *Skilling* standard application. In *Ohle*, the court held that "[w]hile the Supreme Court in *Brady* held that the Government may not properly conceal exculpatory evidence from a defendant, it does not place any burden upon the Government to conduct a defendant's investigation or assist in the presentation of the defense's case."[183] In accordance with this notion, the court found that the government's disclosure of "several gigabytes of data, including millions of separate files extending to several million pages in length"[184] did not constitute suppression of the evidence.[185] The court's rationale was based on the government's good faith efforts, noting the searchability of the files, the equal access given to the defense, and that the government did not deliberately hide any documents within the voluminous file.[186]

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175. *Id.* at 576.
176. *Id.* at 577.
177. *Id.*
178. *Id.*
179. *See id.* (holding the government did not violate *Brady* because there was no showing that it "hid[ ] potentially exculpatory evidence or otherwise acted in bad faith").
180. *Id.*
181. *Id.* at 576 (emphasis in original).
182. 2011 WL 651849 (S.D.N.Y. Feb. 7, 2011), *aff'd*, 441 F. App'x 798 (2d Cir. 2011).
183. *Id.* at *4 (quoting United States v. Marrero, 904 F.2d 251, 261 (5th Cir. 1990)).
184. *Id.* at *3 (internal quotation marks and citation omitted).
185. *See id.*
186. *Id.* at *4.

In *United States v. Rubin/Chambers, Dunhill Insurance Services*,[187] the Southern District of New York conducted the same analysis as the *Skilling* and *Ohle* courts. In *Rubin/Chambers*, the defendants were charged under federal antitrust and fraud statutes.[188] The government's investigation yielded a large volume of electronic evidence, which was disclosed to the defense through an open file policy.[189] The defendants' *Brady* claim centered on the file's organization; defendants filed a motion to compel the government to categorize its files in a way that would be more conducive to the defense's search for the material evidence.[190] According to the defendants:

> The government undeniably encountered exculpatory audio that is inconsistent with its theory of Defendants' guilt. Yet the Government failed to identify that audio during its review, knowing full well that Defendants likely would be unable to find it once it was placed back into the mass of discovery later produced to the defense.[191]

Using the *Skilling* standard, the court held that the prosecution did not violate its disclosure obligation because, in addition to the defense's access to the documents, the files were searchable and indexed, defendants had the resources to search through the files, and, ultimately the prosecution did not act in bad faith.[192]

United States v. Warshak[193] suggests the threshold for the prosecution's requisite "additional" steps is even lower than indicated in *Skilling*, *Ohle*, and *Rubin/Chambers*. In *Warshak*, the prosecution disclosed three "tera-drives" of material, totaling 17 million pages, in addition to traditional discovery components of 506,000 pages of hard copy documents and 275 discs of material.[194] In its *Brady* claim, the defense unsuccessfully argued that, given the difficulty in searching the electronic evidence, the format rendered the evidence suppressed within the meaning of

187. United States v. Rubin/Chambers, Dunhill Insurance Services, 825 F. Supp. 2d 451 (S.D.N.Y. 2011).
188. *Id.* at 453.
189. *See id.*
190. *See id.* at 453–54.
191. *Id.* at 455 (citation omitted).
192. *See id.* at 455–57.
193. United States v. Warshak, 631 F.3d 266 (6th Cir. 2010).
194. *Id.* at 295.

Brady.[195] However, pointing to the defense's use of some of the prosecution's discovery in its own motions, the court determined that it "does not appear that the discovery materials were nearly as unsearchable as the defense purports."[196] Unlike in *Skilling* and the aforementioned cases where the court deemed the files searchable, the prosecution here did not provide a list of key documents or create indexes for the electronic evidence.[197] The prosecution's only step in addition to providing the documents was supplying the defense with a list of items seized from the defendant's company.[198] Nonetheless, the court found that no *Brady* violation had occurred.[199] In support of its finding, the court cited the defense's capability in navigating the documents itself to find the relevant information.[200] The emphasis on the defense's ability to search the documents parallels the *Skilling*, *Rubin/Chambers*, and *Ohle* courts' assertions that the defense and government were in an equal position to use and search the electronic files.[201] The crux of the court's holding was a finding that the government's compilation of the large file was not done in bad faith.[202] Therefore, *Warshak*'s application of the *Skilling* standard suggests that the government's behavior is the paramount concern for *Brady* compliance.

As illustrated, the *Skilling* standard places particular emphasis on the prosecution's conduct — importantly, whether the

195. *See id.*

196. *Id.* at 296.

197. *See Warshak*, 631 F.3d at 295–97 (describing the "manner in which the government produced discovery" without mention of hot documents or indices for the electronic evidence).

198. *See id.* at 296.

199. *Id.* at 297–98.

200. *Id.*

201. *See* United States v. Skilling, 554 F.3d 529, 576–77 (5th Cir. 2009), *aff'd in part and vacated in part on other grounds*, 561 U.S. 358 (2010) ("[T]he government was in no better position to locate any potentially exculpatory evidence than was Skilling."); United States v. Ohle, 2011 WL 651849, at *4 (S.D.N.Y. Feb. 7, 2011), *aff'd*, 441 F. App'x 798 (2d Cir. 2011) ("Both the Government and defense counsel had equal access to this database. Thus, the defendants were just as likely to uncover the purportedly exculpatory evidence as was the Government."); United States v. Rubin/Chambers, Dunhill Ins. Servs., 825 F. Supp. 2d 451, 456–57 (S.D.N.Y. 2011) ("[T]here is no reason to doubt that the Government has provided Defendants with access to all potential *Brady* material and has taken additional steps to facilitate the Defendants' review of that material. *Brady* and its progeny require no more.").

202. *See Warshak*, 631 F.3d at 297–98 (noting the government did not add irrelevant documents to make the search more demanding, nor did it deliberately conceal any exculpatory evidence within the file).

prosecution executed its obligation in good faith.[203] Together, the aforementioned cases[204] suggest that a "data dump" is permissible so long as the prosecution did not intentionally hide *Brady* material within the open file, or willfully make the defense's search more demanding. This contrasts with *Brady* and its progeny's unequivocal rule that the government's good or bad faith is irrelevant when it comes to suppressing exculpatory evidence. One explanation for this disparity may be resource availability. Since high volumes of electronic discovery are primarily found in white collar or corporate prosecutions,[205] the defendants may be more likely to have the financial means necessary to locate the relevant files than in a typical criminal case.[206] Indeed, they may even be in a better position than the prosecution to do so. The courts' emphasis on an equal ability to search the file suggests that perhaps only bad faith undercuts this shared ability, and therefore courts limit *Brady* violations to these instances of prosecutorial malicious intent. While *Skilling* is the predominant standard to determine cases claiming suppression by volume, this approach is not universally used.

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203. As summarized by one federal district court, electronic discovery open-file cases "tend to draw the same distinction: Absent prosecutorial misconduct — bad faith or deliberate efforts to knowingly hide *Brady* material — the Government's[ ] use of 'open file' disclosures, even when the material disclosed is voluminous, does not run afoul of *Brady*." *Rubin/Chambers*, 825 F. Supp. 2d at 455 (citations omitted).

204. For additional cases using the *Skilling* standard, see United States v. Dunning, 2009 WL 3815739, at *1–2 (D. Ariz. Nov. 12, 2009) (determining there was no suppression of evidence because the defendant had the same access to the material, and it is outside the scope of the prosecutor's obligation to organize the material for the sake of convenience); United States v. Ferguson, 478 F. Supp. 2d 220 (D. Conn. 2007) (focusing on the defense's ability to search the 3.5 million page database, and the prosecution's good faith efforts, the court held no *Brady* violation occurred by turning over the open file); United States v. W.R. Grace, 401 F. Supp. 2d 1069, 1080–81 (D. Mont. 2005) (holding no *Brady* violation occurred as the 2.6 million documents in the prosecution's file were easily searchable).

205. Garrett, *supra* note 22, at 209.

206. In *Skilling* and *Warshak*, the defendants were the CEOs of large corporations. *See Warshak*, 631 F.3d at 276 (noting one of the defendants was the founder of a pharmaceutical company); *Skilling*, 554 F.3d at 534 (noting the defendant was the former Enron CEO). *Rubin/Chambers* was brought against a financial insurance services and products company and its founder, and the *Ohle* defendant was a former Bank One Corporation executive. Ohle v. United States, 2015 WL 5440640, at *1 (S.D.N.Y. Sept. 8, 2015); United States v. Rubin/Chambers, Dunhill Ins. Servs., 825 F. Supp. 2d at 452.

2. *The* Blankenship *Standard*

United States v. Blankenship[207] articulates an alternative approach to evaluate whether a "data dump" constitutes suppression of evidence in violation of *Brady*. Under the *Blankenship* standard, merely giving defendants access to the case file cannot satisfy *Brady*; rather, the prosecution must identify any known favorable evidence within the electronic materials.[208] The rationale is that, "at some point . . . a duty to disclose may be unfulfilled by disclosing too much; at some point 'disclosure,' in order to be meaningful, requires 'identification' as well."[209]

In *Blankenship*, the defense claimed that the government effectively suppressed material evidence in violation of *Brady* by providing it with the equivalent of four million pages of discovery.[210] The prosecution argued that the *Brady* violation was unsupported, as it created a "searchable, indexed, digital database of documents," the defense had sufficient resources to conduct a search of the material, and there were fewer documents at issue here than in *Skilling*, where no *Brady* violation was found.[211] The court disagreed, and rejected the *Skilling* standard. Instead, the court held for the defendant, compelling the prosecutors to identify the *Brady* material within the file.[212] In support of its conclusion, the court asserted that the prosecution, "having determined the nature of the charges and having knowledge of the evidence and witnesses it intends to produce . . . is in a far better position than [Blankenship] to know what evidence might be exculpatory."[213] This holding rejects *Skilling*'s assumption that once defendants have full access to a case file, the parties are equally situated to discover the *Brady* material. In its decision, the court stressed that its standard "conforms to the clear and continuing requirements of *Brady*" by ensuring a fair trial.[214]

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207. United States v. Blankenship, 2015 WL 3687864 (S.D.W. Va. June 12, 2015).
208. *Id.* at *6–7.
209. United States v. Salyer, 2010 WL 3036444, at *6 (E.D. Cal. Aug. 2, 2010) (internal quotation marks omitted).
210. *See Blankenship*, 2015 WL 3687864 at *3–4.
211. *See id.* at *4 (internal quotation marks omitted).
212. *See id.* at *6–7 ("Given the constitutional nature of the Government's *Brady* obligation, and the circumstances presented in this case, the Court finds designation [of *Brady* material], to the extent it can be given, is appropriate.").
213. *Id.* at *7.
214. *Id.*

As the *Blankenship* standard is not commonly used, there are few instances of its application.[215] One such example is *United States v. Salyer*.[216] As in the other electronic discovery cases, the defendant's *Brady* claim in *Salyer* centered on the prosecution's delivery of the material as a "data dump."[217] The prosecution argued a familiar response: it fulfilled its *Brady* obligation by providing the defense with its full case file, including the material evidence, and was not required to review and identify specific documents for the defendant.[218] The file in question was compiled over the course of approximately five years, and contained "multiple gigabytes, pages numbering into the millions."[219] The court rendered its decision for the defense as a "matter of case management (and fairness)."[220] Further, it rejected *Skilling*'s "good faith" versus "bad faith" distinction, noting that a *Brady* violation does not depend on this characterization of a prosecutor's actions.[221] To this end, the court asserted: "if there is a non-disclosure occasioned by the massiveness of the document production to which the defense is given access, it should make no difference whether such was accompanied by good or bad faith — a non-disclosure is a non-disclosure no matter what the motivation."[222]

Despite using general principles of fairness to support his decision, the magistrate judge stressed that the decision had limited precedential value: "[t]he undersigned emphasizes that . . . this . . . order is limited to the circumstances of this case. The undersigned does not find, nor would he, that the identification requirements of this case would apply to other cases not similarly situated in factual circumstances."[223] Specifically, the circumstances in *Salyer* involved "a singular, individual defendant, who is detained in jail pending trial, and who is represented by a relatively small defense team" without aid from a corporate co-

215. *See* Holder, *supra* note 21, at x (describing *Salyer*, a *Blankenship* standard case, as an outlier among cases involving *Brady* claims and high volumes of ESI).

216. United States v. Salyer, 2010 WL 3036444 (E.D. Cal. Aug. 2, 2010).

217. *See id.* at *1.

218. *See id.* at *2.

219. *Id.* at *3.

220. *Id.* at *2. Here, the judge was concerned about fairness to the defendant given how poorly equipped he was to search through the case file. *Id.* at *7.

221. *See id.* at *7 (citing Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 94 (2009)).

222. *Id.* at *2.

223. *Id.* at *8.

defendant.[224] The judge was motivated to use a *Blankenship* standard given what he considered the defendant's distinct disadvantage: limited resources and restricted access. In *Blankenship*, however, the defendant's resources did not influence the court. There, the defendant had access to "virtually unlimited legal resources and personnel" to review the file.[225]

The contrast between two cases applying the same standard raises the question about whether the defendant's resources matter.[226] While the *Skilling* court and its followers at least implicitly answered affirmatively,[227] *Blankenship* suggests that this factor is not uniformly considered.[228]

The *Blankenship* and *Salyer* courts found that the *Blankenship* standard comports with *Brady*'s requirements.[229] However, courts applying *Skilling* similarly believe that their standard fits squarely within *Brady*'s mandates.[230] Both standards adhere to general principles of *Brady*, but define the extent of the requisite governmental actions differently; while presenting a defendant with a full case file without more is not enough to meet either standard, *Skilling* requires only that the government act in good faith and not make the search more demanding, while *Blankenship* requires proactive identification of the specific *Brady* material.[231] The final Part of this Note proposes a third alternative, representing a hybrid of each approach and an attempt to close this gap.

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224. *Id.* at *7.

225. United States' Response to Defense Motion to Compel Concerning *Brady* and Rule 16 at 6, United States v. Blankenship, 2015 WL 3687864 (S.D.W. Va. June 12, 2015) (Docket No. 246).

226. For a potential answer to this question, see *infra* Part IV.

227. *See supra* note 201 and accompanying text.

228. *See supra* note 225 and accompanying text.

229. *See Blankenship*, 2015 WL 3687864 at *7 (requiring the Government to designate which documents contain *Brady* material "conforms to the clear and continuing requirements of *Brady*."); *Salyer*, 2010 WL 3036444 at *7 (emphasizing "the ultimate issue of the case is whether there is 'disclosure' in the letter and spirit of *Brady/Giglio*.").

230. *See, e.g.*, United States v. Skilling, 554 F.3d 529, 576 (5th Cir. 2009), *aff'd in part and vacated in part on other grounds*, 561 U.S. 358 (2010) ("As a general rule [under *Brady*] the government is under no duty to direct a defendant to exculpatory evidence within a larger mass of disclosed evidence." (citations omitted)).

231. *See supra* notes 169, 208 and accompanying text.

IV. A NEW PROPOSAL: HOW *SHOULD* JUDGES EVALUATE *BRADY* CLAIMS INVOLVING VOLUMINOUS ELECTRONIC DISCOVERY?

According to the *Salyer* judge, the prosecutor's argument that merely providing access to a massive electronic file equates to *Brady* compliance is based on a belief that the "logistics in the 'big documents' case render *Brady*/*Giglio* a dead letter."[232] This argument fails, the judge wrote, because "[t]here is no authority to support this evisceration of constitutional rights just because the case has voluminous documentation."[233] Indeed, as explained in Part III, *Brady*'s mandate does not vary with the nature of the evidence.[234] What may change, however, is the manner in which a prosecutor discharges this duty. Full disclosure, as opposed to selective disclosure, may be the only practical way to ensure *Brady* compliance when there are multiple gigabytes of evidence, the equivalent of millions of pages, requiring review. Therefore, courts charged with assessing *Brady* violations are confronted with whether there has been sufficient compliance when the prosecution divulges an open file comprised of massive amounts of electronic discovery. With the *Skilling* and *Blankenship* standards informing the recommendation, this Part proposes a new standard for measuring *Brady* compliance in cases involving large amounts of electronic discovery.

The proposal is as follows: at a minimum, the prosecution must take proactive steps not to hinder the defense's search and should provide the defense with access to a searchable file with a table of contents.[235] Under a rebuttable presumption that the defense is not equally or better able to find *Brady* material within the file, the prosecution must also conduct its own search and

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232. *Salyer*, 2010 WL 3036444 at *5.

233. *Id.*

234. *See supra* note 133 and accompanying text.

235. An important distinction between the existing case law and the proposal here is this standard's emphasis on the difficulty of search, as opposed to the *Skilling* court's emphasis on a prosecutor's bad faith. *See supra* note 169 and accompanying text. As one article notes, proving that the government purposefully padded a case file, or intentionally hid *Brady* material would require "a miracle." Joel Cohen & Danielle Alfonzo Walsman, *The "*Brady *Dump": Problems with "Open File" Discovery*, 47 N.Y.L.J. (Sept. 4, 2009), http://www.newyorklawjournal.com/id=1202433573484/-Ethics-and-Criminal-Practice [https://perma.cc/FME6-D3HJ]. Further, the defense may not want to prove bad faith for the sake of preserving cooperation and avoiding "incurring the wrath" from that prosecutor's office in the future. *See id.*

identify any such evidence it finds. However, upon proving that the defense has the necessary resources, finances, and capacity to adequately conduct an independent search, the government need only satisfy the aforementioned minimum requirements. Alternatively phrased, the proposed standard is *Skilling* "plus," but with the potential for an application of *Blankenship*.

This standard is consistent with existing case law and the principles of *Brady* doctrine. First, the proposed standard recognizes that "while an 'open file' policy *may* suffice to discharge the prosecution's *Brady* obligations in a particular case, it often will not be dispositive of the issue."[236] As the *Skilling* court emphasized, merely providing access to a full case file cannot discharge the prosecution of its duty.[237] However, unlike the *Skilling* standard, the proposed standard requires more from the prosecution than a general good faith obligation. These affirmative requirements — ensuring that the file is searchable and creating a table of contents — are recognized indicators that the government was appropriately assisting the defense.[238] These requirements represent the bare minimum to ensure that the defendant is able to locate the material evidence within the data dump, the crux of the suppression by volume concerns. As the Supreme Court asserted in *Banks v. Dretke*,[239] "[a] rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."[240] Accordingly, these two steps seek to safeguard the de-

236. Smith v. Sec'y of N.M. Dep't of Corr., 50 F.3d 801, 828 (10th Cir. 1995); *see also* United States v. Stein, 2005 WL 3058644, at *2 (S.D.N.Y. Nov. 15, 2005) ("[T]he government is [not] free to proceed on the assumption that its open-file policy utterly protects it from any *Brady* issue involving the material it has produced.").

237. *See supra* note 168 and accompanying text. As the *Smith* court noted, adopting a blanket approval of open file policies without requiring additional steps from the prosecution "would permit the prosecution to discharge its obligations under *Brady* by talismanically invoking the words 'open file policy,' and thus circumvent the purpose behind *Brady*." *Smith*, 50 F.3d at 828.

238. *See supra* note 171 and accompanying text; *see also* Protocol, *supra* note 138, at Strategies & Commentary at 2, 9 ("[Parties] should consider creating [tables of contents] describing the general categories of information available as ESI . . . . [T]o the extent practicable, [such] material should be produced in a searchable and reasonably usable format."); *see also* United States v. W.R. Grace, 401 F. Supp. 2d 1069, 1080 (D. Mont. 2005) ("As it related to the manner of production, *Brady* simply requires that the information be produced in such a way that it will be of value to the accused.").

239. Banks v. Dretke, 540 U.S. 668 (2004).

240. *Id.* at 696.

fendant's *Brady* right and to avoid placing an undue burden on their search of the case file.[241]

However, in circumstances in which the defense lacks resources to conduct an adequate search, this standard proposes that the government should be required to surpass the minimum requirements. In both the *Skilling* line of cases and in *Salyer*, the court tangentially considered resources in its evaluation of *Brady* violations.[242] However, that inquiry should be given more weight given practical concerns about searching through extraordinary volumes of data[243] and the potentially devastating repercussions for the defendant if the search is not adequate.[244] A defendant's ability to discover relevant material is less likely when he does not have the extensive resources needed to conduct a sufficient search.[245] Therefore, in balancing resource constraints of both parties with *Brady*'s underlying concern that the defense be armed with material evidence, the proposed standard places a burden on the government to show that the defense's ability to conduct an adequate search is equal to or greater than the ability of the prosecution. When a defendant has the means to search the file, the prosecution can easily overcome the rebuttable presumption.[246] The burden is only great when the defendant does not have the requisite resources to conduct a meaningful search, and this difficulty should be a desirable outcome. In this instance of unequal resources, the government will be responsible for reviewing the file and identifying the *Brady* material in the manner envisioned by the *Blankenship* court.[247]

Consider the following hypothetical: a defendant is confronted with the equivalent of 500,000 electronic documents, a small number compared to the millions of files at stake in *Skilling* and

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241. While this Note advocates for additional governmental action, it does not envision that the defense no longer has a responsibility to search through the files. Under the proposed model, the government would be required to flag important documents, but as explained above, this practice may unintentionally exclude documents favorable to the defense. Accordingly, defense counsel would still need to be vigilant in searching through the documents.

242. *See supra* Part III.B.

243. *See* Murphy & Esworthy, *supra* note 151, at 42 (concluding outcome-determinative mistakes could result given the increased volume, costs, and resources associated with managing electronic discovery).

244. *See supra* note 149 and accompanying text.

245. *See, e.g.*, Byram, *supra* note 15, for examples of the resources required to conduct a search of voluminous electronic discovery.

246. *See, e.g.*, *supra* note 225 and accompanying text.

247. *See supra* note 208 and accompanying text.

Blankenship. He has no technical support, limited funds, and is represented by a small law firm. Perhaps every page in the file, or none of the pages, contains favorable evidence. He therefore has two options for an adequate search: either reading each page, or having technological resources that leverage algorithms to find the relevant information.[248] Reviewing this file is daunting and time-consuming, even for those who have the resources to do it effectively.[249] When the defense is restricted in its ability to locate potentially exculpatory evidence, placing the burden on the government is appropriate given the spirit of *Brady* and the doctrine's emphasis on truth-seeking and on ensuring that the defense receives a fair trial.[250] Without such governmental assistance, the defense may never find favorable evidence, diminishing the trial's fairness.[251]

The proposed approach also resonates with broader principles of due process, which suggest that the constitutional measure of fair procedures may turn on the comparative resources of the government and the individual. Notably, *Mathews v. Eldridge*[252] announced a three-part balancing test to analyze due process claims, weighing an individual's private interests, the government's interests, and the cost and benefits of granting additional process to the defendant.[253] This final prong is often evaluated in light of an individual's resources, such as the relative importance of that individual's access to social security benefits or to food stamps, and the marginal utility of implementing additional pro-

248. *See supra* notes 14, 15 and accompanying text.

249. *See, e.g.*, *supra* note 181 and accompanying text.

250. This Note does not contend that this position is constitutionally mandated; rather, it argues that such a burden can be appropriate in some instances. Of course, this opinion is not universally accepted. As the *Skilling* court noted, "*Brady* held that the Government may not properly conceal exculpatory evidence from a defendant, [but] it does not place any burden upon the Government to conduct a defendant's investigation." United States v. Skilling, 554 F.3d 529, 576 (5th Cir. 2009) (quoting United States v. Marreo, 904 F.2d 251, 261 (1990)), *aff'd in part and vacated on other grounds*, 561 U.S. 358 (2010). However, as the *Salyer* court explained, in *some* circumstances, this argument is appropriately rejected. *See* United States v. Salyer, 2010 WL 3036444, at *3 (E.D. Cal. Aug. 2, 2010) (summarizing this position from *Skilling*, and noting, under the specific circumstances of the case, the defense had the better argument on this point).

251. *See Salyer*, 2010 WL 3036444 at *2 (ordering the government identify *Brady* materials "as a matter of case management [and fairness]"); United States v. Locascio, 2006 WL 2796320, at *7–8 (D.S.C. Sept. 27, 2006) (holding "basic fairness" required that the government disclose specific records within an open file, rather than have the defense incur the cost of reviewing thousands of documents "in the hopes that they stumble across" the relevant ones).

252. Mathews v. Eldridge, 424 U.S. 319 (1976).

253. *See id.* at 334–35.

cedures.[254] The *Mathews* balancing test has been applied in several cases concerning a defendant's right to access evidence.[255] These principles have also been applied in a *Brady* context, concerning whether the disclosure requirement that exists for impeachment evidence for trial also applies at the plea bargaining stage.[256] The ultimate goal of the *Mathews* framework is to determine how much more reliability and fairness can be discerned by affording an individual some additional process, and if it is worth the incremental cost to the government.[257] Applying reasoning similar to *Mathews*, this Note argues that for those defendants unable to effectively search an oppressive, massive case file, the additional burden on the government is indeed worth the potential risk of an unfair trial.

In addition to the principles of *Mathews* and due process, the constitutional right to appointed counsel also recognizes that an ability to defend oneself cannot be dictated by one's means. *Gideon v. Wainwright*,[258] the seminal decision announcing this right, was grounded in the notion that every defendant should be able to effectively litigate his case.[259] Therefore, constrained resources cannot prevent meaningful participation in the adversarial process, whether this means having access to a lawyer,[260] having expert assistance when necessary,[261] or filing a notice of appeal.[262] Indeed, an equality of opportunity between the defense and government is central to fairness, for "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[263] In the context of *Brady*, the "kind of trial" and its ultimate outcome may hinge on the defendant's capacity to

254. *See, e.g.*, Atkins v. Parker, 472 U.S. 115, 152–56 (1985); *Mathews*, 424 U.S. at 319.

255. *See, e.g.*, McKithen v. Brown, 481 F.3d 89, 107–08 (2d Cir. 2007); Grayson v. King, 460 F.3d 1328, 1340–43 (11th Cir. 2006); Harvey v. Horan, 285 F.3d 298, 315 (4th Cir. 2002).

256. *See* United States v. Ruiz, 536 U.S. 622, 631 (2002) (noting the "due process considerations" of "the nature of the private interest at stake, the value of the additional safeguard, and the requirement's adverse impact on the Government's interests" are relevant to issue before the Court).

257. *See Mathews*, 424 U.S. at 343–44.

258. Gideon v. Wainwright, 372 U.S. 335 (1963).

259. *See id.* at 344 (describing the right to counsel and preservation of fundamental constitutional values, such as fairness and equality).

260. *See id.*

261. *See* Ake v. Oklahoma, 470 U.S. 68 (1985) (holding an indigent defendant was entitled to a state-funded psychiatric evaluation for his defense).

262. *See* Burns v. Ohio, 360 U.S. 252 (1959) (invalidating a filing fee for an indigent defendant).

263. Griffin v. Illinois, 351 U.S. 12, 19 (1956).

find any exculpatory information within the prosecutor's mountain of information, should it exist. In adhering to established case law that accounts for resource disparity, any additional cost to the government imposed by this Note's recommendation is warranted.

V. CONCLUSION

A federal district court recently observed, "[a]s technology expands the volume and the range of potential discovery in criminal cases, courts have started to recognize that the Government needs to impose at least some minimal organization on voluminous discovery to comply with the spirit of its statutory and constitutional obligations."[264] Most courts believe that, so long as it is done in good faith, the prosecution's requirement ends with this minimum level of organization. However, a second view has emerged that organization and access to a case file comprised of copious amounts of electronic discovery is not enough and instead, the government must search the file itself and direct the defense to the *Brady* material. Irrespective of the approach taken, there is a shared acknowledgement that the nature of high volume electronic discovery requires a nuanced adaptation of *Brady*. Further, while the type of evidence employed in criminal adjudications may evolve, *Brady* doctrine's commitment to fairness has not shifted. Against this backdrop, courts must hold the prosecution to a standard that balances this principle with the increasing presence of high volume electronic discovery, and safeguard a criminal defendant's constitutional right to exculpatory evidence.

This Note argues that by adopting a novel approach for assessing *Brady* violations, courts can better strike this balance. Specifically, courts should consider using a standard that, at a minimum, mandates that prosecutors create a searchable file with a table of contents, but that demands more from the government when the defendant lacks the requisite means to conduct a meaningful search. This proposal addresses only a constitutional floor for disclosure requirements, but given the lack of

264. United States v. Quinones, 2015 WL 6696484, at *2 (W.D.N.Y. Nov. 2, 2015) (citations omitted) (reciting a litany of cases involving high volume electronic discovery, including eight terabytes of e-mail messages and instant messages, 5,800 minutes of audio recordings, and 111,250 TIFF [tagged image file format] images).

codified guidance, discrepancy amongst courts, and the increasing pervasiveness of electronic discovery, setting such a baseline is a critical step in securing fundamental fairness and due process of law for defendants in a digital age.