TIME TO FREE THE 'EVIDENCE': ANIMAL CRUELTY PROSECUTIONS, PRE-CONVICTION FORFEITURE, AND *BRADY* VIOLATIONS

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I. INTRODUCTION

This Article presents empirical research to investigate the traditional practice of holding seized animal victims of maltreatment in protective custody until their disposition is resolved pursuant to a criminal proceeding. This is of particular concern because protective custody usually entails confinement in an animal shelter or similar institutional setting.[1] Extended confinement under these circumstances is undesirable—especially when dealing with large numbers of animals—because such confinement causes stress that may inadvertently result in secondary victimization of the animals.[2] Furthermore, institutional

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[1] Jennifer H. Chin, *Pre-Conviction Forfeiture of Seized Animals: Considerations for Justice Professionals*, JUSTICE CLEARINGHOUSE (June 25, 2022) https://www.justiceclearinghouse.com/resource/pre-conviction-forfeiture-of-seized-animals-considerations-for-justice-professionals/ (accessed Oct. 6, 2023).

[2] *Id.*

confinement poses substantial logistical challenges and imposes substantial economic costs for those tasked with caring for the animals.[3]

The impetus for this research is that in nearly half of US states (~22/50) (**Table 1, Appendix**), extended confinement is potentially avoidable, due to statutes which provide for a civil hearing that can lead to rehabilitation and potential rehoming of seized animals weeks, months, or even years before their release at the conclusion of criminal proceedings (so-called pre-conviction forfeiture).[4] Despite the prevalence of such statutes, it is unknown how often civil forfeiture is utilized in practice and whether its use is successful. Because of the lack of actual data, strategy was developed to search appeals of state-level convictions for animal maltreatment. The strategy relied on the assumption that if the State regularly pursues pre-conviction forfeiture and defendants are subsequently convicted at a criminal trial, the unavailability of the animals would likely be included among the issues raised if the convictions were appealed. These issues would manifest as *Brady* violations, alleging a lack of due process arising from the State's failure to preserve potentially exculpatory 'evidence.'[5] Thus, the frequency of *Brady* claims relative to the total number of appealed convictions could be a rough proxy for how frequently pre-conviction forfeiture is used in real–world practice.

This search strategy produced 6,024 cases, which were then filtered for the word "Brady," resulting in only 5 appeals alleging a *Brady* violation related to the unavailability of seized animals. This Article argues that the most plausible reason for the dearth of cases containing *Brady* claims related to the unavailability of animals is that pre-conviction forfeiture is not being used as widely as it could in those states where that option is statutorily available. A corollary to this argument is that if the civil option is being routinely pursued in the interests of achieving early release of seized animals, those efforts must not be particularly successful. Nevertheless, it is encouraging that courts rejected all five *Brady* claims due to unavailability of the 'evidence'.[6] It is also noteworthy that the legal reasoning relied on in these opinions, despite some being unpublished, reaffirmed that the most relevant evidence of animal maltreatment is thorough documentation of the animals'

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[3] *Id.*

[4] Madeline Bernstein & Barry M. Wolf, *Time to Feed the Evidence: What to Do with Seized Animals*, 35 ENVTL. L. REP. NEWS & ANALYSIS 10679 (2005).

[5] *See* Youngblood v. West Virginia, 547 U.S. 867, 869 (2006) (holding that "a Brady violation occurs when the government fails to disclose evidence materially favorable to the accused"); California v. Trombetta, 467 U.S. 479, 488 (1984) (holding that the government has a limited duty to preserve evidence).

[6] Further discussed in Section II. La Rue v. State, 478 So. 2d 13 at note 1 (Ala. Crim. App. 1985); State v. Jones, 2003-Ohio-219 at ¶ 65.; State v. Woodbeck, 2005 WL 1514450 at *1 (Minn. Ct. App. June 28, 2005); State v. Bane, 2008 WL 2406233 at *1 (Ariz. Ct. App. June 10, 2008); State v. Wolford-Lee, 2018-Ohio-5064 at ¶ 16-21 [hereinafter *Brady Cases*].

condition at the time of seizure.[7] In light of these results, more definitive research into beliefs and practices of prosecutors concerning use of pre-conviction forfeiture, as well as any specific barriers or concerns about pursuing that option, is needed. The findings from such studies would be helpful in encouraging more routine use of pre-conviction forfeiture when law enforcement authorities seize abused animals—for their benefit as well as the benefit of those caring for them.

II. THE PROBLEM OF EXTENDED CONFINEMENT OF SEIZED ANIMALS

When animals are rescued from the custody of abusive or negligent owners through the execution of a search warrant, it is common practice that they are held in protective custody pending resolution of the legal proceeding.[8] There is one main exception to this practice: animals who are deemed to be suffering without hope of recovery may be euthanized.[9] This concerns animal welfare because protective custody usually involves animals being held in some sort of institutional setting, such as an animal shelter or kennel.[10] If a case proceeds all the way to trial, this could involve authorities confining animals for many months, if not longer. Extended confinement has both detrimental effects on seized animals as well as logistical and financial challenges associated with the process.[11] Several authors have described how continued confinement in an institutional setting can inadvertently result in a secondary victimization of those animals simply because confinement itself is stressful. Additional restrictions on when, if, and how the

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[7] *Brady Cases*, *supra* note 6.

[8] Chin, *supra* note 1; Bernstein & Wolf, *supra* note 4; Jennifer Wang, *What Due Process Should Be Provided to Dog Owners Before the Government Can Remove or Euthanize Their Dogs?,* ANIMAL LEGAL AND HISTORICAL CTR., MICH. ST. U. (2007), https://www.animallaw.info/article/what-due-process-should-be-provided-dog-owners-government-can-remove-or-euthanize-their-dogs (accessed Oct. 2, 2023); Rebecca Wisch & Ashley Dillingham, *Table of State Holding Laws,* ANIMAL LEGAL AND HISTORICAL CENTER, MICH. ST. U. (2017), https://www.animallaw.info/topic/state-holding-period-laws-impounded-animals (accessed Oct. 2, 2023).

[9] *Supra* note 8.

[10] Chin, *supra* note 1; Bernstein & Wolf, *supra* note 4; Jennifer Wang, *What Due Process Should be Provided to Dog Owners Before the Government can Remove or Euthanize Their Dogs?,* ANIMAL LEGAL AND HISTORICAL CENTER, MICH. ST. U. (2007), https://www.animallaw.info/article/what-due-process-should-be-provided-dog-owners-government-can-remove-or-euthanize-their-dogs (accessed Oct. 2, 2023); Rebecca Wisch & Ashley Dillingham, *Table of State Holding Laws,* ANIMAL LEGAL AND HISTORICAL CENTER, MICH. ST. U. (2017), https://www.animallaw.info/topic/state-holding-period-laws-impounded-animals (accessed Oct. 2, 2023).

[11] Bernstein & Wolf, *supra* note 4; RANDALL L. LOCKWOOD, AM. PROSECUTORS RSCH. INST., ANIMAL CRUELTY PROSECUTION. OPPORTUNITIES FOR EARLY RESPONSE TO CRIME AND INTERPERSONAL VIOLENCE, 26 (2006); Alexis C. Fox, *Using Special Masters to Advance the Goals of Animal Protection Laws*, 15 ANIMAL L., 87 (2008) (several authors describing the challenges and detrimental effects of long-term confinement).

animals may be allowed out of their kennels or cages for exercise and socialization, as well as limitations as to who may interact with them and for how long, likely contribute to the animal's chronic stress and even distress.[12] Although some jurisdictions may permit more flexibility with regard to confinement—such as allowing animals to be placed in temporary foster homes—that relief is neither universal nor guaranteed. This still leaves many potentially traumatized animals in a state of limbo for extended periods, without the healing that a permanent home could provide.[13] The importance of limiting the time seized animals spend in confinement has been succinctly described in an Oregon statute that reads, in part:

> Animals are sentient beings capable of experiencing pain, stress and fear; Animals should be cared for in ways that minimize pain, stress, fear and suffering; The suffering of animals can be mitigated by expediting the disposition of abused animals that would otherwise languish in cages while their defendant owners await trial.[14]

This potential for significant additional suffering begs the question: Why is extended confinement so often the default after abused or neglected animals are seized by authorities pursuant to a search warrant? The explanation is two-fold. First, animals are legally considered property of the defendant until due process[15] is satisfied to determine their disposition. Second, providing due process has traditionally been achieved via a prosecutor obtaining a criminal conviction, followed by a judge's dispositional decision, regardless of how long that might occur following seizure.[16] That tradition, however, is now out-of-date with available legal options in many states.

It is true that an initial short period of protective custody is usually required to allow for medical and behavioral assessment and treatment of the animals by the prosecution and the opportunity for a defense expert to examine them.[17] However, confinement may not necessarily have to extend until trial. In many states, amendments to the cruelty statutes have made it possible to satisfy due process by ordering early disposition of animals through pre-conviction forfeiture prior to the

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12 Bernstein & Wolf, *supra* note 4 at 10683.

13 *Id*.

14 Or. Rev. Stat. § 167.305(1–3).

15 *See Brady*, 373 U.S. at 86 (interpreting the due process clause of the 14th Amendment).

16 *See* Porter v. DiBlasio, 93 F.3d 301, 310 (7th Cir. 1996) ("The seizure and disposal of neglected animals falls squarely within the state's police power. Indeed, the power to seize and dispose of animals is analogous to the state's traditional power to take action to abate a nuisance or to protect the public health. As such, the state's disposal of neglected animals falls within the class of property deprivations for which the Fifth Amendment does not require compensation").

17 *See* State v. Newcomb, 375 P.3d 434, 442 (Or. 2016) (holding that the state may take animals into protective custody to preserve evidence of the crime and to render medical treatment to the animal if needed).

conclusion of a criminal trial.[18] Although the concept of pre-conviction forfeiture of seized animals is hardly new, the details of exactly how this may occur can vary among the applicable state statutes.[19] Unfortunately, vagaries and ambiguity in statutory language complicate investigations into the true prevalence of these state laws.[20] Technically, pre-conviction forfeiture is an outcome that can be achieved, not a type of statute. As a shorthand, this Article will refer to the 'classic' pre-conviction forfeiture statute as one in which definitive disposition may be decided, irrespective of a defendant's wishes, pursuant to a civil hearing where the owner's treatment of the animal is explicitly addressed in front of a judge or magistrate.[21] Depending on the state, this hearing may be requested by the entity who seized the animal, requested by the owner, or initiated automatically per statutory mandate.[22] The State typically must prove by preponderance of the evidence that the animal was maltreated for a court to order forfeiture.[23] However, in eight states, forfeiture can be put on hold until trial if the owner elects to post a bond to cover cost of care.[24] A few states, including Vermont[25], North Dakota[26], and Georgia[27], default to forfeiture proceedings automatically after a specified duration in custody, provided that the owner of the seized animal does not take advantage of other statutory due process where available.

What does seem clear from countless personal conversations with humane investigators, veterinarians, and other animal shelter personnel over the past two decades, is that there is a lingering belief that animals who are seized during execution of a search warrant must be held

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18 *See infra* Table 1 (illustrating statutes that may result in pre-conviction forfeiture of maltreated animals).

19 Bernstein & Wolf, *supra* note 4; Allie Phillips, *Release the Hounds: Using Pre-conviction Forfeiture to Save Seized Animals from Re-victimization,* NAT'L DIST. ATT'Y'S ASSOC. (2015), https://ndaa.org/resource/release-the-hounds-using-pre-conviction-forfeiture-to-save-seized-animals-from-re-victimization/ (accessed Oct. 07, 2023); David Rosengard, *When the Evidence Needs a Home: Best Practices for Pre-conviction Forfeiture Statute Use*, JUSTICE CLEARINGHOUSE (2021), https://www.justiceclearinghouse.com/resource/when-the-evidence-needs-a-home-best-practices-for-pre-conviction-forfeiture-statute-use/ (accessed Oct. 07, 2023).

20 Lockwood, *supra* note 11. In order to avoid overstating the opportunity for pre-conviction forfeiture, at least with respect to appeals for Brady violations, so-called "bond-only" statutes have not been included in Table 1. Those statutes are intended to ensure that cost of care is covered until trial, where disposition is ultimately decided. Pre-conviction forfeiture can only occur if the owner elects not to post a bond (or otherwise make regular payments) for care of seized animals.

21 Bernstein & Wolf, *supra* note 4 at 10680.

22 *Id*.

23 *Id*. at 10687. (in Michigan for example, an animal "can be forfeited before conviction if the prosecution files a civil action and establishes by a preponderance of the evidence that the animal cruelty laws were violated.").

24 See *id*. at 10680 n. 12 (Alaska, Indiana, Louisiana, Michigan, Missouri, New York, Utah, and Wyoming are some states where forfeiture may be placed on hold).

25 13 V.S.A. § 354(e).

26 N.D. CENT. CODE § 36-21.2-06.

27 GA CODE ANN. § 4-11-9.5 (2020).

until trial due to their evidentiary value.[28] With one rare exception,[29] there are no explicit requirements in state animal cruelty statutes indicating that seized animals must be held until the criminal case is adjudicated. Indeed, in their seminal paper "Time to Feed the Evidence," Bernstein and Wolf address this very issue head on and elaborate as to why the evidentiary value of animals is generally not sufficiently enduring to justify their confinement until trial.[30] Along with other authors,[31] they have emphasized that the relevant evidence in prosecutions for animal cruelty is documentation of the conditions of seized animals prior to and up until seizure. This includes, but is not necessarily limited to, veterinary records, necropsy reports, witness statements, photographs, and videos depicting the environment or type of care these animals were subjected to.[32] Nevertheless, the notion that there is evidentiary value in the physical availability of a seized animal

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[29] *See* Bernstein & Wolf, *supra* note 4, at 10681 (highlighting a Nevada statute). There is a provision in the Nevada statute specific to fighting dogs. *See, e.g.*, NEV. REV. STAT. § 574.090(2) (2022) ("The officer shall then deliver such animals, implements or other property to such magistrate, who shall thereupon, by order in writing, place the same in the custody of an officer or other proper person in such order named and designated, to be kept by him or her *until the trial or final discharge of the offender*, and shall send a copy of such order, without delay, to the district attorney of the county.") (emphasis added). The Nevada statute contains another relevant provision. *See* NEV. REV. STAT. § 574.090 (3) ("The officer or person so named and designated in the order shall immediately thereupon assume custody, and shall retain the same for the *purpose of evidence upon the trial*, subject to the order of the court before which the offender may be required to appear, until the offender's final discharge or conviction.) (emphasis added). A cruelty statute in Wisconsin allows for the owner of a seized animal to petition for a hearing to determine return of custody. *See* WIS. STAT. § 173.22(4)(a)-(b) (2021) ("In the hearing under par. (a), the court shall determine if the animal is needed as evidence or if there is reason to believe that the animal was involved in any crime under s. 944.18 or ch. 951. If the court determines that *the animal is needed as evidence* or that there is reason to believe that the animal was involved in any crime under s. 944.18 or ch. 951, the court shall order the animal to be retained in custody. If the court determines that *the animal is not needed as evidence* and that there is not reason to believe that the animal was involved in a crime under s. 944.18 or ch. 951, the court shall order the animal returned to the owner.") (emphasis added).

[30] *See* Bernstein & Wolf, *supra* note 4, at 10680–81. (discussing the evidentiary value of animals at trial).

[31] Danielle Maddox Kinchen, *It Takes a Village to Protect its Pets: How to Empower Local Community Organizations in the Fight for Companion Animal Rights*, 25 ANIMAL L. REV. 269, 289–90 (2019); April Doherty & Martha Smith-Blackmore, *Best Practices in Animal Cruelty Investigations*, NAT'L COALITION ON VIOLENCE AGAINST ANIMALS 74-75 (Sept./Oct. 2018).

[32] Bernstein & Wolf, *supra* note 4, at 10681–82.

is superficially plausible, as it may be seen as a corollary to the treatment of other forms of evidence by pop culture and television crime shows. For those who are more deeply involved in animal cruelty investigations, the notion may be further reinforced if they see the 'evidence' terminology used somewhat loosely in their trade literature. Also, without a uniform procedure or otherwise broadly understood statutory mandate, prosecutors—especially those who do not routinely handle animal cruelty cases—may simply be unaware pre-conviction forfeiture options exist. The same may be true for animal cruelty investigators and humane society administrators, who are consequently unprepared to press prosecutors to consider this option, or otherwise initiate a petition themselves where allowed. Another possibility is that it may be—or at least might be perceived to be—too cumbersome to pursue civil forfeiture prior to trial, particularly for an overworked prosecutor. It is also possible that individual prosecutors have encountered limited success in civil forfeiture hearings and are thus disinclined to pursue that course of action. Finally, given historical beliefs about animals' evidentiary value, it is possible that various decision-makers involved in the prosecution of a case avoid pursuing pre-conviction forfeiture as a strategy to preclude the possibility of encumbering the case with the specter of subsequent legal challenges, however unfounded they may be. In particular, there may be a fear of due process claims based on the failure to preserve evidence, resulting in so-called *Brady* violations because a previously seized animal is no longer physically available.[33] To begin to address that latter possibility, this Article will explore whether there is any substantive indication of alleged *Brady* violations being raised in appeals of convictions for animal cruelty or neglect and the outcomes of those claims.

III. APPEALS ALLEGING *BRADY* VIOLATIONS OF DUE PROCESS

The basis for a *Brady* claim is that a criminal defendant has been deprived of their rights under the Due Process Clause of the Fourteenth Amendment.[34] The Due Process Clause of the Fourteenth Amendment is a constitutional protection intended to ensure that persons accused of a crime have the opportunity to present a complete defense.[35] This necessarily requires the State to preserve and disclose to the defense exculpatory evidence and information relevant to either guilt or punishment. A *Brady* claim can be raised if the prosecution fails to meet the above standard. The good or bad faith of the State is irrelevant when the alleged suppressed evidence is materially exculpable, which

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[33] Brady, 373 U.S. at 87-88 (1963); *Position Statement on Protection of Animal Cruelty Victims*, ASPCA, https://www.aspca.org/about-us/aspca-policy-and-position-statements/position-statement-protection-animal-cruelty-victims (accessed Oct. 4, 2023).

[34] *See* Brady, 373 U.S. at 83.

[35] *Id*.

requires that the evidence's "exculpatory value [] be apparent *before* the evidence is destroyed and be unique in that the defendant would be unable to obtain comparable evidence by other reasonably available means."[36] Alternatively, if the evidence is merely "potentially exculpatory," the defendant "must show bad faith on the part of the prosecution" in its mishandling of or failure to preserve such evidence.[37]

To identify convictions for animal maltreatment which subsequently resulted in a claim of a *Brady* violation, a search was conducted on January 12, 2021, in the Nexis Uni legal database of state-level appeals cases in the United States from the *Brady v. Maryland* decision in 1963 to the present.[38] Out of 6,024 cases retrieved using the search term 'animal cruelty,' 133 also included the term '*Brady*.' These cases were then reviewed individually for relevance. To be eligible for consideration in this review, a case had to involve an appeal alleging a violation of due process in a conviction or sentence for animal cruelty or neglect on grounds broadly relating to the unavailability of the animal victims. Retrieved cases were discarded for four primary reasons: [1] The case was retrieved for reasons other than being primarily an appeal of a conviction for animal cruelty (e.g., a civil action involving the Society for the Prevention of Cruelty to Animals, such as a tax, employment, or defamation issue); [2] The case was retrieved because animal cruelty was mentioned only as part of the history of a person appealing a conviction for other crimes or mentioned in the history of a victim of child abuse; [3] The alleged due process violation involved evidence other than the animals (e.g., documents related to the case or evidence that could impeach a witness); or [4] The case was retrieved simply because one or more of the parties involved (e.g., judge, defendant, prosecutor, expert witness) had the name Brady.

Ultimately, only five appellate cases were identified where *Brady* violations related to the failure to preserve animals or their bodies were among the issues raised by appellants convicted of animal maltreatment. In each case, that specific argument was rejected by the Court.[39] At least half (155/312) of the animals involved had been euthanized and their bodies disposed of prior to trial, often shortly after seizure. A complete accounting of the method of disposition of every animal was not available, but in addition to those which were adopted into new homes prior to trial, some animals were euthanized because of poor medical prognoses, some appear to have been euthanized as a matter of convenience, and some because of their alleged use in dog fighting.[40] It is important to note that pre-conviction forfeiture was not utilized to facilitate any of those pre-trial disposition decisions.

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[36] *Id*.

[37] *Id*.

[38] *Id*.

[39] *Brady Cases*, *supra* note 6.

[40] *See* State v. Wolford-Lee, at ¶ 22 (describing appellants request to secure documents indicating seized cats were placed for adoption).

In *La Rue,* ten dogs—whom the appellant claimed to have taken in as strays—were seized and later euthanized because their medical prognosis was deemed poor by the veterinarian who examined them.[41] The appellant alleged that this violated his right to inspect the evidence to be used against him, arguing that dogs' evidentiary value was analogous to other seized evidence, such as controlled substances.[42] The Court explicitly rejected this line of reasoning, holding that "[i]n order to present sufficient evidence of the offense, the State was required to establish the mistreated or neglected condition of the dogs at the time of the search and seizure."[43] The Court further noted that the state did indeed present a prima facie case of cruelty via evidence of the condition of the dogs at the time when they were removed from the defendant's control, and that the defendant was not prejudiced by the dogs' disposal.[44] The original guilty verdict was thus affirmed.[45]

The next case, *Jones,* involved convictions for dog fighting, cultivating a controlled substance, and a firearms offense.[46] The *Brady* issue here involved seven dogs who were euthanized by the dog warden months prior to trial, in order to reduce costs.[47] The appellant contended that euthanasia of the dogs infringed on his right to due process because the destroyed 'evidence' was potentially material to the issue of guilt.[48] The Court disagreed on that point, noting that the appellant's counsel failed to arrange for an examination by a defense expert within a reasonable period of time. Additionally, the Court held that the state did indeed preserve the evidence through treatment records and by making a videotape of its expert examining and diagnosing the dogs' injuries.[49] Although it found that the better course of action would have been to preserve the dogs until after trial, the Court gave no indication of why that would have been preferable.[50] Ultimately, the conviction was affirmed in part and reversed in part for reasons other than the claim of a *Brady* violation, and the case was remanded for a new trial on the dogfighting charges.[51]

In *Woodbeck*, authorities seized eighteen dogs with injuries consistent with dog fighting, malnourishment, or neglect—or some combination of these conditions. [52] Pursuant to a Minnesota statute, the dogs

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41 La Rue v. State, *supra* note 6 at 14.

42 *Id.* at 16.

43 *Id.*

44 *Id.*

45 *Id.* at 17.

46 State v. Jones, *supra* note 6, at 1.

47 *Id.* at 3.

48 *Id.* at 7.

49 *Id.* at 12.

50 *Id.*

51 *Id.* at 15–16.

52 State v. Woodbeck, *supra* note 6, at 1.

were held for ten days and then euthanized.[53] However, charges were not filed until about a year and a half later, when the appellant made a discovery motion to have access to the dogs or their bodies.[54] The appellant claimed that the dogs' appearance was central to the charges, and without such access, the evidence from the examination of the dogs at the time of seizure should be excluded.[55] In an unpublished opinion affirming the conviction, the Court noted that the appellant failed to show that the decision by authorities to euthanize the dogs was made in bad faith and that the dogs or their bodies would have been exculpatory.[56] Merely alleging that the dogs or their bodies could have potentially been useful was deemed insufficient.[57] In explaining its reasoning, the Court further remarked that the appellant:

> [D]oes not state how his ability to examine the dogs would produce exculpatory evidence or what type of exculpatory evidence he hopes to obtain. In this case, the appellant presumably knew the dogs' condition. Until they were seized, they were in his custody and control. Appellant makes no claim that the appearance of the dogs supports his innocence. Therefore, appellant has not shown that the exculpatory nature of the evidence was apparent at the time the dogs were euthanized and cremated by animal control officers. Furthermore, appellant has failed to show that by allowing the dogs to be killed and cremating their remains, the officers acted in bad faith.[58]

The justices also noted that the appellant could also have questioned the veterinarian who examined the dogs.[59]

In *Bane*, animal control officers and a sheriff's deputy in Yavapai County, Arizona, executed a search warrant at the defendant's so-called 'sanctuary' housing 120 animals.[60] All animals were surrendered to the county by the defendant, either shortly before or at the time of seizure.[61] Almost all of the animals were euthanized on the day of seizure, and their bodies disposed of due to the lack of sufficient refrigerated storage space.[62] Importantly, the animals had been photographed and their physical condition was documented.[63] The Court rejected the appellant's argument that the case should be dismissed because the state

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53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.* at 2 (citing State v. Friend, 493 N.W.2d 540, 545 (Minn. 1992); California v. Trombetta, 467 U.S. 479, 488–89 (1984)).

57 *Id.* (citing Arizona v. Youngblood, 488 U.S. 1051, 1057; State v. Heath, 685 N.W.2d 48, 55 (Minn. CtApp. 2004)).

58 *Id.*

59 *Id.* at 3.

60 State v. Bane, *supra* note 6, at *1-2.

61 *Id.* at *2, *9.

62 *Id.* at *4.

63 *Id.*

failed to preserve the bodies as potentially exculpatory evidence.[64] In an unpublished opinion, the Court noted that:

> [The] [d]efendant has failed to show that he was prejudiced. In fact, Defendant has never identified how the carcasses were exculpatory nor how they could have otherwise benefitted his defense. In his opening brief, Defendant merely argued that during trial, it became apparent that the destruction of the carcasses materially prejudiced his ability to mount an adequate defense to these charges. However, Defendant has never explained how he was materially prejudiced.[65]

The Arizona Court's perceptive observations serve to highlight a more generalizable issue. Specifically, from a veterinary perspective, it is difficult to conceive of how the condition of seized animal(s) when they are well on the road to recovery could provide exculpatory value of any kind of alleged previous maltreatment. It would be prudent to raise that concern with a veterinarian, (especially someone trained in forensic science), in the unlikely event that a very unique set of conditions exists. Given that precaution, the specter of some heretofore unrecognized exculpatory situation should not be allowed to overshadow the pursuit of pre-conviction forfeiture for every animal maltreatment case, given the likely rarity of the former and the high probability of unintended harm associated with long-term confinement.

Finally, in *Wolford-Lee*, a *Brady* claim was raised in the appeal of a conviction that involved the seizure of 157 live and four dead cats from a home converted to a cat shelter—which the appellants claimed was for feral, aged, sick and dying cats.[66] Charges were not filed until about seven weeks after seizure.[67] Apparently, some of the cats were disposed of via adoption by the shelter prior to trial.[68] The appellants argued that they were unable to defend the charges because they did not have prompt access to the cats, which allegedly would have allowed them to prove the cats were in better condition than claimed by the prosecution.[69] In their decision, the Court noted that a defense expert was in fact able to see and photograph the animals approximately three weeks after seizure, when their condition had markedly improved.[70] The Court further referenced the *Jones* decision, finding that documentation at the time of the seizure of the cats—based on photographs of each cat and veterinarian records—provided ample evidence of the animals' conditions as they related to the crimes charged.[71] The Court

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64 *Id.* at *4–5.

65 *Id.* at *5.

66 State v. Wolford-Lee, *supra* note 6, at *1.

67 *Id.* at 2.

68 *Id.* at 3.

69 *Id.* at 2.

70 *Id.* at 3–4.

71 *Id.* at 4.

upheld the convictions, although one justice dissented for reasons unrelated to the availability of the cats.[72]

Two additional claims—one in Arizona and one in California—were identified from this search of appeals cases, in which pre-conviction forfeiture coincided with a *Brady* claim.[73] However, both claims focused on witness impeachment, rather than the unavailability of the forfeited animals due to pre-trial disposition. In the Arizona case, a number of seized cats were forfeited to the state at a post-seizure civil hearing in municipal court, which did not allow pre-trial discovery as a matter of practice in civil cases.[74] The defendant then filed a series of special actions and amendments, requesting that the forfeiture of her cats be vacated on the grounds that undisclosed evidence of impeachment amounts to a *Brady* violation.[75] Ultimately, the Superior Court denied the requested relief on its merits, noting that *Brady* is inapplicable in civil cases.[76] The Appeals Court noted that although *Brady* is rarely applied in civil cases, civil forfeiture in the Superior Court was subject to disclosure and discovery according to the Arizona rules of civil procedure.[77] Although affirming the Superior Court's denial of relief on other grounds, the Court of Appeals held that *Brady* applied to forfeiture actions by the State where discovery was prohibited.[78] Finally, an appeal in California also included a claim of a *Brady* violation related to witness impeachment.[79] The appellant argued, unsuccessfully, that county employees had reason to shade their testimony about the conditions of her cats and that the information sought in discovery could have been exculpatory.[80] However, in affirming the conviction, the court made specific comments that would have been relevant even if the *Brady* claim had involved the early adoption or euthanasia of the animals. Specifically, in an unpublished opinion, the Court found that the conditions of the animals were well catalogued and documented by video and photo evidence, and that evidence was more than sufficient to convict the appellant.[81] In particular, the Court remarked: "Appellant's treatment of the cats qualifies as abuse under any understanding of that word."[82] What is noteworthy in both of these cases is that there was pre-conviction forfeiture, but the defense did not raise the unavailability of the animals in the appeal.

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72 *Id.* at 8.

73 Foor v. Smith*, 416 P.3d 858, 860 (Ariz. Ct. App. 2018),* People v. Rexelle, No. F041006, 2003 Cal. App. Unpub., 2003 WL 22229510, at *16-17 (Sept. 26, 2003).

74 Foor*, supra* note 73.

75 *Id*. at 860, 862.

76 *Id*. at 861.

77 *Id*. at 862.

78 *Id*. at 864.

79 Rexelle, *supra* note 73.

80 *Id*. at *19.

81 *Id*.

82 *Id*. at *13.

IV. CONCLUSION

The key findings of this research are that claims of *Brady* violations of due process arising from early disposition of seized animals have only rarely been raised in appeals of convictions of animal maltreatment, and the courts have uniformly rejected those claims. Furthermore, judicial comments in those appeals cases have unambiguously reaffirmed that the most relevant evidence in a prosecution for animal maltreatment is thorough documentation of the animals' conditions at the time of seizure and not the availability of the animals at time of trial. As previously noted, this evidence can include photographs, video recordings, records of veterinary exams and treatment, necropsy reports, and witness testimony which describes the condition of the animals, the environment they were living in, and type of care they received up to and at the time of seizure. Engaging a veterinarian with experience in the growing field of forensic veterinary medicine as part of the team executing a search warrant to remove the maltreated animals has the potential to further improve the quality of such evidence.

These results are important for another reason. Although circumstantial, the dearth of claims of *Brady* violations arising from the failure to preserve seized animals in appeals of convictions for animal maltreatment could be an indication that pre-conviction forfeiture is itself uncommon. Given that nearly half of states have enacted statutes that may lead to forfeiture prior to trial, this lack of challenges to the legality of such forfeiture supports the contention that the traditional practice of holding animals until trial remains the standard approach, rather than the outlier. That would be unfortunate, since civil forfeiture is not a new tool. Indeed, as far back as 2005, six states–Arizona, Illinois, Kansas, Montana, Oregon, and Vermont–had a statute on the books that provided for the possibility of pre-conviction forfeiture.[83] Unfortunately, in 2019 the statute in Montana was rewritten to only require that the cost of care be covered.[84]

Another possible explanation for the rarity of claims of *Brady* violations is that defense attorneys are sufficiently well-versed in animal law such that they realize claims of the unavailability of animals as evidence are not likely to satisfy the *Brady* standard, and thus have wisely chosen not to include them as grounds for appeals of convictions for animal maltreatment.[85] However, given the variety and frequency of

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[83] Bernstein & Wolf, *supra* note 4, at 10680.

[84] S.B. 320, 66th Leg., Reg. Sess. (Mont. 2019).

[85] The bar to establish a *Brady* violation is set high, and animals not being available during pretrial discovery or disclosure has not been sufficient to meet that high bar.; *See, e.g.*, Wofford-Lee, *supra* note 6, at 2–3 (The court declined to apply *Brady* when appellants alleged the seizure and denial of access to their cats in an animal cruelty proceeding amounted to a due process violation. In doing so, the court found appellants met neither of two alternative, demanding *Brady* thresholds. Because appellants asserted that the State failed to preserve "potentially useful" evidence but failed to demonstrate prosecutorial bad faith, their *Brady* claim necessarily failed.); Foor, *supra* note 67, at

other issues—some of which also have the flavor of grasping at straws—that were commonly raised in appellate briefs, the explanation of legal rigor seems insufficient to explain the dearth of such claims.

It is critical to confirm whether the dearth of *Brady* claims in appeals cases actually reflects a failure to utilize pre-conviction forfeiture in states where it is available. If more definitive research reveals there is lack of awareness about pre-conviction forfeiture statutes where they exist, one remedy is greater education of those involved in intervention and prosecution. This includes prosecutors as well as Humane Society administrators and humane agents, who are in a position to bring the statute to the attention of a prosecutor and explain why this would be so important for the animals, as well as for those tasked with caring for them. Another possible remedy would be to statutorily mandate pursuing pre-conviction forfeiture, at least for some forms of animal maltreatment, rather than leaving it as an option for prosecutors to consider. On the other hand, if civil forfeiture is regularly pursued by prosecutors but denied by courts, it would be valuable to understand the reasons behind the lack of success to help refine future efforts. Judges, who are likely to be even more removed from the nuts and bolts of animal maltreatment than many prosecutors, may also benefit from education, especially if they have misperceptions about the evidentiary value of animals. Finally, it is also conceivable that the lack of use of pre-conviction forfeiture options reflects a cautious strategy intended to preclude encumbering a conviction with the possibility of subsequent claims of a *Brady* violation due to concerns about the evidentiary value of seized animals. If that is the case, then hopefully the information contained in this Article will provide an impetus for reconsidering the pursuit of pre-conviction forfeiture more routinely in states where that option is available. At minimum, it is hoped that the evidentiary value of animals becomes more clearly understood and leads to a more uniform approach to the procedures involved in prosecution of animal maltreatment.

Taking a long view, greater acceptance and familiarity with pre-conviction forfeiture might also help pave the way for other proposed civil efforts which would allow removal of animals from abusive conditions even earlier—perhaps well before conditions deteriorate to the point where seizure is feasible, prosecution is warranted, and conviction is likely—by drawing on concepts related to forensic competency assessment and capacity for care of animals.[86] Such an approach would

863–64 (rejecting, in an animal forfeiture case, appellant's argument that undisclosed impeachment material amounted to a *Brady* violation because a "Constitutional error requiring a new trial based upon nondisclosure of information helpful to the defense exists only when the omitted evidence *creates 'a reasonable doubt that did not otherwise exist*.'") (emphasis added).

[86] *See generally* CATHERINE AYERS ET AL., ANIMAL MALTREATMENT: FORENSIC MENTAL HEALTH ISSUES AND EVALUATIONS (Lacey Levitt et al. eds., 2016) (introducing "an emerging subfield of forensic mental health that aims to assist society and the courts in their responses to animal maltreatment," with one suggestion being "forensic animal maltreatment evaluations").

be consistent with animals' status as a special form of property and as sentient beings. It would also be a way to leave behind having to tolerate any standard of care as long as it was marginally above the line demarcating prosecutable cruelty and move towards providing more animals with the lives they deserve.

Although these principles have not yet been extended to animal care in the United States, the fundamental aspects of several existing competencies that are currently regularly assessed by forensic experts seem particularly relevant. These include the competency to make medical treatment decisions, competency for self-care or care of property, and parenting competency. Indeed, incompetent parenting is a major reason that children are placed in foster care by courts. Particularly with respect to encouraging good care for groups of animals, shelter medicine has matured into a boarded specialty in veterinary medicine, akin to surgery or cardiology. The Association of Shelter Veterinarians has recently released the second edition of their animal care guidelines[87], which would contribute valuable science-based information with respect to both competency and capacity to care for animals. These veterinarians, as well as various forensic specialists, stand ready to assist should the animal law community chose to initiate the process of creating the legislation necessary to establish a new legal competency related to caring for animals, especially those who are vulnerable due to age and health, particularly given the sheer number of animals involved.

[87] *The Association of Shelter Veterinarians' Guidelines for Standards of Care in Animal Shelters: Second Edition*, J. OF SHELTER MEDICINE & CMTY. HEALTH (December 2022), https://jsmcah.org/index.php/jasv/article/view/42/19, (accessed Nov. 19, 2023).

V. APPENDIX

A. TABLE 1: STATE STATUTES THAT CAN BE UTILIZED TO OBTAIN PRE-CONVICTION FORFEITURE OF MALTREATED ANIMALS AFTER SEIZURE[88]

State	Year	Statute
Arizona	2021	ARIZ. REV. STAT. § 13-4281
Colorado	2020	Colo. Rev. Stat. § 18-9-202.5 Colo. Rev. Stat. § 35-42-109
Connecticut	2020	CONN. GEN. STAT. § 22-329A
Florida	2021	FLA. STAT. § 828.073
Georgia	2020	GA. CODE ANN. § 4-11-9.3; § 4-11-9.5
Hawaii	2021	HAW. REV. STAT. § 711-1109.2
Idaho	2021	IDAHO CODE § 25-3520B
Illinois	2021	510 ILL. COMP. STAT. 70/3.04; 70/3.05
Iowa	2021	IOWA CODE § 717B.4, 717B.5
Kansas	2021	KAN. STAT. ANN. § 21-6412(E)
Maine	2021	ME. REV. STAT. 17 § 1021, § 1027
Michigan	2021	MICH. COMP. LAWS § 750.50(3)
Minnesota	2021	MINN. STAT. § 343.235
Mississippi	2020	MISS. CODE § 97-41-2
Missouri	2021	MO. REV. STAT. § 578.018
North Dakota	2021	N.D. CENT. CODE § 36-21-2-05,-06
Oregon	2021	OR. REV. STAT. § 167.347
Rhode Island	2021	R.I. Gen. Laws § 4-1.2-4 R.I. Gen. Laws § 4-1.2-5
South Dakota	2021	S.D. CODIFIED LAWS § 40-1-34
Texas	2021	TX. HLTH. & SAF. CODE § 821.022; § 821.023
Vermont	2021	13 VT. CODE R. § 354(D)
Virginia	2021	VA. CODE ANN. § 3.2-6569

[88] States with bond-only statutes are not included.