A SOLUTION TO *BRADY* VIOLATIONS: NEUTRAL EVIDENCE REFEREES AND STRICTER SANCTIONS

I. INTRODUCTION

Picture a high-crime, inner-city neighborhood plagued with gang violence that neighboring communities generally try to avoid.[1] In response to these dangerous conditions, law enforcement police the area more strictly to make it safer for residents. One day, a woman's body is found badly beaten and mutilated. Because gang violence is so prevalent in this neighborhood, the prosecution advances a theory of a violent group attack. This provides a prime opportunity to jail several gang members from the neighborhood. As the trial goes on, the prosecution collects evidence suggesting that a large group of people committed the murder. Evidence also comes forth suggesting that a single actor committed the murder. This evidence, however, is never made known to the defendants. The prosecution proceeds to offer plea deals to the defendants, who are still unaware of the exculpatory evidence. One defendant accepts the guilty plea; the others reject the offers. Eventually, the case goes to trial, and, based on the evidence presented by the prosecution, the jury finds that there was a group attack and convicts the defendants for the woman's murder. While the defendants may not have necessarily been the ones responsible for the murder, the government feels justice was still properly served, as these dangerous individuals, who are most likely in a gang, are locked up and out of the neighborhood.

Surely, a majority of people would find this troubling. There was no justice served—it was only impeded. But the facts presented here are nearly identical to those in *Turner v. United States*,[2] in which the United States Supreme Court affirmed a narrow view of the *Brady* doctrine, encouraging courts to permit the withholding of exculpatory evidence from criminal defendants.

Part II of this Comment provides a background of the *Brady* doctrine, beginning with *Brady v. Maryland*, and explains how it has been interpreted and where it is heading. Part III analyzes the current view of *Brady*, explaining how its current form has strayed from the Court's initial message and how this gives prosecutors excessive evidentiary nondisclosure power. Part IV proposes that an Evidence Referee, who is bound by broad materiality standards and encouraged to enforce strict sanctions

1. The facts in this hypothetical are based on the facts in *Turner v. United States*, 137 S. Ct. 1885 (2017), which is discussed *infra* Section II.E.

2. *Turner*, 137 S. Ct. 1885.

for noncompliance, can fix the problems surrounding the *Brady* doctrine by overseeing all evidence between the prosecution and defense. Finally, Part V concludes, reiterating the problems with the current *Brady* doctrine and why change is necessary in this area of law.

II. BACKGROUND

The Supreme Court handed down one of its landmark decisions in *Brady v. Maryland*.[3] Unfortunately, this decision created confusion in the lower courts. The standard set forth was new, and how to apply it was unclear. For this reason, courts took on the task of interpreting the *Brady* decision to clarify its message. However, each major decision that has followed appears to stray even further away from the *Brady* Court's initial message.

A. *BRADY V. MARYLAND*

In 1961, John Brady petitioned the Supreme Court for post-conviction relief, and in 1962, the Court granted certiorari.[4] Brady and another man, Boblit, were both found guilty of first-degree murder resulting from a robbery and sentenced to death.[5] It was conceded that Brady and Boblit conspired with one another to rob the victim, but both men claimed it was the other that committed the murder.[6] The two men had separate trials, and Brady "admitted his participation in the crime" and "ask[ed] only that the jury return [a] verdict 'without capital punishment.'"[7] Before the trial, Brady's counsel requested that the prosecution "allow him to examine Boblit's extrajudicial statements" to prepare Brady's defense.[8] Many statements were shown to Brady, but one statement, which contained Boblit's admission to "the actual homicide," was withheld.[9]

After discovering this statement, Brady's counsel filed an application for post-conviction relief, which was denied.[10] On appeal, the Maryland Court of Appeals held that the suppression of evidence by the State denied Brady constitutional due process of

3. Brady v. Maryland, 373 U.S. 83 (1963).
4. *See id.*
5. *Id.* at 84.
6. Brady v. State, 174 A.2d 167, 168 (Md. 1961), *aff'd*, 373 U.S. 83 (1963).
7. *Brady*, 373 U.S. at 84.
8. *Id.*
9. *Id.*
10. *See* Brady v. State, 160 A.2d 912, 914 (Md. 1960).

law, and the case was remanded for retrial on the issue of punishment.[11] The Supreme Court agreed with the court of appeals and, expanding upon previous decisions, held that the suppression of favorable evidence that has been requested by a defendant "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."[12] The Court further noted that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."[13]

B. INTERPRETING THE STANDARD SET FORTH IN *BRADY*

The holding in *Brady* caused confusion for federal and state courts. As a result, the Supreme Court revisited its decision numerous times to clarify its holding. While the *Brady* decision seemed to establish a broad scope for what must be disclosed by the prosecution, every subsequent case appeared to apply a narrow interpretation of materiality. One example is the Court's decision in *United States v. Agurs*.[14] In *Agurs*, a woman was convicted of second-degree murder after stabbing the victim multiple times in the chest.[15] She relied on the defense that she was attacked with the knife and only acted in self-defense.[16] Three months after trial, defense counsel discovered withheld evidence that would have supported a self-defense theory (i.e., the victim's prior criminal record) and a recent opinion indicating "that such evidence was admissible even if not known to the defendant."[17] The district court found that the evidence was not sufficiently material, but the court of appeals reversed, finding that the evidence *was* "sufficiently material" and that its nondisclosure warranted a new trial because it could have affected the jury's decision.[18]

While the appellate court's finding seemed to be in line with *Brady*, the Supreme Court stated that the court of appeals's

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11. *See* Brady v. State, 174 A.2d 167, 171–72 (Md. 1961), *aff'd*, 373 U.S. 83 (1963).

12. Brady v. Maryland, 373 U.S. 83, 86–87 (1963).

13. *Id*. at 87.

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

15. *Id*. at 98.

16. *Id*. at 100. This was a relatively poor defense because when she surrendered to the police, she had "no cuts or bruises"; rather, it was the victim that displayed deep stab wounds "characterized . . . as 'defensive wounds.'" *See id.*

17. *Id*.

18. United States v. Agurs, 510 F.2d 1249, 1251 (D.C. Cir. 1975), *rev'd*, 427 U.S. 97 (1976).

decision was a "significant departure" from the *Brady* holding and reversed.[19] The Court reasoned that in *Brady*, the defense made a specific request for the evidence, whereas in *Agurs*, no request was made.[20] The Court clarified that "if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made."[21] The Court found, however, that the withheld evidence was "cumulative of the evidence" provided and would not have resulted in a fairer trial.[22]

C. DEFINING MATERIALITY

As a narrower interpretation of *Brady* developed, there was still confusion surrounding the standard for materiality of evidence. The *Brady* Court held that evidence must be material, but did not expand upon what constituted material evidence. The Court addressed this problem over twenty years later in *United States v. Bagley*.[23] In that case, Hughes Bagley was indicted for violating multiple "federal narcotics and firearms statutes."[24] Prior to trial, Bagley filed a discovery motion requesting "[t]he names and addresses of witnesses that the government intend[ed] to call at trial . . . and any deals, promises, or inducements made to witnesses in exchange for their testimony."[25] The prosecution produced numerous affidavits signed by its primary witnesses, James O'Connor and Donald Mitchell, each concluding that the signee made the statements free of reward or promises of reward.[26] Bagley was ultimately found guilty for the narcotics charges and once in jail, filed requests for information.[27] He received contracts signed by O'Connor and Mitchell stating that the United States would pay them each $300 for "services and information rendered."[28] Bagley moved to vacate his sentence, arguing that his due process rights under *Brady* were violated because had he received these contracts, they could have been used to impeach

19. United States v. Agurs, 427 U.S. 97, 102 (1976).

20. *Id*. at 106.

21. *Id*. at 107.

22. *Id*. at 114.

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

24. *Id*. at 669.

25. *Id*. at 669–70.

26. *Id*. at 670. Each affidavit produced that was signed by O'Connor and Mitchell contained the statement: "I made this statement freely and voluntarily without any threats or rewards, or promises of reward having been made to me in return for it." *Id*.

27. *Bagley*, 473 U.S. at 671.

28. *Id*.

O'Connor and Mitchell.[29]

The district court found it likely that O'Connor and Mitchell expected compensation for their participation but ultimately found that "the disclosure would have had no effect upon its finding" that the prosecution proved its case "beyond a reasonable doubt."[30] The court of appeals reversed, however, noting that "prosecutorial failure to respond to a specific *Brady* request is properly analyzed as error, and a resulting conviction must be reversed unless such error is harmless beyond a reasonable doubt."[31] The Supreme Court disagreed with the appellate court's reasoning and reversed its holding.[32] The Court noted that *Brady* requires disclosure of evidence that is both favorable and material, and the prosecution is only required to disclose such evidence if its suppression "would deprive the defendant of a fair trial."[33] The Court then provided a standard for materiality under the *Brady* doctrine: "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[34]

D. WITHHELD EVIDENCE AND PLEA BARGAINING: A CIRCUIT SPLIT[35]

Withholding evidence also has substantial effects on pre-trial negotiations. Defendants do not have the same constitutional protections during plea bargaining that they receive at trial.[36] With plea negotiations, a defendant waives his trial rights, and a recommendation of dropping charges for a lesser sentence in exchange for a guilty plea is made to the judge by the prosecution.[37] In 1990, 84% of all federal criminal cases were resolved by guilty

29. United States v. Bagley, 473 U.S. 667, 671–72 (1985).

30. *Id*. at 673.

31. Bagley v. Lumpkin, 719 F.2d 1462, 1464 (9th Cir. 1983), *rev'd sub nom*. United States v. Bagley, 473 U.S. 667 (1985).

32. *Bagley*, 473 U.S. at 674.

33. *Id*.

34. *Id*. at 682.

35. For a more detailed explanation of the issues discussed in this section, see generally Michael Nasser Petegorsky, Note, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599 (2013). Petegorsky's piece is the inspiration for this section and all of its subparts, which aim to provide a succinct summary of the circuit split covered in his work.

36. *Id*. at 3606.

37. This is a basic description of plea bargaining, as the rules and procedures of plea bargaining are not the primary focus of this Comment. For a more detailed explanation, see Petegorsky, *supra* note 35, at 3606–10.

pleas, and by 2011, that number grew to 97%.[38] With such a high volume of guilty pleas, problems arise when the federal circuits disagree as to whether the *Brady* doctrine applies to exculpatory evidence during plea bargaining.[39]

1. THE SOURCE OF CONFUSION: *UNITED STATES V. RUIZ*

This circuit split resulted from the Supreme Court's decision in *United States v. Ruiz*.[40] In *Ruiz*, law enforcement found thirty kilograms of marijuana in the defendant's luggage, and prosecutors offered her a "fast track plea bargain" whereby Ruiz would "waive indictment, trial, and an appeal" in exchange for a lesser prison sentence.[41] The plea agreement further required Ruiz to "waiv[e] the right to receive impeachment information relating to any informants or other witnesses."[42] Ruiz did not agree to this waiver, and the prosecutors withdrew the offer and indicted Ruiz for unlawful drug possession, to which she ultimately pled guilty and received a standard sentence.[43] The Ninth Circuit vacated this sentence, however, finding that "the Constitution requires prosecutors to make certain impeachment information available to a defendant before trial," regardless of whether the defendant waived the right to receive such information.[44] The Supreme Court disagreed and acknowledged that the Constitution requires that defendants enter guilty pleas "voluntar[ily]" and that waivers be made "knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences."[45] With this in mind, the Court concluded that the Constitution does not require pre-guilty plea disclosure of impeachment information.[46]

2. THE CIRCUIT SPLIT

In *McCann v. Mangialardi*,[47] the Seventh Circuit examined

38. Petegorsky, *supra* note 35, at 3611.

39. *See id.* at 3612.

40. United States v. Ruiz, 536 U.S. 622 (2002).

41. *Id*. at 625.

42. *Id*. (quoting Petition for Writ of Certiorari at 46a, United States v. Ruiz, 536 U.S. 622 (2002) (No. 01-596), 2001 U.S. S. Ct. Briefs LEXIS 1050, at 98) (internal quotation marks omitted).

43. *Id.* at 625–26.

44. *See* United States v. Ruiz, 241 F.3d 1157, 1166–67, 1169 (9th Cir. 2001), *rev'd*, 536 U.S. 622 (2002).

45. *Ruiz*, 536 U.S. at 629 (quoting Brady v. United States, 397 U.S. 742, 748 (1970)) (brackets in original).

46. *Id.*

47. McCann v. Mangialardi, 337 F.3d 782, 787–88 (7th Cir. 2003).

the ruling in *Ruiz*. The court noted that in *Ruiz*, the Supreme Court addressed "whether the Constitution requires . . . preguilty plea disclosure of *impeachment* information," whereas the information in *McCann* was exculpatory.[48] The Seventh Circuit further noted that "*Ruiz* strongly suggests that a *Brady*-type disclosure might be required" for such exculpatory information.[49] This is because while the Supreme Court in *Ruiz* found it "difficult to characterize impeachment information *as information the defendant must be aware of before pleading guilty*," the proposed plea agreement specified that the prosecution would provide "any information establishing the factual innocence of the defendant," which lessened the defendant's concern that she would plead guilty to a crime she did not commit.[50] This led the Seventh Circuit to believe that the Supreme Court would likely find a due process violation if prosecutors failed to present such exculpatory information.[51] Similarly, the Tenth Circuit, in *United States v. Ohiri*, found that the Supreme Court in *Ruiz* did not intend to exonerate the government from violating *Brady* by withholding exculpatory evidence from a defendant during plea negotiations.[52] The court ultimately concluded that the district court abused its discretion by refusing the defendant's motion to allege a *Brady* violation regarding withheld exculpatory evidence at the plea negotiations stage.[53]

The Fifth Circuit, however, disagrees with the Seventh and Tenth Circuits. In *United States v. Conroy*, the defendant argued that she pled guilty unknowingly and involuntarily because the prosecution failed to turn over exculpatory evidence.[54] The court

48. McCann v. Mangialardi, 337 F.3d 782, 787–88 (7th Cir. 2003) (noting that the exculpatory information at issue was completely different from the impeachment information in *Ruiz*) (emphasis added). The exculpatory evidence at issue in this case showed that the drugs found in the car that McCann was driving were planted without his knowledge. *Id.* at 787.

49. *Id*.

50. *Id*. at 787–88 (quoting United States v. Ruiz, 536 U.S. 622, 630 (2002)) (internal quotation marks omitted).

51. *Id.* at 787. The court ultimately found that it did not have to resolve the issue because no evidence was presented showing that the prosecutor knew the drugs were planted prior to McCann's guilty plea. *McCann*, 337 F.3d at 788.

52. United States v. Ohiri, 133 F. App'x 555, 562 (10th Cir. 2005). The Tenth Circuit even went so far as to cite the Seventh Circuit's reasoning in *McCann* that the Supreme Court would likely find a violation if such evidence were withheld. *See id.*

53. *Id*.

54. United States v. Conroy, 567 F.3d 174, 176 (5th Cir. 2009). The defendant was charged with fraud after receiving funds from FEMA after Hurricane Katrina. The withheld evidence, however, was from an interview with the defendant's roommate

stated that there was no need to consider the merits of this argument because Fifth Circuit precedent dictates that "a guilty plea precludes the defendant from asserting a *Brady* violation."[55] As a result, the Second Circuit, in *Friedman v. Rehal*, ruled in the same manner when a defendant who pled guilty sought habeas corpus relief because of withheld exculpatory evidence.[56] In *Friedman*, the court categorized the withheld evidence not as exculpatory, but rather as impeachment evidence, which *Ruiz* held does not constitute a violation of due process.[57] The court further noted, however, that because exculpatory and impeachment evidence have been treated "in the same way for the purpose of defining the obligation of a prosecutor to provide *Brady* material prior to trial," there is no obligation for a prosecutor to disclose exculpatory evidence prior to a guilty plea.[58]

E. *TURNER V. UNITED STATES*: THE DIRECTION *BRADY* IS HEADING

In *Brady v. Maryland*, the Court was primarily concerned with ensuring a fair trial for the defendants.[59] The decision's initial language suggests a broad interpretation that any withheld evidence, which "if made available, would tend to exculpate [the defendant] or reduce the penalty," should be made known to the defendant.[60] This, however, does not appear to be the view any longer. One important decision that strays from the all-inclusive, original view of *Brady* is *Turner v. United States*.[61] In *Turner*, the Court was presented with several withheld witness statements and facts that could have influenced the defendants' defenses.[62] After reviewing the withheld information, the Court handed down a decision with the potential to change the way the *Brady* doctrine

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who claimed she overheard a telephone conversation between the defendant and FEMA where all of the information the defendant gave was accurate. United States v. Conroy, 567 F.3d 174, 176–77 (5th Cir. 2009).

55. *Id*. at 178.

56. *See* Friedman v. Rehal, 618 F.3d 142, 145 (2d Cir. 2010).

57. *See id.* at 153. The withheld evidence in this case involved interrogation tactics known for creating false accusations and came to light after a documentary about the defendant was made. *See id.* at 151. An anonymous victim in this documentary claimed that he did not recall any abuse from the defendant until he went through hypnosis, which helped him recall everything that had occurred. *See id*.

58. *Id*. at 154.

59. *See* Brady v. Maryland, 373 U.S. 83, 87–88 (1963).

60. *Id*.

61. Turner v. United States, 137 S. Ct. 1885 (2017).

62. *See generally id*.

is applied.[63]

1. THE TRIAL

In 1985, seven individuals were indicted for kidnapping, robbing, and murdering Catherine Fuller.[64] On October 1, 1984, Fuller left her home around 4:30 PM, and William Freeman discovered her body inside an alley garage around 6:00 PM.[65] She "had been robbed, severely beaten, and sodomized."[66] At trial, the government advanced a theory that she was attacked by "a large group of individuals."[67] The government's main evidence was testimony from Calvin Alston and Harry Bennett, "who cooperated with the Government in return for leniency" and claimed that Fuller was indeed attacked by a large group, including the defendants.[68] Alston and Bennett provided similar testimony, both stating that they were with a group at a park when Alston suggested robbing someone and pointed out Fuller.[69] Alston then testified that the group approached Fuller, a member pushed her into an alley, and the group began attacking her.[70]

Several other witnesses were also presented, such as Melvin Montgomery, who testified that he was present in the park and heard the defendants say they were "going to get that one" while pointing to a woman.[71] Maurice Thomas, who was fourteen years old, testified that he witnessed the attack while walking home from school and recognized members in the group hitting Fuller.[72] Later, Thomas saw a member of the group and overheard him tell another member that they "had to kill" Fuller because she knew someone with them.[73] Carrie Eleby and Linda Jacobs testified that

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63. *See generally* Turner v. United States, 137 S. Ct. 1885 (2017).

64. *See id*. at 1889. The seven individuals were Timothy Catlett, Russell Overton, Levy Rouse, Kelvin Smith, Charles Turner, Christopher Turner, and Clifton Yarborough. *Id*.

65. *Id*.

66. *Id*.

67. *Turner*, 137 S. Ct. at 1889.

68. *Id*.

69. *See id*.

70. *Id*. Specifically, Alston testified that Catlett, Overton, Rouse, Smith, Charles Turner, Christopher Turner, and Yarborough agreed. *Id*.

71. *Turner*, 137 S. Ct. at 1890 (citation omitted). Montgomery testified that he saw Overton, Catlett, Rouse, and Charles Turner in the group. *Id*.

72. *Id*. Thomas recognized Catlett, Yarborough, Rouse, Charles Turner, Christopher Turner, and Smith. *Id*.

73. *Id*. at 1889 (internal quotation marks omitted). Thomas testified that the specific member of the group he saw was Catlett. *Turner*, 137 S. Ct. at 1890.

"[t]hey heard screams coming from where a 'gang of boys' was beating somebody . . . in the alley."[74] They further testified that they recognized members of the group and also saw one member sodomize Fuller with a pole.[75] Lastly, the government presented a videotape of a recorded statement made by one of the defendants to detectives.[76] The defendant in the video described that "he was part of a large group that forced Fuller into the alley" to rob and assault her.[77]

"None of the defendants testified" or tried "to rebut the prosecution witnesses' claim[s]" of a group attack.[78] Each defendant instead pursued a "not me, maybe them" defense, attempting to show that they were not a part of the group by impeaching witnesses who placed them at the scene.[79] None of these were successful, however, as all seven defendants were convicted, with affirmation from the D.C. Court of Appeals.[80]

2. THE *BRADY* CLAIMS

In 2010, the defendants discovered withheld evidence that they believed was favorable and material, and filed for post-conviction relief.[81] There were seven pieces of withheld evidence that the defendants claimed they were entitled to under the *Brady* doctrine, the first being "[t]he identity of James McMillan."[82] "Freeman, the vendor who discovered Fuller's body," testified that he witnessed "two men run into the alley near the garage, stop for about five minutes," and then run out of the garage when an officer approached.[83] The two men were James McMillan and Gerald

74. Turner v. United States, 137 S. Ct. 1885, 1889 (2017). Eleby and Jacobs stated that the two were looking for Smith, who was Eleby's boyfriend. *Id*.

75. *Id*. Eleby and Jacobs recognized Christopher Turner, Smith, Catlett, Rouse, Overton, Alston, and Webb attacking and sodomizing Fuller while Yarborough stood nearby. *Id.*

76. *Id*. The petitioner in the videotape was Yarborough. *Turner*, 137 S. Ct. at 1889.

77. *Id*.

78. *Id*.

79. *Id.* at 1891. Some of the defendants provided evidence that Eleby and Jacobs were high on PCP the day that Fuller was murdered, and some established alibis for the time of Fuller's death. *Id*.

80. *Turner*, 137 S. Ct. at 1889; *see also* Turner v. United States, 116 A.3d 894, 902 (D.C. 2015), *aff'd*, 137 S. Ct. 1885 (2017).

81. *Turner*, 137 S. Ct. at 1891. This withheld evidence was discovered while petitioners reviewed the prosecutor's file, which was turned over in the course of post-conviction proceedings. *Id*.

82. *Id*.

83. *Id.*

Merkerson, neither of whom were suspects, and the government refused to disclose their identities.[84] After the defendants' arrests, but before the trial, McMillan committed crimes similar to the ones that the defendants were accused of committing.[85]

The second piece of withheld evidence was an interview with Willie Luchie, where Luchie "told the prosecutor that he and three others walked through the alley between 5:30 and 5:45 p.m."[86] and "heard several groans."[87] Luchie also stated that he "remember[ed] the doors to the garage being closed" and that no one in the group saw anyone in the alley.[88] The third piece of evidence was a series of undisclosed interviews with Ammie Davis.[89] Originally, Davis told an investigator that she witnessed a man, James Blue, "beat Fuller to death in the alley," but she later stated that she only saw him "grab Fuller and push her into the alley."[90] The prosecutor testified that he failed to disclose the interviews because Davis appeared "playful" and "not serious."[91]

The remaining pieces of withheld evidence involved the impeachment of witnesses.[92] During one interview, a woman named "[Kaye] Porter agreed with Eleby that she . . . heard Alston state he was involved in robbing Fuller."[93] In an undisclosed note, Porter told detectives that she did not hear Alston say anything and was simply agreeing with her friend.[94] With regards to impeaching Eleby, prosecutors had an undisclosed note that stated Eleby was "high on PCP during a . . . meeting with investigators."[95]

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84. *See* Turner v. United States, 137 S. Ct. 1885, 1891 (2017). Counsel for petitioner Harris requested the identity of the two men to ensure that Harris was not one of them, but the government refused. *Id.*

85. *Id*. McMillan was arrested for beating and robbing two women, and seven years after petitioners' trial, he was arrested for robbing, sodomizing, and murdering a woman in an alley. *Id*.

86. This was the approximate time the prosecution argued the attack was taking place. *Id.*

87. *Turner*, 137 S. Ct. at 1892.

88. *Id*.

89. *Id*.

90. *Id*. A few months after this interview, Blue murdered Davis during a drug dispute. *Id*.

91. *Turner*, 137 S. Ct. at 1892.

92. *See id*. Specifically, impeachment of Kaye Porter, Carrie Eleby, Linda Jacobs, and Maurice Thomas. *Id*.

93. *Id*.

94. *Id*. Eleby also admitted to detectives that she lied about Porter being with her when she heard Alston admit he was involved. *Turner*, 137 S. Ct. at 1892.

95. *Id*.

Prosecutors also failed to disclose notes concerning an interview with Jacobs, which stated that a detective "question[ed] her hard," and "kept raising his voice . . . [and] smacking his hand on the desk."[96] The final piece of evidence involved an interview with Maurice Thomas's aunt.[97] Thomas initially stated that he told his aunt about what he witnessed, but during the interview with her, she claimed that she did "not recall [Thomas] ever telling her anything such as this."[98]

3. THE COURT'S FINDINGS

After applying the *Brady* doctrine, the Supreme Court sided with the lower courts, finding that there was no "reasonable probability" of a different result if the withheld information was disclosed.[99] Petitioners argued that all of the withheld evidence, when taken together, could have provided an alternative theory to their original "not me, maybe them" defense, specifically, that one or two perpetrators killed Fuller.[100] The Court stated, however, that when taken into consideration with the whole record, the evidence was simply "too little, too weak, or too distant" to meet *Brady*'s standards.[101] The Court further provided that none of the defendants attempted to raise a defense implicating, as alternative perpetrators, the two men Freeman saw enter the alley.[102] For this reason, the Court found no "'reasonable probability' that the withheld evidence would have changed the outcome of the petitioners' trial," and affirmed the judgment of the lower court.[103]

III. ANALYSIS

As discussed above, numerous courts have examined the *Brady* doctrine since its introduction in 1963. Whether it was to determine the definition of materiality, how materiality relates to pleading guilty, or simply whether withheld evidence is material, courts' decisions have distorted the initial view of materiality. Because materiality has been interpreted so narrowly, prosecutors

96. Turner v. United States, 137 S. Ct. 1885, 1892 (2017) (citations omitted). It was also noted that Jacobs "'vacillated' about what she saw." *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 1893.

100. *See Turner*, 137 S. Ct. at 1894. The petitioners argued that all of this evidence "would have permitted the defense to knit together a theory that . . . it was actually McMillan, alone or with an accomplice, who murdered Fuller." *Id.*

101. *Id.*

102. *See id.*

103. *Id.* at 1895.

have developed immense power in deciding what evidence to disclose. As a result, defendants are being deprived of due process of law. In other words, because a narrow interpretation of materiality typically results in less evidence being disclosed to defendants, they are not able to fully understand the charges against them or prepare an adequate defense.

A. A SKEWED DEFINITION OF MATERIALITY

"Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."[104] This sentence encapsulates the initial concern in *Brady v. Maryland*: ensuring fair trials and fair treatment to those accused of committing crimes. The confusion arising out of the Court's decision in *Brady* was mostly caused by the concept of "materiality." What is materiality? How does one apply this theory to withheld evidence? While it did not set forth a definition of "materiality," it is likely that the Court in *Brady* intended a broad application; this is clear from the language of the decision. The Court noted that the ruling in *Brady* was "an extension of *Mooney v. Holohan*," where the Court ruled that due process is violated when there is a "*deliberate deception* . . . by the presentation of testimony known to be perjured."[105] Further, the Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material . . . irrespective of the good faith or bad faith of the prosecution."[106] If this holding is an extension of *Mooney*'s "deliberate deception" rule in regards to perjured testimony, then it appears that its main focus is to expand due process violations to include withheld evidence. Under the deliberate deception rule, a due process violation exists because the prosecution is disadvantaging the defendant with the perjured testimony. Therefore, one reason the *Brady* Court may not have defined "materiality" is because it was to be assumed that whenever any favorable evidence capable of developing a defense is withheld, that evidence is *ipso facto* material.[107] It was simply unnecessary for the Court to elaborate on such a concept.

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

105. *Id.* at 86 (emphasis added) (citing Mooney v. Holohan, 294 U.S. 103, 112 (1935)).

106. *Id.* at 87.

107. Therefore, any useful evidence that was withheld, irrespective of good or bad faith, would constitute material evidence and its nondisclosure a violation of due process.

If this was, in fact, the Court's initial concern and the concept of materiality did not require defining, then why did the Court revisit *Brady* on numerous occasions to flesh out the true meaning of its holding?[108] One explanation is that such a controversial finding that *any* useful withheld evidence is material and warrants a new trial would "open the floodgates" and cause a multitude of defendants to rush the courts. This would place both an administrative and financial burden on the courts. Perhaps in an effort to prevent such worries from becoming realities, the Court imposed upon itself a duty to enforce stricter guidelines on the concept of materiality and to develop a narrow view of materiality.

1. MATERIALITY IS FAR TOO NARROW

"[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[109] This is the standard developed by the courts—the standard applied today. This test, as pointed out by one scholar, depends on whether a defendant can prove that withheld evidence would have undermined the confidence in a verdict had it been introduced.[110] While seemingly achievable, there are essentially three factors within this test that cause problems for defendants: "(1) the importance of the withheld evidence; (2) the strength of the rest of the prosecution['s] case; and (3) other sources of evidence available to and used by the defense."[111]

These three factors provide the prosecution with ample opportunity to downplay any argument the defense makes about withheld evidence. An example of this can be found in *DeCologero v. United States*.[112] In *DeCologero*, the appellant, Paul A., ran a criminal enterprise and was convicted for "overseeing and directing the conspiracy to kill" the victim.[113] Four years later, a

108. *See* United States v. Agurs, 427 U.S. 97, 114 (1976) (finding that "cumulative" evidence does not constitute a *Brady* violation); United States v. Bagley, 473 U.S. 667, 682 (1985) (providing a standard for materiality not mentioned in *Brady v. Maryland*); Giglio v. United States, 405 U.S. 150, 154 (1972) (reaffirming a previous court's finding that withholding useful evidence does not automatically warrant a new trial).

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

110. Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1541 (2010).

111. *Id*.

112. DeCologero v. United States, 802 F.3d 155, 165 (1st Cir. 2015).

113. *See id*. Paul A. was the leader of the "DeCologero crew," and it was alleged that he ordered members of his crew to kill Aislin Silva because he was worried that she would implicate him in crimes involving hidden guns in her apartment. *Id*.

former attorney on the case discovered FBI reports containing interviews that suggested someone else had ordered the victim to be killed.[114] In the interviews, a woman said her boyfriend was speaking with Portalla, the leader of a different crime enterprise, and later told her "that Portalla would kill her if he told her what" he did.[115] The woman further stated that when she and her boyfriend heard on the news that human remains had been found, he told her, "They're going to put the puzzle together."[116] Paul A. argued that these withheld reports suggested that he did not order the victim killed; rather, it was Portalla.[117] The Government countered this by arguing that "given the overwhelming weight of trial evidence, the FBI reports do not raise a reasonable probability of a different outcome."[118] The court ultimately agreed with the Government, finding that physical evidence and evidence of numerous witnesses identifying members of Paul A.'s crew outweighed what little the FBI reports suggested.[119]

The three implicit factors listed above seem to have influenced the court. These FBI reports were certainly relevant and incredibly important, as they implicated a completely different set of suspects. But, even if considered important, did they downplay the strength of the prosecution's argument? Obviously, the First Circuit did not think so.[120] This reinforces the idea that no matter how important the withheld evidence may seem,[121] if the prosecution has a strong case, the judge may nevertheless find that there is no way the jury members could have changed their minds. But, in the criminal justice system, defendants must be proven guilty beyond a reasonable doubt.[122] What evidence, then, must be presented to cement guilt beyond a reasonable doubt? As long as courts continue to downplay the importance of withheld evidence,

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114. DeCologero v. United States, 802 F.3d 155, 159–60 (1st Cir. 2015). A co-defendant's former attorney received the reports in a fax, and the interviews were with a woman named Michelle Noe. *Id*.

115. *Id*. Noe also stated that her boyfriend told her "I did something, I can't believe I did. She was your age. I'm not going into details . . . We did something to her, she ratted." *Id*. at 160.

116. *Id*.

117. *See DeCologero*, 802 F.3d at 162.

118. *Id*.

119. *See id*. at 163.

120. *See id*. (finding testimony that Paul A. "ordered Silva's killing was corroborated by a considerable amount of more reliable evidence").

121. For example, evidence implicating someone else in the crime committed.

122. *See* Miles v. United States, 103 U.S. 304, 312 (1880) (stating that "[t]he evidence upon which a jury is justified in returning a verdict of guilty must be sufficient to produce a conviction of guilt, to the exclusion of all reasonable doubt").

as the court did in *DeCologero*, it appears that fewer and fewer pieces of evidence will be considered material for purposes of the *Brady* doctrine.

2. HOW DOES A NARROW VIEW OF MATERIALITY AFFECT DEFENDANTS?

The creation of this narrow concept of materiality seems to stray from the *Brady* Court's original goal of ensuring fair trials. The Due Process Clause of the Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."[123] A reasonable argument could certainly be made that *any* evidence withheld from a defendant is depriving that person of life, liberty, or property without due process of law. It seems, however, that only the most damning evidence[124] qualifies as a due process violation, while withholding evidence that falls *just* below the "damning" threshold does not violate due process.[125]

But why should helpful evidence be put into separate categories like "damning" and "merely useful"? As one commentator notes, an effective defense depends on one's ability to present evidence in a way that exculpates the defendant.[126] For this reason, a defendant should be entitled to helpful evidence of any kind to fortify or create effective defenses.[127] One of the central concerns of due process, like the main concern in *Brady*, is ensuring fair trials for criminal defendants. For this reason, it seems counterintuitive to withhold evidence that does no more than simply *help* a defendant. It seems impractical for courts to consider only "damning" evidence as material, when attorneys who

123. U.S. CONST. amend. V. The Due Process Clause also applies to the states through the Fourteenth Amendment. *See* U.S. CONST. amend. XIV, § 1 (stating "nor shall any State deprive any person of life, liberty, or property, without due process of law").

124. *See* Jessica Brand, *The Epidemic of* Brady *Violations: Explained*, INJUSTICE TODAY (Apr. 25, 2017), https://medium.com/in-justice-today/the-epidemic-of-brady-violations-explained-d67ea21f12ef (providing examples of withheld evidence found to be material, such as a video of police planting evidence and testimony from a key witness that police "strong-armed" him into testifying and gave him evidence about the case).

125. *See* Strickler v. Greene, 527 U.S. 263, 273–75, 296 (1999) (finding that eight pieces of evidence downplaying the memory of a key witness withheld from the defendant were not material).

126. Scott Hardy, Note, *The Right to a Complete Defense: A Special* Brady *Rule in Capital Cases*, 87 S. CAL. L. REV. 1489, 1495 (2014).

127. *See id.* (noting that "information that may help in developing [an effective defense] is critical" for defendants to obtain).

obtain information that is "merely useful" can apply it to their defenses, or even create new ones, to strengthen their arguments. As long as courts continue to apply this narrow interpretation of materiality, the promises and guarantees of due process will never be fully realized.

B. PROBLEMS WITH WHERE MATERIALITY IS HEADING

The Court in *Turner* reinforced a narrow view of materiality: evidence that appeared to be material[128] and capable of contributing to a defense against the prosecution's case was rejected for being "too little, too weak, or too distant" from the main evidence.[129] In so finding, the Court essentially made an already lofty standard even more difficult to satisfy. A number of courts around the country have relied on this decision in the months since its publication to deny claims of *Brady* violations.[130] A close reading of the *Turner* decision, however, suggests that the Court forced its view into law, rather than relying on rational reasoning.

First, the Court described the issue it faced as "legally simple."[131] This seems to suggest that the Court was disinterested in handling the matter critically from the beginning. Furthermore, the Court stated that the problem for the defendants was trying to convince the jury that all of the withheld evidence supported an alternative theory of guilt, which, according to the Court, was improbable because the evidence was "largely cumulative."[132] The Court reasoned that the jury had previously heard testimony about witnesses' drug habits and indecisiveness, among other things, and that the jury would not have been shocked to discover even more of this.[133] Since *Brady*, courts have always considered whether a jury would change its mind based on the withheld evidence. But the *Turner* decision reaffirms the narrow view that withheld

128. Namely, evidence of alternative suspects and interviews harmful to the government's arguments. *See* Turner v. United States, 137 S. Ct. 1885, 1891–92 (2017).

129. *Id.* at 1894.

130. *See* Rimmer v. Sec'y, Fla. Dep't of Corr., 876 F.3d 1039, 1054 (11th Cir. 2017) (using the *Turner* Court's reasoning in an analysis of "*Brady* Principles"); Woodson v. Jones, No. 3:16CV180, 2017 WL 5492195, at *8–9 (N.D. Fla. Oct. 27, 2017) (finding the reasoning in *Turner* to be "Clearly Established Federal Law" and concluding that the petitioner was not entitled to relief); Kroemer v. Tantillo, No. 1-17cv-67, 2017 WL 6409148, at *3-4 (W.D.N.Y. Sept. 21, 2017) (dedicating a portion of the decision to an analysis of *Turner v. United States*).

131. *Turner*, 137 S. Ct. at 1893.

132. *Id.* at 1894.

133. *Id.* at 1894–95.

evidence that is cumulative has no chance of influencing a jury's decision. It seems hasty to conclude that withheld evidence is not material solely because a jury has heard similar testimony previously in the trial.

Another flaw in the Court's analysis, and by far the most questionable aspect, is the finding that the excluded evidence suggesting two other men were the actual perpetrators was not material to the defense because "none of the [defendants] attempted to mount a defense that implicated those men as alternative perpetrators acting alone."[134] The defense's reasoning, however, for not raising such a defense, as Justice Kagan points out in her dissent, appears convincing: the government withheld evidence that would have made such an argument credible.[135] This is why the majority's analysis is so problematic—it assesses the materiality of withheld evidence based on what was initially presented by defendants at trial, without acknowledging the simple reality that what defense attorneys choose to present at trial is directly informed by the evidence they are aware of and know exists.

Turner demonstrated the direction in which the *Brady* doctrine is heading, and it appears to be toward an even narrower view of materiality. Lower courts now have Supreme Court precedent holding that cumulative evidence is not material, and neither is evidence that would have been retroactively relied upon in a defense that was not raised.[136] This decision diminishes the types of evidence capable of being found material and sets a dark forecast for how future courts will build upon its reasoning.

C. PROSECUTORS HAVE TOO MUCH POWER

Federal prosecutors are bound by the Federal Rules of Criminal Procedure.[137] Under Rule 16, prosecutors are instructed to disclose certain pieces of evidence only upon a defendant's request and only if the item is believed to be material in preparing the defense, the prosecutors intend to use the evidence in its case-

134. Turner v. United States, 137 S. Ct. 1885, 1894 (2017).

135. *Id.* at 1898 (Kagan, J., dissenting). Such withheld evidence showed that one of the men had a history of violence against middle-aged women and that other witnesses' testimonies would support an alternative theory that these two men actually committed the murder. *Id.*

136. *See generally id*.

137. *See* FED. R. CRIM. P. 16.

in-chief during trial, or the evidence belongs to the defendant.[138] Thus, when defense counsel does not request such evidence, the prosecution has a fairly solid defense against *Brady* violations: the Federal Rules of Criminal Procedure only require disclosure when asked. Oftentimes, however, the defense does ask for evidence; in that case, the prosecutor has the sole responsibility of determining whether the evidence is material to the defense.[139] If the prosecutor decides that the evidence is not material to the defense, possibly because it would be cumulative or would be squashed by the onslaught of testimony offered by the prosecution, then the prosecutor must ensure that it would not be part of its case-in-chief to prevent disclosure.[140] This suggests that while prosecutors are seemingly constricted by the Federal Rules of Criminal Procedure, Rule 16 actually offers moderate leeway with regards to withholding evidence.

The leniency granted to prosecutors under the Federal Rules of Criminal Procedure only adds to the power inherent to the position. As one scholar notes, prosecutors can use their power to avoid *Brady* violations by hiding plea deals from testifying witnesses.[141] The prosecution may call a key witness who has a motive to lie by way of a plea deal, and that witness may testify that no deal was ever made.[142] This is because the prosecutor may hide the deal from the key witness, making the deal with the witness's attorney instead, who does not inform the client of the agreement.[143] Another similar abuse of power arises from a prosecutor's ability to suggest a deal in exchange for testimony but not actually formalize one until after the testimony is given.[144] By doing this, prosecutors claim there could not be a *Brady* violation for soliciting testimony from witnesses because no deal was made for such testimony.[145] Courts have discouraged such behavior,[146]

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138. FED. R. CRIM. P. 16(a)(1)(E).

139. *See* Medwed, *supra* note 110, at 1541.

140. *See* FED. R. CRIM. P. 16(a)(1)(E)(ii). Assuming such evidence did not initially belong to the defense as set out in Rule 16(a)(1)(E)(iii).

141. *See* Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 538 (2007).

142. *See id.*

143. *See id.* at 538–39.

144. *See id.* at 540.

145. Gershman, *supra* note 141, at 540.

146. *See, e.g.*, Hayes v. Brown, 399 F.3d 972, 974 (9th Cir. 2005) (finding that prosecutor's actions violated due process); Bell v. Bell, 460 F.3d 739, 755 (6th Cir. 2006) ("A tacit agreement must be disclosed regardless of when the prosecution acts upon that agreement."); *see also* Gershman, *supra* note 141, at 539–40.

but these actions are examples of the lengths prosecutors will go to in order to avoid disclosing evidence.

The circuit split regarding impeachment and exculpatory evidence also encourages prosecutors to withhold evidence. As discussed above, Second Circuit precedent holds that impeachment evidence and exculpatory evidence are one and the same;[147] therefore, prosecutors have no obligation to turn over exculpatory evidence when a defendant pleads guilty.[148] This interpretation of *Ruiz* provides prosecutors with a way to ensure prison sentences for defendants and dispose of exculpatory evidence with no consequences whatsoever. By combining these two types of evidence, the Second Circuit allows for a disproportionate amount of prosecutorial power. Furthermore, the Fifth Circuit assures prosecutors that withholding any evidence is acceptable so long as a guilty plea is secured.[149] Again, this gives power to the prosecution to withhold whatever evidence they so choose and encourages securing guilty pleas over conducting fair trials.

Once prosecutors decide to withhold evidence, it could take years for such evidence to resurface, if it resurfaces at all. For example, the initial crimes in *Turner* occurred in 1984,[150] and the seven defendants did not seek to vacate their sentences until the withheld evidence emerged in 2010,[151] nearly thirty years later. During this span of time, it is not unimaginable that people would give up on their efforts to vacate a sentence. Also, depending on their age and health when they were initially sentenced to prison, defendants could pass away during this time, rendering the reemergence of withheld evidence moot. Prosecutors know this, and for this reason, it behooves them to err on the side of nondisclosure.[152]

IV. PROPOSAL

States have acknowledged the shortcomings of the *Brady*

147. *See supra* Section II.D.2.

148. Friedman v. Rehal, 618 F.3d 142, 154 (2d Cir. 2010).

149. *See* United States v. Conroy, 567 F.3d 174, 178 (5th Cir. 2009) (citing Matthew v. Johnson, 201 F.3d 353 (5th Cir. 2000); Orman v. Cain, 228 F.3d 616 (5th Cir. 2000)) ("[A] guilty plea precludes the defendant from asserting a *Brady* violation.").

150. Turner v. United States, 137 S. Ct. 1885, 1889 (2017).

151. *Id.* at 1891.

152. This concept is influenced by an idea in Gershman's work that prosecutors "play and . . . beat the odds" in regard to suppressing evidence. Gershman, *supra* note 141, at 549 (describing the prosecutor's calculation of whether or not to disclose evidence as a gamble on whether the evidence will ever be viewed by a court).

doctrine at the federal level, and some have chosen to take the initiative to change how it is being applied. For example, on January 1, 2018, a new rule took effect in New York, requiring judges to order prosecutors to disclose all favorable evidence to the defendant at least thirty days before major trials.[153] Other states, however, are less willing to depart from the federal system.[154] Regardless of how individual jurisdictions approach the *Brady* doctrine, the *Brady* doctrine itself leads to problematic and perverse consequences, as described above. This Comment proposes that such perverse consequences can be avoided by shifting power away from prosecutors and utilizing a neutral referee in charge of evidence and bound by a broad view of materiality.

A. AN EVIDENCE REFEREE BOUND BY A BROAD VIEW OF MATERIALITY

A neutral Evidence Referee, bound by a broad view of materiality, would alleviate some of the problems with the *Brady* doctrine as it stands today and unify the varying standards present across the country. The broad view of materiality that should be adopted is the one discussed above, namely, that useful evidence is material.[155] This may seem to suggest a theory of "open-file discovery,"[156] which has previously been suggested by many commentators.[157] What this Comment proposes, however, is a spin on open-file discovery and something entirely new: a neutral Evidence Referee who receives all evidence from the prosecution and determines what should be disclosed. After determining what evidence must be disclosed, the prosecutor is required to comply by

153. Alan Feuer & James C. McKinley Jr., *Rule Would Push Prosecutors to Release Evidence Favorable to Defense*, N.Y. TIMES, Nov. 8, 2017, at A18.

154. *See* John Simmerman, *Prosecutor Spared Discipline in Key Louisiana Supreme Court Decision over Withheld Evidence*, THE ADVOCATE (Oct. 19, 2017), http://www.theadvocate.com/new_orleans/news/courts/article_371e4f7c-b509-11e7-bde9-bb1d88d2a37f.html (explaining a recent Louisiana Supreme Court decision in which the court ruled that Louisiana law did not hold prosecutors to higher ethical standards than the *Brady* rule).

155. *See supra* Section III.A.1.

156. "Open-file discovery" is essentially the principle that the government's files should be completely open to the defense so that anything available to the prosecution is likewise available to the defense. *See* Robert P. Mosteller, *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, 313 (2008).

157. *See generally id.*; Medwed, *supra* note 110; Brian Gregory, Brady *is the Problem: Wrongful Convictions and the Case for "Open File" Criminal Discovery*, 46 U.S.F. L. REV. 819 (2012).

turning it over. It is important that this Evidence Referee be an independent, neutral individual so that there is no bias in deciding what evidence should be handed over by the prosecution.[158]

1. RULES GOVERNING THE PROSECUTION AND THE EVIDENCE REFEREE

As stated above, the prosecution would be required to turn over all of their evidence to the Evidence Referee. To ensure that defendants obtain this evidence in a timely manner, prosecutors should be required to turn over any evidence they collect within thirty days of receipt. Once in the hands of the Evidence Referee, the analysis is simple: Is the evidence useful to the defense? If so, the referee would instruct the prosecution on what evidence needs to be turned over to the defense. Problems may arise with evidence that does not initially appear to be useful to the defense. For this reason, discovery requests will still be relevant. When the defense sends a discovery request, the Evidence Referee will also receive a copy and determine whether any evidence initially deemed not useful becomes useful in light of the request.

2. WHAT PROBLEMS DO EVIDENCE REFEREES SOLVE?

By adding a neutral Evidence Referee bound by a broader interpretation of materiality to both the federal and state judicial systems, a number of problems seem to vanish. First and foremost, defendants will be in possession of evidence to which they are entitled and have historically been denied. Also, discretionary power will be taken away from prosecutors, as it will be up to the Evidence Referee to decide what evidence is material to the defense. Prosecutors will no longer be able to abuse their power by hiding evidence because the Evidence Referee will know what is being hidden. Moreover, defendants in states where prosecutors practice open-file discovery will also feel relief. With open-file discovery, the defense has to examine the prosecutor's entire file, which some prosecutors purposely fluff up with useless documents, to find relevant evidence. But, under this proposed system, efforts to intimidate defense counsel will be discouraged, as the Evidence Referee also receives the file and all of its contents.

Furthermore, as one scholar notes, there is oftentimes a failure to communicate between the prosecution and the defense

158. For this reason, the presiding judge should not serve as the Evidence Referee; judges must be free of bias and receiving all of the prosecution's evidence may affect their neutrality in one way or another.

during the discovery process, which results in a lack of cooperation.[159] With an Evidence Referee acting as an intermediary for discovery requests, defense attorneys and prosecutors may find it easier to cooperate with one another. Also, the presence of an Evidence Referee may encourage cooperation between attorneys during the plea negotiation process. If the prosecution offers a plea deal, the defense can make a discovery request for any useful information needed to determine whether accepting such a deal would be best for the client.

B. ENFORCE STRICT SANCTIONS TO ENSURE COMPLIANCE

Courts have historically been hesitant to sanction prosecutors for their misconduct arising from withholding evidence, and some courts have even found that granting retrials is a form of punishment.[160] There is hope, however, that this is changing, as courts have just begun enforcing a stricter form of sanctions for prosecutors who withhold evidence—criminal prosecution. In 2013, a former Texas prosecutor became the first prosecutor in the history of the United States to be jailed for withholding evidence.[161] While the prosecutor in that case only served ten days in jail, and the defendant was in prison for nearly twenty-five years, this is still a step in the right direction. Furthermore, California has followed suit by introducing a law that classifies acts of altering or intentionally withholding certain evidence as felonies, warranting up to three years in prison.[162]

A proposed solution to *Brady* violations, such as an Evidence Referee, must include such sanctions to ensure compliance. With a universal system of criminal sanctions in place, prosecutors may

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159. Laurie L. Levenson, *Discovery from the Trenches: The Future of* Brady, 60 UCLA L. REV. 74, 83 (2013).

160. *See* David E. Singleton, Brady *Violations: An In-Depth Look at "Higher Standard" Sanctions for a High-Standard Profession*, 15 WYO. L. REV. 139, 157–58 (2015).

161. Alex Johnson, *Ex-Texas Prosecutor First in History to Be Jailed for Withholding Evidence*, NBC NEWS (Nov. 8, 2013), https://www.nbcnews.com/news/other/ex-texas-prosecutor-first-history-be-jailed-withholding-evidence-f8C11566289. The former prosecutor, Ken Anderson, was jailed after accepting a plea deal offered in exchange for charges of tampering with evidence as a result of withholding evidence from the defendant, Michael Morton. *Id.* During Morton's initial trial, Anderson withheld statements strongly implying his innocence. *Id.* Morton was released from prison after DNA evidence proved his innocence. *Id.*

162. CAL. PENAL CODE § 141 (West, Westlaw through 2018 Legis. Sess.); Christopher Goffard, *Prosecutors Who Withhold or Tamper with Evidence Now Face Felony Charges*, L.A. TIMES (Oct. 3, 2016), http://www.latimes.com/local/lanow/la-me-prosecutor-misconduct-20161003-snap-story.html.

feel more obliged to cooperate with opposing counsel. In the context of an Evidence Referee, if it is discovered that a prosecutor is withholding evidence, the Evidence Referee must report the incident and the prosecutor must be charged with tampering with evidence.[163] When faced with the threat of criminal charges, prosecutors may be prompted to practice better judgment, which could solve the problem of withheld evidence.

V. CONCLUSION

In conclusion, it is evident that reform is needed to ensure that defendants receive fair trials. To implement such reform, the *Brady* Court introduced a seemingly broad rule, which suggested that all useful evidence should be turned over to defendants. The Supreme Court, however, has declined to adopt this interpretation and instead has repeatedly affirmed a narrow view of materiality. This narrow view of materiality has downplayed the significance of evidence favorable to defendants, encouraged prosecutors to secure unethical guilty pleas, and reinforced a culture of abuse of prosecutorial power. Instead of safeguarding the values of due process, this narrow view of materiality urges prosecutors to err on the side of nondisclosure.

The current *Brady* doctrine simply does not work, and the direction it seems to be heading is deeply troublesome. Moreover, due to the lack of uniformity, there is confusion at the state level as to how the doctrine should be applied. For these reasons, the country should adopt a universal standard that would apply at both the state and federal level. This standard should include an Evidence Referee who receives all evidence within thirty days of its receipt and determines whether it is useful to the defense. This will prevent prosecutors from abusing their powers and ease the

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163. In federal cases, charges may be brought under 18 U.S.C. § 1519, which provides as follows:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

18 U.S.C. § 1519 (2012). Many states have statutes that resemble this federal statute. *See, e.g.*, ALA. CODE § 13A-10-129 (West, Westlaw through Act 2018-579); ALASKA STAT. ANN. § 11.56.610 (West, Westlaw through 2018 Legis. Sess.); GA. CODE ANN. § 16-10-94 (West, Westlaw through 2018 Legis. Sess.); LA. STAT. ANN. § 14:130.1 (2018); MISS. CODE ANN. § 97-9-125 (West, Westlaw through 2018 Legis. Sess.); TEX. PENAL CODE ANN. § 37.09 (West, Westlaw through 2017 Legis. Sess.).

burden on defendants who have historically been denied fair trials. Finally, failure to comply with such a standard should result in criminal prosecution. These reforms would ensure fair trials and negotiation processes for all defendants and prevent due process violations.

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