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NO SECRETS ALLOWED: A PROSECUTOR'S OBLIGATION TO DISCLOSE INADMISSIBLE EVIDENCE

Abigail B. Scott[+]

Dominique Strauss-Kahn resigned as managing director of the International Monetary Fund after he was indicted on sexual assault charges.[1] After an extensive post-indictment investigation, the New York District Attorney's office determined that the complaining witness lacked creditability due to inconsistent statements she made regarding the alleged attack by Strauss-Kahn.[2] When prosecutors from the New York District Attorney's office discovered the complainant's inconsistent and allegedly false statements, they informed Strauss-Kahn's defense counsel of this information in accordance with *Brady v. Maryland*.[3] Although the prosecutors moved to dismiss the indictment,[4] the events leading to dismissal of Strauss-Kahn's case underscore a critical aspect of criminal procedure: a defendant's limited "right" to discovery based on the Due Process Clauses of the Fifth and Fourteenth Amendments.[5] These constitutional amendments establish prosecutorial

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1. John Eligon, *Judge Grants Bail to Strauss-Kahn; Prosecutors Announce an Indictment*, N.Y. TIMES, May 20, 2011, at B1, B9.

2. Recommendations for Dismissal at 1–2, State v. Dominique Strauss-Kahn, No. 02526/2011 (N.Y. Sup. Ct. Aug. 22, 2011). The prosecutor discovered that the complainant's asylum application contained an allegation of gang rape in her home country of Guinea, Africa, which she admitted was false to prosecutors during interviews. *Id.* at 14. The prosecution also questioned the complainant's financial motive after listening to her recorded conversations with her fiancé regarding the case's potential for financial recovery, even though she had told prosecutors that she had "no interest in obtaining money as a result of her involvement in the case." *Id.* at 17. Additionally, she conceded involvement in an unrelated tax-fraud scheme. Letter from Joan Illuzzi-Orbon and John McConnell, Assistant Dist. Attorneys, to Benjamin Brafman and William W. Taylor, III, Def. Counsel at 2 (June 30, 2011), *available at* http://asset.rule89.com/file/DSK.pdf [hereinafter Letter from Illuzzi-Orbon and McConnell].

3. Letter from Illuzzi-Orbon and McConnell, *supra* note 2, at 1–3; *see also* Brady v. Maryland, 373 U.S. 83, 87–90 (1963) (holding that prosecutors violate a defendant's due-process rights when suppressing requested material evidence).

4. Recommendation for Dismissal, *supra* note 2, at 11.

5. U.S. CONST. amend. V; *id.* amend. XIV, § 1. The Supreme Court has held that, although Brady gives a defendant access to requested discovery, it does not create a "general constitutional right to discovery." Weatherford v. Bursey, 429 U.S. 545, 559 (1977); *see also*

obligations of pre-trial disclosure in criminal cases, and raise questions concerning disclosure of potentially inadmissible evidence.

In *Brady*, the Supreme Court held that, upon request of the defendant, a prosecutor must disclose to defense counsel any admissible exculpatory evidence that is favorable to the defendant.[6] Favorable evidence includes evidence that is "material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecutor."[7] The Court later expanded *Brady* and determined that prosecutors must disclose all evidence that tends to demonstrate the defendant's innocence, regardless of whether the defense has made a specific request for such information.[8] A prosecutor's failure to disclose admissible exculpatory evidence violates a defendant's due-process right to a fair trial and entitles the defendant to a new trial.[9]

Only one Supreme Court case has specifically addressed prosecutorial disclosure obligations of *inadmissible* evidence.[10] In *Wood v. Bartholomew*, the Court held that no *Brady* violation occurred when prosecutors withheld from defense counsel a witness's failed polygraph, which was inadmissible under state law.[11] The Court found that the prosecution was not obligated to disclose the inadmissible evidence because the evidence was not "material,"

Discovery and Access to Evidence, 39 GEO. L.J. (ANN. REV. CRIM. PROC.) 356, 356–57 (2010) (noting disclosure obligations of the government are grounded in the Constitution).

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

7. *Id.* Favorable evidence includes both exculpatory evidence, which "tends to negate guilt, diminish culpability, support an affirmative defense . . . [or] reduce the severity of the sentence imposed," and impeachment evidence, which includes a wide array of evidence that "would expose weaknesses in the government's case or cast doubt on the credibility of government witnesses." Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 423–25 (2010) (footnote omitted).

8. United States v. Agurs, 427 U.S. 97, 110 (1976) ("[T]here are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request."); *see also* Kyles v. Whitley, 514 U.S. 419, 421–22 (1995) (placing the burden on the prosecution to determine whether evidence is reasonably probable to determine guilt); United States v. Bagley, 473 U.S. 667, 682 (1985) (explaining that evidence must be disclosed if there is a reasonable probability that disclosure would have resulted in a different outcome). In order to bring a *Brady* claim, a defendant must establish that: (1) the contested evidence was favorable to the defendant, based either on its exculpatory or impeaching nature; (2) the prosecutor inadvertently or willfully suppressed the contested evidence; and (3) the suppression prejudiced the defendant. Strickler v. Greene, 527 U.S. 263, 281–81 (1999).

9. *See Kyles*, 514 U.S. at 421–22 (holding that the defendant was entitled to a new trial due to the prosecution's failure to disclose material evidence); *see also* Jones, *supra* note 7, at 443 (noting that when a *Brady* violation is discovered post-trial the typical remedy is a new trial, but if the violation is discovered during the trial, possible remedies include disclosure of the evidence and a continuance, giving defense counsel a chance to review the evidence).

10. Wood v. Bartholomew, 516 U.S. 1, 2 (1995).

11. *Id.* at 6, 8.

and would not have affected the outcome of trial.[12] The Court applied a "reasonable probability" analysis to determine if the evidence was material, noting that evidence is material "only where there exists a 'reasonable probability' that had the evidence been disclosed [to the defense] the result at trial would have been different."[13]

Circuit courts have reached divergent conclusions when applying *Brady* and *Wood* to determine whether prosecutors are obligated to disclose inadmissible evidence to defendants.[14] The Fourth Circuit found that inadmissible evidence is outside the scope of *Brady* because evidence that cannot be introduced at trial cannot be material.[15] In contrast, the First, Sixth, Eighth, Eleventh, and D.C. Circuits have found that inadmissible evidence may be within the scope of *Brady* and have required prosecutors to disclose inadmissible evidence that could lead to exculpatory, admissible evidence in certain circumstances.[16] The Fifth Circuit has diverged slightly from the rest of these courts and has focused its *Brady* analysis on whether the inadmissible evidence, if disclosed, could create a reasonable probability of a different trial result.[17]

This Comment examines the differing approaches to prosecutorial nondisclosure of inadmissible exculpatory and impeachment evidence. First, this Comment discusses the full spectrum of evidence that must be disclosed under *Brady* and its progeny. Next, this Comment examines the *Wood* standard for disclosure of inadmissible exculpatory evidence. The Comment then explores the existing circuit split, and analyzes whether inadmissible exculpatory and impeachment evidence requires obligatory disclosure by the

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12. *Id.* at 5–6, 8.

13. *Id.* at 5–6 (citing *Kyles*, 514 U.S. at 433–34; *Bagley*, 473 U.S. at 682). In other words, under the "reasonable probability" test, a defendant must demonstrate that the likelihood of a different result is so high as to undermine the trial outcome. *Kyles*, 514 U.S. at 434.

14. *See infra* Part I.D.

15. *See* Hoke v. Netherland, 92 F.3d 1350, 1356–57 (4th Cir. 1996) (finding that a victim's prior consensual sexual acts were not material because they could not have changed the judgment).

16. Henness v. Bagley, 644 F.3d 308, 325 (6th Cir. 2011) (considering inadmissible hearsay evidence when determining if a *Brady* violation occurred, and ultimately holding that the habeas petitioner was not prejudiced because he failed to establish that the inadmissible evidence could have led to the discovery of admissible material evidence), *reh'g denied*, No. 07-4479, 2011 U.S. App. LEXIS 18549 (6th Cir. Sept. 2, 2011); Ellsworth v. Warden, 333 F.3d 1, 5 (1st Cir. 2003) (discussing the underlying policy of *Brady* and noting that "evidence itself inadmissible *could* be so promising a lead to strong exculpatory evidence that there could be no justification for withholding it"); Bradley v. Nagle, 212 F.3d 559, 567 (11th Cir. 2000) (discussing a similar theory); Madsen v. Dormire, 137 F.3d 602, 604 (8th Cir. 1998) (finding that alleged impeachment evidence was immaterial because it would not have changed the trial's outcome); United States v. Derr, 990 F.2d 1330, 1335–36 (D.C. Cir. 1993) (finding inadmissible hearsay immaterial under *Brady*), *abrogated on other grounds by* United States v. Bailey, 36 F.3d 106 (D.C. Cir. 1994) (en banc), *rev'd*, 516 U.S. 137 (1994), *superseded by statute*, 18 U.S.C. § 924 (2006).

17. United States v. Lee, 88 F. App'x 682, 685 (5th Cir. 2004) (noting that *Brady* may require disclosure of inadmissible evidence if disclosure would create a reasonable probability of a different outcome at trial).

prosecution. Finally, this Comment argues that the underlying policy of *Brady* and the dicta in *Wood* require disclosure of inadmissible evidence that does, or has a strong tendency to, lead to admissible exculpatory evidence, which creates a reasonable probability of a different trial outcome.

I. REQUIRED *BRADY* DISCLOSURES: EXCULPATORY AND IMPEACHMENT EVIDENCE FAVORABLE TO DEFENDANT

A. Brady *and* Agurs*: Requiring Disclosure of Evidence That Tends to Undermine Proof of Guilt*

Brady v. Maryland is the landmark Supreme Court case mandating prosecutors disclose favorable evidence to the defense.[18] In *Brady*, John Brady and co-defendant, Charles Boblit, received death sentences after they were found guilty of first-degree murder committed during a robbery.[19] In Brady's separate criminal trial, he admitted involvement in the robbery, but blamed Boblit for the murder in hopes of avoiding the death penalty.[20] Before trial, Brady's attorney requested copies of prior statements Boblit made to police.[21] Although the prosecution disclosed several statements, prosecutors did not release a statement in which Boblit admitted to the homicide until after Brady's conviction was affirmed on appeal.[22]

Brady moved for a new trial after discovering the undisclosed statement, which the trial court denied.[23] The Court of Appeals of Maryland affirmed the denial without prejudice.[24] The trial court subsequently dismissed Brady's petition for post-conviction relief, but on appeal, the appellate court held that Boblit's undisclosed statement violated Brady's due-process rights.[25] However, the appellate court remanded the case, restricting a new trial to the question of punishment only.[26]

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18. 373 U.S. 83 (1963).

19. *Brady*, 373 U.S. at 84–85. In Maryland, a homicide committed during the course of a felony, such as robbery, is considered first-degree murder. Brady v. State, 174 A.2d 167, 168 (Md. 1961), *aff'd,* 373 U.S. 83 (1963).

20. *Brady*, 373 U.S. at 84 (noting that Brady's counsel asked the jury to return a "verdict 'without capital punishment'").

21. *Id.*

22. *Id.* Brady's counsel received some statements in which Boblit alleged that Brady murdered the victim. *Brady*, 174 A.2d at 169. The State attempted to introduce the undisclosed evidence, in which Boblit admitted to the murder during his trial, but the trial court excluded the evidence because Boblit had not signed the statement. *Id.*

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

24. *Id.*

25. *Brady*, 174 A.2d at 170.

26. *Id.* at 171–72 (noting that the undisclosed evidence would have given Brady an argument for a lighter *sentence*, but a retrial would be moot because "nothing in [the undisclosed evidence] could have reduced . . . Brady's offense below murder in the first degree").

Brady appealed to the Supreme Court, arguing against the appellate court's denial of a new trial to determine guilt.[27] The Supreme Court held that Brady's constitutional rights were not violated by the appellate court's decision to limit the rehearing to the issue of punishment.[28] However, the Court found that the prosecutors violated Brady's due-process rights when they did not disclose Boblit's confession.[29] Thus, the Court held that prosecutors must disclose requested material evidence that either exculpates the defendant or reduces the defendant's penalty.[30]

The Court clarified prosecutorial disclosure obligations in *United States v. Agurs*.[31] In this case, the trial court found Linda Agurs guilty of murder.[32] After the trial, Agurs discovered that prosecutors withheld the victim's prior criminal record, which included evidence that could have demonstrated the victim's violent character.[33] In light of this belated discovery, Agurs moved for a new trial.[34] In opposing the motion, the government argued that they did not have a duty to disclose the record absent a specific request and noted that the evidence was not material.[35] Although the district court denied Agurs'

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

28. *Id.* at 88–92.

29. *Id.* at 86–87 (noting that deprivation of due process runs counter to the underlying societal goals of convicting the guilty while also ensuring defendants receive fair treatment and a fair trial). The Due Process Clause of the Fourteenth Amendment provides that no "state [shall] deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1, cl. 2. Due-Process procedural rights entitle a defendant to a fair trial, which is violated when the government deprives a defendant of liberty "without adequate procedures." *See* Daniels v. Williams, 474 U.S. 327, 337 (1986) (Stevens, J., concurring) ("[T]he state may not execute, imprison, or fine a defendant without giving him a fair trial."); *see also* Swarthout v. Cooke, 131 S. Ct. 859, 861 (2011) (per curiam) (explaining that due process is implicated when an individual has been deprived of liberty or property and when state procedures are not "constitutionally sufficient"); United States v. Straub, 538 F.3d 1147, 1160–61 (9th Cir. 2008) (noting that the Due Process Clause protects a defendant's right to a fair trial regardless of the government's intent to diminish that right).

30. *Brady*, 373 U.S. at 87–88. In *Brady*, the undisclosed evidence, which implicated another in the murder, was material to punishment because it was directly favorable to Brady. 2 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 144 (4th ed. 2006). The Court also explained that its decision was not meant to punish the public for a prosecutor's wrongs, but to protect a defendant's right to a fair trial. *Brady*, 373 U.S. at 86 (citing Mooney v. Holohan, 294 U.S. 103, 112 (1935)).

31. 427 U.S. 97, 107 (1976).

32. *Id.* at 98. The victim, James Sewell, died from multiple stab wounds inflicted by Agurs after an alleged sexual encounter between the two in a motel room. *Id.* When motel workers entered the room in response to screams for assistance, Sewell was struggling to gain control of the knife that Agurs held. *Id.* at 99.

33. *Id.* at 100. Agurs claimed that she acted in self-defense and did not present any evidence at trial. *Id.* Because Agurs made a self-defense claim, outside evidence indicative of the victim's violent character was relevant to corroborate her defense and was admissible evidence in the U.S. District Court for the District of Columbia at that time. *Id.*

34. *Id.* at 100–01.

35. *Id.* at 101–02.

motion,[36] the United States Court of Appeals for the District of Columbia reversed, finding that the evidence was material based on the likelihood that it may have led the jury to reach a different verdict.[37]

The Supreme Court reversed, holding that the evidence of the victim's violent character was not material because it did not create reasonable doubt as to Agurs' guilt.[38] Thus, failure to disclose the evidence did not violate Agurs' due-process right to a fair trial.[39] Nevertheless, the Court noted that prosecutors are obligated to disclose exculpatory evidence absent a specific request, when the evidence is of "such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request."[40]

B. The Supreme Court Articulates the Result-Affecting Test: Requiring Disclosure of Evidence that Creates a Reasonable Probability of a Different Result

After *Agurs*, the Court further modified the appropriate standard for materiality in *United States v. Bagley*.[41] In *Bagley*, Respondent Hughes Bagley, who was indicted for violating federal narcotics and firearms statutes, made specific pre-trial requests for information regarding deals prosecutors made with their witnesses.[42] The government did not disclose the requested materials, and subsequently, Bagley was convicted on the narcotics charges.[43] A few years after his conviction, Bagley submitted requests for information to a government enforcement agency that employed the two key prosecution witnesses.[44] In response, Bagley received copies of previously undisclosed contracts, which indicated that two officers provided testimony on the

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36. *Id.*

37. United States v. Agurs, 510 F.2d 1249, 1254 (D.C. Cir. 1975), *rev'd*, 427 U.S. 97 (1976) (noting that Sewell's prior conviction of "knife-related offenses would have constituted undeniable evidence" that he was prone to using and having knives).

38. *Agurs*, 427 U.S. at 102. The standard applied by the Court in *Agurs* requires reviewing courts to examine the full trial record and assess whether the suppressed evidence creates "a reasonable doubt that did not otherwise exist." 6 CRIM. PROC. § 24.3(b) (3d ed. 2010).

39. *Agurs*, 427 U.S. at 102, 114 (noting that the D.C. Circuit did not properly interpret due-process guarantees).

40. *Id.* at 106–07 ("[I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed."). The Court outlined three scenarios in which *Brady* evidence arises: (1) when the defendant's conviction is based on perjured testimony; (2) when defense counsel makes a specific pre-trial request for material evidence; and (3) when defense counsel makes either a general *Brady* request or no request at all. *Id.* at 103–04, 107. In all instances, the Court found that prosecutors must disclose the exculpatory evidence. *Id.* at 110.

41. 473 U.S. 667 (1985) (plurality opinion).

42. *Id.* at 669–70.

43. *Id.* at 670–71.

44. *Id.* at 671 (noting that the requests were made under the Freedom of Information Act and the Privacy Act of 1974).

government's behalf in exchange for compensation.[45] This arrangement, which was contingent on a satisfactory result by the government, "served only to strengthen any incentive to testify falsely in order to secure a conviction."[46] Bagley moved to vacate his sentence, claiming that nondisclosure of this deal violated *Brady* disclosure obligations.[47]

The U.S. Supreme Court agreed *Brady* violations existed, and found that *Brady* applies to exculpatory and impeachment evidence.[48] However, the Court held that the evidence in this case was not necessarily material and remanded to determine whether there was "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[49] The Court explained that this inquiry applies to all *Brady* materiality questions, and defined "reasonable probability" as "a probability sufficient to undermine confidence in the outcome [of trial]."[50]

Ten years later, in *Kyles v. Whitley*, the Supreme Court again addressed materiality and disclosure requirements under *Brady*.[51] In *Kyles*, Curtis Kyles

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45. *Id.*

46. *Id.*

47. *Id.* at 671–72. The U.S. District Court for the Western District of Washington found that disclosure of the contracts during Bagley's trial would not have affected the finding of Bagley's guilt. *Id.* at 673. The court reasoned that the testimony of both witnesses primarily involved the firearms charges, of which Bagley was acquitted. *Id.* The U.S. Court of Appeals for the Ninth Circuit reversed and found that the failure to disclose specifically requested *Brady* information that could have been used to impeach the witnesses violated Bagley's Sixth Amendment right to confront witnesses on cross-examination. *Bagley v. Lumpkin*, 719 F.2d 1462, 1464 (9th Cir. 1983), *rev'd sub nom.* United States v. Bagley, 473 U.S. 667 (1985). A defendant's right to confront a witness under the Confrontation Clause also included the right to cross-examine a witness. *See* U.S. CONST. amend. VI ("[I]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."); Lee v. Illinois, 476 U.S. 530, 540 (1986); California v. Greene, 399 U.S. 149, 158 (1970) (noting the ability to cross-examine a witness is a highly effective tool to elicit the truth and allow a jury to evaluate witness credibility).

48. *Bagley*, 473 U.S. at 676 ("The Court has rejected any . . . distinction between impeachment evidence and exculpatory evidence.").

49. *Id.* at 682. Despite the Court's efforts to clarify "materiality," the standard articulated in *Bagley* has led to confusion as some courts use the standard as the basis for reversal while others use the standard to define the contours of prosecutors' pre-trial duty to disclose evidence. Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 HASTINGS L.J. 1321, 1325 (2011).

50. *Bagley*, 473 U.S. at 682; *see also* J. Thomas Sullivan, Brady-*Based Prosecutorial Misconduct Claims,* Buckley*, and the Arkansas Coram Nobis Remedy*, 64 ARK. L. REV. 561, 573–74 (2011) (explaining that the Court in *Bagley* created a single test for evaluating materiality instead of the three scenarios presented in *Agurs*). A minority of states have adopted more favorable standards for defendants in "specific request" cases because of, in part, a belief that defendants are more prejudiced by negative responses to a request. 2 DRESSLER, *supra* note 30, at 148. The most common of these relaxed standards is "'a reasonable *possibility*' that the result would have been different." *Id*.

51. 514 U.S. 419, 432–34 (1995). In outlining the scope of *Brady* responsibilities, the Court articulated that prosecutors have a dual role; they are not only "an advocate," but also a "representative of the sovereign," which must be balanced with disclosure obligations.

was indicted for first-degree murder[52] and specifically requested exculpatory and impeachment evidence before trial.[53] At the time of the request, the prosecutors did not possess exculpatory or impeachment evidence, but were aware that some police officers involved in the investigation did.[54] Nevertheless, the prosecutors told defense counsel that exculpatory evidence did not exist.[55]

The defense discovered the evidence after direct appeal.[56] Kyles subsequently sought habeas relief, claiming that his *Brady* rights were violated because the withheld evidence was material.[57] The Supreme Court analyzed Kyles' complaint using the *Bagley* standard for materiality, and examined the claim in the context of all the evidence presented at trial.[58] The Court found that prosecutorial disclosure obligations included a requirement to "learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[59] Thus, the *Kyles* Court added another prosecutorial duty, and held that a prosecutor's failure to learn of all favorable evidence may result in a *Brady* violation.[60] Applying this duty to the facts

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Christopher Deal, Brady *Materiality Before Trial: The Scope of the Duty to Disclose and the Right to a Trial by Jury*, 82 N.Y.U. L. REV. 1780, 1793 (2007).

52. *Kyles*, 514 U.S. at 428. Victim Dolores Dye was shot to death after being attacked outside of a grocery store in New Orleans, Louisiana. *Id.* at 423. The shooter stole Dye's car. *Id.* Police questioned six eyewitnesses at the scene who provided varying details regarding the perpetrator. *Id.* Police also gathered the license plate numbers of vehicles parked nearby, as they suspected the shooter may have left his car near the grocery store. *Id.* Some time after, an informant contacted the police and implicated Kyles, which led to Kyles' arrest. *Id.* at 426–27.

53. *Id.* at 428.

54. *Id.* at 428–29.

55. *Id.* at 428.

56. *Id.* at 431.

57. *Id.*

58. *Id.* at 433–38. The Court noted four main points regarding materiality: (1) materiality is determined based on the "'reasonable probability' of a different result;" (2) favorable evidence is evidence that, when considered within the context of all evidence presented at trial, undermined the trial verdict; (3) if a reviewing court finds constitutional error in examining a claim of *Brady* violation, harmless-error review is not required; and (4) materiality is a collective consideration. *Id.* at 434–37. On this fourth point, the Court noted that the *Brady* duty is a lower standard than the one imposed by the ABA Standards for Criminal Justice. *Id.* at 437 (quoting ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.11(a) (1993)) (noting that prosecutors "should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused").

59. *Id.* at 437. The Court emphasized that requiring the prosecution to learn of favorable evidence was consistent with *Brady*'s goal to encourage disclosure and ensure fair trials. *Id.* at 439.

60. *Id.* at 437–38 (noting that the government alone knows whether evidence has been provided to defense counsel, and therefore must be charged with determining the effect of the disclosure on the defendant's case); *see also Discovery and Access to Evidence, supra* note 5, at

before it, the Court concluded that a *Brady* violation had occurred because the prosecutors failed to disclose known evidence, and that disclosure of the evidence would have created a reasonable probability of a different trial outcome.[61]

Shortly after *Kyles*, the Supreme Court decided *Strickler v. Greene*, which involved the abduction, robbery, and murder of Leanne Whitlock.[62] During proceedings, a key government witness testified in "vivid detail" about the abduction and stated that she had an exceptional memory.[63] Strickler was found guilty of abduction, robbery, and capital murder and received the death sentence.[64] He subsequently filed a federal habeas corpus petition, and as a result, the federal district court permitted Strickler's counsel to review all police and prosecution files in the case.[65] Upon review of the files, Strickler's counsel discovered conflicting recollections by the key witness.[66] The district court granted Strickler's writ, holding that the undisclosed evidence "was sufficiently prejudicial to undermine confidence in the jury's verdict."[67] The Court of Appeals reversed, and the case was appealed to the Supreme Court.[68]

The Supreme Court held that no *Brady* violation occurred because Strickler failed to demonstrate that the evidence was material or prejudicial.[69] After examining the full trial record, the Court found Strickler's guilt was corroborated by significant forensic and physical evidence, as well as other eyewitness testimony.[70] Further, the Court found that disclosure of the evidence would not have changed Strickler's death sentence because the key

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362–63 (explaining that prosecutors have a *Brady* obligation to affirmatively learn and disclose any "exculpatory or impeachment evidence known to other government agents").

61. *Kyles*, 514 U.S. at 441. Therefore, the Court reversed the lower court holding and remanded the case. *Id.* at 453–54.

62. 527 U.S. 263 (1999).

63. *Id.* at 266.

64. *Id.* at 276–77.

65. *Id.* at 278. Strickler first filed an unsucessful state habeas petition, in which he argued that his trial counsel had been ineffective by failing to file a *Brady* motion to require disclosure of all known exculpatory evidence. *Id.*

66. *Id.*

67. *Id.* at 279.

68. Strickler v. Pruett, Nos. 97-29, 97-30, 1998 WL 340420, at *9–10 (4th Cir. June 17, 1998) (vacating in part because the claim was procedurally defaulted and because Strickler could not establish prejudice as the undisclosed evidence would have provided "little or no help . . . in either the guilt or sentencing phases of the trial").

69. *Strickler*, 527 U.S. at 281–82, 296 ("There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must be suppressed by the [prosecution], either willfully or inadvertently; and prejudice must have ensued."); *see* Elizabeth C. Hernandez & Jason M. Ferguson, *The* Brady *Bunch: An Examination of Disclosure Obligations in the Civilian Federal and Military Justice Systems*, 67 A.F. L. REV. 187, 194 (2011) (noting that *Strickler* provides a straight-forward application of *Brady* by annoucing a three-part test of materiality).

70. *Strickler*, 527 U.S. at 293–94.

witness's testimony was unrelated to his death-sentence eligibility.[71] In sum, the Court found there was no reasonable probability of a different verdict or sentence at trial, even if the key witness's testimony had been impeached or excluded.[72]

C. Prosecutorial Disclosure Requirements of Inadmissible Evidence

Among the Supreme Court cases that followed *Brady*, only *Wood v. Bartholomew* specifically addressed prosecutorial disclosure requirements for inadmissible evidence.[73] In *Wood*, Dwayne Bartholomew admitted to robbing a laundromat and firing two gunshots—one of which killed a laundromat attendant.[74] Bartholomew, however, argued that the murder was not premeditated and claimed that the gun accidentally discharged the two bullets.[75] At trial, prosecutors presented two witnesses who testified against Bartholomew.[76] Before trial, both witnesses submitted to polygraph exams and gave answers consistent with their trial testimony.[77] Their answers to questions regarding their involvement in the robbery were "inconclusive" and "indicated deception."[78] The state did not disclose these results to Bartholomew.[79] He was subsequently found guilty, and sentenced to life in prison without parole.[80]

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71. *Id.* at 295.

72. *Id.* at 295–96.

73. 516 U.S. 1, 8 (1995) (per curium). *But see* Felder v. Johnson, 180 F.3d 206, 212 n.7 (5th Cir. 1999) (noting that *Wood* did not "squarely" articulate a rule for *Brady* disclosure obligations where the evidence at issue was inadmissible).

74. *Wood*, 516 U.S. at 2.

75. *Id.* at 2–3. Premeditation was relevant at trial to determine whether Bartholomew committed felony murder—which did not require proof of premeditation—or aggravated murder in the first degree, which required such proof. *Id.* at 3.

76. *Id.* at 3–4 (noting that Bartholomew's brother and his brother's girlfriend served as the two prosecution witnesses and gave testimony that indicated premeditation).

77. *Id.* at 4.

78. *Id.* Bartholomew's brother's results "indicated deception" when he responded to questions concerning whether he helped with the robbery and whether he was ever in the room where the homicide took place. *Id.* The results of Bartholomew's brother's girlfriend were inconclusive when she responded to whether she assisted with the robbery or handled the gun. *Id.*

79. *Id.*

80. *Id.* at 9. Bartholomew exhausted state remedies challenging the suppression and then filed for habeas relief in federal district court. *Id.* at 4–5. The district court denied Bartholomew's request and found that he failed to show a reasonable likelihood of a different verdict with the polygraph evidence. *Id.* at 5. The Ninth Circuit reversed the lower court and held that although polygraph results were not admissible at trial under applicable state law, the evidence was nonetheless material for *Brady* purposes. Bartholomew v. Wood, 34 F.3d 870, 875–76 (9th Cir. 1994), *rev'd*, 516 U.S. 1.

The Supreme Court held that the prosecutors did not violate *Brady* by failing to disclose the polygraph results.[81] In reaching its conclusion, the Court noted that, under applicable state law, polygraph results were not admissible at trial.[82] Since the polygraph results were not admissible, the Court held that their disclosure "could have had no direct effect on the outcome of trial," as the defense would not have been permitted to mention the results during the proceedings.[83] The Court noted that mere speculation that disclosure of the polygraph results could have led to the discovery of admissible evidence is not enough; instead, a *Brady* violation only occurs when the disclosure of the evidence makes it "reasonably likely" that a different result would have been obtained at trial.[84]

D. Conflicting Wood *Interpretations Cause a Circuit Split*

Wood's ambiguous holding regarding disclosure requirements of inadmissible evidence has resulted in three different approaches employed by various circuit courts to determine whether undisclosed inadmissible evidence can be the basis of a *Brady* claim.[85] The Fourth Circuit has found certain types of inadmissible evidence to be immaterial and outside the scope of *Brady*'s duty to disclose.[86] On the other hand, the First, Sixth, Eighth, Eleventh, and D.C. Circuits have held that *Brady* violations can occur when inadmissible evidence leads to admissible evidence.[87] The Fifth Circuit has taken a slightly broader approach, evaluating the nature of the inadmissible evidence itself, and

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81. *Wood*, 516 U.S. at 8–9. The Supreme Court reversed the Ninth Circuit, which had held that the polygraph results were material under *Brady* because the results could have affected how Bartholomew's counsel conducted and pursued investigation and depositions. *Bartholomew*, 34 F.3d at 874–75 ("Had [respondent's] counsel known of the polygraph results, he would have had a stronger reason to pursue an investigation of Rodney's story.").

82. *Wood*, 516 U.S. at 8–9.

83. *Id.*

84. *Id.* at 6–7. The Court also noted that when Bartholomew's defense counsel was asked about how helpful the polygraph results would have been during his cross-examination of the witnesses, defense counsel stated that, although he "would have liked to have known" the polygraph results, he did not think that they would have "affected the outcome of the case." *Id.* at 7.

85. Felder v. Johnson, 180 F.3d 206, 212 n.7 (5th Cir. 1999) (noting that *Wood* did not clearly articulate a rule regarding *Brady* disclosure obligations where the evidence at issue was inadmissible and as a result "reactions to *Wood* have been . . . varied"); *see also* United States v. Price, 566 F.3d 900, 911–12 (9th Cir. 2009) (discussing the disagreement among the circuit courts regarding *Wood* and whether suppression of inadmissible evidence that led to admissible evidence can form the basis of *Brady* claim).

86. *See* Hoke v. Netherland, 92 F.3d 1350, 1356–57 (4th Cir. 1996).

87. *See generally* Henness v. Bagley, 644 F.3d 308 (6th Cir. 2011), *reh'g denied*, No. 07-4479, 2011 U.S. App. LEXIS 18549 (6th Cir. Sept. 2, 2011); Ellsworth v. Warden, 333 F.3d 1 (1st Cir. 2003); Bradley v. Nagle, 212 F.3d 559 (11th Cir. 2000); Madsen v. Dormire, 137 F.3d 602 (8th Cir. 1998); United States v. Derr, 990 F.2d 1330 (D.C. Cir. 1993), *abrogated on other grounds by* United States v. Bailey, 36 F.3d 106 (D.C. Cir. 1994) (en banc), *rev'd*, 516 U.S. 137 (1994), *superseded by statute*, 18 U.S.C. § 924 (2006).

holding that *Brady* violations can occur when inadmissible evidence would likely affect the outcome of the trial.[88]

1. First Approach: Finding Inadmissible Evidence Immaterial

In *Hoke v. Netherland*, the Fourth Circuit explicitely stated that inadmissible evidence is not subject to *Brady*.[89] In *Hoke*, the defendant, convicted of capital murder connected to an abduction and rape, raised a *Brady* claim due to a series of undisclosed witness interviews that detailed the witnesses' prior consensual sexual relationships with the victim.[90] The Fourth Circuit found that no *Brady* violation occurred because the withheld evidence was not material exculpatory evidence as there was "no chance at all that the outcome of Hoke's capital murder trial would have been different" if the evidence of the victims' prior consensual sexual relationships had been disclosed.[91] Although the Fourth Circuit did not explicitly rule on the admissibility of the undisclosed witness interviews, it stressed, citing *Wood*, that if the evidence was inadmissible, then it would be, "as a matter of law, 'immaterial' for *Brady* purposes."[92]

2. Second Approach: Inadmissible Evidence that Leads to Admissible Evidence Must Be Disclosed

Unlike the Fourth Circuit's explicit rule that inadmissible evidence is immaterial "as a matter of law," many courts have held that inadmissible evidence can be the basis of a *Brady* violation. The First, Sixth, Eighth,

88. United States v. Lee, 88 F. App'x 682, 685 (5th Cir. 2004) (per curium).

89. *Hoke*, 92 F.3d at 1356 n.3 (stating that inadmissible evidence is immaterial as a matter of law).

90. *Id.* Ronald Hoke was sentenced to death after being convicted of capital murder. *Id.* at 1352. After exhausting his state court remedies, Hoke filed a federal habeas petition in U.S. District Court for the Eastern District of Virginia. *Id.* at 1354. Before the habeas hearing, the district court instructed the Commonwealth of Virginia to produce its files from the initial state court trial. *Id.* The files contained interviews of three witnesses that detailed the witnesses' previous consensual sexual encounters with the victim. *Id.* Based on this newly discovered evidence, Hoke amended his federal habeas petition by adding a *Brady* claim. *Id.* The district court vacated Hoke's death sentence and granted him a new trial. *Id.* at 1354. The Fourth Circuit reversed the district court, remanded the case, and reinstated Hoke's death sentence. *Id.* at 1365.

91. *Id.* at 1356–57 (noting that in light of the overwhelming evidence that Hoke raped and murdered the victim, no reasonable jury would have concluded that the witnesses' "normal sexual intercourse" with the victim was material).

92. *Id.* at 1356 n.3 (indicating that the Virginia rape shield statute prevents admission of such evidence). One commenter has characterized the Fourth Circuit's view that inadmissible is immaterial under *Brady* as "the most restrictive approach" of all the appellate courts. Gregory S. Seador, *A Search for the Truth or a Game of Strategy? The Circuit Split over the Prosecution's Obligation to Disclose Inadmissible Exculpatory Information to the Accused*, 51 SYRACUSE L. REV. 139, 149–50 (2001).

Eleventh, and D.C. Circuits have held that *Brady* violations can occur when the undisclosed inadmissible evidence can lead to admissible evidence.[93]

In *United States v. Derr*, the D.C. Circuit found that no *Brady* violation occurred when prosecutors did not disclose inadmissible evidence because there was no indication that the inadmissible evidence would have led to admissible material evidence.[94] In *Derr*, police executed a search warrant for James Lanham's apartment, where defendant Tyrone Derr was staying.[95] As a result of the search, Derr was charged with possession of cocaine with the intent to distribute and firearm use related to drug possession.[96] Before Derr's trial, police executed another search warrant on Lanham's apartment, found a large amount of cash, drug paraphernalia, and cocaine, and arrested Lanham, his brother Michael Lanham, and Chay Rawls.[97] According to a statement by Rawls, the Lanham brothers and another person had begun distributing drugs from the apartment around the time of Derr's arrest.[98] The government did not inform Derr of Rawls's statement, and Derr was convicted despite several motions for acquittal.[99] On appeal, Derr argued that prosecutors violated *Brady* by withholding Rawls's statement, which was material because it implicated someone other than Derr.[100] The D.C. Circuit found that Rawls's statement, which was not subject to a hearsay exception, would not have been admitted at trial.[101] Further, the court stated that even if the statement were disclosed, it was unclear to what additional admissible exculpatory evidence

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93. *See generally* Henness v. Bagley, 644 F.3d 308 (6th Cir. 2011), *reh'g denied*, No. 07-4479, 2011 U.S. App. LEXIS 18549 (6th Cir. Sept. 2, 2011); Ellsworth v. Warden, 333 F.3d 1 (1st Cir. 2003); Bradley v. Nagle, 212 F.3d 559 (11th Cir. 2000); Madsen v. Dormire, 137 F.3d 602 (8th Cir. 1998); United States v. Derr, 990 F.2d 1330 (D.C. Cir. 1993), *abrogated on other grounds by* United States v. Bailey, 36 F.3d 106 (D.C. Cir. 1994) (en banc), *rev'd*, 516 U.S. 137 (1994), *superseded by statute*, 18 U.S.C. § 924 (2006). The Second and Third Circuits have also similarly noted that inadmissible evidence leading to admissible evidence fits within *Brady*'s scope. Maynard v. Gov't of Virgin Islands, 392 F. App'x 105, 115–16 (3d Cir. 2010) (noting *Brady* may apply when prosecutors withhold inadmissible evidence that could lead to admissible evidence); United States v. Gil, 297 F.3d 93, 104 (2d Cir. 2002) (noting that inadmissible evidence that led to admissible evidence is considered material under *Brady*).

94. *Derr*, 990 F.2d at 1330.

95. *Id.*

96. *Id.* at 1333 (noting that the keys to a closet—where a revolver, Derr's birth certificate, drugs, and drug paraphernalia were found—were in Derr's room).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 1335 (noting that Derr's defense was based on the fact that he was in the "wrong place at the wrong time"). Derr also argued that the prosecutors violated *Brady* by not disclosing physical evidence seized during the second search. *Id.* The D.C. Circuit found this argument to be without merit because "Derr's knowledge at trial of the arrests combined with his failure to seek any information about the fruits of the accompanying search necessarily defeat this *Brady* claim." *Id.* at (citing United States v. Agurs, 427 U.S. 97, 103 (1976)) (noting that *Brady* requires disclosure of information for which the defendant does not have prior knowledge).

101. *Id.* at 1335–36 (citing United States v. Kennedy, 890 F.2d 1056, 1059 (9th Cir. 1989)).

this would have led.[102] The court also noted that the materiality of Rawls's statement was undermined by defense counsel's concession that Rawls would have invoked his Fifth Amendment right if asked to testify during Derr's trial.[103] Therefore, the court held that the statement was not material and rejected the *Brady* claim.[104]

Similarly, the Sixth Circuit, in *Henness v. Bagley*, stressed that a *Brady* violation can occur when inadmissible evidence, which could lead to the discovery of admissible evidence, is suppressed.[105] In *Henness*, police created several "informational summaries" concerning the events surrounding the murder for which defendant Warren Henness was convicted.[106] These summaries were not provided to Henness before trial.[107] Henness argued that suppression of the summaries violated *Brady* requirements because they were exculpatory and supported his claim that the victim was mistakenly killed by drug dealers who meant to kill Henness.[108] Although the Sixth Circuit found that one summary was inadmissible hearsay, it held that such inadmissible evidence may form the basis of a *Brady* violation when it leads to the discovery of additional admissible exculpatory or impeachment evidence that could affect the trial outcome.[109] However, the Sixth Circuit noted that the possibility that the inadmissible evidence leads to admissible evidence must be based on more than speculation.[110] Evaluating the evidence in this case, the court held that Henness had not articulated a *Brady* claim because he failed to

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102. *Id.* at 1336 (observing that in considering the full spectrum of physical evidence presented at trial, disclosure of the inadmissible evidence would not have undermined the verdict). This determination by the D.C. Circuit reflects the view that "admissibility determines disclosure" in the *Brady* analysis. Yaroshefsky, *supra* note 49, at 1331 n.51.

103. *Derr*, 990 F.2d at 1335–36 (finding Derr's argument that the evidence was material to impeach a witness was vague and did not meet the "reasonable probability of acquittal" test).

104. *Id.*

105. 644 F.3d 308, 325 (6th Cir. 2011) (explaining that the defendant failed to show that the hearsay could have led to admissible evidence), *reh'g denied*, No. 07-4479, 2011 U.S. App. LEXIS 18549 (6th Cir. Sept. 2, 2011).

106. *Id.* (noting that one informational summary detailed a police interview with one of Henness's friends, one described a conversation Henness had with police, another described a detective's interview with Henness's mother, and two described letters sent after the murder).

107. *Id.*

108. *Id.* at 324–26. Henness pled guilty to forgery counts, but was tried on several other counts including felony murder, and was ultimately found guilty and sentenced to death. *Id.* at 316. The Ohio Supreme Court affirmed the sentence and the district court rejected his habeas petition. *Id.*

109. *Id.*

110. *Id.* at 325–26 (finding speculation does not create "a reasonable probability" of a different verdict).

establish, with more than speculation, that the summaries would have led to admissible evidence.[111]

Similarly, in *Madsen v. Dormire*, the issue before the Eighth Circuit was whether the prosecution's failure to disclose inadmissible evidence of a chemist's competency violated *Brady*.[112] During his state criminal trial, the defendant, Michael Madsen, attempted to introduce a chemist's serology report that indicated that the victim's blood type did not match blood found at the crime scene.[113] The court excluded the report after the prosecution introduced evidence, to which the defense had not been privy before trial, that undermined the chemist's competency.[114] In Madsen's habeas petition following his conviction of forcible rape and sodomy, Madsen raised a *Brady* claim, arguing that the prosecutors' failure to disclose evidence about the chemist's competency constituted a *Brady* violation.[115] The Eighth Circuit compared this case to *Wood* and held that the competency information was "not '*evidence* at all'" because it could not be used to impeach any of the testimony presented at trial.[116] Further, the court found that Madsen failed to establish that the withheld inadmissible evidence could have led to admissible evidence, particularly noting that the defense presented no evidence showing that if Madsen had been aware of the chemist's incompetence, he would have been able to procure another chemist who would have produced similar results.[117] Thus, the court held that no *Brady* violation had occurred.[118]

In *Bradley v. Nagle*, the Eleventh Circuit articulated a similar rule, noting that nondisclosure of inadmissible evidence may form the basis of a *Brady*

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111. *Id.* (finding that none of the informational summaries violated *Brady* because Henness knew the underlying facts of the summaries, and because Henness merely speculated that they would create a reasonable probability of a different result at trial).

112. 137 F.3d 602, 603–04 (8th Cir. 1998).

113. State v. Madsen, 772 S.W.2d 656, 662 (Mo. 1989) (en banc).

114. *Madsen*, 137 F.3d at 603 (noting that the State, out of the presence of the jury, introduced evidence that the chemist had failed two proficiency tests in blood typing).

115. *Id.* at 603–04. Madsen also raised a *Brady* claim on direct appeal, but was rejected by the state supreme court. *Id.* at 604; *Madsen*, 772 S.W.2d at 662.

116. *Madsen*, 137 F.3d at 604 (quoting *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995) (per curium)). The Eighth Circuit reversed the district court, which had granted the defendant habeas relief because "the State's failure to disclose [the chemist's] incompetency before trial 'in effect eliminated valuable impeachment evidence' [by] . . . 'prevent[ing] [the defendant] from having the opportunity to procure an independent expert to test the samples.'" *Madsen*, 137 F.3d at 604. Although the Eighth Circuit did not find a *Brady* violation, it refused to condone the State's "belated disclosure of [the chemist's] incompetency." *Id.* at 605 (noting that although criminal trials should be "a quest for truth," *Brady* is not cure for all errors); *see also* United States v. Gonzales, 90 F.3d 1363, 1369 n.3 (8th Cir. 1996) ("*Brady* was not intended as a constitutional cure-all for errors in criminal trials.").

117. *Madsen*, 137 F.3d at 604 (noting that a more competent scientist likely would have uncovered that the crime-scene blood matched the victim's blood). *See also* Seador, *supra* note 92, at 142 & n.19 (noting that *Madsen*'s approach regarding materiality of inadmissible evidence is based on the "mere speculation" test).

118. *Madsen*, 137 F.3d at 604.

claim when the defendant can demonstrate that disclosure would have led to additional admissible exculpatory evidence and, when evaluated in the context of all evidence presented, would have undermined the verdict.[119] The court also noted that there must be more than a tenuous link between the inadmissible and the additional admissible exculpatory evidence.[120] In *Bradley*, defendant Danny Joe Bradley filed a habeas petition claiming, among other things, that the government allegedly violated *Brady*.[121] Bradley argued that three pieces of evidence were withheld in violation of *Brady*.[122] Each of the withheld evidentiary items was inadmissible at trial based on state evidentiary rules.[123] The Eleventh Circuit denied Bradley's habeas petition because Bradley presented only speculative details about where disclosure would have led him, which is insufficient under *Brady*.[124] In addition, the court held that no *Brady* violation existed because, compared to the entire spectrum of evidence that was presented at trial, the suppressed evidence would not have undermined the verdict.[125]

In *Ellsworth v. Warden*, the First Circuit held that inadmissible evidence may form the basis of a *Brady* claim when it provides a "*promising* . . . lead to strong exculpatory evidence [such] that there could be no justification for

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119. 212 F.3d 559, 567 (11th Cir. 2000) (evaluating a *Brady* violation involving inadmissible challenged evidence); *see also* Wright v. Hopper, 169 F.3d 695, 703–04 (11th Cir. 1999) (discussing now "inadmissible evidence may be material [under *Brady*] if the evidence would have led to admissible evidence," which would have altered the trial outcome (quoting Spaziano v. Singletary, 36 F.3d 1028, 1044 (11th Cir. 1994))); Jannice E. Joseph, *The New Russian Roulette:* Brady *Revisited*, 17 CAP. DEF. J. 33, 51 (2004) (noting that in the Eleventh Circuit, inadmissible evidence is within the scope of a *Brady* disclosure when it leads to admissible evidence).

120. *Bradley*, 212 F.3d at 567.

121. *Id.* Bradley was convicted of the murder of his step daughter. *Id.* at 564. Following Bradley's conviction, he unsuccessfully appealed to the Alabama Court of Criminal Appeals and to the Supreme Court of the United States. *See generally* Williams v. Ohio, 480 U.S. 923 (1987); *Ex Parte* Bradley, 494 So. 2d 772 (Ala. Crim. App. 1986). Bradley then filed a motion for relief from judgment, which was ultimately appealed to, and denied by, the U.S. Supreme Court. *See generally* Bradley v. Alabama, 498 U.S. 881 (1990). Finally Bradley petitioned for federal habeas corpus relief, which was also denied. *Bradley*, 494 So. 2d at 777. Bradley appealed this denial to the U.S. Court of Appeals for the Eleventh Circuit. *Bradley*, 212 F.3d at 564.

122. *Bradley*, 212 F.3d at 567 (indicating that the withheld evidence included three different statements of other individuals who identified three different potential perpetrators).

123. *Id.* (noting that all three pieces of withheld evidence were hearsay and inadmissible under the Alabama Rules of Evidence).

124. *Id.* (noting that Bradley argued that he would have discovered evidence that the three other alleged perpetrators were involved in the murder, but did not go further in detailing this potential evidence or how it would demonstrate that the others were involved).

125. *Id.* The Eleventh Circuit prefaced its analysis by assuming that the withheld *Brady* material should have been disclosed to defense counsel, but found that the district court did not commit error in determining that even if the *Brady* material had been disclosed, disclosure would not have altered the trial outcome. *Id.*

withholding [the evidence]."[126] In *Ellsworth*, habeas petitioner Raymond Ellsworth was convicted of sexual assault.[127] A *Brady* claim was raised based on an intake note that indicated, among other things, that the victim previously falsely alleged sexual abuse, and that the staff should "take special precautions" to avoid such false claims.[128] The First Circuit held that although the intake note was inadmissible hearsay, it was also exculpatory.[129] The court noted that despite the note's inadmissibility, disclosure of the note could have assisted Ellsworth in identifying additional witnesses to corroborate the information.[130] Thus, the court remanded and ordered an evidentiary hearing to determine whether the intake note would have led the defense to admissible evidence of false accusations by others.[131]

3. Third Approach: Whether the Inadmissible Evidence Could Have Affected the Trial Outcome

In a slight variation from the approaches of the First, Sixth, Eighth, Eleventh, and D.C. Circuits, the Fifth Circuit in *United States v. Lee* confirmed that *Brady* may require disclosure of inadmissible evidence by examining the nature of the inadmissible evidence itself.[132] Instead of focusing on the potential discovery of additional admissible exculpatory evidence, the Fifth Circuit's inquiry was broader, questioning whether the inadmissible evidence would alter a trial's outcome.[133] In *Lee*, defendants Samuel Lee and Jacklean Davis were convicted of extortion-related charges.[134] After their trial, prosecutors disclosed that the state's main witness had an outstanding warrant

126. 333 F.3d 1, 4–5 (1st Cir. 2003) (emphasis added) (noting this decision is consistent with the policy underlying *Brady*).

127. *Id.* at 3. Ellsworth worked at a facility "for children with emotional, behavioral and neurological impairments." *Id.* About one year after an eleven-year-old patient came to the facility, he accused Ellsworth of sexually abusing him. *Id.* at 2. Little evidence corroborated the conflicting testimony of the child and Ellsworth. *Id.* at 3. Following the state supreme court's affirmation of Ellsworth's conviction, Ellsworth filed for federal habeas relief claiming that prosecutors violated disclosure obligations under *Brady*. *Id.*

128. *Id.* at 4.

129. *Id.* (noting the letter constituted "double hearsay").

130. *Id.* at 5 (describing the potential evidence of prior accusations as "strong evidence" and "powerful" had it been disclosed).

131. *Id.* 5–6. This holding marked a shift in the First Circuit, which previously held that if evidence was not admissible based on rules of evidence—like the rule against hearsay—it fell squarely outside *Brady* in all circumstances. United States v. Ranney, 719 F.3d 1183, 1190 (1st Cir. 1983).

132. 88 F. App'x 682, 685 (5th Cir. 2004) (per curium).

133. *Id.* (noting that the proper test is whether "the disclosure of the evidence would have created a reasonable probability that the result of the proceeding would have been different" (quoting Felder v. Johnson, 180 F.3d 206, 212 (5th Cir. 1999))).

134. *Id.* at 683. Both defendants were former police officers who worked as security guards at a promotional event and threatened to arrest promoters who did not agree to pay additional fees. *Id.*

at the time of the trial for issuing a bad check.[135] Both Lee and Davis sought acquittal and new trials based on this evidence.[136] The Fifth Circuit, although noting that "inadmissible evidence may be material under *Brady*," found that the defendants in this case failed to demonstrate that disclosure would have reasonably resulted in a different trial outcome.[137] Further, the court noted that sufficient independent evidence supported the verdict regardless of the potential impeachment evidence.[138] Thus, the court held that on these facts, no *Brady* violation had occurred.[139]

II. THE FRICTION BETWEEN PROSECUTORIAL LIABILITY AND A DEFENDANT'S RIGHT TO A FAIR TRIAL

Courts disagree on disclosure of inadmissible evidence because *Brady* and its progeny did not explicitly define "materiality" of evidence[140]—a key factor in determining whether a *Brady* violation has occurred.[141] The split exemplifies the friction between prosecutors' obligations to determine what evidence constitutes *Brady* material before trial and subsequent appellate review of the appropriateness of such determinations.[142] An approach that

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135. *Id.*

136. *Id.* The district court denied the *Brady* claim because the evidence (the outstanding warrant) was not admissible or material. *Id.* at 684.

137. *Id.* at 685. The court also explained that Lee had sufficient information to conduct an investigation of his own, which would have revealed that the witness had an outstanding warrant. *Id.* at 685 n.1.

138. *Id.* at 685.

139. *Id.*

140. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963); *see also* United States v. Agurs, 427 U.S. 97, 106–07 (1976) (attempting to define materiality in three different scenarios); United States v. Coppa, 267 F.3d 132, 141 (2d Cir. 2001) (discussing *Agurs* and subsequent decisions that aimed to define materiality).

141. *See* Strickler v. Greene, 527 U.S. 263, 296 (1999) (holding that the petitioner failed to establish materiality of evidence because he failed to show a reasonable probability of a different trial outcome); United States v. Bagley, 473 U.S. 667, 682 (1985) (utilizing tests from *Agurs* and *Strickler* to define materiality); *Agurs*, 427 U.S. at 112–13 (explaining that the materiality standard must "reflect our overriding concern with the justice of finding the guilt" (footnote omitted)); *see also* Brian D. Ginsberg, *Always Be Disclosing: The Prosecutor's Constitutional Duty to Divulge Inadmissible Evidence*, 110 W. VA. L. REV. 611, 621 (2008) (discussing the implications of an admissibility requirement under *Brady* and noting that *Wood* is the sole Supreme Court case that "expressly addressed the role of admissibility in the materiality inquiry" under *Brady*).

142. *See* 2 DRESSLER, *supra* note 30, at 148 (noting some courts have criticized *Brady* for allowing prosecutors leeway to actually withhold more evidence). Justice Thurgood Marshall noted the conflict facing prosecutors who must make pre-trial determinations of materiality in his dissent in *Bagley*. *Bagley*, 473 U.S. at 702 (Marshall, J., dissenting). Justice Marshall found that the standard of materiality had essentially been narrowed by post-*Brady* cases that allowed prosecutors to take on the jury's role of determining the effect a piece of evidence would have on the verdict. *Id.* He explained that when a prosecutor believes in the defendant's guilt, the prosecutor may overlook or devalue contrary evidence. *Id.* In fact, Justice Marshall argued that instead of requiring prosecutors to disclose evidence that would definitely undermine a jury

encourages—rather than discourages—disclosure would be an appropriate solution.[143]

A. Premising Brady *Disclosure on Admissibility Is an Inappropriate Standard*

The Fourth Circuit's approach that inadmissible evidence falls outside the scope of *Brady* disclosure obligations, despite its exculpatory nature, inappropriately decreases prosecutorial responsibility and accountability.[144] Further, this approach runs counter to *Brady*'s goal to promote disclosure and ensure a fair trial.[145] *Brady* and its progeny establish that prosecutors must affirmatively take steps to evaluate whether evidence in its possession or the possession of one of its agents is exculpatory.[146] It is inapposite to *Brady* to

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verdict, the broader obligation to disclose evidence that "might reasonably be considered favorable to the defendant's case" should be the applicable standard. *Id.* at 702–03; *see also* Stephanos Bibas, Brady v. Maryland*: From Adversarial Gamesmanship Toward the Search for Innocence?, in* CRIMINAL PROCEDURE STORIES, 129, 143–44 (Carol S. Steiker ed., 2006) (calling *Brady*'s test "retrospective" because of the difficulty prosecutors face in predicting what evidence will be viewed as material after the fact and the reluctance of appellate judges to order new trials).

143. Bibas, *supra* note 142, at 142–43 (noting that this broad disclosure requirement will minimize "prosecutorial self-policing"); *see also* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1610 (2006) (suggesting that prosecutors are not well suited to evaluate the material nature of certain evidence because they may not be aware of defendant's arguments and discussing the "bizarre . . . anticipatory hindsight" that prosecutors must engage in to avoid *Brady* challenges).

144. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2011) (requiring prosecutors to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense"); Yaroshefsky, *supra* note 49, at 1330 (advocating for disclosure standards that diminish prosecutorial subjectivity); *see also infra* notes 176–80 and accompanying text. Courts can require broad disclosure without requiring prosecutors to disclose to defense counsel the entirety of his or her files. *See Bagley*, 473 U.S. at 675 n.6 (stating that prosecutorial disclosure obligations are primarily intended to ensure a defendant's right to a fair trial, and are not intended to require the prosecution to help defense counsel obtain an acquittal).

145. *See Brady*, 373 U.S. at 87; *see also Strickler*, 527 U.S. at 281 (explaining that prosecutors have a broad duty to disclose exculpatory or impeachment evidence); Kyles v. Whitley, 514 U.S. 419, 439 (1995) (noting that prosecutors seek to do justice rather than win cases, and thus should weigh any doubt in favor of disclosure); *Agurs*, 427 U.S. at 108 ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure."); *see also* Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 701 (2006) (noting that *Brady* and its progeny center on the role of the prosecutor in ensuring defendants receive a fair trial).

146. *Kyles*, 514 U.S. at 437–38 (holding that prosecutors must take steps to learn of exculpatory evidence); *see also* Jones, *supra* note 7, at 422–23 (noting that the "*Brady* doctrine imposes an affirmative duty on the trial prosecutor to investigate, preserve, and disclose favorable information"); *Agurs*, 427 U.S. at 107 (finding that prosecutors must disclose exculpatory evidence to defense counsel absent a specific request); *Brady*, 373 U.S. at 87 (requiring prosecutors to disclose favorable exculpatory evidence to defense counsel); *Discovery and Access to Evidence*, *supra* note 5, at 360–63 (discussing that, although there are some limits regarding the evidence that must be disclosed, prosecutors nevertheless have an "affirmative duty to learn of and disclose any exculpatory or impeachment evidence").

allow prosecutors to dismiss evidence immediately , without fully evaluating the exculpatory potential.[147] The Fourth Circuit allows prosecutors to withhold inadmissible evidence that could lead to admissible evidence necessary to exculpate the defendant.[148] The approach taken by the Fourth Circuit reflects a hard-line rule that does not require disclosure of evidence regardless of its exculpatory nature.[149] In its analysis of inadmissible evidence, the Fourth Circuit approach is harsher than the views expressed in *Wood*, as the dicta in *Wood* recognizes that inadmissible evidence may have a role in *Brady* disclosure.[150] In *Wood*, the Court noted that "other than expressing a belief that in a deposition [the witness whose polygraph results had been undisclosed] might have confessed to his involvement in the initial stages of the crime . . . the Court of Appeals did not specify what *particular evidence* it had in mind."[151] This suggests that the Court would have given more weight to the inadmissible evidence in its materiality analysis if the appellate court had been able to articulate, in a less speculative and more conclusive manner, the effects the disclosure would have had.[152] Although discussed in dicta, the Court's reference to the speculative nature of the inadmissible evidence reflects the recognition that inadmissible evidence may fall within *Brady*, as long as certain factors are present.[153] The Fourth Circuit misapplies *Wood* by discounting any potential value of inadmissible evidence and holding that such

147. *See Kyles*, 514 U.S. at 437–38; *Agurs*, 427 U.S. at 107; *Brady*, 373 U.S. at 87.

148. Hoke v. Netherland, 92 F.3d 1350, 1356 n.3 (4th Cir. 1996) (finding inadmissible evidence to be, "as a matter of law, 'immaterial' for *Brady* purposes"); *see also* Seador, *supra* note 92, at 150 (noting that the Fourth Circuit approach is restrictive as it does not take into account any possibility that the inadmissible evidence may lead to admissible exculpatory evidence).

149. This hard-line approach is inconsistent with *Brady*, which requires prosecutors to disclose exculpatory evidence to defense counsel. *Brady*, 373 U.S. at 87; *see also*, United States v. Brooks, 966 F.2d 1500, 1502 (D.C. Cir. 1992) (noting that prosecutors have the responsibility to seek out the significance of the evidence within their possession and that prosecutors may not "avoid knowledge that would lead to exculpatory material to avoid the *Brady* obligation").

150. Wood v. Bartholomew, 516 U.S. 1, 6 (1995) (per curium) (finding the inadmissible evidence to be immaterial, not because it could never be material, but because the Ninth Circuit failed to articulate with specificity new admissible evidence that would have been discovered if the withheld evidence had been disclosed, not because inadmissible evidence is immaterial as a matter of law).

151. *Id.* (emphasis added).

152. *Id.* at 7 (noting that the speculative connection between the inadmissible evidence and any additional evidence it may have led to was insufficient to invoke *Brady*); Ginsberg, *supra* note 141, at 632 (suggesting that perhaps the Court in *Wood* would have found the inadmissible evidence to be material had a stronger link to admissible exculpatory evidence been demonstrated). *But see* Yaroshefsky, *supra* note 49, at 1331 n.51 ("In *Wood v. Bartholomew*, the Supreme Court suggested that admissibility is a precondition to trigger a prosecution's *Brady* disclosure duties.").

153. *See* Ginsberg, *supra* note 141, at 629–32 (commenting that the *Wood* decision is unclear on whether the inadmissible nature of evidence is the reason it is not material, and leaves open the possibility that "indirect effects [of inadmissible evidence] may be material").

evidence is always outside of *Brady* obligations without requiring further evaluation by prosecutors.[154]

B. The First, Sixth, Eighth, Eleventh, and the D.C. Circuit Approach Holds True to Brady *and* Wood

On the other hand, the First, Sixth, Eighth, Eleventh, and D.C. Circuits have employed an approach that requires disclosure of certain inadmissible evidence, primarily based on the likelihood that admissible evidence would have been discovered and led to a different outcome.[155] Under this view, when there is a sufficient basis to believe that inadmissible evidence would lead to admissible exculpatory or impeachment evidence, prosecutors must disclose the evidence.[156] Although the circuits have reached the same conclusions, the focus of their holdings has been slightly different.

For example, rather than strictly equating materiality with admissibility of the *Brady* evidence itself, the Sixth, Eighth, Eleventh, and D.C. Circuits have focused their inquiry on whether there is a strong tendency for the evidence to lead to material, admissible evidence.[157] In *Henness*, the Sixth Circuit rejected Henness's claim that the undisclosed hearsay testimony would have led to information that implicated another perpetrator.[158] Similarly, in *Madsen* and *Derr*, the D.C. Circuit and the Eighth Circuit concluded that speculation that the inadmissible evidence would lead to admissible evidence could not support a *Brady* claim.[159] These decisions remain consistent with the language in

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154. Hoke v. Netherland, 92 F.3d 1350, 1356 n.3 (4th Cir. 1996).

155. *See supra* Part I.D.2; *see also* Gershman, *supra* note 145, at 701–02 (noting that some circuits have "rejected admissibility as a precondition for determining the applicability of *Brady*").

156. *See supra* Part I.D.2; *see also* Strickler v. Greene, 527 U.S. 263, 280 (1999) (citing United States v. Bagley, 473 U.S. 677, 676 (1985)) (explaining that *Brady* applies to exculpatory and impeachment evidence); Kyles v. Whitley, 514 U.S. 419, 433–34 (1995) (applying the "reasonable probability" analysis to the evaluation of materiality); *Bagley*, 473 U.S. at 682 (explaining that evidence was material "if there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

157. *See generally* Henness v. Bagley, 644 F.3d 308 (6th Cir. 2011), *reh'g denied*, No. 07-4479, 2011 U.S. App. LEXIS 18549 (6th Cir. Sept. 2, 2011); Ellsworth v. Warden, 333 F.3d 1 (1st Cir. 2003); Bradley v. Nagle, 212 F.3d 559 (11th Cir. 2000); Madsen v. Dormire, 137 F.3d 602 (8th Cir. 1998); United States v. Derr, 990 F.2d 1330 (D.C. Cir. 1993), *abrogated on other grounds by* United States v. Bailey, 36 F.3d 106 (D.C. Cir. 1994) (en banc), *rev'd*, 516 U.S. 137 (1994), *superseded by statute*, 18 U.S.C. § 924 (2006).

158. *Henness*, 644 F.3d at 325. The Third Circuit has also explicitly underscored that a "concrete showing" of the probability that inadmissible evidence would lead to admissible material evidence is required for a *Brady* claim. Maynard v. Gov't of Virgin Islands, 392 F. App'x 105, 116–17 (3d Cir. 2010).

159. *Madsen*, 137 F.3d at 604; *Derr*, 990 F.2d at 1335–36. In addition, the Eleventh Circuit elaborated on the *Brady* analysis when suppressed evidence was not admissible. *Bradley*, 212 F.3d at 567; *see also* Wright v. Hopper, 169 F.3d 695, 703–04 (11th Cir. 1999) (holding similarily). The Eleventh Circuit proposed an ultimate focus on whether the defendant received a fair trial. *Bradley*, 212 F.3d at 567. Thus, even when suppressed evidence was inadmissible, it

Wood, which notes that a *Brady* claim may not be based on the "mere speculation" that exculpatory or impeachment evidence would be discovered,[160] and are also consistent with the broader underlying *Brady* obligations to disclose favorable material evidence.[161] By requiring that the connection between inadmissible and admissible evidence be more than a tenuous connection, the Court in *Wood*, consistent with *Brady*, *Bagley*, and *Kyles*, was concerned with the ultimate ability of the challenged evidence to undermine the trial result.[162] The Sixth, Eighth, and D.C. Circuits applied the same analysis as *Wood*, holding that when the defendant is unable to conclusively articulate to what admissible exculpatory evidence the inadmissible evidence would have led, the Court will not find a *Brady* violation.[163]

Similar to the Sixth, Eighth, Eleventh, and D.C. Circuits, the First Circuit held that inadmissible evidence may be within the scope of *Brady* if it leads to admissible evidence.[164] However, the First Circuit imposed a stricter requirement: whether the inadmissible evidence itself was of such quality that it created a "promising lead" to admissible evidence.[165] The First Circuit's inquiry focused on the quality of the admissible evidence, questioning whether the chance of leading to admissible exculpatory evidence was so high that it

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was possible to have a *Brady* violation. *Id.* A *Brady* violation based on inadmissible evidence occurred, however, only when suppressed evidence definitively led to admissible evidence and the strength of the evidence was considered in the context of all available admissible evidence presented. *Id.*

160. Wood v. Bartholomew, 516 U.S. 1, 6 (1995) (per curium).

161. *See supra* note 145 and accompanying text.

162. *Wood*, 516 U.S. at 5, 8 (finding that the inadmissible evidence would not have made a different trial result "reasonably likely"); United States v. Bagley, 473 U.S. 677, 682 (1985) (finding that a *Brady* claim can be found where defense counsel abandoned certain areas of investigation, lines of questioning, and defenses); Kyles v. Whitley, 514 U.S. 419, 433–34 (1995); *see also* 6 CRIM. PROC. § 24.3(b) (3d ed. 2010) (discussing that materiality under *Brady* and its progeny requires a "reasonable probability" that disclosure would have altered the trial outcome).

163. *Wood*, 516 U.S. at 6; *Henness*, 644 F.3d at 325–26 (finding that the inadmissible evidence was not sufficient to establish "a reasonable probability that, had the evidence been disclosed to the defense, the result at trial would have been different"); *Madsen*, 137 F.3d at 604 (finding that the disclosure of the inadmissible evidence would not "have changed the outcome of the trial"); *Derr*, 990 F.2d at 1336 (evaluating whether the inadmissible evidence created a "reasonable probability" of undermining the trial verdict); *see also* 2 DRESSLER, *supra* note 30, at 148 (noting that although the term "*Brady* violation" is used in reference to the disclosure obligation of prosecutors in general, technically a "*Brady* violation" occurs only when the suppression is significant to the extent that "there is a reasonable probability that the suppressed evidence would have produced a different result").

164. Ellsworth v. Warden, 333 F.3d 1, 4-5 (1st Cir. 2003); *see also* Yaroshefsky, *supra* note 49, at 1332 & n.52 (noting that the First Circuit is among the courts holding that the threshold for disclosure is whether the evidence leads to admissible evidence).

165. *Ellsworth*, 333 F.3d at 4–5.

was improper to withhold it from defense counsel.[166] This heightened requirement is a shift from *Wood*, as the Court in *Wood* only stressed that the link between the inadmissible evidence and exculpatory admissible evidence must be more than speculation, not that it must be "promising."[167] However, as a whole, the First Circuit appropriately emphasized that where the disclosure of inadmissible evidence leads to admissible evidence, such that the disclosure creates a reasonable probability of altering the trial verdict, the inadmissible evidence is material and disclosure is required.

C. The Fifth Circuit Diverges Slightly

The Fifth Circuit's trial-outcome test in *United States v. Lee* diverges from the First, Sixth, Eighth, Eleventh, and D.C. Circuits, and approaches disclosure of inadmissible evidence from a slightly different perspective than the Supreme Court in *Wood*.[168] Instead of focusing its inquiry on whether the inadmissible evidence would lead to admissible evidence, the Fifth Circuit focused on the effect inadmissible evidence would have on the trial.[169] In its *Brady* analysis, the Fifth Circuit approach does not premise materiality on admissibility.[170] The Fifth Circuit analysis is in line with *Kyles* and *Bagley*, concerning itself with the effect on the outcome—questioning whether the inadmissible evidence creates a reasonable probability of a different result, such that confidence in the outcome is undermined.[171] However, *Wood* suggests that a materiality determination should not overlook where inadmissible evidence may lead in order to determine its potential effect on the trial outcome.[172] Although the Fifth Circuit attempts to evaluate the ability of the inadmissible exculpatory evidence to affect the trial verdict, the approach may potentially allow prosecutors to discount the value of inadmissible evidence, if they are not also required to determine proactively what additional admissible evidence may be garnered by disclosure.[173]

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166. *Id.*

167. *Wood*, 516 U.S. at 8 (applying the broader "reasonable probability" test).

168. 88 F. App'x 682 (5th Cir. 2004) (per curium).

169. *Id.* at 685.

170. *Id.* (acknowledging that although inadmissible evidence may form the basis of a *Brady* challenge, the evidence presented was not sufficient to undermine the trial outcome, regardless of its admissibility).

171. *See supra* Part I.B.

172. *Wood*, 516 U.S. at 6.

173. *See* Yaroshefsky, *supra* note 49, at 1330 (noting that prosecutors tend to apply a certain amount of "prosecutorial subjectivity" when evaluating evidence and may view certain items of evidence in a different manner than defense counsel).

III. DISCLOSING INADMISSIBLE EVIDENCE: THE NEED TO ALLOW IN CAMERA REVIEW OR DISCLOSURE TO DEFENSE COUNSEL

The Supreme Court's decision in *Wood v. Bartholomew* did not overrule the obligations established by *Brady* and its progeny.[174] Thus, when evaluating whether inadmissible evidence is qualifying *Brady* evidence, courts must take into account *Brady*'s underlying goals. Although this consideration is apparent in most cases, it is equally apparent that some courts, especially the Fourth and Fifth Circuits, have differed in understanding *Wood*'s holding.[175]

Judicial guidance is required to address the difficulty prosecutors already face when making *Brady* disclosure determinations.[176] *Wood* did not clearly articulate a rule regarding *Brady* disclosure obligations for inadmissible evidence.[177] The varied interpretations of *Wood* demonstrate that another layer has been added to an already confused doctrine.[178] The failure of prosecutors to adhere properly to existing *Brady* doctrine can lead to significant legal consequences.[179] Thus, as the goal of *Brady* is to provide defense counsel with

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174. *See* Harris v. United States, 536 U.S. 545, 556–57 (2002). The Supreme Court "will not overrule a precedent absent a special justification," and it did not do so in *Wood*. *Id.* (finding the argument that prior Supreme Court decisions cannot be reconciled is insufficient when there are factual distinctions between the precedent cases); Ginsberg, *supra* note 141, at 621–22 (noting that *Wood* is factually different from *Brady* and is the sole Supreme Court case to elaborate on an admissibility requirement under *Brady*).

175. *See* Henness v. Bagley, 644 F.3d 308, 325 (6th Cir. 2011) (noting that the standard for *Brady* violations involving disclosure of inadmissible evidence must also be analyzed under the holding in *Wood*); United States v. Lee, 88 F. App'x 682, 685 (5th Cir. 2004) (per curium) (referencing the *Wood* case; however, not applying *Wood* to the materiality evaluation); Madsen v. Dormire, 137 F.3d 602, 604 (8th Cir. 1998) (noting the case's similarity to *Wood*); Hoke v. Netherland, 92 F.3d 1350, 1356–57 (4th Cir. 1996) (misapplying *Wood* by immediately discounting inadmissible evidence as immaterial); *see also Discovery and Access to Evidence*, *supra* note 5, at 361 n.1113 (discussing the emergence of a circuit split among courts evaluating *Brady* claims of inadmissible evidence and interpreting the implications of *Wood*); Ginsberg, *supra* note 141, at 614 n.3, 629 n.152 (indicating the lower courts that have applied *Wood* when evaluating *Brady* violation claims).

176. Yaroshefsky, *supra* note 49, at 1325 (noting that "[a]pplication of the *Brady* decision varies widely across federal and state jurisdictions, and there remains a lack of clarity about the boundaries of its requirements"). Another commentator has discussed how although *Brady* and its progeny aim to address the problems that can arise from defense counsel's lack of access to critical evidence by attempting to equalize the positions of prosecutors and defense counsel, "the effectuation of such access has been problematic." Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion*, 53 FORDHAM L. REV. 391, 394 (1984) (noting that the main problems with the *Brady* doctrine arise from natural prosecutorial bias and the retrospective nature of *Brady* challenges).

177. Felder v. Johnson, 180 F.3d 206, 212 n.7 (5th Cir. 1999).

178. Yaroshefsky, *supra* note 49, at 1331–32 (noting the circuit split regarding whether inadmissible evidence must be disclosed); *see also* Deal, *supra* note 51, at 1796 (stating that a great number of *Brady* challenges occur at the post-conviction stage of criminal litigation, as opposed to pre-trial hearings).

179. Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets* Brady, 109 PENN. ST. L. REV. 1133, 1150 (2005) (noting that the improper application of *Brady*

favorable exculpatory evidence, clear recognition by courts that disclosure encompasses inadmissible evidence is consistent with this broad obligation.[180]

In order to cure the existing confusion, an approach that combines the analyses of the First, Sixth, Eighth, Eleventh, and D.C. Circuits should be followed.[181] Circuit courts should require disclosure of inadmissible evidence if the inadmissible evidence does, or has a strong tendency to, lead to admissible exculpatory or impeachment evidence that creates a reasonable probability of a different trial outcome.[182] Such disclosure is consistent with *Brady*'s underlying policy, as well as subsequent Supreme Court decisions that focus on a results-affecting test.[183] Further, it provides prosecutors with the much-needed guidance in determining when to disclose inadmissible exculpatory or impeachment evidence and also recognizes defendants' due-process guarantees.[184]

This proposal, however, requires a balancing effort to ensure that a prosecutor has the ability to prepare for trial, while also making a proper determination of materiality. Although this task may seem precarious, the constitutional rights of defendants must be given greater weight.[185] To address these concerns, prosecutors should always be obligated to make a pre-trial determination regarding any evidence in their possession to discern the reason

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disclosure by withholding favorable exculpatory evidence increases the risk of convicting innocent defendants); *see also* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 146 (discussing the frequency of prosecutorial misconduct in the form of suppression of exculpatory evidence). A clear rule is also required in order to mitigate the occurrence of prosecutorial bias, which is the natural tendency for prosecutors to give more or less weight to certain pieces of evidence based on the likelihood of the evidence proving or disproving the prosecutors' theories. Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 495–96 (2009). Prosecutorial bias may cause the prosecutor to overlook evidence that defense counsel considers exculpatory. *Id.* If prosecutors were permitted to discount the potential value of inadmissible evidence, this only further limits the exculpatory evidence that may reach defendant.

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

181. *See supra* Part II.B–C.

182. Commentators agree that *Brady* disclosure obligations are not limited to admissible evidence, as evidenced by the Court in *Kyles* and its comparison of the *Brady* "reasonable probability" threshold with the ABA *Standards for Criminal Justice* "tendency" requirement, which it found to be less stringent. Ginsberg, *supra* note 141, at 628–29; *see also* STANDARDS FOR CRIMINAL JUSTICE § 3-3.11(a) (1993). As the ABA standards arguably would require a prosecutor to disclose more than what *Brady* requires, that disclosure also includes more than just admissible evidence. *Id.* at 629.

183. *See* Strickler v. Greene, 527 U.S. 263, 289 (1999); Kyles v. Whitley, 514 U.S. 419, 421–22 (1995); Wood v. Bartholomew, 516 U.S. 1, 5–6 (1995) (per curium); United States v. Bagley, 473 U.S. 677, 682 (1985).

184. Ginsburg, *supra* note 141, at 629.

185. *See, e.g.*, Sewell v. State, 592 N.E.2d 705, 707 n.4 (Ind. Ct. App. 1992) (granting defendant's right to access DNA evidence in order to conduct post-trial DNA testing and noting that "where the specified evidence is exculpatory, the defendant's right to fundamental due process outweighs the State's interest in nondisclosure").

for their hesitancy to disclose such evidence to defense counsel. If the reason a prosecutor does not wish to disclose evidence to the defense is because the prosecutor finds the evidence itself to be inadmissible and devoid of any potential exculpatory value, that evidence should be disclosed to the judge for pre-trial, in camera review[186] to determine whether the inadmissible evidence has a strong tendency to lead to additional admissible evidence.[187] The prosecutor would then be required to evaluate the exculpatory nature of such admissible evidence. In this narrow situation, the judge does not become the trier of fact, as the review is merely an extension of the judge's role in assessing admissibility of evidence generally.[188] It is crucial to ensure that the judge does not assume the prosecutor's liability for nondisclosure.[189]

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186. Under current law, in camera review is within the court's discretion when there is disagreement over withheld evidence. *See, e.g.*, United States v. Deerfield Specialty Papers, Inc., 501 F. Supp. 796, 817 (E.D. Pa. 1980) (conducting in camera review of portions of contested transcripts that the defense claimed contained *Brady* material). Similarly, circumstances already exist in which the court may conduct in camera review of alleged *Brady* evidence. For example, in camera review may be required when the prosecutor acknowledges possession of favorable evidence but wishes to challenge disclosure, or the prosecutor believes evidence may be material under *Brady* but is not sure, or the defendant has affirmatively demonstrated that prosecutors possess exculpatory evidence. Capra, *supra* note 176, at 423–24. In each of these scenarios, the court may conduct an in camera review of the identified evidence. *Id.* at 424.

187. It has been suggested that the proper solution is to require prosecutors to turn over all inadmissible evidence, including all inadmissible exculpatory and impeachment evidence to the court to evaluate. Seador, *supra* note 92, at 160 (proposing that as a blanket rule the judge should decide whether inadmissible evidence will lead to admissible, exculpatory evidence). Under this approach, the court would review the evidence to determine its exculpatory and impeachment nature and determine whether disclosure to defense counsel is required. *Id.* at 160–61. This approach, however, is not appropriate because it effectively removes prosecutors' responsibility and places disclosure obligations in the hands of the courts. *See* Brady v. Maryland, 73 U.S. 83, 87–90 (1963) (prosecutors must disclose favorable evidence to defense counsel); *see also* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-5.001(B) (2010) (noting that the obligation to disclose "material exculpatory or impeachment evidence" belongs to the prosecution).

188. It is appropriate for the judge to make a general determination of admissibility of evidence. FED. R. EVID. 104(a) (delegating to the court the responsibility of determining whether evidence is admissible). However, it is not appropriate for prosecutors to request that the judge determine whether evidence is material and exculpatory. *See* Stephen P. Jones, *The Prosecutor's Constitutional Duty to Disclose Exculpatory Evidence*, 25 U. MEM. L. REV. 735, 778 (1995) (acknowledging that although prosecutors may attempt to shift their disclosure burden to the court, courts are reluctant to evaluate evidence to determine if it is exculpatory); *see also* THOMAS A. MAUET & WARREN D. WOLFSON, TRIAL EVIDENCE § 2.1 (4th ed. 2009) (stating that in criminal proceedings under the Federal Rules of Evidence "the judge determines the admissibility of evidence"); Wright v. Hopper, 169 F.3d 695, 703 (11th Cir. 1999) (noting, however, that the court cannot speculate regarding what admissible evidence the inadmissible evidence may disclose).

189. The important duty of prosecutors to disclose exculpatory evidence to defense counsel stems from numerous sources, such as judicial decisions and ethical standards, which guide and complement one another. Yaroshefsky, *supra* note 49, at 1324–28.

If, on the other hand, a prosecutor is hesitant to disclose certain evidence because of its exculpatory nature, the prosecutor is responsible for disclosing the evidence directly to the defense if the exculpatory evidence is admissible, or if it is inadmissible, if it is clear that it will lead to admissible exculpatory evidence.[190] This requirement is consistent with the standard clarified in *Kyles*,[191] as it ensures that prosecutors remain liable, while protecting the due-process rights of the defendant.[192]

This method would not be unduly burdensome on prosecutors.[193] Requiring prosecutors to submit inadmissible evidence to judges, who then assist prosecutors in their ultimate evaluation of the exculpatory value of the evidence, merely clarifies judicial requirements and is consistent with existing ethical obligations with which prosecutors must already comply.[194] In fact, such a requirement would aid prosecutors who carry the difficult burden of determining *before* the trial what value evidence will have *at* trial.[195]

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190. *See, e.g.*, Boyd v. United States, 908 A.2d 39, 61 (D.D.C. 2006) (noting that when a prosecutor is unsure whether exculpatory evidence should be disclosed to defense counsel, the doubt should be resolved in favor of disclosing to the defense, or "at the very least mak[ing] it available to the trial court for in camera inspection").

191. Kyles v. Whitley, 514 U.S. 419, 437–38 (1995) (expanding the prosecutor's duty to disclose favorable material evidence to include a duty to learn of any favorable information and to disclose this information to defense counsel). The expansion of the prosecutor's duty in *Kyles* suggests that a broad disclosure obligation is the appropriate standard by which prosecutors should make disclosure determinations. Deal, *supra* note 51, at 1794 n.83 (acknowledging the Court's emphasis of broad disclosure in *Kyles* and *Strickler*).

192. *See Brady*, 373 U.S. at 87 (finding that the due-process rights of the defendant were not violated with proper disclosure of exculpatory evidence); *see also* Sara Gurwitch, *When Self-Policing Does Not Work: A Proposal for Policing Prosecutors in the Obligation to Provide Exculpatory Evidence to the Defense*, 50 SANTA CLARA L. REV. 303, 307 & n.19 (2010) (noting that prosecutors play a critical role in ensuring defendants receive a fair trial).

193. Potential negative consequences of an expansion to prosecutorial disclosure obligations have been held to include manufactured defense evidence or intimidation of witnesses based on early disclosure to defense counsel. *See* United States v. Pollack, 534 F.2d 964, 973–74 (D.C. Cir. 1976); *see also* United States v. Gleason, 265 F. Supp. 880, 887 (S.D.N.Y. 1967).

194. Prosecutors are already under ethical obligations to disclose *Brady* material to defense counsel. *See* MODEL RULES OF PROF'L CONDUCT § 3.8(d) (2011); STANDARDS FOR CRIMINAL JUSTICE § 22-2.1(a)(viii) (1996). Per these guidelines, prosecutors must disclose to defense counsel "[a]ny material or information within the prosecutor's possession or control which tends to negate the guilt of the defendant as to the offenses charged or which would tend to reduce the punishment of the defendant." STANDARDS FOR CRIMINAL JUSTICE § 22-2.1(a)(viii). In addition to the ABA standards and the *Model Rules of Professional Conduct*, the U.S. Department of Justice's United States Attorneys' Manual details the obligation of federal prosecutors to disclose exculpatory and impeachment evidence and outlines components of that obligation. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-5.001(A)-(D) (2010) (setting out the purpose of *Brady* disclosure requirements, the obligation to disclose exculpatory and impeachment evidence to ensure a fair trial, and timing of disclosure). These ethical obligations should be supplemented with the proposed judicial ruling regarding disclosure when the evidence at issue is deemed to be inadmissible.

195. *See* Yaroshefsky, *supra* note 49, at 1330.

Furthermore, requiring disclosure of inadmissible evidence would help reduce "prosecutorial subjectivity" in the prosecutors' initial evaluation of the value of the evidence itself and help reduce any likelihood of prosecutorial misconduct.[196]

IV. CONCLUSION

Brady and its progeny firmly establish the prosecutorial obligation to disclose favorable exculpatory evidence to defense counsel. In *Wood*, the Supreme Court rejected a *Brady* claim based on inadmissible evidence, as it was not material and therefore could not affect the outcome of trial. Thus, there was no obligation to disclose. This decision sparked different interpretations by various courts; some circuits held that prosecutors were not required to disclose inadmissible evidence, although other circuits, applying a range of approaches, determined that inadmissible evidence leading to admissible exculpatory or impeachment evidence must be disclosed. A judicial solution that weighs prosecutors' liability, defendants' right to a fair trial, and the potentially prejudicial effect of disclosure of otherwise inadmissible evidence is required. Courts should require disclosure of inadmissible evidence that leads to, or has a strong tendency to lead to, admissible exculpatory evidence that undermines the trial outcome. Courts should require prosecutors to submit evidence to a judge via in camera review when the prosecutor decides not to disclose evidence because the evidence is inadmissible, and the prosecutor believes the evidence itself lacks any exculpatory value. If the prosecutor contemplates suppression because the evidence is exculpatory or impeaching, the prosecutor remains responsible for disclosing this evidence directly to defense counsel if the evidence is admissible or, if inadmissible, leads to admissible exculpatory evidence. This is an appropriate balance to ensure that prosecutors' liability, defendants' due-process rights, and the underlying goals of *Brady* are satisfied.

196. Sometimes prosecutors do not disclose certain evidence to defense counsel because the prosecutor does not view the evidence as impeaching, although defense counsel may find this same evidence to be favorable to his or her client's case, and would therefore expect its disclosure. *Id.* The subjective analysis of the value of evidence has been referred to as "confirmation bias." Burke, *supra* note 179, at 494. Confirmation bias refers to the "tendency to favor evidence that confirms one's working hypothesis." *Id.* at 495. Professor Alafair Burke found that when prosecutors are reviewing evidence for a case, they will view evidence through this lens and naturally focus on evidence confirming, rather than refuting guilt. *Id.* at 495–96. This focused evaluation of evidence may also lead prosecutors to evaluate improperly evidence that would otherwise fall under *Brady* disclosure obligations, including evidence that itself may not be admissible at trial. *Id.*