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Inadmissible but Material? Resolving the Circuit Split After *Wood*

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Introduction

When the United States Supreme Court decides a case, the exact meaning of its decision is often amorphous. Did the Court merely decide the case before it based on the unique set of facts with which it was presented, or did the Court establish a more categorical rule applicable in all cases involving the same subject matter? As courts of appeal begin to use the Court's ruling as precedent, they often apply it inconsistently. Some appellate courts will hold that the law of the case is absolute and reject any exceptions attorneys attempt to rationalize. Others will hold that the Court's decision was entirely contingent on certain facts and refuse to apply the case even to closely analogous factual circumstances. Such an inconsistency in implementation typically is referred to as a "circuit split" as the circuit courts are split over how to use the Court's ruling as precedent.

Since the 1963 case *Brady v. Maryland*, the Supreme Court has held that a prosecutor's failure to disclose material evidence to an accused can be the basis for granting that accused a new trial. Based on the case's name, the courts and commentators have named such a failure to disclose evidence a *Brady* violation. Twenty-two years after *Brady*, in *Wood v. Bartholomew*, the Court was faced with the question of whether and when a prosecutor's failure to disclose inadmissible evidence could be the basis for a *Brady* violation and new trial. The Court found that there was no *Brady* violation in *Wood*, but its opinion was ambiguous as to whether the case created a *per se* rule that failure to disclose inadmissible evidence can never be the basis for a *Brady* violation or whether the application of *Brady* was highly dependent on the type of evidence involved in the case. In the wake of the Court's decision, there has been a circuit split over whether and when a prosecutor's failure to disclose inadmissible evidence can be the basis for a *Brady* violation and new trial.

Some circuits have held that *Wood* created a *per se* rule that failure to disclose inadmissible evidence can never be the basis for a *Brady* violation. Such a bright line rule would promote judicial and prosecutorial efficiency; prosecutors no longer have to closely scrutinize whether every piece of inadmissible evidence in their files may be material, and judges can summarily dispose of motions for new trials based on a prosecutor's failure to disclose inadmissible evidence. Further, to the extent that inadmissible evidence generally can have no direct impact on trial, it is difficult to argue that its exclusion substantially impairs the rights of an accused. Conversely, inadmissible evidence may lead directly to admissible evidence or be used to impeach a witness. To this extent, a *per se* rule could encourage a prosecutor to withhold inadmissible evidence from an accused when he knows this evidence could lead to highly probative evidence or be used in some form at trial. At the same time, without a *per se* rule, prosecutors must closely analyze every piece of inadmissible evidence in their possession to determine whether it could assist the accused, and when the prosecutor does not disclose every piece of evidence , defense counsel can file a motion for new trial based on a potential *Brady* violation, threatening judicial economy. There is even the possibility that after a new trial is granted based on failure of the prosecutor to disclose inadmissible evidence, defense counsel will be unable to uncover any new material exculpatory evidence.

Overall, then, the circuit split after *Wood* presents difficult questions that directly relate to the question of what constitutes a fair trial for an accused. Presently, an accused in one state can be granted a new trial for the prosecutor's failure to disclose a piece of evidence while an accused in another state has his *Brady* claim denied despite the same piece of evidence being withheld. Application of widely divergent interpretations of what constitutes the violation of a defendant's rights undermines the integrity of the American criminal justice system. Therefore, this essay will critically analyze and attempt to synthesize the approaches taken by different circuits. Part I will give a brief history of how the Supreme Court has dealt with the failure of prosecutors to disclose material evidence to the defense. Part II will look at how several circuits have disparately interpreted *Wood*. Finally, Part III will look at potential solutions to the circuit split.

I. The Supreme Court's Treatment of Brady Material Through *Wood*

In 1963, in the seminal case of *Brady v. Maryland*, the Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment…."[1] Thirteen years later, the Court extended *Brady* to require prosecutors to disclose material evidence even without a specific or general request by defense counsel.[2] In *United States v. Bagley*, the Court included material impeachment evidence under *Brady*'s ambit of protection.[3]

In deciding whether to grant a new trial to petitioners under *Brady*, reviewing courts must ask whether the prosecutor has withheld "material" evidence. The criterion for materiality is whether "there is a reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been different."[4] A reasonable probability is "a probability sufficient to undermine confidence in the outcome."[5]

Finally, in *Wood v. Bartholomew*, the Court reviewed a case in which the Ninth Circuit had found a *Brady* violation based on the prosecution's failure to disclose

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[1] 373 U.S. 83 (1963).

[2] *United States v. Agurs*, 427 U.S. 97, 107 (1976) (holding that, "if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made").

[3] *United States v. Bagley*, 473 U.S. 667, 676 (1985) (construing *Giglio v. United States*, 405 U.S. 150, 154 (1972)) (holding that "[t]his Court has rejected any such distinction between impeachment evidence and exculpatory evidence").

[4] Strickland v. Washington, 466 U.S. 668, 694 (1984).

[5] *Id.*

inadmissible evidence to a defendant.[6] The case involved the robbery of a laundromat, and the "evidence" was an inadmissible polygraph test given to the defendant's brother.[7] The brother was asked "whether he had assisted his brother in the robbery and whether at any time he and his brother were in the laundromat together."[8] The brother answered "No" to both questions, "and the examiner concluded that the responses indicated deception."[9]

The Court found no *Brady* violation based on several factors. First, the polygraph results were "not 'evidence' at all" because they could not have been used in any manner during the trial.[10] Second, the Court of Appeals' determination that disclosure of the results would have changed the outcome of the trial was "mere speculation."[11] It was uncertain whether disclosure of the results would have led to a different defense trial strategy, "additional discovery" leading to material evidence, or a pre-trial confession by the brother.[12] This uncertainty was also compounded by the fact that a confession by the brother "would have been in no way inconsistent with [the defendant's] guilt" and the defense lawyer's statement that disclosure of the results would not have significantly changed his trial practices.[13] In implementing *Wood*, the circuits had to answer whether (1) it created a *per se* rule that failure to disclose inadmissible evidence can never be the basis for a *Brady* violation; (2) it held that failure to disclose inadmissible evidence could lead to a *Brady* violation only if disclosure would have led directly to admissible evidence; or (3) *Wood* was largely limited to its facts, and failure to disclose material evidence can be a *Brady* violation under many circumstances?

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[6] 516 U.S. 1 (1995).
[7] *Id*. at 4.
[8] *Id*.
[9] *Id*.
[10] *Id*. at 6.
[11] *Id*.
[12] *Id*.
[13] *Id*. at 6-8.

II. The Circuit Split in Implementing *Wood*

A. A *Per Se* Rule Against Inadmissible Evidence

The First, Fourth, and Seventh Circuits have held that *Wood* creates a *per se* rule that a prosecutor's failure to disclose inadmissible evidence can never be the basis for a *Brady* violation. In *United States v. Montalvo*, the District Court for the District of Puerto Rico held that suppressed alleged statements by a policeman "were mere layman's opinion as to the victim's connection with drugs"[14] and thus inadmissible.[15] Citing a First Circuit case from before *Wood*, the court held that there was no *Brady* violation because "'inadmissible evidence is by definition not material [for Brady purposes].'"[16] *Brady* only applies when the evidence in question could have affected the outcome of the trial. Thus, "[i]nadmissible evidence is by definition not material because it never would have reached the jury and therefore could not have affected the trial outcome."[17]

Similarly, the Fourth Circuit has found that if withheld statements were "inadmissible at trial under Virginia's Rape Shield Statute, they would be, "as a matter of law, 'immaterial' for *Brady* purposes."[18] Concurrently, the Seventh Circuit has concluded that "failure to disclose [an informant's] identity and background" did not constitute a *Brady* violation because "evidence that would not have been admissible at trial is immaterial because it could not have affected the trial's outcome."[19]

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[14] 20 F.Supp.2d 270, 277 (D. P.R. 1998).
[15] *See id.* ("Opinion testimony on the veracity of the testimony of another witness is not admissible.").
[16] *Id.* at 278 (quoting United States v. Ranney, 719 F.2d 1183, 1190 (1st Cir. 1983)).
[17] *Ranney*, 719 F.2d, at 1190 (construing United States v. Agurs, 427 U.S. 97, 105-06 (1976).
[18] Hoke v. Netherland, 92 F.3d 1350, 1356 n.3 (4th Cir.1996) ") (construing *Wood*, 116 S. Ct., at 10).
[19] United States v. Silva, 71 F.3d 667, 670 (7th Cir. 1995).

B. Failure to Disclose Inadmissible Evidence Violates *Brady* Only if its Disclosure Would Have Lead Directly to Admissible Evidence

The Sixth, Ninth, and Eleventh Circuits have held that failure to disclose inadmissible evidence could constitute a *Brady* violation, but only if the petitioner can definitively prove that its disclosure would have led directly to admissible evidence at or before the original trial. For instance, in *Wright v. Hopper*, the Eleventh Circuit rejected a claim that the prosecution's failure to disclose an inadmissible affidavit from a detective containing hearsay constituted a *Brady* violation.[20] The petitioner had been convicted of murdering storeowners during a robbery, and the affidavit contained a girlfriend's statement that the gun used to kill the victims belonged to her boyfriend - - another suspect.[21]

The court stressed that the defense had not called the "girlfriend as a witness at the federal evidentiary hearing," so it was "unknown exactly what she would say…."[22] Thus, the defense did not prove a direct link to admissible evidence, and "[a] court cannot speculate as to what evidence the defense might have found if the information had been disclosed."[23]

Using similar reasoning, the Sixth Circuit has found that failure to disclose a videotape containing hearsay was not a *Brady* violation and that "information withheld by the prosecution is not material unless the information consists of, or would directly lead to, evidence admissible at trial…."[24] The Ninth Circuit has also concluded that failure to disclose the inadmissible evidence of the existence of eliminated alternate suspects was not a *Brady* violation and that, "[t]o be material, evidence must be admissible or must lead to admissible evidence."[25] Apparently, then, these circuits took the "mere speculation" language of *Wood* to mean that the defense must be able to prove a direct and definite link to admissible evidence at or before trial for there to be a *Brady* violation.

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[20] 169 F.3d 695, 703-04 (11th Cir. 1999).
[21] *Id.* at 703.
[22] *Id.*
[23] *Id.*
[24] United States v. Phillip, 948 F.2d 241, 249 (6th Cir. 1991).
[25] Coleman v. Calderon, 150 F.3d 1105, 1117 (9th Cir. 1998).

C. *Wood* is Limited to its Facts

The Second and Fifth Circuits have found that failure to disclose inadmissible evidence can be a *Brady* violation even if it would not have led directly to admissible evidence. In the Fifth Circuit case, *United States v. Gil*, Gil was found guilty "on a variety of mail fraud counts" related to "false and inflated invoices."[26] Gil's defense was that "the overpayments were intended to compensate him for work he performed outside the contract…."[27] After conviction, the prosecution turned over a memorandum to the defense that Gil claimed detailed the meeting "at which the inflated billings were authorized…."[28] The court found a *Brady* violation, holding that, even if the memorandum were inadmissible or did not lead directly to admissible evidence, it could have been "an effective tool in disciplining witnesses during cross-examination by refreshment of recollection or otherwise."[29]

In the Fifth Circuit case, *Spence v. Johnson*,[30] the court found no *Brady* violation but re-affirmed its pre-*Wood* decision in *Sellers v. Estelle*.[31] There, the court first found that inadmissible evidence was material under *Brady* because, after disclosure, "[the petitioner] may have been able to produce witnesses whose testimony or written statements may have been admissible."[32] Second, it found the inadmissible evidence "was material to the preparation of the petitioner's defense, regardless of whether it [was] intended to be admitted into evidence or not."[33]

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[26] 297 F.3d 93, 94 (5^{th} Cir. 2002).
[27] *Id.*
[28] *Id.* at 96-97.
[29] *Id.* at 104.
[30] 80 F.3d 989, 998 (5^{th} Cir. 1996).
[31] 651 F.2d 1074 (5^{th} Cir. 1981).
[32] *Spence*, 80 F.3d, at 998 (quoting *Sellers*, 651 F.2d, at 1077 n.6) (alteration in original).
[33] *Id.*

III. Resolving the Circuit Split

A. "Not Evidence at All"?

There are justifications for the *per se* rule established by certain circuits. When there are complicated rules for determining whether inadmissible evidence is material, already overburdened prosecutors need to sift through and closely analyze every piece of information they have collected to determine their disclosure obligation. Requiring prosecutors to turn over information that is preliminary and inconsequential would waste governmental resources. Concurrently, given that there is no bright line rule for materiality, petitioners might use a rule permitting *Brady* challenges based on inadmissible evidence to challenge convictions based on prosecutorial non-disclosure of any piece of information no matter how inconsequential,, compromising judicial economy.

Conversely, to the extent that the arguments for a *per se* rule rest on the assumption that inadmissible evidence is not evidence at all and would never reach the jury, that assumption is fallacious. Consider the argument in *Gil* that the inadmissible memorandum could have been used to refresh the recollection of witnesses. Under the Federal Rules of Evidence, if the memorandum were used to refresh a witness' recollection while or before testifying, the "adverse party [would be] entitled to…introduce in evidence those portions which relate to the testimony of the witness."[34] In such a case, the previously inadmissible memorandum could both become admissible evidence and be viewed directly by jurors, defeating both of the justifications for the *per se* rule. In *Gil*, an employer who did not recall the meeting authorizing Gil's overpayments could have had his recollection refreshed by an attorney using the memorandum, making the document highly probative. With a *per se* rule, the attorney would never have had that opportunity, resulting in substantial injustice.

[34] FED. R. EVID. 612.

In contrast, some evidence, like evidence excluded by Rape Shield statutes, will truly never be admissible for any purpose. There might also be other justifications for failing to disclose this information to the defense. For instance, disclosing evidence of a rape victim's prior sexual partners can cause extreme shame to the victim. This evidence is of a fundamentally different nature than the evidence in *Gil*. Even circuits currently applying a *per se* rule should recognize this distinction and find that inadmissible evidence that could itself become admissible is material potentially subject to *Brad*.

B. Inadmissible Evidence Used Solely for Trial Preparation

At the same time, the 5th Circuit likely went too far in finding that inadmissible evidence can be material even if it only would have been used for trial preparation and not as evidence at trial. There is a decent argument that *Sellers* was correctly decided. Sellers claimed innocence but was found guilty of a school shooting and sentenced to life in prison; however, his conviction was reversed under *Brady* because the prosecution withheld an inadmissible report. The report contained statements by another student claiming that he was the gunman but also implicating Sellers.[35] Clearly, if given this report, Sellers' attorney could have changed his trial strategy. Seeing the document, Sellers might have admitted guilt, and his attorney could then have changed his strategy to arguing that Sellers was not the gunman and that he should receive a lesser sentence.

Still, the central problem with this test for materiality is that the Supreme Court explicitly rejected it in *United States v. Agurs*.[36] Perhaps anticipating *Sellers*, the Court noted that this test "would necessarily encompass incriminating evidence as well as exculpatory evidence [because] knowledge of the prosecutor's entire case would always

[35] *Sellers*, 651 F.2d, at 1075.
[36] 427 U.S. 97, 113 n.20 (holding that "focus[ing] on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, rather than the materiality of the evidence to the issue of guilt or innocence…would be unacceptable for determining the materiality of…'Brady material'…").

be useful in planning the defense."[37] The report in Sellers was inculpatory to the extent that it implicated the defendant in the crime, and it only would have helped the defendant on re-trial because he apparently lied at the original trial. If, at the original trial, Sellers had admitted that he participated in the shooting, the report could not have altered his attorney's trial strategy on re-trial, and it would have been immaterial. Because such an approach would put the perjurer in a better position than the honest defendant, the Court rejected it as too broad an extension of Brady.

The Court also noted that "such an approach would primarily involve an analysis of the adequacy of the notice given to the defendant by the State, and it has always been the Court's view that the notice component of due process refers to the charge rather than the evidentiary support for the charge."[38] The *Sellers* approach necessarily switches the court's focus from the materiality of the evidence to the quality of the defense attorney and the notice given. As an example, a court might need to inquire into whether a moderately qualified defense attorney receiving inadmissible evidence three days earlier could have altered his trial strategy enough to change the trial's outcome. Such a focus belies the Court's position since *Brady* that the materiality inquiry should turn primarily on the quality of the evidence and not the behavior of the attorneys involved.[39]

C. When the Link Must be Determined

There is some merit to the argument that petitioners who do not show that inadmissible evidence would lead to admissible evidence by trial cannot prove a *Brady* violation. If an appellate court grants a new trial under *Brady* without defense proving a direct link, a new trial could be conducted without there being any new admissible evidence. Requiring a showing that undisclosed inadmissible evidence would at least

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[37] *Id.*
[38] *Id.*
[39] *See United States v. Agurs*, 427 U.S. 97, 110 (1976) (holding that, "[i]f the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor").

have led to admissible evidence would also appear consistent with *Wood*'s requirement that the defense's case be based on more than "mere speculation."[40] Even when the defense can prove a definitive link to admissible evidence, however, it is difficult to prove a reasonable probability that the evidence would have changed the outcome of the trial. When the defense has not proven this link, it is asking the court to accept that it might be able to find evidence and that this amorphous evidence would likely have changed the trial's outcome. While the Court has never defined "mere speculation," this two-step process appears dangerously close to it.

A review of *Hopper*,[41] however, reveals why this approach would provide improper motivations to defense counsel and prosecutors. In *Hopper*, the court found no *Brady* violation because the defense did not call a witness - - who was quoted in an undisclosed affidavit as saying the gun supposedly used by the defendant belonged to her boyfriend - - at the evidentiary hearing. This begs the question of why the defense would call a witness when the prosecution has failed to disclose the very evidence that would provide the reason for calling her. Under *Hopper*'s analysis, the defense would have an incentive to call every potential witness and ask endless questions in case the prosecution has withheld evidence. *Hopper* would also motivate unethical prosecutors to withhold inadmissible evidence about potential witnesses the defense is unaware of, even when the government knows this evidence could lead to highly probative evidence. Thus, there should not be an absolute rule that a link to admissible evidence must be proved by trial.

D. Why the "Dent Rule" Does Not Resolve the Circuit Split

The one author who has attempted to resolve the circuit split recommended the Third Circuit's approach in *United States v. Dent*.[42] There, "Dent sought to subpoena the

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[40] *See supra* note 11 and accompanying text.
[41] 169 F.3d 695 (11th Cir. 1999).
[42] 149 F.3d 180 (3d Cir. 1998).

personnel file of his arresting officer," but "[t]he district court reviewed the file in camera and concluded that it did not contain exculpatory or proper impeachment evidence and thus granted the government's motion to quash the subpoena."[43] "On appeal, the Third Circuit upheld the district court's ruling" and held that the district court judge's decision should stand unless it was arbitrary.[44] While *Dent* dealt with subpoenas, the author felt its analysis was "adaptable to the problem of inadmissible evidence."[45] Under what would be called the "Dent Rule," "[a]fter receiving a discovery request," "the prosecutor would be required to disclose all potentially exculpatory information to the court so that a judge could make a determination as to whether it should be disclosed."[46]

Initially, this rule would have to be altered because *Brady* also covers evidence that was not specifically requested.[47] Assuming the rule were broadened, it would have some appeal. Because prosecutors would no longer have to determine materiality, they would be relieved of a substantial burden. Also, because judges are impartial, they would be better able to make rulings unaffected by partisan interest in disadvantaging the defense.

Still, all this rule would do is shift the burden from prosecutors to judges. Under the proposed rule, already overburdened federal judges would be forced to review everything in prosecutors' files to determine materiality. Also, while judges are more objective, prosecutors are more likely to know the strengths and weaknesses of their cases and how a particular piece of evidence could alter the outcome of trial. Finally, even with the rule, courts would still have to make materiality determinations after noncompliance. Assume a prosecutor fails to comply with the Dent Rule and withholds evidence that could be material. The court could hold that such withholding should

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[43] Gregory S. Seador, Note, *A Search for the Truth or a Game of Strategy? The Circuit Split over the Prosecutor's Obligation to Disclose Inadmissible Exculpatory Information to the Accused*, 51 SYRACUSE L. REV. 139, 160 (2001).
[44] *Id.*
[45] *Id.* at 160-61.
[46] *Id.* at 161.
[47] *See United States v. Bagley*, 473 U.S. 667, 676 (1985)

automatically result in a new trial under *Brady*. Requiring the court to find a *Brady* violation on such facts , though, would be nonsensical if the evidence would be of no meaningful assistance to the defense. A superficially more workable approach might be to to establish a rule requiring the court to sanction the prosecutor for nondisclosure of possibly material evidence, while focusing the separate *Brady* inquiry on whether the nondisclosed evidence was in fact material. And that would leave courts in the same situation they would have been in before adoption of a "Dent Rule."

IV. Conclusion

Materiality determinations under *Brady* are difficult, and the Court's decision in *Wood* only complicated matters. As a result, the lower courts currently use widely different standards to determine when prosecutorial non-disclosure of evidence violates the rights of an accused, meaning that those rights are somewhat contingent on the trial court's location. Such inconsistent applications of a Supreme Court decision undermine the integrity of the American criminal justice system and the convictions or acquittals of every defendant where inadmissible evidence is withheld by prosecutors. In the absence of a Supreme Court case resolving this conflict, there must be some other method by which to reconcile the divergent approaches taken by the circuits in implementing *Wood*.

Circuits have primarily erred in implementing *Wood* to the extent that they have attempted to adopt *per se* rules to address questions that must be resolved on a case-by-case basis. Where the appellate courts hold that failure to disclose inadmissible evidence can never lead to a *Brady* violation, prosecutors are rewarded by withholding evidence that might be very useful to an accused. Conversely, if courts were to grant a new trial whenever a prosecutor failed to submit every piece of evidence he had to a judge,new trials would proceed even when there was no indication that the defense would be able to present any new evidence on retrial.

Those *per se* approaches are clearly unworkable. Thehe Fifth Circuit's apparent conclusion that even failure to disclose inculpatory evidence that defense would have used to change a not guilty plea to a guilty plea while asking for a reduced sentence seems to conflict with *Brady* in a different way. *Brady* ostensibly stands for the principle when an accused is deprived of a material piece of evidence which could have helped him prove his innocence, his rights have been violated, and he deserves a new trial.

In essence, then, resolving the circuit split after *Wood* simply comes down to the guiding principle behind *Brady*. When a prosecutor fails to disclose an inadmissible piece of evidence, the court should closely analyze the likelihood that disclosure of that piece of evidence would have helped the accused to prove his innocence. This determination should hinge solely on the quality of that evidence. The court should ask whether the evidence in question could have led to admissible evidence or been used itself at trial. If circuit courts return the *Wood* analysis to the principle behind *Brady*, their approaches to materiality determinations will be far less disparate and their determinations of what constitutes the violation of the rights of the accused far more uniform.

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