"Sorry" *is not* Enough:

Strengthening the *Brady* Duty to Disclose in the Seventh Circuit

*By Michael G. Babbitt**

The seminal Supreme Court decision *Brady v. Maryland,* 373 U.S. 83 (1963) places on the Government an affirmative duty to disclose all material information to a criminal defendant. However, courts may not be applying this rule strong enough. Even when the Government withholds helpful evidence from the defense, a new trial based on a violation of the Brady rule is rare. Too often it seems, prosecutors can say "I'm sorry" and avoid any consequences in court for withholding evidence.

This article proposes three ways the Seventh Circuit can help strengthen *Brady.* First, as a threshold matter, courts in the Seventh Circuit can adjust the bar for proving that withheld evidence might have created a "reasonable probability" of a different result under *Brady.* Second, courts can clarify that all evidence that could have affected the result at trial, whether admissible or not, can warrant a new trial under *Brady.* Third, courts can freely grant evidentiary hearings regarding the potential effect of withheld evidence.

Setting the Bar for Proving Materiality

Under *Brady,* a defendant is entitled to a new trial if: "(1) the prosecution suppressed evidence; (2) the evidence was favorable to the defense; and (3) the evidence was material to an issue at trial." *Toliver v. McCaughtry,* 539 F.3d 766, 780 (7th Cir. 2008). Information is "material" if there is a "reasonable probability" that, had the evidence been disclosed, the result of the trial would have been different. *Kyles v. Whitley,* 514 U.S. 419, 434 (1995). The challenge for courts is to set the proper bar for what does and what does not amount to a "reasonable probability."

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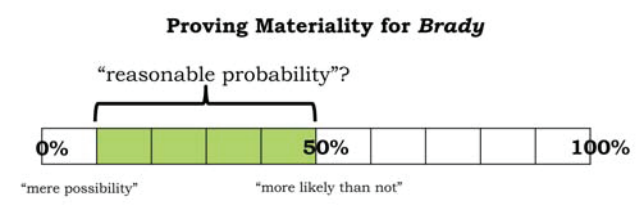
The case law has laid out the upper and lower boundaries of what may be a "reasonable probability." On the upper end of the boundaries, a defendant need not prove he would have "more likely than not" received a different verdict to show a "reasonable probability." *Id.* On the lower end, the "mere possibility" that undisclosed information might have helped the defense cannot rise to the level of a "reasonable probability" of a different result. *See United States v. Villasenor,* 664 F.3d 673, 683-84 (7th Cir. 2011) (quoting *United States v. Agurs,* 427 U.S. 97, 109–10 (1976)).

Put in terms of probability, if a hypothetical defendant could show that he would have more likely than not gotten a different verdict, say above 50% odds, then there would be materiality under this line of cases. Or, if a hypothetical defendant only showed that he would have a mere possibility of a different verdict, say 1% odds, then there would be no materiality. But what about in between these boundaries? Is 40% odds of a different verdict a reasonable probability? Is 25%? 10%? The chart below is illustrative of these boundaries.



In a recent dissent, Chief Judge Kozinski of the Ninth Circuit took a provocative look at the incentives at work in setting the bar for a "reasonable probability" under *Brady. See United States v. Olsen,* 737 F.3d 625 (9th Cir. 2013). Judge Kozinski started his dissent boldly: "[t]here is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it." *Id.* at 626. Calling the majority ruling excusing the Government's non-disclosure "dangerously broad," *id.* at 630, he continued:

> The panel shrugs off an egregious *Brady* violation as immaterial. . . . By raising the materiality bar impossibly high, the panel invites prosecutors to avert their gaze from exculpatory evidence, secure in the belief that, if it turns up after the defendant has been convicted, judges will dismiss the *Brady* violation as immaterial.

Id. at 633. Rather, Judge Kozinski said judges must "send prosecutors a clear message: Betray *Brady,* give short shrift to *Giglio,* and you will lose your ill-gotten conviction." *Id.*

In the *Olsen* case, Judge Kozinski explained he "would easily find a *Brady* violation." *Id.* The jury in *Olsen* convicted the defendant of knowingly developing a weapon of mass destruction (i.e., ricin). The defendant admitted that he made ricin, but said he had no intent to use it as a weapon. To convict him, the Government relied on a bottle of "spiked" allergy pills in his possession that allegedly contained ricin, based on the testimony of the crime lab technician. The defense unsuccessfully tried to cast doubt on the evidence by arguing the test was contaminated. However, the Government withheld impeachment evidence showing that the lab technician had been fired for being "incompetent" and engaging in "gross misconduct." The Government had a report showing that the technician botched other cases and wrongfully contaminated evidence. Yet, the Government did not disclose this evidence to the defense and the panel did not find a *Brady* violation because the panel said the withheld evidence was not material in light of other allegedly incriminating evidence.

On Judge Kozinski's logic, in situations like those presented in *Olsen,* to protect defendants' constitutional rights and disincentivize prosecutors from failing to disclose information, courts may be better off setting the bar closer to the lower end of the "reasonable probability" boundaries discussed above. Such an approach is completely permissible under the case law. For example, to do so, courts in the Seventh Circuit can emphasize that evidence may be material if it "creates a reasonable doubt that did not otherwise exist." *United States v. Fairman,* 769 F.2d 386, 392 (7th Cir. 1985) (quoting *United States v. Agurs,* 427 U.S. 97, 112 (1976)); *Toliver,* 539 F.3d at 782 (finding "the disputed evidence might well have created a reasonable doubt."). By definition, if withheld evidence could have created reasonable doubt, then it should also be "material" under *Brady* because there is a "reasonable probability" of a different result.

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Going back to our hypothetical probabilities, reasonable doubt that didn't otherwise exist surely does not need to rise to the level of 50% odds of a different result. What about 40%? Or 25%? Whatever the bar, what is key is that prosecutor knows that there is a real risk of losing a conviction if he does not properly disclose all evidence. A higher bar too easily allows the prosecutor to say "I'm sorry for not disclosing the evidence, but it wouldn't have mattered anyway."

Clarifying Inadmissible Evidence May be Material

The Seventh Circuit has not expressly held that inadmissible evidence may be material under *Brady.* In some cases, the Seventh Circuit has suggested a *per se* rule that inadmissible evidence cannot be material, following the minority view of federal appellate courts. *See United States v. Salem,* 578 F.3d 682, 686 (7th Cir. 2009) ("[O]nly admissible evidence can be material, for only admissible evidence could possibly lead to a different verdict."); *United States v. Silva,* 71 F.3d 667, 670 (7th Cir. 1995); *Jardine v. Dittmann,* 658 F.3d 772, 776-77 (7th Cir. 2011) (*per curiam*). In other cases, the Seventh Circuit indicated that information may be material if it would simply "lead directly to" evidence admissible at trial, following the majority view of circuit courts. *See United States v. Dimas*, 3 F.3d 1015, 1018 (7th Cir. 1993).

In a more recent opinion, however, the Seventh Circuit strongly suggested, but did not hold, that the better rule is the latter, majority rule. *See United States v. Morales,* 746 F.3d 310, 314-15 (7th Cir. 2014).[1] The *Morales* opinion reasoned that the Supreme Court has consistently applied the test for materiality "broadly" and in fact considered whether the withheld information might have led to additional evidence. *Id.* at 314. The opinion described this methodology as "more consistent with the majority view in the courts of appeals than with a rule that restricts *Brady* to formally admissible evidence." *Id.* Further, the opinion said "it is hard to find a principled basis for distinguishing inadmissible impeachment evidence and other inadmissible evidence that, if disclosed would lead to the discovery of evidence reasonably likely to affect a trial's outcome." *Id.* at 315.

Beyond *Morales,* multiple federal courts of appeals that have addressed this issue also agree that inadmissible evidence may be material under *Brady.* For example

- In *Ellsworth v. Warden,* 333 F.3d 1, 4-5 (1st Cir. 2003) (*en banc*) the First Circuit remanded for further proceedings based on a withheld note that was inadmissible double hearsay but could have led to admissible evidence.

- In *United States v. Gil,* 297 F.3d 93, 104 (2d Cir. 2002) the Second Circuit remanded for a new trial based on a memo with hearsay statements of questionable admissibility that "could lead to admissible evidence."

- In *Johnson v. Folino,* 705 F.3d 117, 129-30 (3d Cir. 2013) the Third Circuit remanded based on undisclosed impeachment evidence, even if the evidence was inadmissible.

- In *Felder v. Johnson,* 180 F.3d 206, 212 (5th Cir. 1999) the Fifth Circuit reaffirmed its rule that "inadmissible evidence may be material under *Brady.*"

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[1] The author worked on this appeal on behalf of the Defendant.

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- In *United States v. Taylor,* 471 F. App'x 499, 521 (6th Cir. 2012), the Sixth Circuit stated "[t]his court, however, has held that 'information withheld by the prosecution' need only 'lead directly to[ ] evidence admissible at trial' in order to be material under *Brady.*"

- In *Paradis v. Arave,* 240 F.3d 1169, 1178-79 (9th Cir. 2001) the Ninth Circuit found that the inadmissible notes of the prosecutor, which could have been useful to help impeachment, were material.

- In *Banks v. Workman,* 692 F.3d 1133, 1142 (10th Cir. 2012), the Tenth Circuit observed: "evidence cannot qualify as material without first being admissible or at least 'reasonably likely' to lead to the discovery of admissible evidence."

- In *Spaziano v. Singletary,* 36 F.3d 1028, 1044 (11th Cir. 1994) the Eleventh Circuit also stated that: "[a] reasonable probability of a different result is possible only if the suppressed information is itself admissible evidence or would have led to admissible evidence."

Despite this majority position, the Seventh Circuit declined to extend this rule in the *Morales* case because the rule was not determinative of the outcome in that case. Nonetheless, going forward, the Seventh Circuit and its district courts can help strengthen *Brady* by applying the majority rule and clarifying definitively that inadmissible evidence may be material for the purposes of *Brady.*

Freely Allowing Evidentiary Hearings

Another modest way for courts in the Seventh Circuit to help protect the *Brady* rule is to freely grant evidentiary hearings regarding the potential effect of withheld evidence. If a defendant legitimately requests an evidentiary hearing regarding withheld evidence in the district court, it should be granted as a matter of course to ensure that the record is complete. Similarly, if the materiality of withheld evidence is in question on the appellate record, then the case can be remanded for a hearing. For example, in *Dimas,* the Seventh Circuit remanded and explained "the somewhat sparse record leaves us with serious questions about what impact the *Brady* material might have had on the jury." *United States v. Dimas,* 3 F.3d 1015, 1018 (7th Cir. 1993). Similarly, in *Salem,* the Court remanded for hearing and commented "[w]ithout an evidentiary hearing, we're left wondering what other evidence . . . is out there." *United States v. Salem,* 578 F.3d 682, 686-87 (7th Cir. 2009). To the extent the materiality or admissibility of the suppressed emails is unclear based on the factual record in a *Brady* situation, it is because the Government did not disclose the evidence. Since the defense never had the chance to develop the trial record on this evidence, courts should allow it to do so in the context of an evidentiary hearing.

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Applying the *Brady* rule in this way — that is, setting the bar appropriately for proving materiality, clarifying inadmissible evidence may be material, and freely allowing evidentiary hearings — could help the Seventh Circuit protect the rights of defendants and ensure that "sorry" is not enough for prosecutors when it comes to violations of the *Brady* rule.