No. 13-9003

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JAMES A. DENNIS,
Appellee,
v.

SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS; SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE; SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW; DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA,
Appellants.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania, No. 11-1660
Before the Honorable Anita B. Brody

BRIEF FOR FORMER JUDGES AND PROSECUTORS AS AMICI CURIAE IN SUPPORT OF REHEARING EN BANC

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INTEREST OF AMICI CURIAE[1]

Amici curiae are former prosecutors and judges who maintain an active interest in the fair and effective functioning of the criminal justice system. Amici believe just treatment of defendants is essential to protect the integrity of, and public confidence in, the justice system—particularly where the death penalty is at stake. The prosecution's responsibility under *Brady v. Maryland*, 373 U.S. 83 (1963), to disclose all material favorable evidence in its possession plays a vital role in meeting that goal by ensuring that the justice system operates not merely to produce convictions, but to afford every defendant a fair trial worthy of confidence.

Rehearing en banc is necessary in this case because the Panel decision not only restores a capital conviction that was reached in violation of those principles, but also erodes the standards of fairness to which prosecutors ought to hold themselves. The question whether to disclose the evidence at issue here—a file of investigation reports exploring the possibility that someone else may have committed the crime—should not have been a close call. It was classic *Brady* material. The Panel's decision to the contrary muddies the application of the

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[1] Amici are listed in the Appendix to this brief. Amici have moved for leave to file this brief. No party or counsel to a party authored this brief in whole or in part or contributed money intended to fund the preparation or submission of this brief. No person—other than amici or their counsel—contributed money intended to fund the preparation or submission of this brief.

Supreme Court's *Brady* precedent and misapplies the AEDPA standard in a manner that threatens to limit the availability of federal habeas relief for *Brady* violations.

ARGUMENT

I. THE FRAZIER DOCUMENTS SHOULD HAVE BEEN DISCLOSED

The documents at issue in this case recorded a report by inmate William Frazier that a person other than Mr. Dennis had admitted to the shooting, and they described the limited steps the police took to follow up on Frazier's report, despite "internal markers of credibility" in it. A14, A1691-1696.[2] Prudent prosecutorial practice would have led the Commonwealth to disclose these documents without pause. The documents revealed a promising avenue for further investigation by defense counsel. Moreover, defense counsel could have used the documents at trial to impeach the adequacy of the police investigation. When police or prosecutors encounter evidence that reveals avenues for further investigation into alternative theories of a criminal case, the proper course is to disclose the evidence.

Significant costs arise when a prosecutor, in pursuit of a conviction, inadvertently cuts corners or even intentionally seeks to get away with less than full compliance with *Brady*. Much of that cost, of course, is borne by the defendant in the particular case. But *Brady* violations impose a social cost as well

[2] Citations to the record on appeal ("A__") are to the Joint Appendix filed in this Court on February 10, 2014.

by eroding public confidence in the fairness of the criminal justice system. As the Supreme Court observed in *Brady*, "our system of the administration of justice suffers when any accused is treated unfairly." 373 U.S. at 87.

In light of these costs, the Bar has recognized that criminal trials are better informed and fairer to the accused when prosecutors carefully adhere to the *Brady* obligation. Both the Pennsylvania Rules of Professional Conduct and the American Bar Association's model rules of professional conduct emphasize the prosecutor's responsibility 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."[3] Similarly, a January 2010 Department of Justice memorandum instructs that *Brady* disclosures should be broad and comprehensive.[4] The memorandum provides detailed instructions on the steps a prosecutor should take to meet his or her responsibility to ensure a fair trial generally and to comply with *Brady* in particular, encouraging prosecutors "to provide discovery broader and more comprehensive than the discovery obligations."[5]

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[3] ABA Model R. Prof. Conduct 3.8(d) (2013); Pennsylvania Disciplinary Rules of Professional Conduct 3.8 (2014).

[4] *See* Memorandum from David W. Ogden, Deputy Attorney General, to Department Prosecutors (Jan. 4, 2010) ("DOJ Guidance Memo"), *available at* http://www.justice.gov/dag/memorandum-department-prosecutors.

[5] *Id.* at Step 3: Making the Disclosures.

As these materials indicate, careful and comprehensive *Brady* compliance is widely accepted as a best practice among prosecutors' offices.[6] The sovereign's interest is not advanced when a prosecutor secures a conviction by taking a restricted view of *Brady*'s requirements. Consistent with these policies, the Commonwealth should not have hesitated to disclose the evidence at issue here.

II. THE PANEL DECISION CONTRAVENES *BRADY* AND THREATENS SIGNIFICANT CONSEQUENCES THAT WARRANT EN BANC REVIEW

A. A Categorical Rule Exempting Inadmissible Evidence From The Disclosure Obligation Undermines The Purposes Of *Brady* By Permitting Suppression Of Favorable, Material Information

Brady and its progeny require prosecutors to take affirmative steps to evaluate the exculpatory effect of evidence. *See Kyles v. Whitley*, 514 U.S. 419, 437-438 (1995). The success of *Brady* in ensuring fair and effective trials rests on the expectation that prosecutors will actively seek to disclose exculpatory evidence to avoid the conviction of innocent individuals by resolving "doubtful questions in favor of disclosure." *United States v. Agurs*, 427 U.S. 97, 108 (1976). Allowing prosecutors to suppress evidence on the ground that it might not be admissible at a future trial conflicts with this premise and would result in suppression of important evidence that otherwise meets the Supreme Court's materiality standard.

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[6] *See generally id.*; *see also* Dep't of Justice, *Criminal Resource Manual*, § 9-5.001(F) (government policy "encourages prosecutors to err on the side of disclosure in close questions of materiality"), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm.

For example, limiting *Brady* to admissible evidence ignores that disclosure of such evidence can affect the defense strategy and in turn the trajectory of the case. *See United States v. Bagley*, 473 U.S. 667, 683 (1985) (reviewing court should consider the "adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case.").

In this regard, the investigatory value of inadmissible evidence can be immense. In the hands of competent defense counsel, an inadmissible hearsay statement contradicting a potential witness's other statements, for example, would prompt further interviews with that witness or additional investigation. *See United States v. Gil*, 297 F.3d 93, 104 (2d Cir. 2002) (inadmissible evidence was material where it would lead to further investigation); *Bowen v. Maynard*, 799 F.2d 593, 612 (10th Cir. 1986) (inadmissible evidence was material because "in the hands of the defense, it could have been used to uncover other leads and defense theories and to discredit the police investigation of the murders"). In this case, as Mr. Dennis has argued, the Frazier documents could have been used for this very purpose. *See* Appellee's Petition for Panel Rehearing and for Rehearing en Banc at 19-20 (Mar. 11, 2015) ("Petition").

Similarly, disclosure of inadmissible evidence about abandoned leads tends to help defendants show when an investigation has not been thorough. Courts have consistently recognized evidence that serves this purpose to be material for *Brady*

purposes. *See, e.g.*, *Kyles*, 514 U.S. at 446 (stating that the defendant could have "examined the police to good effect" and "so have attacked the reliability of the investigation"); *Smith v. Secretary of N.M. Dep't of Corr.*, 50 F.3d 801, 830 (10th Cir. 1995) ("[W]hile the knowledge the police were investigating [other suspects] would arguably carry significant weight with the jury in and of itself, that fact would also have been useful in discrediting the caliber of the investigation or the decision to charge the defendant, factors we may consider is assessing whether a *Brady* violation occurred." (internal quotation marks omitted)).

Even more worrisome, a rule that categorically excuses the suppression of even material evidence based on its inadmissibility at trial could be malleable and potentially difficult for law enforcement to apply. Predicting whether a particular piece of evidence might be admissible at a trial that has not begun to take shape is far from straightforward. Admissibility depends on the particular use to be made of the evidence in the context of all the other evidence presented. Such determinations cannot be made in the abstract, and asking prosecutors to do so at best imposes a difficult burden and, at worst, invites prosecutors to shirk their disclosure obligations whenever they can hypothesize a basis for exclusion.

The admissibility requirement established by the Pennsylvania Supreme Court would, therefore, create perverse incentives for prosecutors, potentially subverting the aims of *Brady*. Prosecutors who withhold material evidence that is

favorable to the accused should not be shielded by a rule that petitioners must prove the admissibility of that evidence before it becomes subject to *Brady*. The criminal justice system works best when prosecutors have every incentive to disclose favorable and material evidence to defendants before trial.

B. The Panel Decision Aggravates The *Brady* Error By Misapplying The AEDPA Standard

As the foregoing discussion shows, evidence can satisfy the materiality standard under *Brady* and its progeny even if it would not be admissible at trial. The state court's contrary holding that *Brady* extends only to evidence that is both "material *and* admissible" *Commonwealth v. Dennis*, 950 A.2d 945, 968 (Pa. 2008) (emphasis added), was contrary to and an unreasonable application of the Supreme Court's clearly established materiality standard.

The Panel's decision misconstrued the Supreme Court's precedent. Under *Wood v. Bartholomew*, 516 U.S. 1 (1995), it is clearly established that even where suppressed evidence is inadmissible, materiality is assessed no differently than in any other case—*i.e.*, by determining whether there is a reasonable probability that the result at trial would have been different had the evidence been disclosed. *Id.* at 5-6. In *Wood*, the Court applied that standard to suppressed polygraph test results that were inadmissible at trial. Although the Court found the polygraph results immaterial for *Brady* purposes, its analysis made clear that inadmissibility was but one factor in its determination. *Id.* at 5-8. The Court thus "beg[a]n" its analysis by

noting the inadmissibility of the evidence, but did not it end there, instead going on to consider the effect of suppression on the defendant's investigation and preparation for trial and alternative theories defense counsel might have been able to pursue. Most federal courts, including this Court, have thus had no trouble concluding that suppressed evidence may potentially be material for *Brady* purposes even where it is not admissible.[7]

The Panel concluded that, for AEDPA purposes, the Supreme Court's discussion in *Wood* of the other factors bearing on materiality could reasonably be dismissed as dicta and that the Court's opinion could fairly be read to treat admissibility as dispositive. *Dennis v. Secretary, Pennsylvania Department of Corrections*, 777 F.3d 642, 651 (3d Cir. 2015). But assessing materiality for *Brady* purposes "requires consideration of the totality of the circumstances." *United States v. Perdomo*, 929 F.2d 967, 971 (3d Cir. 1991). The Supreme Court's

[7] *See United States v. Morales*, 746 F.3d 310, 314 (7th Cir. 2014) (listing cases). The Panel cited the Fourth Circuit's decision in *Hoke v. Netherland*, 92 F.3d 1350, 1356 n.3 (4th Cir. 1996), but even that case considered the issue of admissibility within the context of its materiality. Further, the existence of an outlier circuit does not mean that a legal principle is not clearly established. *See Williams v. Bitner*, 455 F.3d 186, 193 n.8 (3d Cir. 2006) ("Even if our sister circuits had in fact split on the issue, we would not necessarily be prevented from finding that the right was clearly established."). The Panel also cited the Seventh Circuit's decision in *Morales*, but it ignored that the Seventh Circuit in that case expressed its inclination to join the majority of circuits on this point. 746 F.3d at 315 ("We find the Court's methodology in *Wood* to be more consistent with the majority view in the courts of appeals than with a rule that restricts *Brady* to formally admissible evidence.").

reference in *Wood* to one particular fact in the course of a materiality analysis therefore cannot be viewed in isolation, divorced from the remaining facts that collectively determined the outcome. That granular approach to identifying "clearly established" law for AEDPA purposes would collapse the distinction between the "contrary to" and "unreasonable application" prongs of AEDPA and make it significantly more difficult for an inmate to obtain federal habeas relief for a *Brady* violation. Similarly, as Mr. Dennis has explained, the Panel erred in finding it "irrelevant that the Supreme Court has never expressly limited *Brady* to admissible evidence." 777 F.3d at 651. Petition at 17; *see Williams v. Taylor*, 529 U.S. 362, 393-394 (2000). Again, this error makes it more difficult to vindicate *Brady* rights in federal habeas proceedings because the materiality standard, although "clearly established," is a general test that must be applied to the totality of facts in each case.

The en banc Court should grant rehearing to reconsider the Panel's erroneous analysis and ensure that *Brady* rights are not undermined, either by a substantive restriction confining *Brady* to admissible evidence or by a crabbed application of the AEDPA review standard. Individual prosecutors—under pressure to achieve convictions—already face frequent countervailing incentives to

limit disclosure.[8] Consequently, *Brady* violations are unfortunately "among the most pervasive and recurring types of prosecutorial violations." Gershman, *Reflections on* Brady v. Maryland, 47 S. Tex. L. Rev. 685, 688 (2006); *see also United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) ("There is an epidemic of *Brady* violations abroad in the land.") (Kozinksi, C.J., dissenting).[9] And when these violations are uncovered, they cast a shadow of impropriety over the whole criminal justice system in the eyes of the public.[10] En banc review here is warranted to ensure that this Circuit's precedent encourages prosecutors to resolve "doubtful questions in favor of disclosure," *Agurs*, 427 U.S. at 108, and that meaningful review remains available in the federal courts when a prosecutor fails in that duty.

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[8] *See, e.g.*, Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. Pa. L. Rev. 959, 984 (2008-2009).

[9] *See also, e.g.*, Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995*, at 5 (2000) (finding that prosecutorial suppression of evidence accounted for 16 to 19 percent of reversible errors); Armstrong & Possley, *The Verdict: Dishonor*, Chi. Trib., Jan. 10, 1999 (finding 381 homicide convictions reversed nationwide from 1963 to 1999 due to prosecutors' concealment of exculpatory evidence).

[10] *See, e.g.*, Cohen, *Another Chance for the Justices to Say No to Prosecutorial Misconduct*, The Atlantic, Feb. 8, 2014, *available at* http://www.theatlantic.com/national/archive/2014/02/another-chance-for-the-justices-to-say-no-to-prosecutorial-misconduct/283731/ (accusing prosecutors of "hid[ing] exculpatory evidence and def[ying] a federal judge in a death penalty case").

CONCLUSION

The Court should grant rehearing en banc.

Respectfully submitted.

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Dated: March 18, 2015

APPENDIX

AMICI CURIAE FORMER PROSECUTORS AND JUDGES

Elizabeth K. Ainslie	Assistant United States Attorney, Eastern District of Pennsylvania (1979-1985).
Hon. William G. Bassler	United States District Judge, District of New Jersey (1991-2006)
	Judge, Superior Court for the State of New Jersey (1988-1991)
Robert J. Cleary	United States Attorney, District of New Jersey (1999-2002)
	Acting United States Attorney, Southern District of Illinois (2002)
Hon. Robert J. Del Tufo	Attorney General, State of New Jersey (1990-1993)
	United States Attorney, District of New Jersey (1977-1980)
	New Jersey Director of Criminal Justice (1976-1977)
	Member, New Jersey State Commission of Investigation (1981-1984)
	Prosecutor, Morris County, New Jersey (1965-1967)
Thomas J. Farrell	Assistant United States Attorney, Western District of Pennsylvania (1995-2000)

Hon. William J. Hughes	U.S. Ambassador to Panama (1995-1998)
	U.S. House of Representatives, 2nd District of New Jersey (1975-1995)
	Chairman, House Judiciary Subcommittee on Crime (1981-1990)
	Prosecutor, Cape May County, New Jersey (1960-1970)
Michael Murphy	Prosecutor, Morris County, New Jersey (1990-1995)
	Former President, New Jersey State Prosecutors' Association
Hon. Stephen M. Orlofsky	United States District Judge, District of New Jersey (1996-2003)
	United States Magistrate Judge, District of New Jersey (1976-1980)
Carl Schnee	United States Attorney, District of Delaware (1999-2001)
Hon. Herbert Stern	United States District Judge, District of New Jersey (1974-1987)
	United States Attorney, District of New Jersey (1971-1974)
James J. West	United States Attorney, Middle District of Pennsylvania (1985-1993)

CERTIFICATE OF BAR MEMBERSHIP

I, CATHERINE M.A. CARROLL, counsel for amici curiae, hereby certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

/s/ Catherine M.A. Carroll
CATHERINE M.A. CARROLL

Dated: March 18, 2015

CERTIFICATE OF COMPLIANCE
PURSUANT TO THIRD CIRCUIT RULE 31.1(c)

Pursuant to Third Circuit Rule 31.1(c), I, CATHERINE M.A. CARROLL, counsel for amici curiae, hereby certify that the text in the electronic copy of the Brief for Former Judges and Prosecutors as Amici Curiae in Support of Appellee is identical to the text in the paper copies.

I further certify that the electronic copy of the Brief for Former Judges and Prosecutors as Amici Curiae in Support of Appellee was scanned for viruses by Trend Micro OfficeScan Client and no viruses were detected.

/s/ Catherine M.A. Carroll
CATHERINE M.A. CARROLL

Dated: March 18, 2015

CERTIFICATE OF SERVICE

I, CATHERINE M.A. CARROLL, hereby certify that on this 18th day of March 2015, I electronically filed the foregoing Brief for Former Judges and Prosecutors as Amici Curiae in Support of Appellee with the Clerk of the Court for the U.S. Court of Appeals for the Third Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

I further certify that on March 18, 2015, I caused seven paper copies to be served on the Clerk of the Court for the U.S. Court of Appeals for the Third Circuit by Federal Express. I also caused one paper copy to be served by Federal Express on the following:

THOMAS W. DOLGENOS
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