NOT GUILTY: THE UNLAWFUL PROSECUTION OF SENATOR TED STEVENS

Sponsor: Criminal Law Section
CLE Credit: 1.0
Wednesday, May 11, 2016
11:50 a.m. - 12:50 p.m.
Cascade Ballroom B
Kentucky International Convention Center
Louisville, Kentucky

A NOTE CONCERNING THE PROGRAM MATERIALS

The materials included in this Kentucky Bar Association Continuing Legal Education handbook are intended to provide current and accurate information about the subject matter covered. No representation or warranty is made concerning the application of the legal or other principles discussed by the instructors to any specific fact situation, nor is any prediction made concerning how any particular judge or jury will interpret or apply such principles. The proper interpretation or application of the principles discussed is a matter for the considered judgment of the individual legal practitioner. The faculty and staff of this Kentucky Bar Association CLE program disclaim liability therefore. Attorneys using these materials, or information otherwise conveyed during the program, in dealing with a specific legal matter have a duty to research original and current sources of authority.

Printed by: Evolution Creative Solutions
7107 Shona Drive
Cincinnati, Ohio 45237

Kentucky Bar Association

TABLE OF CONTENTS

THE PRESENTER

Robert M. Cary
Williams & Connolly, LLP
725 Twelfth Street NW
Washington, DC 20005
(202) 434-5175
rcary@wc.com

ROBERT M. CARY is a partner with Williams & Connolly, LLP in Washington, DC, where he represents clients in civil and criminal matters. He received his A.B. from Dartmouth College and his J.D. from the University of Virginia School of Law. Mr. Cary is a frequent speaker on matters of criminal law, professional liability and legal ethics. He has taught trial advocacy at Georgetown University Law Center and is currently teaching White Collar Crime at Georgetown. Mr. Cary has been appointed by the Virginia Supreme Court to teach professionalism to new members of the Virginia State Bar and serves on the board of directors of the Mid-Atlantic Innocence Project and the Lawyers Committee of the Innocence Project at Cardozo University. He is a member of the Virginia, District of Columbia, New York, and Maryland Bar Associations and is admitted to practice before the United States District Courts for the Northern and Southern Districts of New York, District of Columbia, and Eastern District of Virginia; the United States Courts of Appeals for the District of Columbia, Fourth and Tenth Circuits, and the United States Supreme Court.

BRADY INFORMATION

Rob Cary, Craig Singer and Simon Latcovitch

Excerpted from Federal Criminal Discovery

Since the Supreme Court's 1963 decision in Brady v. Maryland,[1] it has been fundamental to our system of criminal justice that the government must disclose information to the accused that is favorable and material either to guilt or punishment. Properly applied, the Brady rule means that a defendant will not be convicted unfairly on the basis of an incomplete picture of the evidence, one that omits exculpatory information that the government had but the defense did not.

This aspiration is clear enough, and unassailable in principle. As with many constitutional rules, applying Brady to particular cases often proves more controversial, and indeed, the rule has been the subject of several significant divided opinions in the Supreme Court. It is settled that a Brady violation occurs if the following three elements are satisfied: The information must be favorable to the defendant. It must have been in the government's possession and withheld from the defense. And, it must be "material" to guilt or sentencing, that is, sufficiently important that its suppression undermines confidence in the outcome. Whether the prosecutor withheld the information intentionally or not does not matter, though it may affect whether the court decides to impose a punitive sanction. Either way, if these three elements are satisfied, there is a due process violation and the defendant should receive a new trial.

Brady is a constitutional requirement of due process, and no statute or rule defines its contours. Accordingly, while Brady's basic contours are well accepted and understood, its details are a creature of decisional law. In addition, the Brady elements are highly fact-dependent and usually demand a detailed analysis of how the withheld information fits into the evidence at trial. For these reasons, the best way to understand the Brady rule, we think, is to review its history through the Supreme Court cases that discuss and apply the rule.

This chapter begins by analyzing the Brady decision itself and the Supreme Court's decisions interpreting the Brady rule. We then discuss the three elements of a Brady violation. We also discuss other limitations that may apply to claims of Brady violations. Finally, we address practical and procedural issues that often arise for judges and lawyers facing Brady issues, especially at the trial court level.

A. The Supreme Court Cases

We begin by tracing the development of the Brady rule through its history in the Supreme Court. Each of the most significant cases is discussed in detail. We touch briefly on the less significant cases as well.

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

1. Brady v. Maryland (1963): Evidence Favorable to the Defense and Material to Either Guilt or Punishment Must Be Disclosed

The State of Maryland charged John Brady and Donald Boblit with murder while committing a robbery. The state sought the death penalty. Under the law of felony murder in Maryland, if Brady participated in the robbery that led to the murder, he was criminally liable for the murder even if he did not do the actual killing. The trial court tried Brady and Boblit separately. Brady testified at his trial and admitted that he participated in the crime, but claimed that Boblit actually killed the victim. In closing argument, Brady's counsel conceded that Brady was guilty of felony murder; but argued that Brady should be spared the death penalty because he did not actually kill the victim. The jury disagreed and rendered a verdict for Brady to be punished by death.

Before trial, Brady's counsel had asked the state to disclose all statements made by Boblit. The government disclosed several of Boblit's statements but failed to disclose his admission that Boblit himself had killed the victim. Brady did not learn about the undisclosed admission until after his original appeal had failed. He filed a petition for post-conviction relief in Maryland state court system to the U.S. Supreme Court.

The Supreme Court did not disturb the guilty verdict. Brady, after all, had confessed to participating in the underlying robbery and was therefore guilty of felony murder under Maryland law. But the Supreme Court remanded the case for reconsideration of Brady's sentence in light of Boblit's previously undisclosed admission that Boblit had actually killed the victim.[2] In doing so, the Court announced a new rule of due process: "We now hold that the 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, irrespective of the good faith or bad faith of the prosecution."[3] The Court explained:

> Society wins not only when the guilty are convicted, but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts." A prosecution that withholds evidence on demand of an accused which, if made available would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice. . . .[4]

On remand, the State of Maryland commuted Brady's sentence to life, and he was eventually released on parole.[5]

---

[2] The factual recitation in the Supreme Court's Brady opinion is rather spare. For a comprehensive treatment of the facts of the Brady case, *see* Richard Hammer, Between Life and Death (1969).

[3] 373 U.S. at 87.

[4] 373 U.S. at 87-88 (citation and footnote omitted).

[5] Criminal Procedure Stories (Carol S. Steiker ed. 2006).

* * * * * *

The Supreme Court has addressed and expanded upon the fundamental principle of Brady – that due process requires disclosure of exculpatory evidence material to guilt or punishment – in eleven subsequent cases, arising from both federal and state trials. Because it stems from the Due Process Clauses of the Fifth and Fourteenth Amendments, the Brady rule is the same in both federal and state cases.[6] Not all of the Supreme Court cases require lengthy discussion. Below we devote significant attention to the four post-Brady decisions that added substantially to an understanding of the rule, and we touch briefly on the others.

2. Giglio v. United States (1972): Evidence Affecting Credibility Falls within the Brady Rule

The Supreme Court made clear in Giglio v. United States[7] that "evidence favorable to an accused" includes evidence that would impact the credibility of government witnesses. John Giglio was convicted of passing forged money orders. The "key witness" was Giglio's alleged co-conspirator, Robert Taliento, who testified that he had received no promises in exchange for his testimony and that he, like Giglio, could be prosecuted for passing forged money orders. In fact, one of the prosecutors[8] had promised Taliento that he would not be prosecuted. This was not disclosed to defense counsel until after trial. The Giglio Court held that the government should have told the defense about this promise. "When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within th[e] general rule [of Brady]."[9]

It was significant to the Giglio Court that Taliento testified falsely. In addition to Brady, the Court relied on Napue v. Illinois[10] for the proposition that a prosecutor's failure to correct false testimony can violate due process. Napue required a new trial if "'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.'"[11] The Supreme Court had little difficulty concluding that a promise not to prosecute the key witness could have affected the judgment of the jury. But as we shall see, importing the "reasonable likelihood" language from Napue into the Brady line of cases has been a source of confusion over the years.

---

[6] U.S. v. Agurs, 427 U.S. 97, 107 (1976).

[7] 405 U.S. 150 (1972).

[8] The original prosecutor who made the promise was not in fact the prosecutor who tried the case. There was a dispute over whether the original prosecutor advised the trial prosecutor of the promise. There was no dispute that the original prosecutor had in fact promised Taliento that he would not be prosecuted.

[9] 405 U.S. at 154.

[10] 360 U.S. 264 (1959).

[11] 405 U.S. at 154 (alteration in original) (*quoting* Napue, 360 U.S. at 271).

3. United States v. Agurs (1976): The Government's Failure to Disclose Immaterial Information Will Not Lead to Reversal

In Moore v. Illinois,[12] and more significantly, United States v. Agurs,[13] the Court grappled with the materiality component of the Brady rule. In Moore, the defendant claimed that the government should have disclosed that the police originally suspected that somebody else, named "Slick," was the perpetrator and that a witness to whom the defendant allegedly confessed his guilt originally identified Slick as the person who confessed. The Court also considered whether the government should have disclosed a diagram of the crime scene drawn by an eyewitness. In a 5-4 decision, the majority found that "the background presence of the elusive 'Slick,' while somewhat confusing, is at most an insignificant factor."[14] There were two eyewitnesses to the murder who positively identified the defendant, and other witnesses testified that the defendant confessed to them. The Court also found that the diagram did not in fact contradict the government's trial evidence. The four dissenters argued that the undisclosed information might have helped the defense and therefore was material.

In Agurs, the Supreme Court made explicit that the government's failure to produce evidence that would not have had any effect on the result of the underlying trial does not violate Brady. The defendant was charged with murdering her victim by stabbing him in a motel room. Her theory at trial was self-defense. It was undisputed that the victim was carrying two knives, which supported the self-defense theory. But the defendant herself had no injuries, while the victim had several stab wounds in the chest and defensive wounds to his hands.

The defense learned after trial that the victim had a criminal record, including an assault conviction and a weapons conviction. The defense had not asked for the victim's criminal record at trial. The trial judge found that disclosure of the victim's criminal record would not have made any difference and declined to disturb the jury's verdict. The U.S. Court of Appeals for the D.C. Circuit disagreed, holding that the victim's criminal record was material because if the jury had known of the victim's criminal record, the jury "might" have acquitted.

The Supreme Court reversed and reinstated the verdict, holding that the trial judge properly concluded that the undisclosed information was not material. In particular, the Supreme Court found the fact that the defendant herself had no injuries to be inconsistent with her claim of self-defense. The Court also found that the new information did not contradict anything offered by the prosecutor and did not add significantly to the defense evidence, because it was undisputed that the victim had two knives. The Agurs court had this to say about materiality:

[12] 408 U.S. 786 (1972). Moore was a capital case in which the death penalty was imposed. The imposition of the death penalty in Moore was reversed based on the holding of Furman v. Georgia, 408 U.S. 238 (1972), decided the same day as Moore.

[13] 427 U.S. 97 (1976).

[14] Moore, 408 U.S. at 798.

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.[15]

The Court recognized that the materiality of evidence cannot always be anticipated prior to trial. While it declined to impose a different constitutional standard for pretrial disclosure,[16] the Court admonished prosecutors to disclose potentially significant information.

> [T]here is a significant practical difference between the pre-trial decision of [a] prosecutor and the post-trial decision of the judge. Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure.[17]

Aside from what it had to say about materiality, the Agurs decision is instructive in other ways as well. Recall that the holding of Brady appeared to require that the defense *request* exculpatory information before the failure to produce it could be considered a due process violation.[18] Although the Agurs Court found it significant that the defendant did not ask for the victim's criminal record, it also suggested that a Brady violation could be found even in cases where the defense did not ask for information: "[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."[19] This language laid the groundwork for the Court's later clarification that the government's duty to produce Brady information exists regardless of whether the defense asks for it.

---

[15] 427 U.S. at 112-13 (footnotes omitted).

[16] 427 U.S. at 108 ("Logically the same standard [of materiality] must apply [before trial and after trial]. For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose.")

[17] 427 U.S. at 108.

[18] Brady, 373 U.S at 87 ("We now hold that the 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, irrespective of the good faith or bad faith of the prosecution." (emphasis added)).

[19] 427 U.S. at 110.

Agurs also made clear, however, that requests can matter and that a prosecutor should not ignore them. "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable."[20]

Finally, Agurs holds that a Brady violation does not turn on the good faith or bad faith of the prosecutor. "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."[21]

4. United States v. Bagley (1985): Material Undisclosed Evidence Is Evidence that Undermines Confidence in the Outcome of the Trial

The Supreme Court again explored the materiality requirement in United States v. Bagley.[22] That case produced a majority opinion holding that a new trial was required, but a fragmented set of opinions regarding materiality. Five of the eight justices who participated agreed on the appropriate standard for materiality: A new trial is required "if there is a reasonable probability that . . . the result of the proceeding would have been different" had the exculpatory information been disclosed for use at trial.[23] Justice White, joined by Chief Justice Burger, and then-Justice Rehnquist, stated in a concurring opinion that the "reasonable probability" standard was flexible and saw no need to elaborate further.[24] Justice Blackmun, joined by Justice O'Connor, found it appropriate to explain that a "reasonable probability" means "a probability sufficient to undermine confidence in the outcome."[25] Justices Marshall, Brennan, and Stevens dissented, arguing for a more favorable standard for the defendant.[26]

Hughes Bagley was convicted of narcotics offenses in a bench trial. In response to a discovery motion, the government submitted affidavits from its two principal witnesses stating that they had not been rewarded for their testimony. Information obtained after trial through the Freedom of Information Act disclosed that the government had, in fact, entered into written agreements to give the witnesses cash rewards. The trial judge, who had also sat as the finder of fact in the bench trial, "found beyond a reasonable doubt . . . that had the existence of the agreements been disclosed to [the court] during trial, the disclosure would have had no effect" on the judge's finding of guilt.[27]

---

[20] *Id.* at 106.

[21] *Id.* at 110.

[22] 473 U.S. 667 (1985).

[23] *Id.* at 683 (opinion of Blackmun, J., joined by O'Connor, J.), 685 (White, J., concurring in part and concurring in the judgment, joined by Rehnquist, J.) (quotation marks omitted).

[24] *Id.*

[25] 473 U.S. at 682 (emphasis added) (quotation marks omitted).

[26] *See id.* at 685-709 (Marshall, J., dissenting, joined by Brennan, J.), 709-15 (Stevens, J., dissenting).

[27] 473 U.S. at 673.

The U.S. Court of Appeals for the Ninth Circuit reversed on the theory that the defendant's Sixth Amendment right of effective cross-examination had been denied. The Court of Appeals treated impeachment evidence as constitutionally different from other exculpatory evidence. It reasoned that failure to disclose impeachment evidence is "even more egregious" than failure to disclose other exculpatory evidence "because it threatens the defendant's right to confront adverse witnesses."[28]

The Supreme Court rejected the Ninth Circuit's distinction between "impeachment evidence" and "exculpatory evidence,"[29] but it nonetheless found a "significant likelihood that the prosecution's response to respondent's discovery motion misleadingly induced defense counsel to believe that [the witnesses] could not be impeached on the basis of bias or interest arising from inducements offered by the [prosecutor]."[30] The Supreme Court therefore remanded the case to the Court of Appeals "for a determination whether there [was] a reasonable probability that, had the inducement offered by the Government to [the government's principal witnesses] been disclosed to the defense, the result of the trial would have been different."[31] Applying the Supreme Court's test on remand, the Ninth Circuit vacated Bagley's conviction.[32]

Justice Blackmun, joined by Justice O'Connor, engaged in a lengthy discussion of Brady's materiality standard, a discussion that was essentially adopted eleven years later in the Supreme Court's next Brady case, to which we now turn.

5. Kyles v. Whitley (1995): The Court Refines the Materiality Standard and Applies It in a Fact-Intensive Analysis

Kyles v. Whitley[33] stands as perhaps the Supreme Court's most important statement about the Brady rule since Brady itself. Kyles was a murder case in which the government failed to disclose that its witnesses had given inconsistent statements. Some of the evidence favorable to the defense apparently was not disclosed to the prosecutor himself until after trial.

As an initial matter, Justice Souter's opinion for the Court cited Bagley for the proposition that it does not matter whether the defense has asked for the information. "[R]egardless of request," the court held, favorable evidence is material and constitutional error results from its suppression "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result . . . would have been different."[34] Although we do not

[28] 719 F.2d 1462 (9th Cir. 1983) *rev'd*, 473 U.S. 667 (1985).

[29] 473 U.S. at 676.

[30] *Id.* at 683.

[31] *Id.* at 684.

[32] Bagley v. Lumpkin, 798 F.2d 1297 (9th Cir. 1986).

[33] 514 U.S. 419 (1995).

[34] *Id*. at 433-34 (quotation marks omitted).

read this in Bagley, after Kyles there is little doubt that a request from the defense is not necessary to trigger a violation of the Brady rule.[35]

The Kyles Court emphasized four aspects of the materiality inquiry. First:

> a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant) . . . Bagley's touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. *The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worth of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."*[36]

This is the heart of it and bears repeating: A Brady violation occurs when the failure to disclose evidence "undermines confidence in the outcome of the trial."

Second, a sufficiency of the evidence test is not the proper test under Brady. That is, "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict."[37]

Third, once a Brady violation has been found, there is "no need for further harmless-error review."[38] A Brady error "cannot subsequently be found harmless."[39] In short, the materiality test takes the place of any harmless error analysis that might otherwise apply.[40]

Fourth, undisclosed evidence is to be "considered collectively, not item by item."[41] In other words, a piece of information cannot be viewed in isolation and, even if that

---

[35] Nonetheless, as a matter of good practice, and to maximize the likelihood of receiving exculpatory information, we believe that defense lawyers should request that the government produce all Brady information, including specific categories of information that counsel believes may exist.

[36] 514 U.S. at 434 (emphasis added) (citations omitted).

[37] *Id.* at 434-35.

[38] *Id.* at 436.

[39] *Id.*

[40] *Id.* at 435.

[41] *Id.* at 436.

information might by itself be immaterial, it can require a new trial if, in combination with other undisclosed items, its suppression undermines confidence in the outcome of the trial. This has significant implications for the duties of prosecutors.

> [T]he prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.[42]

Echoing the Court's prior admonition in Agurs, the Kyles Court continued, "[t]his means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. This is as it should be."[43] Thus, the prosecution's disclosure of evidence favorable to the defense "will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberation, as the chosen forum for ascertaining the truth about criminal accusations."[44]

The Supreme Court then dived into the facts of the case to determine whether the late-disclosed evidence undermined confidence in the outcome of the trial. The theory of the defense was that Kyles had been framed by an informer named "Beanie." Beanie had told inconsistent stories about the murder to the police and the prosecutor, but the state did not disclose these inconsistent stories to the defense. Nor did the state disclose that two other government witnesses had also given inconsistent accounts of what had happened. The first trial ended in a hung jury. Beanie told the state yet another inconsistent story between the first and second trials. The state again did not disclose Beanie's inconsistencies to the defense. The second trial ended in conviction. The Supreme Court held that its confidence in the outcome of the trial was undermined by the failure to disclose the inconsistent statements and remanded the case for a new trial.

Justice Scalia authored a stinging dissent, calling the defense theory "stupid" and criticizing the majority for deciding the merits of the case.[45] Justice Stevens responded, in a concurring opinion, that "busy judges" are occasionally required to engage in a "detailed review of the particular facts of a case."[46]

After remand from the Supreme Court, Kyles was tried three more times. In each of the three retrials, the defense was able to use the witnesses' inconsistent statements, and the jury was unable to reach a verdict. The state ultimately agreed to release Kyles from custody and did not try him again.[47]

---

[42] *Id.* at 437.

[43] *Id.* at 439 (citation omitted).

[44] *Id.* at 440.

[45] *Id.* at 461 (Scalia, J., dissenting).

[46] *Id.* at 455 (Stevens, J., concurring).

[47] Like the Brady case, a book has been written on the Kyles case. *See* Jed Horne, Desire Street (2005).

6. Brady in the Supreme Court Since Kyles

In the sixteen years since Kyles, the Supreme Court has decided six more Brady cases. These have not changed or added much to the core principles, but they help in understanding how the court approaches Brady claims. Several of these cases turned on the materiality component of the rule.

In Wood v. Bartholomew,[48] the Supreme Court held that a witness's failed polygraph result did not have to be disclosed under Brady. First, all agreed that the polygraph result itself was not admissible under the law of the state of Washington, where the underlying trial took place. Second, the result of the polygraph did not undermine the Court's confidence in the outcome of the case. The Supreme Court found that the proof against the defendant was "overwhelming" and that the defendant's defense was implausible.[49]

In Strickler v. Greene,[50] the Supreme Court again delved deeply into the facts in reviewing a capital murder case in which the State failed to produce inconsistent statements of one of its witnesses. In Strickler, however, there was "considerable forensic and other physical evidence linking petitioner to the crime,"[51] a murder committed by beating the head of the victim with a 67-pound rock. The Court found that "[t]he record provides strong support for the conclusion that petitioner would have been convicted of capital murder and sentenced to death, even if [the witness at issue] had been severely impeached."[52] The Supreme Court upheld the conviction and the Commonwealth of Virginia executed Thomas Strickler about a month later.

Justice Souter concurred in part and dissented in part. Justice Souter had no doubt that the defendant was guilty of murder, but his confidence in the death sentence was undermined by the undisclosed evidence. In an interesting passage, Justice Souter described the confusion that had enveloped the materiality standard ever since the Giglio Court in 1972 quoted the "reasonable likelihood" standard from Napue v. Illinois,[53] which by the time of Bagley,[54] was described as the "reasonable probability" standard.

> The Court speaks in terms of the familiar, and perhaps familiarly deceptive, formulation: whether there is a "reasonable probability" of a different outcome if the evidence withheld had been disclosed. The Court rightly cautions that the standard intended by these words does not require defendants to show that a different outcome would have been

[48] 516 U.S. 1 (1995).

[49] *Id.* at 8.

[50] 527 U.S. 263 (1999).

[51] *Id.* at 298.

[52] *Id.* at 294.

[53] 360 U.S. 264, 271 (1959).

[54] 473 U.S. 667 (1985).

> more likely than not with the suppressed evidence, let alone that without the materials withheld the evidence would have been insufficient to support the result reached. Instead, the Court restates the question (as I have done elsewhere) as whether '"the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence"' in the outcome. Despite our repeated explanation of the shorthand formulation in these words, the continued use of the term "probability" raises an unjustifiable risk of misleading courts into treating it as akin to the more demanding standard, "more likely than not."[55]

Justice Souter suggested that the Court should in the future use the term "significant possibility," which he thought "would do better at capturing the degree to which the undisclosed evidence would place the actual result in question, sufficient to warrant overturning a conviction or sentence."[56]

Four years later,[57] the Court decided Banks v. Dretke,[58] a capital murder case arising on *habeas corpus* review from Texas. Prosecutors advised defense counsel at trial that there would be no need to litigate discovery issues because the state would provide the defense with all the discovery to which it was entitled. Nevertheless, state prosecutors withheld evidence that would have allowed the defendant to discredit the prosecutor's two key witnesses. The state did not disclose that one of those witnesses was a paid police informant. And, the state did not disclose that another witness had been extensively coached by police and prosecutors. The defense did not learn of the withheld evidence until federal *habeas corpus* review. After an intensive review of the facts, the Supreme Court found that the undisclosed information was material and remanded the case. The Banks Court reiterated that the materiality standard is met when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[59]

Finally, in Cone v. Bell,[60] the Court again found that a death sentence was tainted in Brady violations. Gary Cone killed two people after robbing a jewelry store. His defense

---

[55] Strickler, 527 U.S. at 297-98 (citations omitted).

[56] *Id.* at 298 (quotation marks omitted).

[57] In the meantime, the Court had held, in U.S. v. Ruiz, 536 U.S. 622 (2002), that a defendant could waive the "right to receive from prosecutors exculpatory impeachment material – a right that the Constitution provides as part of its basic 'fair trial guarantee.'" *Id.* at 628. Accordingly, the prosecution had no obligation to provide such evidence to the defendant before he decided to accept the plea. The Court reached the same conclusion with respect to information regarding affirmative defenses. By limiting its holding to these forms of exculpatory evidence, the Court arguably revived, by negative implication, a distinction between so-called exculpatory evidence and so-called exculpatory impeachment evidence that had been rejected by the Supreme Court in Bagley. *See* 473 U.S. at 674-75 (rejecting the proposition that a different standard applies under Brady when the undisclosed evidence could be used to cross-examine a witness). Ruiz is discussed in more detail below, in section E.5 of this chapter.

[58] 540 U.S. 668 (2004).

[59] 540 U.S. at 698 (quotation marks omitted).

[60] 129 S.Ct. 1769 (2009).

in Tennessee state court was insanity. He claimed that he was addicted to drugs, which caused amphetamine psychosis. The state argued that Cone was not addicted to drugs. The jury returned verdicts for guilt and punishment by death. Ten years later, Cone learned that the state had withheld police documents and witness statements suggesting that he was in fact addicted to drugs. As in prior Brady cases, the Supreme Court reviewed the facts in detail, and it concluded that the withheld evidence did not undermine confidence in the jury's finding of guilt. But, the Court separately considered whether the evidence may have been material to sentencing. "Evidence that is material to guilt will often be material for sentencing purposes as well; the converse is not always true, however, as Brady itself demonstrates."[61] "'There is a critical difference between the high standard Cone was required to satisfy to establish insanity as a defense on the issue of guilt or innocence as a matter of Tennessee law and the far lesser standard that a defendant must satisfy to qualify evidence as mitigating in a penalty hearing in a capital case."[62] The Supreme Court remanded the case to the federal trial court for a full assessment of the effect that the withheld evidence might have had on sentencing.[63]

Though precision is elusive in describing materiality, the essence of the test is that the suppressed information must "undermine confidence in the outcome of the trial." Brady is ultimately about fairness, and the "undermines confidence" test asks whether the result was fair.

7. Youngblood v. West Virginia (2006): Summarizing Brady Law

One last Supreme Court decision merits brief discussion. In Youngblood v. West Virginia, the West Virginia Supreme Court failed to address the defendant's claim that he was entitled to a new trial because the state suppressed an exculpatory note written by an alleged victim. Without ruling on the merits, the Supreme Court remanded the case for the West Virginia Supreme Court to address the Brady issue and, in the process, summarized nicely the law of Brady:

> A Brady violation occurs when the government fails to disclose evidence materially favorable to the accused. This Court has held that the Brady duty extends to impeachment evidence as well as exculpatory evidence, and Brady suppression occurs when the government fails to turn over even evidence that is "known only to police investigators and to the prosecutor." "Such evidence is material 'if there is a reasonable possibility that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,'" although a "showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." The reversal of a conviction is required upon a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[64]

---

[61] *Id.* at 1784.

[62] *Id.* at 1785.

[63] *Id.* at 1786.

[64] Youngblood v. West Virginia, 547 U.S. 867, 869-70 (2006) (*per curiam*) (citations omitted).

B. The Three Elements of a Brady Violation

The Supreme Court cases make clear that there are three elements of a Brady violation:

1. The information must be favorable to the accused.

2. That information must have been suppressed by the government, either willfully or inadvertently.

3. Prejudice must have ensued – in other words, the suppression of information must undermine confidence in the outcome.[65]

We review each of these elements in turn.

1. Favorable to the Accused

The first element, that the information be favorable or exculpatory to the defendant, is not a difficult hurdle to overcome. The court need only find that the information would have aided the defendant's case in some way. It does not matter how or (for purposes of this first element) how much.

a. "Exculpatory" information versus "impeachment" information.

The Supreme Court cases generally teach that there is no meaningful distinction between so-called impeachment evidence and so-called exculpatory evidence. Evidence that may impeach a government witness is merely one kind of exculpatory evidence. Indeed, experienced judges and lawyers understand that in many cases, impeachment evidence can be the most important evidence for the defendant. More than that: Sometimes impeaching the government's witnesses *is* the defense. "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."[66]

The Supreme Court in Bagley rejected the Ninth Circuit's distinction between exculpatory information and favorable impeachment information.[67] But in United States v. Ruiz, the Supreme Court held that the defendant is not entitled to receive favorable impeachment evidence before entering a guilty plea. The Court reached the same conclusion with respect to evidence relating to affirmative defenses but did not address other kinds of exculpatory evidence, which may implicitly support the notion that there is a difference between impeachment and other "exculpatory" evidence for this purpose.[68] A number of local rules[69] and Department of Justice policies[70] also distinguish between exculpatory

[65] Banks, 540 U.S. at 691 (*citing* Strickler, 527 U.S. at 281-82).

[66] Napue, 360 U.S. at 269.

[67] *See supra* text accompanying note 29.

[68] *See supra* note 57; *infra* section E.5.

[69] *See infra* chapter 11.

evidence and impeachment evidence, particularly in connection with setting deadlines for producing Brady information.

We have difficulty understanding the difference. As the Supreme Court stated in Giglio, "[W]hen the reliability of a given witness may well be determinative of guilt or innocence, non-disclosure of evidence affecting credibility falls within th[e] general rule [of Brady]."[71] Impeachment evidence is a form of exculpatory evidence, and our system of justice would be better served by treating them the same way.

b. "Brady material" versus "Brady information."

Lawyers and judges often refer to the suppression of "Brady material." This can be misleading, because it suggests that the government's duty under Brady extends merely to documents and tangible objects. Certainly such items meeting the elements of the Brady rule must be produced to the defense, but Brady is not limited to tangible things. Rather, the government's Brady obligation extends to all information, whether or not it has been reduced to writing. This includes, for example, oral statements of witnesses that government agents know but have not written down. Thus, the government cannot avoid its Brady obligations by choosing not to memorialize favorable information in writing.[72] Judges, lawyers, and law enforcement alike should use the term "Brady information" instead of "Brady material."

c. Inadmissible evidence may be producible under Brady.

Favorable information is not limited to admissible evidence. Rather, information can be favorable if it could reasonably lead to admissible evidence. As in any Brady case, the question then becomes whether the government's failure to produce the favorable information prejudiced the defendant. As the Seventh Circuit held in Williamson v. Moore, "For prejudice to exist we must find that the evidence – although itself inadmissible – would have led the defense to some admissible evidence."[73]

By contrast, information that would not reasonably lead to admissible evidence need not be produced under Brady. For example, in Wood v. Bartholomew,[74] the Supreme Court held in a *per curiam* opinion that under the facts of that case the defendant was not entitled to a new trial on account of the state of Washington's failure to produce negative polygraph results for a witness. The Court's ruling was based in part on the inadmissibility of polygraph results under Washington law, but Wood is best understood

---

[70] *See infra* chapter 8.

[71] 405 U.S. at 154.

[72] For an example of a case where important information was not memorialized in writing, *see* U.S. v. Rodriguez, 496 F.3d 221 (2d Cir. 2007) (the fact that the government did not make a written record of witness's inconsistent statements does not exempt the government from turning over the information).

[73] 221 F.3d 1177, 1183 (11th Cir. 2000).

[74] 516 U.S. 1, 5-6 (1995).

as a prejudice case – that is, the undisclosed information did not meet the third element of the Brady test because it did not undermine confidence in the outcome of the trial.

At least two circuit court cases after Wood have held that withheld information need not itself be admissible for a Brady violation to have occurred. In Ellsworth v. Warden, New Hampshire State Prison,[75] the defendant had been convicted of sexual assault of a minor. After trial, it was determined that the prosecution had failed to disclose an intake note prepared by the director of the accuser's school that the accuser had raised a similar allegation in the past that turned out to be false. The First Circuit acknowledged that this note was double hearsay, but stated that it is "plain that evidence itself inadmissible could nevertheless be so promising a lead to strong exculpatory evidence that there could be no justification for withholding it." According to the First Circuit, Wood v. Bartholomew "explicitly assumed this is so." The First Circuit remanded for inquiry into whether "there exists admissible evidence that [the accuser] made demonstrably false accusations at [his old school] under similar circumstances." If so, a new trial would be required.

In United States v. Gil,[76] the government turned over two boxes of documents just two business days prior to trial. The defendant was convicted, but then it was discovered following trial that an exculpatory memorandum was among the documents in the boxes. The Second Circuit held that the memo was exculpatory and impeaching under Brady. Though the memo clearly contained hearsay, and its admissibility remained to be decided on remand, the court was satisfied that the memo could either be admissible in whole or in part, "lead to admissible evidence," or "be an effective tool in disciplining witnesses during cross-examination by refreshment of recollection or otherwise."[77]

* * * * *

In the end, there is really no limit to the types of information that might be considered favorable to the accused. The examples discussed below, in the "materiality" section of this chapter, demonstrate the varied forms that such evidence can take. Any information a conscientious defense lawyer might use to challenge the government's case, including the sentence that may be imposed, qualifies as exculpatory.

2. Suppression by the Government

The "suppression" element, too, is broad. If the government had the favorable evidence and did not provide it, it has been "suppressed." It does not matter why the information was not disclosed.

Most of the controversies regarding this element arise when the information was in the possession of someone in the government other than the prosecutor in the case. Of course, when the prosecutor himself possesses favorable information and does not produce it, the suppression element is satisfied. But information may also be suppressed

[75] 333 F.3d 1 (1st Cir. 2003).

[76] 297 F.3d 93 (2d Cir. 2002).

[77] *Id.* at 104.

by the government if it was in the possession of someone else. For example, in Giglio, the trial prosecutor claimed that he did not know that an earlier prosecutor who did not try the case had granted informal immunity to the chief government witness. The Court held that the trial prosecutor was charged constructively with this knowledge.[78] And in Kyles, the Court held that prosecutors have a "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[79] Courts also have held that prosecutors must search for witnesses' conviction records in the possession of the FBI and the National Crime Information Center.[80] Judge Friedman of the District Court for the District of Columbia has held that the duty to search covers all federal agencies, though a "rule of reason" governs" where the prosecutor must search.[81] The duty to search also extends to state agencies working with federal prosecutors. For example, in a recent case in the Central District of California, a Los Angeles Police detective working with federal prosecutors made promises to witnesses that the court held (and federal authorities agreed) should have been disclosed to the defense by federal prosecutors.[82]

For purposes of determining whether the second element of a Brady violation has been met, the good faith or the bad faith of the prosecutor does not matter.[83] If the evidence is in the government's possession (as just described), the prosecutor has a duty to identify it and disclose it.

3. Prejudice to the Defendant: Has Confidence in the Outcome of the Trial Been Undermined?

The third element, prejudice to the defendant, is the one most likely to engender controversy. Several important concepts flow from the Supreme Court cases. After Kyles, it is clear that a defendant need not have requested the information to argue that its suppression caused prejudice.[84] It is also settled that the materiality test does not equate to a "sufficiency of [the] evidence" or a "harmless error" test. A Brady error can never be harmless.[85] The Court should not ask merely whether, after setting aside the suppressed evidence favorable to the accused, there was sufficient evidence to

[78] 405 U.S. 150.

[79] Kyles, 514 U.S. at 437.

[80] *See, e.g.,* U.S. v. Auten, 632 F.2d 478 (5th Cir. 1980); U.S. v. Perdomo, 929 F.2d. 967 (3d Cir. 1991).

[81] U.S. v. Safavian, 233 F.R.D. 205, 207 n.1 (D.D.C. 2006).

[82] Case No. 2:06-cr-00656-SVW, Doc. 997 at 18-46 (9/18/09); U.S. v. Brooks, 966 F.2d 1500, 1503 (D.C. Cir. 1992) (U.S. Attorney's Office must confer with Metropolitan Police department).

[83] Agurs, 427 U.S. at 110 ("If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."). The good faith or bad faith of the prosecutor may have a bearing on whether a remedy above and beyond a new trial is appropriate. *See infra* chapter 10.

[84] 514 U.S. at 433-34.

[85] *Id.* at 435.

convict.[86] Nor should a court ask whether the result "more likely than not" would have been different if the Brady information had been provided.

Rather the question is this: Has "confidence in the outcome" of the trial been undermined?[87] This inquiry should be based on the record as a whole, not piecemeal on each item of information suppressed.[88] The standard is fact-intensive and may require the court to do a great deal of work. In a number of cases, as discussed above, the Supreme Court itself undertook a detailed analysis of the factual record.[89]

As is often the case with fact-intensive questions, the results of Brady cases in the federal courts are difficult to summarize. Each case has its own facts, and reasonable judges may differ even in deciding a theoretically objective question. We can, however, provide some examples of cases that were decided for and against the defendant.

a. Evidence found to be material.

The Supreme Court has found the following information favorable to the accused and material on the facts presented:

- Benefits provided to a witness by the government, especially agreements not to prosecute.[90]
- Inconsistent statements of a witness.[91]
- Evidence that a witness has been coached.[92]
- Evidence that mitigates punishment.[93]

The federal circuits and trial courts have also found, again following a fact-specific analysis, that suppression of the following types of information warranted relief under Brady:

---

[86] *Id.* at 434-35.

[87] Bagley, 473 U.S. 667; Kyles, 514 U.S. 419; Banks, 540 U.S. 668.

[88] Kyles, 514 U.S. at 436.

[89] *See supra* section A.

[90] Giglio, 405 U.S. 150 (agreement not to prosecute witness); Bagley, 473 U.S. 667 (cash reward to witnesses); *see also* Douglas v. Workman, 560 F.3d 1156 (10th Cir. 2009) (*per curiam*) (government assistance in reducing witness's sentence).

[91] Kyles, 514 U.S. 419; Banks, 540 U.S. 668.

[92] Banks, 540 U.S. 668.

[93] Brady, 373 U.S. 83; Cone, 129 S.Ct. 1769.

- Evidence of a witness's negative feelings toward another witness.[94]
- The criminal history of a witness.[95]
- A therapist's report discussing whether a victim was capable of understanding and consenting to sexual advances, where the capacity to consent was an issue in the case.[96]
- Evidence that a key witness was a drug user, lied to police, and could not be trusted to follow departmental rules.[97]
- A policeman's observations that, if disclosed, would have contradicted the testimony of other witnesses.[98]
- An FBI agent's notes and FBI surveillance tapes that could have been used to impeach government witnesses.[99]
- Evidence of a witness's prior perjury in a related proceeding.[100]
- Evidence of a witness's false statements to the FBI.[101]
- Evidence of other plausible suspects for the crime in question.[102]
- Evidence of attempts by one witness to influence the testimony of another witness.[103]
- An affidavit in support of a search warrant describing the primary witness's suspicious banking activity, secret security guard jobs, and cult membership.[104]

---

[94] U.S. v. Sipe, 388 F.3d 471, 491-92 (5th Cir. 2004).

[95] *Id.*

[96] Bailey v. Rae, 339 F.3d 1107, 1114-15 (9th Cir. 2003).

[97] Benn v. Lambert, 283 F.3d 1040, 1054-60 (9th Cir. 2002).

[98] Leka v. Portuondo, 257 F.3d 89, 104-05 (2d Cir. 2001).

[99] U.S. v. Pelullo, 105 F.3d 117, 123 (3d Cir. 1997).

[100] U.S. v. Cuffie, 80 F.3d 514, 518 (D.C. Cir. 1996).

[101] U.S. v. Minsky, 963 F.2d 870 (6th Cir. 1992).

[102] Bowen v. Maynard, 799 F.2d 593 (10th Cir. 1986).

[103] U.S. v. O'Conner, 64 F.3d 355, 359-60 (8th Cir. 1995) (*per curiam*).

[104] U.S. v. Kelly, 35 F.3d 929, 937 (4th Cir. 1994).

- A memorandum from the Drug Enforcement Agency undermining a government witness's integrity.[105]

- Reports of ballistics and fingerprint tests indicating that defendant's gun was not the murder weapon and that defendant was not driving the car associated with the crime.[106]

- Evidence that the government's case lacked integrity, because the government realized that one of its chief witnesses had not been truthful, made that witness a target of its investigation, and decided not to call the witness, but did not tell the defense.[107]

In each of the above-cited cases, the court's confidence in the outcome of the trial was undermined, and a new trial was ordered or the case was remanded to the trial court for determination of whether the trial court's confidence in the outcome of the trial was undermined. In some cases, more than one category of favorable evidence was undisclosed. These cases are fact-intensive, and a thorough reading of the case is required to understand why the court's confidence was undermined in a particular case.

b. Evidence found not to be material.

In other cases, however, the Supreme Court and lower federal courts have found that undisclosed evidence did *not* undermine confidence in the outcome of the trial based on the facts in the record. Examples include the following cases:

- Insignificant information about a potential alternative perpetrator and a diagram consistent with the government's case.[108]

- The criminal record of a murder victim when it was undisputed that the victim was armed and the evidence of defendant's guilt was overwhelming.[109]
- Evidence that a witness failed a polygraph when the polygraph evidence was admissible and proof of the defendant's guilt was overwhelming.[110]

- Inconsistent statements of witnesses when their disclosure would not have made a difference in the face of considerable forensic and physical evidence linking the defendant to the murder.[111]

---

[105] U.S. v. Brumel-Alvarez, 991 F.2d 1452, 1458 (9th Cir. 1992).

[106] Barbee v. Warden, Md. Penitentiary, 331 F.2d 842 (4th Cir. 1964).

[107] U.S. v. Quinn, 537 F.Supp.2d 99 (D.D.C. 2008).

[108] *See* Moore, 408 U.S. 786, discussed *supra* section A.3.

[109] *See* Agurs, 427 U.S. 97, discussed *supra* section A.3.

[110] *See* Wood, 516 U.S. 1, discussed *supra* section A.6.

[111] *See* Strickler, 527 U.S. 263, discussed *supra* section A.6.

- Evidence of defendant's injury that was not disputed.[112]

- A psychiatric report stating a paranoid diagnosis for a non-crucial government witness.[113]

- Evidence that a non-crucial witness violated the terms of his cooperation agreement where the court determined that the violation would not have undermined the witness's credibility in the eyes of the jury.[114]

- Five items, including impeachment information regarding a prosecution witness and a report of a fingerprint test that failed to identify defendant's fingerprints at crime scene, where defense counsel effectively capitalized – in one way or another – on every potentially valuable argument the five items supported, even though the items themselves were unavailable to counsel at the time of trial.[115]

- Keeping witnesses away from the defense, when the witnesses would not have made any difference in light of the "overwhelming physical evidence" inculpating defendant as the perpetrator.[116]

- An immunity agreement with a witness regarding a beating the witness perpetrated, where the agreement was truly cumulative because the witness was "heavily impeached" at trial by, among other things, the existence of other charges against him that were dismissed in exchange for his testimony.[117]

- A prior inconsistent statement of a witness and thirteen polygraph examinations given to another witness, where, at the time of trial, defendant had examples of contradictory statements made by both witnesses and used them to impeach one witness while choosing not to cross-examine the other.[118]

c. "Cumulative" evidence.

Prosecutors often argue that information did not need to be produced under Brady because it was "cumulative" of other evidence. This is not an independent exception to the Brady rule. Rather, it is another way of saying that production of the evidence would

[112] U.S. v. Tyndall, 521 F.3d 877 (8th Cir. 2008).

[113] Ziegler v. Callahan, 659 F.2d 254 (1st Cir. 1981).

[114] U.S. v. Spinelli, 551 F.3d 159 (2d Cir. 2008), *cert. denied*, 130 S.Ct. 230 (2009).

[115] Kelly v. Secretary for Dept. of Corrections, 377 F.3d 1317 (11th Cir. 2004).

[116] Brown v. French, 147 F.3d 307, 312 (4th Cir. 1998).

[117] Simental v. Matrisciano, 363 F.3d 607, 614 (7th Cir. 2004).

[118] Moreno-Morales v. U.S., 334 F.3d 140 (1st Cir. 2003).

not have materially affected the trial because it duplicated information that the defendant already had. Information that truly is cumulative would not meet the prejudice element of the Brady test.[119] But before concluding that a piece of information or evidence is "cumulative," a court should be careful to consider all of the ways the information may have been used at trial.

Relatedly, several courts have also held that the government is not required to produce information it knows the defense already has.[120] Thus, Brady does not relieve the defendant and her counsel from the obligation to review and identify the favorable information already in their possession. But this rule would not necessarily apply where the government has buried Brady information in a voluminous production.[121]

C. Other Considerations Regarding What Must be Produced

In addition to the cases discussed above, a number of federal appellate decisions have considered other potential limitations on what must be disclosed under Brady. We discuss them below.

1. Brady Does Not Require Open File Discovery

For example, if it is not obvious by now, Brady does not require open file discovery. That is, Brady does not require the government to open all of its files to defense counsel.[122] Nor does Brady give rise to a generalized constitutional right to discovery.[123]

[119] *See, e.g.,* U.S. v. Brodie, 524 F.3d 259, 268-69 (D.C. Cir. 2008).

[120] U.S. v. Zagari, 111 F.3d 307, 320 (2d Cir. 1997) ("Brady cannot be violated if the defendants had actual knowledge of the relevant information or if the documents are part of public records and 'defense counsel should know of them and fails to obtain them because of lack of diligence in his own investigation.'" (citation omitted)); U.S. v. Whitehead, 176 F.3d 1030, 1036-37 (8th Cir. 1999) ("The government need not disclose evidence that is *inter alia*, available through other sources or not in the possession of the prosecutor."); U.S. v. Prior, 546 F.2d 1254, 1259 (5th Cir. 1977) ("[N]umerous cases have ruled that the government is not obliged under Brady to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself."); U.S. v. Di Giovanni, 544 F.2d 642, 645 (2d Cir. 1976) ("The government is not required to make a witness' statement known to a defendant who is on notice of the essential facts which would enable him to call the witness and thus take advantage of any exculpatory testimony he might furnish."); Gantt v. Roe, 389 F.3d 908 (9th Cir. 2004).

[121] *See infra* section E.4.

[122] Bagley, 473 U.S. at 675 ("[T]he prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." (footnote omitted)). As a practical matter, however, it may be prudent for the prosecutor to provide open-file discovery to maximize the likelihood that all exculpatory information will in fact be provided.

[123] Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

2. Prosecutors' Work Product

The Supreme Court has not addressed whether a prosecutor's work product must be disclosed under Brady.[124] A number of district courts, however, have held that the work product doctrine does not trump the government's Brady obligations.[125] As Professors Wright and Miller have summarized, "Because Brady is based on the Constitution, it overrides court-made rules of procedure."[126]

Certainly, to the extent that the prosecutor's work product contains exculpatory *facts*, whether those facts relate to the offense or to the government's witnesses, such work product must yield to Brady's constitutional command that such exculpatory information be disclosed. For example, a memorandum reciting what a witness has said about the case may be producible under Brady, to the extent the witness's statements are favorable to the defendant – even though the memorandum was written by the prosecutor. On the other hand, a prosecutor's *opinion work product* – her strategies, legal theories, or impressions of the evidence – may deserve different treatment. Of course, if a document containing opinion work product – such as a legal research memorandum, a memorandum evaluating evidence, or notes used to argue in court or to examine a witness – also contains exculpatory facts, those facts should be disclosed. The Ninth Circuit has explained:

> The Brady rule is not meant to displace the adversary system; the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused, that, if suppressed, would deprive the defendant of a fair trial. Extending the Brady rule to opinion work product would greatly impair the government's ability to prepare for trials. Thus, in general, a prosecutor's opinions and mental impressions of the case are not discoverable under Brady unless they contain underlying exculpatory facts.[127]

In other words, a prosecutor should be able to prepare her case with some degree of privacy. She need not reveal all of her notes. But, the opinion work product doctrine should not be used to conceal exculpatory *facts* from the defense. In addition, some conclusions – such as the conclusion that an important witness is not giving truthful

---

[124] MIncey v. Head, 206 F.3d 1106, 1133 n.63 (11th Cir. 2000) ("Neither the Supreme Court nor this court has decided whether Brady requires a prosecutor to turn over his work product.")

[125] *See* Castleberry v. Crisp, 414 F.Supp. 945, 953 (N.D. Okla. 1976) ("[T]he 'work product' discovery rule cannot, of course, be applied in a manner which derogates a defendant's constitutional rights as propounded in Brady."); *see also* U.S. v. NYNEX Corp., 781 F.Supp. 19, 25 (D.D.C. 1991) ("Cases on this question, albeit without much discussion, suggest that internal materials possibly constituting work product may not automatically be exempt from Brady requirements.") (*citing* cases); U.S. v. Goldman, 439 F.Supp. 337, 350 (S.D.N.Y. 1977) ("Of course, if [work product] material be of a Brady nature, then it must be produced.").

[126] 2 Charles Alan Wright & Peter J. Henning, Federal Practice and Procedure §256, at 162 (4th ed. 2009).

[127] Morris v. Ylst, 447 F.3d 735, 742 (9th Cir. 2006).

information, will not be called to testify, and has himself become a target of a government investigation – may also require disclosure under Brady.[128]

An example may be instructive on this point: Every defense lawyer would like to have a copy of the government's "pros memo," in which a prosecutor responsible for a case has evaluated the strengths and weaknesses of the case for his supervisors. The entire "pros memo" itself probably does not need to be produced. But any factual information in the "pros memo" that constitutes Brady information needs to be disclosed. Brady information is not exempt from disclosure merely because it appears within the same document as opinion work product.

3. Confidential Informants

A right to learn the identity of confidential government informants under appropriate circumstances arose even before Brady. In 1957, the Supreme Court in Roviaro v. United States[129] held that a generally recognized privilege of a government informant to remain confidential would give way "[w]here the disclosure of an informer's identity, or of the contexts of his communication, relevant and helpful to the defense of an accused, or is essential to the fair determination of a cause." This was, in essence, a precursor to Brady. Roviaro is discussed in detail in chapter 6.

Surprisingly, the federal appellate courts that discuss the Roviaro rule do so without referring to Brady. One could argue that, at least in some cases, the Roviaro test is more generous to the defense than Brady. But in any case where information about a confidential informant satisfies the requirements for Brady information, it must of course be produced under Brady, even if it somehow would not be producible under Roviaro.

D. The Brady Rule at the Trial Court Level

The Supreme Court cases addressing Brady all have reviewed *retrospectively* what happened at trial or sentencing. They have attempted to determine whether a trial that has already taken place was fair. Post-trial, the appellate court's task is to review the trial court record in light of favorable information that was withheld from the defense and to apply a "materiality" analysis to determine whether the government's failure to provide that information undermines confidence in the outcome of the case. A federal district court overseeing a criminal case is confronted with a far different task: ensuring a fair trial going forward.

Few published trial court opinions discuss the scope of a prosecutor's obligation to produce exculpatory information viewed from the *pre-trial* perspective. The courts addressing this issue take a generous view of the prosecutor's Brady obligations, on the theory that it is inappropriate to place the prosecutor in a position to decide prior to trial what information may be "material" to a trial that has not yet occurred.

[128] *See, e.g.*, U.S. v. Quinn, 537 F.Supp.2d 99 (D.D.C. 2008).

[129] 353 U.S. 53 (1957).

In United States v. Sudikoff,[130] Judge Pregerson of the Central District of California emphasized that trial courts should determine what should be produced to the defense in advance of trial in order to ensure a fair trial, rather than attempting to predict what is likely to be considered "material" by an appellate court after the fact.

> [I]n the pretrial context it would be inappropriate to suppress evidence because it seems insufficient to alter a jury's verdict. Further, '[t]he government, where doubt exists as to the usefulness of evidence, should resolve such doubts in favor of full disclosure . . . ." Thus, the government is obligated to disclose all evidence relating to guilt or punishment which might reasonably be considered favorable to the defendant's case.[131]

Judge Mahan of the District of Nevada subsequently followed Judge Pregerson in holding that all exculpatory information must be disclosed at the trial court level regardless of whether it might be viewed as material after trial and on appeal.[132]

Finally, Judge Friedman of the U.S. District Court for the District of Columbia recently expanded on the teaching of Sudikoff to reach the same conclusion.

> The prosecutor cannot be permitted to look at the case pre-trial through the end of the telescope an appellate court would use post-trial. Thus, the government must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed – with the benefit of hindsight – as affecting the outcome of the trial. The question before trial is not whether the government thinks that disclosure of the information or evidence it is considering withholding might change the outcome of the trial going forward, but whether the evidence is favorable and therefore must be disclosed. Because the definition of "materiality" discussed in Strickler and other appellate cases is a standard articulated in the post-conviction context for appellate review, it is not the appropriate one for prosecutors to apply during the pretrial discovery phase. The only question before (and even during) trial is whether the evidence at issue may be "favorable to the accused"; if so, it must be disclosed without regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial.[133]

The courts' thoughtful analyses in Sudikoff, Acosta, and Safavian teach that trial courts should order that all information favorable to the defense be produced before trial. And, as the Supreme Court has elsewhere suggested, all doubts should be resolved in favor of full disclosure. Any other rule risks making prosecutors the arbiters of materiality in

---

[130] 36 F.Supp.2d 1196 (C.D. Cal. 1999).

[131] *Id.* at 1199 (alteration in original) (citations and internal quotation marks omitted).

[132] U.S. v. Acosta, 357 F.Supp.2d 1228, 1233 (D. Nev. 2005) (following and *citing* Sudikoff).

[133] U.S. v. Safavian, 233 F.R.D. 12, 16-17 (D.D.C. 2005).

advance of trial, and courts will be unable to correct any mistakes until a post-trial review of the evidence – assuming the favorable evidence ever is disclosed at all.

E. Common Procedural Considerations

1. Timing of Brady Disclosures

If the Brady rule is to have any meaning, favorable information must be disclosed to the defense in time for the defense to use it effectively. In United States v. Pollack,[134] the D.C. Circuit made clear that disclosure of Brady information must occur "at such time as to allow the defense to use the favorable material effectively in the preparation and the presentation of its case."[135]

Despite this sensible admonition, some appellate courts have been lenient in this regard, usually finding no Brady violation as long as production was made at any time before or during trial.[136] For example, in United States v. Woodley,[137] the government belatedly produced correspondence helpful to the defense in a tax evasion and fraud case. The Ninth Circuit found that the defense nevertheless was able to use these documents effectively at trial and declined to reverse. Similarly, in United States v. Warren,[138] the defendant claimed in a forgery case that the government was tardy in disclosing that the government considered the defendant to be a confidential informant. The defendant, however, used the admission in his defense, and the Seventh Circuit noted that the defendant was unable to demonstrate that he would have done anything differently at trial if he had received the information earlier.

While it may be that in some cases a defendant is not prejudiced by late production, courts should be careful not to discount the time needed for conscientious defense counsel to shift strategy on a dime when new information is provided shortly before trial or during trial. And asking for a continuance right before trial (especially if the defendant is incarcerated) or during trial after a jury has been impaneled are hardly viable options. In the first instance, defense counsel must sacrifice a client's freedom and speedy trial

---

[134] 534 F.2d 964, 973 (D.C. Cir. 1976).

[135] *Id.* at 973. Whether Brady information is produced in time is arguably a distinct inquiry from whether the information itself is material. *See* U.S. v. Fallon, 348 F.3d 248, 252 (7th Cir. 2003) ("Materiality focuses not on trial preparation, but instead on whether earlier disclosure would have created a reasonable doubt of guilt.")

[136] U.S. v. Sardinas, 386 F. App'x 927 (11th Cir. 2010), *available at* 2010 WL 2803393; U.S. v. Celestin, 612 F.3d 14 (1st Cir. 2010); U.S. v. Celis, 608 F.3d 818 (D.C. Cir. 2010), (*per curiam*), *cert. denied*, 131 S.Ct. 620 (2010); U.S. v. Kimoto, 588 F.3d 464 (7th Cir. 2009), *cert. denied*, 130 S.Ct. 2079 (2010); Thomas v. Lampert, 349 Fed. App'x 272 (10th Cir. 2009); U.S. v. Jeffers, 570 F.3d 557 (4th Cir. 2009); U.S. v. Aleman, 548 F.3d 1158 (8th Cir. 2008); U.S. v. Navarro, 263 F. App'x 428 (5th Cir. 2008) (*per curiam*); U.S. v. Gordon, 844 F.2d 1397 (9th Cir. 1988); U.S. v. Presser, 844 F.2d 1275 (6th Cir. 1988); U.S. v. Johnson, 816 F.2d 918 (3d Cir. 1987); Powell v. Quarterman, 536 F.3d 325 (5th Cir. 2008), *cert. denied*, 129 S.Ct. 1617 (2009); U.S. v. Warren, 454 F.3d 752 (7th Cir. 2006).

[137] 9 F.3d 774 (9th Cir. 1993).

[138] 454 F.3d 752 (7th Cir. 2006).

rights in order to vindicate her client's right to receive meaningful information. In the second instance, defense counsel runs the risk of antagonizing the jury, which may have already formed a view of the case without the benefit of the favorable information belatedly disclosed to the defense. Giving such jurors time off for their views to harden is not a good solution to untimely disclosure.

A few appellate decisions in recent years have cut against this trend and accorded greater recognition to the practical difficulties presented by late disclosure. In Leka v. Portuondo,[139] the government disclosed a mere nine days before trial that a police officer who witnessed the crime contradicted the account of events provided by other eyewitnesses who implicated the defendant. The government argued that the disclosure was early enough to permit the defense to learn all that it needed to know,. The Second Circuit disagreed, holding "the disclosure was too little too late." The court noted that it was "not feasible or desirable to specify the extent or timing of disclosure [of] Brady" information, but went on to say that the amount of time the prosecutor withholds information, and the amount of time the disclosure is made before trial are "relevant considerations."[140] "The opportunity for use under Brady," the court said, "is the opportunity for a responsible lawyer to use the information with some degree of calculation and forethought."[141]

Similarly, in DiSimone v. Phillips,[142] the Second Circuit considered a petition for *habeas corpus* relief on the theory that the state of New York had violated Brady by not disclosing until near the close of the prosecution's case information that another person other than the defendant had stabbed the victim before the defendant allegedly did so. "The more a piece of evidence is valuable and rich . . . the less likely it will be that late disclosure provides the defense an opportunity for use."[143]

Most recently, in Miller v. United States,[144] the District of Columbia Court of Appeals reversed a criminal conviction where the government produced Brady information prior to trial, but not in sufficient time for the defense to fully understand its significance. Thus the defense did not realize until too late that evidence of a witness's left-handedness supported an alternative theory that he, and not the defendant, was the culprit.

The Tenth Circuit in United States v. Burke[145] aptly stated that "[i]t would eviscerate the purpose of the Brady rule and encourage gamesmanship were we to allow the

---

[139] 257 F.3d 89 (2d Cir. 2001).

[140] *Id.* at 103.

[141] *Id.*

[142] 461 F.3d 181 (2d Cir. 2006).

[143] *Id.* at 197 (internal quotation marks omitted). The Second Circuit remanded the case for the trial court to determine whether defense counsel should have known this information.

[144] No. 07-CF-1169 (D.C. Mar. 3, 2011).

[145] 571 F.3d 1048, 1054 (10th Cir. 2009), *cert. denied*, 130 S.Ct. 565 (2009).

government to postpone disclosures to the last minute, during trial." Following the Second Circuit's reasoning in Leka, the court observed:

> [B]elated disclosure of Brady material "tend[s] to throw existing strategies and [trial] preparation into disarray." It becomes "difficult [to] assimilate new information, however favorable, when a trial already has been prepared on the basis of the best opportunities and choices then available."[146]

The court also explained the "dangerous incentives" that courts would create for prosecutors by condoning late production of Brady material. Prosecutors could then "withhold impeachment of exculpatory information until after the defense has committed itself to a particular strategy during opening statements or until it is too late for the defense to effectively use the disclosed information."[147]

> It is not hard to imagine the many circumstances in which the belated revelation of Brady material might meaningfully alter a defendant's choices before and during trial: how to apportion time and resources to various theories when investigating the case, whether the defendant should testify, whether to focus the jury's attention on this or that defense, and so on. To force the defendant to bear these costs without recourse would offend the notion of fair trial that underlies the Brady principle.[148]

On the facts presented in Burke, the court determined that the defendant had not demonstrated how the delayed disclosure materially prejudiced his case. But Burke remains an excellent summary of why the timing of Brady disclosure matters.

In an effort to prevent eleventh-hour disclosures, courts often require that Brady information be produced prior to trial, by a fixed deadline. Any late production by the government therefore violates a court order and can be sanctioned even if the Constitution would not otherwise require it. Similarly, many districts have established local rules setting deadlines for pretrial disclosure of Brady information. Such deadlines should be encouraged, as late production of favorable information can be disruptive to the trial and devastating to the defense.

2. Form of Brady Disclosures

Courts have rarely addressed, at least in published opinions, the form in which Brady disclosures should be provided to the defense. Some prosecutors disclose Brady information in the form of a letter to defense counsel. For example, the prosecutor may write something like: "Please be advised that in an interview on March 10, 2010, witness

---

[146] *Id.* (*quoting* Leka, 257 F.3d at 101 and *citing* U.S. v. Devin, 918 F.2d 280, 290 (1st Cir. 1990) (explaining that a Brady violation would occur if delayed disclosure altered defense strategy and timely disclosure would likely have resulted in a more effective strategy)).

[147] *Id.* at 1054.

[148] *Id.*

John Doe described a version of events that is inconsistent with his anticipated trial testimony."

Even assuming the letter contained all relevant details about the witness's inconsistent statement (which this example obviously does not), such a letter does not provide information in a format readily usable by defense counsel. Defense counsel will need to cross-examine the witness by confronting him with his earlier inconsistent statement.[149] If the witness does not admit to the prior inconsistent statement, defense counsel will need to call an agent who was present at the interview to elicit evidence of the prior inconsistent statement. It is very difficult for the defense lawyer to impeach the witness with a summary letter from the prosecutor. Rather, if a memorandum of the interview or another contemporaneous record of the statement exists (as it should), that document should be provided to defense counsel.

Judge Sullivan of the U.S. District Court for the District of Columbia has said that summary letters are an "opportunity for mischief and mistake."[150] Judge Harold Green of the same court wrote this before the trial of Admiral John Poindexter, when the Iran Contra Independent Counsel's Office insisted that it could produce summaries of documents instead of the documents themselves:

> The Government is unable to cite a single decision in which a summary of the exculpatory information has been held sufficient to meet its Brady obligations. On the contrary, it is clear that the common practice is . . . to produce the documents themselves.[151]

This is as it should be. If Brady is to be meaningful, the information provided to the defense must be in a format that is readily usable by the defense. The summary letter is the most common manifestation of the "unusable format" problem we have seen, but one can imagine other scenarios where some degree of information is disclosed, but not in a way that defense counsel can make use of it at trial. All participants in the process must remain on guard that Brady information is provided in a format that is in fact usable by the defense.

3. *In Camera* Review of Potential Brady Information

Trial courts sometimes review government materials *in camera* before they are produced to the defendant, to determine whether they contain Brady information. This process should be used sparingly, if ever, for a number of reasons. First, *in camera* review consumes tremendous judicial resources. Second, the trial court (through no fault of its own) may not grasp what would be helpful to the defense. Third, *in camera* review

---

[149] *See* Fed. R. Evid. 613(b) ("Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of party-opponent as defined in rule 801(d)(2).").

[150] *See* United States v. Stevens, No. 1:08-cr-231-EGS Doc. 373 (4/7/2009 Hr'g Tr.) at 9.

[151] United States v. Poindexter, No. 88-0080, 1990 U.S. Dist. Lexis 2023 at *1-2 (D.D.C. Mar. 5, 1990).

makes for an inefficient and in some cases unworkable appellate record. Appellate courts are ill-equipped to review what the trial court did *in camera*. Fourth, *in camera* review runs contrary to the presumption in favor of the public's right to access to judicial proceedings and records.[152] Fifth, often little is gained by *in camera* review. If there is a serious question over whether the information should be turned over to the defense, why not simply turn it over?

Nevertheless, there may be some occasions where *in camera* review of potential Brady material is appropriate. Sometimes, indeed, it may be legally required. For example, the Classified Information Procedures Act requires that the court review *in camera* potentially discoverable documents containing classified information relating to national security.[153] There may also be occasions where extreme privacy issues are implicated. For example, courts sometimes conduct *in camera* review of witnesses' medical records or Presentence Reports to determine whether they contain information favorable to the defense.

Defense counsel sometimes seek *in camera* review when they perceive no other way of getting access to certain materials. Appellate courts have sometimes found reversible error when the trial courts failed to order disclosure in reliance on government representations that the materials did not contain Brady information, without first conducting *in camera* review.[154]

4. Identifying Material Exculpatory Information within a Larger Production

Some prosecutors make large volumes of material available to the defense. Such discovery practices run the risk of overwhelming defense counsel with information of little or no use. The possibility of producing large quantities of computer-generated data increases this risk. When prosecutors provide large quantities of data, must they identify the information within that production that meets the elements of Brady?

The leading case on this developing issue is United States v. Skilling,[155] in which the Fifth Circuit found no Brady violation when the government produced several hundred million pages of documents to the defense. The court in Skilling was careful to rest its holding on the facts presented, and particularly on its finding that there was no evidence that the government knew of Brady information that it hid from the defense. The Fifth Circuit found it significant that the file

---

[152] *See*, *e.g.*, U.S. v. Wecht, 484 F.3d 194, 207-08 (3d Cir. 2007) ("[I]t is well-settled that there exists, in both criminal and civil cases, a common law public right of access to judicial proceedings and records.").

[153] *See infra* chapter 9 section B for a discussion of CIPA. Also, Rule 26.2 expressly requires *in camera* review of potential witness statements in some circumstances. *See infra* chapter 3.

[154] *E.g.*, U.S. v. King, 628 F.3d 693 (4th Cir. 2011); U.S. v. Garcia, 562 F.3d 947 (8th Cir. 2009) (reversible error not to review Presentence Investigation Reports for Brady information *in camera*); U.S. v. Alvarez, 358 F.3d 1194 (9th Cir. 2004) (same); U.S. v. Gaston, 608 F.2d 607 (5th Cir. 1979) (reversible error not to review interview memoranda for Brady information *in camera*).

[155] 554 F.3d 529, 577 (5th Cir. 2009), *rev'd on other grounds*, 130 S.Ct. 2896 (2010).

> was electronic and searchable. The government produced a set of "hot documents" that it thought were important to its case or were potentially relevant to [the] defense. The government provided indices to these and other documents. The government also provided Skilling with access to various databases . . . , [and] there is no evidence that the government found something exculpatory but hid it in the open file with the hope that [the defendant] would never find it.

Even so, the court emphasized that it was not stating a bright-line rule that Brady condones burying favorable information. On the contrary, the court strongly suggested that Brady limits the manner in which the government produces its discovery.

> We do not hold that the use of a voluminous open file can never violate Brady. For instance, evidence that the government "padded" an open file with pointless or superfluous information to frustrate a defendant's review of the file might raise serious Brady issues. Creating a voluminous file that's unduly onerous to access might raise similar concerns. And it should go without saying that the government may not hide Brady material of which it is actually aware in a huge open file in the hope that the defendant will never find it.[156]

5. Disclosing Brady Information before a Guilty Plea

After United States v. Ruiz,[157] the law is now settled that due process does not require the prosecution to disclose favorable impeachment evidence or evidence regarding affirmative defenses to the defendant before the defendant enters a guilty plea. Whether or not other Brady information must be disclosed before the defendant enters a guilty plea is an open question.

In Ruiz, the prosecution represented to the defendant prior to a guilty plea that it had disclosed "any [known] information establishing the factual innocence of the defendant," while acknowledging a "continuing duty to provide such information."[158] The Ninth Circuit held that the government had a similar duty to disclose exculpatory impeachment evidence. The Supreme Court reversed, holding that a defendant may waive his or her right to have favorable impeachment evidence disclosed prior to entry of plea.[159] If a defendant makes the decision to waive this right, she cannot later complain on that basis about her decision to plead guilty. The Court reached the same conclusion with respect to evidence regarding affirmative defenses.[160] The Court did address whether other exculpatory information must be disclosed before a guilty plea, and indeed, the government's proposed plea agreement in Ruiz already contemplated such a duty.[161]

---

[156] *Id.*

[157] 536 U.S. 622 (2002).

[158] *Id.* at 625 (alteration in original) (quotation marks omitted).

[159] *Id.* at 628-33.

[160] *Id.* at 633.

[161] *See id.* at 625, 631.

Justice Thomas concurred in the judgment in Ruiz, apparently on the ground that he saw no right to insist on disclosure of any kind of evidence at the plea stage.[162]

The Court's decision in Ruiz was based in part on the idea that waiving the right to receive impeachment information is no different in principle than waiving any number of other rights that a defendant forgoes when entering a plea of guilty, such as the right to a trial by jury. Under this thinking, one can easily imagine the Supreme Court extending its holding from Ruiz to exculpatory evidence beyond favorable impeachment evidence. The Supreme Court, after all, has rejected a distinction between so-called exculpatory evidence and so-called impeachment evidence in other contexts.[163]

On the other hand, the Court also based its ruling in part on the notion that impeachment information may or may not be helpful to the defendant at the plea stage.[164] This suggests that the Court might reach a different result if presented with other information that it viewed as more fundamental to the defendant's plea decision. This was the basis of Justice Thomas's disagreement with the majority in Ruiz.

The federal circuits have reached divergent results in the wake of Ruiz. Some have suggested that the distinction between "exculpatory" and "impeachment" evidence is critically important in the context of guilty pleas. The Seventh Circuit has said in *dicta*:

> Ruiz indicates a significant distinction between impeachment information and exculpatory evidence of actual innocence. Given this distinction, it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea.[165]

In addition, the First Circuit has held that government's failure to disclose evidence of its witness manipulation rendered a defendant's guilty plea invalid.[166]

On the other hand, the Fifth and Eighth Circuits fail to see the distinction between impeachment and exculpatory evidence in the context of plea agreements.[167] And the Second Circuit has recognized that the issue remains unresolved.[168]

---

[162] *Id.* at 633-34 (Thomas, J., concurring in the judgment).

[163] Bagley, 473 U.S. at 676.

[164] *See* 536 U.S. at 630.

[165] McCann v. Mangialardi, 337 F.3d 782, 788 (7th Cir. 2003).

[166] Ferrara v. U.S., 456 F.3d 278 (1st Cir. 2006).

[167] U.S. v. Tucker, 419 F.3d 719, 721 (8th Cir. 2005); U.S. v. Conroy, 567 F.3d 174, 179 (5th Cir. 2009) (*per curiam*), *cert. denied*, 130 S.Ct. 1502 (2010).

[168] *See, e.g.*, Friedman v. Rehal, 618 F.3d 142, 154 n.4 (2d Cir. 2010) ("[I]t is unclear whether Ruiz overrules all of the Second Circuit precedent in this area or whether the Second Circuit's recognition of a right to disclosure of purely exculpatory information prior to a guilty plea survives." (internal quotation marks omitted)).

The government made a motion to file *ex parte* an unredacted "whistleblower complaint" written by a federal employee which raised allegations of misconduct related to the investigation and trial in the case, and also motioned to file a redacted version of the complaint under seal. The government also provided a copy of the redacted complaint to the defense and sought a protective order related to that production.

The defendant, in contrast, opposed both motions and argued that both the defendant and the public should have access to the unredacted complaint. The employee who authored the complaint, however, opposed its being made public.

The District Court: (1) denied the motion to file *ex parte* and directed the government to provide an unredacted copy to the defense, subject to a protective order, and; (2) granted in part and denied in part the government's motion to file the complaint under seal.

Senator Ted Stevens was charged with making false statements in violation of 18 U.S.C. §1001(a)(1), specifically for the failure to report on his Senate Financial Disclosure Forms a number of gifts he received from Bill Allen, the CEO of VECO Corporation, and others. Bill Allen pled guilty to charges which arose from the government's corruption investigation, and testified as a government witness against Senator Stevens. Both before and during the trial, the defense alleged a number of discovery violations and prosecutorial misconduct, some of which the court remedied, although it denied motions to dismiss the case or to declare a mistrial. A jury returned a verdict of guilty on all seven counts in the indictment.

Several months after the verdict, the government notified the court that it had received a "whistleblower complaint" from a federal employee which alleged that at least two federal employees intentionally violated policies, procedure, discovery, and other legal obligations associated with the government's investigation and Senator Stevens' trial. The government motioned to file *ex parte* an unredacted copy of the complaint, and also to file a redacted version of the complaint under a protective order to seal. The defendant opposed both motions and filed opposing motions. The complainant opposed any public disclosure of the complaint, citing privacy concerns and the intent behind whistleblower provisions. The court then held a hearing, and subsequently denied the government's request to file *ex parte*, and rather preferred to hear the parties' respective propositions for what should be redacted from the complaint. While the complainant and the government were against any disclosure, the defendant opposed any redactions.

When the court reviewed the proposed redactions from the government, it stated that a comparison between the redacted and unredacted documents clearly showed instances where the government attempted to redact information that was directly relevant to the investigation and/or trial. Further, the court noted that the allegations in the complaint were exculpatory with regards to the defendant, and that under Brady were subject to disclosure. Additionally, the court noted that *ex parte* communications between prosecutors and the trial judge are "greatly discouraged and should only be permitted in the rarest of circumstances." While these circumstances were unusual, the court stated

that they did not meet typical exceptional circumstances which permit otherwise "greatly discouraged" *ex parte* communications. Following these statements, the court denied the government's motion to file *ex parte* and directed the government to provide an unredacted copy of the complaint to the defendant subject to the terms of an appropriate protective order.

In evaluating the government's motion to file the redacted complaint under seal, the court agreed with the defendant in stating that both the constitutional and common law rights to public access in this case required disclosure of the complaint, subject to limited redactions to protect the privacy interest and other interests implicated by the disclosure. The court noted that the Sixth Amendment guaranteed a criminal defendant the right to a public trial while the First Amendment guaranteed public access to criminal trials, and that the courts have extended these rights to the proceedings beyond the actual trial. The court put particular importance on the fact that the Sixth Amendment right to a public trial supports disclosure when, as occurred in this case, allegations in the complaint are relevant to the post-trial, presentence litigation currently underway, especially when the conduct of the police or prosecutor is maligned, as this complaint did. The only time when the Sixth and/or First Amendment rights to public access must yield to other interests is if the party seeking nondisclosure can pass the Press-Enterprise test—an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The court in this case stated that the privacy interests asserted by the government could not be said to outstrip the constitutional and public interests related to disclosure as asserted by the defendant.

Additionally, although the government attempted to convince the court to exercise its discretion and grant its motion to seal the complaint, the court declined to do so, stating that the fact that the integrity of officers, even those who did not testify in the trial but whose role in the investigation may still have played an integral role, was called into question by the complaint meant that the information alleged could have a significant impact on the post-trial litigation. The court recognized that anything less would invite the government to engage in rampant misconduct. Additionally, the court noted that under the circumstances it would be inappropriate to seal the complaint based on the six-part analysis for determining whether information should be sealed from public disclosure under United States v. Hubbard, 650 F.2d 293 (D.C.Cir. 1981). The court did agree, however, to redacting the names and identifying information of the individuals within the complaint, including the complainant as well, in the spirit of protecting and promoting whistleblower practices.

The court concluded by denying the motion to file *ex parte* and granting in part and denying in part the motion to file the complaint under seal.

This case also dealt with the aftermath of the indictment, trial, and subsequent allegations of misconduct occurring in the Stevens case. Following the events of Stevens, the Department of Justice acknowledged some of the alleged misconduct, specifically admitting two instances in which the prosecution team had failed to produce exculpatory information to the defense in violation of the government's constitutional obligations. Following these admissions, the DOJ moved to set aside the verdict and dismiss the indictment of Senator Stevens with prejudice. Following the DOJ's admissions, the court appointed an investigator to investigate and prosecute such criminal contempt proceeding as may have been appropriate against the six DOJ attorneys responsible for the prosecution of Senator Stevens.

After reviewing tens of thousands of documents related to the Stevens trial, the investigator submitted a 500-page report in which he concluded that the investigation and prosecution of the Senator was "permeated by the systematic concealment of significant exculpatory evidence which would have independently corroborated his defense and his testimony, and seriously damaged the testimony and credibility of the government's key witness." The investigator found that at least some of the concealment was intentional, but despite these findings, did not recommend any prosecution for criminal contempt.

The recommendation was based on the requirement that, in order to prove criminal contempt beyond a reasonable doubt, the contemnor must disobey an order that is sufficiently clear and unequivocal at the time it is issued. In the opinion of the investigator, such an Order did not exist in Stevens, as the court had decided to rely on the assertions of the prosecutors that they were acting in good faith and complying with their obligations rather than issue an Order to that effect.

The court stated that the public interest in this case, which dealt with DOJ prosecutorial misconduct in the prosecution of a United States Senator, was so high that it was inevitable that the entirety of the investigator's report would be released to the public. However, the court stated that in light of a 2009 Amended Protective Order and the D.C. Circuit's holding in In re North, 16 F.3d 1234 (D.C. Cir. 1994), the complete report would not be made public at least until the DOJ and the attorneys at issue had the opportunity to review the report. The court, while acknowledging that the DOJ had the ability to file motions to attempt to seal the report, recommended that before it did so, it consider the strong interest that the public had in reading a report on the misconduct of government attorneys.

Following the previous In re Special Proceedings, two of the six subject attorneys filed motions to seal the investigator's report on their alleged misconduct, while two others filed notices and memoranda opposing the release of the report. However, upon careful consideration of the matter, the court concluded that (1) the public had an overriding and compelling right to access the report—a right protected by the First Amendment; (2) the investigation differed in significant respects from a grand jury proceeding and is not bound by the grand jury secrecy rules; and (3) the D.C. Circuit's approach in In re North is instructive, and the factors identified in that case are relevant to determining whether to publicly release a special prosecutor's report overwhelmingly counsel in favor of publicly releasing the report under such circumstances.

In light of these facts, the court held that it would order the investigator to file his report on the public docket, although it would allow the subject attorneys to submit objections or comments to the investigator to be published as addenda to the report.

United States District Court
For the District of Columbia
Washington, D.C. 20001

Chambers of
Emmet G. Sullivan (202) 354-3260
United States District Judge

April 28, 2009

VIA FACSIMILE AND FEDEX
The Honorable Richard C. Tallman, Chair
Judicial Conference Advisory Committee
on the Rules of Criminal Procedure
Attn: Rules Committee Support Office
One Columbus Circle, NE
Washington, DC 20054

Dear Judge Tallman:

I write to urge the Advisory Committee on the Rules of Criminal Procedure (the "Rules Committee") to once again propose an amendment to Federal Rule of Criminal Procedure 16 requiring the disclosure of all exculpatory information to the defense. My understanding is that on September 5, 2006, the Rules Committee voted eight to four to forward such an amendment to the Standing Committee on Rules of Practice and Procedure (the "Standing Committee").[1] However, the Department of Justice ("DOJ") strongly opposed the amendment and argued that a modification to the United States Attorney's Manual – which added, for the first time, a section addressing federal prosecutors' disclosure obligations – would obviate the need for an amendment to the federal rule.

There were compelling reasons for eight of the twelve members of the Rules Committee to support the proposed amendment in September 2006. Those reasons are no less compelling today. Moreover, it has now been nearly three years since the United States Attorneys' Manual was modified to "establish guidelines for the exercise of judgement and discretion by attorneys for the government in determining what information to disclose to a criminal defendant pursuant to the government's disclosure obligations as set out in Brady v. Maryland and Giglio v. United States and its obligation to seek justice in every case."[2] While I recognize and respect the commitment and hard work

[1] *See* Minutes of September 5, 2006 Special Session at 7, *available at* http://www.uscourts.gov/rules/Minutes/CR09-2006-min.pdf.

[2] *See* United States Attorneys' Manual §9-5.000, Comment, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm.

demonstrated by federal prosecutors every day in courtrooms throughout the country, it is uncontroverted that Brady violations nevertheless occur.

Earlier this month, Attorney General Eric H. Holder, Jr., for whom I have the highest regard, took the highly unusual, if not unprecedented, step of moving to set aside the verdict and dismiss the indictment with prejudice in the case of United States v. Theodore F. Stevens, Criminal Action No. 08-231 (EGS) (D.D.C.). At a hearing on that motion, the government informed me that during the course of investigating allegations of misconduct, which included several discovery breaches, and preparing to respond to the defendant's post-trial motions, a new team of prosecutors had discovered what the government readily acknowledged were two serious Brady violations:

> THE COURT: All right. Let me ask you this, Counsel, and I need a very precise answer to this question. The Government counsel will concede, will it not, that the failure to produce the notes or information from the April 15, 2008 interview with Bill Allen in which he did not recall having a conversation with Bob Persons about sending a bill to the Senator was a Brady violation.
>
> MR. O'BRIEN: It was a Brady violation. It was impeaching material, and the Court knows that Giglio is a subset of Brady.
>
> THE COURT: Right.
>
> MR. O'BRIEN: Also, there was – I failed to mention this and I should have. The Court did mention it, but there was also information about the value of the work that was performed.
>
> THE COURT: And that was going to be the second question. Indeed, was that a Brady violation as well?
>
> MR. O'BRIEN: I believe that it was. At a minimum, it was favorable evidence to the Defense that should have been turned over pursuant to the instructions that Your Honor previously mentioned.

Motion Hrg. Tr. 13-14 (Apr. 7, 2009). These Brady violations – revealed for the first time five months after the verdict was returned – came to light only after an FBI agent filed a complaint alleging prosecutorial and other law enforcement misconduct, a new Attorney General took office, and a new prosecutorial team was appointed to respond to the defendant's post-trial motions. Attorney General Holder's response to these issues has been commendable, and I understand that he has since discussed instituting training for prosecutors regarding their discovery obligations and has publicly reminded prosecutors that their obligations to fairness and justice are paramount to all other concerns.[3] These developments provide further support for such an amendment.

[3] *See* Nedra Pickler, "U.S. Attorneys Told to Expect Scrutiny; Senator's Case Leaves Taint, Holder Says," The Boston Globe, Apr. 9, 2009, at 8 ("'Your job as assistant U.S. attorneys is not to convict people,' said Holder. 'Your job is not to win cases. Your job is to do justice. Your job is in every case, every decision that you make, to do the right thing. Anybody who asks you to do something other than that is to be ignored. Any policy that is in tension with that is to be

An amendment to Rule 16 that requires the government to produce all exculpatory information to the defense serves the best interests of the court, the prosecution, the defense, and, ultimately, the public. Such a rule would eliminate the need for the court to enter discovery orders that simply restate the law in this area, reduce discovery disputes, and help ensure the integrity and fairness of criminal proceedings. Moreover, such a rule would also provide clear guidance to the prosecutor and indeed protect prosecutors from inadvertent failures to disclose exculpatory information. Finally, a federal rule of criminal procedure mandating disclosure of such information – whether or not the information is requested by the defense – would ensure that the defense receives in a timely manner all exculpatory information in the government's possession.
The importance of the government's disclosure obligations cannot be overstated. Indeed, as articulated by the U.S. Supreme Court in Strickler v. Greene, 527 U.S. 263, 280-81 (1999):

> In Brady, this Court held "that the 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, irrespective of the good faith or bad faith of the prosecution." 373 U.S. [83, 87 (1963)]. We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, United States v. Agurs, 427 U.S. 97 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, United States v. Bagley, 473 U.S. 667, 676 (1985). Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id*. at 682; *see also* Kyles v. Whitley, 514 U.S. 419, 433-434 (1995). Moreover, the rule encompasses evidence "known only to police investigators and not to the prosecutor." *Id*. at 438. In order to comply with Brady, therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." Kyles, 514 U.S. at 437.
>
> These cases, together with earlier cases condemning the knowing use of perjured testimony, illustrate the special role played by the American prosecutor in the search for truth in criminal trials. Within the federal system, for example, we have said that the United States Attorney is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935).

In a decision issued today, the Supreme Court reiterated these principles in equally strong terms. Both the language used by the Supreme Court, and the fact that the Court was faced with yet another case raising important Brady issues, strongly countenance in favor of the Rule 16 amendment previously proposed by the Rules Committee:

---

questioned and brought to my attention. And I mean that.'" (quoting remarks by Attorney General Holder at a swearing-in ceremony)).

> Although the Due Process Clause of the Fourteenth Amendment, as interpreted by Brady, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations. *See* Kyles, 514 U.S. at 437 ('[T]he rule in Bagley (and, hence, in Brady) requires less of the prosecution than the ABA Standards for Criminal Justice Prosecution Function and Defense Function 3-3.11(a) (3d ed. 1993)"). *See also* ABA Model Rule of Professional Conduct 3.8(d) (2008) ("The prosecutor in a criminal case shall" "make timely disclosure to the defense of all evidence of information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal"). As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure. *See* Kyles, 514 U.S., at 439; U.S. v. Bagley, 473 U.S. 667, 711, n. 4 (1985) (STEVENS, J., dissenting); United States v. Agurs, 427 U.S. 97, 108 (1976).

Cone v. Bell, No. 07-1114, slip. op. at 21 n.15 (U.S. Apr. 28, 2009).

A federal rule of criminal procedure requiring all exculpatory evidence to be produced to the defense would eliminate the need to rely on a "prudent prosecutor" deciding to "err on the side of transparency," *id*., and would go a long way towards furthering "the search for the truth in criminal trials" and ensuring that "justice shall be done." Strickler, 527 U.S. at 281. I welcome the opportunity to discuss this issue further.

Respectfully,

Emmet G. Sullivan

cc: Members of the Advisory Committee on the Rules of Criminal Procedure (via facsimile)
The Honorable Eric H. Holder, Jr. (via facsimile)
Counsel of record in United States v. Theodore F. Stevens, Criminal Action No. 08-231 (EGS) (D.D.C.) (via ECF)

LAW OFFICES
WILLIAMS & CONNOLLY LLP
725 TWELTH STREET, N.W.
WASHINGTON, D.C. 20005-5901
(202) 434-5000
FAX (202) 434-5029

June 15, 2010

The Honorable Richard C. Tallman, Chair
Judicial Conference Advisory Committee
On the Rules of Criminal Procedure
Attn: Rules Committee Support Office
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, DC 20054

Re: Rule 16 of the Federal Rules of Criminal Procedure

Judge Tallman:

We write on behalf of the partners at our firm who represent federal criminal defendants. We support amending Rule 16 of the Federal Rules of Criminal Procedure to require the disclosure of all exculpatory information to the defense well in advance of trial. We strongly endorse the letter of Judge Emmet G. Sullivan dated April 28, 2009 recommending an amendment to Rule 16. We further endorse the specific recommendations of the American College of Trial Lawyers.[1]

Our firm represents criminal defendants in federal courts around the country, and a number of our lawyers received your recent invitation to participate in a survey regarding criminal discovery practices in federal district courts. We appreciate greatly your solicitation of input from defense lawyers, and we write to supplement that survey.

Lessons from United States v. Stevens. Our firm was defense counsel in United States v. Stevens.[2] The government's failure to provide exculpatory information to the defense in that case is well-known and is the subject of two pending investigations. We expect the full measure of the government's discovery failures to emerge in due course from those investigations. For purposes of the debate over whether to amend Rule 16 to

[1] *See* "Proposed Codification of the Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16," 41 American Criminal Law Review 93 (Winter 2004); http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentFileID=62.

[2] Cr. No. 08-231 (D.D.C.)

provide that all exculpatory information be provided to the defense, there are two critical points to make.

First, the government argued in the Stevens case that its repeated failures to turn over information helpful to the defense were not actual Brady failures because the withheld information was "not material." This illustrates the problem with limiting the required disclosure of information to that which an appellate court would consider "material" in hindsight. Many prosecutors may be unlikely in the heat of battle to turn over information that they know will hurt their case so long as they can later argue "materiality" to justify their decision. Professor Locke E. Bowman of Northwestern Law School, an expert on wrongful convictions, stated at a recent panel discussion on criminal discovery at the Seventh Circuit Judicial Conference that we need a rule that makes it "impossible to rationalize non-disclosure." Eliminating the materiality limitation would make it impossible to rationalize non-disclosure. It should also lead to less pre-trial litigation over whether information is or is not "material."

The second critical point from the Stevens case as it relates to the debate over Rule 16 is that Judge Sullivan prevented the wrongful conviction of Senator Stevens by ordering that *all exculpatory information* be provided to the defense under Judge Paul L. Friedman's opinion in United States v. Safavian.[3] Judge Sullivan's frustrations with the government's failure to comply with his initial order led him to order that all grand jury transcripts and government interview memoranda be turned over to the defense. This led to revelations that the government had repeatedly made misrepresentations to the Court and eventually led to a whistleblower complaint from an FBI Agent, prosecutors being held in contempt, and the appointment of a new prosecution team. The new prosecution team uncovered information which was "material" under any conceivable definition of materiality. *It was Judge Sullivan's directive that all exculpatory information be provided to the defense that set off a chain of events that led to the production of concealed information that was undeniable "material."*

Experience in Other Cases. Our experience in other cases is difficult to describe, because from a defense lawyer's perspective, government discovery emerges from a black box. More often than not, the government has merely told us that it is aware of its obligations and will abide by them. There is no transparency in the process, and we simply do not know what ground rules the government has employed in deciding what to produce and what to withhold. We can say this: *when we have used logic and instinct to push for additional information, we have often uncovered information that was inarguably exculpatory but was withheld from prosecution despite the government's representations to the defense that it had already met its obligations.*

Because government discovery happens behind closed doors with no transparency, we cannot truly know (nor can the Department of Justice truly know in the absence of a complete review of its files) how many Brady violations we have experienced.[4] But it is

[3] 233 F.R.D. 12 (D.D.C. 2005).

[4] Even a complete review of government files may not resolve the matter, because the government rarely records its interviews of witnesses. We have experienced a number of cases where FBI agents have failed even to prepare a memorandum memorializing witness interviews notwithstanding an FBI regulation purportedly requiring them to do so.

reasonable to infer that beyond those Brady violations of which we have learned, there are additional violations about which we may never know. Chief Judge Mark L. Wolf of the District of Massachusetts has written this about Brady information: "Although some information of this nature comes to light by chance from time to time, it is reasonable to assume in other similar cases such information has never come to light."[5] Regardless of how frequently it has occurred, we know from our experience and other recent federal cases that is has happened far too often.[6]

We also know from the invention and use of DNA testing and the work of organizations such as the Innocence Project that scores of citizens have been wrongfully convicted in this country – many of whom were on death row at the time of their exonerations. A review of the Innocence Project website reveals that the failure of the prosecution to disclose exculpatory information contributed to many of these wrongful convictions.[7]

While no rule change can guaranty protection from dishonest prosecutors, an unambiguous rule requiring the disclosure of exculpatory information in time for the defense to use it effectively would make it less likely that innocent citizens will be convicted in the future.

Privacy and Witness Safety. We are aware that concerns have been raised about privacy and witness safety. These issues do not affect the majority of cases, and we do not believe that those cases that do present issues of privacy and witness safety should stand in the way of basic fairness in all cases. When these issues do arise, they can be addressed through protective orders, which are entered every day in civil cases.[8]

New Department of Justice Guidance. We are also aware that the Department of Justice has recently undertaken a major effort to promulgate guidance to its employees regarding discovery in criminal cases. We appreciate this effort. This is a step forward and is consistent with the leadership we have seen from this Attorney General and others in this Department of Justice.

That said, the Guidance does not go far enough. It expressly provides that it "is not intended to have the force of law or to create or confer any rights, privileges or benefits." Moreover, the new Guidance provides that the policy of providing broad and early discovery may be overridden by "countervailing concerns" such as "strategic

[5] United States v. Jones, 620 F.Supp.2d 163, 172 (D. Mass. 2009).

[6] In 2009 alone, there were at least four additional well-publicized federal cases beyond Stevens marred by major Brady violations. *See* United States v. Jones, *supra*; United States v. Shaygan, 661 F.Supp.2d 1289 (S.D. Fla. 2009); United States v. W.R. Grace, Case No. 9:05-cr-00007-DWM (D. Mont.) Doc. 1150 (4/28/09); United States v. Torres-Ramos, Case No. 2:06-cr-00656-SVW (C.D.Cal) Doc. 997 (9/18/09).

[7] *See* http://www.innocenceproject.org/understand/Government-Misconduct.php. Again, it is reasonable to assume that there are many more instances of withheld evidence than reflected on the Innocence Project website, because biological evidence susceptible to DNA testing is not available in most cases, including most federal cases.

[8] The Classified Information Procedures Act dictates how information affecting national security should be handled.

considerations that enhance the likelihood of achieving a just result in a particular case." What are defense lawyers or judges to do when next confronted with failures to provide exculpatory evidence to the defense? The Department's Guidance does not provide any rights at all. And assurances from current leadership of the Department that they will make sure that the Department's prosecutors do the right thing may be small comfort when the Department's current leaders are no longer in charge.[9]

Finally, the Department's Guidance ignored Formal Opinion 09-454 of the American Bar Association Standing Committee on Ethics and Professional Responsibility (July 8, 2009), which provides that all exculpatory information needs to be disclosed to the defense under Rule 3.8(d) of the ABA Model Rules of Professional Conduct. Rule 3.8(d) has been adopted in more jurisdictions, and the Committee's opinion reflects the view of the Bar that exculpatory information needs to be provided to the defense without a "materiality" limitation.

* * * * *

In the months since the Stevens case, people from all walks of life have told us that they have deep concerns that our system of justice is not fair. Professor James E. Coleman of the Duke University School of Law and Director of Duke's Wrongful Conviction Program, wrote this after the Attorney General moved to dismiss the Stevens case:

> Many of the people who will praise Mr. Holder for dropping the charges against Mr. Stevens will not care that the same kind of misconduct routinely taints the trials of those who are not rich, or famous, or well-connected, or well-regarded. Nor will they likely step back and learn from what happened to Mr. Stevens.

We must learn from what happened to Senator Stevens. Our system of criminal justice must be fair. And it must be perceived to be fair. Amending Rule 16 to provide that all exculpatory evidence be provided to the defense – with appropriate accommodations for privacy, witness safety and national security – would go a long way to restore our confidence and the public's confidence in our system of criminal justice.

We would be happy to provide further information and to answer any questions you may have.

Respectfully,

Brendan V. Sullivan, Jr. Robert M. Cary

[9] By way of another example of a problem with the Department's Guidance, the Guidance expressly endorses the use of summary letters as a substitute for providing source documents in certain situations. We received a letter purporting to summarize Brady information in the Stevens case that was chock-full of falsehoods. Judge Sullivan found that "the use of summaries is an opportunity for mischief and mistakes. . . ." *See* April 7, 2009 Hearing Transcript at 9. Moreover, it is impractical to use a summary from a prosecutor to impeach a witness, because that likely makes the prosecutor a witness.

cc: Honorable Mark L. Wolf
Chief Judge, U.S. District Court for the District of Massachusetts
Honorable Paul L. Friedman
Senior Judge, U.S. District Court for the District of Columbia
Honorable Emmet G. Sullivan
Judge, U.S. District Court for the District of Columbia
Professor James E. Coleman, Jr.
Duke University School of Law
Professor Locke E. Bowman
Northwestern University School of Law

9-5.000
ISSUES RELATED TO TRIALS AND OTHER COURT PROCEEDINGS

9-5.001 Policy Regarding Disclosure of Exculpatory and Impeachment Information

A. **Purpose.** Consistent with applicable federal statutes, rules, and case law, the policy set forth here is intended to promote regularity in disclosure practices, through the reasoned and guided exercise of prosecutorial judgment and discretion by attorneys for the government, with respect to the government's obligation both to disclose exculpatory and impeachment information to criminal defendants and to seek a just result in every case. The policy is intended to ensure timely disclosure of an appropriate scope of exculpatory and impeachment information so as to ensure that trials are fair. The policy however, recognizes that other interests, such as witness security and national security, are also critically important, see USAM 9-21.000, and that if disclosure prior to trial might jeopardize these interests, disclosure may be delayed or restricted (*e.g.* pursuant to the Classified Information Procedures Act). This policy is not a substitute for researching the legal issues that may arise in an individual case. Additionally, this policy does not alter or supersede the policy that requires prosecutors to disclose "substantial evidence that directly negates the guilt of a subject of the investigation" to the grand jury before seeking an indictment, see USAM 9-11.233.

B. **Constitutional obligation to ensure a fair trial and disclose material exculpatory and impeachment evidence.** Government disclosure of material exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial. Brady v. Maryland, 373 U.S. 83, 87 (1963); Giglio v. United States, 405 U.S. 150, 154 (1972). The law requires the disclosure of exculpatory and impeachment evidence when such evidence is material to guilt and punishment. Brady, 373 U.S. at 87; Giglio, 405 U.S. at 154. Because they are Constitutional obligations, Brady and Giglio evidence must be disclosed regardless of whether the defendant makes a request for exculpatory or impeachment evidence. Kyles v. Whitley, 514 U.S. 419, 432-33 (1995). Neither the Constitution nor this policy, however, creates a general discovery right for trial preparation or plea negotiations. U.S. v. Ruiz, 536 U.S. 622, 629 (2002); Weatherford V. Bursey, 429 U.S. 545, 559 (1977).

1. **Materiality and Admissibility.** Exculpatory and impeachment evidence is material to finding of guilt – and thus the Constitution requires

disclosure – when there is a reasonable probability that effective use of the evidence will result in an acquittal. United States v. Bagley, 475 U.S. 667, 676 (1985). Recognizing that it is sometimes difficult to assess the materiality of evidence before trial, prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence. Kyles, 514 U.S. at 439. While ordinarily, evidence that would not be admissible at trial need not be disclosed, this policy encourages prosecutors to err on the side of disclosure if admissibility is a close question.

2. **The prosecution team.** It is the obligation of the federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all the members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant. Kyles, 514 U.S. at 437.

C. **Disclosure of exculpatory and impeachment information beyond that which is constitutionally and legally required.** Department policy recognizes that a fair trial will often include examination of relevant exculpatory or impeachment information that is significantly probative if the issues before the court but that may not, on its own, result in an acquittal or, as is often colloquially expressed make the difference between guilt and innocence. As a result, this policy requires disclosure by prosecutors of information beyond that which is "material" to guilt as articulated in Kyles v. Whitley, 514 U.S. 419 (1995), and Strickler v. Greene, 527 U.S. 263, 280-81 (1999). The policy recognizes, however, that a trial should not involve consideration of information which is irrelevant or not significantly probative of the issues before the court and should not involve spurious issues or arguments which serve to divert the trial process from examining the genuine issues. Information that goes only to such matters does not advance the purpose of a trial and this subject to disclosure.

1. **Additional exculpatory information that must be disclosed.** A prosecutor must disclose information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime.

2. **Additional impeachment information that must be disclosed.** A prosecutor must disclose information that either casts a substantial doubt upon the accuracy of an evidence – including but not limited to witness testimony – the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence. This information must be disclosed regardless of whether it is likely to make the difference between conviction and acquittal of the defendant for a charged crime.

3. **Information.** Unlike the requirements of Brady and its progeny, which focus on evidence, the disclosure requirement of this section applies to

information regardless of whether the information is subject to disclosure would itself constitute admissible evidence.

4. **Cumulative impact of items of information.** While items of information viewed in isolation may not reasonably be seen as meeting the standards outlined in paragraphs 1 and 2 above, several items together can have such an effect. If this is the case, all such items must be disclosed.

D. **Timing of disclosure.** Due process requires that disclosure of exculpatory and impeachment evidence material to guilt or innocence be made in sufficient time to permit the defendant to make effective use of that information at trial. *See, e.g.* Weatherford v. Bursey, 429 U.S. 545, 559 (1997), United States v. Farley, 2 F.3d 645, 654 (6th Cir. 1993). In most cases, the disclosures required by the Constitution and this policy will be made in advance of trial.

1. **Exculpatory information.** Exculpatory information must be disclosed reasonably promptly after it is discovered. This policy recognizes that exculpatory information that includes classified or otherwise sensitive national security material may require certain protective measures that may cause disclosure to be delayed or restricted (*e.g*. pursuant to the Classified Information Procedures Act).

2. **Impeachment information.** Impeachment information, which depends on the prosecutor's decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently. In some cases, however, a prosecutor may have to balance the goals of early disclosure against other significant interest – such as witness security and national security – and may conclude that it is not appropriate to provide early disclosure. In such cases, required disclosures may be made at a time and in a manner consistent with the policy embodied in the Jencks Act, 18 U.S.C. §3500.

3. **Exculpatory or impeachment information casting doubt upon sentencing factors.** Exculpatory and impeachment information that casts doubt upon proof of an aggravating factor at sentencing, but that does not relate to proof of guilt, must be disclosed no later than the court's initial presentence investigation.

4. **Supervisory approval and notice to the defendant.** A prosecutor must obtain supervisory approval not to disclose impeachment information before trial or not to disclose exculpatory information reasonably promptly because of its classified nature. Upon such approval, notice must be provided to the defendant of the time and manner by which disclosure of the exculpatory or impeachment information will be made.

E. **Training.** All new federal prosecutors assigned to criminal matters and cases shall complete, within 12 months of employment, designated training through the Office of Legal Education on Brady/Giglio, and general disclosure obligations and policies. All federal prosecutors assigned to criminal matters and cases shall annually complete two hours of training on the government's disclosure

obligations and policies. This annual training shall be provided by the Office of Legal Education or, alternatively, any United States Attorney's Office of DOJ component.

F. **Comment.** This policy establishes guidelines for the exercise of judgment and discretion by attorneys for the government in determining what information to disclose to a criminal defendant pursuant to the government's disclosure obligation as set out in Brady v. Maryland and Giglio v. United States and its obligation to seek justice in every case. This policy also establishes training requirements for federal prosecutors in this area. As the Supreme Court has explained, disclosure is constitutionally required when evidence in the possession of the prosecutor or the prosecution team is material to guilt, innocence or punishment. Under this policy, the government's disclosure will exceed constitutional obligations. Thus, this policy encourages prosecutors to err on the side of disclosure in close questions of materiality and identifies standards that favor greater disclosure in advance of trial through the production of exculpatory information that is inconsistent with any element of any charged crime and impeachment information that casts a substantial doubt upon either the accuracy of any evidence the government intends to rely on to prove an element of any charged crime or that might have a significant bearing on the admissibility of prosecution evidence. This expanded disclosure policy, however, does not create a general right of discovery in criminal cases. Nor does it provide defendants with any additional rights or remedies. Where it is unclear whether evidence or information should be disclosed, prosecutors are encouraged to reveal such information to defendants or to the court for inspection *in camera* and, where applicable, seek a protective order from the Court. By doing so, prosecutors will ensure confidence in fair trials and verdicts. The United States Attorneys' Offices and Department components involved in criminal prosecutions are also encouraged to undertake periodic training for paralegals and to cooperate with and assist law enforcement agencies in providing education and training to agency personnel concerning the government's disclosure obligations and developments in relevant case law.

See also Criminal Resource Manual 1165 ("Guidance for Prosecutors Regarding Criminal Discovery")

[updated June 2010] [cited in USAM 9-5.100; Criminal Resource Manual 165]

9-5.001 Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy")

On December 9, 1996, the Attorney General issued a Policy regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy"). It applies to all Department of Justice Investigative agencies that are named in the Preface below. On October 19, 2006, the Attorney General amended this policy to conform to the Department's new policy regarding disclosure of exculpatory and impeachment information, *see* USAM 9-5.001. On July 11, 2014, the policy was revised in several respects, including with regard to the candid conversation between a prosecutor and an agency employee; the definition of impeachment information; record-keeping; information that must be provided to agencies; the transfer of Giglio-related information between prosecuting offices; and the

notification of a prosecuting office of Giglio issues when an agency employee is transferred to a new district.

In early 1997, the Secretary of the Treasury issued the 1996 version of the Giglio policy for all Treasury investigative agencies, and that policy remains in effect for Treasury investigative agencies.

Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy")

Preface: The following policy is established for: the Federal Bureau of Investigation, Drug Enforcement Administration, Bureau of Alcohol, Tobacco, Firearms and Explosives, the United States Marshals Service, the Department of Justice Office of the Inspector General, and the Department of Justice Office of Professional Responsibility ("the investigative agencies"). It addresses their disclosure of potential impeachment information to the United States Attorneys' Offices and Department of Justice litigating sections with authority to prosecute criminal cases ("Department of Justice prosecuting offices"). The purposes of this policy are to ensure that prosecutors receive sufficient information to meet their obligations under Giglio v. United States, 405 U.S. 150 (1972), and to ensure that trails are fair, while protecting the legitimate privacy rights of Government employees. NOTE: This policy is not intended to create or confer any rights, privileges, or benefits to prospective or actual witnesses or defendants. It is also not intended to have the force of law. United States v. Caceres, 440 U.S. 741 (1979).

The exact parameters of potential impeachment information are not easily determined. Potential impeachment information, however, has been generally defined as impeaching information which is material to the defense. *It also includes information that either casts a substantial doubt upon the accuracy of evidence – including witness testimony – the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence.* [FN1] This information may include but is not strictly limited to: (a) specific instances of conduct of a witness for the purpose of attacking the witness' credibility or character for truthfulness; (b) evidence in the form of opinion or reputation as to a witness' character for truthfulness; (c) prior inconsistent statements, and (d) information that may be used to suggest that a witness is biased.

> FN1. The italicized language was added in 2006 when USAM 9-5.001 was issued. It broadens the definition of "potential impeachment information."

This policy is not intended to replace the obligation of individual agency employees to inform prosecuting attorneys with whom they work of potential impeachment information prior to providing a sworn statement of testimony in any investigation or case. In the majority of investigations and cases in which agency employees may be affiants or witnesses, it is expected that the prosecuting attorney will be able to obtain all potential impeachment information directly from agency witnesses during the normal course of investigations and/or preparation for hearings or trials.

This policy is intended to provide guidance to prosecuting offices and investigative agencies regarding what potential impeachment information must be produced to the prosecuting office. It does not address the issue of what information the prosecution

must produce to the defense, or to the court for *ex parte, in camera review*. That determination can only be made after considering the potential impeachment information in light of the role of the agency witness, the facts of the case, and known or anticipated defenses, and after considering USAM 9-5.001, the January 4, 2010, Ogden Memo entitled, "Guidance for Prosecutors Regarding Criminal Discovery," the Federal Rules of Evidence, case law, local court rulings and judicial predisposition, and other relevant guidance, policy, regulations and laws.

Procedures for Disclosing Potential Impeachment Information Relating to Department of Justice Employees

1. **Obligation to Disclose Potential Impeachment Information.** It is expected that a prosecutor generally will be able to obtain all potential impeachment information directly from potential agency witnesses and/or affiants. Prosecutors should have a candid conversation with each potential investigative agency witness and/or affiant with whom they work regarding any on-duty or off-duty potential impeachment information, including information that may be known to the public but that should not in fact be the basis for impeachment in a federal criminal court proceeding, so that prosecuting attorneys can take appropriate action, be it producing material or taking steps to preclude its improper introduction into evidence. Likewise, each investigative agency employee is obligated to inform prosecutors with whom they work of potential impeachment information as early as possible prior to providing a sworn statement or testimony in any criminal investigation or case. Each investigative agency should ensure that its employees fulfill this obligation. Potential impeachment information that may relate directly to agency employee witnesses is defined more fully in paragraphs 5 and 6.

   Because there are times when an agency employee will be unaware that he or she is the subject of a pending investigation, prosecutors will receive the most comprehensive potential impeachment information by having both the candid conversation with the agency employee and by submitting a request for potential impeachment information to the investigative agency. This policy sets forth procedures for those in which a prosecutor decides to make such a request.

2. **Agency Officials.** Each of the investigative agencies shall designate an appropriate official(s) to serve as the point(s) of contact concerning Department of Justice employees' potential impeachment information ("the Agency Official"). Each Agency Official shall consult periodically with the relevant Requesting Officials about Supreme Court case law, circuit case law, and district court rulings and practice governing the definition and disclosure of impeachment information.

3. **Requesting Officials.** Each of the Department of Justice prosecuting offices shall designate one or more senior official(s) to serve as the point(s) of contact concerning potential impeaching information ("the Requesting Official"). Each Requesting Official shall inform the relevant Agency Officials about Supreme Court case law, circuit case law, and district court rulings and practice governing the definition and disclosure of impeachment information.

4. **Request to Agency Officials.** Upon initiation of a case or matter within the prosecuting office, or anytime thereafter, a prosecutor may request potential impeachment information relating to an agency employee association with that case or matter. The prosecutor shall notify the appropriate Requesting Official, who may request potential impeachment information related to the employee from the employing Agency Official(s) and the designated Agency Official(s) in the Department of Justice Office of the Inspector General ("DOJ-OIG") and the Department of Justice Office of Professional Responsibility ("DOJ-OPR").

5. **Disclosure of Potential Impeachment Information by Agency Employee and Agency**

(a) **Agency Review and Disclosure.** Upon receiving the request described in Paragraph 4, the Agency Official(s) from the employing agency, the DOJ-OIG, and the DOJ-OPR shall each conduct a review, in accordance with its respective agency plan, for potential impeachment information regarding the identified employee.

(b) **Agency Employee.** Before serving as an affiant or witness in any case or matter, the agency shall advise the prosecuting attorney(s) of the existence of any potential impeachment information. Potential impeachment information can include both on-duty and off-duty conduct. Prosecutors should be mindful that some potential impeachment information, including potential impeachment information stemming from off-duty conduct, may not be in agency files and may only be known to the agency employee.

(c) **Potential Impeachment Information.** Agency witnesses and Agency Officials should make broad disclosures of potential impeachment information to the prosecutor so that the prosecutor can assess the information in light of the role of the agency witness, the facts of the case, and known or anticipated defenses, among other variables. Potential impeachment information is defined in the Federal Rules of Evidence, case law, unpublished court rulings, and Department of Justice policy and guidance. Unless advised by a Giglio Requesting Official or prosecutor that case law or court rulings in the district require broader disclosures, potential impeachment information relating to agency employees may include, but is not limited to, the categories listed below:

i) any finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during a criminal, civil, or administrative inquiry or proceeding;

ii) any past or pending criminal charge brought against the employee;

iii) any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation;

iv) prior findings by a judge that an agency employee has testified untruthfully, made a knowing false statement in writing, engaged in an unlawful search or seizure, illegally obtained a confession, or engaged in other misconduct;

v) any misconduct finding or pending misconduct allegation that either casts a substantial doubt upon the accuracy of any evidence – including witness testimony – that the prosecutor intends to rely on to prove an element of any crime charged, or that might have a significant bearing on the admissibility of prosecution evidence. Accordingly, agencies and employees should disclose findings or allegations that relate to substantive violations concerning:

(1) failure to follow legal or agency requirements for the collection and handling of evidence, obtaining statements, recording communications, and obtaining consents to search or to record communications;

(2) failure to comply with agency procedures for supervising the activities of a cooperating person (C.I., C.S., CHS, etc.);

(3) failure to follow mandatory protocols with regard to the forensic analysis of evidence;

vii) information that reflects that the agency employee's ability to perceive and recall truth is impaired.

6. **Treatment of Allegations Which Are Unsubstantiated, Not Credible, or Have Resulted in Exoneration.** Allegations that cannot be substantiated, are not credible, or have resulted in the exoneration of an employee generally are not considered to be potential impeachment information. Upon request, such information which reflects upon the truthfulness or bias of the employee, to the extent maintained by the agency, will be provided to the prosecuting office under the following circumstances: (a) when the Requesting Official advises the Agency Official that it is required by a Court decision in the district where the investigation or case is being pursued; (b) when, on or after the effective date of this policy: (i) the allegation was made by a federal prosecutor, magistrate judge, or judge; or (ii) the allegation received publicity; (c) when the Requesting Official and the Agency Official agree that such disclosure is appropriate, based upon exceptional circumstances involving the nature of the case or the role of the agency witness; or (d) when disclosure is otherwise deemed appropriate by the agency. The agency is responsible for advising the prosecuting office, to the extent determined, whether any aforementioned allegation is unsubstantiated, not credible, or resulted in the employee's exoneration.

Note. With regard to allegations disclosed to a prosecuting office under this paragraph, the Giglio Requesting Official shall ensure that special care is taken to protect the confidentiality of such information and the privacy interests and reputations of agency employee-witnesses, in accordance with paragraphs 7(b) and 12 below.

7. **Prosecuting Office Records**

(a) **Information in System of Records**. For the purpose of ensuring that potential impeachment information is handled consistently within a prosecuting office, whenever potential impeachment information has been disclosed to the

court or defense, or when a decision has been made that an agency employee should not testify or serve as an affiant because of potential impeachment information, Department of Justice prosecuting offices may retain the following types of information in a Giglio system of records that can be accessed by the identity of the disclosing agency's employee:

i) the potential impeachment information;

ii) any written analysis of substantive communications, including legal advice, relating to that disclosure or decision; and

iii) any related pleadings or court orders.

In all other circumstances, prosecuting offices may keep any written legal analysis and substantive communications integral to the analysis, including legal advice relating to the decision, and a summary of the potential impeachment information in the Giglio system of records. The complete description of the potential impeachment information received from the Agency Official may be maintained in the criminal case file, but it may not be maintained in the Giglio system of records.

(b) **Secure Records with Limited Access.** Giglio Requesting Official(s) shall ensure that the information in their office's Giglio system of records is securely maintained and is accessible only upon a request to a Giglio Requesting Official or other senior management entrusted with this responsibility.

(c) **Duty to Update**. Before any prosecutor or Giglio Requesting Official uses or relies upon information included in the prosecuting office's Giglio system of records, the Requesting Official shall contact the relevant Agency Official(s) to determine the status of the potential impeachment information, the Agency Official(s) shall provide an update, and the Requesting Official shall update the prosecuting office's Giglio system of records to ensure that the information in the system of records is accurate.

8. **Information That Must Be Provided to Agencies.** When Agency Officials have provided impeachment information to a Requesting Official, the Requesting Official shall inform the employing Agency Official how the prosecuting office used the information. A circumstance may arise in which a prosecutor or Requesting Official learns of potential impeachment information relating to an agency employee from a source other than the agency – including but not limited to the agency employee. In such circumstance, the Requesting Official shall notify the Agency Official of such information and provide the Agency with a timely opportunity to meaningfully express its view regarding the information, as required by Paragraph 12. Regardless of the source of the information, the Requesting Official will:

(a) advise the employing Agency Official whether the employee provided an affidavit or testimony in a criminal proceeding or whether a decision was made not to use the employee as a witness or affiant because of potential impeachment issues;

(b) advise the employing Agency Official whether the information was disclosed to a Court or to the defense and, if so, whether the Court ruled that the information was admissible for use as impeachment information; and

(c) provide the employing Agency Official a copy of any related pleadings, and any judicial rulings, findings or comments relating to the use of the potential impeachment information.

The agency shall maintain judicial rulings and related pleadings on information that was disclosed to the Court or the defense in a manner that allows expeditious access upon the request of any Requesting Official.

9. **Continuing Duty to Disclose.** Each agency plan shall include provisions which will assure that, once a request for potential impeachment information has been made, the prosecuting office will be made aware of any additional potential impeachment information that arises after such request and during the pendency of the specific criminal case or investigation in which the employee is a potential witness or affiant. A prosecuting office which has made a request for potential impeachment information shall promptly notify the relevant agency when the specific criminal case or investigation for which the request was made ends in a judgement or declination, at which time the agency's duty to disclose shall cease.

10. **Providing Records and Information to Another Federal Prosecuting Office and Disposition of Records**

(a) **Distribution of Information to Another Federal Prosecuting Office with Notice to Agency Official(s).** If an agency employee has been transferred to another judicial district, or will testify or serve as an affiant in another judicial district, the prosecuting office in the originating district may provide any relevant information from its Giglio system of records relating to that agency employee to a Giglio Requesting Official in the new district. Moreover, nothing shall prohibit the Requesting Official in the new district from consulting with the Requesting Official in the former district about the manner in which the former district handled certain potential impeachment information.

The Giglio Requesting Official(s) providing the information shall notify the Agency Official(s) when distributing materials from its Giglio system of records to another prosecuting office, unless the information related to pending investigations or other incomplete matters, the status of which may have changed or been resolved favorably to the agency employee. With regard to pending investigations or other incomplete matters, to avoid the unnecessary disclosure of potentially derogatory information regarding an agency employee, the Giglio Requesting Official transferring the information shall notify the relevant Agency Official(s) before providing any information to another prosecuting office, except as noted in paragraph 13. The Agency Official(s) shall provide a prompt update. Whether notice is provided before or contemporaneously with the transfer, the Giglio Requesting Official shall also advise the Agency Official(s) what materials will be or have been distributed.

(b) **Duty to Update.** The Requesting Official in the new prosecuting office shall seek an update from Agency Official(s) as part of the Giglio analysis, and shall allow the agency the timely opportunity to fully express their views as required by Paragraph 12 and to provide and update. The Requesting Official in the new district is not bound by the former district's decisions regarding disclosure of information to the Court or defense, or use of the agency employee as a witness or affiant, and should review the former district's information along with other relevant information, when making an independent decision regarding disclosure to the Court or defense, use of the agency employee as a witness or affiant, and other related issues.

(c) **Removal of Records Upon Transfer, Reassignment, or Retirement of Employee.** Upon being notified that an agency employee has retired, been transferred to an office in another judicial district, or been reassigned to a position in which the employee will neither be an affiant nor witness, and subsequent to the resolution of any litigation pending in the prosecuting office in which the agency employee was involved, the Requesting Official shall remove from the prosecuting office's system of records any record that can be accessed by the identity of the employee. More specifically, the records must be removed at the conclusion of the direct and collateral appeals, if any, or within one year of the agency employee's retirement, transfer, or reassignment, whichever is later.

11. **Notification.** When an agency employee is transferred to a new district, the Agency shall ensure that a Requesting Official in the new district is advised of any potential impeachment material known to the Agency when the employee begins meaningful work on a case or matter within the prosecuting district or is reasonably anticipated to begin meaningful work on such a case or matter.

12. **Processing Office Plans to Implement Policy.** Each prosecuting office shall develop a plan to implement this policy. The plan shall include provisions that require: (a) communication by the prosecuting office with the Agency Official about the disclosure of potential impeachment information to the Court or defense counsel, including indicating what materials are being distributed, and allowing for the Agency to promptly update the information and express its views on whether certain information should be disclosed to the Court or defense counsel; (b) preserving the security and confidentiality of potential impeachment information through proper storage and restricted access within a prosecuting office; (c) when appropriate, seeking an *ex parte, in camera* review and decision by the Court regarding whether potential impeachment information must be disclosed to defense counsel; (d) when appropriate, seeking protective orders to limit the use and further dissemination of potential impeachment information by defense counsel; (e) allowing the relevant agencies the timely opportunity to fully express their views; and (f) information contained within the Giglio system of records may not be disclosed to persons outside of the Department of Justice except in a criminal case to which the United States is a party, and where otherwise authorized by law, regulation, or court order.

13. **Exception to Requirements Regarding Providing Notice to Agencies and Soliciting Agency Views.** In rare circumstances, a Giglio issue may arise

immediately before or during a court proceeding, and a prosecuting office may determine that it does not have time to solicit the agency's views or provide notice before it must take action on the matter. In such a case, the prosecuting office shall provide such notice or solicit agency views as promptly as the circumstances reasonably permit. Many situations of this type can be avoided by ensuring that prosecutors and agency employee witnesses have candid conversations and that prosecutors submit formal Giglio requests sufficiently in advance of any proceedings.

14. **Investigative Agency Plans to Implement Policy.** Each investigative agency shall develop a plan to effectuate this policy.

[updated July 2014] [cited in Criminal Resource Manual 165]

9.5110 Testimony of FBI Laboratory Examiners

In situations where FBI laboratory examinations have resulted in findings having no apparent probative value, yet defense counsel intends to subpoena the examiner to testify, the United States Attorney (USA) should inform defense counsel of the FBI's policy requiring payment of the examiner's travel expenses by defense counsel. The USA should also attempt to secure a stipulation concerning this testimony. This will avoid needless expenditures of time and money attendant to the appearance of the examiner in court.

[updated December 2006]

9-5.150 Authorization to Close Judicial Proceedings to Members of the Press and Public

Procedures and standards regarding the closure of judicial proceedings to members of the press and public are set forth in 28 C.F.R. §50.9. Government attorneys may not move for or consent to the closure of any criminal proceeding without the express prior authorization of the Deputy Attorney General.

There is a strong presumption against closing proceedings, and the Department foresees very few cases in which closure would be warranted. Only when a closed proceeding is plainly essential to the interests of justice should a Government attorney seek authorization from the Deputy Attorney General to move for or consent to closure of a judicial proceeding. Government attorneys should be mindful of the right of the public to attend judicial proceedings and the of the Department's[sic] obligation to the fair administration of justice.

Any request for authorization to move for or consent to closure, in addition to setting forth the relevant and procedural background, should include a detailed explanation of the need for closure, addressing each of the factors set forth in 28 C.F.R. §50.9(c)(1)-(6). In particular, the request should address in detail how an open proceeding will create a substantial likelihood of danger to specified individuals; how ongoing investigations will be jeopardized; or how a person's right to a fair trial will be impaired. The request must also consider reasonable alternatives to closure, such as delaying the proceeding, if possible, until the reasons justifying closure cease to exist. The applicable form is in the Criminal Resource Manual at 161.

Whenever authorization to close a judicial proceeding is being sought pursuant to 28 C.F.R. §50.9 in a case or matter under the supervision on the Criminal Division, the request should be directed to the Policy and Statutory Enforcement Unit, Office of Enforcement Operations. In cases or matters under the supervision of other divisions of the Department of Justice, the appropriate division should be contacted.

Because of the vital public interest in open judicial proceedings, every sixty days after termination of any proceeding closed pursuant to 28 C.F.R. §50.9, Government attorneys must review the records of the proceedings to determine whether the reasons for closure still apply. As soon as the justification for closure ceases to exist, the Government must file an appropriate motion to have the records unsealed. *See* 28 C.F.R. §50.9(f). While the Criminal Division monitors compliance with this requirement, it is the affirmative obligation of the U.S. Attorney's Offices to ensure that sealed records are reviewed in accordance with the regulation's requirements. U.S. Attorney's Offices should acknowledge this obligation in any request for authorization to move for or consent to closure.

[updated October 2008]

MEMORANDUM FOR DEPARTMENT PROSECUTORS

JUSTICE NEWS
MEMORANDUM FOR DEPARTMENT PROSECUTORS

Monday, January 4, 2010

FROM: David W. Ogden
Deputy Attorney General

SUBJECT: Guidance for Prosecutors Regarding Criminal Discovery

The discovery obligations of federal prosecutors are generally established by Federal Rules of Criminal Procedure 16 and 26.2, 18 U.S.C. §3500 (the Jencks Act), Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). In addition, the United States Attorney's Manual describes the Department's policy for disclosure of exculpatory and impeachment information. *See* USAM §9-5.001. In order to meet discovery obligations in a given case, Federal prosecutors must be familiar with these authorities and with the judicial interpretations and local rules that discuss or address the application of these authorities to particular facts. In addition, it is important for prosecutors to consider thoroughly how to meet their discovery obligations in each case. Toward that end, the Department has adopted the guidance for prosecutors regarding criminal discovery set forth below. The guidance is intended to establish a methodical approach to consideration of discovery obligations that prosecutors should follow in every case to avoid lapses that can result in consequences adverse to the Department's pursuit of justice. The guidance is subject to legal precedent, court orders, and local rules. It provides prospective guidance only and is not intended to have the force of law or to create or confer any rights, privileges, or benefits. *See* United States v. Caceres, 440 U.S. 741 (1979).

The guidance was developed at my request by a working group of experienced attorneys with expertise regarding criminal discovery issues that included attorneys from the Office of the Deputy Attorney General, the United States Attorneys' Offices, the Criminal Division, and the National Security Division. The working group received comment from the Office of the Attorney General, the Attorney General's Advisory Committee, the Criminal Chiefs Working Group, the Appellate Chiefs Working Group, the Professional Responsibility Advisory Office, and the Office of Professional Responsibility. The working group produced this consensus document intended to assist Department prosecutors to understand their obligations and to manage the discovery process.

By following the steps described below and being familiar with laws and policies regarding discovery obligations, prosecutors are more likely to meet all legal requirements, to make considered decisions about disclosures in a particular case, and to achieve a just result in every case. Prosecutors are reminded to consult with the designated criminal discovery coordinator in their office when they have questions about the scope of their discovery obligations. Rules of Professional Conduct in most jurisdictions also impose ethical obligations on prosecutors regarding discovery in criminal cases. Prosecutors are also reminded to contact the Professional Responsibility

Advisory Office when they have questions about those or any other ethical responsibilities.

Department of Justice Guidance for Prosecutors Regarding Criminal Discovery

Step 1: Gathering and Reviewing Discoverable Information[1]

A. Where to look The Prosecution Team

Department policy states:

It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant.

USAM §9-5.001. This search duty also extends to information prosecutors are required to disclose under Federal Rules of Criminal Procedure 16 and 26.2 and the Jencks Act.

In most cases, "the prosecution team" will include the agents and law enforcement officers within the relevant district working on the case. In multi-district investigations, investigations that include both Assistant United States Attorneys and prosecutors from a Department litigating component or other United States Attorney's Office (USAO), and parallel criminal and civil proceedings, this definition will necessarily be adjusted to fit the circumstances. In addition, in complex cases that involve parallel proceedings with regulatory agencies (SEC, FDIC, EPA, etc.), or other non-criminal investigative or intelligence agencies, the prosecutor should consider whether the relationship with the other agency is close enough to make it part of the prosecution team for discovery purposes.

Some factors to be considered in determining whether to review potentially discoverable information from another federal agency include:

- Whether the prosecutor and the agency conducted a joint investigation or shared resources related to investigating the case;
- Whether the agency played an active role in the prosecution, including conducting arrests or searches, interviewing witnesses, developing prosecutorial strategy, participating in targeting discussions, or otherwise acting as part of the prosecution team;
- Whether the prosecutor knows of and has access to discoverable information held by the agency;
- Whether the prosecutor has obtained other information and/or evidence from the agency;
- The degree to which information gathered by the prosecutor has been shared with the agency;

[1] For the purposes of this memorandum, discovery or discoverable information includes information required to be disclosed by Fed. R. Crim. P. 16 and 26.2, the Jencks Act, Brady, and Giglio, and additional information disclosable pursuant to USAM §9-5.001.

- Whether a member of an agency has been made a Special Assistant United States Attorney;
- The degree to which decisions have been made jointly regarding civil, criminal, or administrative charges, and
- The degree to which the interests of the parties in parallel proceedings diverge such that information gathered by one party is not relevant to the other party.

Many cases arise out of investigations conducted by multi-agency task forces or otherwise involving state law enforcement agencies. In such cases, prosecutors should consider (1) whether state or local agents are working on behalf of the prosecutor or are under the prosecutors[sic] control; (2) the extent to which state and federal governments are part of a team, are participating in a joint investigation, or are sharing resources; and (3) whether the prosecutor has ready access to the evidence. Courts will generally evaluate the role of a state or local law enforcement agency on a case-by-case basis. Therefore, prosecutors should make sure they understand the law in their circuit and their offices[sic] practice regarding discovery in cases in which a state or local agency participated in the investigation or on a task force that conducted the investigation.

Prosecutors are encouraged to err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes. Carefully considered efforts to locate discoverable information are more likely to avoid future litigation over Brady and Giglio issues and avoid surprises at trial.

Although the considerations set forth above generally apply in the context of national security investigations and prosecutions, special complexities arise in that context. Accordingly, the Department expects to issue additional guidance for such cases. Prosecutors should begin considering potential discovery obligations early in an investigation that has national security implications and should also carefully evaluate their discovery obligations prior to filing charges. This evaluation should consider circuit and district precedent and include consultation with national security experts in their own offices and in the National Security Division.

B. What to Review

To ensure that all discovery is disclosed on a timely basis, generally all potentially discoverable material within the custody or control of the prosecution team should be reviewed.[2] The review process should cover the following areas:

1. The Investigative Agency's Files: With respect to Department of Justice law enforcement agencies, with limited exceptions[3], the prosecutor should be granted access to the substantive case file and any other file or document the prosecutor has reason to believe may contain discoverable information related to

[2] How to conduct the review is discussed below.

[3] Exceptions to a prosecutors[sic] access to Department law enforcement agencies files are documented in agency policy, and may include, for example, access to a non-testifying sources files.

the matter being prosecuted.[4] Therefore, the prosecutor can personally review the file or documents or may choose to request production of potentially discoverable materials from the case agents. With respect to outside agencies, the prosecutor should request access to files and/or production of all potentially discoverable material. The investigative agency's entire investigative file, including documents such as FBI Electronic Communications (ECs), inserts, emails, etc. should be reviewed for discoverable information. If such information is contained in a document that the agency deems to be an "internal" document such as an email, an insert, an administrative document, or an EC, it may not be necessary to produce the internal document, but it will be necessary to produce all of the discoverable information contained in it. Prosecutors should also discuss with the investigative agency whether files from other investigations or non-investigative files such as confidential source files might contain discoverable information. Those additional files or relevant portions thereof should also be reviewed as necessary.

2. Confidential Informant (CI)/Witness (CW)/Human Source (CHS)/Source (CS) Files: The credibility of cooperating witnesses or informants will always be at issues if they testify during a trial. Therefore, prosecutors are entitled to access to the agency file for each testifying CI, CW, CHS, or CS. Those files should be reviewed for discoverable information and copies made of relevant portions for discovery purposes. The entire informant/source file, not just the portion relating to the current case, including all proffer, immunity and other agreements, validation assessments, payment information, and other potential witness impeachment information should be included within this review.

   If a prosecutor believes that the circumstances of the case warrant review of a non-testifying source's file, the prosecutor should follow the agency's procedures for requesting the review of such a file.

   Prosecutors should take steps to protect the non-discoverable, sensitive information found within a CI, CW, CHS, or CS file. Further, prosecutors should consider whether discovery obligations arising from the review of CI, CW, CHS, and CS files may be fully discharged while better protecting government or witness interests such as security or privacy via a summary letter to defense counsel rather than producing the record in its entirety.

   Prosecutors must always be mindful of security issues that may arise with respect to disclosures from confidential source files. Prior to disclosure, prosecutors should consult with the investigative agency to evaluate any such risks and to develop a strategy for addressing those risks or minimizing them as much as possible, consistent with discovery obligations.

3. Evidence and Information Gathered During the Investigation: Generally, all evidence and information gathered during the investigation should be reviewed, including anything obtained during searches or via subpoenas, etc. As discussed more fully below in Step 2, in cases involving a large volume of potentially

[4] Nothing in this guidance alters the Departments[sic] Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses contained in USAM §9-5.100.

discoverable information, prosecutors may discharge their disclosure obligations by choosing to make the voluminous information available to the defense.

4. Documents or Evidence Gathered by Civil Attorneys and/or Regulatory Agency in Parallel Civil Investigations: If a prosecutor has determined that a regulatory agency such as the SEC is a member of the prosecution team for purposes of defining discovery obligations, that agency's files should be reviewed. Of course, if a regulatory agency is not part of the prosecution team but is conducting an administrative investigation or proceeding involving the same subject matter as a criminal investigation, prosecutors may very well want to ensure that those files are reviewed not only to locate discoverable information but to locate inculpatory information that may advance the criminal case. Where there is an ongoing parallel civil proceeding in which Department civil attorneys are participating, such as a *qui tam* case, the civil case files should also be reviewed.

5. Substantive Case-Related Communications: "Substantive" case-related communications may contain discoverable information. Those communications that contain discoverable information should be maintained in the case file or otherwise preserved in a manner that associates them with the case or investigation. "Substantive" case-related communications are most likely to occur (1) among prosecutors and/or agents, (2) between prosecutors and/or agents and witnesses and/or victims, and (3) between victim-witness coordinators and witnesses and/or victims. Such communications may be memorialized in emails, memoranda, or notes. "Substantive" communications include factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or interactions with witnesses/victims, and factual issues relating to credibility. Communications involving case impressions or investigative or prosecutive strategies without more would not ordinarily be considered discoverable, but substantive case-related communications should be reviewed carefully to determine whether all or part of a communication (or the information contained therein) should be disclosed.

   Prosecutors should also remember that with few exceptions (*see, e.g.* Fed. R. Crim. P. 16(a)(1)(B)(ii)), the format of the information does not determine whether it is discoverable. For example, material exculpatory information that the prosecutor receives during a conversation with an agent or witness is no less discoverable than if that same information were contained in an email. When the discoverable information contained in an email or other communication is fully memorialized elsewhere, such as in a report of interview or other document(s), then the disclosure of the report of interview or other document(s) will ordinarily satisfy the disclosure obligation.

6. Potential Giglio Information Relating to Law Enforcement Witnesses: Prosecutors should have candid conversations with the federal agents with whom they work regarding any potential Giglio issues, and they should follow the procedure established in USAM §9-5.100 whenever necessary before calling the law enforcement employee as a witness. Prosecutors should be familiar with circuit and district court precedent and local practice regarding obtaining Giglio information from state and local law enforcement officers.

7. Potential Giglio Information Relating to Non-Law Enforcement Witnesses and Fed. R. Evid. 806 Declarants: All potential Giglio information known by or in the possession of the prosecution of team relating to non-law enforcement witnesses should be gathered and reviewed. That information includes, but is not limited to:

- Prior inconsistent statements (possibly including inconsistent attorney proffers, *see* United States v. Triumph Capital Group, 544 F.3d 149 (2d Cir. 2008))
- Statements or reports reflecting witness statement variations (see below)
- Benefits provided to witnesses including:
    - Dropped or reduced charges
    - Immunity
    - Expectations of downward departures or motions for reduction of sentence
    - Assistance in a state or local criminal proceeding
    - Considerations regarding forfeiture of assets
    - Stays of deportation or other immigration status considerations
    - S-Visas
    - Monetary benefits
    - Non-prosecution agreements
    - Letters to other law enforcement officials (*e.g.* state prosecutors, parole boards) setting forth the extent of a witness's assistance or making substantive recommendations on the witness's behalf
    - Relocation assistance
    - Consideration or benefits to culpable or at risk third-parties
- Other known conditions that could affect the witnesss[sic] bias such as:
    - Animosity toward defendant
    - Animosity toward a group of which the defendant is a member or with which the defendant is affiliated
    - Relationship with victim
    - Known but uncharged criminal conduct (that may provide an incentive to curry favor with a prosecutor)
- Prior act under Fed. R. Evid. 608
- Prior convictions under Fed. R. Evid. 609
- Known substance abuse or mental health issues or other issues that could affect the witness's ability to perceive and recall events

8. Information Obtained in Witness Interviews: Although not required by law, generally speaking, witness interviews[5] should be memorialized by the agent.[6] Agent and prosecutor notes and original recordings should be preserved, and prosecutors should confirm with agents that substantive interviews should be memorialized. When a prosecutor participates in an interview with an investigative agent, the prosecutor and

[5] Interview as used herein refers to a formal question and answer session with a potential witness conducted for the purpose of obtaining information pertinent to a matter or case. It does not include conversations with a potential witness for the purpose of scheduling or attending to other ministerial matters. Potential witnesses may provide substantive information outside of a formal interview, however. Substantive, case-related communications are addressed above.

[6] In those instances in which an interview was audio or video recorded, further memorialization will general not be necessary.

agent should discuss note-taking responsibilities and memorialization before the interview begins (unless the prosecutor and the agent have established an understanding through prior course of dealing). Whenever possible, prosecutors should not conduct an interview without an agent present to avoid the risk of making themselves a witness to a statement and being disqualified from handling the case if the statement becomes an issue. If exigent circumstances make it impossible to secure the presence of an agent during an interview, prosecutors should try to have another office employee present. Interview memoranda of witnesses expected to testify, and of individuals who provided relevant information but are not expected to testify, should be reviewed.

a. Witness Statement Variations and the Duty to Disclose: Some witnesses' statements will vary during the course of an interview or investigation. For example, they may initially deny involvement in criminal activity, and the information they provide may broaden or change considerably over the course of time, especially if there are a series of debriefings that occur over several days or weeks. Material variances in a witness's statements should be memorialized, even if they are within the same interview, and they should be provided to the defense as Giglio information.

b. Trial Preparation Meetings with Witnesses: Trial preparation meetings with witnesses generally need not be memorialized. However, prosecutors should be particularly attuned to new or inconsistent information disclosed by the witness during a pre-trial witness preparation session. New information that is exculpatory or impeachment information should be disclosed consistent with the provisions of USAM §9-5.001 even if the information is first disclosed in a witness preparation session. Similarly, if the new information represents a variance from the witness's prior statements, prosecutors should consider whether the memorialization and disclosure is necessary consistent with the provisions of subparagraph (a) above.

c. Agent Notes: Agent notes should be reviewed if there is a reason to believe that the notes are materially different from the memorandum, if a written memorandum was not prepared, if the precise words used by the witness are significant, or if the witness disputes the agent's account of the interview. Prosecutors should pay particular attention to agent notes generated during an interview of the defendant or an individual whose statement may be attributed to a corporate defendant. Such notes may contain information that must be disclosed pursuant to Fed. R. Crim. P. 16(a)(1)(A)-(C) or may themselves be discoverable under Fed. R. Crim. P. 16(a)(1)(B). *See, e.g.*, United States v. Clark, 385 F.3d 609, 619-20 (6th Cir. 2004) and United States v. Vallee, 380 F.Supp.2d 11, 12-14 (D. Mass. 2005).

Step 2: Conducting the Review

Having gathered the information described above, prosecutors must ensure that the material is reviewed to identify discoverable information. It would be preferable if prosecutors could review the information themselves in every case, but such review is not always feasible or necessary. The prosecutor is ultimately responsible for compliance with discovery obligations. Accordingly, the prosecutor should develop a process for review of pertinent information to ensure that discoverable information is identified. Because the responsibility for compliance with discovery obligations rests

with the prosecutor, the prosecutor's decision about how to conduct this review is controlling. This process may involve agents, paralegals, agency counsel, and computerized searches. Although prosecutors may delegate the process and set forth criteria for identifying *potentially* discoverable information, prosecutors should not delegate the disclosure determination itself. In cases involving voluminous evidence obtained from third parties, prosecutors should consider providing defense access to the voluminous documents to avoid the possibility that a well-intentioned review process nonetheless fails to identify material discoverable evidence. Such broad disclosure may not be feasible in national security cases involving classified information.

Step 3: Making the Disclosures

The Department's disclosure obligations are general set forth in Fed. R. Crim. P. 16 and 26.2, 18 U.S.C. §3500 (the Jencks Act), Brady and Giglio (collectively referred to herein as "discovery obligations"). Prosecutors must familiarize themselves with each of these provisions and controlling case law that interprets these provisions. In addition, prosecutors should be aware that Section 9-5.001 details the Department's policy regarding the disclosure of exculpatory and impeachment information and provides for broader disclosures than required by Brady and Giglio. Prosecutors are also encouraged to provide discovery broader and more comprehensive than the discovery obligations. If a prosecutor chooses this course, the defense should be advised that the prosecutor is electing to produce discovery beyond what is required under the circumstances of the case but is not committing to any discovery obligation beyond the discovery obligations set forth above.

A. Considerations Regarding the Scope and Timing of the Disclosures: Providing broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases. It also provides a margin of error in case the prosecutor's good faith determination of the scope of appropriate discovery is in error. Prosecutors are encouraged to provide broad and early discovery consistent with any countervailing considerations. But when considering providing discovery beyond that required by the discovery obligations or providing discovery sooner than required, prosecutors should always consider any appropriate countervailing concerns in the particular case, including, but not limited to: protecting victims and witnesses from harassment or intimidation; protecting the privacy interests of witnesses; protecting privileged information; protecting the integrity of ongoing investigations; protecting the trial from efforts of obstruction; protecting national security interests; investigative agency concerns; enhancing the likelihood of receiving reciprocal discovery by defendants; any applicable legal or evidentiary privileges; and other strategic considerations that enhance the likelihood of achieving a just result in a particular case. In most jurisdictions, reports of interview (ROIs) of testifying witnesses are not considered Jencks material unless the report reflects the state of the witness substantially verbatim or the witness has adopted it. The Working Group determined that practices differ among the USAOs and the components regarding disclosure of ROIs of testifying witnesses. Prosecutors should be familiar with and comply with the practice of their offices.

Prosecutors should never describe the discovery being provided as "open file." Even if the prosecutor intends to provide expansive discovery, it is always possible that something will be inadvertently omitted from production and the

prosecutor will then have unintentionally misrepresented the scope of materials provided. Furthermore, because the concept of the "file" is imprecise, such a representation exposes the prosecutor to broader disclosure requirements than intended or to sanction for failure to disclose documents, *e.g.* agent notes or internal memos, that the court may deem to have been part of the "file."

When the disclosure obligations are not clear or when the considerations above conflict with the discovery obligations, prosecutors may seek a protective order from the court addressing the scope, timing, and form of disclosures.

B. Timing: Exculpatory information, regardless of whether the information is memorialized, must be disclosed to the defendant reasonably promptly after discovery. Impeachment information, which depends on the prosecutor's decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently. *See* USAM §9-5.001. Section 9-5.001also notes, however, that witness security, national security, or other issues that may require that disclosures of impeachment information be made at a time and in a manner consistent with the policy embodied in the Jencks Act. Prosecutors should be attentive to controlling law in their circuit and district governing disclosure obligations at various stages of litigation, such as pre-trial hearings, guilty pleas, and sentencing.

Prosecutors should consult the local discovery rules for the district in which a case has been indicted. Many districts have broad, automatic discovery rules that require Rule 16 materials to be produced without a request by the defendant and within a specified time frame, unless a court order has been entered delaying discovery, as is common in complex cases. Prosecutors must comply with these local rules, applicable case law, and any final court order regarding discovery. In the absence of guidance from such local rules or court orders, prosecutors should consider making Rule 16 materials available as soon as reasonably practical but must make disclosure no later than a reasonable time before trial. In deciding when and in what format to provide discovery, prosecutors should always consider security concerns and the other factors set forth in subparagraph (A) above. Prosecutors should also ensure that they disclose Fed. R. Crim P. 16(1)(E) materials in a manner that triggers the reciprocal discovery obligations in Fed. R. Crim. P. 16(b)(1).

Discovery obligations are continuing, and prosecutors should always be alert to developments occurring up to and through trial of the case that may impact their discovery obligations and require disclosure of information that was previously not disclosed.

C. Form of Disclosure: There may instances when it is not advisable to turn over discoverable information in its original form, such as when the disclosure would create security concerns or when such information is contained in attorney notes, internal agency documents, confidential source documents, Suspicious Activity Reports, etc. If discoverable information is not provided in its original form and is instead provided in a letter to defense counsel, including particular language, where pertinent, prosecutors should take great care to ensure that the full scope of pertinent information is provided to the defendant.

Step 4: Making a Record

One of the most important steps in the discovery process is keeping good records regarding disclosures. Prosecutors should make a record of when and how information is disclosed or otherwise made available. While discovery matters are often the subject of litigation in criminal cases, keeping a record of the disclosures confines the litigation to substantive matters and avoids time-consuming disputes about what was disclosed. These records can also be critical when responding to petitions for post-conviction relief, which are often filed long after the trial of the case. Keeping accurate records of the evidence disclosed is no less important than the other steps discussed above, and poor records can negate all of the work that went into taking the first three steps.

Conclusion

Compliance with discovery obligations is important for a number of reasons. First and foremost, however, such compliance will facilitate a fair and just result in every case, which is the Department's singular goal in pursuing a criminal prosecution. This guidance does not and could not answer every discovery question because those obligations are often fact specific. However, prosecutors have at their disposal an array of resources intended to assist them in evaluating their discovery obligations including supervisors, discovery coordinators in each office, the Professional Responsibility Advisory Office, and online resources available on the Department's intranet website, not to mention the experienced career prosecutors throughout the Department. And, additional resources are being developed through efforts that will be overseen by a full-time discovery expert who will be detailed to Washington from the field. By evaluating discovery obligations pursuant to the methodical and thoughtful approach set forth in this guidance and taking advantage of available resources, prosecutors are more likely to meet their discovery obligations in every case and in so doing achieve a just and final result in every criminal prosecution. Thank you very much for your efforts to achieve those most important objectives.