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KYLES V. WHITLEY: AN OPPORTUNITY LOST?: AN EXAMINATION OF THE RULE OF DISCOVERY CONCERNING THE DISCLOSURE OF IMPEACHMENT MATERIAL CONTAINED IN PERSONNEL FILES OF TESTIFYING GOVERNMENT AGENTS IN FEDERAL CRIMINAL CASES

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The defendant was an "urban legend."[1] The authorities claimed that

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1. The reference to "urban legend" is not based upon any character or the storyline in the movie URBAN LEGEND. (TriStar Pictures, Inc. 1998). Moreover, the illustration set forth in the accompanying text is provided solely to explain how the discovery issue, that is the subject of this article may arise in a federal district court that has yet to adopt the rule governing the discovery of impeachment information in the personnel files of federal agents involved in a particular case that exists in the United States Court of Appeals for the Ninth Circuit. These rules and principles are discussed in the accompanying text. Accordingly, nothing herein is to be construed as an opinion of the author about the illustration provided or the individuals involved in the anecdote case. The author has the privilege of having regular contact with the attorneys and the court involved in the illustrative case. These individuals represent the best and brightest that the legal system offers. With these comments in mind, describing the defendant as an "urban legend" in the illustration provided herein is attributable to the case *United States v. Walker*, No. 96-CR-004 (E.D. Wis. 1996), where the Deputy United States Attorney called Defendant Walker an "urban legend." *See* Dave Daley, *Massive Drug Ring's Leader Gets Life Terms*, MILW. J. SENTINEL, Apr. 5, 1997, at 1A. Martin E. Kohler, Esq. was the attorney defending Jerry Walker in that case. The author was co-counsel with Martin Kohler and is a member of Kohler's law firm, Kohler & Hart LLP. No reference to the *Walker* case herein represents the opinion of Jerry Walker, Attorney Martin E. Kohler, or the law firm of Kohler & Hart LLP. All references to the *Walker* case are a matter of public record and found in the court file in the district court and the published

he conducted a reign of terror in the city for years until the government, after prior attempts, gathered enough evidence to bring him down. The government alleged that he was the leader of a continuing criminal enterprise (CCE) that involved itself in the sale of cocaine throughout the United States.[2] As in many drug conspiracy cases, most of the co-

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opinion *United States v. Coleman*, 1999 U.S App. LEXIS 12015. The case was extensively covered in the media. Those references are noted above and *infra*.

As noted *supra*, the labeling of Walker as an "urban legend" was not based upon any character or the story in the movie by the same name. References in the case law being confused with characters or storylines in the movies are not new. The Honorable Terrence T. Evans of the United States Court of Appeals for the Seventh Circuit, noted in *United States v. Senn*, 129 F.3d 886, 890 n.1 (7th Cir. 1997):

> When [the defendants] arrived in Jamaica they faced more difficulties. Because of hurricane damage, the fishing canal leading to the meeting place–"Rick's Cafe" n2–was too narrow to accommodate the "Yes I Am."
>
> n2 This "Rick's Cafe," unlike the famous "Rick's Cafe," was on water. Recall the lines:
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> Humphrey Bogart (Rick Blaine, the owner of "Rick's Cafe"): I came to Casablanca for the waters.
>
> Claude Rains (Capt. Louis Renault): The waters?
>
> What waters? We're in the desert!
>
> Bogart: I was misinformed.

Id.

2. *See* United States v. Walker, Crim. Action No. 96-CR-004, 1996 U.S. Dist. (E.D. Wis. 1996). Jerry Walker and his associates were charged in an eleven-count superseding indictment alleging violations of the Continuing Criminal Enterprise statute (CCE), 21 U.S.C. §§ 846 and 848, cocaine trafficking in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, and money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i). *See* Dave Daley, *Daytime Execution of Boy Began Drug King's Downfall*, MILW. J. SENTINEL, June 9, 1997, at 1A. These charges stemmed from a drug conspiracy in 1988 to 1995 in which Walker was the leader. Walker and two co-defendants were tried before a jury beginning on October 28, 1996. The government presented evidence describing drug busts at residences, the airport and controlled buys of cocaine on the streets of Milwaukee. *See id.* Moreover, co-conspirators testified about Walker's involvement in the conspiracy. *See id.* On November 14, 1996, a jury found that Walker was guilty on all counts. *See* Dave Daley, *Convicted Drug Lord Could Get Life Term*, MILW. J. SENTINEL, Nov. 15, 1996, at 1B. Walker was subsequently sentenced on April 4, 1997 to two life terms in prison as well as 240 years for the substantive drug dealing counts. At pre-sentencing, Walker objected to the sentence recommendation that he be sentenced in both the CCE count and the substantive predicate acts counts in violation of recent case law. The district court imposed the sentence on all counts. On appeal, the government and Walker conceded this error at law. The victory was

defendants cut a deal with the prosecutors.[3] In exchange for testifying against the kingpin, the government recommended to the federal district court judge that the cooperating defendants be sentenced far below what the federal sentencing guidelines dictated given their criminal history, offense conduct, and relevant conduct as members of the drug trafficking organization.[4] Accordingly, of the defendants indicted in this illustration, all but three plea bargained their cases on the condition that they testify against the kingpin, while the others avoided prosecution by agreeing to testify against him.[5]

During the course of the trial, one of the assistant United States attorneys prosecuting the case announced that he might have potentially "material" information that he might have to disclose to the defense.[6] The prosecutor told the district court judge that the genesis of the information was from the personnel file of one of the federal agents involved in the case and that he was aware of the fairly recent case,

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hollow; Walker still had a life sentence. *See* Daley, *supra* note 1.

3. *See id.*

4. *See id.* The United States Sentencing Guidelines provide for a reduction of sentence based upon substantial assistance provided by defendants in criminal cases. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1. Under section 5K1.1, federal district court judges can depart from the sentence range calculated by the Sentencing Guidelines matrix if a defendant has provided "substantial assistance in the investigation or prosecution of another person who has committed an offense." *Id.*

5. *See supra* note 1. Judge Jose Cabranes has critically discussed the federal sentencing guidelines in Kate Smith & Jose A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247 (1997); *see generally* Jose A. Cabranes, Editorial, *Incoherent Sentencing Guidelines*, WALL ST. J., Aug. 28, 1992, at A11.

6. There are constitutional and statutory rights to discovery in criminal cases. Under the Federal Rules of Criminal Procedure and case law, a defendant in a criminal case has the right to obtain what has been termed "material" information. FED. R. CRIM. P. 16(a)(1)(C). Moreover, under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the government is required to provide a defendant with exculpatory evidence within the government's control "where the evidence is material... either to guilt or to punishment," irrespective of the prosecutor's good or bad faith. Accordingly, impeachment evidence falls within the ambit of the *Brady* rule as evidence that is favorable to the accused. *See* United States v. Bagley, 473 U.S. 667, 676 (1985). Nondisclosure of exculpatory evidence, including impeachment evidence, violates a defendant's due process right to a fair trial. *See id.* at 675. Evidence is material to the defense if it is determined that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *See id.* at 682, 685; United States v. Hamilton, 107 F.3d 499, 509 (7th Cir. 1997); United States v. Kozinski, 16 F.3d 795, 818 (7th Cir. 1994). Thus, a "reasonable probability" has been defined as information sufficient to undermine confidence in the outcome. *See Bagley*, 473 U.S. at 682-85. Materiality is not satisfied, however, by "the mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial...." United States v. Agurs, 427 U.S. 97, 109-10 (1976). The discovery rules and standards that apply to federal criminal cases are more fully discussed *infra* in Part I of this article.

Kyles v. Whitley,[7] and requested that the trial court examine the information *in camera*.[8] The defense argued that if the prosecutor thought that the information was material, then it is and it should be disclosed at once.[9] The trial court ultimately decided to review the information *in camera*. After the district court reviewed the file, the court decided that the information was not material and not subject to disclosure by the government to the defendants.

This example, used only for illustrative purposes and making no judgment or comment about the case or any of the individuals involved, highlights the procedural conundrum that exists in the handling of marginal discovery issues in which varying local rules dictate outcomes. If these events had occurred in a federal district court included within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, the prosecutor would have been responsible for addressing this problem much sooner in the proceedings. As is more fully explained *infra*, case law from that federal circuit does not require that the

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7. 514 U.S. 419 (1995). Justice Souter, writing for the majority in the *Kyles* decision, noted that prosecutors have a broad responsibility to discover exculpatory evidence that may exist outside of their case file. Accordingly, prosecutors have an ongoing duty to learn of "any favorable evidence known to others acting on the government's behalf in the case, including the police." *Id.* at 437; *see also* Lis Wiehl, *Keeping the Files on File Keepers: When Prosecutors are Forced to Turn Over the Personnel Files of Agents to Defense Lawyers*, 72 WASH. L. REV. 73, 104 n.130 (1997); Cynthia L. Corcoran, Note, *Prosecutors Must Disclose Exculpatory Information When the Net Effect of the Suppressed Evidence Makes It Reasonably Probable that Disclosure Would Have Produced a Different Result*, 26 SETON HALL L. Rev. 832 (1996). Both of these articles, and others that are listed *infra*, provide a comprehensive discussion of the *Kyles* case and the implications of Justice Souter's opinion. Moreover, a discussion of the import of the *Kyles* opinion is discussed more fully *infra* in the context of disclosure of material evidence contained in the personnel files of agents and officers.

8. The United States attorney for the Eastern District of Wisconsin sought to invoke himself into the trial efforts of his deputy and assistant United States attorneys by testifying about the veracity of one of the government's investigative agents who testified in the *Walker* trial. *See* Dave Daley, *Federal Prosecutor, Drug Agent in Ugly Dispute*, MILW. J. SENTINEL, Jan. 5, 1997, at 2A; Dave Daley, *Schneider's Pressure on Witness Confirmed Agent Said U.S. Attorney Pushed Him on Complaint*, MILW. J. SENTINEL, Feb. 8, 1998, at 1A. The Honorable Rudolph T. Randa reviewed the information *in camera* and determined that it was neither relevant nor material. *Id.* Accordingly, the information was not disclosed to the defense during the trial, but came out in the media after the fact.

9. Attorneys filed a pretrial motion seeking material information contained in the personnel files of agents and officers involved in this illustrative case. That motion relied heavily upon *Kyles* and Ninth Circuit procedures which require disclosure of such information without the defendant having to demonstrate that the information is material. The motion was the first of its kind since *Kyles* was decided to be filed in the Eastern District of Wisconsin. The thought was that *Kyles* would broaden the scope of this type of discovery. It did not. Both the magistrate and the district court denied the defense request.

defendant make a showing of materiality upon making a request for the disclosure of information contained in an agent or officer's personnel file to be informed of such information by the prosecutor as part of the pretrial discovery process.[10] Simply asking for the information requires the government to undertake a review of the personnel files of agents and officers involved in the investigation to ascertain if there is potentially discoverable information.[11] The Seventh Circuit and some of its sister circuits, however, require that the defendant make a showing that the information is material to the defense in order to obtain information in an agent's or officer's personnel file.[12] Accordingly, this anomaly in the federal discovery standards has created an uneven field of play in federal district courts across the land.

On April 19, 1995, however, the United States Supreme Court may have provided the framework for the discovery of information contained in the personnel records of agents and officers investigating federal criminal cases when it released its decision in *Kyles v. Whitley*.[13] Members of the criminal defense bar hailed the decision as a watershed opinion that would expand the discovery rights of criminal defendants and impose a duty upon federal prosecutors to look beyond their case file to learn of any material information in the possession of cooperating law enforcement agencies that is discoverable in a given case.[14] Moreover, the academy seized upon the ruling by turning out law review articles discussing the importance of *Kyles* to federal criminal procedure and constitutional rights.[15] The idea is that the language provided in the *Kyles* case, while dicta, would be the touchstone from which the varying standards in the federal circuits governing the disclosure of information

10. *See* United States v. Henthorn, 931 F.2d 29, 31 (9th Cir. 1991) (The government has a duty to examine personnel files of those witnesses employed by the federal government and part of the investigation team expected to testify at trial upon a defendant's demand for the production of the information contained in those witness' files). *See also* Wiehl, *supra* note 7, at 75.

11. *See Henthorn*, 931 F.2d at 31.

12. *See* United States v. Driscoll, 970 F.2d 1472 (6th Cir. 1992); United States v. Andrus, 775 F.2d 825 (7th Cir. 1985); United States v. Navarro, 737 F.2d 625 (1984).

13. 514 U.S. 419 (1995). While the issue of discovery of personnel files is not discussed in the *Kyles* majority or dissenting opinions, the majority opinion provides a comprehensive history of the *Brady* rule, which serves as the foundation for discovery of material information contained in personnel files of government agents and officers, and includes profound language about a prosecutor's duty to search out discovery no matter where it exists, even if controlled by the police. *See id.* at 434-36.

14. *See* Wiehl, *supra* note 7, at 90-91.

15. *See* Wiehl, *supra* note 7; Howton, *infra* note 17; Corcoran, *supra* note 7; Hochman, *infra* note 17.

contained in the personnel files of agents and officers investigating a case would be unified in favor of the rule employed in the Ninth Circuit.[16]

While commentators have examined the language in the *Kyles* opinion and assessed its impact upon federal discovery practice,[17] and certain federal circuits have refined long standing discovery principles in light of the *Kyles* decision,[18] the Seventh Circuit has remained fairly silent in addressing whether *Kyles* has changed anything relative to the discovery of material or impeachment material contained in the personnel files of agents and officers.[19] Accordingly, the opportunity for expanding the scope of discovery in federal cases to include the production of information contained in the files of officers and agents involved in an investigation may be lost when examining the cases in the Seventh Circuit since the *Kyles* decision was released by the Supreme Court.

Why the fear of loss? While the language in *Kyles* serves as a conduit for the expansion of a defendant's rights to compel discovery of material information contained in the files of agents and officers involved in a particular case, we practitioners have failed, as of this writing, to utilize the language contained in the *Kyles* opinion, coupled with the Ninth Circuit's well-established procedure for the review and disclosure of such information, to expand the rule of discovery of information contained in the personnel files of agents and officers in the

16. *See* Wiehl, *supra* note 7, at 91-93.

17. *See* Wiehl, *supra* note 7; Corcoran, *supra* note 7; Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381 (1996); Ty Howton, *Supreme Court Review: Kyles v. Whitley: Death or Declaration?*, 86 J. CRIM. L. & CRIMINOLOGY 1461 (1996); Alicia M. Duff, Comment, *Constitutional Law—"Book 'em Danno"... on Second Thought?....: Supreme Court Clarifies When Prosecution Must Reveal Exculpatory Evidence—Kyles v. Whitley, 115 S. Ct. 1555 (1995)*, 30 SUFFOLK U. L. REV. 249 (1996); Robert Hochman, Comment, Brady v. Maryland *and the Search for the Truth in Criminal Trials*, 63 U. CHI. L. REV. 1673 (1996).

18. *See, e.g.*, United States v. Cuffie, 80 F.3d 514, 518 (D.C. Cir. 1996); Brewer v. Marshall, 119 F.3d 993, 1006 (1st Cir. 1997); United States v. Amiel, 95 F.3d 135, 145 (2d Cir. 1996); United States v. Pelullo, 105 F.3d 117, 123 (3d Cir. 1997); Hoke v. Netherland, 92 F.3d 1350, 1358 (4th Cir. 1996); United States v. Gonzales, 121 F.3d 928, 946 (5th Cir. 1997); United States v. Van Brocklin, 115 F.3d 587, 595 (8th Cir. 1997); Paradis v. Arave, 130 F.3d 385, 392-94 (9th Cir. 1997); Smith v. Secretary of New Mexico Dept. of Corrections, 50 F.3d 801, 834 (10th Cir. 1995); McMillan v. Johnson, 88 F.3d 1554, 1568-69 (11th Cir. 1996).

19. *See* United States v. Morris, 80 F.3d 1151, 1169 (7th Cir. 1996) (holding that there is no *Brady* violation when prosecution failed to disclose to the defense material information controlled by Office of Thrift Supervision, the Securities and Exchange Commission, and the Internal Revenue Service because prosecutor did not know about the material evidence and those agencies were not part of the investigative or prosecution teams).

Seventh Circuit. There remain, however, several legal bases supporting an expansion of the discovery rights of a defendant to obtain material information in the possession of agencies involved in the investigation of the case. These principles, when applied in conjunction with the language in the *Kyles* opinion, provide compelling support for the erosion of the current standard in the Seventh Circuit in favor of a broader standard that imposes a duty upon a prosecutor to undertake a review of the files in the possession of agencies involved in the investigation of the case to find material information that must be disclosed to the defendant.

This proposal is not novel. In fact, the existence of applicable rules in another federal circuit that differ from the Seventh Circuit drives this article. The Ninth Circuit precedents, which serve as the precursor to the powerful language utilized by Justice Souter in the *Kyles* opinion, justify the proposed broader standard of discovery for criminal defendants in the Seventh Circuit. Accordingly, the disparity of standards relating to what a defendant can demand and receive from an assistant United States attorney found among the federal circuits provides a compelling reason for the Supreme Court to revisit the principles set forth in *Kyles* as applied to the question of whether a prosecutor has an affirmative duty to inspect the files in the possession of the agencies investigating the case with the concomitant responsibility to turn over material information to the defendant.[20] That issue is not addressed here.

This Article, however, proposes that a broader standard of discovery of material information contained in agency files be adopted in the Seventh Circuit. While the argument provided is not exclusive, and at times illustrative, it is intended to reduce the legal arguments favoring the broader standard of discovery noted above to print in light of Seventh Circuit progeny. Thus, the Article is divided into four parts.

Part I briefly describes the core legal rules and principles governing discovery practice in federal criminal cases. Part II provides an overview of the conflicting rules in the United States Courts of Appeals for the Seventh and Ninth circuits respectively concerning the discovery of information contained in the personnel files of agents and officers. In the Ninth Circuit, no showing of materiality by the defense is required. Instead, the government bears the burden of reviewing the files to ascertain whether there is discoverable information contained in them. The Seventh Circuit employs a different rule to the same issue. Simply

20. *See* Wiehl, *supra* note 7, at 103-04.

stated, the Seventh Circuit rule requires that the defendant show that the information sought from those files is material to the defense. Part III describes the *Kyles v. Whitley* decision and how its language is of great importance to the proposed expanded discovery doctrine proposed in this article. Part IV sets forth legal bases supporting a broader discovery rule that imposes a duty upon prosecutors to review the files in the possession of investigating agencies to find material information that must be disclosed to defendants. Special attention is dedicated to the Ninth Circuit approach to the discovery principles relevant to this discussion.

This subject has been covered recently in the literature by several commentators. Accordingly, this Article does not attempt to reinvent the wheel. Instead, this paper pays homage to the literature and relies upon it to provide the infrastructure for the idea that this article advocates. This Article concludes that the Seventh Circuit should adopt the standard that exists in the Ninth Circuit concerning the discovery of information contained in the personnel files of agents and officers investigating a particular case. Significantly, the Article provides legal bases justifying the adoption of the Ninth Circuit rule governing the issue of discovery of agents' and officers' personnel files in the Seventh Circuit. Thus, this piece differs from the comprehensive treatment of the global subject of discovery of material information in such files that is found in the literature by focusing on first principles. This inquiry examines the legal bases favoring the Ninth Circuit rule over the present rule governing such discovery requests in the Seventh Circuit.[21]

21. Professor Wiehl's article, *supra* note 7, highlights the importance of the *Kyles* case and provides a comprehensive treatment of the history, development and modern application of the law governing the discovery of personnel files of agents and officers investigating a case. Moreover, Professor Wiehl provides various procedures for efficiently administering the review and disclosure of impeachment material contained in agents' files in federal criminal cases. *Id.* As noted in the accompanying text, this article differs from Professor Wiehl's article in that it provides the legal bases for the adoption of the Ninth Circuit's discovery rule in the Seventh Circuit. Accordingly, this article focuses on the inquiry: What legal bases justify the adoption of the Ninth Circuit approach in the Seventh Circuit?

I. ONCE OVER LIGHTLY: DISCOVERY IN FEDERAL CRIMINAL CASES[22]

A. *The Constitutional Framework of Discovery in Federal Criminal Cases*

Defendants in federal criminal cases enjoy no constitutional right to discovery.[23] However, federal courts have established rules that require disclosure to defendants in criminal proceedings of certain types of evidence so as to protect a defendant's right to due process under law. Principally, in *Brady v. Maryland*, the Supreme Court held that due process requires the prosecution to disclose evidence that is favorable to the defendant upon request when that evidence is material to guilt or punishment.[24] After *Brady* was decided, federal appellate courts

22. Several sources exist regarding the historical development, strategic bases, and rules governing discovery in federal criminal matters. The source with the most basic utility is the annual update published by the Georgetown Law Journal. *See Criminal Procedure Project*, 87 GEO. L.J. 1095, 1382-1414 (1999). In fact, this article utilizes the classification of constitutionally based and statutorily based discovery rules in the accompanying text. There are seminal criminal procedure treatises and law review articles that provide a comprehensive treatment of discovery in criminal cases. Examples include: WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 1 (4th ed. 1992); 2 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL (2d ed. 1982 & Supp. 1996); Jonathon M. Fredman, *Intelligence Agencies, Law Enforcement, and the Prosecution Team*, 16 YALE L. & POL'Y REV. 331 (1998); A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249 (1968); Hon. H. Lee Sarokin & William E. Zuckerman, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie this Presumption*, 43 RUTGERS L. REV. 1089 (1991); Carol S. Steiker, *Counter-Revolution in Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996); Steven Washawsky & Gregory D. Bassuk, *Discovery*, 84 GEO. L.J. 992 (1996); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984).

23. *See* Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

24. 373 U.S. 83. In *Brady*, the government failed to disclose a confession obtained from one of the defendant's accomplices after the defendant requested that the prosecution produce all statements made by co-defendants. Brady was granted a new trial because the disclosure was material on the question of punishment. *See id.* at 87-88. Interestingly, the Supreme Court held that a new trial was not justified because the concealed confession could not have been used to reduce the offense charged. *See id.* Significantly, the *Brady* decision represents an historical shift in the traditional context in which criminal cases were litigated. By virtue of requiring disclosure of evidence that was material to the issue of guilt or sentencing, the Supreme Court signaled its support of a criminal justice system designed to facilitate finding the truth by ensuring fair rules rather than a traditional adversarial system. *See* Hochman, *supra* note 17. *See also* William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U. L. Q. 1, 18 (1990); Barbara Allen Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1144 (1982). While the Supreme Court has not specifically declared that seeking the truth is the paramount goal of criminal procedure, four years after *Brady* was decided, Justice Fortas explained in *Giles v. Maryland*, "The State's obligation is not to convict, but to see that, so far as possible, truth emerges." 386 U.S. 66, 98

interpreted the constitutional discovery rule to mean that defendants in criminal cases were not entitled to discovery before the trial. Significantly, *Brady* violations are examined after the trial in post-conviction proceedings.[25] *Brady* and its progeny have established that the prosecutor's duty is to disclose material evidence whether or not the defendant makes a demand for such evidence.[26] The rule in *Brady* is not without limits.[27] A defendant must show that: the evidence was

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(1967). *But see Giles*, 386 U.S. at 117 (Harlan, J. dissenting) (arguing that there has been no change in the criminal procedure by adopting a rule requiring disclosure of evidence to the defense when the evidence is material to guilt or sentencing).

25. *See* Wiehl, *supra* note 7, at 79 n.13 (*citing* United States v. Moore, 439 F.2d 1107 (6th Cir. 1971); United States v. DeLeo, 422 F.2d 487 (1st Cir. 1970); United States v. Manhattan Brush Co., 38 F.R.D. 4 (S.D.N.Y. 1965)).

26. *See* United States v. Agurs, 427 U.S. 97, 107-11 (1976) (stating that a prosecutor's duty to disclose favorable evidence is governed by the materiality standard and not limited to situations where a defendant has requested the favorable evidence). For a discussion of materiality in this context *see* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 1.6, at 37 (1984); Babcock, *supra* note 24; Brennan, *supra* note 24; Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391 (1984); Hochman, *supra* note 17; Richard J. Oparil, *Making the Defendant's Case: How Much Assistance Must the Prosecutor Provide?*, 23 AM. CRIM. L. REV. 447 (1986); Emily D. Quinn, *Standards of Materiality Governing the Prosecutorial Duty to Disclose Evidence to the Defense*, 6 ALASKA L. REV. 147 (1989); Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, U. PA. L. REV. 1365 (1987); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987); Victor Bass, Comment, *Brady v. Maryland and the Prosecutor's Duty to Disclose*, 40 U. CHI. L. REV. 112 (1972); Sarah M. Bernstein, Note, *Fourteenth Amendment–Police Failure to Preserve Evidence and Erosion of the Due Process Right to a Fair Trial*, 80 J. CRIM. L. & CRIMINOLOGY 1256 (1990); Corcoran, *supra* note 7, at 832-36; Michael T. Fisher, Note, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process than the Bottom Line*, 88 COLUM. L. REV. 1298 (1988); Terrence J. Galligan, Comment, *The Prosecutor's Duty to Disclose Exculpatory Evidence after United States v. Bagley*, 1 GEO. J. LEGAL ETHICS 213 (1987); Stephen P. Jones, Note, *The Prosecutor's Constitutional Duty to Disclose Exculpatory Evidence*, 25 U. MEM. L. REV. 735 (1995); Nicholas A. Lambros, Note, *Conviction and Imprisonment Despite Nondisclosure of Evidence Favorable to the Accused by the Prosecution: Standard of Materiality Reconsidered*, 19 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 103 (1993); Willis C. Moore, Note, *Arizona v. Youngblood: Does the Criminal Defendant Lose His Right to Due Process When the State Loses Exculpatory Evidence?*, 5 TOURO L. REV. 309 (1989).

27. For instance, the government has no constitutional duty to disclose the identity of informants. *See* Roviaro v. United States, 353 U.S. 53 (1957). The prosecution does have an affirmative duty, however, to turn over information obtained from an informant that do not reveal the informant's identity. *See id.* at 60. The *Roviaro* court provided an exception to the rule of nondisclosure of the identity of an informant in the case where revelation is "relevant and helpful" to the defendant or "essential" to the outcome of the proceeding. *Id.* at 60-61. Thus, the government must disclose the identity of an informant who is a material witness or whose testimony is substantially relevant to the defense. *See id.* at 64-65. Depending on the federal district, close calls can be or must be decided by the trial court *in camera*. *Compare*

purposefully or inadvertently suppressed; the evidence is favorable to the defendant; and, the evidence is material to the issue of guilt or punishment.[28] Defendants who argue that their due process rights have been violated typically claim that the prosecutor failed to disclose material evidence in his or her possession, or the prosecutor failed to gather, or solicit from others, evidence that is potentially material to the defense.[29]

Of the two claims, the case law discussing the duty of the prosecutor to search for potentially material information not in his possession is, at best, in conflict with and, at worst, negligent regarding the Supreme Court pronouncements concerning disclosure of material evidence that is favorable to the defense.[30]

The prosecutor's duty to turn over favorable evidence under the *Brady* doctrine covers not only what has historically been classified as exculpatory evidence, but also information that the defendant could use to impeach government witnesses.[31] For example, if the prosecution

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United States v. Saa, 859 F.2d 1072-75 (2d Cir. 1988) (requiring *in camera* with informant with defendant's counsel present notwithstanding safety risk to informant when information potentially material to defense), *with* United States v. Danovaro, 877 F.2d 583, 588-89 (7th Cir. 1989) (stating that trial court may conduct *in camera* review of information or material prosecutor failed to include in affidavit to protect informant's safety to determine if nondisclosure would protect the informant's safety).

28. *See* Moore v. Illinois, 408 U.S. 786, 794-95 (1972).

29. *See* Hochman, *supra* note 17 at 1676 (categorizing *Brady* claims as either "Classic Brady" or "Search Brady" claims). These classifications are derived from case law. *See* United States v. Brooks, 966 F.2d 1500, 1502 (D.C. Cir. 1992) (distinguishing between exculpatory evidence and sources to obtain exculpatory evidence).

30. *See, e.g.*, United States v. Escobar, 842 F. Supp. 1519, 1530 (E.D.N.Y. 1994) (stating that "the prosecutor is not responsible for knowing what is in the files of other agencies"); United States v. Anderson, 25 F.3d 563, 569 (7th Cir. 1994) (rejecting argument that prosecutor has duty to discover exculpatory evidence not in his possession).

31. *See* Giglio v. United States, 405 U.S. 150, 154 (1972). In *Giglio*, the defendant was convicted of transferring forged money orders. After the trial, Giglio discovered evidence that the government had failed to inform him that a co-conspirator had been promised leniency by the prosecutor who handled the grand jury proceedings. The co-conspirator was granted immunity and was the only witness to the crime. *See id.* at 150-51. The prosecutor who tried the case, however, did not know of the grant of immunity by the government. Accordingly, the prosecutor did not tell the defendant before trial about the agreement. The Supreme Court reversed the conviction, finding that because the government's case depended in substantial part upon the co-conspirator's testimony, the jury should have learned about the promise of immunity in assessing the co-conspirator's credibility. *Id.* at 154-55. A close reading of the case suggests that the Court's analysis is result-driven because there is little analysis, other than references to agency law, that the prosecutor should have disclosed a fact of which he had no knowledge. *See* Hochman, *supra note* 17, at 1677 (analyzing *Giglio*, 405 U.S. at 152-55). *See also* United States v. Bagley, 473 U.S. 667, 676-77 (1985) (stating impeachment evidence as well as exculpatory evidence falls within ambit of *Brady* disclosure

agrees to compensate a cooperating witness or make a favorable sentencing recommendation for a cooperating criminal defendant, then the government is obligated to disclose the details of any agreement to the defense because such details provide impeachment evidence.[32] There is no requirement, however, that federal prosecutors disclose irrelevant, inculpatory, or independently accessible evidence.[33] The government is not required to turn over evidence that the prosecutor could not reasonably expect to have knowledge of or access to.[34] Accordingly, failure to disclose requested evidence that is favorable to the defendant violates due process where the evidence is material to the determination of guilt or sentencing.[35] Moreover, the prosecution has a duty to learn of any favorable evidence to the defense known to other government agents including the police, even when the prosecutor does not actually possess *Brady* material.[36] Failure to disclose material evidence violates principles of due process which are the touchstone of procedural fairness embedded in the criminal justice system.[37]

As noted *supra*, the general constitutional rule requires the government to disclose evidence material to the defendant's guilt or potential sentence.[38] In the post-*Brady* line of cases, materiality is the touchstone from which many discovery issues have been evaluated in federal criminal cases. Accordingly, the Supreme Court established the

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requirement).

32. *See supra* note 31, and accompanying text.

33. *See* United States v. Morris, 80 F.3d 1151, 1170 (7th Cir. 1996) (holding no *Brady* violation in prosecution's failure to disclose information held by the Office of Thrift Supervision, SEC or IRS because the defendants were aware of the investigation by those agencies and could have sought the Brady information directly from those agencies).

34. *See* United States v. Rodriguez-Andrade, 62 F.3d 948, 952 (7th Cir. 1995) (holding that there was no *Brady* violation when prosecutor failed to turn over to the defendant an internal police report from informant's employer because prosecutor had no knowledge that the report existed).

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

36. *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995). In *Kyles*, the Supreme Court expanded the holding of *Giglio* to extend beyond the prosecutor's office. *Id.* at 434-41. The court held that the prosecutor is responsible for producing favorable evidence to the defense even when the police have not notified the prosecutor of the existence of material evidence. *See id.* Justice Souter wrote: "Any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials." *Id.* at 438. A fair reading suggests that *Kyles* imposes a duty upon the prosecutor to learn of favorable evidence not in his file.

37. *See Brady*, 373 U.S. at 87-90; United States v. Agurs, 427 U.S. 97, 110 (1976); United States v. Jackson, 780 F.2d 1305, 1311 n.4 (7th Cir. 1986).

38. *See Brady*, 373 U.S. at 87.

constitutional standard of material evidence in *United States v. Bagley*.[39] Evidence is material if it can be said that it would reasonably change the outcome of the case.[40]

Deciding how much is enough turns on showing more than a mere possibility that the undisclosed evidence would change the outcome of the trial or might have helped the defense for its impeachment value.[41] Satisfying the materiality standard, however, does not require that the disclosure of the suppressed evidence would result in acquittal if known to the jury or the court.[42] Viewed in that context, the Supreme Court has explained that to show the suppressed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[43]

A concomitant duty of preservation of evidence exists when the evidence is likely to be a substantial part of the defendant's defense. In *California v. Trombetta*,[44] the defendants argued that the breath samples collected by the police should be preserved to impeach the results of the Intoxilyzer test administered by the police.[45] The Supreme Court found

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39. 473 U.S. 667 (1985).

40. *See id.* at 682. Bagley filed a pretrial motion seeking discovery concerning information about the government's witnesses at trial. *See id.* at 669-70. The prosecutor failed to disclose the arrangements with the government's cooperating witnesses including information that the government agreed to pay two principal witnesses in exchange for their testimony against the defendant. *See id.* at 671. The defendant filed a motion for post-conviction relief seeking a new trial. The defendant argued that by failing to disclose the existence and terms of the cooperation agreement between the government and the principal witnesses, the prosecution violated his due process rights under *Brady v. Maryland*. *See id.* at 671-77. The federal appeals court for the Ninth Circuit reversed Bagley's conviction. *See id.* at 676-77. Moreover, the Ninth Circuit adopted a bright line rule holding that nondisclosure of impeachment evidence violates due process and will result in automatic reversal. *See id.* The Supreme Court reversed the Ninth Circuit's decision explaining that the government's failure to disclose both exculpatory and impeachment evidence is evaluated to determine if the evidence is material to the defense. *See id.* Accordingly, the Supreme Court remanded the case so that the lower court could determine whether the evidence concerning the agreement, if introduced at trial, would reasonably have produced a different result. *See id.* at 684.

41. *See Agurs*, 427 U.S. at 109-10.

42. *See* Kyles v. Whitley, 514 U.S. 419, 434 (1995).

43. *Id.* at 435. The Supreme Court viewed evidence showing that undisclosed evidence of two of the four eyewitnesses testifying at Kyles' trial were unreliable, coupled with scant physical evidence connecting Kyles to the murder and conflicting descriptions by witnesses of the assailant, and evidence that the state's law enforcement witness was less than candid about the veracity of the evidence against Kyles, was sufficient grounds to find that there could be no reasonable confidence in the outcome of the verdict finding Kyles guilty. *See id.* at 454.

44. 467 U.S. 479 (1984).

45. *See id.* at 483.

that such evidence was of low probative value, but explained that the prosecution has a duty to preserve evidence that has exculpatory value that is apparent before its destruction and which is the type of evidence that the defendant could not obtain by other means.[46] Even in a case where the police destroy potentially exculpatory evidence, the defendant must show that the police acted in bad faith in failing to preserve the favorable evidence in order to claim that her due process rights were violated.[47]

B. The Statutory Framework of Discovery in Federal Criminal Cases

There are several statutory provisions dictating disclosure of discovery in federal criminal cases. Federal prosecutors are required by Rules 12.1, 16, and 26.2 of the Federal Rules of Criminal Procedure to disclose information, in addition to the constitutional disclosure requirements discussed *supra*, upon a defendant's demand. For instance, Rule 16 of the Federal Rules of Criminal Procedure provides that a defendant is entitled to discovery of his own statements made to the police, proof of his prior criminal record, documents and objects collected by the police relating to the investigation, scientific testing results and reports, and prosecution expert information that serves as the foundation for testimony at trial.[48] Moreover, the government must disclose material evidence that the defendant would deem material to the preparation of the case, as well as evidence that the prosecutor intends to introduce at trial as evidence-in-chief.[49] The government is not required, however, to produce confidential internal documents, memoranda, and reports prepared by government agents in the

46. *See id.* at 489. The court identified alternative methods of challenging the Intoxilyzer test and results. *See id.* at 490.

47. *See* Arizona v. Youngblood, 488 U.S. 51 (1988). In that case, the government destroyed semen samples from a rape victim's body and clothing pursuant to the rape kit protocol administered by medical officials because the laboratory tests found no blood or conclusive semen evidence on the clothing. The victim's clothing had not been refrigerated, which is required to obtain scientifically valid findings for the presence and attribution of semen on clothing. *See id.* at 53-54. Youngblood argued that the victim mistakenly identified him as the assailant. Accordingly, the destruction of the laboratory tests eliminated evidence that Youngblood could have used to argue to the jury that there was no physical evidence linking him to the rape. *See id.* at 54-55. The Supreme Court upheld the conviction. *See id.* at 58. The court held that because there was no evidence showing that the police acted in bad faith in the destruction of the negative evidence, the defendant failed to establish a violation of his due process rights. *See id.*

48. *See* FED. R. CRIM. P. 16(a)(1)(A)-(E).

49. *See* FED. R. CRIM. P. 16(a)(1)(D).

investigation and evaluation of the case.[50] Moreover, the government does not have to produce statements made by government witnesses except as required by the Jencks Act.[51] Rule 26.2 of the Federal Rules of Criminal Procedure incorporates the requirements of the Jencks Act into the rules of procedure, but also expands the dictates of the Jencks Act to include the government's right of discovery of the pretrial statements of defense witnesses, as well as the defendant's right to obtain the pretrial hearing testimony of government witnesses.[52]

Specifically, Rule 16(a)(1)(C) of the Federal Rules of Criminal Procedure provides:

> Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.[53]

It is important to note that Rule 16(a)(1)(C) of the Federal Rules of Criminal Procedure covers the discovery of evidence that the government does not necessarily intend to introduce at trial, but is nevertheless material evidence for the defense.[54]

Under Rule 12.1 of the Federal Rules of Criminal Procedure, the defense is required to furnish the government with a written statement concerning whether the defendant intends to offer an alibi defense at trial.[55] If the defense, in turn, files a written statement that it intends to introduce an alibi defense, the government has a mutual and continuing obligation to file a written statement listing the witnesses it intends to

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50. *See* FED. R. CRIM. P. 16(a)(2).

51. *See id.* Under the Jencks Act, the prosecutor must disclose a government witness' pretrial statements after the witness has testified on direct examination at trial as long as the government is in possession of such statement and the statement relates to the testimony provided by the witness. *See* 18 U.S.C. § 3500 (1994).

52. *See* FED. R. CRIM. P. 26.2; 26.2(g).

53. FED. R. CRIM. P. 16(a)(1)(C).

54. *See* Wiehl, *supra note* 7, at 76 n.3. Accordingly, a defendant who seeks discovery under the federal rules has the burden to show that the information sought is material to his defense. *See id.* (citing 2 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE, 254, 266-67 (2d ed. 1982 & Supp. 1996)).

55. *See* FED. R. CRIM. P. 12.1.

call to rebut the alibi defense.[56]

II. CONFLICTING RULES GOVERNING THE DISCOVERY OF AGENTS' AND OFFICERS' PERSONNEL FILES

A. Overview

A review of the case law and academic literature reveals that the law governing the discovery of information contained in the personnel files of agents and officers is fraught with inconsistencies.[57] There are, however, two rules federal courts have applied. A number of federal circuits, including the Seventh Circuit, require that a defendant in a criminal case make an offer of proof that the agent's personnel file will provide evidence that can materially impeach that agent before the district court will order the prosecutor to produce the file for an *in camera* review for information that should be turned over to the defense.[58] The Ninth Circuit, however, has a rule that once a defendant makes a discovery demand for an agent's personnel file, the government is obligated to review the agent's file for impeachment material.[59] These rules are discussed in more detail below.

The competing rules outlined above were derived from the principles described in Part I of the article *supra*. The first case to deal with the discovery of an agent's personnel file, *United States v. Deutsch*, held that the defendant was entitled to receive the information when it was shown that the witness involved, a postal worker, was the government's key witness, and the defendant made a sufficient record justifying the need to review the witness' personnel file.[60] Conversely, the Tenth Circuit, in *United States v. Muse*, upheld the district court's decision denying the defendant's discovery motion for the production of the personnel files of the agents who were expected to testify against the

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56. *See id.* at 12.1(b).

57. *See* Wiehl, *supra* note 7, at 76-77 (discussing split of authority that exists in the federal circuits).

58. *See id.* (*citing* United States v. Valentine, 100 F.3d 1209 (6th Cir. 1995); United States v. Driscoll, 970 F.2d 1472 (6th Cir. 1992); United States v. Andrus, 775 F.2d 825 (7th Cir. 1985); United States v. Navarro, 737 F.2d 625 (7th Cir. 1984); United States v. Meros, 866 F.2d 1304 (11th Cir. 1989)).

59. *See id.*

60. 475 F.2d 55, 57-58 (5th Cir. 1973). It is important to note that the Fifth Circuit did not create a rule in the case requiring the defense to make a showing of materiality before triggering a prosecutor's duty to inspect the personnel file of agents and officers. *See* Wiehl, *supra* note 7, at 80.

defendant at trial, but reiterated the principle that the prosecutor is obligated to turn over impeachment material.[61] Moreover, certain federal district courts considered this type of discovery issue and uniformly denied the defense requests for production of personnel files.[62]

B. The Ninth Circuit Rule

In 1984, the Ninth Circuit decided, in *United States v. Cadet*, that the prosecutor must collect and give the personnel records to the district court for an *in camera* inspection for impeachment material.[63] The prosecutor argued that the defense must make a showing of materiality before discovering personnel records of testifying agents.[64] The defense argued that the materials were discoverable based upon a theory of outrageous government conduct and entrapment defense.[65] The appellate panel reasoned that the duty to review the personnel files for *Brady* material needed no court order to be in accord with due process, but rather once the defendant requested the material, the duty of inspection was triggered.[66] Accordingly, the *Cadet* decision provides that the defendant is not required to show materiality of the personnel files to require the prosecutor to review the files for *Brady* material.[67]

Seven years after *Cadet* was decided, the Ninth Circuit held, in *United States v. Henthorn*, that when a defendant in a federal criminal case requests impeachment material from the personnel files from government agents who will testify at trial, the prosecutor has a duty to examine those files for evidence that is material to the defense.[68]

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61. 708 F.2d 513, 516-17 (10th Cir. 1983). The court left open the question of whether the defendant bears the burden of showing the materiality of the information contained in a personnel file, and whether the prosecutor has a duty to examine personnel files of agents to find impeachment material. *See* Wiehl, *supra* note 7, at 81 n.23.

62. *See* Wiehl, *supra* note 7, at 81 (*citing* United States v. Boffa, 513 F. Supp. 444, 501 (D. Del. 1980); United States v. Akers, 374 A.2d 874 (D.C. 1977); State v. Butts, 630 S.W.2d 37 (Tenn. Crim. App. 1982)).

63. 727 F.2d 1453 (9th Cir. 1984).

64. *See id.*

65. *See id.*

66. *See id.* at 1467-70.

67. *See id.* at 1467-68. *See also* Wiehl, *supra* note 7, at 83.

68. *See* United States v. Henthorn, 931 F.2d 29, 31 (9th Cir. 1991). Henthorn was charged and convicted of conspiracy to import, possess, and distribute cocaine, as well as aiding racketeering activities of interstate enterprises. He filed a pretrial discovery motion requesting *Brady* material housed in the personnel files of agents who would testify at his trial. The prosecutor responded to the motion by arguing that he had no duty to examine those files because Henthorn had not shown how any information contained in the personnel

Accordingly, the *Henthorn* court held that the defendant does not have to make a showing of materiality to force the prosecutor to examine personnel files for *Brady* material. Once the defendant requests such information, the prosecutor must examine testifying agents' personnel files for *Brady* material.[69] The Ninth Circuit panel in *Henthorn* determined that the government's position that the defendant had to make a prior showing of materiality before being entitled to receive information that was clearly material and have material that was questionable reviewed *in camera* was incorrect in light of the court's precedent in *Cadet*.[70] Moreover, the court reasoned that the prosecutor would not be able to satisfy its obligation of turning over *Brady* material if she did not review sources of information like personnel files.[71]

Following the decision in *Henthorn,* prosecutors and district courts within the Ninth Circuit struggled with the issue of which government official was responsible for reviewing testifying agents' personnel files.[72] While the opinions in both *Cadet* and *Henthorn* may imply that it was the prosecutor's responsibility to examine the personnel files of testifying government agents, those cases did not decide the issue directly. Moreover, privacy considerations regarding personnel files created real and complex logistical problems in agency-to-agency disclosure of such files.[73] Accordingly, prosecutors experienced substantial problems in satisfying their duty under *Cadet* and *Henthorn,* while navigating the problems associated with obtaining and reviewing privileged files from agencies outside of the United States attorney's office.[74]

The Ninth Circuit began its efforts to address this issue in *United*

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files was material to his defense. The trial court agreed with the government's position and concluded, in denying Henthorn's discovery motion, that the defendant failed to identify "specific wrongdoing" that would entitle him to have the prosecutor obtain information from the personnel files and have that information reviewed *in camera* by the court. *See id.* at 29-30. *See also* Wiehl, *supra* note 7, at 85-86. After conviction at his jury trial, Henthorn filed a pro se appeal to the Ninth Circuit. He included no precedent supporting his claim that he was entitled to discovery of testifying agents' personnel files. Instead, the government's response brief included the citation to the *Cadet* case, which was utilized by the majority in *Henthorn* to make its bright line pronouncement that the defendant's request is enough to trigger the prosecutor's duty to examine the personnel files of testifying agents and officers for *Brady* material. *See id.* at 86-87.

69. *See* Wiehl, *supra* note 7, at 85 (citing *Henthorn*, 931 F.2d at 31).

70. *See Henthorn*, 931 F.2d at 31.

71. *See id.*

72. *See* Wiehl, *supra* note 7, at 90.

73. *See id.* at 87-89.

74. *See id.* at 87-89.

States v. Dominguez-Villa.[75] In that case, the trial court ordered that it would exclude the testimony of government agents at trial unless the agents' respective agency counsel and department heads reviewed their personnel files for impeachment material.[76] The government appealed the district court's decision. In reversing the decision of the trial court, the Ninth Circuit held that the trial court had exceeded its authority when it mandated that agency counsel and department heads review the personnel files of testifying agents because the district court does not have supervisory powers over the executive branch of the federal government, and therefore could not order that certain executive branch officials conduct the reviews.[77]

The year after the *Dominguez-Villa* case was decided, the Ninth Circuit released its opinion in *United States v. Jennings*, in which the court reversed the trial court's order that the prosecutor personally review the personnel files of investigating agents for impeachment material.[78] The *Jennings* court ruled that the trial court exceeded its authority when it ordered that the prosecutor personally review personnel files, but reaffirmed the precedent established in *Henthorn* dictating that prosecutors are responsible for learning of *Brady* material.[79] Accordingly, the panel tailored its opinion to take account of the holding in *Dominguez-Villa* that the trial court lacked authority to direct the manner in which the prosecutor fulfilled her duty to learn of *Brady* material contained in the personnel files of investigating agents, while maintaining the standard that the prosecutor remained responsible for learning of impeachment material.[80]

While *Henthorn* and its progeny established that federal prosecutors have a duty to learn of impeachment material and either turn the information over to the defense or have the trial court examine close calls *in camera*, the sagacity of these opinions is limited because nowhere in these rulings did the Ninth Circuit explain who was to review personnel files of investigating agents for purposes of locating *Brady* material.[81]

That question remained when the United States Supreme Court

75. 954 F.2d 562 (9th Cir. 1992).
76. *See id.*
77. *See id.* at 565.
78. United States v. Jennings, 960 F.2d 1488 (9th Cir. 1992).
79. *See id.* at 1491-92.
80. *See id.*
81. *See* Wiehl, *supra* note 7, at 93.

decided *Kyles v. Whitley*.[82] As discussed more fully *infra*, the Supreme Court ruled that the prosecutor has a non-delegable duty to learn of impeachment material even if that information is in the possession of the police.[83] While *Kyles* did not deal with the issue of the discovery of information contained in the personnel files of testifying agents, the *Kyles* opinion perhaps expanded the prosecutor's *Brady* responsibilities. Based upon the strength of the *Kyles* opinion regarding a prosecutor's non-delegable duty to learn of impeachment material even if he is not in possession of files or other material that may reveal *Brady* material, a federal district court judge in the Ninth Circuit ruled in *United States v. Lacy* that *Jennings* was overruled to the extent that a prosecutor could delegate the review of personnel files to the applicable federal agency.[84]

The district court dismissed the indictment against one of the defendants named in the *Lacy* case and the government appealed to the Ninth Circuit when the prosecutor failed to comply with the district court's order that the prosecutor personally review the personnel files of testifying agents.[85] The Ninth Circuit vacated the district court's decision in *United States v. Herring*.[86] The *Herring* court ruled that the import of *Kyles* was limited to the review of personnel files because it was decided based upon a post-conviction review of a case.[87] Moreover, the panel found that *Kyles* provided no guidance to decide whether a trial court may order a prosecutor to review personnel files of testifying agents.[88]

On the heels of the *Herring* decision, the Ninth Circuit, in *United States v. Alvarez*, affirmed the trial court's denial of the defendant's motion for production of the notes of the responding and investigating officers and agents after a police department investigator reviewed the notes and found no discrepancies.[89] While the court affirmed the trial court's decision denying the defendant's discovery request, the Ninth Circuit voiced its concern that the prosecutor had delegated the review

82. 514 U.S. 419 (1995). This opinion and its meaning is discussed at length *infra* in Part III.

83. *See id.* at 439.

84. 896 F. Supp. 982 (N.D. Cal. 1995).

85. *See* Wiehl, *supra* note 7, at 92 (*citing* Transcript of Proceedings at 15, United States v. Herring (N.D. Cal. 1995) (No. CR-94-0384-MHP), *reprinted in* Excerpt of Record at 265, United States v. Herring, 83 F.3d 1120 (9th Cir. 1996)).

86. 83 F.3d 1120 (9th Cir. 1996).

87. *See id.* at 1121. *See also* Wiehl, *supra* note 7, at 93-94.

88. *See Herring*, 83 F.3d at 1122.

89. *See* United States v. Alvarez, 86 F.3d 901, 903-04 (9th Cir. 1996).

of the rough notes for impeachment material to a police official.[90]

In sum, federal district courts in the Ninth Circuit have a rule that when the defendant makes a request for pretrial discovery of the personnel file of the testifying government agents, "the government must examine the file for material that could be used to impeach the agents' credibility."[91] Notwithstanding the pronouncement in *Kyles* that the prosecutor's duty to learn of favorable evidence for the accused is non-delegable, the Ninth Circuit does not impose upon the prosecutor the duty of personally reviewing the personnel files of testifying agents.[92] Instead, the agencies employing the testifying agents may review the respective personnel files to glean whether *Brady* material is contained in the files.[93] If that review reveals impeachment information, then it must be turned over to the prosecutor for review and is discoverable with the exception that close calls may be submitted to the trial court for review *in camera.*[94] Who must conduct the review of personnel files remains an open question.

C. The Seventh Circuit Rule:... For Now?

As is the case in most other circuits, the Seventh Circuit requires that a defendant must show that an investigating agent's personnel file contains information that will enable the defendant to materially impeach the government agent at trial during cross-examination before the government will be required to review the file for discoverable information.[95]

In *United States v. Andrus*, the Seventh Circuit affirmed the trial court's order denying the defendant's motion for discovery of all personnel files of investigating agents who would testify at the trial. The court decided the issue based upon the defendant's failure to show how

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90. *See id.* at 905. The court noted that "[d]elegating the responsibility to a nonattorney... investigator... to determine whether they contain *Brady*, *Bagley*, and *Giglio* information is clearly problematic." *Id.* The court further noted that there is "little justification and much danger to both the prosecutor's reputation and the quality of justice her office serves for a prosecutor not to personally review those materials directly related to the investigation...." *Id.*

91. Wiehl, *supra* note 7, at 102 (*citing* United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991)).

92. *See id.* (*citing Herring*, 83 F.3d at 1122 n.3; United States v. Jennings, 960 F.2d 1488, 1491 (9th Cir. 1992)).

93. *See id.*

94. *See id.*

95. *See* United States v. Andrus, 775 F.2d 825 (7th Cir. 1985); United States v. Navarro, 737 F.2d 625 (7th Cir. 1984).

the files or any information contained in the files were material to the defense.[96] The Seventh Circuit, relying upon *United States v. Navarro,*[97] stated that "[m]ere speculation that a government file may contain *Brady* material is not sufficient to require remand for *in camera* inspection, much less reversal for a new trial. A due process standard which is satisfied by mere speculation would convert *Brady* into a discovery device and impose an undue burden upon the district court."[98]

Recently, however, the Seventh Circuit may have expressed interest in refining its rule governing the discovery of impeachment material contained in the personnel files of agents involved in the investigation of a case. In *United States v. Morris*, the Seventh Circuit examined, among other things, whether the defendants' rights under *Brady* were violated because the government suppressed material information in the possession of federal agencies that were not part of the investigative team, but nevertheless possessed information that the defendant argued was material and exculpatory.[99]

The facts of the case reveal that the defendants were charged with mail and wire fraud based upon their actions as officers of Germania Bank, which is a savings and loan association based in St. Louis, Missouri.[100] The charges were filed based upon the defendants', Edward L. Morris, Germania's former Chief Executive Officer, and Steven M. Gardner, Germania's former Chief Operating Officer, participation in Germania's ten million dollar offering of subordinated capital notes ("Schnotes"). In making the Schnotes available for sale, Germania represented in its offering circular that current loan-loss reserves were "adequate."[101]

The reserves were not adequate. The Executive Committee of Germania's Board of Directors had recommended that the savings and loan approve an additional $9.3 million in loan loss reserves that was recommended by the bank's management team to cover the potential

96. *See Andrus,* 775 F.2d at 843. Andrus was convicted of conspiracy to distribute cocaine. He sought the file of the undercover agent who posed as a potential buyer of cocaine in the case. *See id.*

97. *See Navarro,* 737 F.2d at 625. In this case, the Seventh Circuit ruled that speculation that an agent's file may contain impeachment material was not, without more, enough to trigger the duty of the government to review the file for *Brady* material or for production to the court for *in camera* inspection. The defendant had requested the immigration files from the I.N.S. relating to a government informant who testified at the defendant's trial. *See id.*

98. *Id.* at 631.

99. United States v. Morris, 80 F.3d 1151, 1168-69 (7th Cir. 1996).

100. *See id.* at 1154.

101. *Id.* at 1155.

loss on loans made in 1986 and 1987 in larger multi-family residential and commercial properties.[102] Rather than heed the advice of its designated committee, the Board of Directors did not approve the recommended additional loan-loss reserves because Germania was about to offer for sale the Schnotes and its controlling shareholder insisted that the bank show a profit in the quarter ending prior to the note sale.[103] Because the additional loan-loss reserves would have resulted in a loss for the quarter prior to the ten million dollar Schnote offering, the Executive Committee of the Board authorized loan-loss reserves necessary to cover known losses in the real estate portfolio.[104] Germania then sold the Schnotes.[105]

Shortly after the Schnote offering, Germania's auditors recommended that loan-loss reserves be elevated to the level at about what was recommended before the Schontes were sold.[106] Accordingly, Germania eventually took a loan-loss reserve of an additional $9.4 million in February 1988 which was near the completion of the Schnote offering.[107] The bank's financial condition deteriorated into the spring and it was placed into conservatorship by the Resolution Trust Corporation (RTC) in June 1990.[108] The Schnotes were worthless.[109] The investors recouped nothing on their investment.[110]

The government alleged that the misrepresentation in the bank's Schnote offering circular about the bank's actual financial condition was intended to mask from investors the bank's actual financial condition, resulting in investors being induced to buy the Schnotes based upon bogus information, through the use of the wires and mail.[111] In prosecuting its case, the government relied primarily upon one of Germania's former loan officers, who testified, with the use of a large number of documents, that there was a disparity between the offering circular representations and the bank's actual financial situation.[112]

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102. *See id.* An audit had revealed the loan portfolio's problems and the failure to set aside adequate loan-loss reserves on the expanded real estate portfolio from 1985-1986. *See id.*

103. *See id.*

104. *See id.*

105. *See id.*

106. *See id.*

107. *See id.*

108. *See id.*

109. *See id.*

110. *See id.*

111. *See id.* at 1154-55.

112. *See id.*

As part of the bank's reporting requirements as well as inquiries from the SEC, the IRS, and the RTC, a large volume of records were retained by those agencies during the pendency of the criminal case against Morris and Gardner.[113] Citing *Brady* and *Kyles*, the defendants argued, both in post-conviction and appellate proceedings, that the government failed to learn of exculpatory information contained in the records retained by the SEC, the IRS, and the RTC.[114]

The Seventh Circuit rejected the defendants' argument. The court found that the defendants had failed to make a *Brady* request prior to trial and could have obtained the records themselves prior to trial because the prosecutor had made such records available for review.[115] Moreover, the Seventh Circuit ruled that the agencies involved were not part of the prosecution team and, therefore, the prosecutor had no duty to learn of impeachment material from agencies that conducted independent investigations not related to the criminal case.[116]

Significantly, in justifying its decision that the prosecutor had no duty to review files retained by agencies that were not part of the investigation team, the court made several pronouncements suggesting that the files retained by agencies that are part of the investigation team must be reviewed by the prosecutor to fulfill her duty under *Brady*. For example, the court noted its general rule that the government's duty to disclose exculpatory or impeachment material is limited to information known by the government.[117] The court then stated, "Although we have not interpreted Brady as requiring prosecutors to affirmatively seek out information not presently in their possession, we have found it improper for a prosecutor's office to remain ignorant about certain aspects of a case or to compartmentalize information so that only investigating officers, and not the prosecutors themselves, would be aware of it."[118]

The court also noted that the Seventh Circuit has long followed the rule announced in *Kyles* that *Brady* is violated "even where police, rather than prosecutors, are responsible for the suppression of

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113. *See id.*

114. *See id.* at 1168-69.

115. *See id.* at 1168-70.

116. *See id.* at 1169-70.

117. *See id.* (*citing* United States v. Moore, 25 F.3d 563, 569 (7th Cir.); United States v. Young, 20 F.3d 758, 764 (7th Cir. 1994); Mendoza v. Miller, 779 F.2d 1287, 1297 (7th Cir. 1985).

118. *Morris*, 80 F.3d at 1169 (*citing* Carey v. Duckworth, 738 F.2d 875, 877-78 (7th Cir. 1984); *Young*, 20 F.3d at 764). *See Moore*, 25 F.3d at 569; United States v. Romo, 914 F.2d 889, 898 (7th Cir. 1990).

exculpatory information."[119] The court clarified, however, that "neither *Kyles* nor *Fairman* can be read as imposing a duty on the prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue."[120] The Seventh Circuit appears to suggest in the quoted passage in *Morris* that information in the possession of the prosecution team must be examined by the prosecutor to determine whether *Brady* exists. Lastly, the *Morris* court ruled that no *Brady* violation exists when the information was available to the defendant "through the exercise of reasonable diligence."[121]

D. The Implications

The two basic rules governing the same discovery issue outlined above have prompted the call for Supreme Court review so that the forum disparity that results from the application of the two rules will be eliminated.[122] This anomaly poses significant problems for prosecutors and criminal defense attorneys alike. While there is a uniform set of rules designed to ensure that the defense is entitled to discovery of material information once the prosecutor learns that the evidence exists, the duty to look for such information may depend upon where the case is being prosecuted.[123] This means that a prosecutor in a district within the Ninth Circuit will more readily find impeachment material in the personnel files of agents investigating the case because of the duty to learn of impeachment material upon a discovery request, whereas a prosecutor in a federal district outside of the Ninth Circuit may not learn of such information because no duty exists unless the defense convinces the court that material information exists in a particular agent's file. Professor Wiehl points out that the practical difference between the two rules results in prosecutors in the Ninth Circuit seeking an alternative agent to use at trial when she learns that an agent's personnel file contains impeachment material, or making a more generous plea offer than would have otherwise been made but for the impeachment information contained in the agent's file.[124]

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119. *Morris*, 80 F.3d at 1169 (*citing* Smith v. Fairman, 769 F.2d 386, 391 (7th Cir. 1985)).

120. *Id.*

121. *Id.* at 1170.

122. *See* Wiehl, *supra* note 7, at 121-27.

123. *See id.* This point is illustrated in the cited article by way of interviews of federal prosecutors and defense attorneys.

124. *See id.* at 77.

The anomaly highlights the regional differences and diminution of transparency that exists when two contrary rules govern the administration of identical discovery requests regarding the discovery of the personnel files of agents and officers involved in a particular case, resulting in a split of authority with no guidance, as of this writing, from the Supreme Court, other than a strong pronouncement in dicta in the *Kyles* case.

The Seventh Circuit has not ruled directly on this issue since *Kyles* was decided. Rather, while other circuits have considered and decided the issue, the Seventh Circuit has decided the issue on the margins. Although the Seventh Circuit's basic rule that a defendant must make a prior showing of materiality before the district court will entertain an *in camera* review of personnel files remains intact, there is language found in *United States v. Morris*[125] that when coupled with the language found in *Kyles*, providing that a prosecutor's duty to learn of favorable evidence for the accused is non-delegable, suggests that the Seventh Circuit may be amenable to adopting the present rule in the Ninth Circuit. This position is advocated *infra* in Part IV.

Much has been made up to this point about the importance of the Supreme Court's decision in *Kyles v. Whitley*.[126] Before the argument is made suggesting that recent Seventh Circuit precedent coupled with Supreme Court and Ninth Circuit law provides compelling evidence that the Seventh Circuit should adopt the rule established in the Ninth Circuit governing the discovery of personnel files of testifying agents, a discussion of the *Kyles* case is appropriate to complete the outline of discovery principles provided *supra*. That discussion is provided in the next part.

III. *KYLES V. WHITLEY*: A BRIEF SUMMARY

This case took place in New Orleans. A sixty-year-old woman, Dolores Dye, was murdered in the middle of the afternoon on September 20, 1984, as she was putting her groceries in the trunk of her car in the parking lot of Schwegmann Brother's grocery store. The man who killed her, approached her, demanded her car, and when Delores Dye refused, had pulled a gun. A struggle ensued and the man shot Delores Dye in her left temple. The gunman took her keys and drove

125. 80 F.3d 1151, 1169 (7th Cir. 1996) (noting that it is improper for a prosecutor to remain ignorant about certain material of a case).

126. 514 U.S. 419 (1995).

off in her red LTD.[127]

The New Orleans police obtained seven eyewitness statements from two people who were waiting for a bus, three witnesses who were employed by Schwegmann Brother's and were in the parking lot when the murder occurred, and two additional witnesses to the murder who left the area after the murder but called the police and reported what they saw.[128] The witnesses offered varying descriptions of the gunman, but were united in their accounts of these events that the assailant was black.[129] For instance, four witnesses agreed that the gunman had braided hair.[130] Notwithstanding the almost unanimous belief that the gunman had braided hair, one witness told the police that the assailant had short hair, while another witness said the man had shoulder length hair.[131] Two witnesses agreed that the assailant was between seventeen and eighteen years old, while another witness claimed that the gunman could have been as old as twenty-eight.[132] Moreover, one witness believed that the man was 5'4" or 5'5" and weighed between 140 and 150 pounds, while another witness described the gunman as six feet tall with a slim build.[133] Still another witness claimed that the assailant had a mustache.[134] None of the other five witnesses claimed that the man had a mustache.[135]

While the police showed up at the scene shortly after the murder occurred at approximately 2:20 p.m., the police did not record the license plate numbers of the cars in the Schwegmann Brother's parking lot until 9:15 p.m. that evening.[136] The police believed that the assailant drove his car to the grocery store parking lot and fled in Delores Dye's car.[137] What may have been a solid investigative instinct was acted upon too late. A check of the license plate numbers of the vehicles in the parking lot recorded by the New Orleans police, coupled with a check of individuals matching the descriptions provided by the eyewitnesses,

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127. *See id.* at 423. For a comprehensive explanation of the *Kyles* case see Howton, *supra* note 17 and Corcoran, *supra* note 7.

128. *See Kyles*, 514 U.S. at 423 n.2.

129. *See id.* at 423.

130. *See id.*

131. *See id.*

132. *See id.*

133. *See id.*

134. *See id.*

135. *See id.*

136. *See id.*

137. *See id.*

produced no leads to track down Mrs. Dye's killer.[138]

Without any productive leads, the police failed to advance the investigation until a man calling himself James Joseph contacted the New Orleans police on September 22.[139] Joseph told the police that on the day of the homicide he had purchased a red Thunderbird from a friend named Curtis.[140] When Joseph read about Dye's murder in the newspaper, he feared being linked to the murder by virtue of purchasing a car from Curtis, whom he later identified as Curtis Kyles.[141] Accordingly, the police insisted that Joseph come to the police station to meet with the police investigators handling the homicide investigation.[142]

The caller met with the police hours later.[143] As it turned out, Joseph was not his last name. The police learned that the man, universally referred to in the reported opinions from the state court of appeals through the supreme court as "Beanie," had several aliases. His real name was Joseph Wallace, but he went by the name "Beanie."[144] In the interest of continuity, I reference Joseph Wallace as Beanie herein as well.

Beanie's story changed almost as frequently as his name did. When Beanie met with the police, he changed his original account of how he came in contact with the red Ford Thunderbird. He originally told the police that he bought the car from Curtis Kyles on Thursday, but later told the investigative officer that he did not see Kyles on Thursday, but bought the car from Kyles on Friday.[145] Beanie told the police that he lived with Kyles' brother, and described Kyles as six-feet tall, twenty-four to twenty-five years old, and slim.[146] Moreover, Beanie said that Kyles had a "bush" hairstyle, but had been known to wear his hair in braids.[147] He admitted, however, that when Kyles sold him the red Ford, Kyles' hair was in a "bush" hairstyle.[148] Further, Beanie told the investigating officer that Kyles carried two guns with him, made a living

138. *See id.* at 423-24.
139. *See id.* at 424.
140. *See id.*
141. *See id.*
142. *See id.*
143. *See id.*
144. *See id.*
145. *See id.*
146. *See id.*
147. *See id.* at 425.
148. *See id.*

robbing people, and had even tried to kill Beanie in the past.[149]

Beanie told the officers that after he bought the red car, he and Kyles' brother drove Kyles to the Schwegmann's parking lot at about 9:00 p.m. on Friday evening to pick up Kyles' car that he described as an orange four-door Ford.[150] He took the police to where he recalled Kyles' car being parked in the Schwegmann's parking lot.[151] Beanie claimed that Kyles retrieved a purse from nearby bushes which Kyles hid in his apartment.[152] Moreover, Beanie recalled that there were groceries in Schwegmann's bags and a potty seat in the back seat of the red Ford.[153] Beanie took the investigators to the place where he kept the car. The car was later determined to be Dye's red Ford LTD.[154] Moreover, Beanie suggested that he could set Kyles up so that the police could retrieve the gun used to kill Dye.[155] Beanie also took the police to the place where he claimed Kyles lived.[156] All the while, Beanie appeared to be concerned that he would be linked to the murder because he admitted to the police that he changed the license plates on the red Ford and had been seen driving the car in the French Quarter of New Orleans on Friday evening.[157]

After showing the investigators where the red car was located as well as the detail of the Schwegmann's parking lot, Beanie returned to the police station with the officers.[158] There, he gave a third statement to the police.[159] This third statement deviated from the two prior statements Beanie provided to the police. For instance, Beanie said that he actually helped Kyles unload the groceries from the trunk and back seat of the red Ford and placed them in Kyles' car just after he bought the car from Kyles.[160] Moreover, Beanie told the police that he saw Kyles retrieve a brown purse from the red Ford and that they then drove in the separate cars to Kyles' apartment, where they unloaded the groceries.[161] Beanie

149. *See id.*
150. *See id.* The car was actually a two-door Mercury model. *See id.* at 425 n.5.
151. *See id.*
152. *See id.* at 426.
153. *See id.*
154. *See id.*
155. *See id.*
156. *See id.*
157. *See id.*
158. *See id.*
159. *See id.*
160. *See id.*
161. *See id.*

told the police that he went with Kyles and Kyles' brother to Schwegmann's a few hours later, where they recovered Kyles' car and a brown purse that was located next to a building.[162] Accordingly, this latter account fails to explain why his group would go to Schwegmann's to recover the car, groceries, and purse when he had seen Kyles with those items a few hours earlier.[163]

Notwithstanding Beanie's recitation of facts connecting Kyles to the murder of Delores Dye, the police did not attempt to find Kyles.[164] Rather, Beanie went to Kyles' apartment on that Sunday, September 23, at around 2:00 p.m., after Beanie had discussed the whereabouts of the murder weapon with one of the police investigators.[165] Beanie stayed at Kyles apartment from 2:00 p.m. until 5:00 p.m., when he left and contacted the police.[166] Thereafter, Beanie went back to Kyles' apartment at 7:00 p.m., and remained there until about 9:30 p.m.[167] Beanie again made contact with the police.[168]

The police arrested Kyles on Monday, September 24 at 10:40 a.m.[169] He was arrested outside of his apartment.[170] After his arrest, the police searched Kyles' apartment and found a .32-caliber revolver behind the kitchen stove.[171] That revolver had five bullets and one spent casing in the cylinder.[172] Ballistics testing showed that this revolver was the weapon used to kill Mrs. Dye.[173] The police also found several .32-caliber rounds of the same brand that was found in the revolver behind the stove.[174] Moreover, the police found Schwegmann's grocery bags that contained cans of the same brand of cat food that Mrs. Dye purchased for her cat.[175] The police also collected garbage from outside of Kyles' apartment. In that garbage search, the police recovered Dye's

162. *See id.* at 426-27.

163. *See id.*

164. *See id.*

165. *See id.* at 427. Beanie made a fourth statement to the police in November 1984. This statement was actually given between Kyles' first and second murder trials. This fourth statement provided information about Beanie's activities on Sunday, September 23.

166. *See id.*

167. *See id.*

168. *See id.*

169. *See id.*

170. *See id.*

171. *See id.*

172. *See id.*

173. *See id.*

174. *See id.*

175. *See id.*

purse, identification, and other personal effects, all wrapped in a Schwegmann's grocery bag.[176]

These items were tested for fingerprints.[177] No prints were found on the revolver, but several prints were found on the purse and the red Ford LTD, none of which were Kyles' fingerprints.[178] However, Kyles' finger prints were lifted from a small piece of paper, a Schwegmann's sales slip, recovered from the front passenger-side seat of Mrs. Dye's car.[179] Moreover, three of the six eyewitnesses noted *supra* identified Kyles as the assailant in a photo-array. Two did not identify Kyles as the murderer, and the remaining eyewitness did not participate in the identification process.[180]

Kyles was indicted for first-degree intentional homicide.[181] Before his trial, Kyles' lawyer filed a discovery motion asking for exculpatory and impeachment evidence.[182] The prosecution responded to Kyles' discovery motion in the negative stating that there was no exculpatory evidence of any kind despite the fact that there were conflicting eyewitness statements, records of Beanie's initial call to the police along with differing versions of Beanie's oral and written statements to the police, a taped conversation of Beanie to the police, the police computer printout of the license plates taken from Schwegmann's parking lot on the night of the murder that showed that Kyles' car was not listed, the internal police report calling for the retrieval of garbage from outside of Kyles' apartment building based upon Beanie's suggestion that Dye's purse may be there, and evidence linking Beanie to other acts, evidence, and crimes at Schwegmann's, as well as the murder of Patricia Leidenheimer, the previous January.[183]

Kyles' trial was held in November 1984 before a jury in Louisiana.[184] Not surprisingly, Kyles argued that he was framed by Beanie.[185]

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176. *See id.*
177. *See id.* at 428
178. *See id.*
179. *See id.*
180. *See id.*
181. *See id.*
182. *See id.*
183. *See id.* at 428-29.
184. *See id.* at 429.
185. *See id.* Kyles suggested that Beanie led the police to him and planted incriminating evidence in Kyles' apartment. Beanie was motivated to remove Kyles from the community so that Beanie could pursue the romantic affection of Pinky Burns, who was romantically linked to Kyles. Kyles also offered an alibi defense that he was with his children. *See id.*

Significantly, Beanie did not testify at the trial.[186] The prosecution relied upon the eyewitness testimony from four people who were on the scene when Dye was murdered.[187] The jury deliberated for four hours and maintained that they were deadlocked.[188] Accordingly, the trial court ordered a mistrial.[189]

After the trial, the prosecutor interviewed Beanie.[190] This interview revealed still more inconsistencies in Beanie's version of his story.[191] For instance, Beanie told the prosecutor that he went with Kyles to get Kyles' car from the Schwegmann's parking lot on Thursday, the day of the murder, between 5:00 p.m. and 7:00 p.m.[192] This is contrasted with Beanie's earlier accounts where he claimed that he had gone with Kyles to get the car on Friday at 9:00 p.m.[193] Moreover, in Beanie's second statement to the police, he said that he had not seen Kyles on Thursday at all.[194]

Beanie also said that he was not only accompanied by Johnny Burns to get Kyles' car, but also that Kevin Black went with him to get the car.[195] Beanie's claim that Black had gone with him to get Kyles' car was new. He had not told the police about this fact until after the first trial, in the interview with the prosecutor. Moreover, Black testified for the defense at the first trial.[196]

Beanie said, for the first time, that after the group retrieved Kyles' car from Schwegmann's, they went to Black's house, picked up groceries in Schwegmann's bags, a potty, and a purse, and took the items to Kyles' apartment.[197] Moreover, Beanie now said that he had not been at Kyles'

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186. *See id.*

187. *See id.* Three of the four witnesses had previously identified Kyles in a photograph array conducted by the police. *Id.*

188. *See id.*

189. *See id.* Declaring a mistrial after the jury had deliberated for four hours is somewhat surprising given the fact that this was a murder trial since the remedy for a deadlocked jury is a mistrial with the substantial likelihood of retrial. Accordingly, declaring a mistrial after such a short period of deliberations is expensive and contrary to principles of judicial economy. The record shows that the court inquired of the jury regarding the scope and intensity of their deliberations, but did not give the jury an instruction that implored the jury to reconvene and deliberate further.

190. *See Kyles*. 514 U.S. at 429.

191. *See id.*

192. *See id.*

193. *See id.*

194. *See id.*

195. *See id.* at 430.

196. *See id.*

197. *See id.*

apartment twice as previously stated, but that he was there just once.[198] None of this information was turned over to the defense for the second trial.[199]

Shortly thereafter in December 1984, Kyles was tried again in Louisiana.[200] The prosecution again relied upon the testimony of now four eyewitnesses who identified Kyles as the murderer.[201] Moreover, the State introduced a blown-up photograph of the Schwegmann's parking lot shortly after the murder occurred that showed a two-toned car that the prosecutors, without any corroborating evidence, argued was Kyles' car.[202] Beanie did not testify at the second trial.[203]

The defense argued that the eyewitnesses were mistaken. Kyles called witnesses, including Kevin Black, who testified that he saw Beanie, his hair in braids, driving a red car approximately one hour after the murder occurred.[204] Moreover, a second witness testified that Beanie, his hair in braids, tried to sell him a red car, similar to Dye's car, on Thursday evening, shortly after the murder.[205] Yet another witness testified that Beanie, his hair in a Jheri curl, wanted to sell him the car

198. *See id.*

199. *See id.*

200. *See id.*

201. *See id.* After conviction and pending appeal, Kyles filed a motion under Rule 60(b)(2) and (6) of the Federal Rules of Civil Procedure to reopen the judgment of the federal district court's judgment denying his writ of habeas corpus. That was later affirmed by the United States Court of Appeals for the Fifth Circuit, claiming that one of the eyewitnesses has committed perjury in her identification of Kyles as the murderer. *See id.* at 432 n.6. In an affidavit from the eyewitness, Darlene Kersh (formerly Cahill), who was one of the witnesses who contacted the police after the murder happened and therefore had not given a contemporaneous statement on the scene, swore that she told the police and the prosecutors that she did not see Kyles' face and could not identify him, but that she identified him untruthfully after being told by either the police or the prosecutors that the murderer "would be the guy seated at the table with the attorney and that was the one I should identify as the murderer." *Id.* Her affidavit also revealed that she agreed to identify Kyles only after the authorities assured her that all of the evidence pointed to Kyles as the killer. *See id.* The federal district court denied Kyles' motion ruling that it was an abuse of the writ, but that decision was overruled by the Fifth Circuit instructing the district court to deny the motion on the ground that a petitioner cannot use the writ to raise a Rule 60(b) motion to argue constitutional claims not included in the writ of habeas corpus. *See id.* Kyles sought state collateral review of the ruling. *See id.* The Supreme Court of Louisiana granted review and ordered that the trial court conduct an evidentiary hearing. *See id.* The United States Supreme Court stayed all action pending its review of the case. *See id.* Because the Supreme Court reversed Kyles' conviction, the motion was not decided.

202. *See id.*

203. *See id.*

204. *See id.*

205. *See id.*

on Friday.[206] Beanie's friend, Johnny Burns, testified that he saw Beanie stooping down near the stove at Kyles' apartment on Sunday.[207] The defense also explained that Kyles kept cat food in his apartment because he fed stray cats.[208] The defense introduced evidence that Beanie was romantically interested in Pinky Burns.[209]

Kyles testified at the trial in his own defense.[210] He denied involvement in Dye's murder.[211] He explained that his fingerprints were found on the store receipt from Schwegmann's recovered from Dye's car because he rode in a red car that Beanie picked him up in on Friday, September 24.[212] Significantly, Kyles testified that Beanie drove him to the very Schwegmann's where Dye was killed and bought transmission fluid and cigarettes.[213] Accordingly, Kyles suggested that the receipt fell out of the bag that contained his purchases.[214]

The prosecutors offered a rebuttal to the defense. Beanie was brought into the courtroom and placed next to Kyles. The State's eyewitnesses who testified earlier in the trial reaffirmed their identification of Kyles as the murderer.[215]

Kyles was convicted of first-degree homicide by the jury.[216] He was sentenced to death.[217] Kyles' efforts to have the judgment of conviction and sentence overturned on direct appeal in state courts failed.[218]

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206. *See id.*

207. *See id.* at 430-431. Recall that the revolver used to kill Dye was recovered by the police from behind the kitchen stove at Kyles' apartment. *See* page 431 of the text *supra.*

208. *See id.* at 431.

209. *See id.*

210. *See id.*

211. *See id.*

212. *See id.*

213. *See id.* It is important to note that when the State crime laboratory conducted fingerprint analysis on the Schwegmann's store receipt recovered from Dye's car, the testing process destroyed the print on the paper. *See id.* at 452.

214. *See id.*

215. *See id.*

216. *See id.*

217. *See id.*

218. *See* State v. Kyles, 513 So. 2d 265 (La. 1987), *cert. denied*, 486 U.S. 1027 (1988). On direct appeal, the Louisiana Supreme Court examined whether the items recovered from the garbage outside of Kyles' home and the gun seized from Kyles' apartment were improperly admitted into evidence. The appellate court also considered whether the prosecution intimidated defense witnesses by asking the court to advise those witnesses of their Fifth Amendment right against self-incrimination, and by further advising the court that the State may charge defense witnesses with being accessories after the fact to the murder was prejudicial. Moreover, the court examined whether the trial court's order curtailing the closing statements of the defense was an abuse of discretion. Lastly, the appellate tribunal

Thereafter, Kyles sought state collateral review of his case which revealed that State officials had never disclosed evidence favorable to him.[219] This evidence consisted of eyewitness statements taken by the police; an informant's statements who was not called to testify at the trial; and a computer print-out of the license plate numbers of the cars parked in the parking lot where the murder occurred in which the defendant's car was not listed.[220] The federal district court denied Kyles' habeas corpus petition and the federal appellate court affirmed the district court's decision.[221]

Thereafter, Kyles petitioned the United States Supreme Court. The court granted certiorari.[222] In a five to four decision, the Supreme Court reversed Kyles's conviction and ordered a new trial.[223] Justice Souter, writing for the majority, wrote that the government's obligation to disclose favorable evidence to the defense is to be balanced by weighing the effect the evidence will have on the defense with any cumulative

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evaluated the prejudicial effect that the prosecutor's comments during the closing statement may have had upon the jury relative to their evaluation of guilt and punishment. *See id.* at 267. The Supreme Court of Louisiana affirmed the decisions of the trial court by finding that the evidence recovered outside of Kyles' residence was abandoned. Therefore, there was no expectation of privacy, which is required under the Fourth Amendment to the United States Constitution, when the police recovered the evidence without a warrant. Further, the Louisiana court upheld the trial court's decision denying the defendant's motion to suppress the revolver recovered from the kitchen by finding that the search warrant satisfied the particularity requirement of the Fourth Amendment. Moreover, the court determined that neither the defense witnesses were intimidated to the level of finding that Kyles' rights were violated, nor did the prosecutor's comments during closing show that Kyles was constitutionally prejudiced. *See id.* at 269-77.

219. *See id.*

220. *See Kyles*, 514 U.S. at 420-21.

221. *See id.* at 432; *see* Kyles v. Whitley, 5 F.3d 806 (5th Cir. 1993). Notwithstanding the litany of evidence presented to the federal appellate court that was not disclosed to Kyles during his trials, including evidence of further discrepancies in Beanie's version of events and police reports providing useful evidence that supported Kyles' argument that he did not commit the murder, and his request that the court not apply the probable effect standard to the suppressed evidence, the Fifth Circuit examined the probable effect that the evidence would have had on the jury, and ruled that the prosecution did not suppress exculpatory evidence, and that the outcome would not have been different had the evidence been disclosed to the defense. Moreover, the court ruled that there was no prosecutorial misconduct, nor ineffective assistance of counsel. *See id.* at 811-18. Accordingly, the Fifth Circuit affirmed the decision of the district court. Judge King, in his dissent to the Fifth Circuit's ruling, wrote "[f]or the first time in my fourteen years on this court . . . I have serious reservations about whether the State has sentenced to death the right man." *Id.* at 820.

222. *See* Kyles v. Whitley, 114 S. Ct. 1610 (1994).

223. *See Kyles*, 514 U.S. at 454. Justices Stevens, O'Connor, Ginsburg, and Breyer joined Justice Souter in the majority opinion. *See id.* at 421. Justice Scalia wrote a dissenting opinion, in which Chief Justice Rehnquist and Justices Kennedy and Thomas joined. *See id.*

effect that the undisclosed evidence will have upon the defendant's case.[224] Moreover, Justice Souter noted that a prosecutor's obligation to evaluate whether certain evidence is discoverable under a materiality analysis remains notwithstanding the police's failure to notify the prosecutor that the evidence exists.[225] The Court examined the suppressed evidence in Kyles' case and determined that the evidence was material to the defense relative to guilt.[226] Thus, the Court ordered a new trial.[227]

In making its finding, the majority opinion reviews the history of a prosecutor's duty to disclose material information by reviewing the cases involving the disclosure rule most clearly aligned with *Brady*[228] and its progeny including *Mooney v. Holohan*[229] and *Pyle v. Kansas*.[230] Quoting from *Brady*, Justice Souter noted 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."[231] From this history of early cases, Justice Souter restated the *Brady* duty of disclosure and reiterated the continued importance of the materiality standard derived from *United States v. Bagley*.[232] By emphasizing the importance of the materiality principle, the *Kyles* Court reiterated that materiality is defined by determining whether the evidence has a reasonable probability that the suppressed evidence would conceivably cast doubt upon the credibility of the conviction.[233] Accordingly, materiality of evidence is not to be evaluated under a sufficiency of the evidence standard or proven by a preponderance of the evidence, but to be examined in conjunction with all of the evidence to determine if, in the absence of the evidence, the defendant "received a fair trial resulting in a verdict worthy of confidence."[234]

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224. *See Kyles*, 514 U.S. at 421, 434.

225. *See id.*

226. *See id.*

227. *See id.*

228. *See id.* at 432 (*citing Brady*, 373 U.S. 83, 87 (1963)).

229. *See id.* (*citing* Mooney v. Holohan, 294 U.S. 103, 112 (1935)).

230. *See id.* (*citing* Pyle v. Kansas, 317 U.S. 213, 215-216 (1942)).

231. *Id.* at 432 (*quoting Brady*, 373 U.S. at 87 (*citing* Moore v. Illinois, 408 U.S. 786, 794-95 (1972); United States v. Agurs, 427 U.S. 97, 97 (1976))).

232. 473 U.S. 667 (1985).

233. *See Kyles*, 514 U.S. at 433-34 (*citing Bagley*, 473 U.S. at 682, 685).

234. *Id.* at 434. Justice Souter structured his analysis by highlighting what he termed "four aspects of materiality." *Id.* Justice Souter first defined materiality and reaffirmed that the materiality standard is evaluated using the "reasonable probability" test. Next, he

The fourth aspect of the Court's "four aspects of materiality" analysis provides guidance to prosecutors in assessing whether to disclose certain evidence under the materiality test. Justice Souter noted that while the prosecutor has discretion to review and decide what evidence shall be disclosed to the defense, that same discretion creates a responsibility to assess the probable effect of evidence and disclose at the point of "reasonable probability."[235] Having this discretion 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."[236]

The Court justified this fourth aspect of materiality by suggesting that a prosecutor will not be subject to error for not turning over evidence unless the threshold of materiality is crossed.[237] Moreover, having the prosecutor be responsible for evaluating the quality of evidence under the materiality test reinforces the institutional interest of maintaining trust in prosecutors to ensure that justice is done rather than winning a case, as well as ensuring that the trial is the forum for the evaluation of the evidence relative to guilt or innocence rather than in the prosecutor's private evaluation of all of the evidence.[238]

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clarified materiality for what it does not stand for including negating the sufficiency of evidence and preponderance of evidence approaches applied by the appellate court. Third, the Court rejected the Fifth Circuit's approach of using a harmless error analysis in processing the evidence under the materiality standard. Lastly, Justice Souter emphasized that materiality is to be evaluated collectively with all of the evidence to determine if a *Brady* violation occurred. *See id.* at 434-38.

235. *Id.* at 437.

236. *Id.* The Court further explained that successful or not in this endeavor, and whether in good or bad faith, the prosecutor's responsibility to learn of favorable evidence that would cast doubt upon the outcome, from whatever its source, is "inescapable." *Id.* at 437-38.

237. *See id.* at 439. The Court wrote:

> Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result.
>
> This 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.

Id. (*citing* United States v. Agurs, 427 U.S. 97, 108 (1976)) ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure").

238. *See id.* at 439-40 (*citing* Berger v. United States, 295 U.S. 78, 88 (1935); Rose v. Clark, 478 U.S. 570, 577-78 (1986); Estes v. Texas, 381 U.S. 532, 540 (1965); United States v. Leon, 468 U.S. 897, 900-01 (1984) (recognizing that the goal of the criminal justice system is

After discussing the materiality standard, the Court reviewed the record and criticized the appellate court's reliance upon sufficiency of the evidence, preponderance of the evidence, and harmless error analysis in evaluating Kyles' claims.[239] Moreover, the Court applied the materiality standard to Kyles' case and found that the suppressed evidence would have resulted in a different outcome of the trial if turned over to Kyles.[240]

In making this determination, the majority found that the police investigation was limited by its failure to critically assess the evidence including four versions of the event from Beanie; that one of the investigating detectives failed to be candid during his testimony at trial; that the informant's behavior strongly suggested that he planted the murder weapon and the victim's purse in the places those items were found by the police; that one of the four eyewitnesses provided a description that did not match Kyles, but more closely described the informant; that another eyewitness had been coached since first claiming that he did not see the killer during the murder, whereas at trial he claimed to have witnessed the killing, described the weapon used in the killing, and omitted parts of his first statement that would have conflicted with his trial testimony; and that there was no unified descriptions of the murderer.[241]

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to establish "procedures under which criminal defendants are 'acquitted or convicted on the basis of all the evidence which exposes the truth.'" (*quoting* Alderman v. United States, 394 U.S. 165, 175 (1969)).

239. *See id.* at 440.

240. *See id.* at 441-54. Justice Scalia filed a dissent in the case. *See id.* at 456. He was joined by Chief Justice Rehnquist, and Justices Kennedy and Thomas. *See id.* The dissenting opinion focuses primarily on the grounds for granting certiorari in the *Kyles* case, but does criticize the majority opinion's application of the probable effect standard to the facts of the case by arguing that the evidence presented against Kyles consisted of a solid core of facts justifying the jury's verdict. *See id.* at 456-74. Moreover, the dissent argues that the majority's fact-based evaluation that is inclusive of the suppressed evidence is subject to equally compelling counter-arguments showing that Kyles is guilty of the murder. *See id.* at 460-74. Accordingly, Justice Scalia utilizes the majority opinion to argue that the Supreme Court review of capital cases on a substantive basis fails to adhere to its historical role of reviewing such cases for constitutional error and will result in the dilution of the principle that suppressed or new evidence be evaluated in the light of the entire record in determining if such evidence would have the probable effect of a different result. *See id.* at 458-60. A critical evaluation of the Supreme Court's decision to grant certiorari in the *Kyles* case is found in Howton, *supra* note 17.

241. *See Kyles*, 514 U.S. at 441-54.

IV. THE SEVENTH CIRCUIT SHOULD ADOPT THE NINTH CIRCUIT'S RULE PROVIDING FOR DISCOVERY OF MATERIAL INFORMATION CONTAINED IN THE PERSONNEL FILES OF TESTIFYING AGENTS AND OFFICERS.

Like Justice Souter's emphatic reminder that prosecuting attorneys cannot stick their head in the sand when confronted with exculpatory or material evidence that should be disclosed to defendants in criminal cases, so too must the Seventh Circuit "not stick its head in the sand" when confronted with a fairly recent development in the area of pretrial discovery: the issue of whether prosecutors have a duty to review personnel files of agents and officers investigating criminal cases to determine if there is discoverable material in those files that must be turned over to defendants.

So often, federal indictments contain allegations that are the product of an investigation by federal, state, and local law enforcement agents and officers. Because federal criminal cases often involve several law enforcement officers and agents, a byproduct of discovery practice is to ascertain the credibility of the agents and officers, as much of the information forming the basis of the allegations contained in indictments is obtained by way of police surveillance. Challenging the credibility of agents and officers is a difficult task for the defense. While I do not presume that law enforcement officials conduct themselves outside of the law or even beyond the scope of their duties, one likely source of impeachment material is his or her personnel file. Imposing the burden upon the defense to identify impeachment information that is material is inefficient and impractical because that information is in control of the government. How would a defendant know, using reasonable means of investigation, that an agent who will testify against him has been reprimanded within the last year for contaminating evidence in a homicide case? Do judicial officers and the polity really believe that making a request under the Freedom of Information Act or utilizing the services of an investigator will consistently and efficiently produce impeachment material contained in a prosecution team member's personnel file in a timely manner? Unless the defendant's attorney is a seasoned trial counsel who is familiar with substantially all of the agents and officers investigating any given case, material information in an agent's personnel file may pass the defendant by without the defense ever knowing about the impeachment material. All

along, however, the government possessed this material.

Simply stated, an efficient and fair means of assuring that the defendant has access to impeachment material regarding agents and officers is to require the prosecutor to look in the personnel files. One method of assessing the credibility of officers and agents is to ask the district court to undertake a review of the personnel records of law enforcement agents and officers who participated in the investigation and ask the court to turn over to the defense those personnel files which are material to the credibility of the agents and officers. This approach is justified under the principle that the defense is entitled to request that the government undertake a review of agency personnel files and disclose exculpatory and impeachment information contained in the files. Alternatively, the trial court could conduct an *in camera* review of the testifying agents' personnel files to determine whether exculpatory or impeaching information in those personnel files must be disclosed to the defense in order to protect the due process rights of the defendants under *Brady v. Maryland*[242] and its progeny as outlined above.[243]

A. Defendants Are Entitled to All Records and Information Relevant to the Impeachment of the Investigating Agents and Officers

The information sought in an agent's personnel file may be relevant to impeach the testimony and credibility of agents and officers who will be witnesses in this case at pretrial hearings and trial, to prove character traits of the agents and/or officers in question, to establish their bias, to refresh recollection, and to prove their conduct, custom, propensity, and habit in conformity with such traits.

As discussed *supra* and in the accompanying text, the Due Process Clause of the Fifth and Fourteenth Amendments is the touchstone for the right of a federal criminal defendant to the production of exculpatory evidence in the possession of the government. In 1963, the Supreme Court in *Brady v. Maryland* made this right a pillar of our judicial system.[244] This includes all evidence pertinent to a witness' credibility or reliability.[245] Thus, the law requires that defendants be provided with information regarding all prior material acts of

242. 373 U.S. 83 (1963).

243. *See supra* Parts I-II.

244. *See Brady*, 373 U.S. 83 (1963); *see also* Giglio v. United States, 405 U.S. 150 (1972); Giles v. Maryland, 386 U.S. 66 (1967); Napue v. Illinois, 360 U.S. 264 (1959).

245. *See* United States v. Feola, 651 F.Supp. 1068, 1135 (S.D.N.Y. 1987).

misconduct by witnesses.[246]

In *United States v. Agurs*, discussed *supra* in Part I, the Supreme Court addressed the scope of disclosure, expressly admonishing that any errors should be made on the side of disclosure:

> 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.[247]

Citing *Agurs*, the Supreme Court in *Kyles* furnished prosecutors with a reminder that convictions will be reversed for failure to comply with the *Brady* dictates, under a broader standard of materiality than urged and used by the United States in many cases in this district.[248]

In *Kyles*, discussed in Part III, which involved the government's duty to turn over potentially exculpatory material pursuant to *Brady*, the Supreme Court discussed at great length a prosecutor's duty under *Brady*, and the critical concomitant duty to personally become aware of any such material in the possession of other government actors.[249] The court wrote: "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."[250]

The State of Louisiana argued in *Kyles* that a prosecutor cannot be held responsible to turn over *Brady* material in possession of the police but of which he is not personally aware. The court rejected that argument focusing on the personal duty of the individual prosecutor and stated:

> To accommodate the State in this manner would, however, amount to a serious change of course from the *Brady* line of cases. In the State's favor it may be said that no one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that "procedures and regulations can be established to carry [the

246. *See* United States v. Seiyo, 514 F.2d 1357 (2d Cir. 1975); United States v. Rosner, 516 F.2d 269 (2d Cir. 1975); United States v. Stroop, 121 F.R.D. 269 (E.D.N.C. 1988).

247. United States v. Agurs, 427 U.S. 97, 108 (1976).

248. *See* Kyles v. Whitley, 514 U.S. 419, 433 n.7, 439 (1995).

249. *See id.* at 432-33, 437.

250. *Id.* at 437-38.

> prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it. Since, then, the prosecutor has the means to discharge the government's *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not know about boil down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.[251]

The court concluded that "[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."[252]

Justice Souter's discussion of the importance of the prosecutor's personal duty to comply with the government's *Brady* obligations indicates that any delegation by the prosecutor would undermine the government's duty under *Brady*, as none of the people conducting a review of agency files have any familiarity with the factual context of the particular case in which the request is made. The court in *Kyles* stated: "the character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record."[253] Quite clearly, it is the United States attorney's office prosecuting the case, and only that office, which is sufficiently familiar with the factual nuances of the case and possible defenses to make the necessary judgment call on the relevancy of material in the personnel files. A thorough reading of *Kyles* in connection with the prosecutor's duty to learn of exculpatory and impeachment material, should leave no doubt about where the burden of providing *Brady, Bagley* and *Giglio* material lies. Accordingly, that duty is non-delegable.[254]

In fact, courts have reacted to the language regarding discovery duties noted in *Kyles* to mean that a prosecutor must search agency personnel files for material information and such information must be turned over to the defense.[255] Recall the rule established in *Kyles*

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251. *Id.* at 438.

252. *Id.* at 439.

253. *Id.*

254. *Id.* at 438.

255. *See* United States v. Lacy, 896 F.Supp 982, 984-86 (N.D. Cal. 1995) (U.S. attorney is required to personally review personnel files of agents testifying at preliminary hearings and/or at trial); United States v. Hanna, 55 F.3d 1456, 1461 (9th Cir. 1995) (The obligation flows naturally that a prosecutor's interest is "not that it shall win a case, but that justice shall be done" and, therefore, the individual prosecutor "has a duty to learn of any favorable evidence known to others acting on the government's behalf. . . .") (*quoting* Berger v. United

concerning a prosecutor's duty to search agency personnel and other files is not new.[256]

The Seventh Circuit, however, has not ruled directly on the issue since *Kyles* was decided, but has determined that the prosecutor has no affirmative duty to search files of agency personnel not directly involved with the prosecution team.[257] As noted *supra, Morris* involved the defendants' argument that the prosecutors had a duty to discover information in the hands of *other* government agencies that "at various times conducted independent investigations of Germania's affairs."[258] The court noted:

> The district court was satisfied, as are we, that the prosecution team, which included investigating officers and agents, had no knowledge of the specific documents identified by defendants. The prosecutors therefore had no affirmative duty to discover those documents and to disclose them to defendants.[259]

It is clear that the question presented in *Morris* was the prosecutor's duty to review files of agents and officers not part of the prosecution team.[260] The court in *Morris* decided that neither *Kyles* nor *Fairman* can be read as imposing a duty "on the prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue."[261] Notwithstanding the apparent divergence from the discovery duty articulated in *Kyles*, the Seventh Circuit has ruled, however, that the *Brady* obligation extends to members of the prosecution "team," which

States, 295 U.S. 78, 88 (1935) *and Kyles*, 115 S.Ct. at 1567-68); United States v. Hankins, 872 F. Supp. 170, 172-73 (D.N.J. 1995) (prosecutors have an affirmative duty to search files maintained by different branches of government closely aligned with the prosecutor in order to fulfill its *Brady* obligation).

256. *See* United States v. Brooks, 966 F.2d 1500, 1503-05 (D.C. Cir. 1992) (a prosecutor's *Brady* obligation extended to a search for files in the possession of the local police department); United States v. Henthorn, 931 F.2d 29, 31 (9th Cir. 1991) ("the government has a duty to examine personnel files upon a defendant's request for their production."); United States v. Fairman, 769 F.2d 386, 391 (7th Cir. 1985) (a prosecutor's *Brady* obligation extended to a search for a police officer's ballistic report); United States v. Deutsch, 475 F.2d 55 (5th Cir. 1973) (a prosecutor's *Brady* obligation extended to search for a personnel file of a post office employee).

257. *See* United States v. Morris, 80 F.3d 1151, 1170 (7th Cir. 1996).

258. *Id.* at 1169-70.

259. *Id.* at 1170.

260. *See id.* at 1169-70.

261. *Id.* at 1169.

includes the police and the DEA.[262] The court noted that it has long followed a rule similar to the one approved in *Kyles* that the *Brady* rule is "violated, where the police, rather than prosecutors, are responsible for the suppression of exculpatory information."[263] Accordingly, the prosecutor has a duty to examine agency personnel files for *Brady* material, as such a duty is a logical extension of the language and principles found in *Kyles*.[264]

The mandate of *Kyles* is not overemphasized. The analysis provided in Part II provides ample evidence that the Ninth Circuit procedures employed concerning the review and disclosure of information contained in personnel files of agents and officers is consistent with the Supreme Court's view of the meaning and application of *Brady* disclosures to the defense. The analysis found in the *Lacy* case, interpreting *Kyles*, illustrates the sagacity of having the prosecutor be responsible for the review and assessment of agents' personnel files.[265]

Lacy involved a multi-defendant, multi-count drug trafficking case where the court applied the holding in *Kyles* to the defense request that agency personnel files be turned over to the defense.[266] The court in *Lacy* held that a prosecutor has a duty to personally review agency personnel files based upon the holding in the *Kyles* case.[267] The court reasoned that it is only the prosecutor "prosecuting the case . . . which is sufficiently familiar with the factual nuances of the case and possible defenses to make the necessary judgment call on the relevancy of material in the personnel files."[268] Since the individual prosecutor ultimately is held responsible for turning over exculpatory material to the defense, the prosecutor will at some point have to review materials and make a decision about what should be turned over.[269] *Kyles* provides 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."[270] Based upon this

262. *See* Carey v. Duckworth, 738 F.2d 875, 877-78 (7th Cir. 1984); United States v. Young, 20 F.3d 758, 764 (7th Cir. 1995).

263. *Morris*, 80 F.3d at 1169 (*citing* United States v. Fairman, 769 F.2d 386, 391 (1985)).

264. *See Kyles*, 514 U.S. at 437-39.

265. *See* United States v. Lacy, 896 F.Supp. 982, 983-86 (N.D. Cal. 1995).

266. *See id.* at 983.

267. *See id.* at 985.

268. *Id.* (*citing Kyles*, 514 U.S. at 438).

269. *See id.* at 986.

270. *Kyles*, 514 U.S. at 437 (quoted in *Lacy*, 896 F.Supp. at 986; United States v. Hanna, 55 F.3d 1456, 1461 (9th Cir. 1995)).

pronouncement, the *Lacy* court noted:

> A thorough reading of *Kyles* should leave no doubt about where the burden of providing *Brady, Bagley*, and *Giglio* material lies, and that it is non-delegable.[271] Therefore, under the United States Constitution, the prosecution has the burden of searching the agency personnel files in order to "vindicate fundamental due process rights."[272]

The Ninth Circuit, however, clarified the procedure existent in that circuit relative to the government's duty to examine agency personnel files for exculpatory material. In *United States v. Herring*, the Ninth Circuit held that a district court judge may not order a prosecutor to personally examine the personnel files of cooperating agency employees.[273] The holding in *Herring* did not obviate the rule in the Ninth Circuit, established in *Henthorn,* that the government has a duty to review agency personnel files upon request and there is no requirement of materiality.[274]

The remaining question for not only this analysis, but also across the federal circuits, is not whether the government should be burdened with searching agency personnel files, but who should conduct the review. The foregoing argument suggests that the prosecutor has the duty in light of *Kyles* and its progeny. The alternative is to require an *in camera* review of the files or to require the government to conduct the review of personnel files of agents and officers directly involved in the investigation. Notwithstanding the potential administrability problems that may result with such a procedure, an examination of experience in the Ninth Circuit reveals no significant administrative difficulties that render such a procedure prohibitive.[275] The *Lacy* case provides compelling reasons why such a rule is appropriate in upholding the dictates of *Brady*:

> Adopting the lexicon in *Kyles*, the situation as it exists under *Jennings* is like a ship captain anxious about tacking too close to the wind, but who must rely entirely on landbound compatriots

271. *Lacy*, 896 F. Supp. at 986.

272. *Id.*

273. 83 F.3d 1120, 1122 (9th Cir. 1996).

274. United States v. Herring, 83 F.3d 1120, 1122 (9th Cir. 1996) (citing United States v. Henthorn, 931 F.2d 29, 30-31(9th Cir. 1991)).

275. *See* Wiehl, *supra* note 7.

> to tell him the windspeed and directionals. Without ship's compass, radar or other instruments, the vessel is not seaworthy. If the information from shore proves insufficient, the mythical captain may suffer no more than the indignity of a rude dip in the water; a criminal defendant, on the other hand, has a great deal more at stake.[276]

The court reasoned that the person who is ultimately responsible and who is most intimately familiar with the facts of the case should bear the burden of conducting the search.[277] The court noted:

> [T]his court reads *Kyles* as holding that our constitution places the burden squarely on the prosecutor, not on agency clerks, functionaries and non-prosecuting attorneys who may have no trial experience, who have no knowledge of the facts and intricacies of the particular case, and who are three thousand miles away.[278]

If the Seventh Circuit rules that the prosecutors have an affirmative duty to search agency personnel files, then the method of disclosure and discovery is of great importance. Direct disclosure and discovery occurs between the government and the defendants. As noted *supra*, however, a district court could assure the impartiality and thoroughness of the review procedure by an *in camera* review. Moreover, this procedure is not new in federal district courts within the Seventh Circuit.[279] It seems logical that the prosecutor should conduct the review of the agency personnel files. She will realize what is exculpatory and impeachment material relative to the facts of the case. Alternatively, the issue to be determined is one that may be best observed by a neutral arbiter (the court or a magistrate judge) to determine whether the personnel files contain evidence that would undermine the officers' credibility. It is hard to place a finger on such materials if the viewpoint is that of an advocate whose job is not combing documents for impeachment material, but rather determining whether an officer has committed

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276. *Lacy*, 896 F.Supp. at 986.

277. *See id.*

278. *Id.*

279. *See* United States v. Walker, No. 96-CR-226 (E.D. Wis. 1996) (Judge Rudolph T. Randa conducted an *in camera* review of an agent's personnel file upon the government's disclosure that it learned during the trial of a potential discovery matter within the ambit of *Kyles* and recommended that an *in camera* review be conducted by the court).

perjury. Similarly, there is an institutional bias. Impeachment material affecting credibility can and should include whether the officer has engaged in shading of the truth, "mischaracterizations" of fact short of perjury, or improper police practices, or if an agent or officer failed to accurately characterize statements of the informant.

Another option is to order that the files of law enforcement officers be examined by the appropriate agency's attorney or his staff. The agency legal staff will notify the federal prosecutor assigned to the case if any potential *Brady* material is found. The prosecutor could then determine whether the information should be disclosed or whether a review by the district court is appropriate. Defendants are likely to not prefer this option for the obvious reason that it is hard to believe that an agency's legal staff has any motive other than to hide material which the defense should properly receive by "characterizing" them as non-exculpatory. While it is true that under *Kyles*, the prosecutor would be charged with the *Brady* violation if exculpatory material was disclosed later which was earlier withheld and reversal of a conviction could result, it is hard to conceive of how suppression of evidence by an agency's legal counsel would be uncovered.

Legal bases, apart from the constitutional arguments, exist that support the imposition of a duty upon the prosecutor to examine personnel files of agents and officers to discover impeachment material. These grounds, while not exhaustive, are noted below.

B. Additional Legal Bases Supporting the Rule Imposing a Duty upon Prosecutors to Search the Personnel Files of Agents and Officers for Impeachment Material

1. The Wide Scope of Cross-Examination Necessitates That the Scope of Disclosure Be Broad.

Disclosure of impeachment information is necessary to protect the right of a defendant to confront, cross-examine, and impeach witnesses under the Sixth Amendment. This right is a cherished one and remains "the principal means by which the believability of a witness and the truth of his [or her] testimony are tested."[280] Cross-examination "in matters relevant to credibility ought to be given wide scope."[281] While a trial judge has discretionary authority to restrict the scope of cross-

280. Davis v. Alaska, 415 U.S. 308, 316 (1974).

281. United States v. Williams, 592 F.2d 1277, 1281 (5th Cir. 1979); *see also* United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983).

examination, "this discretionary authority . . . comes into play only after there has been permitted as a matter of sufficient cross-examination to satisfy the Sixth Amendment."[282] The defendant has a right to present a complete defense.[283]

2. The Requested Records and Information Must Also Be Disclosed Because Under the Federal Rules of Evidence, Admissible Impeachment Information Includes Opinion and Reputation Evidence, Evidence of Specific Acts, and Evidence of Potential Bias.

Disclosure of material information contained in personnel files of agents and officers is supported also by the Federal Rules of Evidence, which allow impeachment through a variety of means.

For instance, Rule 608(a) of the Federal Rules of Evidence permits the credibility of a witness to be attacked in the form of opinion or reputation evidence. Judge Weinstein has clarified this rule, stating:

> Rule 701 . . . does not imposes [sic] formal prerequisites such as long acquaintance or recent information about the witness. Cross-examination can be expected to expose defects of lack of familiarity and to reveal reliance on isolated or irrelevant instances of misconduct or the existence of feelings of personal hostility towards the principal witness.[284]

Therefore, the requested information may well produce witnesses who will have an opinion on, or know the reputation of, the officer in question. Production of the requested information will provide counsel with the opportunity to investigate the allegation or complaint made, as well as providing witnesses who may testify on matters covered by Rule 608(a).

Rule 608(b) of the Federal Rules of Evidence permits inquiry on cross-examination into specific instances of misconduct of the testifying

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282. Green v. Wainwright, 634 F.2d 272, 275 (5th Cir. 1981) (quoting United States v. Bass, 490 F.2d 846, 858 n.12); *see also* United States v. Tracey, 675 F.2d 433, 437 (1st Cir. 1982) (any exercise of discretion limiting cross-examination must be informed by the utmost caution and solicitude for the defendant's Sixth Amendment rights); United States v. Houghton, 554 F.2d 1219, 1225 (1st Cir. 1977).

283. *See* California v. Trombetta, 467 U.S. 479 (1984).

284. WEINSTEIN'S FEDERAL EVIDENCE COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS, 608.04, 608-25. *See also* United States v. Watson, 669 F.2d 1374, 1382 (11th Cir. 1981) (finding that the trial court committed reversible error by excluding opinion testimony the 11th Circuit stated, "foundation of long acquaintance is not required for opinion testimony." *Id.* at 1382 (*citing* WEINSTEIN'S EVIDENCE)).

witness which relate to his or her character trait for truthfulness or untruthfulness. The categories of records and information that would be material relate to the truthfulness or untruthfulness of agents and officers. As such, disclosure of agents' personnel files is required. This would also include, for example, disclosure of any allegations of failure to collect potentially exculpatory evidence. It follows that if the officer has, or is alleged to have committed acts reflecting negatively on his or her credibility, he or she may be conducting himself or herself similarly in this case. Therefore, the defense is entitled to receive and investigate such allegations or acts.

Instances of prior misconduct by a witness often will be relevant to his or her bias or motive to testify in such a manner in the current proceeding. It is well-recognized that "bias of a witness is not a collateral issue and extrinsic evidence is admissible to prove that a witness has a motive to testify falsely."[285] The introduction of extrinsic evidence to show bias is allowed even when the evidence is also relevant to character which cannot be proved by extrinsic facts.[286]

By way of example, in *United States v. Garrett*, the Court examined the disclosure of an officer's personnel file and related records of the officer's disciplinary proceedings.[287] In *Garrett*, cross-examination of the officer had been restricted and production of the personnel records was limited. The *Garrett* court found both actions improper, noting:

> [T]he trial judge was too restrictive in his limitation of cross-examination in the present case.... Furthermore, there is no way to determine whether other facts might have been disclosed by an examination of [Officer] Lehman's disciplinary proceedings which would be the possible basis for reasonable inferences of bias or an interest in the outcome of the Garrett prosecution. [Officer] Lehman might well have looked upon a successful prosecution of Garrett as a means of having his suspension lifted and being returned to full duty as a police

285. United States v. James, 609 F.2d 736, 746 (2d Cir. 1976) (citing United States v. Harvey, 547 F.2d 720, 722 (2d Cir. 1976)); *see also* United States v. Blackwood, 456 F.2d 526, 530 (2d Cir. 1972) ("A defendant's major weapon when faced with inculpatory testimony of an accusing witness often is to discredit such testimony by proof of bias or motive to falsify. Evidence of such matters is never collateral... for if believed it colors every bit of testimony given by the witness whose motives are bared." *Id.* at 530).

286. See Beaudin v. United States, 360 F.2d 417, 423-24 (5th Cir. 1966); *see also* WEINSTEIN'S EVIDENCE: UNITED STATES RULES 607.03, 607-24, n.4.

287. 542 F.2d 23 (6th Cir. 1976).

officer.[288]

Garrett illustrates that the disciplining of a police witness constitutes evidence of bias creating a potential motive to lie and is therefore the proper subject of disclosure and cross-examination.[289] The underlying facts of such discipline must be disclosed, especially where they relate to issues and personalities in the case at hand.[290] Accordingly, *Garrett* further supports the disclosure of impeachment information.

V. CONCLUSION

This Article has shown how the issue of disclosure of personnel files in federal criminal cases arises in several settings. What is apparent is that there is a lack of transparency in applying the dictates of *Brady* between the Ninth Circuit and its sister circuits. This author has attempted to show why the Ninth Circuit approach should be favored over the more widely adopted materiality approach that is controlling in most federal circuits including the Seventh Circuit.

The argument is supported by showing that *Kyles* and *Morris* can be fairly read to mean that the prosecutor has a continuing duty to learn of exculpatory or impeachment material contained in the personnel files of agents that are members of the investigation team. Moreover, these opinions suggest that the defendant does not bear the burden of showing how the information contained in those personnel files are material to the defense. While the prerequisite that the defendant demonstrate the materiality of evidence contained in such files is the rule in the Seventh Circuit in so far as *Andrus* and *Navarro* remain good law, it is clear that both *Kyles* and *Morris* contravene that standard. Moreover, there exist independent standards from the constitutional requirement that prosecutors turn over impeachment material to the defense derived from *Brady* and its progeny as outlined above. The foregoing principles strongly suggest that the adoption of the Ninth Circuit approach in the Seventh Circuit is compelling in order to maintain the important due process rights of defendants in criminal cases.

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288. *Id.* at 26.

289. *See id.*

290. *See id.* at 26-27 (citing Davis v. Alaska, 415 U.S. 308 (1974)).