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Keeping Files on the File Keepers: When Prosecutors Are Forced to Turn over the Personnel Files of Federal Agents to Defense Lawyers

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KEEPING FILES ON THE FILE KEEPERS: WHEN PROSECUTORS ARE FORCED TO TURN OVER THE PERSONNEL FILES OF FEDERAL AGENTS TO DEFENSE LAWYERS

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Abstract: The issue of whether criminal defense lawyers can compel federal prosecutors during pre-trial discovery to examine and turn over information in the personnel files of federal agents who will testify at trial has profoundly affected federal prosecutors, law enforcement agents, and defense lawyers alike. Demands for discovery of these files have risen steadily in recent years. In the hands of skilled defense counsel, information in a personnel file can be used to impeach an agent on the witness stand. For agents and prosecutors, much more is at stake than the way this information may be used at trial. Professional reputations and morale are on the line. This Article surveys the federal cases in the area, and discusses the marked split between the circuits on the issue. The Article analyzes the procedures by which the U.S. Department of Justice and the various federal law enforcement agencies have attempted to comply with rulings that have given defendants easier access than before to the personnel files of federal agents. The Article concludes with some proposals for change—ways in which the concerns of prosecutors and law enforcement agencies can be addressed without compromising a defendant's access to evidence that could affect the verdict.

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I believe that my perspective as a former federal prosecutor has aided me enormously in writing this Article. I also recognize that I may hold biases in favor of the prosecution because of that experience. I have attempted to dispense with those biases in writing this Article, and I believe that I have dealt evenhandedly with the issues raised in the Article.

[Defendant claims] that the trial court should have granted his discovery requests for impeaching material on the law enforcement officers who testified against [him at trial]. [He] argues that he should have had access to material from the witnesses' personnel files which might have been impeaching. . . .

[But he] concedes that there is no suggestion that the personnel files actually contained information which was impeaching. . . .

. . .[He] was not entitled to the personnel files of the law enforcement witnesses without even a hint that impeachment material was contained therein.

United States v. Andrus[1]

[T]he government has a duty to examine personnel files [of federal agents who will testify at trial] upon a defendant's request for their production. Absent such an examination, it cannot ordinarily determine whether it is obligated to turn over the files.

The government is incorrect in its assertion that it is the defendant's burden to make an initial showing of materiality. The obligation to examine the files arises by virtue of the making of a demand for their production.

United States v. Henthorn[2]

I. INTRODUCTION

This Article addresses an important issue in federal criminal law: whether criminal defendants can compel federal prosecutors during pretrial discovery to review and turn over the personnel files of law enforcement officers who will testify at trial.[3] The personnel files of

1. 775 F.2d 825, 842–43 (7th Cir. 1985).

2. 931 F.2d 29, 31 (9th Cir. 1991).

3. The scope of this Article is limited primarily to a discussion of federal criminal case law. With a few exceptions indicated in the text, the Article does not discuss state law. Additionally, the Article does not address Federal Rule of Criminal Procedure 16 in detail, nor does it discuss case law dealing with the use of subpoenas in civil or criminal cases, or certain federal statutory regulations, including privacy and accounting of disclosure requirements, that may have an impact under certain circumstances on the information that the government can disclose.

Courts have yet to address squarely a closely related issue, namely, whether or when prosecutors must review or turn over information in the personnel file of an agent who has worked on the case against the

federal agents often contain extremely sensitive material, including job performance reviews, grievances filed by private citizens, and the records of reprimands or disciplinary proceedings. In the hands of skilled defense attorneys, much of this information could be used to impeach an agent's credibility on the witness stand.[4] Although federal agents may be accustomed to keeping files on other people, they are extremely reluctant to allow the people whom they investigate (and even the prosecutors with whom they work) to delve into the files that contain the most private details of their working lives.

As defense lawyers have increasingly sought access to these files,[5] federal courts have increasingly attempted to devise rules governing the review and disclosure of information that the files contain. What has emerged is a distinct split among several appellate circuits over a threshold issue: must the defendant be made to show that an agent's personnel file will yield something of impeachment value before a court will even consider ordering the prosecutor to review the file for information that should be disclosed?

As the law presently stands in a number of circuits, a defendant must make a prior showing that an agent's personnel file will yield something materially impeaching before the government will be required to review the file for information that should be disclosed.[6] In these circuits, it is

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defendant but who will not be called as a government witness at trial. A pre-trial discovery request for the personnel file of an agent who will not be called as a government witness would likely be decided under Federal Rule of Criminal Procedure 16(a)(1)(C) and case law on that rule, and is beyond the scope of this Article. Rule 16(a)(1)(C) governs the discovery of evidence that the government does not intend to use at trial, but that is "material to the preparation of the defendant's defense." *See* Fed. R. Crim. P. 16(a)(1)(C). The general rule is that a defendant who seeks discovery under Rule 16(a)(1)(C) has the burden of making a prima facie showing that the requested information is material to his defense. 2 Charles Alan Wright, *Federal Practice and Procedure*, § 254, at 66–67 (2d ed. 1982 & Supp. 1996).

All of these areas are ripe for discussion in another forum.

4. *See* Giglio v. United States, 405 U.S. 150 (1972).

5. Memorandum from Dennis F. Hoffman, Chief Counsel, Drug Enforcement Administration, to All U.S. Attorneys Within the Ninth Circuit (Mar. 27, 1995) (on file with *Washington Law Review*); Letter from Leland E. Lutfy, U.S. Attorney, District of Nevada, to J.J. Skidmore, Postal Inspector in Charge, U.S. Postal Inspection Service (Aug. 12, 1991) (on file with *Washington Law Review*); Memorandum from Robert S. Mueller, III, Assistant Attorney General, Criminal Division, U.S. Department of Justice, to All U.S. Attorneys Within the Ninth Circuit (Aug. 12, 1991) (on file with *Washington Law Review*); Survey by Lis Wiehl of Federal Public Defenders' offices (sent Aug. 13, 1996) (results on file with *Washington Law Review*) [hereinafter Survey of Federal Public Defenders] (*see infra* note 193).

6. Circuits that have clearly gone this way are the Sixth Circuit (*see* United States v. Valentine, No. 94-6195, 1995 U.S. App. LEXIS 16584, at *1 (6th Cir. June 30, 1995); United States v. Driscoll, 970 F.2d 1472 (6th Cir. 1992)); the Seventh Circuit (*see* United States v. Andrus, 775 F.2d 825 (7th Cir. 1985); United States v. Navarro, 737 F.2d 625 (7th Cir. 1984)); and the D.C. Circuit (*see* United States v. Lafayette, 983 F.2d 1102 (D.C. Cir. 1993); United States v. Lampkin, Crim. Action No. 96-0103 (JHG), 1996 U.S. Dist. LEXIS 7262, at *1 (D.D.C. May 28, 1996)). An Eleventh Circuit panel (like the

entirely possible (even probable) that a file rife with impeachment material will never be reviewed by the prosecutor, let alone disclosed to the defendant, if the defendant cannot make a predicate showing that there is something significant in the file. By contrast, as the law presently stands in the Ninth Circuit, which includes the federal courts for most of the western United States,[7] a defendant's discovery request for an agent's personnel file is enough to trigger the government's obligation to review the agent's personnel file for impeachment material.

The clash between these circuits has produced a plaguing anomaly. Although a prosecutor's obligation to turn over exculpatory or impeachment information once she is aware of it is governed by a single set of rules in all the circuits,[8] her obligation to look for such information in the first place is governed by divergent standards and depends dramatically on which circuit's law applies. This divergence between the circuits affects the way the government prosecutes criminal cases in federal court. For example, the prosecutor who is required to review an agent's personnel file for impeachment material may find entries that will force her to make a more favorable plea offer to the defendant, or to scramble to find another agent to testify. The prosecutor who is not required to review or disclose impeachment information in the file may have an advantage during plea negotiations with a defendant who lacks the resources to discover the agent's history through independent investigation. But, in those cases where the defendant manages to discover the agent's history independently, the prosecutor who is not required to examine the personnel file may find herself "ambushed" at trial by a defense attorney who knows more about the agent than she does.

Part II of this Article surveys the federal cases in which courts have addressed the issue of when the government's lawyer must review the personnel files of agents who will testify at trial. The Article documents the development of the split among the circuits on this issue, and, after chronicling this history, discusses a 1995 U.S. Supreme Court decision

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Seventh Circuit) reached the same result as the courts in *Andrus* and *Navarro*. See United States v. Meros, 866 F.2d 1304, 1310 (11th Cir. 1989), in which the court held that a federal prosecutor was not required to search the files of local police agencies for potentially exculpatory material. The defendant had failed to make any showing that such material existed in the files.

7. The Ninth Circuit includes the following states and territories: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, the Northern Mariana Islands, and Guam.

8. Kyles v. Whitley, 115 S. Ct. 1555 (1995); Giglio v. United States, 405 U.S. 150 (1972); Brady v. Maryland, 373 U.S. 83 (1963).

that, though not directly on point, may offer a preview of how the Court may resolve this split.

Part III of the Article describes the attempts by the U.S. Department of Justice and the various federal law enforcement agencies to adapt to the new reality of increasing discovery demands for agency personnel files. As defendants' requests for discovery of these files have multiplied, the agencies have tried to devise uniform protocols for reviewing the files for impeachment material. However, while the Department of Justice and the agencies have publicly suggested that their protocols are consistent with each other and with the developing law, their public posture has belied some significant differences in their approaches—differences reflecting a fierce debate between agents and prosecutors over how much review and disclosure the law requires of them. Some of the appellate decisions have produced some unintended consequences, as government lawyers and agents have found ways to comply narrowly with (or thwart) discovery requests for personnel files.

Finally, part IV offers some proposals for resolving the split between the circuits, urging the adoption of a single, nationwide standard that would better address the privacy concerns of the law enforcement community and the due process concerns of criminal defendants than the divergent standards that are currently in force. The proposal would winnow the number of discovery requests for files. Defense attorneys could no longer make blanket requests for personnel files, as they can now do in the Ninth Circuit. However, defense attorneys in most of the circuits would gain easier access to relevant information in the files than they presently have.

II. THE LAW

A. Pre-Henthorn

1. 1963 (Brady) *Through 1984* (Cadet)

The federal case law[9] prior to 1984 pertaining to the pre-trial discoverability of agency personnel files can be described as a kind of patchwork with no unifying theme. The starting point of any discussion of the law in this area is the U.S. Supreme Court's 1963 decision in

9. With a few exceptions, this Article discusses federal law only. For a review of the state cases involving state police officers and prior complaints against them, see Jeffrey Ghent, Annotation, *Accused's Right to Discovery or Inspection of Prior Complaints Against, or Similar Personnel Records of, Peace Officers Involved in the Case*, 86 A.L.R.3d 1170 (1995).

Brady v. Maryland,[10] in which the Court laid down the broad rule that suppression by the prosecution of requested evidence favorable to the accused violates due process where the evidence is material, either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecutor.[11] While the *Brady* decision spoke of the prosecutor's duty to divulge exculpatory material in his possession, it did not command prosecutors to affirmatively search for exculpatory material of which they were not aware. In *Giglio v. United States*, the U.S. Supreme Court later determined that evidence impeaching the credibility of a government witness falls within the *Brady* rule when the reliability of the witness is critical to the jury's determination of the defendant's guilt.[12]

In the 1960s and early 1970s a smattering of post-*Brady* decisions established and reiterated that *Brady* did not supply defendants with a basis for pre-trial discovery in any form.[13] Potential *Brady* violations were only to be addressed post-conviction. In looking at whether the statements of government witnesses should be disclosed to the defense pre-trial, a federal district court for the Southern District of New York said, in *United States v. Manhattan Brush Co.*, "[W]hile the Government has an important duty to conduct criminal prosecutions fairly, its obligations must be examined and tested after trial, not before."[14] The courts had not yet wrestled with the issue of agents' personnel files *per se*. Instead, the cases involved requests to inspect, for example, a testifying agent's notes[15] and evidence of inconsistency in a witness' pre-trial identification.[16] In these early cases, every court that considered the issue of whether the defendant was entitled to pre-trial discovery of government files decided firmly in favor of nondisclosure—until 1973.

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10. 373 U.S. 83 (1963).

11. *Id.* at 87.

12. 405 U.S. 150, 155 (1972) (holding that prosecution's duty to present all material evidence to jury was not fulfilled where Government failed to disclose alleged promise of leniency made to its key witness in return for his testimony); *see also* United States v. Bagley, 473 U.S. 667, 676 (1985) ("[I]mpeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule."). In *Bagley*, the Court established the materiality standard applicable when the prosecutor fails to disclose requested information to the defense that could have been used to impeach a government witness.

13. 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).

14. *Manhattan Brush*, 38 F.R.D. at 7.

15. *Id.* at 4.

16. *DeLeo*, 422 F.2d at 498.

In *United States v. Deutsch*,[17] a Fifth Circuit panel considered whether a defendant was entitled to discovery of the personnel file of the government's key witness. The defendant, charged with attempted bribery of a postal worker, had made a pre-trial discovery request for the production of the personnel file of the postal worker whom he had allegedly sought to bribe. The prosecution opposed the request on the grounds that it did not have physical possession of the file, and that the Post Office was not an "arm of the prosecution" and could not, therefore, be ordered to produce the file.[18]

In remanding the case to the district court to examine the file for impeachment material, the panel relied heavily on the fact that the agent's testimony was the government's "whole case."[19] In *Deutsch*, the prosecutor argued that he should not be compelled to inspect the relevant personnel files without the defendant first making a showing that the records contained material relevant to his defense.[20] Although the Fifth Circuit panel did not rule on whether the defense must make such a showing before triggering the prosecutor's obligation to inspect, the court did stretch to find that the defendant had met this burden, if there was one.[21]

After *Deutsch*, the next federal appellate decision on the personnel file issue was a Tenth Circuit case, *United States v. Muse*,[22] in which the

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17. 475 F.2d 55 (5th Cir. 1973).

18. The Sixth Circuit summarized it as follows:

> Before trial defendants moved for the production of [postal worker] Morrison's personnel file, for "insight into the character of said prospective witness," citing Brady v. Maryland, 1963, 373 U.S. 83. The U.S. Attorney responded, "This office does not have the personnel file of D. F. Morrison." The [district court] ruled, "[T]he prosecution cannot be compelled to disclose something which it does not have. Furthermore, the Post Office Department does not appear to be an arm of the prosecution as contemplated by *Brady*."

Id. at 57 (parallel citation omitted).

19. *Id.* at 58.

20. *Id.*

21. The court recited the following portion of the transcript:

> But if there is any burden on the defendants of suggesting a possibility of favorable evidence we note the evasive testimony of Morrison at the trial.
>
> Q. Have you ever had any problems with the Supervisor?
>
> A. No sir.
>
> Q. About your personal appearance, or anything?
>
> A. Personal appearance where they thought my hair may be too long. It was unjustified.
>
> Q. Justified?
>
> A. Unjustified. I had been down to see Mr. Camp. He said there was nothing wrong with it.

Id.

22. 708 F.2d 513, 516–17 (10th Cir. 1983).

panel voted to affirm the district court's denial of a defendant's pre-trial request for production of the personnel files of government agents who would testify against him at trial. The panel agreed with the broad language of *Deutsch* on the government's obligation to turn over information that could be used for impeachment purposes, but held that the trial court's refusal to order production of the personnel files had not been error "because the court did in fact order production of all material favorable or useful to the defense."[23]

While the *Muse* case emphasized the prosecutor's duty to disclose impeachment material, it did not address some important questions. Must the prosecutor inspect the personnel files on her own initiative, or may she wait until the defense has requested the files? Should the defendant be required to make some prima facie showing that the file is likely to yield something exculpatory or impeaching before the prosecutor will be made to review the file? Nothing in the *Muse* decision (or many subsequent decisions in other circuits, discussed *infra*) compelled the prosecutor to examine an agent's personnel file to uncover impeachment material, even after a request by the defense. The *Muse* court reiterated the prosecutor's general obligation to turn over impeachment material but said nothing about whether a prosecutor has an affirmative duty to look at the file in order to discover any impeachment material that might be found there.[24]

Then, in 1984, a three-judge panel[25] of the Ninth Circuit ordered the government on remand to submit the personnel records of government

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23. *Id.* at 517. The court questioned, but did not decide, whether the government was correct in its contention that the defendant's request for the agents' personnel files was merely a "fishing expedition."

24. Between 1973 and 1984 several other federal district and state courts addressed the issue of personnel files in criminal pre-trial discovery. A federal district judge in Delaware denied a defendant's request for:

> Any and all personnel files for the witness, the existence and identity of all federal, state and local government files for the witness and the existence and identity of all official internal affairs, internal investigation or public integrity investigation files relating to or connected with each witness who was or is a law enforcement officer.

United States v. Boffa, 513 F. Supp. 444, 501 (D. Del. 1980). The court held that this request was not for matters material to the preparation of the defense as required by *Brady*. *Id.*; *see also* United States v. Akers, 374 A.2d 874 (D.C. 1977) (reversing lower court's order compelling discovery of police personnel files because not usable for impeachment or material for client counseling); State v. Butts, 640 S.W.2d 37 (Tenn. Crim. App. 1982) (denying defendant's request for police personnel files because defendant failed to demonstrate "sufficient materiality" to warrant disclosure of files).

25. The three judges were Arthur L. Alarcon, William C. Canby, Jr., and Stephen Reinhardt. Seven years later in 1991, Judge Reinhardt would write the seminal opinion in United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991).

agents to the trial court for an in camera inspection for *Brady* material.[26] The requests for the files had been made, ostensibly, in support of an entrapment or outrageous conduct defense. The prosecutor argued that the defendants must make some showing of materiality before his review of the file should be required.

> [This] is an unwarranted intrusion. There is absolutely no reason why they should go into the personnel records of government agents who were involved in this particular case. There has been nothing advanced by these defendants as to why those records would be helpful to them. I think this is an intrusion on [sic] the privacy of these individuals without some kind of a showing that this [sic] relevant to a defense in this case.[27]

Although the panel in *United States v. Cadet* found that the lower court had abused its discretion in ordering the government to produce the personnel files in their entirety, it nevertheless ordered the government to submit the files to the lower court on remand, for review and disclosure of any information material to the defense.[28] As in *Deutsch*, the government argued that the defendants' request should be denied because they had not made a prior showing of materiality.[29] Writing for the panel, Judge Alarcon dismissed that argument rather caustically:

> No order was necessary to compel the government to accord due process to these defendants. Before this court, the government again offered to examine the personnel files for *Brady* material. That duty should have been performed in August of 1982, *as soon as the government was made aware of the defendant's request for the personnel files* in order to assist the defendants in their trial preparation. The prosecutor's oath of office, not the command of a federal court, should have compelled the government to produce

26. United States v. Cadet, 727 F.2d 1453 (9th Cir. 1984). In *Cadet* the government appealed from the trial court's judgment dismissing with prejudice a four-count indictment against three defendants. The indictment charged the defendants with transporting, receiving, and selling documents belonging to a corporation (IBM). Defendants Saffaie's and Ayazi's exhaustive discovery motion included a request for "[p]roduction of all government personnel or other files pertaining to FBI Special Agents Alan J. Garretson and Mary B. Williams." *Id.* at 1457.

27. *Id.* at 1457 n.7.

28. *Id.* at 1470. The panel set forth some procedural guidelines for review and disclosure of a personnel file: "If the prosecution is uncertain about the materiality of information within its possession, it may submit the information to the trial court for an in camera inspection and evaluation." *Id.* (quoting United States v. Gardner, 611 F.2d 770, 775 (9th Cir. 1980) (citing United States v. Agurs, 427 U.S. 97, 106 (1976))).

29. *Id.* at 1467.

> any favorable evidence in the personnel records. While we cannot condone the prosecutor's recalcitrant behavior, it is evident to us the court abused its discretion in ordering disclosure of the entire personnel file without first conducting an in camera inspection to determine whether the files contained any *Brady* material.[30]

The *Cadet* decision made it clear that no prior showing of materiality need be made—the defendant's request alone was enough to trigger the prosecutor's obligation to look for *Brady* material in an agent's personnel file.[31]

2. *1984* (Cadet) *Through 1991* (Henthorn)

The *Cadet* decision went relatively unnoticed by the defense bar, prosecutors, and legal scholars in the Ninth Circuit.[32] Federal district courts in other circuits continued to deny defendants' motions for review of government personnel files unless the defendants could make a prior showing of materiality.[33] The same was true at the appellate level. In the Seventh Circuit, for example, the panel in *United States v. Andrus*[34]

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30. *Id.* at 1467–68 (emphasis added).

31. *Id.* at 1467–68.

32. This assertion is based on several dozen interviews with defense lawyers, federal prosecutors, and legal scholars, and on the dearth of Federal Ninth Circuit cases on the personnel file issue following *Cadet*, and before *Henthorn*. The interviews were conducted between May and September, 1996.

The *Henthorn* case, decided seven years after *Cadet*, is generally regarded as the seminal case in the Ninth Circuit. One reason may be the increased media attention surrounding the *Henthorn* decision. *See* Robb London, *New Weapon for the Defense: Files on U.S. Agents*, N.Y. Times, June 7, 1991, at B7; Airtel communication from Louis J. Freeh, Director of the Federal Bureau of Investigation (FBI), to all Special Agents in Charge, (Nov. 27, 1995) (on file with *Washington Law Review*). It was not until *Henthorn* that defense lawyers seemed to become aware that they could ask for the personnel files of testifying law enforcement agents. *See* Interview with C. James Frush, Defense Attorney, in Bainbridge Island, Wash. (Aug. 21, 1996).

33. In Illinois: United States v. Quintanilla, 760 F. Supp. 687 (N.D. Ill. 1991), *aff'd*, 2 F.3d 1469 (7th Cir. 1993); United States v. Dominguez, 131 F.R.D. 556 (N.D. Ill. 1990); United States v. Cole, 707 F. Supp. 999 (N.D. Ill. 1989); United States v. Dicaro, No. 88 Cr 923, 1989 U.S. Dist. LEXIS 2056, at *1 (N.D. Ill. Feb. 24, 1989); United States v. McDonnell, 696 F. Supp. 356 (N.D. Ill. 1988). In Kansas: United States v. McClennon, Nos. 90-10045-01, 90-10045-02, 1990 U.S. Dist. LEXIS 13203, at *1 (D. Kan. Sept. 7, 1990); United States v. Cooper, Crim. Action No. 89-10025-01, 1989 U.S. Dist. LEXIS 13452, at *1 (D. Kan. Oct. 19, 1989). In New York: United States v. Rufolo, No. 89 Cr. 938 (KMW), 1990 U.S. Dist. LEXIS 2697, at *1 (S.D.N.Y. Mar. 13, 1990); United States v. Davis, No. 89-CR-89, 1989 U.S. Dist. LEXIS 14678, at *1 (N.D.N.Y. Dec. 1, 1989).

34. 775 F.2d 825 (7th Cir. 1985). The appeal followed the conviction of defendant Andrus and others of conspiring to distribute cocaine. One of the agents who testified against Andrus (and whose personnel file had been requested) had acted in an undercover capacity in the case, posing as a potential buyer of cocaine.

upheld the trial court's denial of the defendants' request for access to government personnel files for all of the law enforcement witnesses in the case. The court focused on the defendant's failure to make a showing that the files contained impeachment material:

> Mere speculation that a government file may contain *Brady* material is not sufficient to require a 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.[35]

Other appellate panels in the Seventh Circuit ruled that a defendant's discovery request for a personnel file would not be granted absent a prior showing that the file would contain material that could change a guilty verdict.[36] In *United States v. Navarro*, the court found that the speculative assertion that a particular file might contain impeaching material was not, by itself, enough to force the government to produce the file for the court's inspection.[37] Still another Seventh Circuit panel reaffirmed this position even more broadly, upholding the district court's denial of the defendant's discovery motion seeking access to the FBI's file on a government informant. In *United States v. Phillips*, the appellate court said:

> We reiterate that a *Brady* request does not entitle a criminal defendant to embark upon an unwarranted fishing expedition through government files, nor does it mandate that a trial judge conduct an in camera inspection of the government's files in every case. Such matters are committed to the sound discretion of the trial judge.[38]

35. *Id.* at 843 (citing United States v. Navarro, 737 F.2d 625 (7th Cir. 1984), in which court upheld district court's denial of defendant's motion for discovery of Immigration and Naturalization Service files relating to government informant who testified at trial).

36. United States v. Romo, 914 F.2d 889, 898–99 (7th Cir. 1990) (citing *Andrus*, 775 F.2d 825; *Navarro*, 737 F.2d 625).

37. *Navarro*, 737 F.2d at 631.

38. United States v. Phillips, 854 F.2d 273, 278 (7th Cir. 1988).

B. Henthorn *to Today—The Split Between the Circuits*

1. The Ninth Circuit and the Rule of Henthorn

Seven years after *Cadet*, and six years after *Andrus*, a Ninth Circuit panel held squarely that upon a defendant's request, the government has a duty to examine the personnel files of testifying agent witnesses for evidence material to the defendant's case.[39] That court held that the defense need not make any prior showing that impeachment material will be found in the agent's personnel file. Rather, the government's duty to look through a file is triggered by the defendant's request alone.

Following his conviction for various drug offenses, Donald Henthorn filed a pro se appeal alleging twelve different categories of error by the district court, each of which, he argued, had precluded him from obtaining a fair trial.[40] The government responded that it had "no obligation to examine the personnel files absent a showing by the defendant that they contained information material to his defense."[41] The trial court had denied Henthorn's discovery motion because he had made no showing of materiality.[42] Henthorn cited no specific legal precedent in

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39. United States v. Henthorn, 931 F.2d 29, 31 (9th Cir. 1991). Henthorn appealed from his conviction after a jury trial on charges of conspiracy to import and possess cocaine with intent to distribute, and travel in interstate and foreign commerce in aid of racketeering enterprises. Henthorn claimed that the district court erred in denying his discovery request for impeachment material contained in the testifying officers' personnel files.

40. Brief of the Appellant at ii–ii(a), *Henthorn* (No. 88-5299). Henthorn raised a spectrum of potential abuses, ranging from hearsay violations, to allegations of "trial by ambush," to "interdiction of the truth-seeking process," to various forms of government misconduct, including "witness tampering" and "suppression of evidence." Included in the myriad alleged errors was the claim that the government had erred in denying his request to produce the personnel files of all testifying law enforcement officers. *Id.* at 20.

41. *Henthorn*, 931 F.2d at 29.

42. The trial court concluded that Henthorn had failed to meet his obligation of identifying a "specific wrongdoing" before obtaining the right to have the court review the files in camera. *Id.* at 30. Thus, the trial court appears to have adhered to the standard followed in those circuits in which a prosecutor's duty to review a file hinged on the defendant's obligation to first make a prima facie showing that the file would reveal something materially impeaching or exculpatory. This was certainly at odds with the implicit logic of the Ninth Circuit's view in *Cadet*.

Ironically, after the appellate decision, Henthorn himself still could not identify any specific wrongdoing by the agents: "I'd seen them in action for some time, and I figured there was a good chance that if anybody had something in their files it would be these two guys, so I asked for the files." London, *supra* note 32, at B7.

The following excerpts from his appellate brief are the closest Henthorn came to making any kind of showing or allegation of misconduct on the part of the law enforcement agents:

> During the post arrest sequence, the case agent for the McAllen, Texas D.E.A., agent Mike Harper, told both Henthorn and Riley that the rest of the Baramdyka organization members had

his pro se appeal brief to support his claim of error regarding the trial court's denial of access to the personnel records.

In the appellee's brief to the Ninth Circuit, the Assistant U.S. Attorney (AUSA) responded succinctly to Henthorn on the issue of his request for the personnel files:

> 4. Judge Turrentine properly denied the appellant's motion to inspect the personnel records of testifying law enforcement officers for lack of sufficient showing (RT 2/18/88 at 43–48). United States v. Cadet, 727 F.2d 1453 (9th Cir. 1984).[43]

In a telephone interview five years after the decision, the prosecutor said that he felt compelled to include *Cadet* in his brief, even though it had not been cited by Donald Henthorn in his appeal because he felt that it was "the right and ethical thing to do even though it could hurt the case."[44]

Judge Reinhardt wrote the opinion for the three-judge panel.[45] Citing *Cadet*, Judge Reinhardt wrote that the government had been incorrect in asserting that the defendant must make an initial showing of materiality. "The obligation to examine the files," he wrote, "arises by virtue of the making of a demand for their production."[46] The panel remanded the case

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been arrested in California, and that those arrested were giving incriminating statements to the California agents which inculpated Henthorn and Riley as members of the Baramdyka organization.

On more than one occasion, agent Harper took Henthorn from the Edinberg, Texas jail cell without the presence of counsel and proceeded to interrogate and attempt to persuade the Appellant to accept a Government proffered attorney, Mr. Neal DuVall, plus made several offers of a plea agreement in exchange for perjured testimony from the Appellant.

Brief of the Appellant at 3, *Henthorn* (No. 88-5299).

43. Brief for the Appellee at 34, *Henthorn* (No. 88-5299).

44. Telephone Interview with Roger W. Haines, Jr., Assistant U.S. Attorney for the Southern District of California (Aug. 8, 1996). Haines was counsel for the government in *Henthorn*.

45. The two other judges were Harry Pregerson and Cynthia Holcomb Hall. The panel plucked this issue from among all the others raised by Henthorn as worthy of a published opinion. "Appellant raises a number of other issues which we resolve in a separate memorandum disposition filed concurrently herewith." *Henthorn*, 931 F.2d at 30 n.1. The appeal was decided on the briefs, without oral argument.

46. *Id.* at 31. The opinion further stated:

> In United States v. Cadet, 727 F.2d 1453 (9th Cir. 1984), we set forth the procedure the prosecution must follow when confronted with a request by a defendant for the personnel files of testifying officers. We stated that the government must "disclose information favorable to the defense that meets the appropriate standard of materiality.... If the prosecution is uncertain about the materiality of information within its possession, it may submit the information to the trial court for an in camera inspection and evaluation...." As we noted in *Cadet*, the government has a duty to examine personnel files upon a defendant's request for their

to the district court for an in camera review of the personnel files that Henthorn had requested.[47]

2. *The Immediate Reaction to* Henthorn *in the Ninth Circuit—Prosecutors, Law Enforcement Agents, and Defense Counsel*

Unlike the *Cadet* decision of 1984, *Henthorn* drew the immediate attention of the law enforcement community, defense lawyers, and the media. Several weeks after the decision, *The New York Times* ran a lengthy article on the decision entitled "New Weapon for the Defense: Files on U.S. Agents."[48] The article outlined much of the substance of the decision and predicted that it would stir up great debate in the federal law enforcement community.[49] A great many defense lawyers must have read the *Henthorn* opinion or the *New York Times* article about it because discovery requests for personnel files of government agents soared.[50]

Criminal defense lawyers who had been practicing in the Ninth Circuit at the time of *Cadet* and had never made a discovery request for agents' personnel files suddenly realized that they could ask for (and get) an inspection of the personnel files of agents who were going to testify at trial.[51] The media touted the *Henthorn* opinion as a "new weapon" for

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production. Absent such an examination, it cannot ordinarily determine whether it is obligated to turn over the files.

Id. at 30–31 (citations omitted).

47. *Id.* at 31. On remand, the district court conducted an in camera review of the files, and did not order that anything be turned over. The conviction was ultimately affirmed by the Ninth Circuit. Henthorn filed a petition for writ of certiorari in the Supreme Court on other grounds, which was denied. Henthorn v. United States, 503 U.S. 972 (1992).

48. London, *supra* note 32, at B7.

49. "The ruling has touched off intense debate between law-enforcement officials and members of the defense bar, pitting the privacy rights of Federal agents against the right of defendants to see evidence that could impeach the credibility of witnesses." *Id.*

50. Letter from Lutfy, *supra* note 5. Lutfy stated:

> As a result of the Ninth Circuit decision in *U.S. v. Henthorn*, our office has received motions by defense counsel seeking *Brady* material contained in the personnel files of our agent witnesses. I have had a number of discussions with personnel in the Criminal Division of the Department of Justice concerning the scope of what needs to be done by the Government when we receive a request for *Brady* material concerning an agent's personnel file.

Id. The letter was copied to all Criminal Assistant U.S. Attorneys.

51. Telephone Interview with Frush, *supra* note 32; Telephone Interview with Haines, *supra* note 44; Telephone Interview with Frank Z. Leidman, Law Offices of Frank Z. Leidman (Aug. 12, 1996).

The first such request may have been made midway through a federal murder-for-hire trial in the Western District of Washington that went to trial in Seattle only weeks after the *Henthorn* decision. The FBI, primarily through the work of the lead case agent, had conducted an extensive investigation into the defendant's personal history and had worked closely with the intended victim and with the

defense lawyers, and for the first time, prosecutors and agents began to feel an uneasy tug between two players on the same team. This tension is discussed more fully in part III.

The Department of Justice swiftly issued an official response to the *Henthorn* ruling, an action that it had not taken after the *Cadet* decision. In a memorandum sent to all the United States Attorneys in the Ninth Circuit, the Department acknowledged that the *Henthorn* decision had "prompted a spate of motions by defense counsel seeking *Brady* material contained in the personnel files of our agent witnesses."[52] The Department issued the memorandum in order to "offer some guidance regarding how you should respond to such motions."[53]

It seemed paradoxical for the Department to move so quickly to circulate a memorandum of guidance while insisting that *Henthorn* did not change the law. "First, we do not read *Henthorn* as changing the law in the Ninth Circuit or our duty to disclose under *Brady*."[54] To the extent that *Henthorn* had simply made explicit what had been merely implicit in *Cadet*, the Department's memorandum was correct in assessing that *Henthorn* had not "changed" the law in the Ninth Circuit. But the Department's view that *Henthorn* had not changed the Government's "duty to disclose under *Brady*" was misleading. It missed the salient point—that prosecutors who, prior to *Cadet* and *Henthorn*, rarely had a

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ostensible "hit man" in putting together the case against the defendant. The case agent's testimony at trial was considered absolutely crucial to the successful prosecution of the case. Midway through trial, the defense counsel sent a one paragraph letter to the prosecutor requesting an inspection of the case agent's personnel file, pursuant to *United States v. Henthorn*. The prosecutor telephoned the agent's supervisor at the FBI and asked that he be allowed to review the personnel file in order to formulate a response to the request. The Bureau's response was succinct, as recalled later by the prosecutor in an interview: "'Ain't no way, no how. We will designate an appropriate person within the office to review the file. But we will not let anybody in the United States Attorney's Office have unfettered access to the personnel files of our agents.'"

Refusing to take no for an answer, the prosecutor subsequently met with the Special Agent in Charge and the Legal Advisor of the regional field office to reiterate his request to inspect the file. Again, he was told that the FBI took its obligation seriously, but that the agency would review the file and then report to the prosecutor. "I felt an uneasy compromise had been struck," said the prosecutor of that meeting. Telephone Interview with Gene Porter, Assistant U.S. Attorney for the Western District of Washington (Aug. 13, 1996)

The FBI completed a review of the case agent's personnel file and reported back orally to the Assistant U.S. Attorney who felt satisfied with the thoroughness of the review. The prosecutor then filed a written response with defense counsel indicating that the review had been completed and that he had nothing to disclose. *Id.* The case was United States v. Lees, Dist. Ct. No. CR 90-0260 D (W.D. Wash. 1991). Defense counsel was C. James Frush.

52. Memorandum from Mueller, *supra* note 5, at 1.

53. *Id.*

54. *Id.*

duty to look at, let alone disclose, the contents of personnel files, were now required to look if asked. Prior to *Cadet* and *Henthorn*, prosecutors had been under no pressure to inquire into the existence of exculpatory or impeachment material in personnel files. Now, they had no choice but to do so upon request.

The Justice Department Memorandum went on to inform prosecutors of what *Henthorn* did not encompass, and what they were not required to do to meet the demands of "*Henthorn* requests," as they had already come to be known.[55] In light of this, the fact that the Department elected not to pursue an appeal of the *Henthorn* decision is somewhat surprising. The Assistant U.S. Attorney who prosecuted *Henthorn* and wrote the appellate brief said, "I think the Department felt that the Court had made the right decision. I reported it [to the Department] as an adverse opinion, but they were not willing to take it up with the Solicitor General."[56]

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55. *Id.* at 2. The memorandum told prosecutors the following: they need not inspect the files themselves, but could ask the agencies to review the files of their employees, because the Ninth Circuit had not specifically held that the prosecutor must personally review the file; *Henthorn* did not require the inspection of personnel files of non-federal agents nor those of federal agents who would not testify at trial; and, the *Henthorn* inspection need not include a review of the agent's background security investigation performed prior to employment.

> Although the background check may have disclosed some derogatory information about the agent, he probably would not have been hired if the information rose to the level of perjurious conduct or otherwise qualified as "material" under *Brady*. In essence, each agent has gone through a *Henthorn* search as a condition of employment and there is no need to repeat that search each time he testifies.

Id.

In the same memorandum, the Department's lawyers concluded further that: (1) if *Brady* material were found in a file, the agent should be notified before the prosecutor submitted the material to the court for in camera inspection; and (2) prosecutors could negotiate with defense counsel to "try to get defense counsel to agree to dispense with a search of the personnel files of chain-of-custody witnesses and to settle for a search of the files of those agents whose credibility will actually be contested at trial." *Id.* at 2.

56. Telephone Interview with Haines, *supra* note 44. The head of the appellate unit for the Los Angeles U.S. Attorney's office offered a different perspective on the Department's decision not to appeal *Henthorn*. "I don't think the Department realized just how big this decision [*Henthorn*] was, or the trouble it would cause." Telephone Interview with Miriam Krinsky, Assistant U.S. Attorney for the Southern District of California (Sept. 6, 1996).

3. *Life After* Henthorn*—Within the Ninth Circuit*

a. *Get Your Hands Off My Files—Or, Who Gets To Do the Dirty Work?*

The *Henthorn* panel did not address the question of who was responsible for conducting the review of an agent's personnel file, a question that plagued prosecutors and agents alike as they struggled to interpret and follow the dictates of the decision. In the first Ninth Circuit case after *Henthorn*, the government appealed from a district court's decision to exclude the testimony of government agents unless agency counsel and department heads first reviewed the agents' personnel files for potential impeachment material.[57] The appellate panel in *United States v. Dominguez-Villa* held that the trial judge had exceeded his authority by requiring agency counsel to review the personnel files and by requiring the agency heads to "sign-off" on counsels' determination of whether a particular file contained *Brady* material.[58] The three-judge panel[59] reasoned that because the district court did not have general supervisory powers over the co-equal executive branch of the government, it could not require the agency lawyers and department heads to review the personnel files at issue.[60]

Close on the heels of *Dominguez-Villa*, another Ninth Circuit panel reversed a district court's order requiring the prosecutor to review personally the personnel files of several case agents.[61] Again, a three-judge panel[62] held that the district court's order was outside the scope of the court's supervisory power.[63] The court agreed with the trial court

57. United States v. Dominguez-Villa, 954 F.2d 562 (9th Cir. 1992).

58. *Id.*

59. Judges Alfred T. Goodwin, Otto R. Skopil, Jr., and John T. Noonan, Jr. Opinion by J. Skopil.

60. *Dominguez-Villa*, 954 F.2d at 565.

61. United States v. Jennings, 960 F.2d 1488 (9th Cir. 1992).

62. Judges Cecil F. Poole, Edward Leavy, and Stephen S. Trott. Opinion by J. Poole.

63. *Jennings*, 960 F.2d at 1491. Judge Poole wrote:

> We have never held that the prosecutor's obligations under *Brady*, *Bagley*, or *Giglio* require the personal effort demanded of the AUSA by the district court. To the contrary, we have previously allowed the government to comply with obligations similar to those imposed by *Brady* by submitting an affidavit by a law enforcement officer personally familiar with the relevant facts.

Id. at 1491–92. The *Jennings* court also underscored the presumption that the government would comply with its *Henthorn* obligations, unless the defense could show otherwise. "There is no indication that the government has not or will not comply with its duty faithfully to conduct review of the agent's personnel files. Thus, there is no basis to presume that any illegal conduct must be deterred." *Id.* at 1492.

insofar as "the AUSA prosecuting the case is responsible for compliance with the dictates of *Brady* and its progeny."[64] Nevertheless, the court held that this "personal responsibility" did not authorize the district court to use its supervisory powers to manage the manner in which the prosecutor fulfilled his obligation to produce exculpatory evidence.[65]

The holdings of *Dominguez-Villa* and *Jennings* left open the question of who exactly was supposed to review the personnel files. The holding in *Dominguez-Villa* made it clear that the court would not force the agency heads to "sign-off" on the review, but the *Jennings* decision seemed to take the prosecutor off the hook. Who was left?[66]

Before another Ninth Circuit panel could answer the question, the U.S. Supreme Court decided (in a five-four[67] decision) a case that did not mention personnel files but that perhaps offered some guidance. In *Kyles v. Whitley*, the Court reviewed a state murder conviction to determine whether the prosecutor's unwitting failure to disclose exculpatory evidence in the possession of the police had deprived the defendant of a fair trial. In holding that the failure to produce several items of evidence violated *Brady*,[68] the Court rejected the state's argument that it should not "be held accountable under *Bagley*[69] and *Brady* for evidence known only to police investigators and not to the prosecutor."[70]

A mere two months after the Court's decision in *Kyles*, a district judge in the Ninth Circuit, relying on *Kyles*, ruled that *Jennings* had been effectively overruled "to the extent *Jennings* permits prosecutors to delegate to the relevant federal agencies the responsibility under *Henthorn* to review personnel files."[71] In *United States v. Lacy*, Judge

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64. *Id.* at 1490.

65. *Id.* at 1490–91.

66. The process by which the agencies and U.S. Attorneys' offices have attempted to comply with *Henthorn* and subsequent cases is discussed in greater detail in part III, *infra*.

67. Kyles v. Whitley, 115 S. Ct. 1555 (1995). Justice David Souter delivered the opinion of the Court, in which Justices John Paul Stevens, Sandra Day O'Connor, Ruth Bader Ginsburg, and Stephen Breyer joined. (Justice Stevens also filed a concurring opinion in which Ginsburg and Breyer joined.) Justice Antonin Scalia filed a dissenting opinion in which Justices William Rehnquist, Anthony Kennedy and Clarence Thomas joined.

68. *Id.* at 1558–59.

69. United States v. Bagley, 473 U.S. 667 (1985) ("[I]mpeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule.").

70. *Kyles*, 115 S. Ct. at 1568.

71. United States v. Lacy, 896 F. Supp 982 (N.D. Cal. 1995), *vacated by* United States v. Herring, 83 F.3d 1120 (9th Cir. 1996). The opinion was written by Judge Marilyn Hall Patel. Judge Patel is commonly known as a liberal judge and a critic of the Justice Department. *See, e.g.*, Howard Mintz, *A Question of Responsibility: A Federal Judge Has Ruled that Prosecutors Must Personally Review*

Marilyn Hall Patel was unimpressed with the prosecutor's assurances that he was ultimately responsible for responding to the *Henthorn* request, given his reliance on the agencies to tell him whether the files contained anything noteworthy.[72] When the government refused to comply with Judge Patel's discovery order, she dismissed a drug indictment against Maurice Herring, one of the defendants in the *Lacy* case.[73] The government appealed.

In May of 1996, the Ninth Circuit, in a per curiam opinion, vacated Judge Patel's order and remanded to the district court.[74] The ruling was extremely narrow. The court held only that *Jennings* survived *Kyles* as the law of the Ninth Circuit, so that prosecutors were not compelled, at least not by *Kyles*, personally to conduct a search for *Brady* materials in the personnel files of testifying government agents.[75] The Ninth Circuit

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the Personnel Files of Law Enforcement Agents who Testify in Criminal Cases. Prosecutors are Protesting an Onerous Burden, Recorder, Sept. 5, 1995, at 1, 1 ("San Francisco U.S. District Judge Marilyn Hall Patel is once again taking on the Justice Department's ethics guidelines with a decision that has the U.S. attorney's [sic] office and other federal agencies up in arms.").

72. *Lacy*, 896 F. Supp. at 985. Judge Patel stated:

> Indeed, it is readily apparent that the various agencies' *Henthorn* processes are something of a bureaucratic quagmire which involve a variety of people preparing "summaries" that bounce back and forth between supervisors, attorneys, and clerks, all before anything even reaches the desk of the AUSA who, everyone agrees, is "ultimately responsible." How an AUSA can, in good faith and as an officer of the court, accept such responsibility for work performed *entirely* by others not even under his or her control is somewhat of a mystery.

Id. (footnote omitted).

73. 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) (No. 95-10521).

74. *Herring*, 83 F.3d 1120 (Judges Harry Pregerson, William A. Norris, and Stephen Reinhardt). As one legal commentator wrote, "[t]here are some things even the most liberal Ninth Circuit U.S. Court of Appeals panel will refuse to do." Howard Mintz, *Patel Reversed on Prosecutors' Discovery Burden; They Need Not to [sic] Review Files Personally, Appeals Court Says*, Recorder, May 14, 1996, at 1, 1.

75. The court noted:

> The question we must decide is whether *Jennings* was effectively overruled by *Kyles*. We hold that it was not principally because *Kyles* did not address the question presented by *Jennings* and this case—whether the district court has the authority to issue a pre-trial order requiring a prosecutor to review personnel files of testifying officers personally. Rather, *Kyles* was a post-conviction case involving the application of the well-established *Brady* rule that the prosecution's failure to disclose *Brady* material justifies a new trial, regardless of whether that failure "is in good faith or bad faith."

Herring, 83 F.3d at 1121 (citing *Kyles*, 115 S. Ct. at 1567). Nevertheless, regardless of whether a trial court has the authority to issue a pre-trial order requiring a prosecutor to review a file personally, a prosecutor who wishes to avoid a post-conviction reversal for failure to have undertaken such a review would be prudent to review the file personally, given the language of *Kyles*.

panel distinguished *Kyles*—where *Brady* compliance was assessed from a post-conviction perspective—from *Herring/Lacy*, where *Henthorn* compliance was reviewed on appeal even before the case went to trial.[76] Although *Kyles* certainly reiterated (and arguably expanded) the prosecutor's *Brady* duty as viewed from the post-conviction perspective, the *Herring* panel wrote that the U.S. Supreme Court's language provided "no guidance for deciding whether a district court may issue pre-trial discovery orders requiring prosecutors to review personnel files personally."[77]

Although the Department of Justice viewed *Herring* as a victory,[78] the decision leaves open the question of what method of reviewing files federal prosecutors should rely upon to pass muster in the Ninth Circuit.[79] In effect, the law enforcement community was left with precious little guidance on how to comply with the general principles of *Henthorn*.[80] The *Herring* decision may let the prosecutor close her eyes to a review of the files in the hope that there are no surprises post-conviction, but it also leaves the prosecutor dependent on an agency to perform the review. If the agency review is later found to have been deficient, it is the prosecutor who is faced with a retrial.

The uncertainty of Ninth Circuit law on who should review personnel files was underscored further in a case that did not even deal specifically with personnel files.[81] Citing *Kyles*, the panel in *United States v. Alvarez* reluctantly affirmed the district court's denial of a discovery motion for a testifying police officer's rough notes, but reprimanded the government

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76. The Supreme Court has clearly stated that "[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

77. *Herring*, 83 F.3d at 1122.

78. Telephone Interview with Patty Merkamp Stemler, Attorney, Department of Justice (June 18, 1996). Stemler wrote the appellant's brief and argued on behalf of the government in *Herring*.

79. "[W]e express no opinion as to whether the method by which the AUSA proposes to locate and identify *Brady* material in this particular case satisfies the requirements of *Henthorn*." *Herring*, 83 F.3d at 1123.

80. Interview with Andrew R. Hamilton, Assistant U.S. Attorney for the Western District of Washington, in Seattle, Wash. (Aug. 15, 1996) ("I just wish they [the court] would give us some guidance on how we're supposed to live with this thing [*Henthorn*].").

81. United States v. Alvarez, 86 F.3d 901 (9th Cir. 1996) (opinion written by Judge Betty B. Fletcher). Appellant Alvarez was indicted on federal drug charges. The government turned over to the defense surveillance reports prepared by investigating officers expected to testify at trial. The district court denied a pre-trial order for discovery of "rough notes" after the government represented that a police department investigator had reviewed the officers' rough notes and found no discrepancies. *Id.* at 903–04.

for delegating the inspection of the notes to the police agency.[82] The language, if not the holding, of *Alvarez* makes it unclear whether *Herring* will remain the law of the Ninth Circuit.

Prosecutors in the Ninth Circuit are left, then, with an uneasy balance. On the one hand, *Herring* remains the law of the Circuit, absolving prosecutors of the responsibility to review files personally. On the other hand, if, under *Kyles*, the prosecutor is ultimately responsible for *Brady* violations regardless whether they were made in good faith reliance on an agency's review, the cautious prosecutor should be actively engaged in the review of the file.

b. *How Far Does* Henthorn *Reach?*

When *Henthorn* was decided, lawyers at the Department of Justice assumed that its purview did not extend to the personnel files of local or state law enforcement officers working on task forces with federal agents.[83] That assumption was validated in 1992, with the *Dominguez-Villa* decision,[84] when the Ninth Circuit agreed with the government's contention that the district court had exceeded its authority by requiring review of personnel files of state law enforcement witnesses.[85] In 1994, a circuit panel specifically avoided an opportunity to revisit this issue by finding that the testimony of the witness in question had not affected the

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82. The court indicated that:

> Delegating the responsibility to a nonattorney police investigator to review his own and other officers' rough notes to determine whether they contain *Brady*, *Bagley*, and *Giglio* information is clearly problematic. Although we have held that the district court cannot order an AUSA personally to review law enforcement personnel files, United States v. Jennings, 960 F.2d 1488 (9th Cir. 1992); accord United States v. Herring, Nos. 95-10521, 95-10541, slip op. 5733 (9th Cir. May 13, 1996) (holding that *Jennings* survives *Kyles* as the law of the circuit), we see little justification and much danger to both the prosecutor's reputation and the quality of justice her office serves for a prosecutor not to review personally those materials directly related to the investigation and prosecution of the defendants, such as a testifying officer's surveillance notes.

Alvarez, 86 F.3d at 905.

Compare *Alvarez* with Rivers v. Borg, No. 92-15360, 1992 U.S. App. LEXIS 32193, at *1 (9th Cir. Nov. 4, 1992), where the circuit court upheld the district court's denial of the defendant's discovery request for the police investigative logs of the two officers who investigated him. Effectively creating a materiality standard for discovery of police logs, the *Rivers* court said that the "mere possibility" that a piece of undisclosed information might have helped the defense does not establish an obligation upon the government to turn the information over to the defense. *Rivers*, 1992 U.S. App. LEXIS 32193, at *3 (citing United States v. Agurs, 427 U.S. 97, 109–10 (1976)).

83. Memorandum from Mueller, *supra* note 5.

84. United States v. Dominguez-Villa, 954 F.2d 562 (9th Cir. 1992).

85. *Id.* at 566 ("The prosecution is under no obligation to turn over materials not under its control.") (quoting United States v. Aichele, 941 F.2d 761, 764 (9th Cir. 1991)).

outcome of the case.[86] And recently, a Ninth Circuit panel declined to extend the reach of *Henthorn* to the personnel files of officers of a police department on an Indian Reservation.[87]

But many defense lawyers and prosecutors believe that Ninth Circuit panels have limited *Henthorn* arbitrarily by distinguishing between federal agents and all other law enforcement officers.[88] As one federal prosecutor put it, commenting on the cases following *Henthorn*: "What are we going to do, not hand over impeachment evidence on a state cop who's worked on a federal task force for months? We'd end up with egg all over our face in front of the Ninth Circuit."[89]

The Ninth Circuit has not addressed the question when, if ever, the entries in an agent's personnel file are simply too remote to be relevant at trial. By contrast, the California State Legislature has enacted a procedure in the California Evidence Code that allows the defense to gain access to complaints of misconduct in police personnel records but bars access to complaints concerning conduct "occurring more than five years before the event or transaction which is the subject of the litigation."[90] The Ninth Circuit could elect to adopt some version of a presumptive limitations cut-off on personnel file entries deemed too remote to be relevant, leaving the trial court to make judgment calls

86. United States v. Escobar, C.A. Nos. 93-10690, 94-10027, 1994 U.S. App. LEXIS 30665, at *2 (9th Cir. Oct. 31, 1994). There is confusion among prosecutors trying to comply with the spirit of *Henthorn*. Do testifying officers include Internal Revenue Service auditors or bookkeepers, for example? These witnesses are federal employees, but are not generally considered to be law enforcement officers.

87. United States v. Parrish, No. 95-10035, 1996 U.S. App. LEXIS 10232, at *1, *6–*7 (9th Cir. Apr. 17, 1996). See also United States v. Lawrence, CR No. 94-155-FR, 1994 U.S. Dist. LEXIS 16893, at *1 (D. Or. Nov. 15, 1994) where the defendant requested the personnel file of a Deputy District Attorney working on a joint federal-local task force. The district court reviewed the files in camera and found that they contained no information that would be material to the defendant's case. The case raises the spectre of discovery requests for the personnel files of federal prosecutors themselves. It is not difficult to imagine such a request—especially for a prosecutor who has been known to suppress *Brady* material in the past.

88. Telephone Interview with Mark Bartlett, Assistant U.S. Attorney and Supervisor, General Crimes Unit, for the Western District of Washington (Aug. 14, 1996); Interview with C. James Frush, *supra* note 32; Interview with Thomas W. Hillier, II, Federal Public Defender, Western District of Washington, in Seattle, Wash. (Aug. 15, 1996); Telephone Interview with Leidman, *supra* note 51.

89. Telephone Interview with Mark Bartlett, *supra* note 88.

90. Cal. Evid. Code §§ 1043, 1045 (1995). For a discussion of the law on disclosure of police personnel files in California, see Gerald F. Uelmen, *Lessons From the Trial: The People v. O.J. Simpson* 128–34 (1996).

weighing the relevance of the requested discovery against its prejudicial value. This could limit the potential reach of *Henthorn*.[91]

c. *When Will a Prosecutor's Failure To Inspect an Agent's Personnel File After a* Henthorn *Request Warrant Reversal on Appeal and a New Trial?*

Several Ninth Circuit decisions have made clear that the government's failure to inspect an agent's file does not warrant a new trial if the error was harmless. In making the harmless error analysis, these courts have focused on whether the verdict would have been affected by any doubts that might have been cast upon the agent's credibility by the contents of his personnel file. For example, in a 1994 case, a Ninth Circuit panel, applying the materiality test of *Brady*, held that the district court had committed harmless error when it denied the defendant access to certain records in a Bureau of Alcohol, Tobacco, and Firearms (ATF) agent's personnel file.[92] "Any doubt cast on his [the ATF agent's] credibility would not have affected the verdict."[93] The decision underscored that the courts, in assessing materiality, would necessarily look at whether impeachment of the testifying agent would have mattered to the jury in reaching its verdict.[94]

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91. Such an approach is paralleled in the Federal Rules of Evidence, specifically, Rule 609(b): Impeachment by Evidence of Conviction of Crime:

> Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

Fed. R. Evid. 609(b).

92. United States v. Calise, 996 F.2d 1019, 1022 (9th Cir. 1994).

93. *Id.* at 1022. One of the records submitted by the government and inspected in camera by the court showed that in a previous case a federal magistrate had characterized the agent's testimony as "absolutely incredible." *Id.* at 1021. The government obtained a written statement from the magistrate explaining his earlier conclusion: "[t]hat phrase ['absolutely incredible'] was not what I intended and not what I meant, and I was wrong to use such terminology." *Id.* at 1021.

The test of materiality was defined more recently in *Kyles* as whether there is a "reasonable probability" that had the evidence been disclosed to the defense, the verdict would have been different. Kyles v. Whitley, 115 S. Ct. 1555 (1995); 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).

94. *See also* United States v. Cocoa-Tapia, Nos. 93-10211, 93-10212, 1994 U.S. App. LEXIS 17154, at *1 (9th Cir. July 11, 1994). After an in camera review of the personnel files of testifying witnesses, the Ninth Circuit panel said "[W]e have reviewed the documents and the in camera

4. *Life After* Henthorn—*Outside the Ninth Circuit*

Outside the Ninth Circuit, every federal court that has considered whether to adopt the *Henthorn* rule has declined to do so, rejecting the idea that the government is obligated to review the personnel files of testifying federal law enforcement officers merely upon a request by the defendant. These courts have weighed the *Henthorn* standard (defendant's request triggers review) against a standard tougher on defendants—requiring the defense to make a prior showing that the file will yield information that is material to the defendant's case before the government's obligation to look will be triggered. These courts have been concerned that defendants will engage in needless "fishing expeditions" that will cost the courts and the government time and money without advancing any legitimate or constitutional benefit. But the ramifications of a standard too strict for defendants are equally obvious: defendants will not find what prosecutors are not required to seek.

The next section of this Article analyzes the cases outside the Ninth Circuit and discusses how courts in other circuits have dealt with defendants' attempts to persuade them to adopt the Ninth Circuit's approach in *Henthorn*. In so doing, the Article shows the split between the Ninth Circuit and the other circuits over whether the defendant must make a prior showing that an agent's file will yield something exculpatory or of impeachment value before the government will be required to inspect it.

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proceedings. The personnel files contain no information that would be material to appellant's case." *Id.* at *9.

These appeals—and the determination of whether a *Henthorn* error was harmless or not—can take a long time. In one case, a panel of the Ninth Circuit found in 1992 that the required *Henthorn* examination had not been accomplished with regard to two federal agents. United States v. Montalvo, No. 90-10078, 1992 U.S. App. LEXIS 18863, at *6 (9th Cir. Aug. 4, 1992). The circuit court remanded to the district court to conduct an in camera review of the relevant files to determine whether the failure to examine the records was harmless error. Nearly four years later, the Court of Appeals ruled (in an unpublished opinion) that the district court had properly determined that the government's failure to examine the files was harmless. United States v. Montalvo, Nos. 94-10108, 94-10110, 1996 U.S. App. LEXIS 561, at *1 (9th Cir. Jan. 3, 1996).

a. The Requirement of a Prior Showing of Materiality

1) Appellate Decisions

The decisions from the Sixth Circuit are the strongest against the *Henthorn* rule and most in favor of making a defendant show that an agent's personnel file will yield something of material impeachment value before requiring the government to review the file. In 1992, a Sixth Circuit panel expressly rejected the *Henthorn* rule.[95] In affirming the district court's decision denying the defendant's motion for discovery of several police officers' personnel files for impeachment purposes, the Sixth Circuit panel in *United States v. Driscoll* held the defendant to a tougher standard than that enunciated in *Henthorn*: "Mr. Driscoll offered no support for his contention that personnel files might contain information important to his case."[96] The court cited the Seventh Circuit's pre-*Henthorn* decisions in *United States v. Andrus*[97] and *United States v. Navarro*[98] for the proposition that mere speculation is not enough to trigger the government's obligation to inspect, or the court's obligation to review personnel files of testifying officers.[99]

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95. United States v. Driscoll, 970 F.2d 1472 (6th Cir. 1992). Ronald Driscoll was charged by indictment with being a convicted felon in possession of a firearm and with possession of an unregistered firearm. At trial, he moved for disclosure and inspection of several police officers' personnel files, arguing that he needed this information to attack their credibility. The district court denied the motion. Driscoll appealed his conviction, claiming that the district court's denial of his motion for disclosure of the files violated Brady v. Maryland, 373 U.S. 83 (1963). *Driscoll*, 970 F.2d at 1472.

96. *Driscoll*, 970 F.2d at 1472.

97. 775 F.2d 825 (7th Cir. 1985).

98. 737 F.2d 625 (7th Cir. 1984).

99. See, however, Judge Nathaniel R. Jones' dissent in *Driscoll:*

> If the arresting officers' personnel files contained evidence that would cast doubt on their credibility, there is a reasonable probability that the outcome of Driscoll's trial might have been different. I am also convinced that Driscoll was at an unfair disadvantage, in that the prosecution emphasized the officers' credibility, and Driscoll was unable to rebut these remarks. Therefore, to balance the importance of a defendant's due process rights against the recognition that a defendant does not have a right to unlimited discovery, I would again follow the lead of the Ninth Circuit. In a case on all fours with the instant case, *United States v. Henthorn*, the Ninth Circuit held that a defendant seeking *Brady* materials *for impeachment purposes* is not required to make an initial showing of materiality to have his case remanded for an in camera inspection of the materials in question. The *Henthorn* holding is contrary to the Seventh Circuit's decision in *United States v. Andrus* upon which the majority relies. I believe the *Henthorn* approach more evenly balances the opposing concerns involved. Therefore, I would remand this case to the district court for an in camera inspection of the officers' personnel files . . . .

Driscoll, 970 F.2d at 1489 (Jones, J., dissenting).

Three years later, another Sixth Circuit panel reaffirmed the standard set in *Driscoll*.[100] Once again, the court held that "mere speculation that a government file may contain *Brady* material was not sufficient to require a remand for in camera inspection."[101] The defendant had made the request at the district court level, but, according to the appellate court, had not substantiated his claim with any evidence to support his contention.[102] Citing *Driscoll* and *Andrus*, the court affirmed the district court's denial of the defendant's discovery request.

The District of Columbia Circuit unequivocally adopted the same standard as the Sixth Circuit in holding that the defendant must make some prior showing in order to trigger the government's obligation to review law enforcement personnel files.[103] In doing so, the court expressed its concern for the efficiency of the system. The panel affirmed the district court's denial of discovery, noting, "Were we to grant the relief sought in this case on this basis, the potential for mischief would be boundless."[104]

2) *Federal District Court and State Court Decisions Since* Henthorn

Outside of the Ninth Circuit, no federal district court or state court that has specifically considered whether to adopt the *Henthorn* standard (that is, no materiality showing is required to trigger the government's obligation to review personnel files) has done so. Federal district courts have consistently rejected the *Henthorn* standard, finding that the burden placed on the prosecution to review the files is high, while the likelihood

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100. United States v. Valentine, No. 94-6195, 1995 U.S. App. LEXIS 16584, at *1 (6th Cir. June 30, 1995). Defendant Valentine appealed from his conviction on various counterfeiting charges. On appeal, Valentine contended that the district court erred by requiring him to make an initial showing that the personnel records were "material" before ordering the government to produce the records.

101. *Id.* at *12–*13 (citing *Driscoll*, 970 F.2d at 1482).

102. *Id.*

103. *See* United States v. Lafayette, 983 F.2d 1102, 1106 (D.C. Cir. 1993).

104. *Id.*; *see also* United States v. Leung, 40 F.3d 577 (2d Cir. 1994); United States v. Pou, 953 F.2d 363, 367 (8th Cir. 1992) ("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.") (quoting United States v. Navarro, 737 F.2d 625, 631 (7th Cir. 1984)). *Leung* did not involve personnel files, but rather files of government informants. In affirming the trial court's refusal to order pre-trial discovery of the files, the Second Circuit panel said, "[i]n the rare circumstances where such [in camera] inspection is required, its purpose is not to provide a general discovery device for the defense; criminal defendants have no constitutional right to know the contents of Government files in order to present arguments in favor of disclosure." *Leung*, 40 F.3d at 583.

of finding exculpatory evidence is extremely low.[105] Some have denied personnel file requests out of hand because the defendant did not make a credible showing that the information contained in the files was material to his defense.[106]

Some state courts have considered the accused's right to discovery of personnel records or grievance histories of state or local officers, but only two of these cases have expressly framed the issue as a choice between the federal standards of *Henthorn* and *Driscoll*.[107] In an Arizona case, the Arizona Court of Appeals squarely refused to adopt the

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105. United States v. Preston, No. 95-40083-01-SAC, 1996 U.S. Dist. LEXIS 6712, at *1, *45 (D. Kan. Apr. 5, 1996) ("The court further finds that the defendant's request, as presented, amounts to a 'broad and blind fishing expedition.'"). For other federal district court decisions from Kansas that reaffirm the defendant's obligation to meet a materiality threshold, see United States v. Hill, 799 F. Supp. 86 (D. Kan. 1992); United States v. Sumner, 793 F. Supp. 273 (D. Kan 1992); United States v. Nicholson, Crim. Action No. 91-10027-02, 1991 U.S. Dist. LEXIS 19825, at *1 (D. Kan. Dec. 5, 1991); United States v. Conner, Crim. Action No. 91-10028, 1991 U.S. Dist. LEXIS 17566, at *1, *15 (D. Kan. Nov. 6, 1991) (stating that "defendants are not entitled to the personnel files of law enforcement witnesses without some indication that impeaching material may be contained therein"); United States v. Davis, Crim. Action No. 91-10027-01, 1991 U.S. Dist. LEXIS 8069, at *1 (D. Kan. June 6, 1991).

106. In Pennsylvania: *see, e.g.*, United States v. Chapple, Crim. No. 91-111, 1991 U.S. Dist. LEXIS 19977, at *1 (W.D. Pa. Oct. 24, 1991) (denying defendant's motion for personnel files).

In Illinois: *see, e.g.*, United States v. Zeglen, No. 93 CR 862, 1994 U.S. Dist. LEXIS 14743, at *1 (N.D. Ill. Oct. 18, 1994); United States v. Infelise, No. 90 CR 87-12, 18, 1991 U.S. Dist. LEXIS 10284, at *1 (N.D. Ill. July 25, 1991); United States v. Salerno, 796 F. Supp. 1099 (N.D. Ill. 1991); United States v. Quintanilla, 760 F. Supp. 687 (N.D. Ill. 1991).

In New York: *see, e.g.*, United States v. Escobar, 842 F. Supp. 1519, 1530 (E.D.N.Y. 1994) ("The defendant has made no showing, indeed, he does not even allege that any of the personnel files of the testifying agent-witnesses contain impeachment materials."); United States v. Morales, No. 93 Cr. 291 (KC), 1993 U.S. Dist. LEXIS 15889, at *1 (S.D.N.Y. Nov. 9, 1993). In *Morales* the government agreed to examine the relevant personnel files for exculpatory information, even though the court had noted that the defendant "offers neither a legal basis for this motion nor a specific reason for the particular request." *Id.* at *48. The court called the government's response and willingness to inspect the files "appropriate." Therefore, it did not need to reach the specific issue whether to require a materiality showing. *Id.*

In New Jersey: *see, e.g.*, United States v. Bertoli, 854 F. Supp. 975 (D.N.J.), *aff'd*, 40 F.3d 1384 (3d Cir. 1994), where the district court considered both the standard of the Sixth Circuit (*Driscoll*) and the standard of the Ninth Circuit (*Henthorn*) before finding that the defendant failed under either standard because his request for personnel files was "overly broad in that it failed to identify either specific witnesses or specific exculpatory or impeachment evidence which [the defendant] believed would be contained in those files." *Id.* at 1041. Although the court may not have specifically adopted either standard, the language of the decision certainly suggests that the court required the defendant to make some showing of materiality before it would grant a discovery request for personnel files.

107. The state cases—other than the two that discuss the competing federal approaches of the Sixth and Ninth Circuits—are beyond the purview of this Article.

Henthorn approach, and sided with the Sixth Circuit.[108] In a Delaware case, the Supreme Court of Delaware followed the Arizona Court.[109]

b. *How Can a Defendant Meet the "Showing of Materiality" Requirement?*

Of the circuit courts that have declined to follow the Ninth Circuit's *Henthorn* rule, none has addressed a key issue: how can a defendant support a showing of materiality without first knowing what is in the personnel file he seeks? This section will highlight the few cases that have offered any indication of how high a hurdle a defendant must jump in order to make a sufficient showing of materiality.

In one such case, a Second Circuit panel found that the district court had erred in refusing to compel production of an FBI agent's personnel file for an in camera inspection, even after the prosecutor had informed the court in camera that the agent's file contained complaints against him—including an allegation that he was "on the take."[110] The jury's verdict turned on the credibility of this particular witness, and the prosecutor had argued in summation that the agent was credible because of his long service to the FBI.[111]

Perhaps the only other case to put some meat on the bones of the materiality requirement was a district court decision in the Second Circuit, in which the court ordered the government to submit the personnel file of an FBI agent for an in camera inspection after the defendant proffered that the agent was known to have "a particular reason" to want the defendant convicted, "based on a personal

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108. State v. Robles, 895 P.2d 1031 (Ariz. Ct. App.), *review denied*, 908 P.2d 483 (Ariz. 1995). "Although we have found no Arizona authority directly on point, we decline appellant's invitation to adopt *Henthorn*. Rather, we adopt the threshold materiality showing required in *United States v. Driscoll*." *Id.* at 1035. The Arizona Court offered no reason why it chose *Driscoll* over *Henthorn*.

109. Snowden v. State, 672 A.2d 1017, 1023 (Del. 1996). The court stated:

> There is a divergence of opinion with regard to when a defendant will be entitled to an in camera judicial review of police personnel files for general impeachment purposes. The majority view requires a determination that the defendant has established a factual basis for the requested files before ordering an in camera inspection.

Id.

110. United States v. Kiszewski, 877 F.2d 210 (2d Cir. 1989). The prosecutor said that the agent's file contained complaints against him, one to the effect that the agent was "on the take," and another for appearing as a witness without the FBI's permission. The prosecutor reported that the FBI had exonerated the agent on the first complaint, and had issued a letter of reprimand after investigating the second. *Id.* at 215.

111. *Id.*

animosity."[112] The court ruled for the defendant, citing the "somewhat unique posture of this case vis á vis the relationship" between the defendant and the agent.[113]

5. *A Summary of Where the Federal Prosecutor and Defense Lawyer Stand Today*

a. *Inside the Ninth Circuit*

Since 1984[114] and as recently as May, 1996,[115] courts in the Ninth Circuit have established that upon a request by a defendant in a criminal case for pre-trial discovery of the personnel file of a federal agent who will testify at trial, the government must examine the file for evidence that could be used to impeach the agent's credibility.[116] The review of the file need not be made by the prosecutor personally. It can be made by officials of the agency-employer of the agent-witness.[117] Those officials must report the results of their review of the file to the prosecutor, who is ultimately responsible for complying with *Brady* and *Giglio*.[118]

If the prosecutor, or agency, finds no impeachment material, the prosecutor has no duty to disclose to the defense or the court any information in the agent's personnel file.[119] If, however, the examination does produce material that could be used to impeach the agent, the prosecutor must turn that material over to the defense.[120] If the examination reveals information of questionable impeachment value, then the prosecutor must turn the questionable portions of the file over to the court for an in camera review, and thus allow the court to determine whether the information must be turned over to the defense.[121] To date, the *Henthorn* obligation has been applied only to the personnel files of

112. United States v. Leonard, 817 F. Supp. 286, 302 (E.D.N.Y. 1992). The agent's testimony and his written reports were critical to the government's case.

113. *Id.*

114. *See* United States v. Cadet, 727 F.2d 1453 (9th Cir. 1984).

115. *See* United States v. Herring, 83 F.3d 1120 (9th Cir. 1996).

116. United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991).

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

118. *Herring*, 83 F.3d at 1122.

119. *Henthorn*, 931 F.2d at 31.

120. *Id.* at 30–31; United States v. Cadet, 727 F.2d 1453, 1467–68 (9th Cir. 1984).

121. *Henthorn*, 931 F.2d at 31; *Cadet*, 727 F.2d at 1467–68.

federal law enforcement agents, not to those of state or local agents working on federal task forces, even if they are to testify at trial.[122]

The government's obligation to review the personnel files of testifying agents is triggered by the defense attorney's request alone. The defense is not required to make any prior showing of materiality—that is, the defense is not required to make a showing that the personnel files actually contain information that could be used to impeach the credibility of the agent on the stand. Should the government fail to make such an inspection prior to conviction, the appellate court will determine whether the failure nevertheless constituted harmless error.[123] In making its analysis, the court will look to the significance of the particular agent's testimony and to whether impeachment of the witness would have affected the verdict.[124]

b. *Outside the Ninth Circuit*

The *Henthorn* line of cases has not been accepted outside of the Ninth Circuit. Several circuit courts and district courts have expressly refused to adopt *Henthorn*, holding instead that the defendant must make some showing of materiality before triggering the government's obligation to search the personnel files for *Brady* or *Giglio* information. Still other circuit, district, and state courts have held the defendant to the same materiality standard, although they have not always made specific mention of *Henthorn* when rejecting its approach.[125] The result has been consistent denials of defendants' requests for personnel files except in the very few cases where a defendant made a credible showing that particular information probably lay within a particular file.[126]

A plaguing question remains: assuming that prosecutors in all the circuits have the same constitutional and ethical obligations under *Brady* and *Giglio* to turn over evidence that is either exculpatory or can be used to impeach government witnesses, how can it be that one circuit triggers the government's obligation to look for that evidence upon a simple

122. United States v. Dominguez-Villa, 954 F.2d 562 (9th Cir. 1992).

123. United States v. Calise, 996 F.2d 1019 (9th Cir. 1994); United States v. Cocoa-Tapia, Nos. 93-10211, 93-10212, 1994 U.S. App. LEXIS 17154, at *1 (9th Cir. July 11, 1994).

124. United States v. Escobar, C.A. Nos. 93-10690, 94-10027, 1994 U.S. App. LEXIS 30665, at *1 (9th Cir. Oct. 31, 1994); *Cocoa-Tapia*, 1994 U.S. App. LEXIS 17154, at *1.

125. *See* supra notes 95–104 and accompanying text.

126. *See* supra notes 110–113 and accompanying text.

request by the defendant while others put the burden on the defendant to find it and then ask the government to produce it?

6. *Resolving the Split: The U.S. Supreme Court and a Look at the Future*

In *Kyles v. Whitley*,[127] a decision in which personnel files are not even mentioned, the U.S. Supreme Court has perhaps given us some idea of the direction it could take if and when the split between the circuits on the personnel files issue is brought before it. In a five-four[128] decision, the Court in *Kyles* ruled that prosecutors have a broad mandate to discover exculpatory evidence that may exist outside of their own case files.[129] Justice Souter, writing for the majority, said that the prosecution has an ongoing, cumulative duty to learn of "any favorable evidence known to others acting on the government's behalf in the case, including the police."[130]

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127. 115 S. Ct. 1555 (1995).

128. *See supra* note 67.

129. One commentator has noted:

> *Kyles* has put to rest any notion that the prosecution is only accountable for the facts known. The prosecutor's obligations include the duty to ferret out "favorable evidence known to others, acting on [her] behalf in the case, including the police." The Supreme Court, in *Kyles*, rejected the State of Louisiana's request "to substitute the police for the prosecutor, and even the courts themselves, as the final arbiters of the government's obligation to ensure fair trials." The Supreme Court's confidence that prosecutors will play fair is the most important component of the *Brady* line of cases.

John C. Lambrose, *Discovery in the Wake of Kyles: Don't Tack Too Close to the Wind*, Nev. Law., Nov. 1995, at 10, 11 (citations omitted).

Kyles is discussed in part II, *supra*, in the context of United States v. Jennings, 960 F.2d 1488 (9th Cir. 1992) and United States v. Herring, 83 F.3d 1120 (9th Cir. 1996). This section looks more broadly at the language of *Kyles* to see not whether *Kyles* overruled *Jennings* with respect to who is responsible for conducting the personnel file review, but rather for insight into how the Supreme Court might rule if presented with the issue of when and how the government's duty to inspect those files is triggered.

130. *Kyles*, 115 S. Ct. at 1567. The defendant was convicted of first-degree murder by a Louisiana jury and sentenced to death. After the conviction and sentence were affirmed on direct appeal, state collateral review showed that the State had never disclosed evidence favorable to the defendant. This evidence included: (1) eyewitness statements taken by the police following the murder; (2) various statements made to the police by an informant who was never called to testify; and (3) a computer print-out of license numbers of cars parked at the crime scene on the night of the murder (the list did not include the defendant's car). Because the net effect of the state-suppressed evidence favoring the defendant raised a reasonable probability that its disclosure would have produced a different result at trial, the conviction was reversed and the defendant was entitled to a new trial. For a full discussion of *Kyles*, see Corcoran, *supra* note 93.

Reading *Kyles* broadly as applied to personnel files, it follows that the prosecutor has an ongoing obligation to learn of exculpatory or impeachment evidence in personnel files of government agents, and that this obligation should not depend on a request by the defendant. And, although Justice Souter's opinion did emphasize that evidence is not material (and hence need not be turned over to the defense) unless there is a "reasonable probability" that its disclosure would have produced a different result, the opinion can also be read to suggest that the prosecutor's obligation to look for exculpatory and impeachment information in government files is not dependent upon a prior showing of materiality by the defendant.[131]

III. THE PROCESS

Part III of this Article describes the procedures that the Department of Justice and the various federal law enforcement agencies have designed for reviewing their agents' personnel files when obligated to look for impeachment material.

Part III first addresses the official compliance process as it has been developed by the Department of Justice and the federal law enforcement agencies. After a review of the official compliance process, the Article then looks behind the scenes and explores the unofficial dissatisfaction with the ways in which the government has responded to requests to review files, from the perspectives of the federal agencies, the federal prosecutors, and defense attorneys. Part III shows that, in the Ninth

131. *Kyles*, 115 S. Ct. 1555. One commentator writing on *Kyles* has suggested that *Kyles* should not be taken as a sign that the Supreme Court might be inclined to embrace *Henthorn*. *See* Stephen P. Jones, Note, *The Prosecutor's Constitutional Duty to Disclose Exculpatory Evidence*, 25 U. Mem. L. Rev. 735 (1994). The commentator focuses on a 1987 case, Pennsylvania v. Ritchie, 480 U.S. 39 (1987), in which the Court ruled that a defendant did not have an unfettered right to review confidential Children's and Youth Services records. The Court's refusal to grant the defendant automatic access to the records upon request was, in Jones' view, at odds with *Henthorn*, where it was held that the defendant's request for the personnel file was enough to trigger the government's review of the file. But *Henthorn* and *Ritchie* are not at odds. *Henthorn* does not give a defendant unfettered or automatic access to sensitive records upon request—the problem that bothered the Court in *Ritchie*. Under *Henthorn*, a defendant's request for a personnel file simply triggers the government's obligation to review the file for *Brady* or *Giglio* material. If there is no such material to be found, the file will not be turned over. If the prosecutor is not certain whether information in the file is materially significant enough to disclose, she must submit the file to the trial judge for an in camera determination. That procedure is not in conflict with anything the Court said in *Ritchie*. On the contrary, the *Ritchie* court endorsed that very same procedure, holding that, while the defendant did not have a right to unfettered review of the Children's and Youth Services records upon request, he did have a right to have the records reviewed by the trial judge to determine whether they contained information that might affect the verdict.

Circuit, the *Henthorn* decision has led to some unintended consequences and has created a triad of new tensions between prosecutors, agents, and defense lawyers.

A. The "Official" Procedures for Reviewing Personnel Files

As was mentioned earlier, the Justice Department's first reaction to the *Henthorn* decision was a memorandum circulated from Robert S. Mueller, Assistant Attorney General, Criminal Division, to the ninety-four U.S. Attorney's Offices across the country.[132] The memorandum offered some, though not much, guidance on how to respond to so-called *Henthorn* requests. Principally, the memorandum advised prosecutors to work with the agencies to facilitate timely responses to *Henthorn* requests. The memorandum passed along to prosecutors a suggestion from the federal agencies on how *Henthorn* requests could be expedited:

> Reviewing personnel files is a cumbersome task yet it must be completed quickly. To facilitate the process, the agencies have made several suggestions. First, they ask that you attempt to negotiate with defense counsel regarding the number of files that must be searched. For instance, try to get defense counsel to agree to dispense with a search of the personnel files of chain-of-custody witnesses and to settle for a search of the files of those agents whose credibility will actually be contested at trial.[133]

To date, the agencies' suggestion of winnowing the number of files for review to the files of agents whose credibility will be an issue at trial remains just a suggestion. Defense attorneys are not compelled by case law, rule, or statute to acquiesce in the government's request that a *Henthorn* review be limited.

In the five years since that memorandum was circulated, the Department of Justice and the various federal law enforcement agencies have developed and refined their protocols for reviewing personnel files. These protocols apply not just in the Ninth Circuit, but nationwide, governing the way the agencies review files for *Brady* or *Giglio* material whenever such a review is required. The various protocols have not been developed uniformly, and the Department and the agencies have debated fiercely what the law requires of them. This debate will be described below. Publicly, however, the Department and the agencies have

132. Memorandum from Mueller, *supra* note 5.

133. *Id.*

suggested that their procedures for reviewing files are consistent with each other and with the law.

In the government's appellate brief in *Herring*, Department of Justice lawyers summarized the procedure by which U.S. Attorney's offices nationwide have reviewed personnel files for impeachment material:

> Under this system, the prosecutor initiates the search, he can define the scope of the search by providing information about the charges or the issues that are likely to be raised at trial, he can demand to see additional documents if he is not satisfied with the information that the agency provides, and he alone determines what information to disclose. The agencies perform the labor of culling through various files to identify the pool of potential impeachment evidence. In this capacity, the agencies assist the prosecutor but they do not substitute for him. The agencies have taken their role seriously. Each agency has designated particular attorneys and staff members to conduct the reviews, and they have instructed those individuals to be liberal in their identification of potentially relevant information.[134]

Although the government's description of this process implied a uniform and consistent approach by the various agencies, the government filed with its brief in *Herring* several declarations from agency officials revealing differences in the agencies' protocols for reviewing files. In some of these agencies, for example, the initial task of searching for *Brady* or *Giglio* material was delegated to agency lawyers. In others, it was delegated to lay employees.

According to the declaration submitted on behalf of the Drug Enforcement Administration (DEA), upon receipt of an Assistant U.S. Attorney's written request for a *Henthorn* review, the request is processed by the Discovery Processing Staff of the Office of the Chief Counsel.[135] That staff reviews the investigative and personnel files maintained by the DEA's Office of Professional Responsibility and the Office of Personnel. The Discovery Processing Staff gathers and summarizes any information that relates to allegations of misconduct, and forwards that information to a DEA attorney for review. The file is

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134. Brief for the United States at 24–25, United States v. Herring, 83 F.3d 1120 (9th Cir. 1996) (No. 95-10521).

135. Declaration of Robert T. Richardson, Deputy Chief Counsel, Drug Enforcement Administration (DEA), United States v. Lacy, 896 F. Supp. 982 (N.D. Cal. 1995) (No. CR-94-0384-MHP), *reprinted in* Excerpt of Record at 140 exh. A, *Herring* (No. 95-10521), *referred to in* Brief for the United States at 6, *Herring* (No. 95-10521).

reviewed again by the Chief of the Domestic Criminal Law Section and then by the Deputy Chief Counsel, who discloses to the prosecutor "all evidence contained in [DEA] files arguably meeting [the *Brady* or *Giglio*] standard[s], even if in [the opinion of the DEA] it does not."[136] According to the declaration, the DEA will forward additional documents to the prosecutor upon request. The prosecutor can then determine whether the material should be disclosed, either to the court or the defense. If the DEA search produces no potential *Brady* or *Giglio* material, the Deputy Chief Counsel notifies the prosecutor by letter.[137]

A personnel file review at the U.S. Immigration and Naturalization Service (INS) requires the effort of "at least six employees."[138] Each request is forwarded to the relevant department within the agency (for example, Border Patrol or Immigration Inspector), where a management official searches four categories of files: the agent's Official Personnel File, Labor Management Relations Files, Office of the Inspector General files, and files maintained by the Office of Internal Audit.[139] An INS management official (not necessarily a lawyer) prepares a record of "any allegations of wrongdoing or the results of any disciplinary investigation pertaining to the agent's conduct," and discloses "any allegation of an adverse nature to the AUSA."[140] The management officials who review the files are told that "they are to record any negative information, no matter how minor and no matter how remote."[141] The decision whether to disclose the information is then left to the prosecutor.

The Bureau of Alcohol, Tobacco, and Firearms conducts a *Henthorn* search of "official personnel files, incident reports and integrity investigations conducted by the Office of Internal Affairs, and records involving any personnel actions maintained by the Personnel Division."[142] The staff assistant who performs the review advises the prosecutor of "information that even arguably could be considered

136. *Id.*

137. *Id.*

138. Declaration of William B. Odencrantz, Western Regional Counsel for the Immigration and Naturalization Service (INS), *Lacy* (No. CR-94-0384-MHP), *reprinted in* Excerpt of Record at 145 exh. B, *Herring* (No. 95-10521), *referred to in* Brief for the United States at 7, *Herring* (No. 95-10521).

139. *Id.*

140. *Id.*

141. *Id.*

142. Declaration of Richard Isen, Staff Assistant to the Chief Counsel, Bureau of Alcohol, Tobacco and Firearms (ATF), *Lacy* (No. CR-94-0384-MHP), *reprinted in* Excerpt of Record at 155 exh. C, *Herring* (No. 95-10521), *referred to in* Brief for the United States at 7, *Herring* (No. 95-10521).

evidence that is required to be disclosed under any applicable court order or legal criteria, such as those set forth in *Brady v. Maryland* or *Giglio v. United States*."[143]

At the Internal Revenue Service (IRS), an attorney reviews the personnel files of its employee witnesses for "any evidence of untruthful or perjurious conduct," or other evidence that may be relevant to the charges in question, such as past incidents of excessive force in an assault case.[144] The IRS attorneys are instructed to be "candid in disclosing any negative information to prosecutors" because "the prosecutor must ultimately decide whether to disclose the information to the court or defense counsel."[145] The IRS searches through four categories of files[146] for *Brady* or *Giglio* material before providing the prosecutor with copies of the relevant information.[147]

At the Federal Bureau of Investigation (FBI), the review of an agent's personnel file is supervised by an FBI attorney in the agent's field office. The attorney searches the file for "any information that is or may be exculpatory or impeachment material."[148] The FBI counsel sends the

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143. *Id.* (citations omitted).

144. Declaration of Paul J. Krug, Attorney, Office of Chief Counsel, Internal Revenue Service (IRS), *Lacy* (No. CR-94-0384-MHP), *reprinted in* Excerpt of Record at 159 exh. D, *Herring* (No. 95-10521), *referred to in* Brief for the United States at 7–8, *Herring* (No. 95-10521) [hereinafter Krug Declaration].

However, as late as September 1993, the IRS did not necessarily have an attorney review the personnel files pursuant to a *Henthorn* request. *See* Litigation Guideline Memorandum from the Assistant Chief Counsel, Criminal Tax, to All Deputy Regional Counsel (Sept. 3, 1993) (on file with *Washington Law Review*). It states:

> It is our view that the immediate supervisor [not necessarily an attorney] of the requested employee-witness should be responsible for conducting the examination of testifying IRS employee personnel files. For example, if the witness is a special agent, the group manager should handle the review. If the witness is an attorney in a District Counsel office, the ADC should handle the review. If the witness is in the National Office, the branch chief should handle the review.

Id. Clearly, between September 1993 and August 1995, the IRS changed its official policy to require that an IRS attorney actually participate in the review. It is unclear, however, when the change in policy was implemented and how many non-attorney supervisors were charged with the task of reviewing the files.

145. Krug Declaration, *supra* note 144, *referred to in* Brief for the United States at 8, *Herring* (No. 95-10521).

146. *Id.* The four categories of files that may be subject to review under the IRS procedure are: (1) Official Personnel Files; (2) Employee Personnel Files; (3) Drop Files; and (4) Employee Investigative Files.

147. *Id.*

148. Declaration of James D. Whaley, Chief Division Counsel, San Francisco Division, Federal Bureau of Investigation, *Lacy* (No. CR-94-0384-MHP), *reprinted in* Excerpt of Record at 173 exh. E, *Herring* (No. 95-10521), *referred to in* Brief for the United States at 8, *Herring* (No. 95-10521).

results of the bureau's review to the FBI's Office of General Counsel in Washington, D.C. That office undertakes a review of additional files maintained at FBI headquarters. These files contain information "concerning administrative inquiries or investigations" relating to "[allegations] of improper or illegal conduct."[149] The Office of General Counsel then informs the prosecutor of the results of its search.

B. A Look Behind the Scenes—the Problems with the Official Review Policies.

1. From the Agencies' Perspective

For at least the past two years, the Attorney General's Advisory Committee (AGAC),[150] the Criminal Division of the Department of Justice (DOJ), the Office of Investigative Agency Policies,[151] and the federal law enforcement agencies, including the FBI, the DEA, and the INS, have attempted to devise a more uniform policy governing the review of personnel files for impeachment material.[152] The formulation of a uniform policy seems to be of ever-greater importance, given the growing number of requests for files by defense counsel, especially in the Ninth Circuit, where *Henthorn* governs.[153]

Among the issues that are being addressed are:

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149. *Id.*

150. The Attorney General's Advisory Committee of U.S. Attorneys consists of fifteen U.S. Attorneys, designated by the Attorney General. The membership is selected to represent the various geographic areas of the nation and both large and small offices. Members serve at the pleasure of the Attorney General. The Committee makes recommendations to the Attorney General, to the Deputy Attorney General and to the Associate Attorney General concerning any matters that the Committee believes to be in the best interests of justice, including establishing and modifying policies and procedures of the Department. 28 C.F.R. § 0.10 (1996).

151. The mandate of the Office of Investigative Agency Policies is to increase efficiency within the Department by coordinating specified activities of the Department's criminal investigative components and by advising the Attorney General and the Deputy Attorney General on all criminal investigative policies, procedures, and activities that warrant uniform treatment or coordination. 28 C.F.R. § 0.17 (1996).

152. Airtel communication from Freeh, *supra* note 32.

153. Although the government does not keep official statistics on the nationwide number of requests for reviews of personnel files, the Chief Counsel of the DEA, in a 1995 memorandum to the U.S. Attorneys within the Ninth Circuit, wrote that his office processes a "large number" of reviews: "For example, during the 1993 calendar year alone, we processed approximately 800 *Henthorn* reviews." The reviews are not easily accomplished: "Depending on the particular circumstances, each review may take several hours or up to several days to complete. Frequently, older files must be retrieved from the archives for review which is a time-consuming process." Memorandum from Dennis F. Hoffman, *supra* note 5.

> (1) the types of disciplinary information that must be disclosed; (2) the degree of certainty that misconduct has occurred that triggers disclosure; (3) the stage in the investigation when disclosure must be made; and (4) the extent to which prosecutors may retain in their systems of records for future retrieval disciplinary information from the personnel files of law enforcement personnel.[154]

As the AGAC, the DOJ, and the law enforcement agencies struggled to reach agreement on these and other issues, the FBI set forth its "interim guidance" to assist field offices in the review of personnel files for potential impeachment material.[155] The "interim guidance," which came out in late 1995, advised agents that, in general, they were rarely obligated to disclose unsubstantiated allegations or accusations of which they had been exonerated: "Allegations of misconduct that are not credible, cannot be proved, or result in the exoneration of an employee-witness are rarely considered to be impeaching material."[156]

On April 10, 1996, the AGAC circulated a memorandum to the various federal law enforcement agencies, proposing that even unsubstantiated allegations against an agent be disclosed.[157] In a responding memorandum sent collectively by the Director of the FBI, the Chief Administrator of the DEA, the Director of the U.S. Marshal's

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154. Airtel communication from Freeh, *supra* note 32, at 2.

155. *Id.* at 1. The FBI Director's Airtel states:

> The purpose of this airtel is to provide guidance concerning the disclosure to federal prosecutors of disciplinary information about FBI employees who will be affiants or witnesses in criminal prosecutions. Federal judicial districts and circuits have not provided uniform standards concerning the methods by which disciplinary information is located and evaluated for submission to a court for review as potential impeaching material. In addition, United States Attorneys' offices have not taken a consistent approach concerning the methods by which prosecutors obtain access to such information from FBI field offices and/or FBIHQ [FBI headquarters].
>
> Because of the lack of a clear and uniform standard for disclosure, there has been confusion about the obligation of Agents or other employees to notify a prosecutor of information that might be used to impeach their testimony. As a result, convictions have been reversed, and others are now in jeopardy because of the failure of government employees to disclose such information to prosecutors during preparation for trial.

Id.

156. *Id.* at 2.

157. Memorandum from Louis J. Freeh, Director of the Federal Bureau of Investigation; Thomas A. Constantine, Administrator, Drug Enforcement Administration; Eduardo Gonzalez, Director, U.S. Marshal's Service; Doris M. Meissner, Commissioner, Immigration and Naturalization Service; and Michael R. Bromwich, Inspector General, to Jamie S. Gorelick, Deputy Attorney General for the U.S. Department of Justice (May 7, 1996) (on file with *Washington Law Review*) [hereinafter Memorandum from Federal Agency Heads] (responding to memorandum from Attorney General's Advisory Committee (Apr. 10, 1996)).

Service, the Commissioner of the INS, and the Department of Justice Office of the Inspector General, to the Deputy Attorney General, the agency heads expressed their strong opposition to the Department's position that even unsubstantiated allegations or accusations that have resulted in exoneration should be disclosed.[158] The agency heads tried to walk the line between complying with the requirements of *Brady/Giglio* and protecting, to the extent possible, the reputations and privacy of their employees. While acknowledging that there might be instances when exonerations or unsubstantiated allegations should be turned over, the agency heads objected to the Department's policy requiring that they "routinely disclose such information absent an underlying legal requirement or a particularized showing of need."[159] The agency heads cited *Brady* in support of their position against disclosure. "The fact that an allegation was investigated and found not to have occurred is legally significant since the U.S. Supreme Court has explained that *Brady* does not require disclosure of 'preliminary, challenged, or speculative information.'"[160]

The agency officials disagreed with the AGAC's argument that such allegations should be disclosed to protect the prosecution and the agent from ambush: "[T]he contention that the defense bar is likely to be aware of exonerated allegations [*sic*] that may have been publicized or those initiated by a judge, magistrate judge, or prosecutor, while the prosecution will not be aware of them, is speculative and insupportable."[161]

The agency heads also argued vehemently against another of the Department's proposals, namely, that U.S. Attorney's Offices start keeping logs of allegations against agents. Such logs would "prove most

158. *Id.*

159. *Id.* at 4.

160. *Id.* at 3 (quoting United States v. Agurs, 427 U.S. 97, 109 n.16 (1976) (quoting Giles v. Maryland, 386 U.S. 66, 98 (1967) (Fortas, J., concurring))).

161. *Id.* at 5. See also the following argument from the agencies:

> [T]he AGAC states that "if there is no indication that the defense is aware of this sort of information, and if the prosecution is comfortable that the information in question is not *Giglio*, then the prosecution will keep the information confidential and will not file a motion in limine." Since the defense is under no obligation to notify the prosecutor in advance of what information it will attempt to use to impeach Government witnesses, the prosecutor will often not know what information the defense possesses until cross-examination. The risk of ambush is no greater for exonerated allegations initiated by judges or prosecutors than it is for any other type of exonerated allegations.

Id. at 5 (citation omitted).

detrimental to agency employees [and] should not be permitted."[162] Understandably concerned with protecting the privacy of their employees,[163] the agency heads balked at the idea of a prosecutor keeping what would essentially amount to a permanent log of agents whose files had been reviewed. Their primary concern was that a log could be "misused by a prosecutor to determine whether that [agent] is a potentially 'problematic' witness. Such a demoralizing prospect, in the face of no actual benefits, is not worth chancing."[164]

Some FBI agents are convinced that the larger U.S. Attorney's Offices, such as those in Chicago and Los Angeles, do in fact keep logs of allegations of misconduct by agents.[165] The FBI has instructed its agents to "insist that prosecutors return material from FBI personnel files and to rely on the FBI as the sole repository for such information when it is needed in the future."[166] As one agent put it, "I don't want my file in the hands of a prosecutor who may one day leave the U.S. Attorney's Office and go to the other side."[167]

The debate between the Department of Justice and the federal law enforcement agencies may be quelled somewhat with the implementation of a recently adopted policy, approved by the Attorney General of the United States, regarding the disclosure to prosecutors of potential impeachment information concerning law enforcement agency witnesses.[168] As of the time this Article went to press, this policy was scheduled to take effect on April 8, 1997. It will apply to all Department of Justice investigative agencies.[169]

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162. *Id.* at 6.

163. *See, e.g.*, Memorandum from Mueller, *supra* note 5, at 2 ("Because personnel files are extremely private, the federal investigative agencies are reluctant to ship these files to AUSAs as a routine matter. For this reason, each agency feels strongly that it should first examine the pertinent files and advise the AUSA if the files contain any information bearing on the agent's credibility.").

164. Memorandum from Federal Agency Heads, *supra* note 157, at 7.

165. Telephone Interviews with present and former Special Agents of the FBI (May-Sept., 1996).

166. Airtel communication from Freeh, *supra* note 32, at 7.

167. Interview with anonymous Special Agent from the FBI, in Seattle, Wash. (July 26, 1996).

168. Office of the Attorney General, Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy") (signed by Janet Reno, Attorney General, Dec. 9, 1996) [hereinafter "DOJ Policy"] (on file with *Washington Law Review*).

169. *Id.* at 1; Memorandum from Carol DiBattiste, Director, Executive Office for the United States Attorneys, U.S. Department of Justice, to All United States Attorneys 1 (Dec. 13, 1996) (on file with *Washington Law Review*). Additionally, the Department of Treasury has agreed to issue the same policy for its investigative agencies. *Id.*

Although the Department's new policy does not mention *Henthorn* by name and so cannot be taken as a formal policy regarding *Henthorn* requests in particular, it does appear applicable to *Henthorn* issues in the Ninth Circuit.[170] The stated purpose of the policy "is to ensure that prosecutors receive sufficient information [from agencies] to meet their [disclosure] obligations, while [still] protecting the legitimate privacy rights of Government employees."[171] The policy presumes that the prosecutor will generally be able to obtain all potential impeachment information directly from the agent witness.[172] Nevertheless, the policy sets forth procedures for those cases when a prosecutor decides to request additional information from the investigative agency,[173] presumably when he is not satisfied with the information provided by the agent.

Under the new policy, upon a request by a prosecutor, the employing agency will be required to conduct a review for findings of misconduct that reflect upon the truthfulness or possible bias of an employee, any past or pending criminal charge brought against an employee, and any credible allegation of misconduct that reflects upon the truthfulness or bias of the employee.[174] The policy indicates that an agency official shall conduct the review, but does not say whether that official must be a lawyer.[175]

In the context of *Henthorn* reviews, the Department's new policy will add very little to the scope of the reviews the agencies are already engaged in, with a few exceptions. One exception is that the policy requires agencies to provide prosecutors with information regarding even those allegations that are unsubstantiated, not credible, or have resulted in exoneration of the employee, under certain narrow circumstances.[176]

The policy strikes a compromise between the agencies and the Department on the issue of whether prosecutors may retain records, such as the logs discussed earlier, of impeachment items that they have

170. Memorandum from Harry J. McCarthy, Chief of the Criminal Division, United States Attorney's Office, Western District of Washington, to All Criminal AUSA's (Dec. 19, 1996) (on file with *Washington Law Review*).

171. DOJ Policy, *supra* note 168, at 1.

172. *Id.* at 1–2.

173. *Id.* at 2.

174. *Id.*

175. *Id.*

176. *Id.* One of the narrow circumstances triggering disclosure to the prosecutor is the following: "(a) when the Requesting Official advises the Agency Official that it is required by a Court decision in the district where the investigation or case is being pursued." *Id.* Defense counsel in the Ninth Circuit could certainly make the argument that *Henthorn* is the decision alluded to in this provision.

learned about various agents. The policy allows prosecutors to maintain such records, but only of impeachment material that has been disclosed to defense counsel.[177] The policy prohibits prosecutors from maintaining records of potential impeachment material disclosed to the court in camera but not to the defense.[178]

2. *From the Prosecutor's Perspective*[179]

At the end of the day, it is the Federal prosecutors nationwide—especially those within the Ninth Circuit—who bear the responsibility of complying with requests for discovery of personnel files. It is upon their shoulders that these discovery requests weigh most heavily, for they are the ones who must determine whether a personnel file or a portion of a file must be disclosed. Although a prosecutor may be able to rely on an agency to cull materials in a personnel file, it is the prosecutor himself who must decide what to disclose, or, when he cannot decide, whether to submit the file to the court for an in camera review. Failure to disclose what is later deemed by a court to be *Brady* material can result in the reversal of a conviction and in a written sanction or reprimand from the court.[180]

Many prosecutors, especially those in the Ninth Circuit, are uncertain of the parameters of their responsibilities of review and disclosure and would welcome more guidance from the Department of Justice or the courts. Notwithstanding the most recent decisions from the Ninth Circuit resolving (at least for now) some of the issues raised by *Henthorn*,[181] many questions remain regarding how to comply with *Henthorn* requests, and, at the same time, protect the privacy and personal interests of agents.

The following discussion raises some of the issues that federal prosecutors, in particular, face. The issues are discussed from the perspective of the many prosecutors interviewed for this Article, most of

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177. *Id.* at 4.

178. *Id.*

179. The sources for this subsection are all Assistant U.S. Attorneys presently practicing within the Ninth Circuit. They spoke on the condition of anonymity and on condition that the citations or docket numbers of cases not be revealed. Accordingly, although the case summaries in this section are based on real cases, they are not specifically identified. These interviews were conducted between May and September of 1996.

180. Kyles v. Whitley, 115 S. Ct. 1555 (1995).

181. United States v. Herring, 83 F.3d 1120 (9th Cir. 1996); United States v. Jennings, 960 F.2d 1488 (9th Cir. 1992).

whom work in the Ninth Circuit, where *Henthorn* makes these issues more common. But federal prosecutors in other circuits are not insulated from these problems, especially in light of the uncertainty of the law[182] and the U.S. Supreme Court's broad interpretation of a prosecutor's responsibilities enunciated in *Kyles*.

Most prosecutors and law enforcement agents see themselves as members of a "federal family," sticking together through the highs and lows of complex and lengthy investigations and prosecutions, many of which are potentially dangerous to the agents who investigate and to the prosecutors who charge. But in 1991, the *Henthorn* decision began to divide the family in ways not seen before. Seemingly out of the blue, prosecutors were forced to ask for reviews of agents' personnel files, calling into question the entire premise of the prosecutor-agent relationship: implicit trust in the integrity of another member of the family. The following case summaries illuminate some of the new tensions.

A prosecutor was preparing to try several members of a major kidnapping ring. The defendants and the victims all spoke Mandarin Chinese only, so the prosecutor requested that the FBI assign to the case an agent who could speak Mandarin Chinese. The FBI complied with his request, and the prosecutor worked with the FBI agent for several months. During this time, the agent not only interviewed the victims, but, in transporting and fingerprinting the defendants, obtained inculpatory statements from them. The prosecutor planned to call the agent at trial, primarily for his testimony about the defendants' inculpatory statements.

Several weeks before trial, one of the lawyers for the defense made a written *Henthorn* request. The prosecutor asked the FBI to conduct a *Henthorn* review of the agent's file. The FBI's response was immediate: the agent had "a *Henthorn* problem."[183] Two things were clear to the prosecutor: (1) he could not call the agent at trial[184] and would not, therefore, be able to introduce the inculpatory statements made by the

182. Airtel communication from Freeh, *supra* note 32.

183. The "*Henthorn* problem" in this case was a shoplifting accusation that dated back more than six years. The agent, who was employed by the FBI at the time, maintained his innocence, but, in order to obtain a "pre-trial diversion" of his case, acknowledged that he had committed the crime. The *Henthorn* problem arose not only from the fact that the agent may have shoplifted more than six years earlier, but also from his failure to inform his employer, the FBI, about the accusation at the time it was made.

184. The Assistant U.S. Attorney was emphatic about not calling the agent at trial: "They [the defense] would have made this guy the centerpiece of the trial. They would have tried to smear the FBI and the U.S. Attorney's Office." Interview with Anonymous A, Assistant U.S. Attorney in Ninth Circuit, in Seattle, Wash. (Aug. 15, 1996) (*see supra* note 179).

defendants; and (2), the FBI had known about the agent's *Henthorn* problem before assigning him to the case, but had not told the prosecutor about it.[185]

In another case, a defense attorney made a *Henthorn* request for the personnel file of a postal inspector. The Postal Service told the prosecutor that there was no *Henthorn* material in the agent's personnel file. The prosecutor relayed this response to the defense attorney, who then made a second *Henthorn* request, this time particularizing by name other files in which personnel information was likely to be found. The prosecutor asked the Service to inspect the particular files named in the second *Henthorn* request. Indeed, impeachment material was discovered in those files, and, because this agent was the key government witness, the prosecutor dismissed the charges.[186]

Still another case illustrates the struggle prosecutors face when deciding whether to disclose information in a personnel file. Anticipating a *Henthorn* request, a federal prosecutor in a tax evasion case asked the IRS to review the personnel files of IRS employees who might testify at trial.[187] The search turned up a problem. One of the IRS agents had written a derogatory comment about his supervisor in his daily work diary.[188] Uncertain whether *Henthorn* required her to turn over the information and concerned that the agent would be made to look foolish on the stand, she elected not to call the agent, thus avoiding the need to make a decision. To this day, however, she wonders whether she would

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185. The prosecutor's response: "I wish they [the FBI] had just told me. I wouldn't have used him, but I wouldn't have had to carve up my case to take him out just before trial." *Id.*

186. The material stemmed primarily from several disciplinary sanctions that had been brought by the Service against the inspector for his failure to keep investigative files, which was an issue in the instant case. The prosecutor surmised that the defendant, a former postal worker, must have heard about the agent's personnel problems from his time at the post office and, being a former postal employee, knew the names of the various kinds of files likely to contain personnel information. Interview with Anonymous B, Assistant U.S. Attorney in Ninth Circuit, in Seattle, Wash. (Aug. 15, 1996) (*see supra* note 179).

187. Interview with Anonymous C, Assistant U.S. Attorney in Ninth Circuit, Seattle, Wash. (Aug. 15, 1996) (*see supra* note 179). Although *Henthorn* speaks only of "testifying officers," the prosecutor in this case understood *Henthorn* to mean that the file of any government employee who might testify at trial was subject to review.

The Ninth Circuit has yet to decide whether *Henthorn* extends to the files of any government employee who will testify, or to those of criminal law enforcement agents only. Here, the testifying IRS employees were civil revenue agents and civil collections agents. Obviously, the more prudent course for a prosecutor would be to ask for a review of all government employee files.

188. The IRS agent was suspended for 30 days for calling his female supervisor a "wildebeest" in his work diary. *Id.*

have had to disclose the incident had she called the agent to testify.[189] The agent had not been disciplined for an act of dishonesty. If anything, he had been punished because he did not mask his true feelings—he had been too honest.[190]

Some prosecutors believe that they have an obligation to share an agent's *Henthorn* material with other prosecutors who work with that agent in subsequent cases:

> How are we supposed to forget the information after one case, and let the agent go on to the next investigation without informing those prosecutors? If the agent is removed from this district because of a *Henthorn* problem and is transferred to Nevada, do we have an obligation to inform Nevada? It's not *Brady* yet, but it may be if the prosecutor there gets a *Henthorn* request.[191]

Finally, many prosecutors worry about still another looming consequence of *Henthorn*—that convicted defendants will increasingly claim ineffective assistance of counsel on appeal whenever their lawyers failed to make pre-trial requests for discovery of personnel files.[192]

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189. *Id.*

190. Another case illustrates the prosecutorial dilemma even further. In this instance, a *Henthorn* review revealed that 10 years earlier, when the agent had applied for his position with the government, he had initially failed to indicate on his application that he had once used an alias. Upon realizing that he had failed to report his alias, the agent revised his application. The revision indicated that 10 years prior to the *Henthorn* review he had rented an apartment with a girlfriend and, in order to survive the landlord's scrutiny, had assumed the girlfriend's last name on the rental application. The prosecutor was uncertain whether this information should be disclosed. *Id.*

191. Telephone Interview with Haines, *supra* note 44; *see also* Telephone Interview with Krinsky, *supra* note 56.

192. Telephone Interview with Haines, *supra* note 44; *see* Sanchez v. United States, 50 F.3d 1448 (9th Cir. 1995) (holding that defendant challenging voluntariness of guilty plea could assert *Brady* claim).

3. *From the Criminal Defense Attorney's Perspective—The Fox Guarding the Chicken Coop?*[193]

Federal criminal defense lawyers complain that they rarely receive any information pursuant to a request for a review of a personnel file. Perhaps that is because many prosecutors elect to "deal" a case before having to disclose impeachment material to the defense:

> In most cases, if an AUSA learns of a problem, he will give the defendant a better deal on a plea so as not to ruin an agent's career. We'd work out a deal—give them a year or two off rather than take our loss in front of a jury which demands absolute honesty from government agents. The bottom line is that we deal the case or put someone else on to testify. The defense may never know that we had a problem with a particular witness.[194]

One of the most common complaints of defense attorneys about the government's review of personnel files for *Brady* or *Giglio* material is

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193. In order to conduct the research for this section, the following 10-question survey was sent via e-mail to every Federal Public Defender's office in the nation. Responses were received from 21 of the 58 Federal Public Defender's offices. Survey of Federal Public Defenders, *supra* note 5. Also interviewed were several of the private practice defense attorneys involved in the Ninth Circuit cases discussed in part II of this Article. This was an informal survey, and is not offered here for its statistical value. The survey's value is anecdotal.

1. In what percentage of cases have you asked AUSAs to review the personnel file of a testifying government agent for Brady/Giglio material?
2. How have you made this request, i.e. as part of your general written discovery request or as a separate request?
3. At what stage of the case do you make the request, i.e. before/during/after plea negotiations?
4. Are you making these requests in an increasing/decreasing number?
5. What responses have you received from the AUSAs upon making such a request?
6. In what percentage of cases have you received discovery from an AUSA regarding a testifying agent's personnel file? What was the discovery material?
7. How did you use the discovery? (Cross-examination of government agent, for example.)
8. In what percentage of cases have you received no discovery following your request for the AUSA to review a testifying agent's personnel file?
9. In what percentage of cases have you made a request for an AUSA to review a particular agent's personnel file, only to be told (or to find out at trial) that the agent will not testify after all?
10. How often has your request for a personnel file review led to an in camera review of the file by the court? What happened after the in camera review?

194. Telephone Interview with Haines, *supra* note 44.

that it "smacks of the fox guarding the chicken coop."[195] As lead defense counsel in *Lacy* said: "The agencies just wave a wand at the documents. I don't blame the prosecutors for not knowing what's in those files when the agencies have it in their own best interest not to tell them."[196] And yet, defense attorneys nationwide have been making an increasing number of requests for discovery of personnel files,[197] usually after reviewing the government's general discovery and determining that the case will probably go to trial.[198]

In the overwhelming majority of cases in which defense lawyers have made such requests, the government has not turned over discovery from the agent's personnel file.[199] Some defense attorneys—both inside and outside the Ninth Circuit—have said that the government has tried to "stonewall"[200] their efforts to obtain discovery of personnel files.[201]

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195. Memorandum of Law in Support of Motion for Discovery of Personnel Files at 9, United States v. Lacy, 896 F. Supp. 982 (N.D. Cal. 1995) (No. CR-94-0384-MHP), *reprinted in* Excerpt of Record at 94, United States v. Herring, 83 F.3d 1120 (9th Cir. 1996) (No. 95-10521) [hereinafter Leidman brief].

196. Interview with Leidman, *supra* note 51. In his brief to the district court in *Lacy*, Mr. Leidman wrote:

> The defense urges most strenuously against this procedure for the obvious "fox guarding the chicken coop" 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 [sic] as non-exculpatory. While it is true that under *Kyles*, the United States Attorney 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.

Leidman Brief, *supra* note 195, at 9.

197. *See* Survey of Federal Public Defenders, *supra* note 5.

198. Sample answers included the following: "In all cases that may go to trial a *Henthorn* request is made," from Roger Peven, Chief Trial Attorney, Federal Defenders of Eastern Washington and Idaho; "Only started asking recently, now I ask in 100% of my cases that look like they will be trials," from Thomas Thornton, Assistant Federal Public Defender (AFPD) at Middle District of Pennsylvania, Williamsport, Penn.; "I make a request in all cases in which a federal agent will testify and in which it is apparent that the case will be tried," from Franny Forsman, AFPD in Las Vegas, Nev. Survey of Federal Public Defenders, *supra* note 5.

199. The respondents to the survey indicated that they have not received discovery pursuant to *Henthorn* requests between 75% and 100% of the times they have made such requests. Survey of Federal Public Defenders, *supra* note 5.

200. David Phillips, AFPD, in Kansas City, Kan.. *See* Survey of Federal Public Defenders, *supra* note 5.

201. For example, Anthony Gallagher, AFPD in Great Falls Mont. stated that, "[t]hey [the government] will usually fight the request vehemently if it's an FBI, DEA, or ATF agent; they are not so protective of BIA [Bureau of Indian Affairs] police, but still refuse unless we can make a particularized showing in our initial request"; Thomas Thornton, AFPD in Williamsport, Penn. said the government responds with "[d]isdain and they never find anything"; and Vionnette Reyes,

According to the defense attorneys surveyed, only rarely have discovery requests for personnel files led to in camera review, and rarely has a court ordered disclosure of material from the file after an in camera review.[202] The defense lawyers who were interviewed or surveyed for this Article generally agreed, however, that their increasing pressure for review and disclosure of agency personnel files has been helpful in obtaining more favorable plea offers from the government.[203]

IV. CONCLUSION: SOME PROPOSALS FOR CHANGE

Given the increasing number of discovery requests for agent personnel files[204] both within and outside the Ninth Circuit, prosecutors are more and more likely to be compelled to review the personnel files of

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Federal Defender Program, Inc. in Atlanta, Ga. said that the government "ignore[s] it [the request]." *See* Survey of Federal Public Defenders, *supra* note 5.

Survey results in response to question 5, which asked, "What responses have you received from the AUSAs upon making such a request?," included: "Opposition. It doesn't seem spirited, but almost pro forma. As a result, we go to the court, and the court usually huffs and puffs and then grants it. It is easier to grant than to give us an issue on appeal," from Jon Sands, AFPD in Phoenix, Ariz.; "Requests are met by (1) silence; (2) there's nothing in the file; (3) we won't call him as a witness," from Franny Forsman, AFPD in Las Vegas, Nev.; "Usually they claim negative. In a few cases we have had hits such as an agent [who] was investigated for DUI, molesting a stepchild, misuse of official funds, etc. Usually the response has been to the judge, in camera, and then the judge discloses to defense counsel," from Fred Kay, AFPD in Tucson, Ariz. *See* Survey of Federal Public Defenders, *supra* note 5.

202. From Anthony Gallagher, AFPD in Great Falls, Mont., "Only in one case in which we requested an ATF agent's personnel file did the court indicate that it would revisit the issue after an in camera review of the file. Before the court conducted the review, the witness was withdrawn by the government." From Miriam Siefer, AFPD in Detroit, Mich.:

> We have been successful in a few cases to get the court to review the personnel file in camera. However, we have never been given any discovery/impeachment material from the file. In one case there were rumors that one of the DEA agents was shaking down informants. We were aware of an internal investigation. The court reviewed the personnel file in camera but ruled that none of the materials was *Brady*.

See Survey of Federal Public Defenders, *supra* note 5.

203. Henry Bemporad, AFPD in San Antonio, Tex., wrote "[s]ome cases are so stacked that evil things in personnel files will not affect the defendant's chances at trial, though the request may be a factor in the disposition." His requests are met with "slow compliance and sometimes a deal that is worth taking while the request is pending." Jon Sands, AFPD in Phoenix, Ariz. wrote, "you can use it [a *Henthorn* request] to get a good deal." Fred Kay, AFPD in Tucson, Ariz. wrote, "[d]isclosure likely has resulted in better plea offers." *See* Survey of Federal Public Defenders, *supra* note 5.

Some defenders have had even more dramatic results: Michael Kennedy, AFPD in Sacramento, Cal. wrote that he has used *Henthorn* discovery in "cross examination [and] in one case, dismissal of the indictment." *See* Survey of Federal Public Defenders, *supra* note 5.

204. The survey results showed an increasing number of requests. *See* Survey of Federal Public Defenders, *supra* note 5.

testifying federal agents. Although many prosecutors would like the court to impose a "showing of materiality" standard (as the Sixth Circuit requires),[205] it may be safe to predict that in the wake of the U.S. Supreme Court's dicta in *Kyles*, courts will be less inclined to impose such a showing on defendants.[206] It is also possible that a defense lawyer's failure to request discovery of an agent's personnel file will surface more frequently in appeals as grounds for an ineffective assistance of counsel argument.[207]

Considering the difficulty that defendants have historically had in meeting the "showing of materiality" standard,[208] courts outside the Ninth Circuit—and the U.S. Supreme Court, should it choose to resolve the split—should dispense with that standard. It is virtually impossible for a defendant to identify *Brady* or *Giglio* material in a file that she has not seen.[209] As the law presently stands in the circuits that require the defendant to make a materiality showing before triggering the government's obligation to review a personnel file, it is entirely possible—and even probable—that a file containing impeachment material will never be reviewed, let alone disclosed. This approach is not

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205. United States v. Driscoll, 970 F.2d 1472 (6th Cir. 1992). The prosecutors interviewed for this article were united in their belief that the defendant should have to make some prior showing of materiality, that is, some showing that something of material importance to the defendant's defense would be contained in the relevant files before the prosecutor would be required to inspect the files. Roger W. Haines, Jr. offered one example of a fairly low burden of proof:

> The defense lawyer should at least be able to say that his client told him X and the agent is testifying to Y, therefore there is a discrepancy in the two stories, and one person must be lying. Then a review of the personnel file might be justified to see if there is anything to lend credence to the defendant's argument that the agent is lying.

Telephone Interview with Haines, *supra* note 44.

The problem, of course, with a general "showing of materiality" standard is that the defendant or his lawyer may have met the agent only briefly, may know nothing of his past, and, therefore, have no idea of what specifically to ask for in the files.

206. If this is true, then the prosecution will have less room to "stonewall" the defense, leading to a freer flow of discovery between prosecutor and defense attorney.

207. Sanchez v. United States, 50 F.3d 1448 (9th Cir. 1995).

208. *See* United States v. Valentine, No. 94-6195, 1995 U.S. App. LEXIS 16584, at *1 (6th Cir. June 30, 1995); United States v. Lafayette, 983 F.2d 1102 (D.C. Cir. 1993); 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. Lampkin, Crim. Action No. 96-0103 (JHG), 1996 U.S. Dist. LEXIS 7262, at *1 (D.D.C. May 28, 1996); *see also supra* notes 33–38.

209. This was the same concern that troubled Chief Justice Marshall more than a century and a half ago in United States v. Burr, 25 Fed. Cas. 187 (C.C.D. Va. 1807) (No. 14694): "Now, if a paper be in possession of the opposite party, what statement of its contents or applicability can be expected from the person who claims its production, he not precisely knowing its contents?" *Id.* at 191.

intrusive enough. That being said, the author does not urge the adoption of the *Henthorn* standard in its place. The *Henthorn* rule has the potential to be needlessly intrusive into the privacy of federal agents, subjecting them to the possible exposure of every "wart" of their professional lives, no matter how far back in time their mistakes may have been made. There should be some limitation on a defendant's ability to expose irrelevant information. The author recommends, therefore, a nationwide standard that fashions a compromise between the two approaches, one that is more fair to defendants than the "showing of materiality" requirement but is at least somewhat more protective than *Henthorn* of the privacy of agents.

One possibility would be to fashion a rule that distinguishes among kinds of witnesses. For example, the automatic rule of *Henthorn* could apply to witnesses whose testimony and credibility would be at issue at trial. In contrast, the defendant would be required to make a prima facie showing of materiality before triggering the government's obligation to review personnel files of agents whose testimony would be undisputed, as is often the case, for example, with chain of custody witnesses or records custodians. The problem with this solution, of course, is that the credibility of *any* government witness may be crucial to the defense, depending on the facts of the particular case. Moreover, while in many cases the defendant may choose not to attack the chain of custody for particular evidence, if he were aware of information that undermined the credibility of a chain of custody witness, his tactics might change. Thus, the courts would be extremely reluctant to base the government's obligations to review personnel files on distinctions among categories of agent witnesses.

It may be possible, however, to limit the number of personnel files reviewed in a particular case by cooperation between the prosecutor and defense attorney. If the prosecutor is willing to disclose a witness list to the defense well in advance of trial, indicating the general subject matter of each witness's testimony, it may be possible for the parties to agree on which testimony would not be disputed at trial. In these cases, the defense might be willing to forego a *Henthorn* request for a review of those agents' files. This approach mirrors some of the agencies' recommendations[210] and potentially may reduce the number of *Henthorn* requests and reviews. Of course, defense attorneys may not be willing to accept the prosecutor's assertion that particular witnesses are interchangeable or testifying only to uncontested matters. Indeed, the

210. Memorandum from Mueller, *supra* note 5.

prosecutor herself may not know before trial which witnesses are essential and which are not. Thus, although it is worthwhile for the parties to try to reach an agreement in any given case on the scope of files to be reviewed, this approach is unlikely to reduce significantly the government's obligation under the *Henthorn* standard.

To limit the intrusiveness of *Henthorn*, a "statute of limitations" could bar the disclosure of potential impeachment material that stems from incidents too remote in an agent's past to be of continuing impeachment value or relevance. Although this proposal raises obvious questions of line-drawing (that is, when does an agent's history become ancient history?), courts are quite accustomed to making similar calls when they weigh the relevance of requested discovery material against its prejudicial value. Obviously, some personnel file entries will always be relevant and material, no matter how old. Convictions for perjury, or reprimands for falsifying evidence or engaging in otherwise egregious conduct would always be relevant, even when remote, to impeach the witness's credibility at trial. But other personnel file entries—for example, an agent's use of his girlfriend's last name in order to secure an apartment some ten years earlier—are probably too remote to be relevant and should not be dredged up in an attempt to embarrass. A five to ten year limitation on most personnel file entries would limit at least somewhat the number of disclosures, while still allowing the defense access to relevant entries.[211]

Although it is important to limit the intrusiveness of *Henthorn*, this Article has suggested that the Ninth Circuit standard is in some ways not broad enough. The *Dominguez-Villa* exemption of the personnel files of state and local officers from the reach of *Henthorn* requests is outdated in terms of today's law enforcement, when there are increasing numbers of state and local officers working closely with federal agents on task forces coordinated by the Federal government.[212] The testimony, and therefore the credibility, of state and local law enforcement officers may be as critical to the government's case as those of federal agents. The rationale of *Dominguez-Villa*—that the files of local police departments are not in the "possession" of the federal authorities and are therefore beyond the government's responsibility or the court's control—rings hollow given a

211. The presumptive limitations cut-off could be patterned after Federal Rule of Evidence 609(b), *see supra* note 91, or California Evidence Code sections 1043 and 1045, *see supra* text accompanying note 90, which contain a five year statute of limitations on disclosure of entries from police personnel files. Any limitations period should be presumptive rather than conclusive, allowing a defense attorney to argue to the court that an exception should be made in a particular case.

212. *See* United States v. Dominguez-Villa, 954 F.2d 562 (9th Cir. 1992).

federal prosecutor's ability to obtain, through agreement, access to the files of local officers who work in tandem with federal agents. Moreover, the *Dominguez-Villa* exception for the personnel files of state and local officers seems to clash with Justice Souter's dicta in *Kyles v. Whitley*, where the Court held the government responsible for information in other kinds of files kept by local police. Therefore, federal prosecutors and federal law enforcement agencies should require that state and local law enforcement agencies agree to comply with *Henthorn* requests, as a condition of their working on task forces receiving federal money. State and local law enforcement agencies routinely enter into memoranda of understanding with federal authorities in joining a joint task force. These memoranda of understanding could include a provision that requires state and local law enforcement agencies to submit personnel files for review. Although the state and local law enforcement agencies will probably not embrace the imposition of this new requirement (and may mount barriers to meeting such a requirement), prosecutors will be better able to plan their cases, more secure in knowing that all of the agents they may eventually call to testify at trial have passed a *Henthorn* review.

By the same reasoning, prosecutors should review the exonerations or unsubstantiated allegations of misconduct that appear in agents' personnel files. Although most prosecutors will probably determine that, in most cases, the entries should not be turned over to the defense, or even subject to an in camera review, they should at least have inspected these entries to assure compliance with *Henthorn* requests. The prosecutor should also consider reviewing the method by which the allegations were found to be unsubstantiated or the agent exonerated. The danger of which the prosecutor should at least be aware is that the agent's exoneration may well have come from the agency's internal investigation, a process that may be suspect to many defense attorneys. Although the agencies have been waging a campaign against the disclosure of these personnel file entries to even the prosecutor, and the Department's new policy for disclosure of these materials to the prosecutor is very narrowly drawn, it behooves the agencies to recognize that such disclosure may ultimately protect agents from being ambushed in cross-examination by defense lawyers who have learned of these allegations from other sources. If the prosecutor is unaware of the allegations, she would be unprepared to repair the agent's lost credibility, and thus risk damaging the effectiveness of the agent's entire testimony.

Finally, the Department of Justice should keep a log or history of *Henthorn*-type requests, detailing the results of all *Henthorn* reviews that have resulted in potential impeachment material being turned over to the

prosecutor. Each prosecutor in the field should be held responsible for updating the log on the particular agents with whom she has worked. The Department's new policy of allowing prosecutors to maintain records only of potential impeachment material disclosed to the defense does not go far enough. Such a narrow policy does not adequately take into consideration two important policy reasons for allowing the prosecutors broader access to the results of prior *Henthorn* reviews. First, a national database or log, kept in a secure manner to protect the agents' privacy, would serve as the institutional memory of the Department on disclosure issues, enabling prosecutors to look at earlier *Henthorn*-type requests to see how courts have resolved *Henthorn* disputes. In this sense, the log would have a kind of precedent value, detailing what kind of personnel information has had to be disclosed, and what the courts have allowed to be withheld. Such a database could serve (perhaps to the surprise of agencies reluctant to acquiesce in the idea of a *Henthorn* log) to protect certain entries from disclosure to the defense. In other words, once one trial judge has found in an in camera review that a particular file entry on a particular agent should not be disclosed to the defense, a prosecutor is in good standing to use that finding to convince any subsequent trial judges that the entries should not be disclosed. In order to use the information, however, the prosecutor would need to know about the prior *Henthorn* request, and the outcome of the court's in camera review.

Second, the log would allow prosecutors in one district to alert those in other districts of a particular agent's *Henthorn* history.[213] To the extent that the Court in *Kyles* indicated its willingness to impute the knowledge of one government agency to another, *Henthorn* logs could offer important protection to prosecutors against the possibility of being sanctioned for failure to disclose impeachment material known to prosecutors in other districts.[214] These benefits should, in the long run, outweigh the administrative headaches associated with establishing and maintaining a national database.

Although no single proposal on this subject will completely assuage all of the players, taken together, these proposals should alleviate at least some of the privacy concerns of federal agents, and, at the same time, give defendants meaningful access to impeachment material in the files

213. This is true especially in view of the number of times agents are typically transferred from one office to another.

214. As mentioned, prosecutors have sometimes taken it upon themselves to alert other prosecutors of an agent's "*Henthorn* problem," but this has been random at best.

of agents whose testimony and credibility will in fact be challenged at trial.

The split between the circuits on the issue of the government's obligation to review agents' personnel files for impeachment material has created a plaguing anomaly that should ultimately be addressed by the U.S. Supreme Court. Without a national standard for dealing with the issues raised in this Article, the scope of the government's obligation to turn over exculpatory or impeachment material in the personnel files of federal agents depends on which circuit's law applies. If the government is required to disclose only what it has looked for and discovered, then the crucial question is really whether prosecutors will be made to look for disclosable material that they will otherwise not discover. The duty to disclose is only as meaningful as the duty to discover that which should be disclosed.