IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee

v.

RYAN M. PALIK
Technical Sergeant (E-6)
United States Air Force,
Appellant

USCA Dkt. No. 23-0206/AF

Crim. App. Dkt. No. ACM 40225

APPELLANT'S REPLY BRIEF

MATTHEW BLYTH, Maj, USAFR
Appellate Defense Division, AF/JAJA
U.S.C.A.A.F. Bar No. 36470
1500 W. Perimeter Rd, Ste. 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
matthew.blyth.1@us.af.mil

Counsel for Appellant

TABLE OF CONTENTS

Argument 1

1. An R.C.M. 914 motion had a reasonable probability of success on the merits 2

a. The Defense, without trying, met its minimal burden under R.C.M. 914 3

i. The evidence shows the Air Force Office of Special Investigations (OSI) recorded the interviews 3

ii. The Government adds additional burdens to an R.C.M. 914 motion 6

b. The good faith loss doctrine does not protect the Government here 11

2. Trial defense counsel's declarations show they did not understand the mechanics and power of R.C.M. 914 14

3. Any reasonable, informed attorney would have raised a motion under R.C.M. 914 18

4. Ineffective assistance is not measured by overall performance 20

TABLE OF AUTHORITIES

Statutes

18 U.S.C. § 3500 (1970) (Jencks Act) 7–10

Cases

Supreme Court of the United States

Campbell v. United States, 365 U.S. 85 (1961) 8–9, 10

Hinton v. Alabama, 571 U.S. 263 (2014) (per curiam) 1

Porter v. McCullum, 558 U.S. 30 (2009) (per curiam) 2

United States v. Cronic, 466 U.S. 648 (1984) 20

Court of Appeals for the Armed Forces and Court of Military Appeals

United States v. Clark, 79 M.J. 449 (C.A.A.F. 2020) 13

United States v. Jarrie, 5 M.J. 193 (C.M.A. 1978) 11

United States v. Marsh, 21 M.J. 445 (C.M.A. 1986)................................. 11

United States v. McConnell, 55 M.J. 479 (C.A.A.F. 2001) 2

United States v. Muwwakkil, 74 M.J. 187 (C.A.A.F. 2015) 11, 19

United States v. Sigrah, 82 M.J. 463 (C.A.A.F. 2022) 6–7, 17

United States v. Warda, __ M.J. __, 2023 CAAF LEXIS 687 (C.A.A.F. Sept. 29, 2023) 16

United States Circuit Courts of Appeal

Ogden v. United States, 303 F.2d 724 (9th Cir. 1962) 9

Saunders v. United States, 316 F.2d 346 (D.C. Cir. 1963) 9

United States v. Benton, 890 F.3d 697 (8th Cir. 2018) 5

United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971).................... 11, 13

United States v. Smaldone, 544 F.2d 456 (10th Cir. 1976) 10
United States v. Smith, 984 F.2d 1084 (10th Cir. 1993)......................... 10
Williams v. United States, 328 F. 2d 178 (D.C. Cir. 1963) 9

Service Courts of Criminal Appeals

United States v. Sigrah, ARMY 20190556, 2021 CCA LEXIS 279
(A. Ct. Crim. App. June 9, 2021).. 6, 19

United States District Courts

United States v. Hykes, 2016 U.S. Dist. LEXIS 49049
(D.N.M. Apr. 11, 2016) 9–10

<u>Rules for Courts-Martial</u>

R.C.M. 703(e)(2) 16
R.C.M. 905 8
R.C.M. 906 8
R.C.M. 914 .... *passim*

Pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure, Technical Sergeant (TSgt) Ryan M. Palik, the Appellant, hereby replies to the Government's Answer (Ans.), filed on October 10, 2023, concerning the granted issue.

ARGUMENT

Defense counsel's declarations and trial behavior demonstrate they did not understand Rule for Courts-Martial (R.C.M.) 914's power in the face of SM's lost statements. Yet without trying, they managed to put on the evidence necessary to prevail on an R.C.M. 914 motion. Under existing case law, defense counsel had a reasonable probability of prevailing on the motion. Defense counsel's deficient performance stemmed from ignorance, a "quintessential example of unreasonable performance." *See Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (per curiam). Any reasonable, fully informed attorney would have raised the motion.

The Government brands an R.C.M. 914 motion here as "futile." (Ans. at 17, 21.) Thus, this reply will first address why defense counsel would have succeeded on the motion. This analysis will help answer the related questions of whether a reasonable attorney would have filed the

motion, and whether defense counsel here understood the Rule in order to intelligently decide whether to file a motion.

1. *An R.C.M. 914 motion had a reasonable probability of success on the merits.*

Because this ineffective assistance of counsel (IAC) claim is premised on failure to file a motion, TSgt Palik must show a "reasonable probability" that the motion would prove meritorious. *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001). This is less than a preponderance of the evidence. *Porter v. McCullum*, 558 U.S. 30, 44 (2009) (per curiam). Defense counsel managed to elicit the facts necessary to prevail on the motion, and the law existing at the time of trial was uniformly favorable. Yet the Government argues the motion would fail for two main reasons: (1) the videos were never in the possession of the United States; and (2) the good faith loss doctrine excuses the failure to produce the videos. Each argument fails on the facts and the law, especially in light of the low burden of showing a "reasonable probability" of success.

a. The Defense, without trying, met its minimal burden under R.C.M. 914.

Though defense counsel never raised an R.C.M. 914 motion, they elicited all the necessary information through cross-examinations attacking two law enforcement agents in this case. Still, the Government claims the motion would fail because defense counsel could not prove the videos existed. (Ans. at 7, 12–16.) Notwithstanding the Government's efforts to graft additional requirements onto R.C.M. 914, the Defense had enough information to meet its burden.

i. The evidence shows the Air Force Office of Special Investigations (OSI) recorded the interviews.

The Government injects uncertainty into the question of whether the interviews were recorded. It begins when reciting the facts, where it declines to actually state that the videos were "recorded." (Ans. at 3–4.) It then skips to Capt OH's declaration, which indicated an assistant trial counsel could not confirm whether the interviews were recorded. (Ans. at 4.) Thus, the Government concludes, the record is "devoid of any evidence indicating the recordings existed prior to any 'deletion.'" (Ans. at 13.)

The glaring counterexample is Special Investigator (SI) HO's Testimony. When asked if the second interview was "also" recorded, SI HO responded, "Yes, ma'am." (JA at 48–49.) SI HO confirmed twice more that the interviews were recorded on further cross-examination. (JA at 54, 55.) Defense counsel also established that recording these interviews was OSI's standard practice, and that OSI normally puts the interviews on a disk in the case file. (JA at 48, 53, 55.)

So how does the Government conclude the record is "devoid" of evidence that the recordings existed? In part, by treating its own speculation as fact. It asserts that when SI HO "realized the recordings did not exist on the system, she jumped to a conclusion to explain their absence." (Ans. at 14.) The Government does not know this, and the record does not support this; the Government simply argues it into existence. Additionally, it cites to Capt OH's declaration which explains that it was "*possible*" that there was a software error or a system malfunction. (Ans. at 14 (emphasis added) (citing JA at 156–58).) But this is pure speculation. Finally, the Government cites again to Capt OH's declaration, which relays that a third-party assistant trial counsel could not confirm whether the recordings occurred. (Ans. at 4

(citing JA at 157).) But this states little more than the obvious—a trial counsel, almost a year after the OSI interview, could not confirm why the recordings were missing. (JA at 157.) It is unclear what, if any, steps the assistant trial counsel actually took to investigate the deletion of the recordings. Neither the Government's imagination, nor the defense counsel's guess about what else could have happened, nor the assistant trial counsel's inability to confirm what occurred can stand against SI HO's plain testimony.

The Government seeks to buttress its argument by citing *United States v. Benton*, 890 F.3d 697, 718 (8th Cir. 2018). As the Government notes, *Benton* involved "contradictory evidence about whether government agents had taken any notes during a witness interview." (Ans. at 22 (citing *id.*).) Attempting to draw a parallel, the Government concludes that "evidence that the videos of SM's interview ever existed was equivocal at best since no one had ever seen the videos." (*Id.*) But unlike *Benton*, here the evidence was not contradictory about whether OSI recorded the interview. It did.

Additionally, the Government glosses over a metaphysical question. The testimony and internal data pages confirm that the recordings were

deleted. (JA at 41, 48–49, 54, 55.) But something must first exist to be deleted. This gets to the heart of the issue: it is not the Defense's burden to show how the Government lost the statements.

ii. The Government adds additional burdens to an R.C.M. 914 motion.

In essence, the Government seeks to graft an additional burden onto R.C.M. 914—that someone must have seen the videos to prove they existed.

The Government finds support in *United States v. Sigrah*, claiming that "[n]othing in *Sigrah* stands for the premise that defense counsel can prove an R.C.M. 914 violation occurred when they cannot prove the statements at issue existed in the first place." (Ans. at 16 (citing 82 M.J. 463 (C.A.A.F. 2022)).) While it is true that *Sigrah* did not answer that question, the factual overlap is instructive. In *Sigrah*, it does not appear anyone actually viewed the videos. 82 M.J. at 465–66; *see also United States v. Sigrah*, ARMY 20190556, 2021 CCA LEXIS 279, *2–9 (A. Ct. Crim. App. June 9, 2021), *rev'd*, 82 M.J. 463 (Appendix A). Instead, the defense met its burden not by showing that someone watched the video, but with testimony of an agent whose practice was to "always turn the

audio on."[1] *Id.* at 465. Though the Government here states that it will not concede a violation—as the Army did in *Sigrah,* 82 M.J. at 466 n.2—it is noteworthy for assessing a "reasonable probability" of success that another service felt that similar facts merited a concession.

Sigrah demonstrates two additional points. First, even though defense counsel inadvertently met their burden here, uncertainty about what happened to the recordings is a reason *to* file the motion, not to refrain. Had defense counsel raised the issue, an evidentiary hearing like *Sigrah* would have followed to establish the regular practices of OSI and what happened during the interview. As explained in the opening brief, defense counsel's suggestion that they avoided the existence or non-existence of the videos is belied by their repeated invocation of the lost videos through the trial. (App. Br. at 20–21.)

Second, R.C.M. 914 and the Jencks Act, 18 U.S.C. § 3500, do not place defense counsel in the impossible position of proving the mechanics of how the Government lost the statements. The Government notes the standard burden of persuasion falls to the moving party (Ans. at 6 (citing

---

[1] The video in the interview room recorded continuously without agent intervention. *Sigrah*, 82 M.J. at 465.

R.C.M. 905(c)(2)(A)).) But R.C.M. 914 is *sui generis*. It is its own rule, rather than those listed in R.C.M. 905 or R.C.M. 906. (Although those rules are non-exclusive lists.) Moreover, federal courts applying the parallel Jencks Act have not required the same showing from an accused that the Government demands here. In *Campbell v. United States*, 365 U.S. 85, 88–90 (1961), the issue was the judge's refusal to order the Government to produce an interview report of a witness who testified at trial. The judge required the defense to subpoena a witness with key information and refused to summon the witness himself or order the Government to do so. *Id.* at 95. The Supreme Court then described the hearing that *should* have occurred to determine whether the statement qualified and whether or order production:

> The inquiry being conducted by the judge was not an adversary proceeding in the nature of a trial controlled by rules governing the allocation between the parties of the burdens of proof or persuasion. The inquiry was simply a proceeding necessary to aid the judge to discharge the responsibility laid upon him to enforce the statute. The function of prosecution and defense at the inquiry was not so much a function of their adversary positions in the trial proper, as it was a function of their duty to come forward with relevant evidence which might assist the judge in the making of his determination. These considerations standing alone suggest that the emphasis on the petitioners' burden to produce the evidence was misplaced. The statute says nothing of burdens of producing evidence.

Id.

Other federal courts have followed suit. When a defendant seeks production of a statement under the Jencks Act, "the district court has an affirmative duty to determine whether any such statement exists and is in the possession of the Government and, if so, to order the production of the statement." *Williams v. United States*, 328 F.2d 178, 180 (D.C. Cir. 1963) (internal quotation marks omitted) (first citing circuit precedent, and then citing *Campbell*, 365 U.S. 85).[2] "The defendant bears the initial burden of showing that particular materials qualify under the Jencks Act, but the defendant's burden is not heavy." *United States v.*

[2] *See also Saunders v. United States*, 316 F.2d 346, 349 (D.C. Cir. 1963) ("Because the defendant often does not and cannot know whether any such statement exists, the court must conduct any inquiry which is 'necessary to aid the judge to discharge the responsibility laid upon him to enforce the statute.'" (citations omitted)); *Ogden v. United States*, 303 F.2d 724, 733 (9th Cir. 1962) ("An affirmative duty is placed upon the trial court to secure the information which is necessary to a proper ruling on particular requests for production in the light of the statutory purposes. The prosecution and defense have a duty beyond that imposed by their 'adversary positions in the trial proper' to assist the Court in this effort." (citation omitted)).

Hykes, No. CR 15-4299, 2016 U.S. Dist. LEXIS 49049, *35–36 (D.N.M. Apr. 11, 2016) (collecting cases) (Appendix B).[3]

Indeed, in *Campbell*, where the witness stated that an agent took notes during his interview, the "cross-examination of [the witness] had shown a *prima facie* case of their entitlement to a statement." 365 U.S. at 96.[4] So too here. The defense counsel, without even trying, made out a *prima facie* case of entitlement to the statements by eliciting from SI HO both that the interviews were recorded and that it was OSI's standard practice to do so. Thus, the evidence was sufficient to prevail on the motion.

[3] *See also United States v. Smith*, 984 F.2d 1084, 1086 (10th Cir. 1993) (explaining the defense's burden to trigger a hearing is to make a "prima facie showing that a statement of the witness existed which may have been producible under the Jencks Act" (citations omitted)); *United States v. Smaldone*, 544 F.2d 456, 460 (10th Cir. 1976) ("Under the Act, the burden is on the defendant to show that particular materials qualify as 'Statements' and that they relate to the subject matter of the testimony of the witness." (citations omitted)).

[4] The notes were never produced and the Assistant United States Attorney stated, "I do not have them in my possession and I do not know whether they ever existed." *Id.* at 89–92.

b. The good faith loss doctrine does not protect the Government here.

The good faith loss doctrine is "generally limited in its application." *United States v. Jarrie*, 5 M.J. 193, 195 (C.M.A. 1978) (citation omitted). In analyzing the Government's behavior, "[n]egligent failure to comply with the required procedures will provide no excuse," and the right "ought . . . to be protected by rules, systematically applied and systematically enforced." *United States v. Bryant*, 439 F.2d 642, 652 (D.C. Cir. 1971). Instead, the Government here argues for a capacious version of the good faith loss doctrine, chiefly citing *United States. v. Muwwakkil*, 74 M.J. 187 (C.A.A.F. 2015) and *United States v. Marsh*, 21 M.J. 445 (C.M.A. 1986). (Ans. at 17–18.) But neither *Muwwakkil* nor *Marsh*, applied to the facts here, support the good faith loss doctrine. (App. Br. at 27–28.)

In *Muwwakkil*, the good faith loss doctrine failed. 74 M.J. at 193. The Government thus seeks to distinguish *Muwwakkil* because the trial counsel failed to provide any training on handling of preliminary hearing audio, whereas here "OSI had a policy in place to preserve recordings of victim interviews, and SI HO attempted to follow it by trying to retrieve the recordings off the OSI recording system." (Ans. at 17–18 (citing 74

M.J. at 193.) It thus claims that SI HO's incorrect belief about accessing videos "does not necessarily rise to the level of negligence." (Ans. at 26–27.) But the evidence shows both SI HO's negligence and the OSI's broader negligence in allowing this to occur.

SI HO was new to OSI; this was one of her first investigations. (JA at 130.) In fact, this was her *first week* on the job. (R. at 284–85 (explaining that she began with OSI on 17 August 2020, three days before the interview in question).) Special Agent (SA) RA, recognizing that SI HO was brand new, "offered up my help to help with the interview itself and, kind of, train her, essentially." (JA at 130.) After the interviews, which were recorded (JA at 48–49, 54, 55), the record contains no other information about the recordings' status until SI HO noticed that they were deleted on October 26, 2020.[5] As explanation for the deletion, the internal data pages state that "SI [HO] was unaware of the timeframe OSI requires videos to be copied to a disk." (JA at 41.)

The Government would excuse this failure because OSI has a policy to record and preserve interviews. (Ans. at 18.) But "[n]egligent failure

[5] The update to the internal data pages did not occur until months later (January 19, 2021) and was made by another agent, not SI HO. (JA at 41.)

to comply with the required procedures [provides] no excuse." *Bryant*, 439 F.2d at 652. There are two species of negligence at work. First is SI HO's ignorance of the steps to preserve the evidence OSI created. OSI may have had a policy, but what good is an unknown policy? This connects to the second point. OSI placed an investigator in her first week on the job into the role where, through the interviews, she created evidence requiring preservation under R.C.M. 914. And yet apparently, even with SA RA's assistance on the case, she was never informed on the basic steps of preserving the evidence. It should be little surprise that something like this occurred when an untrained, new investigator has responsibilities beyond their understanding.

In *United States v. Clark*, this Court addressed a lost video where the agent "fail[ed] to adequately copy and preserve" the video. 79 M.J. 449, 452 (C.A.A.F. 2020). Although this Court assumed without deciding the Government was negligent and the good faith loss doctrine did not apply, it wrote that "it would not be unreasonable for this Court to conclude that the military judge made a negligence finding when he found that 'the Ft. Campbell CID Office appears to have inadequate procedures to ensure they know who is conducting the proper

preservation of interviews recorded on [the recording system], at least in this case.'" *Id.* at 454. That same sentence could encapsulate the issue here. And, again, where the burden is to show a reasonable probability of prevailing, that burden is met.

The Government does not answer the point that SI HO was new and untrained on this critical issue; instead, it suggests there is not even negligence afoot. Given the evidence already existing—which defense counsel could have supplemented with evidence from a hearing on an R.C.M. 914 motion—TSgt Palik would have had a reasonable probability of prevailing on the motion. The good faith loss doctrine, on these facts, would not excuse the Government's failure to produce the statements.

2. ***Trial defense counsel's declarations show they did not understand the mechanics and power of R.C.M. 914.***

A key aspect of this ineffective assistance of counsel claim is that trial defense counsel did not understand how R.C.M. 914 works. A comprehensive reading of their declarations demonstrates fundamental misunderstanding of the Rule's mechanics, and even suggests they were not aware of the Rule at all before trial. (App. Br. at 18–22.) Yet the Government concludes that "there was no ignorance or misunderstanding of the law." (Ans. at 23.) To reach this conclusion the

Government must credit defense counsel with an understanding of the Rule absent from the declarations. Further demonstrating the inadequacy of defense counsel's understanding of the Rule, the Government devotes significant space to discussing what other reasonable attorneys *might* have considered, though defense counsel here clearly did not. *See infra* at 18–20.

In defense of, well, defense counsel, the Government claims they "made the correct choice in not filing a motion that would have failed due to their inability to prove the existence of the statement." (Ans. at 23.) The only evidence the Government can marshal here is Capt OH's comment that defense counsel would have needed to prove the existence or non-existence of a recorded interview to prevail. (Ans. at 21 (citing JA at 158).) As explained above, the *actual* evidence at trial had already demonstrated the recording occurred and was later deleted, so Capt OH's supposition addresses an already-answered evidentiary query and thereby has no bearing on the analysis. And Capt OH overstates the burden they would face. *See supra at* 11–14.

The next paragraph of Capt OH's declaration illustrates the misunderstanding. She explains that she viewed R.C.M. 914 through the

lens of her prior experience with R.C.M. 703(e)(2), where she lost in a motions hearing because it was uncertain if the missing audio ever existed. (JA at 158.) As she explained, she considered R.C.M. 914 "under that experience." (*Id.*) But R.C.M. 703(e)(2), a pretrial matter relating to the production of evidence, has different mechanics than R.C.M. 914. *Compare* R.C.M. 914 *with* R.C.M. 703(e)(2).[6] Researching the case law on R.C.M. 914 would have provided the understanding Capt OH needed to make an informed decision; instead, the wrong Rule weighed heavily in her mind.

Additionally, the Government declines to address the following problems with defense counsel's understanding of the Rule.

- Maj AN, the lead counsel, never mentioned R.C.M. 914 at all. (JA at 153–55.)

- Maj AN and Capt OH, in their declarations, suggest that OSI routinely committed R.C.M. 914 violations. (JA at 154 ("Furthermore, OSI interviews captured on their recording devices are not indefinitely maintained on the recording device and will be erased after a certain period of time or may be overwritten by

[6] *See also United States v. Warda*, __ M.J. __, 2023 CAAF LEXIS 687 (C.A.A.F. Sept. 29, 2023). In *Warda*, this Court recounted the military judge's denial of an R.C.M. 914 motion for immigration records because there was no "meaningful testimony" about immigration status. *Id.* at *11. This Court then proceeded to review the standards for now-R.C.M. 703(e)(2), although in the context of evidence not subject to compulsory process and not lost evidence. *Id.* at *18–29.

subsequent recordings."), 157 ("I knew from previous experience with OSI that it was possible the interviews . . . were recorded and not removed from the system, so automatically overwritten after a certain period of time.").) If such potential R.C.M. 914 violations were occurring with regularity, one would expect that Maj AN and Capt OH, if they had litigated the issue, would know more about the Rule and its operation. That they did not suggests that they did not understand when R.C.M. 914 applies.

- Defense counsel do not mention the good faith loss doctrine, or prejudice, or anything similar to what the Government, on appeal, suggests a "reasonable attorney" would have considered.

In their declarations, both defense counsel assert they might have treated the situation differently in light of *Sigrah*. (JA at 155, 158.) The Government finds "unpersuasive" TSgt Palik's claim that *Sigrah* did not change R.C.M. 914, arguing that *Sigrah* "did serve to reconcile some 'disagreements' surround R.C.M. 914." (Ans. at 20 (citing 82 M.J. at 470–72 (Maggs, J., concurring).) But as the Government earlier acknowledged, *Sigrah* "only addressed the appropriate remedy for the R.C.M. 914 error." (Ans. at 19.) In this case, questions of remedy and prejudice are utterly absent from the declarations. Defense counsel would have acted differently in light of *Sigrah* because the case made their failure appear so stark, not because it changed the law in a way that should alter their decision.

Defense counsel did not understand the mechanics and power of R.C.M. 914. Consequently, they failed to seize a ripe opportunity and raise a motion under the Rule.

3. Any reasonable, informed attorney would have raised a motion under R.C.M. 914.

As noted above, the Government departs from what Maj AN and Capt OH actually understood about the Rule and adds its own arguments about what a reasonable attorney might consider. Yet the way the Government describes a "reasonable attorney" should give this Court pause: the Government's "reasonable attorney" scours the law to find reasons not to file a motion. (*See* Ans. at 7, 17–19.) Virtually every motion has litigation risk. But risks are assessed in terms of benefits. And the calculation here decisively favors filing a motion.

The Government claims "reasonable attorneys might have chosen not to file an R.C.M. 914 in the same situation because they did not believe they could (1) prove the videos ever existed, (2) prove the good faith loss doctrine did not apply, and (3) prove prejudice." (Ans. at 7.) On the first two points, the review above demonstrates that the concerns about (1) and (2) are overblown; the motion would certainly not be futile because of either one.

On prejudice, the Government seizes on the lower court's opinion in *Sigrah*, which applied the wrong prejudice standard. (Ans. at 19.) It argues that "[l]ike the Army Court [in *Sigrah*], reasonable attorneys at the time of Appellant's trial might have believed that they would have to make a prejudice showing in order to prevail on an R.C.M. 914 motion." (Ans. at 19.) But this confuses prejudice on appeal with prejudice at trial. The lower court in *Sigrah*, having found error in the denial of the R.C.M. 914 motion, had to determine whether the error prejudiced the appellant. 2021 CCA LEXIS 279, at *17 (Appendix A). This is a completely separate question from whether TSgt Palik would have to prove prejudice to the trial judge. And this Court already definitively answered that question in *Muwwakkil*: R.C.M. 914 "provides two remedies for the Government's failure to deliver a 'statement' without referencing a predicate finding of prejudice to the accused. Absent any reference to prejudice or harmless error, at this stage of the proceedings we conclude that the military judge was not required to engage in a prejudice analysis." 74 M.J. at 194.

The Government also disputes TSgt Palik's characterization of the motion as "cost free," claiming that it might have cost defense counsel

credibility or detracted from other preparations. (Ans. at 20.) First, as noted above, defense counsel already made out the case for an R.C.M. 914 motion without trying. Second, defense counsel in this case never suggested these were costs of filing the motion. And third, an R.C.M. 914 motion is about as simple as it gets: defense counsel stands up and makes an oral motion to produce the statement. This would have been cost free; the worst that would happen is the military judge rules against them away from the members, thereby eliminating any risk to defense counsel's credibility before the factfinder.

4. ***Ineffective assistance is not measured by overall performance.***

Deficient performance on a single issue may give rise to an IAC claim. *See United States v. Cronic*, 466 U.S. 648, 657 n.20 (1984) ("Of course, the type of breakdown in the adversarial process that implicates the Sixth Amendment is not limited to counsel's performance as a whole -- specific errors and omissions may be the focus of a claim of ineffective assistance as well.") Yet the Government argues that it is "especially true" that defense counsel's performance did not fall below standards because they earned acquittals for 12 of the 15 specifications. (Ans. at 24.) The Government does not cite a case on this point.

If an attorney does 500 things right and one thing catastrophically wrong, a claim of IAC may still prevail. That defense counsel performed well overall here does not eliminate an ineffective assistance claim on a case-dispositive motion that would have undermined the only remaining convicted specifications.

WHEREFORE, TSgt Palik respectfully requests this Honorable Court set aside all convictions related to SM.

Respectfully Submitted,

MATTHEW BLYTH, Maj, USAFR
Appellate Defense Division, AF/JAJA
U.S.C.A.A.F. Bar No. 36470
1500 W. Perimeter Rd, Ste. 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
matthew.blyth.1@us.af.mil

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Rule 24(b) because it contains 4,325 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Century Schoolbook font, using 14-point type with one-inch margins.

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36470
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Rd, Ste. 1100
Joint Base Andrews NAF, MD 20762
240-612-4770
matthew.blyth.1@us.af.mil

APPENDIX A

Warning
As of: October 20, 2023 1:12 PM Z

United States v. Sigrah

United States Army Court of Criminal Appeals

June 9, 2021, Decided

ARMY 20190556

Reporter
2021 CCA LEXIS 279 *; 2021 WL 2385270

UNITED STATES, Appellee v. Private E2 LEEROY M. SIGRAH, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by *United States v. Sigrah, 81 M.J. 447, 2021 CAAF LEXIS 719, 2021 WL 4190924 (C.A.A.F., Aug. 6, 2021)*

Motion granted by *United States v. Sigrah, 81 M.J. 450, 2021 CAAF LEXIS 730, 2021 WL 4269906 (C.A.A.F., Aug. 9, 2021)*

Review granted by, in part *United States v. Sigrah, 82 M.J. 235, 2022 CAAF LEXIS 144, 2022 WL 781059 (C.A.A.F., Feb. 23, 2022)*

Motion granted by *United States v. Sigrah, 2022 CAAF LEXIS 489, 2022 WL 3219306 (C.A.A.F., July 13, 2022)*

Vacated by, in part, Reversed by *United States v. Sigrah, 2022 CAAF LEXIS 627 (C.A.A.F., Aug. 30, 2022)*

Prior History: [*1] Headquarters, Fort Campbell. Matthew A. Calarco and Jacqueline Tubbs, Military Judges, Colonel Laura J. Calese, Staff Judge Advocate.

United States v. Sigrah, 2021 CCA LEXIS 121 (A.C.C.A., Mar. 23, 2021)

Case Summary

Overview
HOLDINGS: [1]-The military judge did not abuse her discretion in denying defense counsel's motions to strike testimony of government witnesses under R.C.M. 914, Manual Courts-Martial because the military judge's errors in this case did not substantially influence the findings as defense counsel's cross-examination of the witnesses was not significantly encumbered as all of the witnesses provided contemporaneous, detailed, sworn statements, adequately capturing, in their own words, their discussions with Army Criminal Investigation Command on the facts of central importance; [2]-The service member's Brady claim failed because the service member failed as a threshold matter to demonstrate that the government suppressed or withheld the DNA report, irrespective of its favorability or materiality.

Outcome
Findings of guilty and sentence affirmed.

Counsel: For Appellant: Captain David D. Hamstra, JA (argued); Colonel Michael C. Friess, JA; Lieutenant Colonel Angela D. Swilley, JA; Major Christian E. DeLuke, JA; Captain Paul T. Shirk, JA (on brief); Colonel Michael C. Friess, JA; Lieutenant Colonel Angela D. Swilley, JA; Major Christian E. DeLuke, JA; Captain David D. Hamstra, JA

(on reply brief); Colonel Michael C. Friess, JA; Lieutenant Colonel Angela D. Swilley, JA; Captain Thomas J. Travers, JA; Captain David D. Hamstra, JA (on supplemental brief); Colonel Michael C. Friess, JA; Lieutenant Colonel Angela D. Swilley, JA; Captain Julia M. Farinas, JA; Captain David D. Hamstra, JA (on supplemental reply brief).

For Appellee: Captain R. Tristan C. DeVega, JA (argued); Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Brett A. Cramer, JA; Captain R. Tristan C. DeVega, JA (on brief); Major Brett A. Cramer, JA; Captain R. Tristan C. DeVega, JA (on surreply brief); Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Brett A. Cramer, JA; Captain R. Tristan C. **[*2]** DeVega, JA (on supplemental brief).

Judges: Before ALDYKIEWICZ, BURTON, and WALKER Appellate Military Judges. Senior Judges ALDYKIEWICZ and BURTON concur.

Opinion by: WALKER

Opinion

MEMORANDUM OPINION

WALKER, Judge:

On appeal before this court pursuant to *Article 66, UCMJ*, appellant raises five assignments of error, two of which merit discussion but no relief.[1] Specifically, appellant claims the military judge abused her discretion in denying defense counsel's motions to strike testimony of government witnesses under Rule for Courts-Martial (R.C.M.) 914. Appellant further argues the government violated its obligations under *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*, by withholding favorable and material evidence. We agree with appellant that the military judge erred in her application of R.C.M. 914, but conclude appellant suffered no prejudice. Further, we find appellant affirmatively waived his *Brady* claim. Therefore, we affirm the findings and sentence.[2]

I. BACKGROUND

A. Events Leading to the Charges

In February 2018, the victim, a female Specialist (SPC) in the U.S. Army, spent the evening socializing and consuming alcohol with friends. Following a farewell party, she went to a male friend's, SPC D's, barracks room. Once at SPC D's barracks room, she continued socializing and consuming alcohol with SPC D and two other **[*3]** male soldiers, appellant and SPC B, both of whom she knew. After consuming around seven shots of alcohol at the farewell party and another two beers at SPC D's barracks room, the victim felt very intoxicated and went to sleep alone in SPC D's bed, fully clothed. Her next memory was waking up with her legs spread, her pants and underwear partially removed, and with a person on top of her. She testified the person on top of her was appellant, based in part on seeing his silhouette and hearing his voice. After pushing appellant off of her, she left SPC D's

---

[1] A panel of officers with enlisted representation sitting as a general court-martial convicted appellant, contrary to his plea, of one specification of sexual assault, in violation of *Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920* [UCMJ]. The panel sentenced appellant to a dishonorable discharge, confinement for twelve years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the adjudged sentence.

[2] We gave full and fair consideration of the remaining three assignments of error concerning the military judge's correction of the record under R.C.M. 1112(d) as ordered by this court, the factual sufficiency of appellant's conviction, and dilatory post-trial processing, and have likewise fully and fairly considered the matter appellant personally submitted pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*. None of these issues warrant discussion or relief.

room and returned to her own room. Once back in her room, the victim cried herself to sleep. The next morning, she woke up with pain in her vaginal area, consistent with sexual intercourse.

Later that day, appellant began sending messages to the victim. In his opening message, he wrote, "I fucked up. U have all the reasons in this world to hate. I'm very sorry. I really am. u don't have to reply. I just wanna say how sorry and stupid I am." (emojis omitted). In another message, appellant wrote, "I feel guilty as fuck." Despite the sheer volume of messages sent to the victim, nowhere did appellant admit to the victim the specifics of **[*4]** what happened in SPC D's bedroom. The victim did not recall being penetrated. Specialist D, however, testified at trial that appellant stated to him that he pulled down the victim's pants and had sex with her.

B. The Investigation and Charges

Initially, the victim did not want to report the incident, but chose to do so approximately a week later after talking with friends and upon realizing it was not something she could simply let go. Following the report, Army Criminal Investigation Command (CID) began an investigation. As part of the investigation, CID Special Agent (SA) M, with the assistance of SA P, interviewed the victim, appellant, SPC D, and SPC B. All of the interviews were video recorded and temporarily stored on a CID server. At the relevant time in February 2018, the Fort Campbell CID interview rooms were configured in a manner such that the video-recording feature automatically began whenever someone entered an interview room. In order to record the audio of an interview, however, the interviewing CID agent had to affirmatively press a button to engage the audio recording feature. As SA M testified, "[T]he only button that we have to click is an audio button. So we have **[*5]** the option to turn the audio on and off in the interview rooms, but the video is always recording."

Video recordings of interviews—and the audio recordings of interviews, if the button was pressed—were automatically stored on a CID server with limited storage space. Unless a CID agent accessed the server and affirmatively preserved a specific recording, the recordings were automatically overwritten when the server's storage capacity was reached. According to SA M, it was CID policy at the time to preserve only subject interviews on a physical disc.[3] Depending on the storage capacity of the CID server, non-subject witness interviews would be overwritten approximately thirty to forty-five days after the interview.

In this case, only appellant's CID interview—video and audio—was preserved on a physical disc. The interviews of the victim and SPCs D and B were not affirmatively preserved by CID and, as such, were eventually automatically overwritten. These three recordings contained both audio and video because the audio button was engaged prior to entering the interview rooms. Indeed, SA M testified, "My practice is I always turn the audio on . . .". The victim and SPCs D and B did, however, **[*6]** provide written sworn statements to CID during their interviews, all of which were preserved and disclosed to the defense. The victim wrote a seven-page sworn statement; SPC D wrote a five-page sworn statement; and SPC B wrote a four-page sworn statement. In addition to appellant, SPC D was advised of his *Article 31(b), UCMJ*, rights prior to his interview and waived his rights. Notwithstanding the rights advisement, SPC D's interview was not affirmatively preserved. According to SA M, SPC D was issued a rights advisement based on guidance SA M received from his supervisors. At the time, however, CID believed appellant was the "suspect subject." Special Agent M testified that the issuance of *Article 31(b), UCMJ*, rights was not the "threshold that determines if a recording is going to be burned to a disc or not."

In addition to conducting recorded interviews, in February 2018, CID executed a magistrate-issued search authorization to collect appellant's DNA. Law enforcement also collected the victim's and SPC D's DNA with their consent, as well as the linens from SPC D's bed. All of these materials were sent off for laboratory testing and analysis. The DNA report was completed on 12 June 2018.

---

[3] The only evidence of the CID policy was provided by the testimony of SAs M and P. No written policy was entered into evidence.

The government preferred the court-martial **[*7]** charge against appellant on 1 October 2018. The *Article 32, UCMJ*, preliminary hearing was conducted on 7 December 2018 and on 27 December 2018, the preliminary hearing officer issued her report recommending trial by general court-martial. The Charge and its Specification were referred to trial by general court-martial on 27 March 2019. On 7 May 2019, defense counsel filed a discovery request. In the request, defense counsel requested, among other things, "[a] complete copy of any law-enforcement investigation that relates to this matter." The government responded to defense's discovery request on 12 May 2019. In the government's response, it stated, among other things, "[a] complete copy of [appellant's CID case file] is available for inspection by Defense at CID Fort Campbell, Kentucky. The point of contact for inspecting said files is SA [P] . . . . The Government provided Defense a hard copy of that investigation on 01 October 2018, followed by delivery of digital media on 02 October 2018." The record reveals no pretrial motions to compel discovery by the defense.

C. Litigation of R.C.M. 914

Following the victim's direct examination, defense counsel moved to strike her testimony under R.C.M. 914 because the government **[*8]** failed to preserve her recorded interview. In support of the motion, defense counsel called SAs M and P, whose testimony is summarized above. The government offered no evidence, relying solely on argument. Trial counsel acknowledged the victim's recorded interview contained statements and that the government could not produce those statements due to the recording being automatically overwritten. Trial counsel argued that despite the loss of the statements, there was no showing of bad faith on the part of CID and that the defense had access to the victim's sworn statement. During the same *Article 39(a), UCMJ*, hearing, the defense indicated it would be making the same motion, supported with the same evidence, with respect to the testimony of SPCs D and B. The government maintained its argument concerning the absence of bad faith and the availability of sworn statements as to SPCs D and B. The military judge orally denied defense counsel's R.C.M. 914 motions for all three witnesses and stated she would supplement the record with written findings of fact and conclusions of law.

Following a correction of the record ordered pursuant to R.C.M. 1112(d), the court received the military judge's written R.C.M. 914 ruling. In her ruling, the military **[*9]** judge found that the recorded interviews of the victim and SPCs D and B were "technically . . . recorded statement[s]" that were "deleted/overwritten prior to preferral of charges." However, she concluded there was "no violation of R.C.M. 914 or the Jencks Act." She also found there "was no evidence presented that law enforcement acted in bad faith or in a negligent manner." The military judge further concluded that all three witnesses provided "comprehensive, thorough and detailed" sworn statements and that the statements "constitute[d] an adequate substitute for the deleted video recordings."

D. The DNA Report

Following the announcement of appellant's sentence and immediately prior to final adjournment, defense counsel informed the military judge that the defense had recently received a DNA report dated 12 June 2018. The DNA report was purportedly produced by the Defense Forensic Science Center as part of CID's investigation of appellant. Defense counsel informed the military judge that the defense was aware the report existed the day before trial, but did not receive a copy of it until the members were deliberating on a sentence. Defense counsel stated nothing was being alleged at the time **[*10]** and that additional time would be needed to review the report, possibly with expert assistance, to determine if it contained favorable and material information. Defense counsel concluded, stating:

> If the defense believes that we are entitled to relief under *Brady* for a *Brady* violation, the defense will make a request for a post-trial *Article 39(a)* session with the Court for a potential *Brady* violation and a potential mistrial. We do not request a decision today. The defense needs more time to find out if this evidence is, in fact, material, Your Honor.

Trial counsel did not respond to defense counsel's comments and the military judge adjourned the court-martial on 15 August 2019. Ultimately, defense counsel noted the DNA report issue in appellant's 15 September 2019 post-

trial submissions to the convening authority. Defense counsel never requested a post-trial hearing or the appointment of expert assistance.

II. LAW AND DISCUSSION

A. The Military Judge's R.C.M. 914 Ruling

Appellant claims the military judge abused her discretion when she denied defense counsel's motions to strike the testimony of the victim and SPCs B and D based on the government's failure to produce their recorded CID interviews. We review **[*11]** a military judge's ruling on a R.C.M. 914 motion for an abuse of discretion. *United States v. Clark, 79 M.J. 449, 453 (C.A.A.F. 2020)* (citing *United States v. Muwwakkil, 74 M.J. 187, 191 (C.A.A.F. 2015)*). A military judge abuses her discretion when: (1) "h[er] findings of fact are clearly erroneous," (2) "the military judge's "decision is influenced by an erroneous view of the law," or (3) when "the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Miller, 66 M.J. 306, 307 (C.A.A.F. 2008)* (citations omitted). To find an abuse of discretion under the last of these tests, our superior court requires "more than a mere difference of opinion"; rather, the military judge's ruling "must be arbitrary, fanciful, clearly unreasonable or clearly erroneous." *United States v. Collier, 67 M.J. 347, 353 2009)* (internal quotation marks omitted) (citations omitted).

Rule for Courts-Martial 914(a) states "[a]fter a witness other than the accused has testified on direct examination, the military judge" upon motion of the opposing party shall order the production of "any statement of the witness that relates to the subject matter concerning which the witness has testified." A "statement" is defined, in part, as "[a] substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement **[*12]** and contained in a[n] . . . electrical, or other recording." R.C.M. 914(f)(2). If the government, as the opposing party, fails to produce a qualifying statement, R.C.M. 914(e) provides the military judge with two remedies for the government's failure to deliver the qualifying statement: (1) "order that the testimony of the witness be disregarded by the trier of fact" or (2) "declare a mistrial if required in the interest of justice."

Not every failure to produce a qualifying statement triggers a R.C.M. 914 remedy. Both the Supreme Court and the Court of Appeals for the Armed Forces [CAAF] "have indicated that good faith loss or destruction of *Jencks Act* material and R.C.M. 914 material may excuse the government's failure to produce 'statements.'" *Clark, 79 M.J. at 454* (citing *Muwwakkil, 74 M.J. at 193*; *United States v. Augenblick, 393 U.S. 348, 355-56, 89 S. Ct. 528, 21 L. Ed. 2d 537 (1969)*). "A finding of sufficient negligence may serve as the basis for a military judge's conclusion that the good faith loss doctrine does not apply." *Id.* (citing *Muwwakkil, 74 M.J. at 193*). If a military judge is convinced the good faith loss doctrine applies to excuse the government's loss of a qualifying statement, then a R.C.M. 914 remedy is not required, even though the government violated the rule by its plain text. The good faith loss doctrine, however, is "generally limited in its application." *Muwwakkil, 74 M.J. at 193* (quoting *United States v. Jarrie, 5 M.J. 193, 195 (C.M.A. 1978)*).

[*13] *1. The Military Judge Erred by Concluding R.C.M. 914 was not Violated*

We first address the military judge's determination that "there was no violation of R.C.M. 914 or the Jencks Act." We easily conclude that the recorded interviews of the victim and SPCs D and B constitute "statements" for purposes of R.C.M. 914. Trial counsel acknowledged as much during the *Article 39(a), UCMJ*, hearing, government appellate counsel conceded the point, and the testimony makes clear that the CID interviews of these three witnesses—both video and audio—were automatically recorded and subsequently overwritten. As the CAAF recently stated, military jurisprudence "has favored an expansive interpretation of the definition of 'statement' with respect to the *Jencks Act*." *79 M.J. at 454*. In *Clark*, the CAAF concluded that even a law enforcement officer's comments during a video-recorded interview constituted statements for purposes of R.C.M. 914.

Here, because qualifying statements were created, demanded, and not produced, the government violated R.C.M. 914. It appears the military judge conflated the threshold determination of whether a R.C.M. 914 violation occurred with the follow-on determination of whether the good faith loss doctrine applied to excuse the government's loss of the statements. This **[*14]** was error. Clearly, the government violated R.C.M. 914 in this case.

2. The Military Judge Erred by Concluding the Good Faith Loss Doctrine Applied

Having found a R.C.M. 914 violation, we next address whether the military judge abused her discretion in finding that the government's failure to produce the qualifying statements in this case did not constitute a violation of R.C.M. 914 because the loss was excusable under the good faith loss doctrine. The military judge, in a "finding of fact," concluded there "was no evidence presented that law enforcement acted in bad faith or in a negligent manner in recording" the victim's and SPCs D and B's statements. We agree with the military judge's determination that there was no evidence of bad faith but find her conclusion as to negligence is clearly erroneous in light of the record.

As to bad faith, the record contains no evidence of intentional or deliberate suppression of exculpatory statements, nor is this a case where the loss of a statement was unexplained. *Cf.* *United States v. Bryant, 439 F.2d 642, 645-47, 142 U.S. App. D.C. 132 (D.C. Cir. 1971)* (discussing the "intentional non-preservation by investigative officials of highly relevant evidence," a video recording of the appellant's controlled drug transaction in a motel room, "colored by clear reluctance **[*15]** even to admit that the evidence ever existed at all"). Given the record, we do not disturb the military judge's determination on this point.

What the record does contain, however, is overwhelming evidence of negligence on the part of CID in electing to make audio and video recordings of these three witnesses and then letting those recordings spoil. On its face, the CID policy violated neither R.C.M. 914 or the Jencks Act because there was no obligation for CID to *create* qualifying statements during their interviews of the witnesses in this case. *See* *United States v. Bernard, 625 F.2d 854, 859-60 (9th Cir. 1980)* (rejecting a claim that the government is required to create Jencks Act material by recording everything a potential witness says). Despite the lack of an obligation to create qualifying statements, the CID agents in this case *elected* to create such statements by affirmatively engaging the audio recording feature in the interview rooms. In so doing, CID created qualifying statements and assumed a responsibility to preserve them. *See* *United States v. Scott, 6 M.J. 547, 549 (A.F.C.M.R. 1978)* (footnotes omitted) ("It is clear that there is no obligation on the part of the *Article 32* investigating officer to cause statements to be recorded verbatim. When they are recorded, however, they must be retained."). **[*16]** Once the CID agents elected to create qualifying statements, the existence of a CID policy not to preserve said statements cannot absolve the government of its requirements under R.C.M. 914. Simply put, a routine CID policy does not excuse violating R.C.M. 914. *See* *United States v. Carrasco, 537 F.2d 372, 376 (9th Cir. 1976)* (declining to apply the good faith loss doctrine because the law enforcement agent's destruction of a statement—while consistent with the agency's routine practice—was "manifestly unreasonable").

Here, the military judge's barebones conclusion that there was no evidence of CID negligence failed to address what the record plainly demonstrates. Law enforcement *elected* to create qualifying statements and then *elected* not to preserve the statements. The fact that the recordings were automatically overwritten without any affirmative actions by CID agents does not inure to the government's benefit. It is not disputed that CID had both the technological means and between thirty and forty-five days to access the server and preserve the statements on a physical disc, just as the agents did in this case with respect to appellant's recorded interview. This constitutes sufficient negligence to preclude the application of the good faith loss doctrine. Indeed, **[*17]** in *Clark*, the CAAF assumed without deciding that the good faith loss doctrine did not apply to the loss of a portion of the appellant's video-recorded interview because a plausible reading of the record indicated "the military judge made a negligence finding when he found that 'the Ft. Campbell CID Office appears to have inadequate procedures to ensure they know who is conducting the proper preservation of interviews recorded on Casecracker, at least in this case.'" *79 M.J. at 454*. Though insufficiently explained or analyzed by the military judge, the CID deficiency is even more patent in this case. This is not a case about inadequate preservation procedures; rather, this case concerns a CID

policy *not to preserve* qualifying statements. Under the circumstances, the military judge's finding of no negligence and application of the good faith loss doctrine were clearly unreasonable.

B. Prejudice

Having found the military judge erred in denying defense counsel's R.C.M. 914 motions, we must determine whether the error prejudiced appellant. *Clark, 79 M.J. at 454* (citing *UCMJ art. 59(a)*). We "test for prejudice based on the nature of the right violated." *Id.* (quoting *United States v. Tovarchavez, 78 M.J. 458, 465 (C.A.A.F. 2019)*). "Generally, a Jencks Act violation will not rise to a constitutional level." *Id.* ***[*18]*** (citing *Augenblick, 393 U.S. at 356*). As the Supreme Court stated in *Augenblick*, a case where the government lost a video recording of an interview with a key prosecution witness (the other participant in the indecent act), "apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten . . . that the proceeding is more a spectacle . . . or trial by ordeal . . . than a disciplined contest." *393 U.S. at 356* (citations omitted). In *Clark*, the CAAF declined to test the error for constitutional prejudice, but noted there may be circumstances in which the failure to produce statements infringes upon the constitutional right of confrontation. *79 M.J. at 454-55*. It did not apply the constitutional prejudice standard in part because the CID agents in that case were subject to cross-examination concerning the missing portion of appellant's video-recorded interview. *Id. at 455*.

Given that the victim, SPCs D and B, and the CID agents in this case all testified and were subject to cross-examination, we conclude appellant was not denied his constitutional right to confront the witnesses against him. Additionally, we do not view the proceedings **[*19]** as constitutionally unfair as the Supreme Court described that term in *Augenblick*. Consequently, we test for prejudice under the nonconstitutional standard, where the question is "whether the error had a substantial influence on the findings." *Clark, 79 M.J. at 455* (quoting *United States v. Kohlbek, 78 M.J. 326, 333 (C.A.A.F. 2019)*). Our review for prejudice is de novo. *Id.*

The parties disagree over the applicable framework for addressing prejudice. Appellant contends the familiar standard reiterated by the CAAF in *United States v. Kohlbek* controls and that we should weigh: (1) the strength of the government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question. *78 M.J. 326, 333 (C.A.A.F. 2019)*. The government argues we should apply the standard articulated by the Supreme Court in *Rosenberg v. United States*, where the Court stated a Jencks Act violation may be held harmless if the defense otherwise had access to the same information. *360 U.S. 367, 371, 79 S. Ct. 1231, 3 L. Ed. 2d 1304 (1959)*. Looking at the precedent of our superior court, there is good cause for the parties' disagreement on this issue.

In *United States v. Marsh, 21 M.J. 445 (C.M.A. 1986)*, the government lost a recording of the *Article 32, UCMJ*, preliminary hearing. In place of the *Article 32, UCMJ*, recording, the government provided the defense with a summarized transcript **[*20]** of the proceedings. *Id. at 452*. Notwithstanding the loss of the recording, our superior court determined that the defense counsel "was not significantly encumbered in his cross-examination of government witnesses" and was still able to conduct "effective" cross-examination based on the summarized transcript. *Id.* Although the *Marsh* opinion did not cite *Rosenberg*, it appeared to apply a similar standard, concluding the summarized transcript of the lost recording was sufficient for the defense to conduct effective cross-examination of government witnesses because the summarized transcript contained essentially the same information as the lost recording. The *Marsh* opinion did not analyze the relative strengths of the cases and the materiality and quality of the evidence in question, although that framework for addressing prejudice was first adopted the previous year in *United States v. Weeks, 20 M.J. 22, 25 (C.M.A. 1985)*. Our predecessor court and our sister courts have likewise applied *Marsh*'s reasoning in this context. *See United States v. Guthrie, 25 M.J. 808, 811 (A.C.M.R. 1988)*; *United States v. Cook*, 2001 CCA LEXIS 19, *18 (A.F. Ct. Crim. App. 29 Jan. 2001) (unpublished) (citing *United States v. Barber, 20 M.J. 678, 681 (A.F.C.M.R. 1985)*); *United States v. Strand, 21 M.J. 912, 915 (N.M.C.M.R. 1986)*. The *Marsh* framework—an assessment of whether a defense counsel's representation was materially encumbered by the government's failure to produce qualifying statements—permeates Article III case law. **[*21]** *See, e.g., United States v. Hill, 976 F.2d 132, 140-42 (3d Cir. 1992)* (citing *Rosenberg, 360 U.S. at 371*).

More recently in *Clark*, the CAAF explicitly applied both analytical frameworks when addressing prejudice. 79 M.J. at 455. Applying the *Kohlbek/Weeks* standard, the CAAF determined the appellant suffered no prejudice because even assuming the testimony in question should have been stricken based on the government's loss of a portion of the appellant's recorded CID interview, the record otherwise contained sufficient evidence of appellant's guilt. *Id.* The CAAF continued its prejudice analysis, however, noting that in the context of R.C.M. 914 and the Jencks Act, "a failure to produce may be held harmless if the defense otherwise had access to the same information." 79 M.J. at 455 (citing Rosenberg, 360 U.S. at 371). In applying the *Rosenberg* standard, the CAAF concluded that even though the appellant did not have the "very same information" that would have been available had the government not lost a portion of the appellant's recorded CID interview, he nevertheless suffered no prejudice because the defense counsel still possessed "sufficient information to cross-examine" the CID agent based on appellant's participation in the interview and because appellant explained in his own testimony the manner in which CID conducted the **[*22]** interrogation. *Id.* The judgment in *Clark* did not turn on the analytical framework employed for assessing prejudice because, under either standard, the appellant suffered no prejudice. *Id.* Such is not the case here.

An exclusive application of the *Kohlbek/Weeks* standard would easily result in a finding of prejudice to appellant and compel us to set aside the findings and the sentence. If the testimony of the victim and SPCs D and B was struck at trial based on R.C.M. 914, it would have eviscerated the government's case. At oral argument, government appellate counsel did not dispute this point, and for good reason. Unlike *Clark*, there was scant independently admissible evidence in this case to prove appellant's guilt.

Under the *Rosenberg* standard, however, we reach a different result. Given the longstanding precedent on this issue—both from our superior court, our own court, our sister courts, and, of course, the Supreme Court—we conclude this is the correct analytical framework for addressing prejudice in the context of the Jencks Act and R.C.M. 914. As the CAAF stated in *Muwwakkil*, "our Jencks Act case law and that of the Supreme Court informs our analysis of R.C.M. 914 issues." 74 M.J. at 191. In *Clark*, the CAAF both cited and **[*23]** applied Supreme Court case law in the specific context of Jencks Act prejudice. We believe we are bound to do the same, while recognizing the judgment in this case would be different if we strictly applied the *Kohlbek/Weeks* prejudice framework. Our *Rosenberg* analysis follows.

Here, as in *Clark* and *Marsh*, defense counsel did not possess the "very same information" that would have been available had the recordings not been lost. Clark, 79 M.J. at 455. Nevertheless, we conclude the defense counsel's cross-examination of these witnesses "was not significantly encumbered" because all of the witnesses provided contemporaneous, detailed, sworn statements, adequately capturing, in their own words, their discussions with CID on the facts of central importance. Marsh, 21 M.J. at 452. This case does not present "the kind of uncertainties that necessitated corrective action in [*Jarrie*], where summarization of an informant's statement was untimely and of dubious accuracy." Strand, 21 M.J. at 915. Like our sister court concluded in *Strand*, "[w]e are confident that . . . appellant had substantially the same information." *Id.*; *see* United States v. Boyd, 14 M.J. 703, 705-06 (N.M.C.M.R. 1982). Furthermore, all of the witnesses, including the CID agents who interviewed them, were subject to cross-examination about the details **[*24]** of the interviews. *See* Clark, 79 M.J. at 455. Finally, we reiterate the lack of malicious intent on the part of CID and no evidence of any intent to destroy or conceal possibly exculpatory evidence. In conclusion, we find that the military judge's errors in this case did not substantially influence the findings.[4]

C. The Brady Allegation

---

[4] We recognize that overruling by implication is disfavored and it is for our superior court to overrule its own precedent. United States v. Davis, 76 M.J. 224, 228 n.2 2017). We believe our prejudice analysis in this case faithfully applies the precedent of our superior court, in this context, and that of the Supreme Court. If we misapplied precedent from our superior court or the Supreme Court, we urge the CAAF to reconsider or clarify its precedent in this area. *Id.* (stating a lower court's recourse is to "urge . . . reconsideration" of superior court precedent).

Appellant asserts the government violated its obligations under *Brady* when it failed to disclose the DNA report, dated 12 June 2018, prior to trial. On brief, appellant presents his arguments as if this issue was fully preserved and litigated. It was not. As such, we must confront at the outset the appropriate standard of review given the limited record on this issue.

According to defense counsel's statements to the military judge immediately prior to final adjournment, he was first made aware of the DNA report the day before trial during an interview with CID SA M. Defense counsel did not raise any concern about the DNA report at that time, or request a continuance, because SA M allegedly conveyed to defense counsel that the DNA report contained only inculpatory information. Defense counsel further averred that the defense did not receive a copy of the DNA report until **[*25]** the panel was deliberating on a sentence. Defense counsel made clear that he was "not specifically alleging anything at this time," and that if, after studying the report, he believed appellant was "entitled to relief under *Brady* . . . the defense will make a request for a post-trial Article 39(a) session with the Court." In his concluding sentence, defense counsel reiterated, "We do not request a decision today." A month later, on 15 September 2019, defense counsel submitted post-trial matters to the convening authority discussing the issue but requesting no specific relief. He never requested a post-trial hearing.

The record before this court merely contains a copy of the DNA report in question marked as an appellate exhibit, but we have no testimony, much less expert testimony, as to its meaning. We have no litigation or rulings concerning if and when the report was disclosed or made available to the defense. We have no litigation or rulings as to whether the DNA report contains information within the ambit of *Brady*. And we have no claims of ineffective assistance of counsel raised on appeal and a legal presumption that counsel are competent. United States v. Anderson, 55 M.J. 198, 201 (C.A.A.F. 2001).[5]

1. Waiver

While rooted in constitutional due process, **[*26]** *Brady* claims, like many other constitutional rights, are subject to waiver. *See* United States v. Keltner, 147 F.3d 662, 673 (8th Cir. 1998) (citing United States v. Wagoner, 713 F.2d 1371, 1374 (8th Cir. 1983) (finding the defendant's *Brady* issue was not preserved for appellate review because he did not raise the issue in his motions for a new trial and thus failed to obtain a ruling on the issue from the district court judge); United States v. Payne, 102 F.3d 289, 292-93 (7th Cir. 1996) (holding the defendant waived his *Brady* argument with respect to a law enforcement agent's debriefing notes by failing to give the district court the opportunity to review the notes before taking an appeal, despite defendant's request that the matter be preserved for appeal).

Waiver is "the 'intentional relinquishment or abandonment of a known right.'" United States v. Haynes, 79 M.J. 17, 19 (C.A.A.F. 2019) (quoting United States v. Jones, 78 M.J. 37, 44 (C.A.A.F. 2018)). "The purpose of the so-called raise-or-waive rule is to promote the efficiency of the entire justice system by requiring the parties to advance their claims at trial, where the underlying facts can best be determined." United States v. King, 58 M.J. 110, 114 (C.A.A.F. 2003). Whether an issue has been waived is a question of law reviewed de novo. Haynes, 79 M.J. at 19.

It is clear to us that defense counsel had full knowledge and awareness of this "potential *Brady*" issue and understood there was a process to litigate the issue at the trial level, either by requesting a continuance upon the alleged **[*27]** initial discovery of the report before trial, or through the mechanism of post-trial proceedings following adjournment. Despite this, defense counsel chose to abandon the opportunity for substantive resolution of the issue at the trial level where the facts could be appropriately developed. In so doing, he affirmatively waived this claim, leaving no error for this court to correct on appeal.[6]

---

[5] During oral argument, appellate defense counsel affirmatively disclaimed any allegations of ineffective assistance of counsel.

[6] During oral argument, appellate defense counsel contended the CAAF's opinion in United States v. Garlick, 61 M.J. 346 (C.A.A.F. 2005) precluded this court from finding waiver. We disagree. Having carefully reviewed *Garlick*, not only is it factually distinguishable from appellant's case, but nowhere does it state, expressly or impliedly, that *Brady* claims are not subject to

2. Assuming the Issue was not Waived, Appellant's Claim Still Fails

"The government violates *Brady* when [it] withhold[s] favorable and material information from the defense." *United States v. Ellis, 77 M.J. 671, 675 (Army Ct. Crim. App. 2018)* (citing *United States v. Behenna, 71 M.J. 228, 237-38 (C.A.A.F. 2012)*). "Evidence is favorable if, among other things, it impeaches the government's case." *Id.* (citing *Behenna, 71 M.J. at 238*). "Evidence is material when 'there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.'" *Id.* (quoting *Behenna, 71 M.J. at 238*).

> The purpose of *Brady* is to assure that the accused will not be denied access to exculpatory evidence known to the government but unknown to him. Irrespective of whether the statement here was exculpatory evidence under *Brady*, a question we do not reach, there is no *Brady* violation when the accused or his counsel knows before trial **[*28]** about the allegedly exculpatory information and makes no effort to obtain its production.

Id. (quoting *United States v. Lucas, 5 M.J. 167, 171 (C.M.A. 1987)*). "The State has no obligation to point the defense toward potentially exculpatory evidence when that evidence is either in the possession of the defendant or can be discovered by exercising due diligence." *Id.* (quoting *Rector v. Johnson, 120 F.3d 551, 558-59 (5th Cir. 1997)*).

Here, appellant's *Brady* claim never gets off the ground because he fails as a threshold matter to demonstrate that the government suppressed or withheld the DNA report, irrespective of its favorability or materiality.[7] For several reasons, the defense could have, but inexplicably chose not to, obtain the DNA report or exercise due diligence in determining what, if any, DNA testing was conducted during the investigation. Appellant himself submitted a DNA sample to CID on 12 February 2018 pursuant to magistrate-issued search authorization. This was documented in the CID case file with a notation that the sample was "submitted to [United States Army Criminal Investigation Laboratory]" on 27 February 2018. Additionally, Defense Exhibit B for Identification—clearly a document in the defense's possession before trial—lists the linens that were collected from SPC D's bedroom **[*29]** on 12 February 2018 and indicates those materials were "submitted to [United States Army Criminal Investigation Laboratory]" on 27 February 2018. This document, combined with appellant's own knowledge that his DNA was collected, should have put the defense on notice that DNA testing was being conducted in his case. Further, in the government's discovery response, dated 12 May 2019, trial counsel informed defense counsel that the entire physical CID case file was available for inspection and provided a CID point of contact. The discovery response also indicated a complete copy of the investigation was provided to the defense on 1 October 2018. As evidenced by Defense Exhibit E for Identification, defense counsel understood how to contact CID to gain access to the case file.

For these reasons, we determine the government did not suppress or withhold the DNA report in this case. The CID case file was accessible to the defense and was littered with notations concerning DNA testing. This is hardly a case where the government denied access to exculpatory evidence known to the government but unknown to the defense. Through the exercise of due diligence, all of the evidence could have been **[*30]** reviewed and inspected. As such, even if appellant did not waive his *Brady* claim, he is still entitled to no relief.

III. CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

---

waiver. To the contrary, in the view of the concurring judge, the majority opinion denied relief precisely because it determined that the appellant waived his *Brady* claim. *Id. at 351* (Baker, J., concurring).

[7] Because there is no evidence in the record discussing the meaning of the DNA report, we are unable to discern whether it was favorable or material evidence. As discussed above, the absence of a record is due to defense counsel's decision not to litigate the issue at trial. While we could order a post-trial fact-finding hearing pursuant to *United States v. Dubay, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967)*, we decline to do so because it is unnecessary to resolve the issue.

Senior Judges ALDYKIEWICZ and BURTON concur.

End of Document

APPENDIX B

Positive
As of: October 20, 2023 1:01 PM Z

United States v. Hykes

United States District Court for the District of New Mexico

April 11, 2016, Filed

No. CR 15-4299 JB

Reporter
2016 U.S. Dist. LEXIS 49049 *

UNITED STATES OF AMERICA, Plaintiff, vs. GRANT HYKES, Defendant.

Subsequent History: Request denied by *United States v. Hykes, 2017 U.S. Dist. LEXIS 180136, 2017 WL 4990548 (D.N.M., Oct. 31, 2017)*

Sentence imposed by, Findings of fact/conclusions of law at *United States v. Hykes, 2022 U.S. Dist. LEXIS 219382 (D.N.M., Dec. 6, 2022)*

Counsel: **[*1]** For the Plaintiff: Damon P. Martinez, United States Attorney, Samuel A. Hurtado, Assistant United States Attorney, United States Attorney's Office, Albuquerque, New Mexico.

For the Defendant: Sylvia A. Baiz, Federal Public Defender, Federal Public Defender's Office, Albuquerque, New Mexico.

Judges: James O. Browning, UNITED STATES DISTRICT JUDGE.

Opinion by: James O. Browning

Opinion

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on the Defendant's Motion for Information Pursuant to *Giglio v. United States*[1] Regarding All Arresting Officers and Those Involved in the Search, filed February 29, 2016 (Doc. 25)("Giglio Motion"). The Court held a hearing on March 31, 2016. The primary issue is whether the Court should require Plaintiff United States of America to disclose impeachment information inside the personnel files of three Bernalillo County New Mexico Sheriff's Office ("BCSO") officers who will testify at Defendant Grant Hykes' suppression hearing. Given that the United States has access to the personnel files, the United States must review the personnel files of the three officers who will testify at trial and determine whether any material constitutes exculpatory evidence under Brady v. Maryland, **[*2]** *373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*("Brady"), or impeachment evidence under *Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)*("Giglio").

---

[1] In *Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)*("Giglio"), the Supreme Court of the United States of America held that prosecutors must disclose evidence that impeaches the credibility of government witnesses. *Giglio, 405 U.S. at 154-55*. Giglio extended the Supreme Court's holding in *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*("Brady"), where the Supreme Court held that prosecutors must disclose all favorable material evidence to the defense. *Brady, 373 U.S. at 93*.

FACTUAL BACKGROUND

On November 12, 2015, detectives in Bernalillo County were investigating a reported death threat against Detective Gerald Koppman near the area of Pennsylvania Street and Menaul Boulevard NE in Albuquerque, New Mexico. See Complaint at 3; Government Response to Defendant's Motion for *Giglio* Information (Doc. 25) at 1, filed March 14, 2016 (Doc. 29)("Response"). A confidential informant gave Koppman reason to believe that Hykes made the death threats against him. See Complaint at 3. Notably, however, Hykes asserts that Koppman "did not tell his superiors about those threats because [the information] came from an informant that he did not believe and whom he was investigating for a murder." Reply to Government's Response to Mr. Hykes Motion to Suppress Evidence Due to Violation of the *Fourth Amendment* **[*3]** at 2, filed March 25, 2016 (Doc. 32)("Motion to Suppress Reply"). As detectives watched Hykes in a parking lot, the United States contends that Hykes reached into his waistband and pulled out a firearm before stashing the firearm in the truck bed.[2] See Response at 1; Transcript of Hearing (taken March 31, 2016).[3] Hykes disputes that he grabbed a gun or even that he reached into his waistband. Instead, he argues that he reached with both hands into the bed of his silver Ford F-150 pick-up truck to get a new shirt. See Complaint at 3; Motion to Suppress at 3.

The detectives then attempted to detain Hykes. See Response at 1. Although the United States asserts that Hykes resisted detention, Hykes explains that the detectives apprehended him by throwing him to the ground, kneeing him in the back, delivering several blows to his back while he was down, and kicking him in the head, while yelling "this is personal." Motion to Suppress Evidence Due to Violation of the *Fourth Amendment* at 4, filed February 29, 2016 (Doc. 24)("Motion to Suppress"). Detectives observed a silver Smith and Wesson model 659, 9mm semi-automatic pistol with serial number TAL8284 (the "firearm") in the truck bed where Hykes reached. Complaint at 3. The United States alleges that this firearm was visible in plain sight. See Response at 1-2. As the detectives had previously determined that Hykes was a convicted felon, they advised him that he was under arrest for possessing the firearm. See Complaint at 3. Hykes' prior felony convictions include: (i) aggravated assault with a deadly **[*5]** weapon in D-202-CR-200300417 (1st Jud. Dist., State of New Mexico); (ii) receiving stolen property in D-202-CR-200401389 (1st Jud. Dist., State of New Mexico); and (iii) possession of a controlled substance in D-202-CR-200402605 (1st Jud. Dist., State of New Mexico). See Indictment at 1, filed December 2, 2015 (Doc. 14).

While searching Hykes incident to arrest, detectives located an empty holster inside his waistband and a spare magazine. See Complaint at 3; Response at 2. The holster contained a spare loaded magazine designed for use in the firearm that the officers found in the truck bed. See Complaint at 3; Response at 2. The firearm also fit inside of Hykes' holster. See Complaint at 3. The firearm was loaded with fourteen rounds of Federal .40 caliber ammunition. See Complaint at 3; Response at 2. The spare magazine attached to Hykes' holster was loaded with fourteen rounds of Federal .40 caliber ammunition. See Complaint at 3; Response at 2.

Detectives advised Hykes of his rights, and Hykes stated that he understood his rights. See Complaint at 3; Response at 2. When the detectives asked Hykes about the firearm, he stated that he did not know it was in the truck bed. See Complaint **[*6]** at 3; Response at 2. When the detectives asked Hykes about the holster in his waistband, "he stated that it was not illegal to have the holster and that the magazine was not his and would not have his fingerprints on it." Complaint at 3. See Response at 2. Officers subsequently found black gloves on the rail

---

[2] Initially, the United States asserted that Hykes' actions were "consistent with either someone hiding or retrieving a firearm." Tr. at 16:20-24 (Hurtado). Neither the Response nor the Complaint stated that the detectives saw Hykes pull out a firearm before they approached him. Nevertheless, at the hearing, the United States informed the Court that it spoke with the deputies about the case, and they indicated "that they actually saw the firearm in the defendant's hand before they even made their approach." Tr. at 17:3-7 (Hurtado). Accordingly, the United States "dispense[d] with its initial argument that the officers had reasonable suspicion," and "now seeks to elevate the argument from one involving reasonable suspicion to actual probable cause." Tr. at 17:8-18 (Hurtado). Hykes noted that Koppman did not say that he saw Hykes holding a firearm until March, even though the arrest occurred in November. See **[*4]** Tr. at 18:15-20 (Baiz).

[3] The Court's citations to the transcript of the hearing refer to the court reporter's original, unedited version. Any final transcript may contain slightly different page and/or line numbers.

of the truck's bed and inside the truck's bed near the firearm. See Complaint at 3. Officers tested the firearm, and determined that it fired and functioned as designed. See Complaint at 4. The firearm and ammunition were not manufactured in the State of New Mexico, but were found in New Mexico, thereby affecting interstate commerce. See Complaint at 4.

PROCEDURAL BACKGROUND

On December 2, 2015, a grand jury indicted Hykes for knowingly possessing a firearm and ammunition in violation of *18 U.S.C. § 922(g)(1)*. See Indictment, filed December 2, 2015 (Doc. 14). On December 9, 2015, the Court entered an Order requiring the United States to provide "all of the information to which defendant is entitled pursuant to *Rule 16 of the Federal Rules of Criminal Procedure*." Order, filed December 9, 2015 (Doc. 18). Specifically, the Order requires the United States to disclose all materials that Brady, Giglio, and the Jencks Act, *18 U.S.C. § 3500*, require the government to disclose. **[*7]** See Order at 4.

1. The Giglio Motion.

Hykes has also filed a Motion to Suppress evidence. See Motion to Suppress at 1. He expects several of the arresting agents, "including Officers Gerald Koppman, A. Arias, Sgt. L. Funes, S. Cotton, J. Nance, B. Cooksey and Zachary J. Rominger," will testify at a hearing on the Motion to Suppress. Giglio Motion at 2. He "requests this Court order the government to disclose certain pertinent information pertaining to the above-mentioned officer[s] as the information is relevant to impeachment." Giglio Motion at 2. Particularly, Hykes requests the following information:

- Documentation of any and all OPR[4] Investigations;
- Citizen complaints;
- Disciplinary write-ups, actions, and reports;
- Internal affairs investigations and reports;
- Performance evaluations;
- Reprimands for off-duty or on-duty conduct;
- All other material written or otherwise revealing specific acts of dishonesty or misconduct bearing on these officers' character for truthfulness as well as their propensity for engaging in unlawful activity going beyond the scope of their official duties.

See Giglio Motion at 2.

In his Giglio Motion, Hykes argues that the Supreme Court's Giglio decision requires the government to disclose evidence affecting a government witness' credibility. See Giglio Motion at 3. He states that he "has a good faith basis to believe that the internal personnel files of some o[r] all of these officers contain information that may potentially be properly used for impeachment." Giglio Motion at 4. Hykes asserts that "witnesses have revealed that the information relied upon by officers to arrest Mr. Hykes was false." Giglio Motion at 4. He contends that this false information led the arresting officers to arrest him, beat him, and search him without warrants. See Giglio Motion at **[*9]** 4. He states that, because the Court will determine whether Hykes' Motion to Suppress is well-founded, the officers' credibility is "of critical import for this Court's ultimate decision." Giglio Motion at 4. Hykes reasons that the officers' personnel files will reveal whether the officers are trustworthy. See Giglio Motion at 4. Hykes argues that credibility information is especially relevant in this case, where the only witnesses against him are police officers, so "anything that goes to their credibility is exculpatory and admissible." Giglio Motion at 5.

---

[4] The Office of Professional Responsibility ("OPR") was established by the Attorney General **[*8]** to ensure that Department of Justice attorneys and law enforcement personnel perform their duties in accordance with the highest professional standards expected of the nation's principal law enforcement agency. See Policies and Procedures, Department of Justice, *https://www.justice.gov/opr/policies-and-procedures* . OPR has jurisdiction to investigate allegations of misconduct against Department law enforcement personnel that relate to allegations of attorney misconduct within the jurisdiction of OPR. See Policies and Procedures, Department of Justice, *https://www.justice.gov/opr/policies-and-procedures* .

Additionally, Hykes observed that the Court has cautioned the United States Attorney's office to honor its "open file" policy and not to just disclose to "criminal defendants only the bare minimum that the law requires and nothing more." Giglio Motion at 6 (quoting *United States v. Rodella, 2015 U.S. Dist. LEXIS 20704, 2015 WL 711931 (D.N.M. Feb. 2, 2015)*(Browning, J.)). Hykes further observes that, when the scope of disclosure to defense counsel is uncertain, "errors are to be made in favor of disclosure." Giglio Motion at 7. He concludes that, because this information will reveal essential impeachment evidence, the United States must disclose it. See Giglio **[*10]** Motion at 7-8.

2. The Response.

The United States responded, arguing that "the defendant's motion pertaining to discovery is not necessary and essentially redundant of the Court's previous Discovery Order." Response at 4. It argues that Hykes' Giglio Motion is premature. See Response at 4. It explains that Giglio concerns a defendant's right to effectively cross-examine prosecution witnesses at trial, while the United States has not yet decided who it will call as witnesses at trial or at the suppression hearing. See Response at 4. It asserts that, before the suppression hearing, it will disclose any impeachment information that the Court's Order would require it to disclose as to those witnesses it plans to call at the suppression hearing. See Response at 5. The United States, thus, agrees that it must disclose material evidence that supports actual innocence before trial, but argues that it need not disclose this information "in advance of a suppression hearing unless the information is also potential impeachment of a person the government will call to testify at the suppression hearing." Response at 5.

Next, the United States argues, Hykes does not identify specific information that **[*11]** might be material. See Response at 11. It concedes that, if there is specific exculpatory information that Hykes believes exists, he may petition the Court for its disclosure, but "only after a specific request for production has been denied by the opposing party." Response at 11. It asserts that no law "entitles a defendant to the sort of fishing expedition/carte blanche discovery that he seeks here." Response at 5.

Furthermore, the United States argues, Hykes' "laundry list of items that he requests, to the extent it goes beyond what is required by *Brady, Giglio*, *Rule 16*, *Rule 26.2* and the Jencks Act, [is] simply not subject to disclosure by the government." Response at 5. It explains that many of the items that Hykes requests either do not exist or are not within the United States' control. See Response at 8, 10. The United States argues that it need not produce what it does not have. See Response at 8. Further, it asserts, pursuant to precedent from the United States Courts of Appeals for the Fifth and Ninth Circuits, it need not produce documents within the state government's control when the federal government does not have control over those documents. See Response at 9. Finally, it states that **[*12]** "the government's review and determination is controlling unless the defense provides grounds to believe there is impeachment information in the items to which the defense seeks access." Response at 6. It contends that Hykes must "make a particularized showing of what information he was seeking or how it would be material" rather than making broad discovery demands. Response at 7.

3. The Hearing.

Hykes did not file a reply. The Court held a hearing on March 31, 2016. The United States informed the Court that it intended to present three witnesses, all from the BCSO: Koppman, Detective Arnie Arias, and Sergeant Luis Funes. See Tr. at 4:10-14 (Hurtado). Hykes stated that he had received "partial information" on Koppman. Tr. at 4:22-25 (Baiz, Court).

Hykes explained that, after only a simple Internet search, he found "at least" two excessive force cases filed against Koppman, and another excessive force case against Koppman and Funes together. Tr. at 5:11-20 (Baiz). He stated that the United States gave him no information regarding these cases. See Tr. at 5:11-20 (Baiz). In response, the United States argued that the material Hykes requests does not meet the materiality standard required **[*13]** for document production. See Tr. at 11:5-10 (Hurtado). It contended that the United States should not have to produce or examine the personnel files without "a particular showing of materiality." Tr. at 11:25-12:2 (Hurtado).

In determining whether the United States had access and control over the information that Hykes requests, the Court then asked the United States about its relationship with the BCSO. See Tr. at 5:21-25 (Court). The Court described how the BCSO has been "pretty willing to share personnel files with the U.S. Attorney's office" in the past. Tr. at 5:21-25 (Court). The United States "concede[d] that this was a joint investigation between BCSO and ATF." Tr. at 6:1-3 (Hurtado). After the United States informed the Court that it had spoken to each officer testifying at the suppression hearing earlier in the week, the Court asked whether the United States would be able to review those officers' personnel files. See Tr. at 6:13-24 (Court, Hurtado). The United States asserted that it would likely be able to review those files. See Tr. at 6:25-7:1 (Hurtado).

Given the BCSO's participation in the investigation and the United States' relationship with BCSO, the Court suggested that the **[*14]** United States review the personnel files of the officers who will testify and conduct a Brady and Giglio review. See Tr. at 7:2-18 (Court). The Court directed the United States to make specific requests to view citizen complaints, disciplinary actions, and other items that Hykes seeks instead of asking for all relevant information. See Tr. at 8:17-25 (Court). The Court then instructed the United States to make a personal determination whether the information is Brady or Giglio material. See Tr. at 8:17-25 (Court). The Court asked Hykes if such a review would satisfy his needs in the Giglio Motion. See Tr. at 9:1-2 (Court). Hykes responded that such a review would satisfy his needs. See Tr. at 9:3-6 (Baiz)("[I]f he sits down and looks at the personnel files and sees if any of the items that as you mentioned there is citizen's complaints, reports that they are not following the rules or doing their job."). He asked whether he could give the United States the names of the cases against Koppman and Funes. See Tr. at 9:3-6 (Baiz). The Court directed Hykes to send a letter to the United States with the case names and "as much information as you can so that he can trigger the officers' memory." **[*15]** Tr. at 9:11-15 (Court).

At the end of the hearing, the United States explained that the United States Attorney's Office does not have an open-file policy. See Tr. at 12:7-15 (Hurtado)("I want to affirm clearly in open Court and on the record that there is no open file policy that the U.S. Department of Justice or the U.S. Attorney's office follows either in this district or across the entire United States."). The United States asserted that it still believes that the United States does not have to search personnel files unless Hykes demonstrates that the information is material, but stated that it "understand[s] the court's reasoning and the Government respects the court's decision." Tr. at 13:4-7 (Hurtado). The Court clarified that it is not ordering production of the personnel files before the suppression hearing. It simply directs the United States to examine the files, to determine whether any Giglio or Brady material exists, and to produce any such material before trial. See Tr. at 13:14-23 (Court).

LAW REGARDING RULE 16

Rule 16(a)(1)(E) of the Federal Rules of Criminal Procedure provides:

> **(E) Documents and Objects**. Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, **[*16]** tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:
>
> **(i)** the item is material to preparing the defense;
>
> **(ii)** the government intends to use the item it its case-in-chief at trial; or
>
> **(iii)** the item was obtained from or belongs to the defendant.

Fed. R. Crim. P. 16(a)(1)(E). Although *rule 16*'s language is permissive, it does not authorize "a blanket request to see the prosecution's file," and a defendant may not use the rule to engage in a "fishing expedition." *United States v. Maranzino, 860 F.2d 981, 985-86 (10th Cir. 1988)*(citing *Jencks v. United States, 353 U.S. at 667*). *Rule 16* also does not obligate the United States to "take action to discover information which it does not possess." *United States v. Badonie, No. CR 03-2062 JB, 2005 U.S. Dist. LEXIS 21928, 2005 WL 2312480, at *2 (D.N.M. Aug. 29,*

2005)(Browning, J.)(quoting United States v. Tierney, 947 F.2d 854, 864 (8th Cir. 1991))(internal quotation marks omitted); United States v. Rodella, 2015 U.S. Dist. LEXIS 20704, 2015 WL 711931, at *14 (D.N.M. Feb. 2, 2015)(Browning, J.). Nor is the United States required to secure information from third parties. See United States v. Gatto, 763 F. 2d 1040, 1048 (9th Cir. 1985)(holding that rule 16 does not contain a due diligence element requiring a prosecutor to search for evidence not within the United States' possession, custody, or control).

Evidence is "material" under rule 16 if "there is a strong indication that it will play an important role in uncovering admissible evidence, aiding **[*17]** witness preparation, . . . or assisting impeachment or rebuttal." United States v. Graham, 83 F.3d 1466, 1474, 317 U.S. App. D.C. 418 (D.C. Cir. 1996)(internal quotation marks omitted)(quoting United States v. Lloyd, 992 F.2d 348, 351, 301 U.S. App. D.C. 186 (D.C. Cir. 1993))(internal quotation marks omitted). "Although the materiality standard is not a heavy burden, the Government need disclose rule 16 material only if it enables the defendant significantly to alter the quantum of proof in his favor." United States v. Graham, 83 F.3d at 1474 (alterations omitted)(citations omitted)(internal quotation marks omitted).

Rule 16(d)(2) "gives the district court broad discretion in imposing sanctions on a party who fails to comply with" Rule 16. United States v. Wicker, 848 F.2d 1059, 1060 (10th Cir. 1988).

> **(2) Failure to Comply**. If a party fails to comply with this rule, the court may:
>
> > **(A)** order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;
> >
> > **(B)** grant a continuance;
> >
> > **(C)** prohibit that party from introducing the undisclosed evidence; or
> >
> > **(D)** enter any other order that is just under the circumstances.

Fed. R. Crim. P. 16(d)(2). In selecting a proper sanction, "a court should typically consider (1) the reasons the government delayed producing requested materials, including whether the government acted in bad faith; (2) the extent of prejudice to defendant as a result of the delay; and (3) the feasibility of curing the prejudice **[*18]** with a continuance." United States v. Charley, 189 F.3d 1251, 1262 (10th Cir. 1999)(internal quotation marks omitted)(quoting United States v. Gonzales, 164 F.3d 1285, 1292 (10th Cir. 1999)).

LAW REGARDING THE UNITED STATES' DUTY TO DISCLOSE UNDER THE DUE PROCESS CLAUSE OF THE CONSTITUTION OF THE UNITED STATES

The Due Process Clause of the Constitution requires that the United States disclose to the defendant any evidence that "is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. The Supreme Court of the United States has extended the prosecution's disclosure obligation to include evidence that is useful to the defense in impeaching government witnesses, even if the evidence is not inherently exculpatory. See Giglio, 405 U.S. at 153; Douglas v. Workman, 560 F.3d 1156, 1172-73 (10th Cir. 2009)("[N]o distinction is recognized between evidence that exculpates a defendant and 'evidence that the defense might have used to impeach the [United States'] witnesses by showing bias and interest.'" (quoting United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)); United States v. Abello-Silva, 948 F.2d 1168, 1179 (10th Cir. 1991)("Impeachment evidence merits the same constitutional treatment as exculpatory evidence."). Finally, the Supreme Court has refined Brady and clarified that it is not necessary that a defendant request exculpatory evidence: "Regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government." Kyles v. Whitley, 514 U.S. 419, 433, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)(quoting United States v. Bagley, 473 U.S. at 682). See Douglas v. Workman, 560 F.3d at 1172 ("The government's obligation to disclose exculpatory evidence does **[*19]** not turn on an accused's request."); United States v. Summers, 414 F.3d 1287, 1304 (10th Cir. 2005)("[T]he prosecution has an affirmative duty to disclose exculpatory evidence clearly supporting a claim of innocence even without request.").

1. Material Exculpatory Evidence Under Brady.

"The Constitution, as interpreted in Brady, does not require the prosecution to divulge every possible shred of evidence that could conceivably benefit the defendant." *Smith v. Sec'y of N.M. Dep't of Corr., 50 F.3d 801, 823 (10th Cir. 1995)*. Brady requires disclosure only of evidence that is both favorable to the accused, and "material either to guilt or to punishment." *Brady, 373 U.S. at 87*. "Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley, 473 U.S. at 682*. See *United States v. Allen, 603 F.3d 1202, 1215 (10th Cir. 2010)*. A "reasonable probability," in turn, is a "probability sufficient to undermine confidence in the outcome." *United States v. Bagley, 473 U.S. at 682* (internal quotation marks omitted). The Tenth Circuit has noted that "[t]he mere possibility that evidence is exculpatory does not satisfy the constitutional materiality standard." *United States v. Fleming, 19 F.3d 1325, 1331 (10th Cir. 1994)*. The Tenth Circuit has also stated that evidence is material if it "might meaningfully alter a defendant's choices before and during trial . . . including whether the defendant should testify." *Case v. Hatch, 731 F.3d 1015 (10th Cir. 2013)*(quoting *United States v. Burke, 571 F.3d 1048, 1054 (10th Cir. 2009))*(internal **[*20]** quotation marks omitted).

"To be material under Brady, undisclosed information or evidence acquired through that information must be admissible." *Banks v. Reynolds, 54 F.3d 1508, 1521 n.34 (10th Cir. 1995)*(quoting *United States v. Kennedy, 890 F.2d at 1059*). The Supreme Court in *Cone v. Bell, 556 U.S. 449, 129 S. Ct. 1769, 173 L. Ed. 2d 701 (2009)*, noted:

> Although the *Due Process Clause of the Fourteenth Amendment*, as interpreted by Brady, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations. See *Kyles, 514 U.S. at 437* ("[T]he rule in Bagley (and, hence, in Brady) requires less of the prosecution than the ABA Standards for Criminal Justice Prosecution Function and Defense Function 3-3.11(a) (3d ed. 1993)"). See also ABA Model Rules of Professional Conduct 3.8(d) (2008)("The prosecutor in a criminal case shall" "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal").

556 U.S. at 470 n.15.

The government bears the burden of producing exculpatory materials; defendants **[*21]** have no obligation to first point out that such materials exist. See *Kyles v. Whitley, 514 U.S. at 437* (stating that the prosecution has an affirmative duty to disclose evidence, because "the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached"); *United States v. Deutsch, 475 F.2d 55, 57 (5th Cir. 1973)*(granting a mistrial for failure to produce personnel files of government witnesses), overruled on other grounds by *United States v. Henry, 749 F.2d 203 (5th Cir. 1984)*; *United States v. Padilla, No. CR 09-3598 JB, 2011 U.S. Dist. LEXIS 31091, 2011 WL 1103876, at *6 (D.N.M. Mar. 14, 2011)*(Browning, J.). This obligation means that the United States must "volunteer exculpatory evidence never requested, or requested only in a general way." *Kyles v. Whitley, 514 U.S. at 433* (internal quotation marks omitted). Additionally, "[u]nder Brady, the good or bad faith of government agents is irrelevant." *United States v. Quintana, 673 F.2d 296, 299 (10th Cir. 1982)*. "This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence." *Kyles v. Whitley, 514 U.S. at 439*.

2. Timing of the Disclosure Under Brady.

"The obligation of the prosecution to disclose evidence under Brady can vary depending on the phase of the criminal proceedings and the evidence at issue." **[*22]** *United States v. Harmon, 871 F. Supp. 2d 1125, 1149*

(D.N.M. 2012)(Browning, J.). As a general matter, "[s]ome limitation on disclosure delay is necessary to protect the principles articulated in Brady v. Maryland." *United States v. Burke, 571 F.3d at 1054*. The Tenth Circuit has recognized, however, that "[i]t would eviscerate the purpose of the Brady rule and encourage gamesmanship were we to allow the government to postpone disclosures to the last minute, during trial." *United States v. Burke, 571 F.3d at 1054*. "[T]he belated disclosure of impeachment or exculpatory information favorable to the accused violates due process when an 'earlier disclosure would have created a reasonable doubt of guilt.'" *United States v. Burke, 571 F.3d at 1054*. The Tenth Circuit has stated:

> Where the district court concludes that the government was dilatory in its compliance with Brady, to the prejudice of the defendant, the district court has discretion to determine an appropriate remedy, whether it be exclusion of the witness, limitations on the scope of permitted testimony, instructions to the jury, or even mistrial.

United States v. Burke, 571 F.3d at 1054. Notably, "not every delay in disclosure of Brady material is necessarily prejudicial to the defense." *United States v. Burke, 571 F.3d at 1056*. "To justify imposition of a remedy, the defense must articulate to the district court the reasons why the delay should be regarded as materially prejudicial." *United States v. Burke, 571 F.3d at 1056*.

Once a prosecutor's **[*23]** obligations under Brady have been triggered, however, they "continue[] throughout the judicial process." *Douglas v. Workman, 560 F.3d at 1173*. For instance, the prosecutor's obligation to disclose Brady material can arise during trial. See *United States v. Headman, 594 F.3d at 1183 (10th Cir. 2010)*("Although Brady claims typically arise from nondisclosure of facts that occurred before trial, they can be based on nondisclosure of favorable evidence (such as impeachment evidence) that is unavailable to the government until trial is underway."). The disclosure obligation continues even while a case is on direct appeal. See *United States v. Headman, 594 F.3d at 1183*; *Smith v. Roberts, 115 F.3d 818, 819, 820 (10th Cir. 1997)*(applying Brady to a claim that the prosecutor failed to disclose evidence received after trial but while the case was on direct appeal).

The Supreme Court has held that Brady does not require "preguilty plea disclosure of impeachment information." *United States v. Ruiz, 536 U.S. 622, 629, 122 S. Ct. 2450, 153 L. Ed. 2d 586 (2002)*("We must decide whether the Constitution requires that preguilty plea disclosure of impeachment information. We conclude that it does not."). The Supreme Court recognized that "impeachment information is special in relation to the fairness of a trial, not in respect to whether a plea is voluntary." *United States v. Ruiz, 536 U.S. at 632* (emphasis in original). The Supreme Court acknowledged that, "[o]f course, the more information the defendant has, the **[*24]** more aware he is of the likely consequences of a plea, waiver, or decision, and the wiser that decision will likely be," but concluded that "the Constitution does not require the prosecutor to share all useful information with the defendant." *United States v. Ruiz, 536 U.S. at 632*. The Supreme Court added:

> [T]his Court has found that the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor.

United States v. Ruiz, 536 U.S. at 630. The Supreme Court explained that "a constitutional obligation to provide impeachment information during plea bargaining, prior to entry of a guilty plea, could seriously interfere with the Government's interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice." *United States v. Ruiz, 536 U.S. at 630*. The Tenth Circuit has reiterated these principles from United States v. Ruiz:

> Johnson asserts that his plea was not knowing and voluntary because he did not know that he was giving up a claim that the government failed **[*25]** to disclose impeachment evidence. The Supreme Court, however, foreclosed this exact argument in United States v. Ruiz, by holding that the government has no constitutional obligation to disclose impeachment information before a defendant enters into a plea agreement. Ruiz emphasized that "impeachment information is special in relation to the fairness of a trial, not in respect to whether a plea is voluntary." Rather, "a waiver [is] knowing, intelligent, and sufficiently aware if the defendant

> fully understands the nature of the right and how it would likely apply in general in the circumstances -- even though the defendant may not know the specific detailed consequences of invoking it."

United States v. Johnson, 369 F. App'x 905, 906 (10th Cir. 2010)(unpublished)(quoting *United States v. Ruiz, 536 U.S. at 630*).[5]

The Tenth Circuit has held, however, that United States v. Ruiz does not apply to exculpatory evidence but rather applies only to impeachment evidence:

> Ruiz is distinguishable in at least two significant respects. First, the evidence withheld by the prosecution in this case is alleged to be exculpatory, and not just impeachment, evidence. Second, Ohiri's plea agreement was executed the day jury selection was to begin, and not before indictment in conjunction with a "fast-track" plea. Thus, the government should have disclosed all known exculpatory information at least by that point in the proceedings. By holding in Ruiz that the government committed no due process violation by requiring a defendant to waive her right to impeachment evidence before indictment in order to accept a fast-track plea, the Supreme Court **[*27]** did not imply that the government may avoid the consequence of a Brady violation if the defendant accepts an eleventh-hour plea agreement while ignorant of withheld exculpatory evidence in the government's possession.

United States v. Ohiri, 133 F. App'x 555, 562 (10th Cir. 2005)(unpublished). The Tenth Circuit qualified its holding in United States v. Ohiri, however, stating that the case presented "unusual circumstances." *133 F. App'x at 562*.

The United States Courts of Appeals "have split on the issue whether Brady v. Maryland's restrictions apply to suppression hearings." *United States v. Harmon, 871 F. Supp. 2d at 1151*. In an unpublished opinion, the Tenth Circuit, without discussing whether Brady applies to a suppression hearing, rejected a defendant's argument that the prosecution violated Brady by failing to disclose impeachment evidence before a suppression hearing on the basis that the evidence was not impeachment evidence and not material. See *United States v. Johnson, 117 F.3d 1429* [published in full-text format at *1997 U.S. App. LEXIS 16776*], 1997 WL 381926, at *3 (10th Cir. 1997)(unpublished table decision). Specifically, the Tenth Circuit found:

> [D]isclosure of the evidence existing at the time of the hearing, even if impeaching, would not establish a reasonable probability that the outcome of the suppression hearing would have been different. First, we question whether the evidence in question would have been admitted at the suppression hearing. **[*28]** Even if it had been admitted, however, in light of [the defendant's] lack of truthfulness, our confidence in the result of the hearing has not been undermined. Therefore, we hold that the evidence was not material, and that its nondisclosure by the prosecution does not constitute a Brady violation.

*United States v. Johnson, 1997 U.S. App. LEXIS 16776, 1997 WL 381926, at *3* (citation omitted).

The United States Court of Appeals for the District of Columbia Circuit has recognized that "it is hardly clear that the Brady line of Supreme Court cases applies to suppression hearings," because "[s]uppression hearings do not determine a defendant's guilt or punishment, yet Brady rests on the idea that due process is violated when the

---

[5] United States v. Johnson is an unpublished opinion, but the Court can rely on an unpublished opinion to the extent its reasoned analysis is persuasive in the case before it. See ***10th Cir. R. 32.1(A)***("Unpublished opinions are not precedential, but may be cited for their persuasive value."). The Tenth Circuit has stated:

> In this circuit, unpublished orders are not binding precedent, . . . and we have generally determined that citation to unpublished opinions is not favored. However, if an unpublished **[*26]** opinion or order has persuasive value with respect to a material issue in a case and would assist the court in its disposition, we allow a citation to that decision.

United States v. Austin, 426 F.3d 1266, 1274 (10th Cir. 2005)(citations omitted). The Court finds that United States v. Johnson and *United States v. Ohiri, 133 F. App'x 555 (10th Cir. 2005)*(unpublished), have persuasive value with respect to a material issue, and will assist the court in its disposition of this Memorandum Opinion and Order.

withheld evidence is 'material either to guilt or to punishment.'" United States v. Bowie, 198 F.3d 905, 912, 339 U.S. App. D.C. 158 (D.C. Cir. 1999)(citation omitted). Without deciding the issue and in an unpublished opinion, the United States Court of Appeals for the Sixth Circuit quoted with approval this language from United States v. Bowie. See United States v. Bullock, 130 F. App'x 706, 723 (6th Cir. 2005)(unpublished)("Whether the suppression hearing might have come out the other way, however, is of questionable relevance to the Brady issues at stake here."). The United States Court of Appeals for the Seventh Circuit held that, under its precedent and the law from other circuits, it was **[*29]** not "obvious" for clear-error purposes that "Brady disclosures are required prior to suppression hearings." United States v. Stott, 245 F.3d 890, 902 (7th Cir. 2001). The Second Circuit also noted that Brady's applicability to suppression hearings was not "obvious" for plain error purposes. See United States v. Nelson, 193 F. App'x 47, 50 (2006).

Before the Supreme Court issued its United States v. Ruiz decision, the Fifth Circuit and the United States Court of Appeals for the Ninth Circuit held that Brady applies to suppression hearings. See United States v. Barton, 995 F.2d 931, 935 (9th Cir. 1993)("[W]e hold that the due process principles announced in Brady and its progeny must be applied to a suppression hearing involving a challenge to the truthfulness of allegations in an affidavit for a search warrant."); Smith v. Black, 904 F.2d 950, 965-66 (5th Cir. 1990)("Timing is critical to proper Brady disclosure, and objections may be made under Brady to the state's failure to disclose material evidence prior to a suppression hearing."), vacated on other grounds, *503 U.S. 930, 112 S. Ct. 1463, 117 L. Ed. 2d 609 (1992)*.

Most recently, the Tenth Circuit has suggested that Brady does not apply to suppression hearings, because "*Brady* rests on the idea that due process is violated when the withheld evidence is material to either guilt or punishment," but "[s]uppression hearings do not determine a defendant's guilt or punishment." United States v. Dahl, 597 F. App'x 489, 491 n.2 (10th Cir. 2015)(quoting United States v. Lee Vang Lor, 706 F.3d 1252, 1256 n.2 (10th Cir. 2013 (acknowledging that **[*30]** "[w]hether *Brady's* disclosure requirements even apply at the motion to suppress stage is an open question")). Although the United States Courts of Appeals have split on whether Brady applies to suppression hearings, "it is not likely that a prosecutor must disclose impeachment evidence before a suppression hearing in light of the Supreme Court's conclusion in United States v. Ruiz that a prosecutor does not have to disclose impeachment evidence before the entry of a guilty plea." United States v. Harmon, 871 F. Supp. 2d at 1151. The Tenth Circuit affirmed United States v. Harmon, in which the Court concluded that the United States need not disclose impeachment information before a suppression hearing.

> Given that the Court has located no Tenth Circuit case deciding this issue, the Court believes that the Tenth Circuit would extend the holding of United States v. Ruiz to suppression hearings. The Supreme Court's rationale distinguishing the guilty-plea process from a trial applies equally to a comparison of the suppression-hearing process and a trial. The Court believes that both the Tenth Circuit and the Supreme Court would recognize that impeachment evidence need not be disclosed before a suppression hearing. In United States v. Ruiz, the **[*31]** Supreme Court recognized that "impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is voluntary." United States v. Ruiz, 536 U.S. at 632, 122 S. Ct. 2450 (emphasis in original). It acknowledged that, "[o]f course, the more information the defendant has, the more aware he is of the likely consequences of a plea, waiver, or decision, and the wiser that decision will likely be," but concluded that "the Constitution does not require the prosecutor to share all useful information with the defendant." United States v. Ruiz, 536 U.S. at 632, 122 S. Ct. 2450. Likewise, "the more information the defendant has, the more" likely he will be able to successfully suppress a particular piece of evidence, but "the Constitution does not require the prosecutor to share all useful information with the defendant." United States v. Ruiz, 536 U.S. at 632, 122 S. Ct. 2450.

United States v. Harmon, 871 F. Supp. 2d at 1169, aff'd, 742 F.3d 451 (10th Cir. 2014). Accordingly, Brady does not require the United States to disclose impeachment evidence before suppression hearings. See United States v. Harmon, 871 F. Supp. 2d at 1165-67.

LAW REGARDING THE JENCKS ACT

In *Jencks v. United States, 353 U.S. 657, 667, 77 S. Ct. 1007, 1 L. Ed. 2d 1103, 75 Ohio Law Abs. 465 (1957)*, the Supreme Court held that a "criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses **[*32]** touching the subject matter of their testimony at trial." *353 U.S. at 672*. In so holding, the Supreme Court recognized that the

> rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense.

353 U.S. at 671. Congress later codifies the Jencks v. United States into *18 U.S.C. § 3500*. See *United States v. Kimoto, 588 F.3d 464, 475 (7th Cir. 2009)*(explaining that "the Jencks Act, *18 U.S.C. § 3500*[,] . . . was enacted in response to the Supreme Court's holding in *Jencks v. United States, 353 U.S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103, 75 Ohio Law Abs. 465* . . . ").

Section 3500 of Title 18 of the United States Code provides:

> **(a)** In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> **(b)** After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the **[*33]** possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

18 U.S.C. §§ 3500(a)-(b). "The Jencks Act requires the government to disclose to criminal defendants any statement made by a government witness that is 'in the possession of the United States' once that witness has testified." *United States v. Lujan, 530 F. Supp. 2d at 1232* (quoting *18 U.S.C. §§ 3500(a)* & *(b)*). The Jencks Act "manifests the general statutory aim to restrict the use of such statements to impeachment." *Palermo v. United States, 360 U.S. 343, 349, 79 S. Ct. 1217, 3 L. Ed. 2d 1287, 1959-2 C.B. 480 (1959)*. The Jencks Act's purpose is "not only to protect Government files from unwarranted disclosure but also to allow defendants materials usable for the purposes of impeachment." *United States v. Smaldone, 544 F.2d 456, 460 (10th Cir. 1976)*(citing *Palermo v. United States, 360 U.S. at 352*).

The Jencks Act defines statements as:

> **(1)** a written statement made by said witness and signed or otherwise adopted or approved by him;
>
> **(2)** a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; **[*34]** or
>
> **(3)** a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C. § 3500(e).

The Tenth Circuit has held: "Interview notes could be 'statements' under the [Jencks] Act if they are substantially verbatim." *United States v. Smith, 984 F.2d 1084, 1086 (10th Cir. 1993)*. At least one district court within the Tenth circuit has distinguished interview notes from reports that "embody only the agent's epitomization, interpretation, or impression of an interview," finding that the latter are not producible under the Jencks Act. *United States v. Jackson, 850 F. Supp. 1481, 1508 (D. Kan. 1994)*(Crow, J.). In United States v. Lujan, the Honorable Robert C.

Brack, United States District Judge for the District of New Mexico, explained that rough interview notes may be discoverable under the Jencks Act, when a defendant makes "at least . . . a colorable claim that an investigator's discarded rough notes contained exculpatory evidence not included in any formal interview report provided to the defense." *530 F. Supp. 2d at 1266*. Judge Brack went on to hold that, "[b]ecause the contents of rough interview notes may in some cases be subject to disclosure and because the potential impeachment value of the notes may not become evident until trial," the United States must preserve its rough interview notes "made by **[*35]** law enforcement agents during interview of potential witnesses" under *18 U.S.C. § 3500*. *530 F. Supp. 2d at 1267*. See *United States v. Cooper, 283 F. Supp. 2d 1215, 1238 (D. Kan. 2003)*(Crow, J.)(noting that rough interview notes may be discoverable under the Jencks Act); *United States v. Jackson, 850 F. Supp. at 1508-09* (finding that interview notes may be producible under the Jencks Act).

The defendant bears the initial burden of showing that particular materials qualify under the Jencks Act, but the defendant's burden is not heavy. See *United States v. Smaldone, 544 F.2d at 460* ("[T]he burden is on the defendant to show that particular materials qualify as 'Statements' and that they relate to the subject matter of the testimony of the witness."); *United States v. Harry, 2013 U.S. Dist. LEXIS 25721, 2013 WL 684671, at *10 (D.N.M. Feb. 6, 2013)*(Browning, J.). To satisfy this burden, the defendant need not prove that particular materials are within the scope of the Jencks Act, as the documents are not in the defendant's possession, but rather, "must plainly tender to the Court the question of the producibility of the document at a time when it is possible for the Court to order it produced, or to make an appropriate inquiry." *United States v. Smith, 984 F.2d at 1086* (quoting *Ogden v. United States, 303 F.2d 724, 733 (9th Cir. 1962))*. See *United States v. Burton, 81 F. Supp. 3d 1229, 1250-51 (D.N.M. Jan. 26, 2015)*(Browning, J.). The defendant's demand for documents under the Jencks Act must be sufficiently precise for a court to identify the requested statements. See *United States v. Smith, 984 F.2d at 1086*. For example, in **[*36]** United States v. Smith, the Tenth Circuit found that a defendant had met his burden and made a prima facie showing that a statement of a witness existed which may be producible under the Jencks Act when a government witness testified during the United States' case-in-chief that she had been interviewed by a government agent before testifying, and the defense counsel moved for production of the notes. See *984 F.2d at 1085-86*. Once the defendant makes a prima facie showing that a witness statement exists that may be producible under the Jencks Act, the court should conduct a hearing or in camera review of the statement. See *984 F.2d at 1086*.

In United States v. Fred, No. CR 05-801 JB, the Court ordered the United States to produce "any personal notes or investigative materials that Federal Bureau of Investigation" agents "may have created regarding an interview" with the defendant. No. CR 05-801 JB, Order at 1, filed November 8, 2006 (Doc. 86). The Court required the United States to disclose the notes and investigative materials in a timely manner, so that the defendant could properly prepare for cross-examination at trial of the FBI agent who conducted the interview. See No. CR 05-801 JB, Order at 1-2. The Court has **[*37]** applied the Jencks Act to Drug Enforcement Agency agents' notes, generated from interviews with defendants, holding that the notes must be turned over to the defendants after the agents testify at trial. See *United States v. Goxcon-Chagal, No. CR 11-2002 JB, 2012 U.S. Dist. LEXIS 110768, 2012 WL 3249473, at *2, *6 (D.N.M. Aug. 4, 2012)*(Browning, J.). In *United States v. Tarango, 760 F. Supp. 2d 1163 (D.N.M. 2009)*(Browning, J.), the Court, applying *18 U.S.C. § 3500*, held that the United States must produce Federal Bureau of Investigation ("FBI") agents' 302s, after the United States' witnesses testified at trial, to the extent those reports contained statements from witnesses who testified at trial. See *760 F. Supp. 2d at 1164, 1167*.

THE NEED FOR PRACTICAL AND EFFECTIVE CRIMINAL DISCOVERY

In 1990, a jury convicted Debra Milke of murdering her four-year-old son, Christopher. See *Milke v. Ryan, 711 F.3d 998, 1000 (9th Cir. 2013)*. The judge sentenced her to death. The Honorable Alex Kozinski, Chief Justice for the Ninth Circuit, described the trial as "a swearing contest between Milke and Phoenix Police Detective Armando Saldate, Jr." *711 F.3d at 1000*. At the trial, Saldate testified that Milke confessed to the murder; Milke vehemently protested her innocence and denied confessing. See *711 F.3d at 1000*. With no other witnesses, the judge and jury believed Saldate. They were unaware, however, of one **[*38]** fact that might have changed their minds: Saldate had a "long history of lying under oath and other misconduct." *711 F.3d at 1000-01*. Specifically, Saldate had lied to

a grand jury or a judge in four cases, requiring state judges to throw out indictments or confessions. See *711 F.3d at 1004*. In another four cases, "judges threw out confessions or vacated convictions because Saldate had violated suspects' Miranda and other constitutional rights during interrogations, often egregiously." *711 F.3d at 1004*. Finally, Saldate's personnel file documented a five-day suspension "for taking sexual liberties with a motorist he stopped and then lying to his supervisors about it." *711 F.3d at 1011*. The file revealed that his "supervisors had caught him in a lie and concluded that his credibility was compromised." *711 F.3d at 1006, 1012* (describing the report as showing that "Saldate has no compunction about lying during the course of his official duties" and that he has "a willingness to abuse his authority to get what he wants"). The information about Saldate's misconduct was in the hands of the party responsible for ensuring that justice is carried out -- the state. Unfortunately, however, the state did not disclose this information, despite its requirements under Brady and Giglio **[*39]** . See *Milke v. Ryan, 711 F.3d at 1005* (describing how the state did not mention the evidence, even though a critical question in Milke's case was whether Saldate ignored Milke's request for an attorney). "This error resulted in a 'one-sided presentation of evidence' and 'impeded [the jury's] ability to fully and fairly assess the credibility of both [Milke] and Saldate." *Milke v. Ryan, 711 F.3d at 1005* (alterations in the original). More than that, however, the error resulted in Milke's death sentence and imprisonment on death row for twenty-two years. See *Milke v. Ryan, 711 F.3d at 1001*.[6]

The disclosure problem is not confined to the context of overzealous police officers closing murder cases. It reaches to all corners of the criminal justice system. Judges and scholars are increasingly recognizing the problem with blatant **[*40]** Brady violations. See Daniel S. Medwed, Brady's Bunch of Flaws, *67 Wash. & Lee L. Rev. 1533 (2010)*; David Keenan et al., The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct, 121 Yale L.J. Online 203 (2011). For example, in 2012, an investigation revealed that two Department of Justice prosecutors intentionally hid evidence in the 2008 political corruption case against Senator Ted Stevens, the longest serving Republican Senator in history. See *United States v. Stevens, No. 08-cr-231 (EGS), 2009 U.S. Dist. LEXIS 39046, 2009 WL 6525926 (D.D.C. April 7, 2009)*(Sullivan, J.). See Henry F. Schuelke III, Special Counsel, Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order (dated April 7, 2009), filed March 15, 2012 in In re Special Proceedings, No. 1:09-mc-00198-EGS (D.D.C. March 15, 2012)("Stevens Report"). Special prosecutor Henry F. Schuelke III's blistering report found that the United States team concealed documents that would have damaged the credibility of key United States witnesses and helped the late Stevens to defend himself against false-statements charges. See Stevens Report at 12. Stevens lost his Senate seat as the scandal unfolded, dying at age eighty-six in a plane crash two years later. See Carrie Johnson, Report: Prosecutors Hid Evidence in Ted Stevens Case, NPR News (May 15, 2012), *http://www.npr.org/2012/03/15/148687717/report-prosecutors-hid-evidence-in-ted-stevens-case* . Schuelke based his 500-page report **[*41]** on a review of 128,000 documents and interviews with prosecutors and FBI agents. See Stevens Report at 12. United States Attorney General Eric Holder moved to vacate Stevens' conviction. See Jerry Seper, Inquiry Slams Prosecution of Stevens Corruption Case By Justice Department, The Washington Times (March 15, 2012). The Department of Justice ("DOJ") subsequently "instituted a sweeping training curriculum for all federal prosecutors, and made annual discovery training mandatory." Mark Memmott, Report Slams Sen. Stevens' Prosecutors, NPR News (March 15, 2012), *http://www.npr.org/sections/thetwo-way/2012/03/15/148668283/report-slams-sen-stevens-prosecutors* .

As *Milke v. Ryan* and the Stevens Report reveal, prosecutors hold a tremendous amount of power in criminal prosecutions, often more than the jury. See Alex Kozinski, Criminal Law 2.0, 44 Geo. L.J. Ann. Rev. of Crim. Proc. iii, xxii (2015)(explaining that prosecutors often hold more power "than jurors because most cases don't go to trial"). They are the ones with access to the evidence, both inculpatory and exculpatory. They can disclose it easier than anyone else can. See Scott H. Greenfield, The Flood Gates Myth, Simple Justice (Feb. 16, 2015),

[6] After the Ninth Circuit vacated Milke's conviction and gave Arizona the chance to re-try Milke, the Arizona Court of Appeals barred any re-trial in a scathing opinion that garnered the New York Times' attention. See Arizona: No Retrial for Woman Freed from Death Row, N.Y. Times (Dec. 11, 2014), *http://www.nytimes.com/2014/12/12/us/arizona-no-retrial-for-woman-freed-from-death-row.html?_r_1* . The Court of Appeals described the "long course of *Brady/Giglio* violations" as a "flagrant denial of due process" and a "severe stain on the Arizona justice system." *Milke v. Mroz, 236 Ariz. 276, 339 P.3d 659, 665-66, 668 (Ariz. App. Ct. 2014)*.

http://blog.simplejustice.us/2015/02/16/the-flood-gates-myth/ . As one illustration, in Milke v. Ryan, Milke discovered the impeachment evidence **[*42]** detailing Saldate's misconduct "only after a team of approximately ten researchers in post-convictions proceedings spent nearly 7000 hours sifting through court records." *711 F.3d at 1018*. The team worked eight hours a day for three and a half months searching through the clerk of court's officers for Saldate's name in every criminal case file from 1982 to 1990. See *711 F.3d at 1018*. It took another researcher another month to review motions and transcripts from each of those cases to find examples of Saldate's misconduct. See *711 F.3d at 1018*. The Ninth Circuit concluded: "A reasonably diligent lawyer couldn't possibly have found these records in time to use them at Milke's trial." *711 F.3d at 1018*. The prosecutor was in the best position to give Milke the opportunity to effectively cross-examine Saldate and ensure that she had a fair trial. Although Brady and Giglio require prosecutors to disclose exculpatory evidence to the defense, it is often extremely difficult for criminal defendants to know whether the prosecution is complying with this obligation. Furthermore, prosecutors exert tremendous control over witnesses.

> They can offer incentives -- often highly compelling incentives -- for suspects to testify. This includes providing sweetheart **[*43]** plea deals to alleged co-conspirators and engineering jail-house encounters between the defendant and known informants. Sometimes they feed snitches non-public information about the crime so that the statements they attribute to the defendant will sound authentic. And, of course, prosecutors can pile on charges so as to make it exceedingly risky for a defendant to go to trial. There are countless ways in which prosecutors can prejudice the fact-finding process and undermine a defendant's right to a fair trial.

Kozinski, *supra, at xxii* (internal footnotes omitted).

To address this problem, Holder put together a working group of senior prosecutors, law enforcement representatives, and information technology professionals to improve the DOJ's discovery practices. See Hearing on the Special Counsel's Report on the Prosecution of Senator Ted Stevens at 3-4, Committee on the Judiciary United States Senate (March 28, 2012)("Hearing"). The DOJ then issued guidelines that federal prosecutors must follow in complying with their discovery obligations in criminal cases. See Memorandum for Department Prosecutors from David W. Ogden, Deputy Attorney General, Regarding Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case **[*44]** Management Working Group (Jan. 4, 2010); Memorandum for Department Prosecutors from David W. Ogden, Deputy Attorney General, Regarding Requirement for Office Discovery Policies in Criminal Matters (Jan. 4, 2010); Memorandum for Department Prosecutors from David W. Ogden, Deputy Attorney General, Regarding Guidance for Prosecutors Regarding Criminal Discovery (Jan. 4, 2010), *https://www.justice.gov/dag/memorandum-department-prosecutors* . These memoranda are intended to establish a methodical approach to discovery obligations and to address inconsistent discovery practices among prosecutors within the same office. See Hearing at 4-5. Although these memoranda are "not intended to have the force of law or to create or confer any rights, privileges or benefits," DOJ attorneys will likely have to follow the guidance in the memoranda to argue that they have complied with their discovery obligations. Later in January 2010, Deputy Attorney General David W. Ogden appointed a long-serving career prosecutor as the DOJ's first full-time National Criminal Discovery Coordinator to lead and oversee all DOJ efforts to impose disclosure practices. See Hearing at 4.

Many courts and scholars, however, have argued that training prosecutors is insufficient to fully **[*45]** combat discovery abuse. Instead of relying on prosecutors alone to disclose all potentially exculpatory evidence, they have suggested that judges take a more active role in preventing Brady and Giglio violations. See *United States v. Jones, 686 F. Supp. 2d 147, 149 (D. Mass. 2010)*(Wolf, J.)(expressing the district court's skepticism that prosecution-initiated training sessions, in the absence of strong judicial action, would effectively curb Brady violations). Chief Judge Kozinski has asserted that "[t]here is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it."[7] *United States v. Olsen, 737 F.3d 625, 626 (9th Cir. 2013)*(Kozinski, C.J., dissenting). Two years after Chief Judge Kozinski described the "epidemic of *Brady* violations," he observed that his use of the phrase "caused

---

[7] Neither Chief Judge Kozinski nor anyone else has empirically shown that an epidemic **[*47]** of Brady violations is occurring. The Court does not see it. The Assistant United States Attorneys appear to take their duties very seriously.

much controversy but brought about little change in the way prosecutors operate." Kozinski, *supra, at viii* (citing Center for Prosecutor Integrity, An Epidemic of Prosecutor Misconduct, White Paper (Dec. 2013), available at *http://www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutor-Misconduct.pdf* . Accordingly, he proposed some additional reforms, such as requiring open-file discovery. See Kozinski, *supra, at xxvi-vii*. North Carolina has adopted such a rule by statute that requires courts to order the "State to make available to the defendant the complete files of all law enforcement agencies, investigatory **[*46]** agencies, and prosecutors' offices involved in the investigation of the crimes committed or the prosecution of the defendant." *N.C. Gen. Stat. § 15A-903(a)(1)* (2011). The DOJ, however, has opposed such a law, instead advocating that prosecutors should remain in charge of deciding what evidence will be material to the defense. See Video Recording: Ensuring that Federal Prosecutors Meet Discovery Obligations: Hearing on S. 2197 Before the S. Judiciary Comm., 112th Cong. (2012)(on file with S. Judiciary Comm.)(statement of James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice opposing the bill: "[I]n reacting to the *Stevens* case, we must not let ourselves forget . . . true improvements to discovery practices will come from prosecutors and agents . . . . In other words, new rules are unnecessary."); Eric Holder Jr., Preface, In the Digital Age, Ensuring that the Department Does Justice, *41 Geo. L.J. Ann. Rev. Crim. Proc. iii (2012)*. Chief Judge Kozinski contends that effectively deterring Brady and Giglio violations means that prosecutorial offices across the country must establish firm open-file policies to ensure compliance.[8] See Kozinski, *supra, at xxviii*.

---

[8] In New Mexico, the New Mexico Legislature has not enacted an open-file policy for its state prosecutors, nor does the United States Attorney's Office -- according to the Assistant United States Attorney in this case -- operate under an open-file policy. See Tr. at 12:7-15 (Hurtado)("I want to affirm clearly in open Court and on the record that there is no open file policy that the U.S. Department of Justice or the United States Attorney's office follows either in this district or across the entire United States."). Despite the Assistant United States Attorney's contention in this case, however, the United States Attorney's Office has previously represented to the Court that the Albuquerque office operates under such a policy. See *United States v. Rodella, 2015 U.S. Dist. LEXIS 20704, 2015 WL 711931, at *39, n.12 (D.N.M. Feb. 2, 2015)*(Browning, J.)(stating that the United States Attorney's Office for the District of New Mexico has "consistently represented that they maintain an 'open file policy'"). The Court recognized that, despite the United States' representations that it maintains an open-file policy, its "conduct before the Court suggests otherwise." **[*48]** *United States v. Rodella, 2015 U.S. Dist. LEXIS 20704, 2015 WL 711931, at *39 n.12*.

> These attorneys have at times shown that they are willing to disclose to criminal defendants only the bare minimum that the law requires and nothing more. In *United States v. Roybal, 46 F. Supp. 3d 1127, 2014 WL 4748136 (D.N.M. 2014)*(Browning, J.), the United States refused to produce certain raw wiretap data and progress reports they made concerning wiretaps. *See* *46 F. Supp. 3d 1127, 2014 WL 4748136, at *1*. The United States did not give a reason for denying the defendants' request for the information, other than the law did not require it to produce the documents. *See* *46 F. Supp. 3d 1127, 2014 WL 4748136, at *4*. Again in *United States v. Folse*, the United States refused to disclose reports related to a shooting between a co-defendant and a Federal Bureau of Investigation agent for a similar reason: the law did not require it to disclose the information. *See United States v. Folse*, No. CR 14-2354, Unsealed Memorandum Opinion and Order, filed January 26, 2015 (Doc. 75). . . By its very name -- the Department of Justice -- the United States is also interested in the pursuit of justice. In refusing to disclose evidence, documents, and materials unless the law requires it to produce the items, the United States may be undermining the appearance of justice. Defendants are often left in the dark, not knowing **[*49]** what information the United States has in its possession. While Courts and Congress have placed requirements on what information the United States must disclose, these requirements are a bare minimum and not a recommendation. Criminal defendants are already at a disadvantage, because of the United States' resources and because the United States gets a head start in every case by being able to investigate before bringing an indictment. The United States need not compound this disadvantage by refusing to give over any evidence unless it is absolutely required. After the United States secures a conviction, the criminal defendant, and the public at large, should feel that the conviction was based on a fair trial in which there was nothing else the defendant could have done to obtain a different result -- *i.e.* the appearance of justice. The nation may not be well served when a defendant is left wondering whether things would have been different if the United States had disclosed all of the information that it possessed. By refusing to disclose all available information, the United States may create the perception that it obtained a conviction through gamesmanship and concealment, *i.e.*, **[*50]** through sharp practices, and not through the pursuit of truth and justice. This perception undermines the pillars of our criminal justice system. The Court will continue to faithfully follow the law and will not require the United States to disclose any information which the law does not require it to disclose. The Court, however, cautions the United States that, if it continues its pattern of refusing to disclose available information to criminal defendants, it is undermining the representation that it routinely makes that it has an open file policy and that the Court will take that

While these reforms may indeed decrease the number of Brady and Giglio violations that occur, the Court cannot unilaterally impose those requirements upon attorneys. Judges have several other tools at their disposal, however, and the Court uses several of these tools to ensure compliance with Brady and Giglio in the District of New Mexico. First, while the Court must rely heavily on the prosecutors to do their job under Brady and Giglio, the Court does more than rely solely on the prosecutors to comply with their obligations. See Kozinski, *supra, at xxxiii* ("*Brady* is not self-enforcing; failure to comply with *Brady* does not expose the prosecutor to any personal risk."); *Imbler v. Pachtman, 424 U.S. 409, 430, 431 n.34, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976)*(noting that prosecutors are absolutely immune for "activities [that are] intimately associated with the judicial phase of the criminal process," including the willful suppression of exculpatory evidence). The Court enters orders at the beginning of the case directing prosecutors to comply with those obligations by disclosing documents and objects, reports and tests, expert witness opinions, and all relevant material that Brady and Giglio require.[9] If courts do not enter an order **[*52]** requiring prosecutors to comply with Brady and Giglio, the court lacks the power to sanction attorneys, because those attorneys will not have violated any court-imposed obligations. See Henry F. Schuelke III, supra, at 507-510. By entering such orders, the Court can hold prosecutors personally responsible for failures to disclose information.

Second, when prosecutors hide Brady and Giglio material, courts can name the offending prosecutors in their judicial opinions. One author terms this technique "public shaming." Adam M. Gershowitz, Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct, *42 U.C. Davis L. Rev. 1059 (2009)*. Naming prosecutors' names can serve as a unique tool to encourage compliance with a prosecutor's disclosure obligations. Prosecutors will know that non-compliance can expose them to embarrassment in front of their friends and colleagues. See Jenia Iontcheva Turner, Policing International Prosecutors, *45 N.Y.U. J. Int'l L. & Pol. 175, 229 (2012)*("The court's judgment condemning particular actions of prosecutors as unlawful can serve as a potent deterrent for most prosecutors, who would not like to be called out publicly by a court for failing in their obligation."). **[*53]** While the Court is usually reluctant, in both civil and criminal cases, to name the attorneys it sanctions, prosecutors run the risk that the Court may, depending on the egregiousness of a violation, believe that more than a sanction is necessary.

Finally, several scholars have endorsed Professor Jason Kreag's proposal that judges engage in a formal colloquy with the prosecutor on the record during pretrial hearings. See Jason Kreag, The Brady Colloquy, 67 Stan. L. Rev. Online 47 (2014); Kozinski, *supra, at xxxiv* (endorsing Kreag's colloquy); Adam M. Samaha & Lior Jacob Strahilevitz, Don't Ask, Must Tell -- And Other Combinations, *103 Cal. L. Rev. 919, 984 n.296 (2015)*. Kreag suggests that trial judges routinely ask a series of questions such as:

> 1. Have you reviewed your file, and the notes and file of any prosecutors who handled this case before you, to determine if these materials include information that is favorable to the defense?
> 2. Have you requested and reviewed the information law enforcement possesses, including information that may not have been reduced to a formal written report, to determine if it contains information that is favorable to the defense?
>
> 3. Have you identified information that is favorable to the defense, but **[*54]** nonetheless elected not to disclose this information because you believe that the defense is already aware of the information or the information is not material?

> purported policy with a grain of salt. That representation, which is not completely accurate, and the unclear practices of the Assistant United States Attorneys undermine the administration of justice and the public's perception of the justice system. It also puts its convictions unnecessarily at risk, if the Court is wrong that the United States did not have to produce the documents. The United States is a key player in the adversarial system; as the people's representative, it too plays a fundamental role in ensuring the appearance of justice.

*United States v. Rodella, 2015 U.S. Dist. LEXIS 20704, 2015 WL 711931, at *39*. It appears that the United States has finally abandoned **[*51]** its representations that it has an open-file policy.

[9] The District of New Mexico routinely enters such orders. See Order, filed December 9, 2015 (Doc. 18).

4. Are you aware that this state's rules of professional conduct require you to disclose all information known to the prosecutor that tends to be favorable to the defense regardless of whether the material meets the *Brady* materiality standard?
5. Now that you have heard the lines of cross-examination used by the defense and have a more complete understanding of the theory of defense, have you reviewed your file to determine if any additional information must be disclosed?

Kreag, supra, at 50-51 (internal footnotes omitted). Kreag contends that the formality of facing a judge on the record impresses upon prosecutors the need to scrupulously comply with their disclosure obligations. See Kreag, supra, at 49. He further argues that the colloquy will require prosecutors to explain why they are not disclosing certain information at the time they decide not to disclose that information, instead of asking for an explanation years later when the non-disclosure comes to light. See Kreag, supra, at 53-54.

The Court agrees that some form of pretrial questioning will increase compliance with *Brady* and **[*55]** *Giglio*. Despite this agreement, the Court believes that the formal colloquy that Kreag proposes is not only unnecessary, but also somewhat impractical for district judges that see hundreds of criminal cases a year. Because the District of New Mexico sees more felony cases than any other federal district in the country,[10] and more criminal cases than most courts in the country, the Court has developed professional relationships with the United States Attorneys who appear before it on a regular basis. See Criminal Cases Commenced, by Number of Felony Defendants, Excluding Reopens, During the 12-Month Period Ending March 31, 2015, JNET, Criminal Caseload Tables, *http://jnet.ao.dcn/resources/statistics/caseload-tables/criminal-caseload-tables* (listing New Mexico as having the highest number of criminal cases involving felony defendants in the nation). Asking United States Attorneys whether they intentionally refused to disclose exculpatory information can appear derogatory and insulting to attorneys who frequently appear before the Court. See Radley Balko, Judge Says Prosecutors Should Follow Law. Prosecutors Revolt., The Wash. Post. (March 7, 2014), *http://www.washingtonpost.com/news/the-watch/wp/2014/03/07/judge-says-prosecutors-should-follow-the-law-prosecutors-revolt* (describing how a prosecutor opposed the Arizona Supreme Court's recommendation that Arizona adopt an ethical rule to **[*56]** ensure that prosecutors disclose new evidence of a potential wrongful conviction, in part because he was insulted by the suggestion that an ethical guideline was needed to encourage him to do what he claimed he would do as a matter of course). Kreag concedes that "some prosecutors might be insulted by having to answer these or similar questions from the court, believing that the questions themselves amount to an accusation." Kreag, supra, at 56. The Court agrees with this assessment. The Court has known many of these lawyers for years; there is no need to insult them with questions about whether they have complied with their ethical duties that it does not ask of defense lawyers or civil lawyers.

Moreover, the Court can accomplish the same goals that the colloquy seeks to accomplish by getting assurances at a pretrial hearing that the United States has complied with its duty. Merely holding a hearing or a pretrial conference where the United States Attorney knows that he or she must answer to the Court about discovery issues and what has been produced heightens the importance of disclosing Brady and Giglio material; the hearing impresses upon attorneys the seriousness of their representations to the Court.[11] The Court can therefore "signal to young

---

[10] In addition to seeing more felony cases than other courts, the District of New Mexico consistently sees more criminal cases than most other courts in the country. See Criminal Cases Commenced, Terminated, and Pending (Including Transfers), During the 12-Month Periods Ending March 31, 2014 and 2015, JNET, Criminal Caseload Tables, *http://jnet.ao.dcn/resources/statistics/caseload-tables/criminal-caseload-tables* ("Criminal Filings"). In 2015 alone, 4,227 criminal cases were filed in the District of New Mexico. See Criminal Filings at 1. Only Arizona, with 5,059, and Texas' Southern and Western Districts, with 5,491 **[*57]** and 6,074, respectively, saw more criminal filings. See Criminal Filings at 1. In comparison, 98 criminal cases were filed in the District of Rhode Island, 128 were filed in Vermont, 116 were filed in the Northern District of Mississippi, 109 were filed in the Western District of Wisconsin, and 61 were filed in the Eastern District of Oklahoma. See Criminal Filings at 1.

[11] Those professors and judges who have endorsed the formal colloquy do not hear criminal cases at the district court level, especially with the frequency that the Court does. See Kozinski, supra; Kreag, supra. The District of New Mexico sentences hundreds more criminal defendants than judges in most other districts. A formal colloquy is not always practical in this context.

prosecutors [] the importance the judge places on enforcing a prosecutor's ethical and *Brady* obligations" by holding a hearing or pretrial conference and asking about discovery issues, without running through a standardized and potentially insulting checklist. Kreag, supra, at 54. Second, a hearing or pretrial conference does **[*58]** more than demonstrate the seriousness of the situation. Like the colloquy, it also personalizes the prosecutor's decision not to disclose. A hearing or pretrial conference requires prosecutors to acknowledge that they made the non-disclosure decision and that they are responsible for providing an explanation for that non-disclosure. Furthermore, the hearing emphasizes -- without having to say it -- that they may be sanctioned for any misrepresentations they make about Brady and Giglio material. This accountability -- and threat of sanctions for making misrepresentations to the Court -- increases disclosure on the front-end without the need for "public shaming" on the back end if the Court later discovers a Brady or Giglio violation. The Court agrees that some of Kreag's suggested questions may be useful in some hearings or pretrial conferences. Other situations, however, call for more pointed and probing questions. Moving away from a checklist of questions gives judges the flexibility to get to the point more quickly and easily, to ask specific questions rather than general ones, and to avoid impairing its working relationship with United States Attorneys and the assistants in the **[*59]** meantime. Finally, holding a hearing or pretrial conference encourages prosecutors to review their notes and to effectively prepare a reason for non-disclosure early in the proceedings. Accordingly, while asking some of Kreag's questions may be helpful, the Court can more practically curb Brady and Giglio violations by asking questions tailored to the circumstance rather than going through a standardized formal checklist.

In sum, the Court is not comfortable with engaging in a colloquy with an Assistant United States Attorney like he or she is a defendant. While no one wants to admit this fact, the truth is that, if the DOJ prosecutors do not do their duties under Brady and Giglio the system is in trouble. The Court, the defense bar, and the nation, to a great extent, trust them. They are, therefore, entitled to respect, not suspicion, mistrust, **[*60]** or hostility, until they conduct themselves in a manner that is unprofessional. Sometimes more vigilance is achieved in a respectful environment than one where the Court asks the lawyer: "Have you been ethical today?"

One additional check that the Court requires of prosecutors is to disclose officers' and investigators' notes as "statement[s]" within the meaning of the Jencks Act. See *United States v. Harry, 2013 U.S. Dist. LEXIS 25721, 2013 WL 684671, at *1 (D.N.M. Feb. 6, 2013)*(Browning, J.). As explained above, some courts -- including the Court -- have concluded that an officer's interview notes may be "statement[s]" that the Jencks Act requires the United States to disclose. *18 U.S.C. § 3500*. See *United States v. Harry, 2013 U.S. Dist. LEXIS 25721, 2013 WL 684671, at *11-12* ("The United States must turn over to Harry, after the witness testifies at trial, any investigative notes containing statement from those witnesses . . . ."); *United States v. Tarango, 760 F. Supp. 2d at 1164, 1167* (requiring the United States to produce FBI reports, which contain statements from prosecution witnesses after those witnesses testify at trial); *United States v. Cooper, 283 F. Supp. 2d at 1238* (noting that rough interview notes may be discoverable under the Jencks Act); *United States v. Smith, 984 F.2d at 1086* ("Interview notes could be 'statements' under the [Jencks] Act if they are substantially verbatim."); *United States v. Jackson, 850 F. Supp. at 1508-09* (finding that interview notes may be producible under the Jencks Act). Officers then maintain these notes pursuant to various standards **[*61]** and protocols. See *United States v. Harrison, 524 F.2d 421, 424 n.2, 173 U.S. App. D.C. 260 (D.C. Cir. 1975)*; *United States v. Lujan, 530 F. Supp. 2d at 1267* (stating that, "[b]ecause the contents of rough interview notes may in some cases be subject to disclosure and because the potential impeachment value of the notes may not become evident until trial," the United States must preserve its rough interview notes "made by law enforcement agents during interview of potential witnesses" under *18 U.S.C. § 3500*). Officers then use their notes as the basis for their reports. When officers write their reports, however, they may exclude certain information that does not help the prosecution. These reports are then placed in a prosecutor's file, but the notes are not. To ensure that any impeachment information is disclosed, the Court requires prosecutors to disclose the investigating officer's notes as Jencks material after the government witness testifies at trial. This disclosure could reveal information that conflicts with the officer's report, serving as valuable impeachment evidence. The more often that district judges require prosecutors to disclose a testifying officer's notes, the more care officers will take to ensure that their reports reflect their notes and accurately summarize the events leading to an arrest. Even if some courts resist **[*62]** requiring such disclosure, see *United States v. Lujan, 530 F. Supp. 2d 1224, 1266 (D.N.M. 2008)*(Brack, J.), cases are randomly assigned to different judges. The threat of being assigned to a judge who requires disclosure may incentivize officers to include all exculpatory and impeachment evidence in

their formal report. Additionally, even if a prosecutor's file omits the officer's notes, courts must require prosecutors to disclose exculpatory information in officers' notes under *Brady*. See *Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)*(placing an affirmative obligation on prosecutors to learn of exculpatory evidence in others' possession); *United States v. Padilla, 2011 U.S. Dist. LEXIS 31091, 2011 WL 1103876, at *5 (D.N.M. Mar. 14, 2011)*(Browning, J.)("The *Due Process Clause of the Constitution* requires the United States to disclose information favorable to the accused that is material to either guilt or to punishment."); *United States v. Burke, 571 F.3d at 1054* (holding that the "belated disclosure of impeachment or exculpatory information favorable to the accused violates due process when an earlier disclosure would have created a reasonable doubt of guilt").

ANALYSIS

Pursuant to the Court's order at the hearing, the United States must review each testifying officer's personnel file to determine whether any Brady or Giglio material exists. If the United States uncovers any such exculpatory material, it must produce any material evidence in time for its effective **[*63]** use at trial. See *United States v. Coppa, 267 F.3d 132, 144 (2d Cir. 2001)*("[W]e reiterate the longstanding constitutional principle that as long as a defendant possesses *Brady* evidence in time for its effective use, the government has not deprived the defendant of due process of law."). The Court addressed all three of the United States' disclosure objections at the hearing. First, although the United States initially argued that it lacked access to the requested information, see Response at 6-7, it acknowledged at the hearing that the BCSO participated in the joint investigation with the federal government and that the United States had access to information within the officers' personnel files. See Tr. at 6:1-3 (Hurtado)(stating that the BCSO was participating in the joint investigation with the United States); Tr. at 6:13-24 (Court, Hurtado)(stating that the United States had already interviewed each of the officers); Tr. at 6:25-7:1 (Hurtado)(stating that the United States could likely access the officers' personnel files).[12]

Second, the United States **[*65]** originally argued that it need not produce information regarding officers who would not testify at the suppression hearing. See Response at 4-5. The Court does not require the United States to produce impeachment information on all officers, nor does it require the United States to produce this information before the suppression hearing, because *Brady* and *Giglio* do not require the United States to produce impeachment evidence before suppression hearings. See *United States v. Harmon, 871 F. Supp. at 1165* ("Even if the evidence is impeachment evidence, Brady v. Maryland did not require the United States to disclose this evidence to Harmon before his suppression hearing."). Instead, the Court requires the United States to review the personnel files of the officers who will testify at trial, and to disclose any Brady or Giglio material in time for its effective use at trial. See Tr. at 13:14-23 (Court); *United States v. Burke, 571 F.3d at 1054* (recognizing that "[i]t would eviscerate the purpose of the Brady rule and encourage gamesmanship were we to allow the government to postpone disclosures to the last minute, during trial"). The Court notes, however, that the United States asserted that it would disclose any impeachment information relating to those officers who will **[*66]** testify at the suppression hearing before the suppression hearing. See Response at 5.

---

[12] The Court has consistently stated that it cannot require the United States to go get documents from third parties or to seek documents that refuse access to the United States. See Tr. at 13:24-14:2 ("And like I said **[*64]** and I've said this in the past, I don't want to require the Government to do any more than the law requires. So I'm trying to toe that line."); *United States v. Rivas, 26 F. Supp. 3d 1082, 1105 (D.N.M. 2014)*(Browning, J.)("A prosecutor does not have a duty . . . to obtain evidence from third parties."); *United States v. Badonie, 2005 U.S. Dist. LEXIS 21928, 2005 WL 2312480, at *2 (D.N.M. Aug. 29, 2005)*(Browning, J.)("It is well settled that there is no affirmative duty upon the government to take action to discover information which it does not possess."). Here, however, the United States has such access to BCSO's personnel files, even if the BCSO still has custody or possession of them. See *United States v. Padilla, 2011 U.S. Dist. LEXIS 31091, 2011 WL 1103876, at *7 (D.N.M. March 14, 2011)*(Browning, J.)("[A] prosecutor's office cannot get around *Brady* by keeping itself in ignorance, or by compartmentalizing information about different aspects of a case."); id. ("A prosecutor must disclose information of which it has knowledge and access."); *United States v. Brooks, 966 F.2d 1500, 1503, 296 U.S. App. D.C. 219 (D.C. Cir. 1992)*(stating that a prosecutor may have a duty to search files maintained by other "governmental agencies closely aligned with the prosecution" when there is "some reasonable prospect or notice of finding exculpatory evidence"). The Court wants to ensure that the United States is the one determining that no Brady or Giglio material exists rather than the BCSO. See Tr. at 14:1-7 (Court).

Finally, the United States argues that it need not produce the requested information because Hykes has not yet shown that the information is material. See Response at 11. As the Court expressed at the hearing, however, the Court is not requiring the United States to produce information that is not material. See Tr. at 13:14-19 (Court)("Make that review, I'm not ordering any sort of production of the personnel files [or] really it's not ordering any production. It's just simply, let's have you take a look and you make an attorney's evaluation of what's there."); Tr. at 8:17-9:2 (Court). It requires only that the United States review its files for possible Brady or Giglio material, and produce any such material evidence if it exists. See *United States v. Burton, 81 F. Supp. 3d at 1254* (directing the United States to "take a second look" at certain reports "to determine whether they contain any material that must be disclosed"). Courts "are almost unanimous in holding that in response to a specific motion . . . the prosecution is required to review the identified personnel file for *Brady* material." *Snowden v. State, 672 A.2d 1017, 1023 (Del. 1996)*(Holland, J.). See *Milke v. Ryan, 711 F.3d at 1006*; *United States v. Quinn, 123 F.3d 1415, 1421 (11th Cir. 1997)*(requiring the government to **[*67]** search personnel records for Brady or Giglio material). Similarly, the current United States Attorneys' Manual also requires prosecutors "to seek all exculpatory and impeachment information from . . . federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant." United States Attorneys' Manual §9-5-001(B)(2)(2014). It is well-established that law enforcement officers' personnel files can often include Brady or Giglio material.[13] See Jonathan Abel, Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team, *67 Stan. L. Rev. 743, 746 (2015)*(compiling cases in which police officers' personnel files contained Brady and Giglio material); United States Attorneys' Manual § 9-5.100(5)(c)(recognizing that personnel files may contain Brady and Giglio material).

Furthermore, Hykes is not sending the United States on a fishing expedition. Hykes demonstrates that the officers' personnel files may contain impeachment evidence. As support, Hykes points to the officers' involvement in several excessive-force lawsuits, discrepancies between the officers' story and eyewitnesses' stories, and evidence that the officers had a personal feud with Hykes. See Tr. at 5:11-20 (Baiz); Giglio Motion at 4 (noting that witnesses have

---

[13] Personnel files can contain a wealth of exculpatory and impeachment information:

> A report in one case found that a detective's "image of honesty, competency, and overall reliability must be questioned." Records in another revealed a detective's repeated lies to internal affairs investigators, a psychological assessment that the detective **[*68]** "should not be entrusted with a gun and badge," and a warning to the police department from the office of the state attorney general: "If you had a homicide tonight . . ., I would instruct you that [the detective] not be involved in the case in any capacity." Findings from other cases excoriated officers for making false overtime claims, filing false police reports, and stealing from the police department. When this misconduct has come out, sometimes decades after trial, murder convictions have been overturned and people have been released from death row.

Jonathan Abel, Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team, *67 Stan. L. Rev. 743, 746 (2015)*(internal footnotes omitted).

The United States Attorneys' Manual also recognizes that personnel files often can contain impeachment information.

> [P]otential impeachment information relating to agency employees may include, but is not limited to . . .
>
> i) any finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during a criminal, civil, or administrative inquiry or proceedings;
>
> ii) any past or pending criminal charge brought against the employee; **[*69]**
>
> iii) any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation;
>
> iv) prior findings by a judge that an agency employee has testified untruthfully, made a knowing false statement in writing, engaged in an unlawful search or seizure, illegally obtained a confession, or engaged in other misconduct;
>
> v) any misconduct finding or pending misconduct allegation that either casts a substantial doubt upon the accuracy of any evidence -- including witness testimony -- that the prosecutor intends to rely on to prove an element of any crime charged, or that might have a significant bearing on the admissibility of prosecution evidence.

United States Attorneys' Manual § 9-5.100(5)(c).

revealed that the **[*70]** information upon which the officers relied to arrest Hykes was false and that he was arrested on site, beaten and searched without warrants); Motion to Suppress at 4 (explaining that detectives yelled "this is personal" when apprehending and allegedly beating Hykes). Cf. *United States v. Lafayette, 983 F.2d 1102, 299 U.S. App. D.C. 288 (D.C. Cir. 1993)*(affirming the denial of the appellants' request for an officer's personnel file, because "nothing in appellants' brief informs us why they have any reason to believe that the personnel files would provide any useful evidence whatsoever"); *United States v. Andrus, 775 F.2d 825, 843 (7th Cir. 1985)*(noting that the defendant was "not entitled to the personnel files of the law enforcement witnesses without even a hint that impeaching material was contained therein"). Hykes also requested specific information within the personnel files. See Giglio Motion at 2. Accordingly, the United States must search the personnel files of the testifying officers pursuant to the Court's order at the hearing, examining the list of documents that Hykes specifically requests in his Giglio Motion. See *United States v. Deutsch, 475 F.2d 55, 57 (5th Cir.1973)*(granting a mistrial for failure to produce personnel files of government witnesses), overruled on other grounds by *United States v. Henry, 749 F.2d 203 (5th Cir.1984)*; *United States v. Padilla, 2011 U.S. Dist. LEXIS 31091, 2011 WL 1103876, at *6*.

IT IS ORDERED that: (i) the Defendant's Motion for Information Pursuant to *Giglio* ***[*71]*** *v. United States* Regarding All Arresting Officers and Those Involved in the Search, filed February 29, 2016 (Doc. 25), is granted in part and denied in part; and (ii) the United States must review the personnel files of those officers who will testify at trial for exculpatory or impeachment evidence, and ask the BCSO for the specific list of items that Hykes listed in his Giglio Motion.

/s/ James O. Browning

UNITED STATES DISTRICT JUDGE

End of Document

CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was sent via electronic mail to the Court and served on the Government Appellate Division on October 20, 2023.

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36470
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Rd, Ste. 1100
Joint Base Andrews NAF, MD 20762
240-612-4770
matthew.blyth.1@us.af.mil