



materials in the correctional facility in which he is detained pending trial, except for statements made by witnesses who are currently incarcerated in certain specified jail facilities.<sup>1</sup>

The government has appealed the magistrate judge's order.<sup>2</sup> The government objects to the provision of the magistrate judge's order allowing the incarcerated defendant to possess discovery materials. At the hearing counsel for the government represented that the government did not object to the defendant reviewing such materials in the presence of his attorney—it is the defendant's continued possession of the materials in jail that the government opposes, both because it increases risks to cooperating witnesses, including even those not incarcerated in the same facility as the defendant, and because of the burden on the jail authorities if the defendant is permitted to keep large numbers of documents.<sup>3</sup>

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<sup>1</sup> The order specifies the New River Valley Regional Jail and the Bristol City Jail, local jail facilities which the Marshals Service currently utilizes to confine pretrial detainees for this court. Presumably, the magistrate judge specified those facilities because those are ones in which the defendant might conceivably be housed.

<sup>2</sup> See 28 U.S.C.A. § 636(b)(1)(A) (West 1993 & Supp. 2002) (providing that a magistrate judge may be designated to hear and determine certain pretrial matters, subject to reconsideration by a district judge where it is shown that the magistrate judge's order is clearly erroneous or contrary to law.).

<sup>3</sup> Shortly after the indictment was returned in this case, the court entered an order on the motion of the government and in the form proposed by the government allowing “grand jury . . . and other investigative materials” to be disclosed to defense counsel. The order allowed the defendant and his counsel to use “this material” but with the requirement that the

An evidentiary hearing was held on the government's appeal on June 30, 2003, at which the government produced knowledgeable law enforcement and correctional witnesses who testified regarding the potential threats to government witnesses resulting from a rule allowing incarcerated defendants to possess discovery materials that detail the cooperation that government witnesses are providing. Additionally, it was contended that allowing incarcerated individuals to maintain large numbers of documents would hamper the functioning of the detention facilities because there is not adequate space to store such materials or to provide for their viewing in a confidential manner.

Counsel for the defendant argues that it is prejudicial to the preparation of the defendant's case and in violation of his Sixth Amendment right to effective counsel to prevent the defendant from being able to review and reflect on such discovery materials while incarcerated. By necessity, defense counsel is able to visit his client in jail for limited periods of time and he urges that it is unrealistic to expect the defendant to adequately digest discovery materials—some of which may be crucial to his defense—only while in the presence of counsel.

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material not be removed from the office of defense counsel “unless kept in the personal possession of defense counsel at all times.” (Order Apr. 3, 2003.) In a written submission filed after the hearing, the government now appears to object to defense counsel having copies of witness statements, although it agrees to allow defense counsel to review such statements in the United States Attorney's office. (Letter to Court July 7, 2003, p. 2.)

The production by the government of what is broadly referred to as discovery materials is usually partly voluntary and partly required. Rule 16(a)(1) requires the government to disclose (after proper request by the defendant) oral or written statements by the defendant (Rule 16(a)(1)(A, B, and C)); the defendant's prior criminal record (Rule 16(a)(1)(D)); documents or other tangible items within the government's control that are material to the defense, or which the government intends to use at trial in its case in chief, or which were obtained from the defendant (Rule 16(a)(1)(E)); and reports of examinations or tests and opinions of experts (Rule 16(a)(1)(F and G)). Rule 26.2 and the Jencks Act, 18 U.S.C.A. § 3500 (West 2000), require the government to produce any statement of a government witness after the witness has testified. *Brady* and its progeny (including *Giglio*) require the government to disclose evidence favorable to the defendant that is "material either to guilt or punishment." 373 U.S. at 87. Such disclosure must be at a time when it might reasonably be of assistance at trial, *see Hamric v. Bailey*, 386 F.2d 390, 393 (4th Cir. 1967), and the government's obligation exists regardless of any specific direction by the court, *see United States v. Holmes*, 722 F.2d 37, 41 (4th Cir. 1983).<sup>4</sup>

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<sup>4</sup> Common categories of *Brady* and *Giglio* material are any prior criminal records and prior contradictory statements of government witnesses, in order to facilitate impeachment.

On the other hand, the government also engages in voluntary disclosure through its so-called “open file” policy, which allows the defense access to materials not technically discoverable at the time. For example, under an open file policy the government may decide to disclose witnesses’ statements before trial that would not be otherwise discoverable until after the witnesses had testified. This policy usually results in saving the government time and resources by promoting early guilty pleas and avoiding protracted discovery disputes.

The present dispute involves balancing of legitimate interests. It is possible that under some circumstances the defendant’s retention in jail of certain documents may be important to his effective representation by counsel. On the other hand, the government certainly has a valid interest in the security of its witnesses and the proper governance of its detention facilities. In the absence of particularized facts, I cannot finally determine the proper balance of these interests in this case, but I will set forth a procedure for the parties to follow leading to a determination. It is therefore **ORDERED** as follows:

1. The magistrate judge’s order entered June 17, 2003 (other than the part thereof denying the defendant’s motion for bill of particulars) is vacated;
2. The government will permit the attorney for the defendant to examine and copy all required discovery materials (or provide copies to the attorney);

3. The discovery materials are to be used solely for the defense of the case and must not be disclosed to or discussed with any person other than counsel's employed staff or retained persons directly assisting counsel in the defense of the case and any such persons must be previously advised of the court's restrictions on disclosure. All discovery materials (including any copies thereof) must be returned to the government at the conclusion of the case or counsel must certify in writing that all discovery materials (including any copies thereof) have been destroyed ;

4. The government may designate to defense counsel in writing those parts of the discovery materials that are to be either (a) viewed only by defense counsel and withheld from disclosure to the defendant or (b) may be shown to and discussed with the defendant but not left in the defendant's possession, which designations must be compiled with unless the court orders otherwise. The government must set forth the reasons for its designation. Absent any such designation, the defendant may view and retain discovery materials, subject to any reasonable restrictions imposed on detainees by any detention facility or by the Marshals Service; and

5. The defendant may contest any restriction on discovery materials by moving the court for relief. The government will bear the burden of justifying any restriction that prevents the defendant from viewing discovery materials while the defendant will bear the burden of showing that a restriction on the defendant's

personal possession of discovery materials is unreasonable. It will be presumed (subject to rebuttal) that restrictions on the defendant's personal possession of government witnesses' criminal records, prior statements and other materials relating to government witnesses are reasonable.

ENTER: July 24, 2003

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United States District Judge