Office of the Attorney General

Washington, D. C. 20530

January 6, 2017

MEMORANDUM FOR HEADS OF DEPARTMENT COMPONENTS

FROM: THE ATTORNEY GENERAL Loretta E. Lynch

SUBJECT: Recommendations of the National Commission on Forensic Science; Announcement for NCFS Meeting Twelve

As part of the Department's ongoing coordination with the National Commission on Forensic Science (NCFS), I am responding today to several NCFS recommendations to advance and strengthen forensic science. These recommendations involve establishing a National Disaster Call Center and ensuring that pretrial discovery of forensic evidence is comprehensive.

I am pleased to announce today that the Department supports the principal goals of the Commission's National Disaster Call Center proposal, under which the public can report missing persons and medicolegal death investigation offices can use those reports to assist in identifying human remains in the immediate aftermath of a disaster. I have directed Department staff to share the recommendation with the Departments of Homeland Security and Health and Human Services. I also have appointed a liaison to work with these agencies to consider this recommendation and determine how agencies can coordinate our separate efforts.

I am also pleased to announce that the Department has considered the Commission's recommendation on pretrial discovery. Earlier this week, the Deputy Attorney General issued a memorandum to Department personnel, entitled *Supplemental Guidance for Prosecutors Regarding Criminal Discovery Involving Forensic Evidence and Experts*, which is attached to this document.

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

January 5, 2017

MEMORANDUM FOR DEPARTMENT PROSECUTORS
DEPARTMENT FORENSIC SCIENCE PERSONNEL

FROM: Sally Q. Yates
Deputy Attorney General

SUBJECT: Supplemental Guidance for Prosecutors Regarding Criminal Discovery Involving Forensic Evidence and Experts

Forensic evidence is an essential tool in helping prosecutors ensure public safety and obtain justice for victims of crime. When introduced at trial, such evidence can be among the most powerful and persuasive evidence used to prove the government's case. Yet it is precisely for these reasons that prosecutors must exercise special care in how and when forensic evidence is used. Among other things, prosecutors must ensure that they satisfy their discovery obligations regarding forensic evidence and experts, so that defendants have a fair opportunity to understand the evidence that could be used against them.

In January 2010, then-Deputy Attorney General David Ogden issued a memorandum entitled *Guidance for Prosecutors Regarding Criminal Discovery* (the "Ogden Memo"), which provided general guidance on gathering, reviewing, and disclosing information to defendants.[1] Given that most prosecutors lack formal training in technical or scientific fields, the Department has since determined that it would be helpful to issue supplemental guidance that clarifies what a prosecutor is expected to disclose to defendants regarding forensic evidence or experts. Over the past year, a team of United States Attorneys, Department prosecutors, law enforcement personnel, and forensic scientists worked together to develop the below guidance, which serves as an addendum to the Ogden Memo.

All Department prosecutors should review this guidance before handling a case involving forensic evidence. In addition, any individuals involved in the practice of forensic science at the Department, especially those working at our law enforcement laboratories, should familiarize themselves with this guidance so that they can assist prosecutors when the government receives a request for discoverable material in a case. Thank you for your attention to this issue and for the work you do every day to further the proud mission of this Department.

[1] Memorandum from David W. Ogden, Deputy Attorney General, to Department Prosecutors, *Guidance for Prosecutors Regarding Criminal Discovery*, January 4, 2010, available at http://dojnet.doj.gov/usao/eousa/ole/usabook/memo/ogden_memo.pdf.

SUPPLEMENTAL GUIDANCE FOR PROSECUTORS REGARDING CRIMINAL DISCOVERY INVOLVING FORENSIC EVIDENCE AND EXPERTS[1]

Forensic science covers a variety of fields, including such specialties as DNA testing, chemistry, and ballistics and impression analysis, among others. As a general guiding rule, and allowing for the facts and circumstances of individual cases, prosecutors should provide broad discovery relating to forensic science evidence as outlined here. Disclosure of information relating to forensic science evidence in discovery does not mean that the Department concedes the admissibility of that information, which may be litigated simultaneously with or subsequent to disclosure.

The Duty to Disclose, Generally

The prosecution's duty to disclose is generally governed by Federal Rules of Criminal Procedure 16 and 26.2, the Jencks Act (18 U.S.C. §3500), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). In addition, §9-5.001 of the United States Attorney's Manual describes the Department's policy for disclosure of exculpatory and impeachment material.

Rule 16 of the Federal Rules of Criminal Procedure establishes three disclosure responsibilities for prosecutors that may be relevant to forensic evidence. First, under Fed. R. Crim. P. 16(a)(1)(F), the government must, upon request of the defense, turn over the results or reports of any scientific test or experiment (i) in the government's possession, custody or control, (ii) that an attorney for the government knows or through due diligence could know, and (iii) that would be material to preparing the defense or that the government intends to use at trial. Second, under Fed. R. Crim. P. 16(a)(1)(G), if requested by the defense, the government must provide a written summary of any expert testimony the government intends to use at trial. At a minimum, this summary must include the witness's opinions, the bases and reasons for those opinions, and the expert's qualifications. Third, under Fed. R. Crim. P. 16(a)(1)(E), if requested by the defense, the government must produce documents and items material to preparing the defense that are in the possession, custody, or control of the government. This may extend to records documenting the tests performed, the maintenance and reliability of tools used to perform those tests, and/or the methodologies employed in those tests.

Both the Jencks Act and *Brady/Giglio* may also come into play in relation to forensic evidence. For example, a written statement (report, email, memo) by a testifying forensic witness may be subject to disclosure under the Jencks Act if it relates to the subject matter of his or her testimony. Information providing the defense with an avenue for challenging test results may be *Brady/Giglio* information that must be disclosed. And, for forensic witnesses employed by the government, *Giglio* information must be gathered from the employing agency and reviewed for possible disclosure.

These are the minimum requirements, and the Department's discovery policies call for disclosure beyond these thresholds.

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[1] This document is not intended to create, does not create, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.

The Duty to Disclose in Cases with Forensic Evidence and Experts

The Department's policy to provide discovery over and above the minimum legal thresholds applies to cases with forensic evidence. Rule 16's disclosure requirements – disclosing the results of scientific tests (16(a)(1)F)), the witness' written summary (16(a)(1)(G)), and documents and items material to preparing the defense (16(a)(1)(E)) – are often jointly satisfied when presenting expert forensic testimony, since disclosure of the test results, the bases for those results, and the expert's qualifications will often provide all the necessary information material to preparation of the defense. But, depending on the complexity of the forensic evidence, or where multiple forensic tests have been performed, the process can be complicated because it may require the prosecutor to work in tandem with various forensic scientists to identify and prepare additional relevant information for disclosure. Although prosecutors generally should consult with forensic experts to understand the tests or experiments conducted, responsibility for disclosure ultimately rests with the prosecutor assigned to the case.

In meeting obligations under Rule 16(a)(1)(E), (F), and (G), the Jencks Act, and *Brady/Giglio*, and to comply with the Department's policies of broad disclosure, the prosecutor should be attuned to the following four steps:

1. First, the prosecutor should obtain the forensic expert's laboratory report, which is a document that describes the scope of work assigned, the evidence tested, the method of examination or analysis used, and the conclusions drawn from the analyses conducted. Depending on the laboratory, the report may be in written or electronic format; the laboratory may routinely route the report to the prosecutor, or the prosecutor may need to affirmatively seek the report from the forensic expert or his or her laboratory. In most cases the best practice is to turn over the forensic expert's report to the defense if requested. This is so regardless of whether the government intends to use it at trial or whether the report is perceived to be material to the preparation of the defense. If the report contains personal information about a victim or witness, or other sensitive information, redaction may be appropriate and necessary. This may require court authorization if the forensic expert will testify, as the report likely will be considered a Jencks Act statement. (See the Additional Considerations section below.)

2. Second, the prosecutor should disclose to the defense, if requested, a written summary for any forensic expert the government intends to call as an expert at trial. This statement should summarize the analyses performed by the forensic expert and describe any conclusions reached. Although the written summary will vary in length depending on the number and complexity of the tests conducted, it should be sufficient to explain the basis and reasons for the expert's expected testimony. Oftentimes, an expert will provide this information in an "executive summary" or "synopsis" section at the beginning of a report or a "conclusion" section at the end. Prosecutors should be mindful to ensure that any separate summary provided pursuant to Rule 16(a) should be consistent with these sections of the report. Further, any changes to an expert's opinion that are made subsequent to the initial disclosure to the defense ordinarily should be made in writing and disclosed to the defense.

3. Third, if requested by the defense, the prosecutor should provide the defense with a copy of, or access to, the laboratory or forensic expert's "case file," either in electronic or hard-copy form. This information, which may be kept in an actual file or may be compiled by the forensic expert, normally will describe the facts or data considered by the forensic expert, include the underlying documentation of the examination or analysis performed, and contain the material necessary for another examiner to understand the expert's report. The exact material contained in a case file varies depending on the type of forensic analysis performed. It may include such items as a chain-of-custody log; photographs of physical evidence; analysts' worksheets or bench notes; a scope of work; an examination plan; and data, charts and graphs that illustrate the results of the tests conducted.

   In some circumstances, the defense may seek laboratory policies and protocols. To the extent that a laboratory provides this information online, the prosecutor may simply share the web address with the defense. Otherwise, determinations regarding disclosure of this information should be made on a case-by-case basis in consultation with the forensic analysts involved, taking into account the particularity of the defense's request and how relevant the request appears to be to the anticipated defenses.

4. Fourth, the prosecutor should provide to the defense information on the expert's qualifications. Typically, this material will include such items as the expert's curriculum vitae, highlighting relevant education, training and publications, and a brief summary that describes the analyst's synopsis of experience in testifying as an expert at trial or by deposition. The prosecutor should gather potential *Giglio* information from the government agency that employs the forensic expert. If using an independent retained forensic expert, the prosecutor should disclose the level of compensation as potential *Giglio* information; the format of this disclosure is left to the discretion of the individual prosecuting office.

Disclosure should be made according to local rules but at least as soon as is reasonably practical and, of course, reasonably in advance of trial. It is important that the prosecutor leave sufficient time to obtain documents and prepare information ahead of disclosure. When requesting supporting documents from a laboratory's file regarding a forensic examination, the prosecutor should consult the guidelines set by the laboratory for the manner in which discovery requests should be made, and for the time required for them to process and deliver the materials to the prosecutor. Further, if multiple forensic teams have worked on a case, the prosecutor should build in sufficient time to consult with, and obtain relevant materials from, each relevant office or forensic expert.

Additional Considerations

Certain situations call for special attention. These may include cases with classified information or when forensic reports reveal the identities of cooperating witnesses or undercover officers, or disclose pending covert investigations. In such cases, when redaction or a protective order may be necessary, prosecutors should ordinarily consult with supervisors.

Laboratory case files may include written communications, including electronic communication such as emails, between forensic experts or between forensic experts and prosecutors. Prosecutors should review this information themselves to determine which communications, if any, are protected and which information should be disclosed under *Brady/Giglio*, Jencks, or Rule 16. If the circumstances warrant (for example, where review of a case file indicates that tests in another case or communications outside the case file may be relevant), prosecutors should request to review additional materials outside the case file. At the outset of a case, prosecutors should ensure that they and all forensic analysts involved are familiar with and follow the Deputy Attorney General's memorandum entitled "Guidance on the Use, Preservation, and Disclosure of Electronic Communications in Federal Criminal Cases": http://dojnet.doj.gov/usao/eousa/ole/usabook/memo/dag_ecom.pdf.

Finally, when faced with questions about disclosure, prosecutors should consult with a supervisor, as the precise documents to disclose tend to evolve, based especially upon the practice of particular laboratories, the type and manner of documentation at the laboratory, and current rulings from the courts.