Memorandum

United States Attorney
Eastern District of North Carolina

Subject	Date
Eastern District of North Carolina Criminal Discovery Policy	December 7, 2017
To	**From**
All Criminal AUSAs/SAUSA	Robert J. Higdon, Jr. United States Attorney

Nearly eighty years ago, in Berger v. United States, 295 U.S. 78, 88 (1935), the Supreme Court described the mission of a federal prosecutor as follows:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

In order to fulfill this sacred responsibility, it is incumbent upon each AUSA[1] in this district to diligently prosecute criminal cases in a manner that affords each criminal defendant with their rights under the Constitution, including their Sixth Amendment Right to a fair trial. A central component to a defendant's right to a fair trial is the receipt of timely and complete discovery.

In order to ensure that each AUSA provides such timely discovery, the following Criminal Discovery Policy ("Discovery Policy") is designed to provide disclosures that are broader than required by the Constitution, applicable caselaw, federal statutes, Federal Rules of Criminal Procedure, Local Criminal Rules, and the policies of the United States Attorney's Manual ("USAM"). This Discovery Policy is intended to establish a methodical approach for a prosecutor to follow in complying with discovery obligations. While the policy is designed to err on the side of disclosure, it recognizes that other interests, such as witness security and national security, are also critically important to our mission and might require delayed or restricted disclosure. However, such limitations are the exception, rather than the rule, and are subject to specific Department of Justice (DOJ) policies. All prosecutors in this office are responsible for fully complying with this Discovery Policy and are required to consult with our Criminal Discovery Coordinator regarding any questions pertaining to the scope of their discovery obligations.

[1]These discovery policies also cover SAUSAs and United States Department of Justice Attorneys prosecuting cases in the Eastern District of North Carolina.

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I. INTRODUCTION.

The Fifth Amendment to the Constitution provides a criminal defendant with the right to "due process of law." This section of the Fifth Amendment, known as the Due Process Clause, was held by the Supreme Court in Brady v. Maryland, 373 U.S. 83, 87 (1963), to require a prosecutor to disclose exculpatory information that is material to a determination of a defendant's guilt or punishment. The Supreme Court later found that the Due Process Clause also requires a prosecutor to disclose material that could be used to challenge or impeach the credibility of government witnesses. Giglio v. United States, 405 U.S. 150, 154 (1972). In addition to these Constitutionally-based discovery obligations, an AUSA is also required to comply with disclosure requirements contained in Federal Rules of Criminal Procedure 16 and 26.2, Federal Rules of Evidence 404(b), 413, 414, and 1006, 18 U.S.C. § 3500, Local Criminal Rule 16.1, USAM §9-5.001, *et. seq.*, including the extensive discovery guidance provided by the "Guidance for Prosecutors Regarding Criminal Discovery" issued by then Deputy Attorney General David Ogden on January 4, 2010, the supplemental discovery guidance provided by the "Supplemental Guidance for Prosecutors Regarding Criminal Discovery Involving Forensic Evidence and Experts" issued by then Deputy Attorney General Sally Q. Yates on January 5, 2017, specific court orders entered in particular cases, and applicable rules of professional conduct.

In order to meet discovery obligations in a given case, each AUSA **must** be familiar with the legal concepts and authorities referenced above. In addition, each AUSA **must** be familiar with the discovery obligations set forth herein, which provide broad discovery beyond that required by the authorities referenced above.[2] In essence, this Discovery Policy requires AUSAs to handle decisions regarding which disclosures to make as if a rebuttable presumption exists requiring that the defense be given access to everything of an evidentiary nature that is in the custody or control of our office.[3] However, this does not mean that our files are literally turned over to the defense. Our case files contain many things, such as prosecution memoranda, that are part of an AUSA's work product/deliberative process and should not be shared outside the office. Furthermore, as noted by the Deputy Attorney General:

> Prosecutors should never describe the discovery being provided as 'open file.' Even if the prosecutor intends to provide expansive discovery, it is always possible that something will be inadvertently omitted from production and the prosecutor will then have unintentionally misrepresented the scope of materials provided. Furthermore, because the concept of the 'file' is imprecise, such a representation exposes the prosecutor to broader disclosure

[2]The following Discovery Policy provides guidance only and does not create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party, or witness in any administrative, civil, or criminal matter. See United States v. Caceres, 440 U.S. 741 (1979).

[3]For a discussion of the scope of evidence deemed to be in the custody or control of our office, consult Section II of this memorandum, entitled "Prosecutor's Obligation to Review Material."

> requirements than intended or to sanction for failure to disclose documents, e.g. agent notes or internal memos, that the court may deem to have been part of the 'file.'

Under our Discovery Policy, a prosecutor will typically provide the defense, during the time provided for discovery by the local rule, access to all memoranda of interviews (e.g., FBI 302s), access to evidentiary documents (whether we plan to introduce them or not), physical evidence, expert reports (e.g., lab reports), and audio/videotapes. The principal ways in which such expansive pretrial discovery goes beyond that required by the caselaw, statutes, and rules are that: (1) the defense gets access to nearly all "Jencks" materials early;[4] (2) the Government provides copies of rough notes relating to reports of both state and federal agents; and (3) discovery includes evidence even though it may not ultimately be used in the Government's case-in-chief. The addresses, telephone numbers, and social security numbers of witnesses are redacted from copies of documents provided to the defense.

There are many advantages to expansive pretrial discovery. It eliminates haggling over discovery and allows the Government, Defense Counsel, and the Court to concentrate on the central issues of the case. Such practice also encourages timely agreements to plead guilty. Furthermore, in the long term, such a policy fosters and supports a reputation of candor and fair dealing for all of the AUSAs in this office. This office believes that the ends of justice and the proper management of our limited resources support an expansive approach to discovery practice.

Nevertheless, some cases may not be appropriate for this broad approach to discovery, because of national security issues, witness security concerns, or legitimate fear that obstruction of justice may occur. Discovery practice in cases involving national security should be in accordance with Section VI of this memorandum. As noted below, in cases involving witness security concerns or obstruction of justice dangers, it is within the discretion of the AUSA to limit pretrial discovery to that required by the applicable statutes, rules, and case law. However, this discretion should be exercised sparingly and requires supervisory approval. It is our preference to obtain a court order allowing for a delay in providing such information. See Fed. R. Crim. P. 16(d)(1).

II. PROSECUTOR'S OBLIGATION TO REVIEW MATERIAL.

Each AUSA "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Kyles v. Whitley, 514 U.S. 419, 437 (1995). What this means is that it is the obligation of each AUSA to seek all exculpatory and

[4]As part of our expansive discovery policy, the prosecutor may, but is not required to, give such early access to grand jury transcripts of non-defendant witnesses who are prospective trial witnesses or whose grand jury testimony contains information relevant to the government's case or material to preparing the defense, without seeking a court order. See Standing Order of the USDC-EDNC, filed March 5, 1985, attached hereto. If the defendant testified before the grand jury, a transcript of his/her testimony must be provided within the discovery period set forth under Local Criminal Rules. See Fed. R. Crim. P. 16(a)(1)(B)(iii).

impeachment information from all members of the AUSA's prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against a defendant. See USAM §9-5.001(B)(2). In addition to searching for exculpatory and impeachment material, the AUSA must also search for material covered by Federal Rules of Criminal Procedure 16 and 26.2, Local Criminal Rule 16.1, and the Jencks Act (see below). This search duty is one which you must take very seriously and which goes to the heart of our obligations under federal law.

A. The Scope of Review.

In most cases, the scope of an AUSA's review for discoverable material will include the agents and law enforcement officers within the relevant district working on the case. However, in multi-district investigations and parallel criminal and civil proceedings, this definition will necessarily be adjusted to fit the circumstances. In addition, in complex cases that involve parallel proceedings with regulatory agencies (SEC, FDIC, USDA, EPA, etc.), or other non-criminal investigative or intelligence agencies, the prosecutor should consider whether the relationship with the other agency is close enough to make it a part of the prosecution team for discovery purposes. You should err on the side of including such agency within the scope of your team.

Some factors to be considered in determining whether to review potentially discoverable information from another federal agency include, but are not limited to:

- Whether the prosecutor and the agency conducted a joint investigation or shared resources related to investigating the case;
- Whether the agency played an active role in the prosecution, including conducting arrests or searches, interviewing witnesses, developing prosecutorial strategy, participating in targeting discussions, or otherwise acting as part of the prosecution team;
- Whether the prosecutor knows of and has access to discoverable information held by the agency;
- Whether the prosecutor has obtained other information and/or evidence from the agency;
- The degree to which information gathered by the prosecutor has been shared with the agency;
- Whether a member of an agency has been made a Special Assistant United States Attorney;
- Whether an agency has been listed as involved in the investigation in any press release issued by the Government;

- The degree to which decisions have been made jointly regarding civil, criminal, or administrative charges; and

- The degree to which the interests of the parties in parallel proceedings diverge such that information gathered by one party is not relevant to the other party.

Many cases in our office involve investigations conducted by state and local law enforcement. Such investigations typically involve multi-agency state/federal task forces or cases which began solely as state prosecutions and then were adopted as federal cases. In the Fourth Circuit, evidence that must be disclosed under Rule 16 is specifically limited "to documents within the federal government's actual possession, custody, or control." United States v. Pinto, 905 F.2d 47 (4th Cir. 1990); see also U.S. v. Gatto, 763 F.2d 1040 (9th Cir. 1985); but cf. U.S. v. Capers, 61 F.3d 1100, 1104 (4th Cir. 1995) (In a Jencks/Giglio context, the court stated, "It follows then, that we cannot say that the government had actual *or constructive possession* of Salone's spiral notebook.")Prosecutors should seek discoverable information from state and local agencies fulfilling a major role in the case as if they were federal agencies.

B. What to Review.

To ensure that all discovery is disclosed on a timely basis, generally all potentially discoverable materials within the custody or control of the prosecution team should be reviewed. The review process should cover the following areas:

1. Investigative Agency's Files: With respect to DOJ law enforcement agencies, the prosecutor, with limited exceptions,[5] should be granted access to the substantive case file and any other file or document the prosecutor has reason to believe may contain discoverable information related to the matter being prosecuted.[6] Therefore, the prosecutor can personally review the file or documents or may choose to request production of potentially discoverable materials from the case agents. With respect to outside agencies, the prosecutor should request access to files and/or production of all potentially discoverable material. The investigative agency's entire investigative file, including documents such as FBI Electronic Communications ("EC"), inserts, emails, and the like, should be reviewed for discoverable information. If such information is contained in a document that the agency deems to be an "internal" document such as an email, an insert, an administrative document, or an EC, it may not be necessary to produce the internal document, but it will be necessary to produce all of the discoverable information contained in it. Prosecutors should also discuss with the investigative agency whether files from other investigations or non-

[5]Exceptions to a prosecutor's access to DOJ law enforcement agencies' files are documented in agency policies and may include, for example, access to a non-testifying source's files.

[6]Nothing in this section alters the DOJ's Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses as contained in USAM §9-5.100.

investigative files such as confidential source files might contain discoverable information. Those additional files or relevant portions thereof should also be reviewed as necessary.

2. Confidential Informant ("CI")/Confidential Witness ("CW")/Confidential Source ("CS") Files: The credibility of cooperating witnesses or informants will always be at issue if they testify during a trial. Therefore, prosecutors are entitled to access to the agency file for each testifying CI, CW, or CS. Those files should be reviewed for discoverable information and copies made of relevant portions for discovery purposes. The entire informant/source files, not just the portion relating to the current case, including all proffer, immunity, other agreements, validations, assessments, payment information, any other benefits offered to such witness, and other potential witness impeachment information should be included within this review. In conducting such review, you will need to follow the particular agency's procedures for requesting the review of such file.

Prosecutors should take steps to protect the non-discoverable, sensitive information found within a CI, CW, or CS file. Further, prosecutors should consider whether discovery obligations arising from the review of the CI, CW, or CW files may be fully discharged while better protecting government or witness interests (such as security or privacy) via a summary letter to defense counsel rather than producing the record in its entirety.

Prosecutors must always be mindful of security issues that may arise with respect to disclosures from confidential source files. Prior to disclosure, prosecutors should consult with the investigative agency to evaluate any such risks and to develop a strategy for addressing those risks or minimizing them as much as possible, consistent with discovery obligations.

3. Evidence and Information Gathered During the Investigation: Generally, all evidence and information gathered during the investigation should be reviewed, including anything obtained during searches or pursuant to subpoenas, or the like. As discussed more fully below, in cases involving a large volume of potentially discoverable information, prosecutors may discharge their disclosure obligations by choosing to make the voluminous information available to the defense.

4. Documents or Evidence Gathered by Civil Attorneys and/or Regulatory Agency in Parallel Civil Investigations: If a prosecutor has determined that a regulatory agency, such as the SEC, is a member of the prosecution team for purposes of defining discovery obligations, that agency's files should be reviewed. See US v. Parker, 790 F.3d 550 (4th Cir. 2015) ("We similarly are unpersuaded by the government's argument that its disclosure obligations were not triggered because the prosecution team was unaware before trial of the imminent civil complaint initiated by the SEC and filed by a different division of the United States Attorney's Office in South Carolina.") Of course, if a regulatory agency is not part of the prosecution team but is conducting an administrative investigation or proceeding involving the same subject matter as a criminal investigation, prosecutors may very well want to ensure that those files are reviewed not only to locate discoverable information, but to locate inculpatory information that may advance the

criminal case. Where there is an ongoing parallel civil proceeding in which DOJ civil attorneys are participating, such as a qui tam case, the civil files should also be reviewed.

In addition, because habeas corpus motions are typically handled by our Civil Division, you should check to determine whether any cooperating co-defendants that have already been sentenced have filed any habeas corpus motions that might contain material that could be used to impeach them.

5. Substantive Case-Related Communications: Substantive case-related communications may contain discoverable information. Those communications that contain discoverable information should be maintained in the case file or otherwise preserved in a manner that associates them with the case or investigation. "Substantive" case-related communications are most likely to occur (1) among prosecutors and/or agents; (2) between prosecutors and/or agents and witnesses and/or victims; and (3) between victim-witness coordinators and witnesses and/or victims. Such communications may be memorialized in emails, memoranda, or notes. "Substantive" communications include factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or interactions with witnesses/victims, and factual issues relating to credibility. Communications involving case impressions or investigative or prosecution strategies without more would not ordinarily be considered discoverable, but substantive case-related communications should be reviewed carefully to determine whether all or part of a communication (or the information contained therein) should be disclosed.

Prosecutors should also remember that with few exceptions (see, e.g., Fed. R. Crim. P. 16(a)(1)(B)(ii)) the format of the information does not determine whether it is discoverable. For example, material exculpatory information that the prosecutor receives during a conversation with an agent or a witness is not less discoverable than if that same information were contained in a case report or an email. Thus, an AUSA would be obligated to provide such information to defense in a letter or by having an agent summarize such information in a case report and providing such report to the defense.

6. Potential Giglio Information Relating to Law Enforcement Witnesses: Prosecutors should have candid conversations with the law enforcement officers with whom they work regarding any potential Giglio issues, and they should follow the procedure established in USAM §9-5.100 whenever necessary before calling the law enforcement employee as a witness.

7. Potential Giglio Information Relating to both Law Enforcement and Non-Law Enforcement Witnesses and Federal Rule of Evidence 806 Declarants: All potential Giglio information known by or in the possession of the prosecution team relating to non-law enforcement witnesses should be gathered and reviewed. That information includes, but is not limited to:

- Prior inconsistent statements (possibly including inconsistent attorney proffers, see Spicer v. Roxbury Correctional

Institute, 194 F.3d 547 (4th Cir. 1999); United States v. Triumph Capital Group, 544 F.3d 149 (2nd Cir. 2008));

- Statements or reports reflecting witness statement variations (see below);

- Benefits provided to non-law enforcement witnesses including:

  -Dropped or reduced charges;
  -Immunity;
  -Proffer letter agreements;
  -Agreements to toll the statute of limitations;
  -Expectations of downward departures or motions for reduction of sentence;
  -Assistance in a state or local criminal proceeding;
  -Agreements to not pursue federal charges against a target due to pending state charges;
  -Local law enforcement statements suggesting that charges may be dropped based on cooperation;
  -Considerations regarding forfeiture of assets;
  -Stays of deportation or other immigration status considerations;
  -S-Visas;
  -Monetary benefits or payments;
  -Non-prosecution agreements;
  -Letters to other law enforcement officials (e.g. state prosecutors, parole boards) setting forth the extent of a witness's assistance or making substantive recommendations on the witness's behalf;
  -Relocation assistance;
  -Consideration or benefits to culpable or at risk third-parties;

- Other known conditions that could affect the witness's bias such as:

  -Animosity toward the defendant;
  -Animosity toward a group of which the defendant is a member or with which the defendant is affiliated;
  -Relationship with a victim;
  -Known but uncharged criminal conduct (that may provide an incentive to curry favor with a prosecutor);

- Prior acts under Fed. R. Evid. 608;

- Prior convictions under Fed. R. Evid. 609;

- Known substance abuse or mental health issues or other issues that could affect the witness's ability to perceive and recall events.

8. Information Obtained in Witness Interviews: Although not required by law, generally speaking, witness interviews should always be memorialized by the agent in an official report within a reasonable time after the interview has taken place. Under Fourth Circuit law, the Government need not preserve the rough interview notes of a government agent when those notes have been incorporated into a formal interview report. United States v. Hall, 93 F.3rd 126,131 (4th Cir. 1996); United States v. Hinton, 719 F.2d 711, 722 (4th Cir. 1983). However, although not required by law or DOJ policy, our Office has exercised its discretion to impose an obligation on AUSAs in this District to include federal and state agency rough notes from interviews in discovery. [7]

When a prosecutor participates in an interview with an investigative agent, the prosecutor and agent should discuss note-taking responsibilities and memorialization before the interview begins. If more than one agent attends the interview, only the agent tasked with preparing the formal summary of interview should be allowed to take notes. Prosecutors should never conduct an interview without an agent present to avoid the risk of making themselves a witness to a statement and being disqualified from handling the case if the statement becomes an issue. If exigent circumstances make it impossible to secure the presence of an agent during an interview (and this should be extremely rare), prosecutors should try to have another office employee present as a witness. Interview memoranda of witnesses expected to testify, and of individuals who provided relevant information but are not expected to testify, should be reviewed.

a. Witness Statement Variations and the Duty to Disclose: Some witnesses' statements will vary during the course of an interview or investigation. For example, they may initially deny involvement in criminal activity, and the information they provide may broaden or change considerably over the course of time, especially if there are a series of debriefings that occur over several days or weeks. Material variances in a witness's statements should be memorialized, even if they are within the same interview, and they should be provided to the defense as Giglio information.

b. Trial Preparation Meetings with Witnesses: Trial preparation meetings with witnesses generally need not be memorialized. However, prosecutors should be particularly attuned

[7]This decision is made, in part, in light of requirements imposed on state law enforcement pursuant to N.C. Gen. Stat. §15A-903(a)(1). This policy change is applicable to any cases indicted or otherwise charged after September 6, 2013.

to new or inconsistent information disclosed by the witness during a pre-trial witness preparation session. New information that is exculpatory or impeachment information that is revealed in a witness preparation session must be disclosed to defense immediately. Similarly, if the new information represents a variance from the witness's prior statements, prosecutors should consider whether memorialization and disclosure is necessary consistent with the provisions of subparagraph (a) above. This may be done by writing a letter to defense counsel summarizing the Brady or Giglio material that surfaced during the trial preparation meeting.

c. Agent Notes: As noted above, an agent's rough notes from witness interviews (effective on any cases charged after the date of the issuance of this Discovery Policy).

III. MANNER OF CONDUCTING REVIEW.

Having gathered the information described above, AUSAs must ensure that the material is reviewed to identify discoverable information. It would be preferable if prosecutors could review the information themselves in every case, but such review is not always feasible or necessary. The prosecutor is ultimately responsible for compliance with discovery obligations. Accordingly, the prosecutor should develop a process for review of pertinent information to ensure that discoverable information is identified. Because the responsibility for compliance with discovery obligations rests with the prosecutor, the prosecutor's decision about how to conduct this review is controlling. This process may involve agents, paralegals, agency counsel, and computerized searches. **Although prosecutors may delegate the process and set forth criteria for identifying potentially discoverable information, prosecutors should never delegate the disclosure determination itself**. In cases involving voluminous evidence obtained from third parties, prosecutors should consider providing defense access to the voluminous documents to avoid the possibility that a well-intentioned review process nonetheless fails to identify material discoverable evidence.

Such broad disclosure may not be feasible in national security cases involving classified information. Indeed, many national security cases involve classified information which is handled and disclosed pursuant to the Classified Information Procedures Act.

IV. TIMING OF DISCOVERY DISCLOSURES.

A. Pre-Charge Discovery.

Courts have not interpreted Brady and its progeny to require discovery to a defendant in the pre-indictment phase of a case. However, informal pre-indictment discovery may be appropriately given in connection with negotiations for a pre-indictment resolution to the case. A

memorandum to the file, or cover letter identifying the documents and materials provided to defense counsel, and the date and manner such discovery was provided, is crucial and mandatory on every occasion that informal discovery is provided. Moreover, if discovery is provided in an electronic medium, attorneys should maintain an exact duplicate of what is disclosed to defense counsel so that they can properly respond to any discovery disputes which may arise. Grand jury testimony may not be provided as pre-indictment informal discovery without an appropriate court order pursuant to Federal Rule of Criminal Procedure 6(e).

B. 21 Day Deadline.

Local Criminal Rule 16.1(b)(1)-(7) requires the Government to provide the defense with any exculpatory evidence and with disclosures required by Federal Rule of Criminal Procedure 16 within 21 days after the indictment or initial appearance, whichever comes later (21 Day Deadline"). The disclosure may be made during an in-person meeting or by mail. Local Criminal Rule 16.1(d). Although Jencks[8] disclosures are not due until after a witness testifies, AUSA's should provide broad disclosure of Jencks material at the 21 Day Deadline or as soon thereafter as possible. In limited instances where available Jencks is not provided to defense at the 21 Day Deadline (such as in instances involving the danger of witness intimidation) in the interest of fairness and trial efficiency our policy is to provide the Jencks material on the Thursday before trial. It is worth noting that defense attorneys also have discovery obligations under Federal Rules of Criminal Procedure 16 and 26.2 and Local Criminal Rule 16.1. Furthermore, as noted below, both the Government and the defense have a continuing obligation pursuant to Local Criminal Rule 16.1(e) to provide supplemental discovery to the defense for material obtained following the 21 Day Deadline. Any decision to withhold Rule 16 material must be made pursuant to a court order obtained pursuant to Federal Rule of Criminal Procedure 16(d)(1).

[8]The Jencks Act grants to the defense a right to production of any prior statements of a Government witness relating to the subject matter of the testimony after the witness has testified on direct examination. If there is any exculpatory material in the prior statement then disclosure of such material would be due at the 21 Day Deadline.

C. Local Criminal Rule 16.1(e) Continuing Discovery Obligations.

After you have made your initial discovery disclosures, you will, in the course of trial preparation, almost always come into possession or control of additional documents related to the case. For example, during in-person interviews of witnesses previously interviewed by investigators, you may receive copies of new documents. This is covered by Federal Rule of Criminal Procedure 16(c) and Local Criminal Rule 16.1(e), each of which imposes a continuing discovery obligation on prosecutors and defense counsel. Such supplemental discovery disclosures should be made promptly upon receiving or being given access to such material.

D. Expert Witness and Federal Rule of Evidence 1006 Disclosures.

Federal Rule of Criminal Procedure 16 requires disclosure upon the request of the Defendant of a written summary of a testifying expert's expected testimony, including the expert's opinion, bases and reasons for the opinions, and the expert's qualifications. If an expert reports exist, such as a lab report in a drug case, they should be provided to the defendant at the 21 Day Deadline. However, because in many cases it is necessary to avoid expense of an expert until the case gets closer to trial, the AUSA should make such disclosure as soon as possible, but no later than one week prior to trial. The discovery guidance provided by the "Supplemental Guidance for Prosecutors Regarding Criminal Discovery Involving Forensic Evidence and Experts" issued by then Deputy Attorney General Sally Q. Yates on January 5, 2017, clarifies what a prosecutor is expected to disclose regarding forensic evidence or experts.

As an AUSA, you are strongly encouraged to utilize summary exhibits of voluminous material that cannot be conveniently examined in court. This practice greatly simplifies your trial presentation and also reduces the length of the trial, saving judicial resources. Pursuant to Federal Rule of Evidence 1006, "[t]he proponent must make the originals or duplicates [of such voluminous material] available for examination or copying, or both, by other parties at a reasonable time and place." Reasonable time is generally interpreted to mean within a sufficient amount of time prior to trial to allow defense counsel time to confirm the accuracy of the summary exhibit.

E. Federal Rules of Evidence 404(b), 413, and 414.

Rule 404(b) requires reasonable pretrial notice of other crimes or bad act evidence to be offered by the United States. According to Rule 404(b)(2), prior to trial the prosecutor must provide reasonable notice of the general nature of any such evidence that the prosecutors intends to use at trial." Rules 413 and 414 allow for "similar crimes" evidence in sexual-assault and child-molestation cases. As provided in Rule 413(b) and 414(b), if the prosecutor intends to proffer such evidence at trial he or she is required to provide certain disclosures to defense at least 15 days prior to trial, or at a later date if allowed by the Court for good cause.

V. RECURRING ISSUES.

A. Witness Danger Issues.

Section 9-6.200 of the USAM states that the names and other personal information of victims and witnesses are private and should be disclosed only pursuant to the Government's discovery obligations. It is also noted that "[i]nsuring the safety and cooperativeness of prospective witnesses, and safeguarding the judicial process from undue influence, are among the highest priorities of federal prosecutors." Thus, we follow the USAM guidance and require AUSAs to withhold all personal information from disclosure other than witness identities. As to witness identities, disclosure should be considered on a case-by-case, witness-by-witness, basis. According to the USAM, a witness' identity or statement may be withheld "if there is, in the judgment of the prosecutor, any reason to believe that such disclosure would endanger the safety of the witness or any other persons, or lead to efforts to obstruct justice." The decision to withhold a witness identity is not to be taken lightly and requires supervisory approval. The office preference is to seek a protective order authorizing such action.

B. Confidential Informants.

Roviaro v. United States, 353 U.S. 53 (1957) and its progeny do not create a "fixed rule" with respect to the disclosure of an informant's identity. Whether disclosure is required depends on the circumstances of each case including the nature of the crime charged, the possible defenses and the importance to the defense of the informer's potential testimony. As a general rule, the Government does not have to disclose the identity of an informant unless it is reasonably likely the informer can give testimony necessary to determine guilt or innocence, i.e. the informant is a material witness or an eyewitness to the charged offense and there is "a reasonable possibility that the informer's testimony is necessary to a fair determination of guilt or innocence." Weinstein's Federal Evidence § 510.07[5]; see also United States v. SAA, 859 F.2d 1067, 1072 (2d Cir. 1988). If an informant is merely acting as a tipster, it is unlikely that his identity will need to be disclosed. However, if an informant is slightly more involved in the case it will be necessary to disclose to the defense that an informant was used, without providing the identity of the informant. This will put the defense on notice and allow it to determine whether to move the Court for disclosure of the informant's identity.

Obviously, the disclosure of an informant may endanger the safety of that informant and also jeopardize ongoing investigations unrelated to the case in question. However, if the informant is central to your case, his or her identity will need to be turned over. In such a situation, if you believe that a delay in the disclosure is necessary due to safety issues or to protect an investigation, you should discuss this with your supervisors and seek a court order allowing for such delay. Without such a court order, the disclosure of the identity must be made in compliance with the discovery rules described herein.

C. Giglio Disclosures.

In Giglio v. United States, 405 U.S. 150, 154 (1972), the Supreme Court expanded the scope of evidence that must be disclosed to the defense under Brady (evidence that is exculpatory of guilt or punishment), to include "evidence affecting credibility." The type of material that falls within this category, typically referred to as "impeachment evidence," is described in Section II(B)(6) and (7) above. To the extent such impeachment material is so serious that it constitutes "exculpatory evidence," it is required to be disclosed by the 21 Day Deadline. If the material is it is limited to "impeachment evidence" of the credibility of a witness, our practice is to provide it at the 21 Day Deadline, if possible. However, during the weeks leading to trial the Government sometimes changes its strategy regarding which witnesses to call at trial, resulting in the need to disclose additional impeachment material. The Government also often obtains additional impeachment material of witnesses during trial preparation sessions. Such impeachment material should be disclosed to defense as soon as is reasonably practical, but, barring exigent circumstances, no later than the Thursday before trial.

D. Jailhouse Telephone Recordings.

In some cases, an AUSA may be able to obtain copies of jailhouse telephone recordings involving the defendant. The ability to obtain such recordings is sometimes difficult to achieve in light of the use of local facilities to hold federal defendants in pending cases and the number of times a federal defendant might be moved while awaiting trial. If you obtain such recordings, you should be aware that recordings of a defendant are covered by Rule 16 and must be disclosed no later than the 21 Day Deadline or, if obtained thereafter, should be immediately disclosed. To the extent such disclosure might jeopardize an obstruction investigation relating to the content of the recordings, you can only delay disclosure pursuant to a court order issued pursuant to Rule 16(d)(1).[9]

E. Emails, Text Messages, Etc.

The use of email has become widespread. AUSAs, law enforcement agents, and other employees use email to communicate about a variety of case-related matters. While a valuable tool, email may have significant adverse consequences if not used appropriately. Text messages and other means of electronic communications present similar risks. The use of email to communicate substantive case-related information in criminal and parallel criminal/civil cases may trigger an AUSA's responsibilities under the Jencks Act, Federal Rules of Criminal Procedure 16 and 26.2, Brady/Giglio, USAM 9-5.001, and the Federal Records Act (discussed more fully below).

Emails fall into three general categories: (i) potentially privileged communications; (ii) substantive communications; and (iii) purely logistical communications. Potentially privileged communications might include discussions of case strategy or a discussion of legal issues

[9]Rule 16(d)(1) empowers the Court, for good cause, to "deny, restrict, or defer discovery or inspection, or grant other appropriate relief.

pertaining to the case. Because such emails contain your attorney work product, they would not subject to disclosure. However, if an AUSA were to include a case agent in these email exchanges, the AUSA's work product privilege might be inadvertently waived. See Goldberg v. United States, 425 U.S. 94 (1979). For example, if the case agent responds to the email at least some portion of the email chain would constitute Jencks material if the case agent were to testify. Substantive case-related email communications should be reviewed and will likely be required to be turned over in discovery at the 21 Day Deadline. Purely logistical emails may not need to be turned over, but should be reviewed and retained in the event a purely ministerial matter in the case were to become more relevant as the case proceeded. For further guidance on this important subject, please review the Deputy Attorney General's March 2011 memorandum entitled "Guidance on the Use, Preservation, and Disclosure of Electronic Communications in Federal Criminal Cases."

F. Memorializing Discovery Disclosures.

One of the most important steps in the discovery process is keeping good records regarding disclosures. Prosecutors should make a record of when and how information is disclosed or otherwise made available. While discovery matters are often the subject of litigation in criminal cases, keeping a record of the disclosures confines the litigation to substantive matters and avoids time-consuming disputes about what was disclosed. These records can also be critical when responding to petitions for post-conviction relief, which are often filed long after the trial of the case. AUSAs should personally sign all discovery letters. If an AUSA is not available in the office to sign a discovery letter, the AUSA's supervisor will be required to sign the letter on the AUSAs behalf.

When witness statements, or any other items provided in discovery, are delivered to defense counsel for trial, a cover letter itemizing the documents turned over should be prepared.[10] To avoid any later dispute as to whether all of the required material was, in fact, turned over, a line for signature and date of receipt may be added to the letter, and "bates-stamping" or its equivalent should be used. Especially in large-document cases, and in any case where over 100 pages of discovery will be produced, the AUSA should have staff scan all evidentiary documents into the computer, format the computer file to add page numbers to the scanned material, and provide such discovery to defense counsel on a CD. An identical copy of the CD or other electronic medium should be maintained for our records. Early coordination with the Litigation Support Specialist will help ensure a smooth and timely discovery production.

[10]Because it is not always practicable to itemize each individual document turned over in discovery, the cover letter should, at the very least, list the bates numbers of the materials disclosed. For example, if a prosecutor provides a CD containing 9,234 pages of discovery, the cover letter should note: "the enclosed CD contains discovery which has been numbered as pages 1-9,234."

G. Obligation to Resolve Discovery Dispute without Judicial Intervention.

Each AUSA should strive to comply with Local Criminal Rule 16.1(a) and make a good faith effort to resolve any discovery dispute without judicial interview. Reference to Local Criminal Rule 16.1(a) should be included in each discovery letter and if contacted by defense counsel regarding a discovery dispute, which contact is required prior to the filing of any discovery motion, you are required to work diligently and professionally to resolve the issue.

H. Communications with Defense Bar.

As an AUSA you are expected to act in a professional manner in engaging with defense counsel. The defense counsel is not an enemy, but diligently working to defend his or her client. In an effort to ensure a quick resolution of any reoccurring discovery complaints, the management of this office will communicate with the various leaders of the defense bar on a periodic basis.

I. Training.

Our office has had expansive discovery policies in place for years. In addition, our office has required AUSAs to attend mandatory discovery training since 2007. However, in the final analysis the execution of our Discovery Policy is only as good as our AUSAs execution of it. Consequently, we will conduct periodic micro-training sessions pertaining to specific discovery issues which are pertinent to each section. In addition, I am requiring your supervisors to conduct a more detailed review of your discovery practices in order to ensure compliance with these rules. As noted above, your success in this office and as a prosecutor in general, is directly linked to your ability to understand and comply with your discovery obligations.

VI. DISCOVERY GUIDANCE PERTAINING TO CASES INVOLVING NATIONAL SECURITY ISSUES.

Cases involving national security, including terrorism, espionage, counterintelligence, and export enforcement, can present unique and difficult criminal discovery issues. The DOJ has developed special guidance for those cases. Prosecutors should consult with DOJ's National Security Division and their supervisors regarding discovery obligations relating to classified or other sensitive national security information.

VII. CONCLUSION

Our office is filled with talented and dedicated public servants who work tirelessly on behalf of the United States. Compliance with this Discovery Policy will allow our office to effectively prosecute criminal cases, while complying with a defendant's rights. While each case is different and will necessarily involve specific and unique considerations, the general approach of an AUSA in this District should be to provide expansive discovery whenever and wherever possible. Any questions or uncertainties regarding the application of this Discovery Policy in a particular case or circumstance should be raised with our Criminal Discovery Coordinator.