United States Attorney's Office, Eastern District of Arkansas

Policy Memorandum

CLASSIFICATION: Unclassified
Law Enforcement Sensitive
Not for Dissemination Outside USAO

Date: **October 15, 2010**

Subject: **Discovery Policy**

To: **All Criminal AUSAs**

From: **Jane W. Duke**
U.S. Attorney

This document sets forth the policy directives regarding discovery in criminal cases and are internal directives and declarations for the Eastern District of Arkansas United States Attorney's Office only. They are not intended to, do not, 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. Nor does this document place any limitations on otherwise lawful litigation prerogatives of the United States Attorney's Office.

These policy statements and directives are essential to fulfill our obligations and for the orderly function of our office. The formulation of these directives and policies comes after a thorough review of the existing practices of each AUSA and a survey of the existing

law. Through that process, we recognized several realities about which we were all aware anecdotally. First, as an office, we routinely and successfully complied with the requirements of Rule 16, the Jencks Act, *Brady v. Maryland* and *United States v. Giglio*. Second, AUSAs vary as to the manner in which they fulfilled these various requirements and obligations. Third, we have been, and will continue to be, more generous regarding these obligations than most other districts and more so than the law dictates.

We must be mindful of the changes that have taken place in our society and the justice system. Security is an ever growing concern in every aspect of this job. We have experienced a number of witness intimidation incidents over the years ranging from the subtle threats to attempted murder. These incidents occur in white collar cases as well as drug cases. The integrity of the fact finding function of the judicial system is as important as the critical issues of due process and fair play. The United States is entitled to present witnesses without unnecessarily exposing them to pre-trial threats or ever subtle intimidation. The law is clear on these points.

The dangers are greatly enhanced if Jencks Act materials are put into the possession of defendants well before a related witness testifies. The risk is even greater when non-discoverable official documents such as internal agency investigative memorandums are physically produced. For example, the internet permits actual images of those documents to be posed on the world wide web, enhancing the problem like never before. The court's new policies regarding electronic filings are in part necessary because of these very same security concerns and technological developments.

To address these legitimate concerns, we now abide more closely to DOJ directives and the policies of our client agencies by not permitting AUSAs to *physically produce* (please

not the distinction between *"physical production of"* and *"access to"*) internal agency documents along with Jencks Act material if the law does not specifically provide for their discovery or production. This also explains our policy to withhold Jencks Act material until three days before trial. Although these particular policies conform to the already established practices of many AUSAs in this district, we have now established them as the USAO policy in every case.

Defendants have not been prejudiced by this policy because AUSAs have the discretion to provide access to those materials during normal working hours for inspection prior to trial. It is vitally important to the interest of witness security and to the integrity of the fact finding function of the judicial system that these particular procedures be followed by us.

It is not our intention to push the limits when it comes to the absolute legal requirements of discovery law. We would never want to stand on some provision of discovery law solely because we are legally entitled to do so.

Our goals regarding discovery are relatively simple. Discovery should happen promptly and should always be supplemented as needed. Notwithstanding legitimate concerns about investigative memos falling into the wrong hands, we encourage discovery that exceeds our legal obligations whenever possible. Our intention is to normalize our discovery practice throughout the office, protect witnesses from intimidation or fear, and to *continue* to maintain one of the most open and cooperative federal prosecution practices in the entire country.

General Principles for Discovery

This document sets forth the Eastern District of Arkansas U.S. Attorney's Office's policy on discovery in criminal cases. The following is intended to provide a checklist and general guidance. The policy does not create or confer any rights, privileges, or benefits on any person. *See United States v. Caceres*, 440 U.S. 741 (1979).

The discovery obligations of federal prosecutors in this District are established by the Federal Rules of Criminal Procedure, 18 U.S.C. § 3500 (the Jencks Act), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), and relevant case law, the Department of Justice's policy on the disclosure of exculpatory and impeachment information, the Local Rules of Criminal Procedure, the general Discovery Orders entered in all cases, and the rules governing professional conduct. We must comply with the authorities set forth above.

Second, as a general matter and allowing for the exercise of prosecutorial discretion and subject to the needs of individual cases, AUSAs in this District are encouraged to provide discovery beyond what the rules, statutes, and case law mandate ("expansive discovery"). The decision in any particular case on whether, how much, and when to provide materials in excess of that which is required will rest with the lead prosecutor in a case. There may well be good reason for withholding something that does not have to be disclosed, such as the need to protect a witness or safeguard investigations of other people or other crimes committed by the defendant, or to preserve a legitimate trial strategy. Keep in mind, however, that expansive discovery may facilitate plea negotiations or otherwise expedite litigation. In the long term, moreover, expansive discovery may foster or support our reputation for candor and fair dealing.

Finally, if you decide to adopt expansive discovery in a case, **do NOT refer to the expansive discovery practice as "open file discovery."** Our files should not ever be completely

open (to preserve attorney-client privileged information and the work product doctrine) and there may be times when another government agency might have some material or information of which you are not aware. The use of the term "open file" is therefore inexact and potentially misleading.

These general principles provide the basic foundation for this discovery policy. The following provides further guidance, but does not and cannot answer every question that may arise in a particular case. There is no substitute for being intimately familiar with the rules, statutes, and case law.

I. DISCOVERY MATERIALS

A. Rule 16 Materials

- Defendant's oral statements made to law enforcement in response to interrogation by a person the defendant knew was law enforcement.

  Ask all law enforcement officers who had any contact or dealings with the defendant to disclose to you all statements, verbal and non-verbal, made by the defendant at any time.
- Defendant's written or recorded statements, including grand jury testimony.
- Statements by organizational defendant.
- Defendant's prior record.
- Documents and objects for use in our case-in-chief or which are material to preparing the defense.
- Reports of examinations and tests.
- Expert witnesses - summary of opinion, bases and reasons, qualifications.

  Give serious thought to what actually may be considered "expert testimony." Under Rule 702 of the Federal Rules of Evidence, expert testimony includes not only anything of a scientific or technical nature, but also anything

requiring specialized knowledge. It would include, for example, testimony by a police officer, based on his experience, about drug prices in his beat or what drug quantities are consistent with personal use versus distribution. Failure to follow proper discovery procedures regarding expert testimony might result in suppression of an important part of your case.

- Evidence favorable to defendant, including impeachment evidence.
- Our intent to use Rule 404(b) evidence.
- Results of intercepts of wire, oral or electronic communication containing relevant statements by defendant, intended to be used in our case-in-chief, or which are material to preparation of the defense.
- Notice of our intent to use evidence pursuant to Fed. R. Crim. P. 12(b)(4)(B) -- essentially, evidence we will use in our case-in-chief, in order to allow the defendant to file a suppression motion.

B. Exculpatory and Impeachment Material

1. *Brady* and *Giglio*.

We have constitutional obligations, as set forth in *Brady v. Maryland*, and *Giglio v. United States*, and other case law, to disclose exculpatory and impeachment information when such information is material to guilt or punishment, regardless of whether a defendant makes a request for such information. Exculpatory and impeachment information is deemed material to a finding of guilt when there is a reasonable probability that effective use of that information will result in an acquittal. (DOJ policy, however, demands broader disclosure.) Prosecutors must take a broad view of materiality and err of the side of disclosure. For an extensive discussion of cases interpreting *Brady* and *Giglio*, see USA Book, "Brady & Giglio Issues" (http://10.173.2.12/usao/eousa/ole/usabook/bgig/bgig.pdf).

2. DOJ Policy.

The Department of Justice has adopted a policy that requires us to go beyond even the strict requirements of *Brady* and *Giglio* and other relevant case law. Specifically:

- Exculpatory information - information that is inconsistent with any element of the crime or which establishes a recognized affirmative defense, regardless of whether the prosecutor believes the information is admissible evidence or will make a difference between conviction or acquittal.
- Impeachment information - information that either casts a substantial doubt on the accuracy of any evidence the prosecutor intends to rely on to establish an element (including but not limited to witness testimony) or which might have a significant bearing on the admissibility of prosecution evidence. This is regardless of whether the prosecutor believes the information is admissible as evidence or will make a difference between conviction and acquittal.
- Admissibility of the exculpatory or impeachment information - our disclosure requirement applies even when the information subject to disclosure is not itself admissible evidence.
- Cumulative impact - if the cumulative impact of several pieces of information meets the disclosure requirements, disclose all of the information even if the pieces, considered separately, do not meet the requirements.

See United States Attorney's Manual sections 9-5.001 (http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm).

3. Rules of Professional Conduct.

The Model Rules of Professional Conduct and the Arkansas Rules of Professional Conduct, both of which apply to us, also impose requirements regarding exculpatory and impeachment material. Both Rules state:

> 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 a prosecutor is relieved of this responsibility by a protective order of the tribunal.

See Rule 3.8(d), Model Rules of Professional Conduct; Rule 3.8(d), Arkansas Rules of Professional Conduct.

C. Witnesses' Statements - Jencks Act and Rule 26.2

1. What is a statement?

The Jencks Act (18 U.S.C. § 3500) and Fed. R. Crim. P. 26.2 require disclosure of a witness's statements that relate to the subject matter of the witness's testimony at trial or a hearing. Both the Jencks Act and Rule 26.2 define "statement" similarly. Specifically, a statement includes:

- a **written** statement that the witness makes and signs or otherwise adopts and approves.

- a substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in any recording or any transcription of a recording. This may include relevant portions of a report of, or notes from, an interview of a witness, if the report or notes contain a substantially verbatim recitation of the witness's oral statement. Remember, "substantially verbatim" does not mean "precisely verbatim."
- grand jury testimony.
- Give out Jencks statements three days before trial to defense counsel, but allow the defense counsel and the defendant to read the Jencks statements at our office during business hours.

2. What is not a statement?

Generally, an agent's report of interview (e.g., FBI "302" or "DEA-6"), is not considered a statement of the witness who was interviewed, unless, as noted above, the report contains a substantially verbatim recital of the witness's statement, or the witness reviews and adopts the report. A witness may be deemed to have adopted the report or notes that were taken during an interview if the witness agrees with an agent's oral recitation of his notes or report to see if the notes or report is correct. Generally, we allow reports of interview to be read by defense counsel, in the exercise of an expansive discovery practice. Remember, even though a report of interview is not generally a statement of the witness interviewed, it is a statement of the agent who prepared the report. The report must be disclosed if that agent will be a witness and the report relates to the subject matter of the agent's testimony.

If you decide to disclose an agent's report of interview that under the law is not a

witness's statement, discuss your intention with the agent before making the disclosure.

3. Redaction of statements.

Rule 26.2(c) provides that where a statement of a witness contains some material that is relevant to the case, but other material that is either privileged or does not relate to the subject matter of the witness's testimony, the government may call upon the trial court to review in camera the statement in its entirety and excise any privileged or unrelated portions of the statement before it is disclosed to the defense. This implies that the government may not excise such a statement on its own.

4. Notes of interview (agents and prosecutors)

If an agent's notes contain *Brady* or *Giglio* material that is not included in the agent's formal summary of the interview, the notes remain relevant and the *Brady/Giglio* material must be disclosed. Similarly, a prosecutor's notes of a witness interview (as opposed to notes containing mental impressions, personal beliefs, trial strategy and legal conclusions) may have to be disclosed, or the relevant information contained therein, if the notes reflect exculpatory or impeachment information.

Also, the government may not limit its obligation to disclose exculpatory or impeachment evidence of which it is aware either by simply declining to make a written record of the information in the first place or by omitting the information in a final draft of the memorandum of interview and destroying the notes that contain that information. The substantive demands of *Brady* and *Giglio* are not thwarted by the manner in which the government treats or packages exculpatory information.

It is highly recommended that you emphasize with all members of the prosecution team that exculpatory and impeachment information must be disclosed, regardless of whether we make a formal record of it.

It is recommended that you explain to the agents working on the case that they may not destroy their informal notes unless and until everything exculpatory or impeaching in them has been fairly included in a formal memorandum of the interview. Such a warning, regularly given, should help to dispel any notion that the duty to disclose exculpatory or impeachment material may be controlled or limited by the manner in which that information is recorded or treated. Moreover, demanding that agents review their notes against their final, formal memoranda to insure that all impeaching or exculpatory information has been disclosed is perhaps one way to forestall that task eventually falling to AUSAs.

5. Applicability of the Jencks Act and Rule 26.2.

The Jencks Act applies to trials. Rule 26.2 applies to:

- preliminary hearings
- detention hearings
- suppression hearings
- sentencing hearings
- hearings to consider revocation of probation or supervised release
- 2255 hearings

D. Materials NOT Subject to Disclosure Requirements

Rule 16 generally does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or by an agent in connection with the investigation or prosecution of a case. See

Fed. R. Crim. P. 16(a)(2).

An agent's report, however, may contain information favorable to the defendant. It may also contain information that might be deemed a "statement" for purposes of the Jencks Act or Rule 26.2. That is, to the extent it relates to the subject matter of the agent's testimony, or contains a substantially verbatim recital of another witness's oral statements, the relevant portions of the report may be subject to disclosure.

Again, under an expansive discovery practice, you may wish to consider allowing the defense attorney to read the agent's report, regardless of whether the law and the rules would require disclosure. Discuss this with the agent before allowing the review of he report.

II. GATHERING DISCOVERY MATERIALS

A. Where to Look - the Prosecution Team

We must locate and disclose all discoverable materials, including information that is exculpatory and/or impeaching of a prosecution witness, that is within the possession of the "prosecution team." This team includes the agents and law enforcement officers who helped to develop the case or worked with or under the supervision of the prosecutor during the investigation. The "prosecution team," however, may at times include other agencies. For a more complete discussion of who might be included in the "prosecution team" for discovery purposes, see pages 2-3 of the Deputy Attorney General's January 4, 2010 "Guidance For Prosecutors" memo.

B. What to Review/Request

All evidence and other potentially discoverable material gathered during the investigation, whether in our custody or the custody or control of the other members of the prosecution team, should be reviewed. Special care should be given to gathering

exculpatory/impeachment information and witnesses' statements. Specifically, you should review, or cause to be reviewed by someone intimately familiar with the law and DOJ policy on the disclosure of exculpatory and impeachment information, the following:

- ***All*** of the agency's investigative files.
- ***All*** of the CI/CW/CHS/CS files, by whatever name the agency labels these. Agencies who make use of confidential informants and cooperating individuals have their own established procedures for retaining information about those witnesses. The agencies may keep multiple files containing different types of records or information. Thus, inquiries to agencies about informants should include a review of every kind of file that might contain information about the individual.
- Evidence/information obtained via subpoena, search warrants, or other legal process. With respect to electronically-stored evidence, including e-mails, sufficient time must be allotted for a search of hard drives, disks and other storage hardware. These searches may take a long time, so they should be undertaken well before indictment.
- Evidence/information gathered by civil or regulatory agencies in parallel investigations.
- Substantive communications/correspondence including e-mails, text messages, and letters, between and among prosecutors, agents, witnesses, victims, victim-witness coordinators, etc.
- Potential *Giglio* information about non-law enforcement witnesses (including declarants whose hearsay statements the government might seek to introduce at trial). Ask the case agent to run a criminal history report on all non-law

enforcement witnesses.

C. Confidential Informants/Witness Testifying Under Plea or Immunity Agreement

You should investigate a confidential informant, or a witness who has agreed to cooperate pursuant to a plea or immunity agreement, very thoroughly. Among other things, you should investigate and disclose any information obtained in the following areas when you are going to have a confidential informant or cooperating witness testify at trial or a hearing:

- the witness's relationship with the defendant
- the witness's motivation for cooperating/testifying
- drug and alcohol problems
- all benefits the witness is receiving, including:
    i. Monetary payments--how are they calculated?
    ii. Expenses, costs and housing--is anyone paying?
    iii. Immigration status for the witness and/or family members
    iv. Arrests--intervention by law enforcement
    v. Taxes--has the witness paid taxes on informant payments?
- any notes, diaries, journals, e-mails, letters, or other writings by the witness
- prison files, tape recordings of telephone calls, and e-mails, if the informant is in custody
- criminal history

Also see the "The Use of a Criminal as a Witness," by Senior United States Circuit Judge Stephen S. Trott, for an extensive discussion of the issues associated with using confidential informants and other cooperators (http://10.173.2.12/usao//eosua/ole/usabook/homi/07homi.htm).

D. Agent Awareness of *Brady/Giglio* and DOJ Policy

It is our responsibility to ensure that the agents understand the government's obligations with respect to exculpatory and/or impeachment information. To aid in this regard, a *Brady/Giglio* material request letter should be sent which restates our responsibilities under *Brady*, *Giglio*, and DOJ policy, and calls for the agency to look for and disclose to this Office anything that might be construed as exculpatory or impeachment material.

This letter is to be sent to the agent or agents early on in the investigation -- long before indictment. In the event the investigation is being worked by more than one agency, one of these letters should be sent to the lead agent from each such agency.

E. *Giglio* Information About Prosecution Team Members

We also have an obligation to seek out potential impeachment information about law enforcement agents and other members of the prosecution team who are expected to testify. To that end, a letter should be sent to the supervisor or other agency-designated contact of any member of the prosecution team who may be a witness in the case. This letter is specifically aimed at discovering impeachment information on agents, officers, and government employees who are potential witnesses in the case. It calls for the agency to review the individual's personnel file.

F. Trial Preparation Interviews

When preparing a witness for a hearing or trial, be very aware of our continuing obligation to disclose information that might be exculpatory or have impeachment value. Thus, if a witness provides information that conflicts in material ways with information the witness has previously provided, or conflicts with material information provided by other witnesses, we should disclose that conflict to the defendant.

III. PREPARING DISCOVERY MATERIALS FOR AND MAKING THE DISCLOSURE

A. Bates Labeling/Electronic Storage of Materials

As documents are gathered during the course of an investigation, you should make a complete and organized record of what has been gathered by the prosecution team. You should Bates label the documents. This process can be done very quickly with office software. **Do not Bates label original documents.** Scan the originals and Bates label the electronic version. The originals should be kept in the order and condition in which they were obtained. . (There may be times that a production or seizure of records is too voluminous for scanning. In this instance, you should make the documents available for review by defense counsel.)

It is recommended that you Bates label the documents in a way that will allow you to determine the source of the documents. (It is also recommended that you keep a record or log containing a description of the documents, the Bates numbers, the source of the documents, and how they were obtained). For example, in an investigation of John Doe, rather than simply Bates labeling all documents in numerical order with no reference to the source, you may wish to Bates label that bank's records as DOE.Bank ABC.0001 - 1000, or in a similar fashion. Documents obtained via search warrant might be labeled DOE.SW.0001-1000.

It is not necessary to include the target's name in the label, and you may ultimately choose to label documents in any manner that fits the needs of your particular case. Whatever system you use, however, please ensure that you have a record system that will allow you, as well as any person who might have to deal with the documents at a later time, to determine the source of the documents and how they were obtained. It is important that we be able to determine if records were obtained

via the grand jury, in order to ensure that we comply with the secrecy requirements of Rule 6 of the Federal Rules of Criminal Procedure.

B. Grand Jury Materials

The Department of Justice has guidelines for obtaining and handling evidence pursuant to grand jury subpoena. See United States Attorney's Manual section 9-11.254; *Federal Grand Jury Practice Manual*, Chapter 6 (October 2008). Specific points to remember:

- Identify a records custodian. Typically this is the agent on the case. This person must be familiar with and have the ability to comply with the security requirements for storing grand jury materials.
- Subpoena log. Maintain a log of subpoenas issued for documents and other objects. The log should record the date the subpoena was issued, the grand jury to which the documents or objects were subpoenaed, the date they were received, and the date they were returned to the grand jury.
- Bates label documents. Remember, do not Bates label the original documents.
- Make a return to the grand jury of the documents returned.

  This is important! The use of the grand jury to obtain documents or other objects presupposes that the records were obtained for use by the grand jury. The return makes the grand jury aware of the existence of the records. Also, the Right to Financial Privacy Act mandates that records obtained from a financial institution be returned to the grand jury. See generally 12 U.S.C. §§ 3401-3422.

C. Materials Seized by Search Warrant

If you have used a search warrant in the investigation, material related to the warrant, including affidavits, orders and the warrant itself, must be disclosed so that the defense can pursue a motion to challenge the constitutionality of the search and suppress evidence obtained in the search. Moreover, if the affiant is to be a witness at the trial, the affidavit is in all likelihood a Jenck's Act statement. Before disclosing a search warrant affidavit, be sure that it is not sealed.

If the affidavit has been sealed pursuant to our motion, you must apply for an order to unseal the affidavit before disclosing it to the defense. In those instances where the substance of the affidavit should not be made public -- as in where the affidavit may refer to an ongoing, covert criminal investigation -- you may ask for an order allowing the limited release of the material to defense counsel, but prohibiting defense counsel from copying the material or making it public.

D. The Discovery Response

We should document the disclosure of discovery materials to the defense. The disclosure should be in a letter to the defense counsel with a list of what we are providing or some other way of insuring that we can prove what we disclosed and when.

We should keep in our files an exact copy of everything we have disclosed and in the form that it was disclosed.

Child pornography may not be released to a defendant, notwithstanding its relevance and the fact that it may constitute evidence. Depictions of child pornography are contraband, and should receive special handling.

E. Limiting Disclosures

In a case where there are legitimate concerns about the safety of an informant or witness, it may be appropriate to apply to the court for a protective order limiting distribution and copying of material disclosed or about to be disclosed. There have been occasions when a witness's statement or grand jury testimony has been copied and distributed in a jail or to other potential defendants. Obviously, this may jeopardize the safety of the witness. In situations where this kind of concern is justified, courts have ordered defense counsel not to make copies of certain discovery material and not to let that material out of their personal custody. In these instances, the lawyers may review the material in question with their clients, but may not provide the client with the documents or transcripts themselves. .

F. Communication With Agent About Discovery

While perhaps an obvious point, remember to discuss discovery with the case agent before indictment. Issues such as protecting witnesses, turning over the agent's report, redacting certain items of information (such as agency file numbers and the like), and ensuring that all potentially exculpatory or impeachment information has been brought to the attention of the prosecutor in a case, are vitally important.

In any case with a confidential informant or cooperating witness, such as drug cases, you must discuss with the agent the timing of any disclosure that would reveal the identity of the confidential informant or cooperating witness, before the disclosure is made. This will allow the agent to take steps to safeguard the witness.

IV. TIMING - WHEN DO YOU DISCLOSE THE MATERIALS?

A. Disclosing Exculpatory/Impeachment Information Before Indictment

In applying for a search warrant, we have a duty to disclose exculpatory or impeachment information if that information would defeat a finding of probable cause. This duty to disclose arises not from *Giglio*, but under *Franks v. Delaware*, 438 U.S. 154 (1978). This duty to disclose impeachment information would apply to any confidential informant on whose statements a search warrant affidavit was based. It would also apply, however, to the affiant as well. Again, the standard for measuring whether to disclose exculpatory or impeachment information, particularly about a law enforcement officer, is whether the exculpatory or impeachment information would defeat probable cause.

Case law does not require that the government disclose exculpatory or impeachment information to a grand jury. Department of Justice policy, however, mandates the presentation of evidence that substantially negates the target's guilt in any grand jury proceeding. See USAM 9-11.233.

B. General Post-Indictment Timing Requirements

Our obligations on when we have to disclose discovery materials are very important. Obviously we must comply with the applicable law and discovery orders regarding the timing of disclosures. In addition, being cognizant of the timing requirements should spur us to *gather* the discovery materials as early as possible in the course of an investigation and any resulting prosecution. Here are the applicable deadlines for making disclosure:

- Rule 16 and additional materials covered by the standard discovery requests - within 14 days of arraignment.
- Witnesses' Statements - (Meaning Jencks statements) three days before trial and any hearing covered by Rule 26.2.
- Exculpatory materials discovered after the initial 14 day disclosure - disclose reasonably promptly after the material is discovered.

- Impeachment material discovered after the initial 14 day disclosure - disclose at a reasonable time before the trial or hearing to allow the trial or hearing to proceed efficiently, unless other interests such as protecting the witness's safety or national security require later disclosure.
- Sentencing considerations - exculpatory or impeachment information that casts doubt on proof of a material matter relevant to sentencing, even if unrelated to proof of guilt, must be turned over no later than the date of the filing of the court's initial presentence investigation report.

C. Delayed Disclosure

Situations may arise where delayed disclosure of discovery materials may be justified. These situations may include instances where the integrity of an ongoing investigation may be compromised by a disclosure, the safety of a witness may be compromised, or national security interests may be implicated. In such situations, it may be prudent to delay disclosure of material for a reasonable time. You should consult with the United States Attorney, First AUSA and Criminal Chief if you wish to delay any disclosure of discovery materials that may otherwise be required by law, rule, or the arraignment order.

This discovery policy does not govern disclosure in cases involving terrorism and national security. Policy concerning these cases will be dependent on guidance currently being developed by the Department.

V. SPECIAL CONSIDERATIONS

A. Disclosing/Storing Impeachment Information About Agents

The Department of Justice's policy regarding the disclosure of exculpatory and impeachment information (see United States Attorney's Manual section 9-5.100) requires that we designate a

"Requesting Official" to serve as a point of contact concerning potential impeachment information about an agent. The Requesting Official in this Office is our Criminal Chief. In addition, the Department's policy requires the following:

1. Disclosing impeachment information about an agent.

The disclosure of impeachment information about an agent requires special consideration. The following considerations apply to such information:

- Prior to making any disclosure of impeachment information on an agent, the AUSA shall communicate with the agency concerned about our intentions, and allow the agency sufficient opportunity to express its views on whether such information should be disclosed to the court or to defense counsel.
- When appropriate, and after consultation with the Criminal Chief and the agency concerned, AUSAs should seek *ex parte, in camera* review and decision by the Court regarding whether potential impeachment information must be disclosed to defense counsel.
- When appropriate, AUSAs should seek protective orders to limit the use and further dissemination of potential impeachment information by defense counsel.
- If any impeachment information is disclosed to the Court or defense counsel, the AUSA making the disclosure shall also provide a copy of the material that was disclosed, along with related pleadings and court orders, to the agency concerned.
- At the conclusion of the case, or upon declination of a matter, AUSAs shall return to the agency any impeachment information

provided by an agency about any of its officers. Our file should continue to maintain, however, all motions, responses, legal memoranda, court orders and internal office memoranda and correspondence in the relevant criminal case file.

2. Storage of impeachment information about an agent.

Unless impeachment information about a law enforcement agent is disclosed to defense counsel, this Office will not retain such information in a manner that can be accessed by the agent's identity. Such information shall be retained in individual case files.

However, if an AUSA discloses impeachment information about an agent to defense counsel, the AUSA should provide the Criminal Chief with a copy of the information disclosed, along with related pleadings, court orders and correspondence. The Criminal Chief shall maintain the information by the agent's identity, in a secure file. If, in a future case, an AUSA desires to use or rely on the witness or evidence to which the impeaching information on file relates, the Criminal Chief shall contact the agency concerned to determine the status of the information and whether there is additional information.

B. Child Pornography

1. Protective orders.

In child pornography cases, 18 U.S.C. § 3509(m) specifically provides that a court cannot order the copying or reproduction of any child pornography, or material containing child pornography, including the duplication of the hard drives of computers and electronic storage media, so long as the government provides a reasonable opportunity to inspect, view, and examine the material in government offices. The statute also provides that this material is to remain in government care, custody, and control. Thus, in cases where child pornography has been found on a computer belonging to or otherwise used by the defendant,

the government and the defense typically agree on a protective order that will allow for the defense to have a "mirror image" of the computer evidence. This mirror image, however, is kept in the custody of law enforcement and can only be accessed by the defense at the offices of law enforcement, with limited exception.

2. Handling child pornography.

It is a common practice to introduce (under seal) a sample of the defendant's collection of child pornography at a guilty plea hearing. In these instances, you should choose images that will satisfy not just the elements of the crime charged, but also any enhancements under the U.S. Sentencing Guidelines.

C. Terrorism and National Security

Cases involving national security, including terrorism, espionage, counterintelligence, and export enforcement, can present unique and difficult criminal discovery issues. The Department of Justice has developed special guidance for those cases, which is contained in Acting Deputy Attorney General Gary G. Grindler's September 29, 2010, memorandum, "Policy and Procedures Regarding the Government's Duty To Search for Discoverable Information in the Possession of the Intelligence Community or Military in Criminal Investigations." Prosecutors should consult that memorandum and their supervisors regarding discovery obligations relating to classified or other sensitive national security information. As a general rule, in those cases where the prosecutor, after conferring with other members of the prosecution team, has a specific reason to believe that one or more elements of the Intelligence Community (IC) possess discoverable material, he or she should consult NSD regarding whether to request a prudential search of the pertinent IC element(s). All prudential search requests and other discovery requests of the IC must be coordinated through NSD.

Although discovery issues relating to classified information are most likely to arise in national security cases, they may also arise in a variety of other criminal cases, including narcotics cases, human trafficking cases, money laundering cases, and organized crime cases. In particular, it is important to determine whether the prosecutor, or another member of the prosecution team, has specific reason to believe that one or more elements of the IC possess discoverable material in the following kinds of criminal cases:

- Those targeting corrupt or fraudulent practices by middle or upper officials of a foreign government;
- Those involving alleged violations of the Arms Export Control Act or the International Emergency Economic Powers Act;
- Those involving trading with the enemy, international terrorism, or significant international narcotics trafficking, especially if they involve foreign government or military personnel;
- Other significant cases involving international suspects and targets; and
- Cases in which one or more targets are, or have previously been, associated with an intelligence agency.

For these cases, or for any other case in which the prosecutors, case agents, or supervisors making actual decisions on an investigation or case have a specific reason to believe that an element of the IC possesses discoverable material, the prosecutor should consult with NSD regarding whether to make through NSD a request that the pertinent IC element conduct a prudential search. If neither the prosecutor, nor any other member of the prosecution team, has a reason to believe that an element of the IC possesses discoverable material, then a prudential search generally is not necessary.

D. Cases Involving a Wiretap

1. Disclosure orders.

Section 2517 of Title 18 governs the disclosure of the contents of wire, oral or electronic communications that were intercepted pursuant to court order. You should review

this section thoroughly upon obtaining the court authorization for the interception and before making any disclosures. Disclosure orders must be on file prior to submitting any information obtained from the interception to a grand jury and before indictment.

2. Sealing the recordings.

When the order authorizing the interception expires, you must make the recordings available to the district judge who authorized the interception and then seal the recordings.

3. Using interception evidence in a hearing.

If you intend to rely on intercepted communications at a detention or preliminary hearing, you must, at least ten (10) days before the hearing, serve the defense with a copy of the interception application and the court's authorization order. If you do not comply with the ten day rule, the intercepted communications will not be received into evidence.

E. Other General Considerations

1. Prior convictions older than ten years.

Notice of intent to introduce evidence of a prior conviction to impeach a witness, and that more than ten years has passed since the date of the conviction or the release of the witness from confinement (whichever is later), pursuant to Fed. R. Evid. 609(b).

2. Co-defendant statements and *Bruton*.

If you intend to introduce at trial statements by a defendant that have been redacted to eliminate references to co-defendants, pursuant to *Bruton v. United States*, 391 U.S. 123 (1968), submit the statements, with the proposed redactions highlighted, to the defense and the court, well before the pre-trial motions hearing. This will put the defense on notice of our intent, avoid surprise, and provide the court sufficient time to rule on any defense objections.

3. Organizations as victims.

If an organization is the victim of a charged federal crime, the government must file a statement identifying the victim-organization. If the victim-organization is a corporation, the statement must identify any parent corporation and any publicly held corporation that owns 10% or more of the victim-corporation's stock, or state that there is no such corporation. See Fed. R. Crim. P. 12.4.

THE END