DISCOVERY POLICY

October 15, 2010

United States Attorney's Office
Central District of California

This document sets forth the general policy of the United States Attorney's Office for the Central District of California ("this office") on discovery in criminal cases.[1] More detailed guidance that includes discussion of case law and internal approval requirements is provided in a separate document.[2] Both this general policy and the more detailed guidance are intended to ensure that in our discovery practices, as in other areas, we comply with the Supreme Court's directive regarding the duties of an AUSA, which, though first stated in 1935, remains valid to this day: "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. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88 (1935). The core principle underlying this office's discovery policy is, therefore, that our discovery practices must be consistent with our duty to prevent wrongful convictions and to ensure not only that every conviction is just, but that any reasonable person involved in or observing the process that results in a conviction will view that process as fundamentally fair. With this core principle in mind, this office's general policy on discovery in criminal cases is as follows:

1. Every prosecutor in this office is expected and required to be aware of and comply with the discovery obligations imposed by the Federal Rules of Criminal Procedure; 18 U.S.C. § 3500 (the Jencks Act); any other applicable statutes and rules; Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972); the California Rules of Professional Conduct; the

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[1] This policy extends to criminal cases involving classified or other sensitive national security information. In such cases, however, application of this policy must take account of the special considerations that apply to those cases, as discussed in the September 29, 2010 memorandum from Acting Deputy Attorney General Gary G. Grindler titled "Policy and Procedures Regarding Discoverable Information in the Possession of the Intelligence Community or Military in Criminal Investigations" (the "Grindler Memo"). In particular, prosecutors handling such cases may, in certain circumstances, need to restrict discovery to only that required under applicable statutes, rules, and case law, or otherwise deviate from this policy, based on an individualized assessment of the specific factors in the case and in a manner that is consistent with the law. Further guidance for such cases, including requirements for consultation with the National Security Division, is provided in the Grindler Memo.

[2] This policy and the more detailed guidance provide prospective guidance only, are not intended to have the force of law, and are not intended to, do not, and may not be relied on to create any right, privilege, or benefit, substantive or procedural, enforceable by any person or entity against this office, the Department of Justice, or the United States. See United States v. Caceres, 440 U.S. 741 (1979).

ABA Model Rules of Professional Conduct; the ABA Standards for Criminal Justice, Prosecution Function and Defense Function; relevant case law and ethics opinions interpreting and applying the obligations imposed by these cases, statutes, rules and standards; Department of Justice policies governing discovery, including in particular USAM §§ 9-5.001 & 9-5.100, the January 4, 2010 memorandum from Deputy Attorney General David W. Ogden titled "Guidance for Prosecutors Regarding Criminal Discovery" (the "Ogden Memo"), and the Grindler Memo; and any local rules or district court orders governing discovery. Compliance with the discovery obligations imposed by all of the above is expected and required unless we are openly contesting compliance with a particular obligation as contrary to law or excused on the particular facts of the case. Compliance with these discovery obligations remains an ongoing duty that applies if new discoverable information is learned at any time "when disclosure would be of value to the accused." Tennison v. City and County of San Francisco, 570 F.3d 1078, 1093 (9th Cir. 2009) (internal quotation marks omitted). Thus, compliance with these discovery obligations is expected and required even where a prosecutor first learns of discoverable information when preparing a witness for trial, during trial, after trial but before sentencing, or, in certain limited instances, after judgment has been entered.

2. Prosecutors in this office are encouraged to provide discovery beyond what the statutes, rules, and case law mandate, and to apply the general principle that, even absent a specific discovery obligation imposed by statute, rule, or case law, relevant materials should timely be produced absent a legitimate reason for withholding or delaying production. In many of the cases this office handles, there may be such a legitimate reason, for example, to protect a witness, to safeguard investigations of other people or other crimes committed by the defendant, to protect classified or other sensitive national security information, or to preserve a legitimate trial strategy. Prosecutors handling a case bear the burden of affirmatively identifying such a legitimate reason for withholding or delaying production of relevant materials and, in the absence of doing so, should timely produce all relevant materials, even those not subject to a specific discovery obligation imposed by statute, rule, or case law. Even where prosecutors believe withholding or delaying production is justified, they should consider disclosing to the court the materials at issue and the reasons for withholding or delaying production. This broad approach to discovery is consistent with the Department of Justice's policy regarding disclosure of exculpatory and impeachment information, which makes clear that as a matter of policy we must ordinarily disclose "information beyond that which is 'material' to guilt as articulated in Kyles v. Whitley, 514 U.S. 419 (1995), and Strickler v. Greene, 527 U.S. 263, 280-81 (1999)," and, more generally, "should err on the side of disclosure in close questions of materiality" and "favor greater disclosure in advance of trial." See USAM 9 -5.001(C), (E). This broad approach to discovery is also consistent with the encouragement in the Ogden Memo that prosecutors "provide discovery broader and more comprehensive" than that required by the specific discovery obligations imposed by statutes, rules, and case law. This broad approach to discovery is also intended to facilitate plea negotiations, expedite litigation, promote this office's truth-seeking function, and foster and support this office's reputation for candor and fair dealing.

3. Prosecutors have a "duty to learn of any favorable [to a defendant] evidence known to the others working on the government's behalf in the case, including the police." Kyles v. Whitley, 514 U.S. at 437; see also USAM § 9-5.001(B)(2); United States v. Price, 566 F.3d 900, 908-09 (9th Cir. 2009). Consistent with this duty, prosecutors in this office are encouraged to take a broad approach in reaching out to law enforcement and other government agencies with which this office works to search for relevant materials that may be subject to production, whether pursuant to a discovery obligation imposed by statute, rule, or case law, or pursuant to the

broader approach to discovery described in (2) above. In general, prosecutors should not limit this inquiry to law enforcement and government agencies directly participating in the investigation and prosecution of the particular case, but should extend this inquiry to any law enforcement or government agency, whether federal, state, or local, that the prosecutor reasonably believes may be in possession of information that would be subject to discovery if it were in the possession of the prosecutor. This broad approach to inquiry to other government agencies is consistent with encouragement in the Ogden Memo that prosecutors "err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes."

4. When producing discovery, prosecutors must do so in a way that creates a record both of what was produced and what was not produced. See United States v. Chapman, 524 F.3d 1073, 1085 (9th Cir. 2008) (finding of "flagrant misbehavior" by prosecution justified, in part, because "although the case involved hundreds of thousands of pages of discovery, the AUSA failed to keep a log indicating disclosed and undisclosed materials. The AUSA repeatedly represented to the court that he had fully complied with Brady and Giglio, when he knew full well that he could not verify these claims."). In many cases, this can be accomplished by sequentially numbering all documents produced to the defense, maintaining in our files copies of all documents produced and not produced, and keeping logs relating to production and non-production of items of non-documentary evidence such as audio- or video-tapes, digital files, or physical items. In cases involving large volumes of evidence, other systems for creating a discovery record may be appropriate. Whatever the system adopted, it must be sufficient to allow future verification to the court of what has and has not been produced to the defense.

The four general principles set forth above constitute the office's discovery policy, which generally mandates timely, broad production of all relevant information.[3] More detailed guidance regarding the application of this policy is being issued separately. Even this more detailed guidance, however, will not answer every question that may arise in a particular case. To the extent difficult questions arise in particular cases, prosecutors are encouraged to consult with supervisors, senior litigation counsel, professional responsibility officers, and colleagues. Compliance with their advice, the governing legal authorities, and this discovery policy will help to achieve a fair and just result in every case, which is this office's singular goal in pursuing a criminal prosecution.

[3] While broad production designed to ensure that the defense is aware of the same relevant information as we are is intended to be the norm, this office's discovery practices should not be referred to as "open file discovery." This office's files will almost never be completely open (for example, to preserve information subject to the deliberative privilege, sensitive informant information not required to be disclosed, and AUSA work product) and there may be times when, despite the broad approach to inquiry set forth in (3) above, another government agency may be in possession of relevant information of which we are not aware. The use of the term "open file" is therefore inexact and potentially misleading in that it may deter the defense from engaging in its own efforts to seek out and obtain information it views as relevant to the case.