UNITED STATES ATTORNEY'S OFFICE FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION DISCOVERY POLICY
(OCTOBER 2010)

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Memorandum

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District of Columbia

Subject:	Date:
Criminal Division Discovery Policy[1]	October 13, 2010

To:	From:
All Criminal Division Personnel	Ronald C. Machen Jr.

I. Background

It is important that we have discovery policies that, while standardized, provide sufficient flexibility to respond to the unique case responsibilities of the different Sections of the Criminal Division. After careful discussion among supervisors, Office management, and line AUSAs, we have formulated the discovery policy set forth in this memorandum to guide you in the furnishing of discovery in your cases. It is essential to remember that minimum discovery obligations for federal prosecutors 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), Giglio v. United States, 405 U.S. 150 (1972), other relevant case law, Department of Justice policy, court orders, and rules governing professional conduct. Our Division policy is entirely consistent with, and builds upon, the general discovery concepts articulated by the Deputy Attorney General earlier this year. See Guidance for Prosecutors Regarding Criminal Discovery (Jan. 2010) (Attachment A hereto).

As a general guiding principle, and allowing for the needs of individual cases, **Criminal Division prosecutors should provide expansive discovery**. Providing discovery is guided by four sometimes competing considerations:

(i) requirements imposed by rules, statutes, case law, court orders, and DOJ policy;

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[1] This memorandum contains confidential and law enforcement sensitive material and may not be distributed outside the United States Attorney's Office for the District of Columbia without permission. This memorandum does not purport to contain complete policies and procedures utilized for the handling of discovery and potentially exculpatory information, as each case is subject to individualized review for appropriate discovery and disclosure decisions. The policies and procedures articulated in this memorandum may be changed at any time without prior notice. No part of this memorandum creates any rights, substantive or procedural, enforceable at law by any person in any matter, civil or criminal. See United States v. Caceres, 440 U.S. 741 (1979). Nor does any part of this memorandum place any limitations whatsoever on the otherwise lawful exercise of the prerogatives of the United States Attorney's Office for the District of Columbia.

(ii) the demands of justice in a particular case (we often furnish broad discovery not because we are required to, but because it is just to do so);

(iii) the efficient administration of the court system (e.g., furnishing earlier or more expansive discovery than is required to facilitate plea negotiations); and

(iv) the need to protect witness security, classified information, and the integrity of investigations and prosecutions.[2]

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[2] Cases involving national security, including terrorism, espionage, counterintelligence, and export enforcement, can present unique and difficult criminal discovery issues. DOJ 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 (Attachment B hereto). 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 DOJ's National Security Division (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

While most of our discovery obligations are derived from Federal Rule of Criminal Procedure 16, it has been the Office policy for decades to disclose information in a manner and at a time more generous than the requirements of Rule 16. **When litigating discovery disputes, be certain to distinguish between that which is required from that which we typically disclose as part of our best practices**. We ought not to face sanctions for failing to disclose something that we were not required to disclose in the first instance. (In this respect, AUSAs should never describe our discovery practices as "open file.")

The responsibility to produce all discoverable information in a criminal case lies with the prosecutor(s) assigned to the case. To fulfill this responsibility, as to each case you should consider the following four questions:

(i) **What information is subject to disclosure?** Section II below addresses this topic, and cites the rules, statutes, case law, and policies that govern.

(ii) **Where should you search for discoverable information, and what materials should be reviewed?** You must produce information that is within the possession of the **prosecution team**. Section III defines the concept of the "prosecution team," and provides a non-exhaustive list of what materials should be reviewed in each case.

(iii) **When should discoverable information be disclosed?** Section IV sets forth general principles regarding the timing of the production of discoverable information.

(iv) **How should discovery materials be produced and documented?** Prosecutors must decide in what form to produce the discovery, and must keep a careful record of all discovery produced. Section V addresses these topics.

Should you confront a situation where you believe some component of discovery should be handled differently than is set forth in this policy, please seek the guidance and approval of a supervisor, who in turn should consult with the Division chief or deputy chief.

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.

II. Information Subject To Disclosure

A. Exculpatory and Impeachment Information

1. General Principles

The practice of this Office is to go beyond the minimum requirements of Brady, Giglio and their progeny. See also United States Attorney's Manual § 9-5.001 (Policy Regarding Disclosure of Exculpatory and Impeachment Information) (Attachment C hereto). Some general principles warrant emphasis:

- Exculpatory information is defined as information that is inconsistent with (or casts serious doubt upon) any element, including identification, of any crime charged against the defendant, or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal. See USAM § 9-5.001(C)(1).

- Impeachment information is defined as information casting substantial doubt on any evidence the government may use in its case-in-chief at trial – including witness testimony – or that might bear on the admissibility of the government's evidence at trial, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal. See USAM § 9-5.001(C)(2).

- Exculpatory and impeachment information should be disclosed even if the defense has not made a request for such information, and should be disclosed even if we believe the defense is aware of the information.

- Brady and Giglio apply to the "prosecution team," defined to include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution. It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from members of the prosecution team.

- Brady and Giglio apply not only to the disclosure of evidence, but also to the disclosure of information that might lead to the discovery of admissible evidence.

- Exculpatory and impeachment information should be considered cumulatively when determining whether disclosure is required.

In addition, "close calls" should be resolved in favor of disclosure. In general, our approach should be to inquire why questionable information should not be turned over rather than inquiring why we are obligated to turn over something. Put differently, **there is a strong presumption in favor of disclosing any information that arguably could be exculpatory or impeachment information**.

2. Continuing Duty To Disclose

Please keep in mind that our duty to disclose Brady information is an ongoing one that extends through post-conviction litigation. Under our Office policy, exculpatory and impeachment information must be disclosed in affidavits, in the grand jury, and prior to:

- pre-trial evidentiary hearings;
- trial;
- sentencing; and
- post-conviction evidentiary hearings.

Accordingly, you must be continuously vigilant about discovering, reviewing, and disclosing exculpatory and impeachment information. And, it is crucial that AUSAs keep their supervisors aware of any Brady issues or litigation that arise.

3. Rule 3.8

Under the McDade Amendment (28 U.S.C. § 530B), AUSAs are subject to state laws and rules of the jurisdiction in which they practice. Thus, your disclosure obligations arise not only from the Constitution, case law, Federal Rules of Criminal Procedure, and DOJ policy, but also from Rule 3.8 of the D.C. Rules of Professional Conduct, entitled "Special Responsibilities of a Prosecutor." Under that rule, among other things, a prosecutor:

- may not intentionally fail to disclose exculpatory or mitigating evidence in time for use by the defense or for sentencing; and

- may not intentionally fail to bring to the grand jury's attention material facts tending to substantially negate the existence of probable cause.

Timing of disclosures for exculpatory and impeachment information is a critical issue and is covered below. **See Section IV concerning the timing of Brady disclosures**.

B. Statements of the Defendant

1. Rule 16 Discovery

Rule 16(a)(1)(A) and (B) require the government to disclose, upon request by the defendant, the defendant's own oral, written, and recorded statements under the following circumstances:

- the substance of any **relevant oral statement** made by the defendant before or after arrest in response to interrogation by a person the defendant knows is a government agent, if the government intends to use the statement at trial;

- a defendant's **relevant written or recorded statement** if the statement is within the possession, custody, or control of the government (or is capable of being known through due diligence) (e.g., statements made to an undercover officer or cooperating witness wearing a recording device, one-party consent recorded telephone calls, wire interceptions, jail calls which have been obtained by the government) (note: this provision is not limited to statements made to government agents);

- any **written record** containing the substance of any **relevant oral statement** of the defendant if the statement was made in response to interrogation by an individual the defendant knew was a government agent; and

- the defendant's recorded **grand jury testimony** relating to the charged offense.

Rule 16(a)(1)(C) governs statements of organizational defendants, and requires the government to disclose, upon the defendant's request, the statements covered above, if the government takes the litigation position that the person making the statements:

- was legally able to bind the defendant regarding the subject of the statement because of the person's position with the defendant; or

- was personally involved in the offense conduct and was able to legally bind the defendant regarding that conduct because of the person's position.

2. Other Information To Be Disclosed

In addition to the information that must be disclosed pursuant to Rule 16, we should also disclose (assuming a discovery request for statements has been made):

- the substance of <u>any</u> statement made by the defendant relating to the charged offense that was made to a law enforcement officer; and

- where the government is relying on the defendant's statement made to a law enforcement officer to support a detention request, the statement should be disclosed in its entirety at the detention hearing.

Practice Tip: You should make careful inquiry of all law enforcement agents and officers who came in contact with the defendant relating to your case to make sure you know of every word uttered by the defendant, and how any statements may have been documented. In addition, you should be mindful of the need to produce statements of the defendant made to law enforcement officers at a time other than arrest if they are related to the charged crime (as may sometimes be the case in a more protracted or complex investigation). You are not in a position to determine all that must be disclosed until you know the full universe of statements.

C. Defendant's Prior Record

1. Rule 16 Discovery

Rule 16(a)(1)(D) requires the government, upon the defendant's request, to disclose to the defense the defendant's prior criminal record. This requires that we search available databases and our records to determine the prior convictions of the defendant.

2. Other Information To Be Disclosed

Prior to trial, you should obtain copies of certified convictions and disclose them to the defense, as a certified conviction may be necessary to utilize enhancement provisions based upon the defendant's prior record or as a prerequisite to impeachment by prior conviction at trial.

D. Documents and Tangible Objects

1. Rule 16 Discovery

Rule 16(a)(1)(E) requires the government, upon the defendant's request, to disclose and make available – for inspection, copying, or photographing – **books, papers, documents, data, photographs, tangible objects**, buildings or places (or copies or portions thereof) that are within its possession, custody, or control, if:

- **the items are material to the preparation of the defense**;
- **the government intends to use the items in its case-in-chief at trial**; or
- **the items were obtained from or belong to the defendant**.

The following law enforcement documents, and information, typically fall under Rule 16 (assuming they exist in your case)[3]:

- advice of rights card
- property and evidence reports
- letters or other documents prepared by the defendant
- crime scene reports
- recorded law enforcement communications (e.g., 911/311 calls; communications containing substantive information beyond numbers and transport, such as descriptions or lookouts)
- documents/tangible objects concerning identification (e.g., photo array)
- arrest photographs
- photographs, maps, and diagrams of the crime scene
- documents concerning fingerprints
- reports of scientific testing (e.g., chemist's report and notes)
- videotaped or audiotaped recordings of the offense or crime scene
- written, recorded, or adopted statements by the defendant
- medical and business records (e.g., ownership, lease, or rental documentation for automobiles or dwellings; cellular telephone records, GPS data; bank and financial records)
- arrest warrants and affidavits
- search warrants, affidavits, seizure lists, and items seized during search
- items of physical evidence (e.g., drugs, clothing, weapons, currency)
- documents received in response to subpoenas

Such documents are subject to appropriate redaction for personal identification or other confidential information.

2. Other Information To Be Disclosed

Even though under Rule 16 the defense might not be entitled to all of the many law enforcement documents we typically provide in discovery, it is our general practice to turn over these documents. We do so to facilitate the efficient administration of justice and to avoid protracted litigation over relatively insignificant issues.

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[3] In a particular case, some of these items may only constitute Jencks Act material. Nonetheless, it is generally our practice to turn them over as part of our broad disclosure policy.

E. Reports of Examinations and Tests

1. Rule 16 Discovery

Rule 16(a)(1)(F) requires, upon request by the defendant, the disclosure of any results or reports of:

- physical or mental examinations; or
- scientific tests or experiments

that are within the government's possession or, through due diligence, may be known to us. To be discoverable pursuant to Rule 16(a)(1)(F), the examinations and tests must be either:

- material to the preparation of the defense; or
- intended for use by the government as evidence in its case-in-chief at trial.

2. Other Information To Be Disclosed

- While the results of some tests may be neither intended by us for use at trial nor material to the preparation of the defense, **in most cases the best practice is to turn over all results of examinations and tests**, with one important caveat. In some cases, we receive reports of examinations and tests that contain personal information about a victim or witness. In such cases, we should only disclose relevant information and even then should redact personal identification information or other material to which the defense is not entitled under Rule 16.

F. Expert Witnesses

Rule 16 Discovery

Rule 16(a)(1)(G) requires, upon request by the defendant, the disclosure of a written summary of the testimony of any expert witness that the government intends to use under Federal Rules of Evidence 702, 703, or 705 during its case-in-chief at trial. The summary must describe:

- the witness's opinions;
- the bases and reasons for those opinions (these must be detailed); and
- the witness's qualifications (we must turn over the witness's curriculum vitae).

Practice Tips: (1) Any changes to an expert's opinion that are made subsequent to our written disclosure should also be made in writing. (2) When requesting supporting documents from the laboratory's file regarding a forensic examination, you should consult the guidelines set by the laboratory for the manner in which discovery requests should be made, and for the time required for

them to process and deliver the materials to our office. You should also consult a supervisor when determining which supporting documents would be appropriate to disclose through discovery.

G. Witness Statements, Notes, and Reports of Investigation

1. Rule 16 Considerations

To properly consider our discovery obligations as they pertain to witness statements, notes, and reports of investigation, we must consider Rule 16 in conjunction with Rule 26.2 and the Jencks Act, 18 U.S.C. § 3500. For its part, Rule 16(a)(2) clearly states that "[n]or does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500."

2. Jencks Act and Rule 26.2

a. Statements To Be Disclosed

Section 3500(a) in turn makes clear that "no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness . . . shall be the subject of . . . discovery . . . or inspection until said witness has testified on direct examination in the trial of the case." A "statement" is:

- a written statement that the witness makes and signs, or otherwise adopts or 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; or
- the witness's statement to a grand jury, however taken or recorded, or a transcription of such a statement.

b. Proceedings Where Jencks Act Applies

Rule 26.2 states that, upon request, witness statements must be produced at:

- preliminary, detention, and suppression hearings
- trial
- sentencing hearings
- hearings to revoke probation or supervised release
- evidentiary hearings held under 28 U.S.C. § 2255

c. Preservation of Notes

- **All handwritten notes of agents must be preserved**. While the notes may not constitute Jencks material, it is necessary to preserve them in the event that the accuracy of the related formal report becomes an issue.

- Similarly, **all AUSA notes of witness interviews must be preserved**. While a prosecutor's notes of witness interviews are usually protected from discovery by privilege rules and Rule 16(a)(2), notes that contain substantially verbatim quotes of what a witness said, or that contain Brady or Giglio information, may be discoverable.

d. Disclosure

- Unless otherwise ordered by the court, Jencks material that was not provided previously in discovery, including prior substantive witness statements, does not have to be disclosed until a relevant hearing or trial, pursuant to Rule 26.2. **However, in cases where witness safety is not a concern, prosecutors are encouraged to turn over Jencks material at an earlier juncture**.

- In cases where witness safety may be an issue, reports of interviews and notes of interviews should not be disclosed except as required by Jencks, Rule 26.2, Rule 16, or our policy on disclosure of potentially exculpatory information.

Practice Tip: Very early in the investigation, make an absolute priority of acquiring all notes, reports, and witness statements. Promptly examine each document to determine whether it contains contemporaneously recorded and substantially verbatim statements of others (i.e., possible Jencks statements), potentially exculpatory or impeachment information (including internal inconsistencies and inconsistencies with other witnesses or evidence), or other matters that will require further investigation (such as references to other incidents or possible witnesses). Remember that you are responsible for the disclosure of information even if it does not appear in any notes, reports, or written witness statements.

H. Electronic Communications Issues

We are increasingly encountering e-mail communications between investigators and witnesses, prosecutors and witnesses (including law enforcement witnesses), amongst law enforcement officers, or amongst members of the prosecution team. Last year, the U.S. Attorney announced a policy to govern retention of these types of e-mails, as well as to limit their prevalence. See May 29, 2009 memorandum from Jeffrey A. Taylor entitled "Policy Regarding Emails from and among Agents-Witnesses" (Attachment D hereto).

- In general, **you should discourage use of e-mail for substantive case discussion**.

- **If e-mails do contain substantive case discussions, you should collect and retain them and analyze whether we have a disclosure obligation for the e-mail communication**.

- "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 prosecutive 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.

III. Where To Search For Discoverable Information

The recent DOJ guidance on where to look for discoverable information contains a thorough discussion of that topic. See Guidance for Prosecutors Regarding Criminal Discovery (Jan. 2010) (Attachment A hereto). In general, where to search will depend on the make-up of the prosecution team and the places in which discoverable information likely is to be found.

A. The "Prosecution Team"

The prosecution team is a broad concept that includes the USAO and the lead investigative agencies (law enforcement or internal agency investigators). The USAO team includes not only the assigned prosecutor and supervisors, but support staff, our investigators and intelligence analysts, and victim/witness assistance staff. In multi-district investigations, investigations that include prosecutors from other components of DOJ or other USAOs, and/or parallel criminal and civil proceedings, the "prosecution team" definition will have to be adjusted to fit the circumstances.

When determining the extent to which an agency or other government entity may be part of the prosecution team, pertinent factors include:

- whether the agency played an active role in the prosecution, including conducting arrests or searches, interviewing witnesses, developing prosecutorial strategy, participating in discussions about targets of the investigation, or otherwise acting as part of the prosecution team;

- whether the prosecutor has access to and should know of 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;

- 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.

Prosecutors are encouraged to err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes. Carefully considered efforts to locate discoverable information are more likely to avoid future litigation over Brady and Giglio issues and avoid surprises at trial.

B. Communicating with the Prosecution Team

1. Law Enforcement Officers and Agents

AUSAs are responsible for ensuring that all agents working on criminal matters are aware of the discovery policies and practices governing the criminal investigation. Specifically, AUSAs should meet with all agents at the start of an investigation or prosecution and provide guidance, orally or in writing, explaining the agents' responsibilities to:

- preserve and provide to the AUSA all original recordings and reports of witness interviews;

- preserve and provide to the AUSA all notes from witness interviews (whether taken by hand or on computer), even if the notes are described, consolidated, or otherwise formalized in a final investigative report;

- preserve and provide to the AUSA all correspondence relating to the investigation, including formal and informal written correspondence whether in letter form, e-mail, text, or other physical or electronic form; and

- gather and provide to the AUSA all materials in the investigative agency's files; files of informants, special employees, and cooperating witnesses; and all evidence and information gathered via search warrant, subpoena, wiretap, consensual monitoring, surveillance, and witness interviews.

2. Victim/Witness Advocates

AUSAs are responsible for ensuring that all victim/witness advocates working on criminal matters are aware of the discovery policies and practices governing the criminal investigation. AUSAs should meet with the advocate as soon as one is assigned and provide guidance, orally or in writing, explaining the advocate's responsibility to:

- preserve and provide to the AUSA all statements, the subject matter of which are related to the offense, made by the victim or witness to the advocate orally, in writing, or in electronic form; and

- record and provide to the AUSA an accounting of all benefits or services provided to the victim or witness, including non-monetary benefits or assistance.

C. What To Review

Once you have identified the agencies with potentially discoverable information, our review for documents and material to be furnished in discovery must be thorough. In this regard, 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[4]:

1. The Investigative Agency's Files

- **All substantive case-related information in the possession of an agent who is part of the investigative team should be reviewed** to determine whether it should be disclosed as part of discovery. The search for information should not be limited to formal investigative reports such as FBI 302s, DEA-6s, IRS MOIs, etc. The investigative agency may also have substantive case-related information in other formats or locations that an agent may not consider to be part of the "investigative" file, such as electronic communications, searchable electronic databases, inserts, or emails. It may not be necessary to disclose the information in its original format, but whenever possible AUSAs should review the information in its original format.

- Keep in mind that **we draw a distinction between investigative files of our investigative partners and personnel or other administrative files held by those agencies**. Thus, for example, a law enforcement agency's investigative files are within our possession for purposes of producing discoverable information. On the other hand, we generally deem that personnel files on administrative matters are not within our possession and therefore as a routine matter need not be searched for potentially discoverable material. However, understand that this is an unsettled area of law that is fraught with peril. Accordingly, you should consult with a supervisor

[4] This list is by way of example and is not exhaustive.

if you are asked by the defense to search personnel files or otherwise think it appropriate to conduct such a search in your case.

2. Informant, Special Employee, and Cooperating Witness Files

- **Review the entire informant/source file**, not just the portion relating to the current case, including all proffer, immunity, and other agreements, validation assessments, payment information, and other potential witness impeachment information.

  Practice Tip: This will usually involve the AUSA going to the agency to review the files on site, as they will not generally be copied or released outside the agency.

- **Prosecutors must always be mindful of security issues that may arise with respect to disclosures from confidential source files**. Prior to disclosure, you 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

- **AUSAs should review all evidence and information gathered during the course of the investigation**, including, but not limited to, information and evidence gathered via search warrant, subpoena (grand jury, administrative, inspector general, etc.), Title III wiretaps, consensual monitorings, surveillance, and witness interviews.

4. Documents or Evidence Gathered by Civil Attorneys and/or Regulatory Agency in Parallel Civil Investigations

- If civil attorneys and/or regulatory agencies involved in parallel civil investigations are deemed to be part of the prosecution team, AUSAs should also gather and review any and all information and evidence from them that could be discoverable using the criteria set forth in the January 2010 DOJ policy memorandum. See Guidance for Prosecutors Regarding Criminal Discovery (Jan. 2010) (Attachment A hereto).

5. Substantive Case-Related Communications (e.g., E-mails)

- See Section II.H., above.

6. Potential Giglio Information Relating to Law Enforcement Witnesses

- Please follow the procedures set forth in the March 12, 2010 memorandum on Lewis and Giglio Procedures (Attachment E hereto).

- Be mindful as well that a search of law enforcement personnel files may be controlled by our more expansive policy on disclosure of potentially exculpatory information. Thus, for example, in an FBI case, we will request that the FBI conduct a Giglio review of their files to determine whether there exists any disclosable information. In so doing, they may review their own personnel files. Nonetheless, we will not ourselves review personnel files for potentially discoverable material absent a reason to believe the files may contain potentially exculpatory material. For MPD and other non-DOJ law enforcement officers, we instead use our Lewis database and Giglio questions to help ferret out disclosable information. While it is possible that this process will lead us to examine personnel files, we would undertake such a review only if we had a specific reason for doing so.

- Disclose Giglio information involving a law enforcement officer in consultation with a supervisor.

7. Potential Giglio Information Relating to Civilian Witnesses and FRE 806 Declarants

Civilian witnesses present special challenges, and you should search:

- prior case jackets;
- plea agreements, cooperation agreements, and related court transcripts (from a plea or sentencing hearing, for example);
- presentence reports for any cooperating witness;
- law enforcement informant, special employee, or cooperating witness files;
- any records of payments or other benefits provided to witnesses (statutorily required fees for witness appearances generally are not discoverable);
- criminal history databases;
- reports of witness interviews;
- victim/witness assistance files;
- grand jury material, especially as it relates to inconsistent statements, both internal and as between witnesses (this will require permission of the court prior to disclosure); and
- mental health or substance abuse records.

These materials should be reviewed for impeaching information including, but not limited to:

- prior inconsistent statements of a witness (see Section III.C.8.a., below);
- statements or reports reflecting variations in witness statements (see Section III.C.8.a., below);
- benefits provided to witnesses including:

    - dropped or reduced charges

    - immunity
    - expectations of downward departures or motions for reduction of sentence
    - assistance in a state or local criminal proceeding
    - considerations regarding forfeiture of assets
    - stays of deportation or other immigration status considerations
    - S-visas
    - monetary benefits
    - non-monetary benefits or services
    - assistance obtaining benefits or services
    - non-prosecution agreements
    - letters to other law enforcement officials 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; and

- 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 the victim
    - known but uncharged criminal conduct;

- prior acts under FRE 608;
- prior convictions; and
- 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 be memorialized by the agent**.

- As discussed above, **agent and prosecutor notes must be preserved**, and prosecutors should confirm with agents that substantive interviews should be memorialized. 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 (unless the prosecutor and the agent have established an understanding through prior course of dealing).

- Interview memoranda of witnesses expected to testify, and of individuals who provided relevant information but are not expected to testify, must be reviewed. It is often difficult for a prosecutor to assess what information the defense will consider

exculpatory or impeaching, so AUSAs should consider disclosing reports of witness interviews, for both testifying and non-testifying witnesses, when there are no countervailing circumstances.

a. Witness Statement Variations and the Duty To Disclose

- 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 to new or inconsistent information disclosed by the witness during a pre-trial witness preparation session. New information that is exculpatory or impeachment information should be disclosed. 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) immediately above.

c. Agent Notes

- **Agent notes must always be reviewed**. Prosecutors must review notes to, inter alia, check if they are materially different from the memorandum, if a written memorandum was not prepared, if the precise words used by the witness are significant, or if the witness disputes the agent's account of the interview.

- Prosecutors should pay particular attention to agent notes generated during an interview of the defendant or an individual whose statement may be attributed to a corporate defendant. Such notes may contain information that must be disclosed pursuant to Rule 16.

IV. Timing Of Discovery Disclosures

A. General Principles

The timing of discovery will depend on many factors, including the type of case, the need to engage in early plea negotiations, the existence of potentially exculpatory information (including impeachment information), victim and witness security, protecting privileged information, protecting the integrity of ongoing investigations, protecting national security interests, and an efficient court process. With close calls, be sure to consult with a supervisor.

1. **Discovery should be provided, in most cases, at arraignment or as soon thereafter as is practicable**. If helpful to facilitate a plea, cooperation, or the effective administration of justice, discovery may be provided at an earlier time as well.

2. **Our discovery obligation is an ongoing one**. It is preferable to provide to the defense additional disclosable information as close in time as possible to receiving it.

3. **Exculpatory information** that casts doubt upon or is inconsistent with any element of a charged offense (including information relating to identification) **must be disclosed reasonably promptly**. See USAM § 9-5001(D)(1) ("Exculpatory information must be disclosed reasonably promptly after it is discovered.").

    - Generally, **this means at the time of a detention hearing**, to the extent the exculpatory information is then known.

    - "Reasonably promptly" is not linked to the timing of the indictment or any other event, and exculpatory information should not be withheld simply because the case has not been indicted.

    - "Reasonably promptly" allows for some period for the government to investigate the information as long as disclosure after a reasonable period to investigate will allow the defense enough time to make effective use of the information.

    - Where "reasonably prompt" disclosure raises witness-security or national-security concerns, consult with a supervisor and consider filing a motion for a protective order, seeking court permission to delay disclosure, or some other mechanism.

4. **Impeachment information** (information casting substantial doubt on any evidence – including witness testimony – or that might bear on the admissibility of evidence) **must be disclosed at a reasonable time before trial**, but presents greater difficulties

for a variety of reasons, principally related to witness security. See USAM § 5.001(D)(2) ("Impeachment information, which depends on the prosecutor's decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently.").

Giglio/Lewis Information

- Where the information is traditional Giglio/Lewis information that requires no investigation in order to make use of it (e.g., criminal convictions, plea agreements, cooperation agreements, payments or other benefits provided to the witness), follow these guidelines:

    - Where the witness's identity is unknown to the defendant and witness-security concerns are present, the information may be disclosed at the time of trial, unless otherwise ordered by the court.

    - Where the witness's identity is known to the defendant (that is, the defense knows both the identity of the witness and that the witness likely will testify), and it is practicable to do so, the information should be disclosed reasonably in advance of trial to facilitate an efficient trial and to avoid last-minute problems. (Consider using protective orders under Rule 16(d) when security concerns are present.)

Other Impeaching Information

- For other impeaching information that reasonably requires some investigation in order to make use of it (e.g., inconsistent witness statements, information that bears on the admissibility of other evidence, and other impeaching information that is not merely basic Giglio/Lewis information), follow these guidelines:

    - To the extent we have impeachment information for any witness or evidence on which we are relying at a detention hearing, **the information should be disclosed at the detention hearing**.

    - For any witness we are reasonably likely to call or evidence we are reasonably likely to rely upon at trial, follow the guidelines for the disclosure of exculpatory information and disclose the information reasonably promptly.

- Despite this general policy, there may be instances where witness security or other investigative priorities justify a delay in disclosure. (USAM § 9-5.001 notes that witness security, national security, or other issues may require that

disclosures of impeachment information be made at a time and in a manner more consistent with the policy embodied in the Jencks Act.) Consult with a supervisor when you believe that the countervailing circumstances warrant delayed disclosure.

B. Pre-Charge Disclosures

1. Grand Jury

Although the Supreme Court has held that there is no constitutional requirement that the government disclose exculpatory evidence to the grand jury, see United States v. Williams, 504 U.S. 36, 52-54 (1992), USAM § 9-11.233 directs AUSAs to disclose to the grand jury "substantial evidence that directly negates the guilt of a subject of the investigation." Our Office policy is broader: if you are aware of disclosable exculpatory or impeachment information, you should disclose that information to the grand jury.

2. Affidavits

If you are aware of disclosable exculpatory information at the time you are preparing an affidavit in support of a search warrant, Title III application, etc., you should disclose that information in the affidavit. Similarly, if there exists impeachment information relating to the affiant or a person relied upon in the affidavit (e.g., a confidential informant), and that information could undermine the court's confidence in the probable cause contained in the affidavit, that information must be disclosed.

C. Post-Charge Disclosures

As stated above in Section II.A.2., exculpatory and impeachment information needs to be disclosed prior to:

- pre-trial evidentiary hearings;
- trial;
- sentencing; and
- post-conviction evidentiary hearings.

While the Supreme Court has held that "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant," United States v. Ruiz, 536 U.S. 622, 633 (2002), if you are aware of disclosable impeachment information, you should disclose that information unless not disclosing it would be justified by national security, witness safety, or other compelling reasons. You should consult with a supervisor if you believe known impeachment information ought not be disclosed prior to a plea. If you are aware of disclosable exculpatory information, you should disclose it to the defense prior to entry of the plea, absent supervisory approval otherwise.

D. Delayed Disclosures

- Despite the time requirements set forth above, there may be circumstances, especially in violent crime, organized crime, narcotics conspiracy, and national security cases, in which it is necessary to conduct further investigation or provide for witness security before disclosing certain information.

- If you believe there is reason to delay the disclosure of exculpatory or impeachment information beyond the time limits set forth above, you should immediately consult with a supervisor and then with the Division chief, who must approve any such delay of disclosure.

- Reasons for delayed disclosure must be documented.

E. Special Considerations

1. FRE 404(b) Evidence

- **Typically turn over with other discovery**. Discovery related to FRE 404(b) evidence will usually be turned over with the case-related discovery. Be mindful that early and full production of FRE 404(b) evidence may facilitate an early resolution of a case.

2. Statements in Co-Defendant Cases

- **Furnish all statements**. In co-defendant cases, we typically will furnish all counsel with the statements of all defendants. That will facilitate pretrial resolution of Bruton or related issues.

- **Defendant who debriefed**. If one of your defendants has debriefed or at one time was thought to be a possible cooperating witness, consult a supervisor prior to disclosing statements of that defendant.

3. Wiretap Materials

- **Disclosure orders**. 18 U.S.C. § 2517 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.

- **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. If you do not properly seal the

recordings, they will be suppressed. Any evidence derived from the recordings will also be suppressed.

- **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 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. Note though that the judge can waive the ten-day disclosure requirement. See 18 U.S.C. § 2518(9).

4. Child Pornography Cases

- **No reproduction of discovery**. Note that child pornography materials are not to be reproduced and turned over to the defense. See 18 U.S.C. § 3509(m)(2)(A) ("Notwithstanding Rule 16 of the Federal Rules of Criminal Procedure, a court shall deny, in any criminal proceeding, any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography . . . , so long as the Government makes the property or material reasonably available to the defendant.").

5. Protective Orders

- **Utilize Rule 16(d)**. Rule 16(d) specifically provides for protective orders to deny, restrict, or defer discovery, and that application for a protective order may be made ex parte. Consider seeking a protective order when disclosure of information might endanger or embarrass a witness.

- **Limiting the reach of disclosure**. Among other things, protective orders may be used to limit the persons who are entitled to see the disclosable information (e.g., in a gang case, move to preclude defense counsel from distributing a cooperating witness's plea documents to the defendant or third parties). The efficacy of a protective order should be evaluated whenever delayed disclosure is being considered.

6. Classified Material

- **The Classified Information Procedures Act** ("CIPA"), Title 18, United States Code, Appendix 3, **controls the disclosure of classified information in discovery**. If your case involves or implicates classified information, contact the chief or deputy chief of the National Security Section as soon as your learn of this fact.

7. Discovery in Cases Involving a Filter/Taint Team

- **Use filter/taint teams**. In all cases involving attorney targets or where there is a significant likelihood of a privilege taint issue (e.g., Garrity, attorney-client privilege), a filter team must be put in place. AUSAs should consult with their supervisors immediately as soon as such a situation arises.

    - It is the filter team AUSA's responsibility to pass all discoverable information or material to the prosecution team or the defense.

    - The use of a filter team does not alter our responsibilities to comply with all discovery obligations.

V. Producing And Documenting Discovery

A. Manner of Production

1. Documents

AUSAs must maintain a record of discovery provided to the defense. Generally, documentary evidence should be bates numbered. Whenever possible, discoverable documents should be scanned and produced electronically in a format that allows the documents to be searched by a word or name. Disks containing electronic data should be well-labeled so that they can readily be identified. If the discoverable documents in a case are too voluminous to be scanned, the documents should be made available to the defense for inspection and copying, and a record should be made of when the documents were made available and when the defense reviewed the documents.

2. Privacy Protection: Redacting Documents

All personal identifiers should be redacted in whole or in part from discovery, including, but not limited to, names of minors, dates of birth, social security numbers, taxpayer identification numbers, home street addresses, telephone numbers, Medicare or Medicaid identification numbers, financial account numbers, or any other identifier which may improperly disclose private or sensitive information. Rule 49.1, which contains directions for redacting documents filed with the court, should also be used as a starting point for the redaction of documents that will be produced in discovery.

3. Non-Documentary Evidence

Non-documentary evidence should be made available to the defense for inspection and photographing. Video and audio recorded conversations should be duplicated and produced to the defense.

B. Record Keeping

It is essential for all discovery disclosures to be documented. Discovery must always be accompanied by a letter that clearly memorializes that which is being disclosed.

- When it is not practicable for such a letter to accompany discovery (such as when disclosures are made in court), as soon as possible thereafter, and in any case within the same business week, a letter should be sent to counsel documenting the discovery that has been furnished.

- **A copy of each of our discovery letters (without attachments) should be attached to a notice of filing and made part of the court file**. This especially facilitates appellate review when there is an otherwise murky record as to the state of discovery.

VI. Reciprocal Discovery Considerations

We should insist on a request for discovery by the defense before providing discovery. Even when providing discovery in court, this can be accomplished simply by asking the defense if they are requesting full discovery (and then later documenting that request).

- When the government discloses material, after a defense request, pursuant to Rule 16(a)(1)(E) (documents and objects) and (F) (reports of examinations and tests), the defense must, upon request, disclose all like evidence in its possession that it intends to introduce at trial. In addition, if the defense requests disclosure under Rule 16(a)(1)(G), regarding the testimony of expert witnesses, and the government complies, the defense must, at the government's request, provide the government with a summary of any expert testimony the defense intends to use at trial.