U.S. Department of Justice
United States Attorney's Office
District of Delaware

MEMORANDUM

date: **October 15, 2010**

subject: Criminal Discovery Practice in the District of Delaware

to: All Criminal Division AUSAs
All Criminal Division SAUSAs
All Paralegal Specialists

from: Keith M. Rosen
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I. Introduction

Beginning at or about the time a defendant is arraigned, we are obligated to make disclosures of certain evidence to the defense. Although the discovery obligations placed on the government by law are quite limited in scope, it historically has been the practice of this office ("the USAO") to provide materials well-beyond what is required by the Constitution, federal statutes and the Federal Rules of Criminal Procedure.

Many lawyers (both within the USAO and outside it) have referred colloquially to our more expansive discovery practice as "open file" discovery. This term is a misnomer and should be avoided. We never provide the defense with an "open file" to the extent that that term implies disclosure of internal USAO memoranda, AUSA notes, and the like. Moreover, in some cases there will be valid reasons for a less expansive approach, including national security implications or concern for the safety of witnesses. These reasons could counsel redactions or the non-production of certain documents. In any such instances, however, the AUSA must be sure of at least two things: (a) that production is not *required* by law; and (b) that the AUSA is prepared to justify the decision before the district court if the non-production is ever challenged.

That said, the USAO has taken a very broad view of what should be provided to the defense, and for good reason. Using this approach renders discovery in most cases a straightforward part of the litigation of a criminal case. Providing broad and early discovery often promotes the truth-seeking mission of the Department and fosters the efficient resolution of our cases. Our Court (like most district courts) hates discovery disputes, and there have been remarkably few over the years. AUSAs should do their best to keep it that way.

On January 4, 2010, Deputy Attorney General David W. Ogden issued a memorandum entitled *Guidance for Prosecutors Regarding Criminal Discovery* [hereinafter "the Ogden Memo"]. The Ogden Memo was developed by a Department of Justice working group, and was

intended to establish a methodical approach to consideration of discovery obligations that prosecutors should follow in every case to avoid lapses that can result in consequences adverse to the Department's pursuit of justice.

Recognizing that the practice of law differs in the various federal districts, this memorandum is designed to build off of the Ogden Memo and provide AUSAs and SAUSAs with guidance concerning the basic policies and practices that govern criminal discovery in this district. This memorandum provides prospective guidance only, and is not intended to have the force of law or create or confer any rights, privileges or benefits for criminal defendants or any other person. *See United States v. Caceres*, 440 U.S. 741 (1979).

It is important to recognize that this memorandum will discuss only the most general principles, policies, and practices. Indeed, specific, case-related considerations may warrant a departure from the general practices that should be applied by all prosecutors in the USAO. This memorandum is not intended to answer every question that could arise, and is not a substitute for careful research, discussion, and deliberation when conducting discovery in a specific case.

Both the Chief of the Criminal Division and the USAO Discovery Coordinator are available to consult on all these issues. Importantly, if you believe that a material deviation from the discovery practices described herein is warranted in a given case, you must consult with the Criminal Chief or the USAO Discovery Coordinator.

II. Sources of Discovery Obligations

The government's discovery obligations under law are set forth in the following:

- Federal Rule of Criminal Procedure 16;
- Federal Rule of Criminal Procedure 26.2;
- *Brady v. Maryland*, 373 U.S. 83 (1963);
- *Giglio v. United States*, 405 U.S. 150 (1972); and
- 18 U.S.C. §3500 (the Jencks Act).

In addition, Department policy provides for broader disclosures of exculpatory and impeachment information than *Brady* and *Giglio* require. *See* USAM §9-5.001. For purposes of this memorandum, the term "discoverable information" refers to that information required to be disclosed by these sources.

III. Initial Disclosures

Beginning at the time of arraignment or a reasonable time thereafter, the assigned AUSA should provide defense counsel with the initial discovery production. This initial discovery typically should include the Rule 16 material, and any core *Brady* material (not including *Giglio*

material). In routine reactive or adopted cases, the principal police reports should be provided with the initial discovery. Use of redactions and protective orders is appropriate at this stage.

This initial production should be made as close to the time of arraignment as practicable. The District Court has not to date promulgated any local rules relating to the timing of Rule 16 discovery, however the Court does set the Rule 12 motions deadline (usually 30 days after arraignment) based on the expectation that we will be making discovery reasonably promptly after the arraignment. If a case is complex and/or involves voluminous discovery, the assigned AUSA is encouraged to meet and confer with defense counsel to work out a mutually acceptable production schedule.

Note that the rules do not require the government to make photocopies of the discovery materials in all cases; the government is only obliged to make the discovery available for inspection and copying. AUSAs should inform defense counsel as to how the discovery materials will be made available. Production of documents in electronic format is encouraged when discovery is voluminous.

IV. Jencks Act Material and Investigative Reports

The Jencks Act and Rule 26.2 require that statements of a witness be produced only after that witness has testified on direct examination. However, it is the practice of the USAO to provide Jencks Act materials no later than three (3) business days before trial unless there are compelling reasons (including, for example, articulable concerns for witness safety) for later production. When the Jencks material in a case is substantial in size, and particularly when there is no real articulable threat to the safety of witnesses, AUSAs should make an effort to provide the documents at the earliest practical date, so as to avoid any unnecessary trial delays.

The safety of witnesses and the integrity of the grand jury process are of paramount importance to the USAO. Accordingly, AUSAs should seek protective orders in any case where there is a concern about the distribution of Jencks Act materials (or their contents) to persons beyond the defense team. Such protective orders should prohibit the dissemination of the Jencks Act discovery to persons not involved in the defense of the case. In the rare case, AUSAs may also seek protective orders precluding defense counsel from providing copies of certain discovery materials to the defendant.

IV.1. Witness Statements and Witness Interview Reports

The scope of the Jencks Act is limited. It only requires production of substantially verbatim transcripts or adopted statements, such as signed statements, signed confessions, grand jury testimony, in-court testimony from another proceedings, and depositions. *See* 18 U.S.C. §3500(e). Strictly speaking, this does not include reports prepared by agents or police officers summarizing their witness interviews. *See United States v. Starusko*, 729 F.3d 256, 263 (3d Cir. 1984). It is the practice of the USAO, however, to produce reports of witness interviews when

the Jencks material is produced. Subject to case-specific concerns, it is also the practice of the USAO to produce any relevant and material reports prepared by the case agent(s) in connection with the case. Again, use of redactions and protective orders are appropriate here, particularly if the reports contain the opinions of the agents writing the reports.

Although not required by law, the Ogden Memo provides the following guidance with respect to witness interviews:

- Generally speaking, witness interviews should be memorialized by the agent. If audio/video recording is used, further memorialization generally will not be necessary. "Interview" refers specifically to formal question/answer sessions conducted for the purpose of obtaining information pertinent to a case/matter. It does not include conversations for the purpose of scheduling or other ministerial matters.

- Agent and prosecutor notes of an interview should be preserved, and prosecutors should confirm with agents that substantive interviews should be memorialized.

AUSAs should conform their practice to this guidance.

Agents must be aware of exculpatory or impeaching material provided by witnesses during interviews, and that material must be included in the final report. If a witness lies during an interview, but later "comes clean" in the same interview, AUSAs must ensure that the fact of this "progressive truth-telling" is disclosed in the report or in the agent notes (which must then be produced). If it is not disclosed, the AUSA must inform the defense of the inconsistency.

IV.2. Interviews of Non-Testifying Individuals

During some investigations, agents will author reports of interviews of individuals who will not be called as witnesses by the government. Similarly, there will also be occasions when individuals who testified before the grand jury are not called as witnesses for the government at trial. Unless these reports/transcripts otherwise contain discoverable information (such as *Brady* material), they ordinarily should not be produced. AUSAs should err on the side of production, however, in assessing whether these reports/transcripts contain otherwise discoverable information.

IV.3. Agent Rough Notes

Although not required by law or policy, it has historically been the practice of the USAO to produce agent notes of testifying witness interviews, when available. Rough notes must be produced, however, if they contain *Brady* material, and that material is not contained in the final report of the interview. Rough notes may contain *Giglio* material if there are material

inconsistencies between the notes and the final report, or between the notes and the witness's testimony.

The Third Circuit has previously interpreted Rule 16 to require production of an agent's notes of an interview with the defendant. AUSAs should take steps to ensure that such notes are preserved upon becoming aware that such an interview occurred.

In all events, AUSAs should review agent notes, particularly if (a) there is a reason to believe that the notes are materially different from the interview report; (b) a written memorandum was not prepared; (c) the precise words used by the witness are significant; or (d) if the witness disputes the agent's account of the interview. *See* Ogden Memo at 8. AUSAs 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, as such notes may contain information that must be produced pursuant to Rule 16. *Id.*

IV.4 Witness Trial Preparation Sessions

AUSAs will typically meet with witnesses to prepare them for trials, hearings, or appearances before the Grand Jury. These sessions are not "interviews," and thus reports ordinarily will not be prepared. However, a witness during such a session may make a statement that constitutes *Brady* material, or is either inconsistent with what the witness said in another interview, or otherwise discloses information that could be used to impeach the witness. In the event that this occurs, the information must be disclosed to defense counsel promptly. In most cases disclosure is accomplished by the agent who attended the session memorializing the information in a report (which is preferred), or the AUSA preparing a letter to defense counsel. *See also* USAM §9-5.001.

V. *Brady* and *Giglio* Material

Generally speaking, *Brady* obligates the government to disclose exculpatory evidence that is material to the determination of guilt or the appropriate punishment. *Giglio* material is evidence that can be used to impeach government witnesses. In order to ensure full compliance with our *Brady*/*Giglio* obligations, each AUSA should be familiar with the *Brady*/*Giglio* case law in this circuit, USAM §§ 9-5.001 and 9-5.100, and the Ogden Memo.

As a matter of law, *Brady* contains a materiality requirement. DOJ policy dispenses with this. *See* USAM §9-5.001. The USAO has historically taken a broad view of the scope of *Brady* and *Giglio* material as well, consistent with the policy in the USAM. Given the consequences of nondisclosure, AUSAs should not take risks when it comes to *Brady*/*Giglio*; if in doubt, the material should be disclosed, and disclosed reasonably promptly. If disclosure raises safety or security concerns, an AUSA should seek appropriate protective orders from the court.

Per the Ogden Memo, AUSAs should have candid conversations with federal agents with whom they work regarding any potential *Giglio* issues. Our office has established a standardized procedure for obtaining *Giglio* information relating to federal agents, and has a *Giglio* Coordinator who is responsible for requesting the information from the federal agencies. AUSAs should be sure that a list of all federal agent trial witnesses is provided to the *Giglio* Coordinator sufficiently in advance of trial to allow the review process to take place.

This procedure does not apply to State and Local law enforcement officers. However, AUSAs are encouraged to have candid conversations with these witnesses as well regarding any potential *Giglio* issues. AUSAs should similarly be aware that State and Local police departments may generate reports (such as Use of Force Reports) that, while not part of the investigative file, may nonetheless contain discoverable information, including *Giglio* information.

The timing of disclosures of *Brady* and *Giglio* material differs. *Brady* material must be disclosed reasonably promptly after it is discovered, and sufficiently in advance of trial to allow the defendant to make use of it. *Brady* material that is relevant to sentencing considerations (but not proof of guilt) should be provided prior to the dissemination of the initial PSR draft. However, if there is an articulable basis to believe that early disclosure of *Brady* or *Giglio* material could subject a witness to harassment or intimidation, the AUSA should make an *in camera* request of the court for a protective order allowing disclosure to be delayed.[1]

There is some debate as to whether *Brady* material must be provided prior to the entry of a guilty plea. Even if the government is not obligated to provide *Brady* prior to a plea, the better practice is to do so.

Giglio material, by contrast, need only be provided at a reasonable time before trial, which, in this district, is normally at or about the same time as Jencks Act materials are produced – i.e. no later than three days before trial. AUSAs should resist motions for early disclosure of *Giglio* material.

VI. Witness Identity Information, Confidential Informant Information, and National Security Cases

The USAO is obligated to protect the privacy of victims/witnesses, particularly as it pertains to personal identity information. It is the policy of the USAO that victim/witness identity information, such as Social Security numbers, dates of birth, addresses, and home phone numbers, should not be provided in discovery. Even if an individual's identity information is relevant to the charges (such as in an identity theft case), the AUSA generally should redact the

[1]If the *Brady* material contains classified or otherwise sensitive national security information, the AUSA should seek appropriate orders permitting the government to delay or restrict disclosure.

discovery so as only to provide the information necessary to establish the relevant fact (e.g. the last four digits of a Social Security number). AUSAs should make liberal use of protective orders, as well as redactions, to safeguard this information.

It is also important for AUSAs to use similar means to limit the disclosure of information about confidential informants beyond what is required by law. AUSAs should be familiar with the *Roviaro* line of cases on this topic, and should follow the District Court's opinion in *United States v. Beckett*, 889 F. Supp. 152 (D. Del. 1995), on the disclosure of *Giglio* information relating to testifying cooperators. Informants who merely act as tipsters should not be disclosed. Given that the disclosure of informant information may very well endanger the safety of that informant and jeopardize other investigations in which the informant has been involved, it is the policy of the USAO to resist any efforts by defense counsel to obtain informant information beyond what is required by *Beckett*, as well as to resist any efforts by defense counsel to obtain *Beckett* information earlier than is required by that case.

Defendants will often seek contact information for government witnesses, especially confidential informants. The government is not required by law to provide such information, and AUSAs should resist any such requests. AUSAs should only provide witness contact information if ordered to do so by the Court.

This discovery policy does not govern disclosure in cases involving 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.

Cases involving classified information are governed by the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3. If an AUSA has a case that involves or implicates classified information, he/she should consult with the Criminal Chief at the earliest possible juncture, and, at all events, before any discovery is produced in the case.

VII. Gathering and Reviewing Discoverable Information

It is the obligation of the AUSA to ensure that any relevant documents and files created or acquired during the investigation are reviewed, and to ensure that all discoverable information is produced at an appropriate time in the litigation of the case. This review includes the investigative files, as well as documents obtained via search warrant or subpoena.

While AUSAs may utilize agents, paralegals, or document database searches to identify potentially discoverable information, it is ultimately the AUSA that is responsible for the completeness of the review process and any decisions regarding disclosure/non-disclosure. The AUSA may not delegate the disclosure responsibility to an agent or staff member.

VII.1. Scope of the "Prosecution Team"

It is the obligation of AUSAs, in preparing for trial, to seek all exculpatory and impeachment information from all members of the prosecution team. USAM §9-5.001. Per the Ogden Memo, this search duty extends to information prosecutors are required to disclose under Rule 16, Rule 26.2, and the Jencks Act.

In most cases, the "prosecution team" will include the federal agents in the district who have worked on the case. In assessing the extent to which AUSAs must review potentially discoverable information from State and Local law enforcement officers involved in the case, a three-factor test applies:

1. Whether the party with knowledge of the information is acting on the government's behalf or under its control;

2. The extent to which state and federal government are part of a team, are participating in a joint investigation, or are sharing resources; and

3. Whether the entity charged with constructive possession has ready access to the evidence.

United States v. Risha, 445 F.3d 298, 303-06 (3d Cir. 2006).

In complex cases that involve parallel proceedings with regulatory agencies or other non-criminal investigative agencies, the AUSA should apply a similar analysis to determine whether that agency should be considered part of the "prosecution team" for discovery purposes. AUSAs are encouraged to err on the side of inclusiveness when conducting this analysis.

VII.2. Reviewing Agency Files

With limited exceptions, AUSAs should request, and be granted, access to any federal law enforcement agency's substantive case file, as well as any other file or document in that agency's possession related to the matter being prosecuted that the AUSA has reason to believe may contain discoverable information.

AUSAs should ensure that a review is done of the investigative agency's entire file in the matter. This review should include not only the investigative reports on the case, but also such materials as CI/CW/CHS/CS files, and substantive case-related communications. AUSAs should discuss with the case agents what relevant files exist, and whether files from other investigations, or non-investigative files, may contain discoverable information.

VII.3. Substantive Case-Related Communications

Substantive case-related communications can occur in letters, e-mails, text messages, and voice mails. These communications are most likely to occur between (a) prosecutors and agents; (b) prosecutors and victims/witnesses; (c) agents and victims/witnesses; (d) the victim-witness coordinator and victims/witnesses; and (e) case agents and other agents or supervisors . "Substantive" communications include:

- factual reports about investigative activity;
- factual discussions of the relevant merits of the evidence; and
- factual discussions of witness interviews or statements by witnesses.

Communications involving case impressions or investigative/prosecutorial strategies, without more, are generally not considered substantive. AUSAs should be aware that with few (albeit important) exceptions, the format of the communication does not control whether it is discoverable.

AUSAs should ensure that any substantive case-related communications in which they participate are preserved in the case file. AUSAs should similarly instruct the agents working on the case as to the need for preservation; and should ensure that agents understand that agent-to-agent communications (or agent-to-supervisor communications) may also qualify as "substantive case-related communications," which should be preserved and provided to the AUSA for discovery review. AUSAs should also confer with the victim-witness coordinator before trial about any substantive case-related communications in her files.

VIII. Defense Discovery

Rule 16 and the Jencks Act impose reciprocal discovery obligations on the defense. AUSAs should make sure that they make reciprocal discovery demands in writing sufficiently in advance of trial. If the defense fails to respond to the written demand, AUSAs should file a formal discovery motion, and seek to exclude any defense evidence at trial that was not produced in accordance with the defendant's reciprocal discovery obligations.

IX. Keeping a Record

It is critical to maintain a record of what is produced to defense counsel, and when. There are numerous ways to accomplish this, depending upon the volume of discovery and the manner of production. Regardless of the method used, all discovery should be Bates numbered. If redacted materials are produced, the AUSA should keep a record of both the redacted and unredacted versions.

In those instances where the material is too voluminous to produce, and the AUSA is making the materials available to the defense for inspection and copying, the case agent should compile an inventory of those records that have been made available. This inventory should record the specific dates on which the different materials were made available.

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