CRIMINAL DISCOVERY POLICY

United States Attorney's Office
Southern District of Georgia

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Edward J. Tarver
United States Attorney

James D. Durham
First Assistant United States Attorney

Brian T. Rafferty
Criminal Division Chief

Frederick W. Kramer
Joseph D. Newman
Assistant United States Attorneys
Senior Litigation Counsel

FOIA/PRIVACY ACT PROTECTED 5 U.S.C. § 552(b)

General Principles for Discovery

This document sets forth the Office's policy on discovery in criminal cases. The Outline that follows is intended to provide a checklist and general guidance. The Office's policy and the Outline is subject to legal precedent, court orders, and local rules. It provides prospective guidance only, is not intended to have the force of law, or to create or confer any rights, privileges, or benefits on any person. *See United States v. Caceres*, 440 U.S. 741 (1979).

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

In most cases, prosecutors in this District will provide discovery beyond what the rules, statutes, and case law mandate, pursuant to this District's "expanded discovery practice,"[1] which is defined further in this document. The expanded discovery practice will only be followed in cases where the Defendant has "opted in" to the discovery obligations of Rule 16 of the Federal Rules of Criminal Procedure, including but not limited to Defendant's obligation to provide Reciprocal Discovery.

In exceptional cases, an Assistant United States Attorney may seek to deviate from this expanded discovery practice. However, before doing so, the Assistant United States Attorney must obtain approval from the Criminal Division Chief.

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

[1] This Office has, at times, described its discovery policy as "Open File," but that term should no longer be used, as it may be misleading as to the scope of the information being provided.

(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.

As final note, prosecutors in this District are encouraged to seek guidance on discovery issues from the District's Senior Litigation Counsel and the Criminal Division Chief. Although this Policy and the aforementioned rules and caselaw provide a solid foundation for a prosecutor's understanding of its discovery obligations, the District's Senior Litigation Counsel and Criminal Division Chief can provide useful insights on discovery from experience, not only in terms of what is discoverable, but also on where discovery information might be found.

These general principles provide the basic foundation for this Office's discovery policy. The Outline that follows provides further guidance. The Outline does not and could not answer every question that may arise in a particular case. There is no substitute for being intimately familiar with the rules, statutes, and case law. Compliance with the governing legal authorities and this Office's policy on discovery will help to achieve a fair and just result in every case, which is our singular goal in pursuing a criminal prosecution.

Edward J. Tarver
United States Attorney
Southern District of Georgia

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I. Sources of Obligations and Resources

A. Federal prosecutors are subject to several overlapping legal and ethical standards with respect to discovery

1. Relevant legal standards under the Federal Criminal Rules and applicable case law

2. Expanded discovery obligations adopted by the Department of Justice and the USAO of SDGA

a. See, Guidance for Prosecutors Regarding Criminal Discovery, DAG Ogden, Jan. 4, 2010 (hereinafter "Jan. 4, 2010 Guidance")

b. See, U.S. Attorney's Manual (USAM) § 9-5.001 and USAM § 9-5.100

3. Rules of Professional Conduct

a. AUSAs generally satisfy their ethical obligations when they comply with DOJ guidance. The Rules of various jurisdictions, however, differ. When in doubt, consult with PRO Joseph D. Newman.

B. Generally, the obligations imposed by DOJ are broader than those required under the Rules and case law

1. Prosecutors should be mindful that DOJ policy and the Expanded Discovery Practice encourage broad and early disclosure of discovery materials in order to promote truth-seeking and to foster a speedy resolution of the case. These considerations, however, must be counterbalanced with the specific needs of the case, the need to protect witnesses and the need to protect ongoing investigations.

II. Gathering and Reviewing Potentially Discoverable Information

A. The Prosecution Team- defined by DOJ to include "federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant." USAM § 9.5-001.

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1. AUSAs should consult and be familiar with the directions provided in the Jan. 4, 2010 Guidance as to who may be included in the Prosecution Team.

2. In multi-district investigations, include AUSAs and prosecutors from other USAOs and DOJ components.

3. May include regulatory agencies (SEC, FDIC, EPA, etc.) or other non-criminal or intelligence agencies in complex cases.

4. Prosecutors should consider the following factors in determining whether potentially discoverable information may be held by another federal agency:

    a. Whether the prosecutor and the agency conducted a joint investigation or shared resources related to investigating the case;

    b. Whether the agency played an active role in the prosecution, including conducting arrests or searches, interviewing witnesses, developing prosecutorial strategy, participating in targeting discussions, or otherwise acting as part of the prosecution team;

    c. Whether the prosecutor knows of and has access to discoverable information held by the agency;

    d. Whether the prosecutor has obtained other information and/or evidence from the agency;

    e. The degree to which information gathered by the prosecutor has been shared with the agency;

    f. Whether a member of an agency has been made a Special Assistant United States Attorney;

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

    h. 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.

5. "Prosecutors are encouraged to err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes." Jan. 4, 2010 Guidance.

B. Information to be Reviewed

1. The Investigative Agency's Files- AUSAs may choose to review the file or request production of potentially discoverable materials from the case agents.

   a. the file includes documents such as FBI Electronic Communications (ECs), DEA teletypes, inserts, emails, etc.

2. Confidential Informant/Source Files

   a. AUSAs shall review the *entire* informant file of any testifying informant, not just the portion relating to the current case, including all proffer, immunity and other agreements, assessments, payment information and other potential impeachment information. AUSAs should review the *entire* file of any non-testifying informant for any *Brady* information.

   b. AUSAs shall also consult with the case agents to ensure that all potentially discoverable information has been properly documented in the CI and/or other pertinent file.

   c. AUSAs shall consult with the case agents to determine whether any statutes, agency regulations or policies prohibit disclosure of potential *Giglio* materials—e.g., I.R.S. taxpayer information, drug and alcohol counseling records, certain DEA intelligence files—and/or other privacy and security considerations. If such considerations prohibit direct disclosure of a document or file, the AUSA may choose to disclose discoverable information in summary format to the defendant rather than producing the underlying documents. If such considerations prohibit disclosure of the information in any form, the AUSA shall consult with USAO and Agency supervisors to determine whether the information may be disclosed to the Court *ex parte, in camera* and the impact on the case if the court determines that the information must be released.

3. All evidence and information gathered during the investigation.

4. Documents or evidence gathered by civil attorneys and/or regulatory agencies in parallel civil investigations.

5. Substantive case-related communications

    a. 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.

    b. "'Substantive' case-related communications are most likely to occur (1) among prosecutors and/or agents, (2) between prosecutors and/or agents and witnesses and/or victims, and (3) between victim-witness coordinators and witnesses and/or victims." *See* Jan. 4, 2010 DAG Guidance.

    c. Substantive case-related communications do not include logistical communications. Logistical communications include emails which only contain travel information, or the dates and times of hearings or meetings.

    d. AUSAs and Agents should print and maintain any substantive case-related e-mails. Substantive case-related e-mails are to, from or between agents, witnesses and USAO personnel that include reports about investigative activity, discussions of the relative merits of evidence, characterizations of potential testimony, interviews of or interactions with witnesses/victims and issues related to credibility. Note: email communications from paralegals, auditors or other USAO personnel may become Jencks materials if such communications relate to matters on which they later become witnesses.

6. *Gilgio* information for law enforcement witnesses (*see generally* USAM 9-5.100)

    a. SDGA's *Giglio* coordinator (Requesting Official) is Deputy Criminal Chief Karl Knoche.

    b. Each investigative agency must establish an Agency Official who is to be the primary contact for coordinating the disclosure of *Giglio* information. With respect to Federal task forces including

state and local agencies and law enforcement, the lead Federal investigative agency is responsible for gathering and disclosing to the USAO any potential *Giglio* information relating to such state and local agents/officers.

c. When necessary to request impeachment information, the AUSA must contact the Requesting Official (Karl Knoche), who will then request that the Agency Official disclose the following information:

i. any finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during an administrative inquiry;

ii. any past or pending criminal charge brought against the employee; and

iii. any credible allegation of misconduct that reflects upon the truthfulness or possible bias of the employee that is the subject of a pending investigation.

d. AUSAs should consult with the *Giglio* coordinator (Karl Knoche) to determine if allegations which are unsubstantiated, not credible, or have resulted in exoneration should be disclosed. *See* USAM 9-5.100.

e. Throughout the *Giglio* investigation and disclosure process, AUSAs must remain mindful of the privacy interests of the law enforcement witness.

f. AUSAs should update requests for *Giglio* information from the investigative agency as appropriate.

7. *Giglio* information for non-law enforcement witnesses, includes, but is not limited to:

a. Prior inconsistent statements;

b. Benefits provided to witnesses, including but not limited to:

i. Dropped or reduced charges,

ii. Immunity,

iii. Expectations of downward departures or motions for reduction of sentence,

iv. Assistance in a state or local criminal proceeding,

v. Considerations regarding forfeiture of assets,

vi. Stays of deportation or other immigration status considerations,

vii. S-Visas,

viii. Monetary benefits,

ix. Non-prosecution agreements,

x. Letters to other law enforcement officials (e.g. state prosecutors, parole boards) setting forth the extent of a witness's assistance or making substantive recommendations on the witness's behalf,

xi. Relocation assistance, and

xii. Consideration or benefits to culpable or at-risk third-parties;

c. Witness bias, including but not limited to:

i. Animosity toward defendant,

ii. Animosity toward a group of which the defendant is a member or with which the defendant is affiliated,

iii. Relationship with a victim, and

iv. Known but uncharged criminal conduct (that may provide an incentive to curry favor with a prosecutor);

d. Prior acts under Fed. R. Evid. 608 and prior convictions under Fed. R. Evid. 609,

e. Known substance abuse or mental health issues; and/or

f. Inconsistent witness statements. Note: The Jan. 4, 2010 DAG Guidance contains detailed instructions for ensuring that inconsistent witness statements are properly documented and disclosed. AUSAs must be familiar with those requirements. In general:

i. AUSAs generally should ensure that all witness interviews are memorialized in a report,

ii. Material variations by a witness should be documented and must be disclosed, and

iii. AUSAs may need to review agents' notes on a case-by-case basis.

C. Conducting the Review

1. The Jan. 4, 2010 DAG Guidance provides guidelines on how AUSAs should conduct their discovery review. The format of this review will necessarily be conducted on a case-by-case basis. Ultimately, it is the responsibility of the AUSA to ensure that all discovery obligations have been met.

2. In the SDGA, AUSAs should whenever possible conduct pre-indictment discovery meetings in complex or unusual cases with case agent(s) and/or any cooperating Federal, state or local regulatory agencies to discuss the scope, location and sensitivity of potentially discoverable materials. Such meetings should include any USAO staff who have participated in the pre-indictment investigation—e.g., auditors, paralegals, ALS support and/or victim-witness coordinators. If a pre-indictment discovery conference is not feasible, the conference should be held as soon as practicable after the indictment is returned, but not later than arraignment.

III. Disclosing Discoverable Information

A. Rule 16 provides for the discovery of the following, of which AUSAs have a due diligence and affirmative duty to inquire of investigating agencies:

1. Recorded and written statements made by the defendant before or after arrest, including:

a. Defendant's grand jury testimony; and

b. Recorded telephone calls, body wires, T-III electronic surveillance, subject to protective order if necessary.

2. The substance of any oral statements made by the defendant to any person then known to the defendant to be a government agent, including:

a. Pre-arrest statements not discoverable if unknown to defendant that other party was a government agent and

b. Third party admissions not discoverable.

3. The defendant's prior criminal history;

4. Documents and tangible things, where disclosure is material[2] to defense; the government intends to use in case-in-chief; and/or the evidence was obtained from or belonged to the defendant. (Note: the Government is only required to produce what is in their possession, custody or control; but control may depend on whether state and local law enforcement are involved, or federal, state and local regulatory agencies are involved. *See*, section II *supra*); and

5. Reports of scientific tests and medical examinations;

a. Where defendant shows materiality; or

b. The government intends to use in case-in-chief.

6. Reciprocal discovery from the defense is required if Rule 16 discovery has been provided

7. Limitations on Discovery

a. Rule 16(a)(2) excludes agent reports and witness statements except as provided under Jencks Act;

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[2]The standard for materiality being where disclosure would enable the accused to substantially alter the quantum of proof in his favor.

b. No right to grand jury testimony except if it constitutes Jencks material.

c. No right to the government's witness list unless defendant makes specific showing of reasonableness and materiality. (In a capital case, the defendant does have a right to the government's witnesses.)

d. Witnesses to be used at trial who are in "protective custody or otherwise under government control" must be made available to defense counsel one week before trial.

B. Disclosure of Confidential Informants.

1. The standard for disclosure of the identity of a non-testifying confidential informant is reasonable probability that the informer can give relevant testimony material to the defense.

2.. Informant must be "active participant" and not "mere tipster."

3. Disclosure not required where:

a. the informant played only a small or passive role in the offense charged or

b. the informant would be in personal danger and the potential testimony of the informant is not exculpatory.

4. Disclosure of the identity of a confidential informant is required where the informant is substantially involved, however the government has no duty to produce such an informant at trial.

5. If disclosure is required under case law, the identity of any confidential informant who participated in or is otherwise a material witness to the commission of the offense(s) alleged in the indictment shall be disclosed no later than one week before trial.

C. Exculpatory Evidence

1. *Brady v. Maryland*, 373 U.S. 83 (1963), is not a rule of discovery but rather one of fundamental fairness and due process. The *Brady* rule imposes an affirmative duty on the prosecutor to produce at the

appropriate time requested evidence that is materially favorable to the accused either as direct or impeaching evidence. It applies to sentencing as well as to guilt/innocence determinations. The obligation to disclose is measured by the character of the evidence, not the character of the prosecutor. *United States v. Agurs*, 427 U.S. 97, 110 (1976).

2. DOJ policy recognizes that a fair trial will often include examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, result in an acquittal or, as is often colloquially expressed, make the difference between guilt and innocence. As a result, this policy requires disclosure by prosecutors of 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). (USAM § 9.5-001)

    a. Additionally, a prosecutor must disclose information that is inconsistent with any element 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 of the defendant for a charged crime. (USAM § 9.5-001).

    b. A prosecutor must disclose information that either casts a substantial doubt upon the accuracy of any evidence—including but not limited to witness testimony—the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence. This information must be disclosed regardless of whether it is likely to make the difference between conviction and acquittal of the defendant for a charged crime. (USAM § 9.5-001).

3. To establish a *Brady* violation, a defendant bears the burden to show that non-disclosed materials were:

    a. favorable to the defendant;

    b. material; and

    c. that the prosecution had the materials and failed to disclose them. *Moore v. Illinois*, 408 U.S. 786, 794, 795 (1972).

d. Mere speculation fails to meet the burden. *United States v. Crowell*, 586 F.2d 1020, 1029 (4th Cir. 1978).

4. *United States v. Agurs* identified three types of situations implicating a duty to disclose under *Brady*:

a. Where the prosecution knew or should have known its case contained perjured testimony. Non-disclosure requires reversal where there is any reasonable likelihood that the false testimony could have affected the jury's judgment. *Id*. at 103.

b. Where the prosecution fails to respond to a defendant's specific request for information, a new trial must be granted if the suppressed evidence "might have affected the outcome." *Id*. at 104. Mere possibility is not enough.

c. Where the defendant does not request exculpatory evidence, reversal is necessary only if the undisclosed evidence "creates a reasonable doubt that did not otherwise exist". *Id*. at 112.

d. Evidence which impeaches government witnesses must be disclosed. *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Crowell*, 586 F.2d at 1020. Includes plea agreement, grants of immunity, criminal history, pending indictments, etc.

D. Jencks Act (18 U.S.C. §3500) and Rules 26.2, 12(i) and 5.1, Fed. R. Crim. P.:

1. Due process requires production of prior statements of a witness in the possession of the United States which relate to the events to which the witness testifies to be produced upon request after the witness testifies. *Jencks v. United States*, 353 U.S. 657 (1957); codified at 18 U.S.C. §3500.

2. Jencks disclosure is a statutory, not Constitutional requirement and should be read in conjunction with *Brady* requirements.

4. Rule 26.2, applies Jencks-like requirements on the government and all defense witnesses except the defendant.

5. Rule 12(i) applies Rule 26.2 to suppression hearings and Rule 5.1 applies Rule 26.2 to preliminary hearings. At such hearings, a law enforcement officer shall be deemed a witness called by the government. Privileged material shall be excised. Pursuant to Rule 5.1, if the government fails to

produce *Jencks* material, the magistrate cannot consider the testimony from that witness.

6. Jencks applies to statements in the possession of the Government, but possession may depend on whether the state and local law enforcement are involved, or federal, state and local regulatory agencies are involved. *(See*, section II *supra*):

   a. Pre-Sentence Reports and documents of the Probation Office, personal diaries of defendants have been held not in the possession of the United States.

   b. The writing must be a statement attributable to the witness to fall within the Jencks Act:

      i. Notes and reports of an investigator are not Jencks statements of the interviewee. *United States v. Hinton*, 719 F.2d 711, 722 (4th Cir. 1983). Interview notes that contain verbatim quotes do not constitute Jencks statements. *United States v. Foley*, 598 F.2d 1323 (4th Cir. 1979).

      ii. Unless the interviewee approves or adopts the notes or report.

   c. Most circuits permit routine destruction of an agent's notes after they have been incorporated into a formal report, *i.e.* a DEA-6 or FBI-302. If the witness read and approved the notes, they must be preserved. *United States v. Crowley*, 586 F.2d at 1028.

   d. A tape recorded interview is the witness' Jencks statement and must be preserved.

   e. Standard of review on appeal for Jencks violations is harmless error. In the absence of bad faith or prejudice, the failure to disclose Jencks Act material will not result in reversal. *United States v. Schell*, 775 F.2d 559, 567 (4th Cir. 1985).

   f. With limited exception, sensitive material such as victim/witness names, telephone numbers, addresses, dates of birth, social security numbers, bank account and/or financial information may be redacted and certain impeachment material withheld from the Expanded File without supervisory approval. Compliance with

Rule 49.1 of the Federal Rules of Criminal Procedure is mandatory.

E. Timing of Disclosure

1. DOJ Guidance:

a. "Providing broad and early discovery often promotes the truth·seeking mission of the Department and fosters a speedy resolution of many cases. It also provides a margin of error in case the prosecutor's good faith determination of the scope of appropriate discovery is in error. Prosecutors are encouraged to provide broad and early discovery consistent with any countervailing considerations." Jan. 4, 2010 Guidance.

b. Countervailing concerns to early disclosure include, but are not limited to:

i. protecting victims and witnesses from harassment or intimidation;

ii. protecting the privacy interests of witnesses;

iii. protecting privileged information;

iv. protecting the integrity of ongoing investigations;

v. protecting the trial from efforts at obstruction;

vi. protecting national security interests;[3]

vii. investigative agency concerns;

viii. enhancing the likelihood of receiving reciprocal discovery by defendants;

[3] In cases that involve national security interests, all AUSAs are expected to comply with 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."

ix. any applicable legal or evidentiary privileges; and

x. other strategic considerations that enhance the likelihood of achieving a just result in a particular case.

2. Exculpatory information, regardless of whether the information is memorialized, must be disclosed to the defendant promptly upon discovery.

3. *Giglio*/impeachment material must be disclosed at a reasonable time before trial to allow the trial to proceed efficiently. (USAM §9-5.001).

4. *Brady* and *Giglio* evidence must be disclosed regardless of whether the defendant makes a request for exculpatory or impeachment evidence.

5. Exculpatory or impeachment information that casts doubt upon sentencing factors but does not relate to proof of guilt, must be disclosed no later than the court's initial presentence investigation. (USAM §9-5.001).

6. **A prosecutor must notify the Chief of the Criminal Division before any disclosure is made of any classified exculpatory or impeachment information.**[4] Upon supervisory approval, notice will be provided to the defendant that classified materials contain potential impeachment information and of the time and manner by which disclosure of the exculpatory or impeachment information will be made. (USAM §9-5.001).

7. "The government is encouraged, but not required, to provide early disclosure of Jencks Act material."

8. **In SDGA, the government will produce and/or make available discovery at Defendant's arraignment, or within a reasonable time thereafter.**

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[4] Exculpatory information that includes classified or otherwise sensitive national security material may require certain protective measures that may cause disclosure to be delayed or restricted (e.g. pursuant to the Classified Information Procedures Act). (USAM § 9.5-001). In cases that involve national security interests, all AUSAs are expected to comply with 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."

9. In cases in which a Defendant will be pleading guilty to an information, the government will produce and/or make available discovery at a reasonable time prior to Defendant's Rule 11 hearing.

IV. Expanded Discovery Practice In The Southern District of Georgia

A. In most cases, prosecutors in the SDGA will follow an Expanded Discovery Practice, which is intended to make discovery available to defense counsel in an indicted criminal case in order to expedite its resolution. The Expanded Discovery Practice does not create any procedural or substantive rights for the defendant or for defense counsel, and therefore should not give rise to judicial review of alleged violations.

B. The Expanded Discovery Practice will only be followed in cases where the Defendant has "opted in" to the discovery obligations of Rule 16 of the Federal Rules of Criminal Procedure, including but not limited to Defendant's obligation to provide Reciprocal Discovery. Any deviation must be approved by the Chief of the Criminal Division.

C. Although the Expanded Discovery Practice will include materials in addition to those materials which the government is required to make available to the defense pursuant to Rule 16 of the Federal Rules of Criminal Procedure, the Expanded Discovery Practice does not mandate that the prosecutor make available to defense counsel everything known to the prosecutor.

D. Subject to the foregoing, the Expanded Discovery Practice will typically include all of those materials that must be produced pursuant to Rule 16 of the Federal Rules of Criminal Procedure, and some or all of the following items:

1. Investigative reports;

2. Reports of Interview, including DEA-6 reports, HHS-OIG Reports of Interview, FBI-302 Reports, and similar agency reports, summarizing interviews of witnesses;

3. Grand Jury transcripts, and other materials that fall within the definition of materials that must be produced pursuant to the Jencks Act (18 U.S.C. §3500) or Rule 26.2 and Rule 5.1 of the Federal Rules of Criminal Procedure; and,

4. Transcripts of audio and video recordings.

E. The Expanded Discovery Practice will not include the production of attorney work

product, including internal memoranda, internal government documents made by the attorney for the government, nondiscoverable correspondence, or internal memoranda made by government agents in connection with the investigation or prosecution of the case.

F. The Expanded Discovery Practice will also not include the production of nondiscoverable materials which are not in the U.S. Attorney's file but which are in possession of federal, state, or local law enforcement agencies, regardless of whether the prosecutor is aware of such materials. Any request by defense counsel to review nondiscoverable materials in possession of an agency will be considered on a case-by-case basis.

G. An individual prosecutor may deviate from the Expanded Discovery Practice (as defined herein), but only in exceptional cases, after consulting with the approval of the Chief of the Criminal Division for the District. If a request to deviate from the Expanded Discovery Practice is approved by the Chief of the Criminal Division, the individual prosecutor shall announce at the defendant's arraignment that the Government will not be following the Expanded Discovery Practice, and will describe for the Court what materials will be provided to Defendant as part of discovery.

H. Although the USAO has previously described its policy as "Open File," that term should no longer be used because it may be misleading as to the scope of the information being provided. As described herein, the "Expanded Discovery Practice" refers to the government providing greater discovery than that required under Rule 16 of the Federal Rules of Criminal Procedure.

I. Sensitive material such as victim/witness names, telephone numbers, addresses, dates of birth, social security numbers, bank account and/or financial information may be redacted and certain impeachment material withheld from the Expanded File without supervisory approval.

V. Making A Record

A. AUSAs shall make a record of when and how information is provided or otherwise disclosed to defense counsel and/or the defendant:

1. Production cover letters generally should describe the information being provided and, where appropriate, list Bates numbers of disclosed documents

2. All telephone conversations or other oral communications with defense counsel describing discovery production, withholding of documents or discovery requests from either side should be documented, such as a memo to the file or a follow-up email with counsel.

B. Keeping accurate and contemporaneous records reduces subsequent litigation, including post-conviction actions.