

Memorandum

United States Attorney
Southern District of Indiana



Subject	Date
CRIMINAL DISCOVERY POLICY	October 14, 2010
To	From
All Criminal AUSAs	Joseph H. Hogsett United States Attorney Southern District of Indiana

INTRODUCTION

On January 4, 2010, the Department issued guidance for prosecutors regarding criminal discovery. (The DAG's memorandum is posted on the office intranet under Criminal/Criminal Policies and Procedures/Guidance for Prosecutors Regarding Criminal Discovery, DAG Memo of 1/4/10) The guidance is 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." The guidance directs each United States Attorney's Office to establish a written discovery policy.

The Department recognizes that discovery practices vary by district and permits each district to consider local practice. This memorandum outlines the policy of the Southern District of Indiana on discovery in criminal cases. This policy is subject to legal precedent, court order and local rules. It provides only internal guidance. This policy is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice. This discovery policy applies in all criminal cases arising in the Southern District of Indiana, but does not govern disclosure in cases involving national security. Applicable policy concerning these cases is set forth in section 6.

Prosecutors are encouraged to provide discovery beyond what statutes, rules and case law require. This District's policy on the disclosure of information and evidence is intended to be broader than what is required. Such practice may move criminal cases to resolution more quickly and demonstrate candor and openness. However, in certain cases countervailing considerations, including risk of harm to victims or witnesses, privacy concerns, obstruction of justice, and risk

to ongoing investigations or other security concerns, counsel against broad and early disclosure.

In cases where an AUSA wishes to deviate from the discovery principles set forth in this policy and restrict discovery, supervisory approval is required and such approval must be documented in the case file. No approval is necessary to provide discovery that is broader than provided for in this policy.¹

SOUTHERN DISTRICT OF INDIANA DISCOVERY POLICY

1. Gathering Discoverable Information - The Prosecution Team

The discovery obligations of federal prosecutors are generally established by Federal Rules of Criminal Procedure 16 and 26.2, 18 U.S.C. §3500 (Jencks Act), *Brady*, and *Giglio*. In addition, the U.S. Attorney's Manual describes DOJ's policy for disclosure of exculpatory and impeachment information. See USAM §§ 9-5.001 ("Policy Regarding Disclosure of Exculpatory and Impeachment Information") and 9-5.100 ("Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Witnesses ("Giglio Policy").

The first question in every case is where to look for discoverable information. Department policy requires prosecutors to seek discoverable information from all members of the prosecution team. In most cases, the prosecution team will include the federal agents and state and local law enforcement officers working on the case. USAM § 9-5.001.

In order to determine who should be considered part of the prosecution team, an AUSA must decide whether the relationship is close enough to warrant inclusion for discovery purposes. When in doubt, consult with your supervisors and/or the District's Discovery Coordinator. Examples include:

- Multi-district investigations – the prosecution team could include the AUSAs and agents from the other district(s).
- Regulatory agencies – the prosecution team could consist of employees from non-criminal investigative agencies such as the SEC and FDIC.
- State/local agencies – a state and local officer is a part of the "prosecution team" if the AUSA or federal agents are directing the officer's actions or if the state or local officer participated in the investigation or gathered evidence which ultimately led to the charges.

¹ If broader disclosure, however, conflicts with another DOJ policy (such as disclosure of the identity of an informant or non-testifying source), supervisory approval is required.

Considerations in determining whether an agency or entity should be considered part of the "prosecution team":

- Whether the AUSA or investigative agency conducted a joint investigation or shared resources with the other agency or entity;
- Whether the other agency or entity played an active role in the AUSA's case;
- The degree to which information or evidence has been shared or exchanged with the other agency or entity; and
- Whether the AUSA has control over or has directed action by the other agency or entity.

AUSAs should take an expansive view and err on the side of inclusiveness in deciding who should be considered part of the "prosecution team." Additional guidance on this issue is set forth in the DAG's January 4, 2010, "Guidance for Prosecutors Regarding Criminal Discovery" memorandum.

2. What to Review Once the Prosecution Team is Defined

All evidence and other potentially discoverable material gathered during the investigation, whether in our custody or the custody or control of the other members of the prosecution team should be reviewed. In most cases it is not practical for the AUSA to conduct the review. In such cases, the prosecutor should develop a process for review to ensure that discoverable information is identified. It is the AUSA, however, who makes the ultimate disclosure decision.

a. Specific Issues

i. The Investigative Agency's File

For DOJ law enforcement agencies, AUSAs should have access to the agencies' investigative files. AUSAs should review the files or request production of potentially discoverable materials from the case agents. With respect to outside agencies, AUSAs should request access to files or request production of all potentially discoverable material.

ii. Confidential Informant, Confidential Witness, Confidential Human Source, and Confidential Source Files

For testifying witnesses, the AUSA should ensure that the entire file for each witness is reviewed, not just the part relating to the current case. An AUSA should also review a relevant non-testifying source's file for Brady/Giglio or other discoverable material. An AUSA should follow the agency's procedures for

requesting the review of such files.² If issues develop regarding access to such files, contact the District's Discovery Coordinator.

iii. Evidence

Generally, all evidence and information gathered during the investigation should be reviewed for discoverable material, including all evidence obtained via subpoenas, search warrants, or other legal process. In cases involving voluminous evidence, this requirement may be met by permitting defense counsel access to all of the material.

iv. Regulatory Agency/DOJ Civil attorney files

If an AUSA has determined that a regulatory agency is a member of the prosecution team or has information that the regulatory agency has material discoverable evidence, the AUSA should arrange for that agency's files to be reviewed for discoverable material.

3. Timing of Disclosures

a. Rule 16 and Rule 12 Discovery

Every Magistrate Judge in the District orders at arraignment the production of Rule 16 discovery by a certain date. You should comply with the order by either sending the Rule 16 material to defense counsel or making the Rule 16 material available for review.

It is the policy of the District to turn over Rule 12 material (*e.g.*, search warrants, reports of search and seizure and arrests, and witness identification) to the defense with the Rule 16 material. It is in our interest to provide such notice by turning over evidence that may be the subject of a motion to suppress as soon as possible. Furthermore, if you have a case in which there is evidence that is not covered by a discovery rule but that may be the subject of a motion to suppress (for example identification procedures), you should turn the material over with the Rule 16 material.

AUSAs should always consider security concerns of victims and witnesses when making discovery timing decisions as well as protecting ongoing investigations, preventing obstruction of justice, investigative agency concerns, and other strategic considerations that improve our chances of reaching a just result in our cases.

² In FBI investigations, guidance on this issue is set forth in the DAG's January 15, 2009 memo "Guidance on the Federal Bureau of Investigation's (FBI) Administration of Confidential Human Sources and its Impact on the Discovery Obligation of Prosecutors."

b. Expert Disclosures

Rule 16 requires disclosure upon the request of the defendant of a written summary of a testifying expert's expected testimony, including the expert's opinions, bases and reasons for the opinions, and the expert's qualifications. In most cases, expert disclosures are not made at the Rule 16 deadline in the arraignment because either the government has not determined whether an expert will testify or the expert has not yet been identified. AUSAs should make expert disclosures in compliance with any pre-trial order but in the absence of such an order, no later than one week prior to trial.

c. Confidential informants

Roviaro v. United States, 353 U.S. 53 (1957) and its progeny mandate the disclosure of the identity of government informants under a narrow set of circumstances. As a general rule, the government does not have to disclose the identity of an informant unless the informant has relevant information that is helpful to the defense, *i.e.*, he or she was an eyewitness to the charged offense. Informants who merely act as tipsters should never be disclosed.

In those instances where we are required to disclose the identity of the informant, judges typically require the government to make the informant available to the defense. With respect to these disclosures, AUSAs should make informant disclosures in compliance with any pre-trial order but in the absence of such an order, no later than one week prior to trial.

d. Federal Rules of Evidence 404(b), 413 and 414

Federal Rules of Evidence 404(b) requires reasonable pretrial notice of other crimes or bad act evidence to be offered by the United States. Given that it would likely be held to be ineffective assistance of counsel not to make such a request, notice should be provided even if no request is made. Similar notice obligations exist for introduction of evidence in sexual abuse cases. FRE 413 authorizes introduction of evidence of similar crimes in sexual assault cases and FRE 414 allows introduction of similar evidence in child molestation cases.

Both FRE 413 and 414 mandate that the government must give notice of its intention to offer such evidence and disclose the evidence to the defendant at least 15 days prior to trial, and AUSAs must comply with this requirement. FRE 404(b) mandates reasonable notice without a specific deadline. AUSAs should disclose FRE 404(b) evidence in compliance with any pre-trial order but in the absence of such an order, no later than one week prior to trial.

e. Jencks Act Material

Although not required by the Jencks Act, the practice in the District is to disclose Jencks Act at least one week before trial. In many cases, however, AUSAs should consider giving earlier discovery than required by the policy because it fosters a speedy resolution of many cases. Early disclosure also negates any issues concerning whether the Jencks Act material contains *Brady* or *Giglio*

information. An AUSA must obtain supervisory approval to disclose Jencks Act material less than one week before trial. Withholding of such material should be based on security concerns of victims and witnesses, protecting ongoing investigations, preventing obstruction of justice, investigative agency concerns, or other strategic considerations that improve our chances of reaching a just result.

Seventh Circuit law is clear that agent interview reports are not Jencks Act material for the individual interviewed unless the individual adopted the report or the report is a substantially verbatim recitation of what the individual said during the interview. While we should never concede that such interview reports are Jencks, the policy in the District is to disclose such interview reports as if they were Jencks Act material. Therefore, if an AUSA seeks to disclose interview reports that are not technically Jencks Act material less than one week before trial, the AUSA must obtain supervisory approval.

An AUSA is not required to disclose interview reports for non-testifying individuals. However, AUSAs should err on the side of disclosing such reports absent concerns related to witness safety, obstruction of justice, ongoing investigations, or legitimate privacy concerns.

Rule 26.2 applies the Jencks Act to suppression hearings and to the extent specified in the Rules to other proceedings such as preliminary hearings, sentencing, and detention hearings. The rule requires production of the statement of a witness, other than the defendant, after the witness has testified upon motion of the party who did not call the witness. AUSAs must be prepared to provide such statements to defense counsel at these various hearings.

f. *Brady and Giglio*

AUSAs are constitutionally required to provide *Brady* and *Giglio* material to defense counsel. Government disclosure of material exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial.

Department policy set forth in USAM 9-5.001 requires disclosure by AUSAs of information beyond that which is “material” to guilt. Under Department policy 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
- Additionally, 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.

In this District, we interpret *Brady* and *Giglio* broadly. If an AUSA has any doubt whether a piece of evidence is exculpatory, the evidence should be disclosed. The supervisory criminal AUSAs or the Discovery Coordinator should be consulted as issues arise.

With respect to the timing of disclosures, the District follows DOJ policy. DOJ policy directs disclosure of exculpatory (*Brady*) information “reasonably promptly after it is discovered,” and directs that disclosure of impeachment information (*Giglio*) be made before trial. USAM 9-5.001. Delaying disclosure per the Jencks Act should be done only when necessary due to witness safety or other security concerns. An AUSA must obtain supervisory approval not to disclose impeachment information before trial or not to disclose exculpatory information reasonably promptly because of security of other concerns. Such approval must be documented in the case file.

i. *Giglio* Policy for Law Enforcement Witnesses (Federal, State and Local)

In all cases in which law enforcement officers are scheduled to provide a sworn statement or testimony the AUSA will satisfy the requirements of the *Giglio* policy by either requesting impeachment information directly from the witness or affiant or by making a written request to the employing agency. If the AUSA is obtaining the information directly from the agent, the *Giglio* form may be found on the USAO Bar in WordPerfect > Criminal Forms A-O> *Giglio* Questionnaire. If the agent answers yes to any of the *Giglio* questions, the AUSA should contact the *Brady/Giglio* Officer, who will contact the agency’s *Giglio* contact to obtain the relevant information. The AUSA should maintain a copy of the *Giglio* Questionnaire in the file to confirm that the AUSA completed the *Giglio* inquiry for each testifying law enforcement officer.

If the AUSA seeks a written request to the employing agency, the request will be made by the *Brady/Giglio* Officer. The AUSA is responsible for providing the *Brady/Giglio* Officer with relevant information to make the request. To obtain information from an officer/agent’s employer, the *Brady/Giglio* Officer will send a letter requesting the following information from the employer:

- A. Any finding of misconduct that reflects upon the truthfulness or possible bias of the agency employee, including a finding of lack of candor during an administrative inquiry;
- B. Any past or pending criminal charge brought against the agency employee;
- C. Any credible allegation of misconduct that reflects upon the truthfulness or possible bias of the agency employee that is the subject of a pending investigation; and
- D. Any allegations that could not be substantiated, are not credible, or which resulted in the exoneration of the agency

employee, if the allegations reflected upon the truthfulness or bias of the agency employee.

When potential *Giglio* information exists, the AUSA should consult with the Discovery Coordinator or the *Brady/Giglio* Officer, and a supervisory criminal AUSA to determine whether it is appropriate to withhold the information, seek *ex parte, in camera* review by the district court concerning disclosure, disclosing the material while seeking an order *in limine* precluding introduction of the information at trial, or disclosing the information to the defense.

4. Other Issues

a. Agents' Interview Notes

Agents typically make rough notes of witness statements during interviews. They then prepare an interview report based on the notes. Depending on agency policy, agents retain their rough notes. It is the law of the circuit that these rough notes generally are not deemed to be Jencks Act material of the interviewed witness. If the notes are a faithful representation of what is contained in the formal report of interview, AUSAs have no duty to disclose the interview notes.

However, issues may arise when rough notes are inconsistent with the formal interview report. If the notes depart materially from what is contained in the formal report the notes may constitute *Brady* or *Giglio* material. If an AUSA has information that the interview notes may differ from the report of interview and thereby contain *Brady* or *Giglio* material, the AUSA should review the notes for disclosure issues. Disclosure of the notes (or the content of the notes) should be considered after consultation with a criminal supervisor or the Discovery Coordinator.

b. Trial Preparation Witness Interviews

When preparing for trial, it is the practice to meet with witnesses prior to their testimony. During this process, prosecutors and/or agents may make notes of the statements made by the witnesses. These notes typically are not memorialized in an interview report and raise discovery issues.

First, if the witness statement is noted in verbatim or substantially verbatim form, it may constitute Jencks Act material that must be produced.

Second, if the witness provides information that is arguably exculpatory or makes a statement regarding a material fact that is arguably inconsistent with a prior statement of that witness, the AUSA must determine whether the information should be disclosed as *Brady* or *Giglio*.

Whether information is exculpatory may not become apparent until a later time or during trial. Prosecutors, therefore, should retain their rough notes and be cognizant of the potential they may contain *Brady* or *Giglio* information that may need to be disclosed.

When considering disclosure, the AUSA may consider providing the information by way of letter or e-mail. The AUSA may also go to the court and seeking an in camera review of the information and ask the court to determine whether the information constitutes *Brady* or *Giglio*.

c. Email

AUSAs, law enforcement agents, and other employees use email to communicate about a variety of case related matters. While a valuable tool, email may have significant adverse consequences if not used appropriately. The use of email to communicate substantive case-related information in criminal and parallel criminal/civil cases may trigger AUSAs' responsibilities under the Jencks Act, Federal Rules of Criminal Procedure Rules 16 and 26.2, *Brady/Giglio*, USAM 9-5.001, and the Federal Records Act (discussed more fully below).

Emails fall into three general categories: purely logistical communications, potentially privileged communications; and substantive communications.

Email may be used to communicate purely logistical information and to send formal investigative reports as attachments, or to communicate efficiently regarding non-substantive issues such as scheduling meetings, interviews, and court appearances. Such emails are generally not discoverable.

Emails may be used to communicate with others regarding case strategy, to seek approval or legal advice from supervisors or others, to give legal advice, or to request that an agent, paralegal, auditor, or other USAO personnel conduct certain research, analysis, or investigative action in anticipation of litigation. Such emails are "potentially privileged" and as such may be protected from discovery.

An email that contains "substantive" case-related information raises additional legal issues. AUSAs and other personnel must be careful in the exchange of such email. They should avoid using email to communicate substantive case-related information in criminal and parallel criminal/civil cases whenever possible. Because email communications from agents may not be as complete as investigative reports, and may have the unintended effect of circumventing the investigative agency's established procedures for writing and reviewing reports, AUSAs should advise investigative agents that, unless circumstances dictate otherwise, substantive written communications from agents about cases should be in the form of a formal investigative report, rather than an email.

When substantive communications are sent via email, these guidelines should be followed:

i. If email is used to communicate substantive case-related information with agents, victims or witnesses, or anyone else, the email must be maintained in the case file or electronically in an Outlook folder. Alternatively, the

AUSA can require the agent to memorialize the substantive communication in a written interview report.

ii. As part of the discovery collection and review process, AUSAs should routinely ask agents and others to provide them with access to all emails that contain substantive case-related information. This includes, but is not limited to, communications between agents, and between agents, AUSAs, any USAO personnel, or anyone else, just as any formal reports would be collected and reviewed.

iii. While substantive emails need to be reviewed during the discovery phase, any discoverable information may be disclosed in a redacted or alternative form (*e.g.*, a letter or memo) in appropriate circumstances, particularly when agency policy or practice disfavors disclosure of emails. Redaction may also be appropriate if an email contains a mix of substantive, potentially privileged communications, and purely logistical information.

iv. AUSAs and any USAO personnel who interact with victims and witnesses should limit email exchanges to non-substantive matters such as the scheduling of interviews or notification of dates and times of hearings. Similarly, AUSAs should strongly encourage agents to limit email exchanges with victims or witnesses to non-substantive matters. Any substantive information received from a victim or witness should be considered potential Jencks Act material and also maintained for *Brady/Giglio* review. If USAO personnel other than the AUSA receives a substantive email from a victim or witness, such email should be forwarded to the AUSA(s) assigned to the investigation or case.

5. Maintaining a record of disclosures

AUSAs shall maintain a record of the disclosures made to defense counsel sufficient to counter a claim by defense counsel that a particular document or piece of evidence was not disclosed. The manner in which an AUSA maintains a record will change depending on the case. For example, the AUSA may maintain a Bates-stamped copy of all material disclosed, an electronic copy of all material disclosed, or a written record of the documents and evidence furnished to counsel on particular dates.

6. Special Concerns in Cases Involving 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 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
- 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.