Eastern District of Kentucky
Discovery Policy
Revised 15 Oct 2010

A. Introduction:

On January 4, 2010, following a thorough review of the policies, practices and training related to case management and discovery utilized across the Department of Justice (DOJ), the Deputy Attorney General (DAG) directed each United States Attorney's Office (USAO) and each DOJ litigating component handling criminal matters to establish uniform criminal discovery practices. Also on January 4, 2010, the DAG issued "Guidance for Prosecutors Regarding Criminal Discovery" setting a baseline for all component discovery policies. The following implements the DAG memorandums and is the discovery policy for the United States Attorney's Office in the Eastern District of Kentucky.

Discovery is an important obligation of the United States. Each Assistant United States Attorney (AUSA) has an independent duty to insure that discovery is properly conducted and that certain information is timely produced. In almost every case, paralegals and legal assistants have an important role in gathering, tracking and producing discovery materials. Our support staff makes possible the prosecution of complex and multi-defendant cases. It is the AUSA, however, who is responsible for timely and complete discovery. AUSAs must supervise all phases of discovery and insure discovery materials, Jencks Act materials, and *Brady* and *Giglio* information are timely produced.

In general terms, the discovery obligations of federal prosecutors are set forth in Rules 16 and 26.2 of the Federal Rules of Criminal Procedure. Those rules are augmented by statute in the form of the Jencks Act, 18 U.S.C. § 3500, *et seq*., and case law, particularly, *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). In addition, DOJ promulgated guidance concerning disclosure of exculpatory and impeachment materials at USAM § 9-5.001, and the production of Brady and Giglio materials at USAM § 9-5.100. The practice in the Eastern District of Kentucky (EDKY) has been to provide timely, complete discovery pursuant to the Rules, case law, and district court discovery orders in a manner that facilitates the fair administration of justice and does not compromise a defendant's rights.

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B. Discovery Practice:

There is a wide variety of cases prosecuted in EDKY. Cases range from the factually simple (e.g. a felon in possession of a firearm) to the factually and legally complex (e.g. a RICO prosecution). Many factors play into the consideration of when a matter is charged. All too often, however, we overlook the impact of discovery when deciding when a matter should be presented to the grand jury or charged by complaint. In general, AUSAs should strive to have all discovery ready to be provided or made available to defense counsel and all related issues addressed before a case is indicted. In those situations when it is not possible or practical to have discovery prepared, AUSAs should seek the guidance of their first line supervisor before moving a case forward to presenting an indictment to the grand jury.

1. Discovery Orders:

Each District Court judge in EDKY issues a discovery order in every criminal case. The orders issued by the judges in EDKY vary slightly. All such orders, however, set forth a fairly short time frame by which the litigants must commence discovery. Most of these orders require the litigants to consult with each other about discovery within 10 days of the defendant's arraignment. All such orders require Rule 16 discovery be produced upon request of the Defendant promptly, usually no less than 10 days following the request. In EDKY we do not always require a written request from the defendant to initiate discovery. Nevertheless, AUSAs should document verbal discovery requests from defense counsel and discussions concerning discovery issues. AUSAs should also document what discovery was provided, when it was provided, and if possible, its receipt. Where there is no discovery request, the government's Rule 16 obligations are not triggered. Our obligations under *Brady*/*Giglio* and the Jencks Act are independent of Rule 16

2. FRCP 16:

FRCP 16(a) established the basic discovery obligations of the United States. Under the Rule, the government is required to disclose "prior statements of the defendant, the defendant's prior criminal record, documents, photographs, or tangible objects, which are withing the custody or control of the government and which are material to the defense or intended for use by the government in its case-in-chief at trial or which were

obtained from or belong to the defendant, and the results of any mental or physical examinations performed on the defendant which are material to the defense or which are intended for the use by the government as evidence in its case-in chief at trial." *United States v. Presser*, 844 F2d 1275, 1284-85 (6th Cir.1988). Rule 16 explicitly excludes from disclosure witness statements and internal reports written by government agents or attorneys in connection with the investigation or prosecution of the case.

3. Jencks Act Materials:

The Jencks Act, 18 U.S.C. § 3500, *et seq*. requires the government to make "witness statements" available to the defense **after** the witness has testified on direct examination. There is no requirement that Jencks Act materials be provided prior to trial. *Presser* at 1283. In fact, a court cannot order the government to produce Jencks Act materials until after the witness has testified. *Presser* at 1284. However, it is typically the practice in EDKY to provide Jencks Act materials prior to trial to avoid disruptions during trial. Caution, however, should be exercised in determining what and when materials should be produced under the Jencks Act.

A question often arises as to whether a report of an interview of a testifying witness should be produced under the Jencks Act. Reports of interviews do not automatically qualify for production under the Jencks Act. A report of an interview, such as an FBI 302 or a DEA 6, qualifies as Jencks Act materials **only if it contains a verbatim statement of the witness or it has been adopted by a witness.** A witness statement may include, but is not limited to, something written or signed by the witness; recordings of the witness; substantially verbatim written recordings of the witness; and grand jury transcripts. Note, however, that a report of an interview written by a testifying agent must be produced under the Jencks Act if the agent testified about a matter contained in the report.

There are circumstances in which an AUSA may wish to delay the production of Jencks Act materials until immediately before a witness testifies or just after. Those circumstances might include security issues for witnesses and victims; concerns about reports of interviews circulating among prison populations; and other misuse of such reports. In those circumstances, AUSAs should seek guidance from their first line supervisors. There may be alternatives to withholding the documents, such as requesting protective orders limiting the defendant's access to the documents or providing access

only to defense counsel. Finally, there may, of course, be other grounds for producing a report of an agent during discovery.

4. *Brady*/*Giglio* Issues:

Under *Brady v. Maryland*, 373 U.S. 83 (1963), the government is obligated to provide any evidence that is material to guilt or punishment. *Brady*, 373 U.S. at 87; *Giglio v. United States*, 405 U.S. 150 (1972), and its progeny, require the government to turn over to the defendant anything known to the government which would adversely impact the outcome of a trial in a material way. *Giglio*, 405 U.S. at 154. *Brady* and *Giglio* information must be disclosed to the defense regardless of whether the defense makes a request for such information. USAM § 9-5.001 "requires AUSAs to go beyond the minimum obligations required by the Constitution and establishes broader standards for disclosure of exculpatory and impeachment information." This policy requires disclosure of "information beyond that which is 'material' to guilt as articulated in *Kyles v. Whitley*, 514 U.S. 419 (1995)," and encourages AUSAs to "err on the side of disclosure." **This policy requires the prosecution team to produce "information," not just "evidence," and counsels that the assigned AUSA(s) must consider the cumulative impact of items of information.** In EDKY, *Brady and Giglio* information must be supplied to the defendant for "effective use at trial." *Presser* at 1285. The practice in EDKY is to provide such materials as soon as reasonably possible, but no later than several days before trial commences. Additionally, such information should be supplied to defense counsel in sufficient time for effective use at contested pre-trial hearings, sentencing hearings, and post-conviction evidentiary hearings.

What constitutes the prosecution team is crucial in determining the extent to which an AUSA must go to identify *Brady/Giglio* information and Jencks Act materials. Generally, the prosecution team includes the federal, state, and local law enforcement agents participating in the investigation. It may also include any other government officials participating in the investigation or in a parallel proceeding. In determining who may be part of the prosecution team for discovery purposes, AUSAs should consider whether other districts or regulatory agencies participated or shared resources in the investigation; whether another district or agency played an active role in the investigation; and the level at which another district or agency played a decisional role in the

investigation. In short, AUSAs should take an expansive view of "prosecution team." When in doubt, an AUSA should consult with a first line supervisor.

Exculpatory information, not just documentation, must be timely disclosed. AUSAs should go beyond the Constitutional requirements and take a broad view of materiality when determining what must be disclosed. According to USAM § 9-5.001,

> 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.

Exculpatory information may be contained in interview memoranda of testifying and non-testifying witnesses, memoranda, internal emails and texts, memos, and other documents. Exculpatory information, however, need not be provided in its original form. Such information may be provided in a letter to defense counsel, depending on the circumstances of the case. In the alternative, documents may be redacted to provide only the exculpatory information. For case specific guidance, AUSAs should consult their first line supervisor.

Brady/Giglio information must also be produced in time for effective use at hearings and trial. USAM § 9-5.001 requires an AUSA to disclose anything that is material to the witness's credibility, or "that casts a substantial doubt upon the accuracy of any evidence ... 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." USAM § 9-5.001. Materials provided pursuant to *Brady/Giglio* and/or USAM § 9-5.001 should be disclosed regardless of admissibility. The rule is not one of admission, but rather one of disclosure. Such materials should be disclosed.

AUSAs have an obligation to determine whether *Giglio* information exists with regard to testifying members of law enforcement. USAM § 9-5.100 sets forth DOJ's policy on obtaining and disclosing *Giglio* information relating to law enforcement witnesses. In every case, AUSAs should discuss this obligation with the members of law enforcement and explain the process by which the information is obtained. Of course,

law enforcement members may provide such information directly to the AUSA. The AUSA, however, should request *Giglio* information in writing. A standard letter requesting *Giglio* information is available on Criminal Forms on the District's Sharepoint site. Such requests take time, and AUSAs should make these requests sufficiently early in the litigation to obtain timely responses. AUSAs should also seek protective orders when *Giglio* information is disclosed to prevent the information from use outside of court or dissemination to third persons. If a *Giglio* request has been made but not responded to before trial begins, the AUSA should so advise the court.

5. Agent's Notes:

In general, agent's notes are not discoverable if the notes are faithfully represented in the formal report. If the agent's notes depart materially from what is contained in the formal report, disclosure may be appropriate. Although there is no policy or law requiring AUSAs to review agent's notes, it is recommended that AUSAs do so. Recently, whether AUSAs have reviewed agent's notes has been the subject of litigation, and AUSAs have been ordered to make such reviews. Any question of whether agent's notes are discoverable should be settled well before trial, and an AUSA review of those notes in the course of identifying discovery should prevent such issues from arising immediately before trial. In situations where the AUSA is unsure whether the notes should be produced, the AUSA should consult with a first line supervisor.

Under FRCP 16(a)(1)(B)(ii), agents notes of a defendant interview may be subject to production. Rule 16(a)(1)(B)(ii) requires, upon request, the disclosure of any written record containing the substance of a defendant's statement to the government. The Sixth Circuit has found that failure to produce the agent's notes of an interview of the defendant violated Rule 16(a)(1)(B)(ii), even though a report containing substantially the same substance of the defendant's statement was produced pursuant to Rule 16(a)(1)(A). *United States v.* Clark, 385 F.3d 609, 619 (6th Cir.2004).

6. Substantive Communications:

Substantive case-related communications may include communications with agents, sources, confidential informants, local law enforcement and AUSAs. Specifically, substantive communications include factual reports about investigative activity, factual discussions of the relative merits of the evidence, factual information obtained during

interviews or interactions with witnesses/victim, and factual issues relating to credibility. Case impressions or investigative/prosecution strategies without more are not ordinarily discoverable, but such communications should be reviewed carefully to determine whether all or part of the communication (or the information contained therein) should be disclosed. Often, substantive communications are contained in electronically stored information, known as ESI. ESI can include, but is not limited to, emails, voice mails, tweets, instant messages, text messages, memoranda and notes. AUSAs should insure that all substantive case-related communications are reviewed for discovery materials, Jencks Act statements, and *Brady* and *Giglio* information.

7. National Security Cases

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 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.

8. Documentation:

In EDKY, we generally enjoy a professional working relationship with opposing counsel. As our practice expands, however, we need to consistently document our compliance with our discovery obligations. AUSAs should document efforts to comply with discovery obligations. In addition, AUSAs should utilize receipts recording any and all documents, statements, reports, or exhibits given to defense counsel and such receipts should be signed by defense counsel or his/her agent.

Consideration should also be given to retaining an exact copy of the discovery given to the defense for later reference.

9. Redacting Privacy Information:

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 ID numbers, financial account numbers, and any other identifier which may improperly disclose private or sensitive information. FRCP 49.1, which contains direction 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.

C. Conclusion:

This policy is not intended to cover every situation arising in the discovery context, but rather sets forth general guidelines. AUSAs should consult with their first line supervisors for guidance concerning discovery issues arising in particular cases. In addition, this policy is not intended to have the force of law or to create or confer any rights, privileges, or benefits to defendants. Finally, this discovery policy does not govern disclosure in cases involving terrorism and national security. Policy concerning these cases will be dependent on guidance currently being developed by DOJ.