Memorandum

Subject:	Date:
DISTRICT OF MONTANA CRIMINAL DISCOVERY POLICY	October 15, 2010
To:	**From:** MICHAEL W. COTTER United States Attorney District of Montana
All Assistant U.S. Attorneys District of Montana	

INTRODUCTION [1]

The discovery obligations of federal prosecutors are generally established by Federal Rules of Criminal Procedure 16 and 26.2, 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). In addition, the United States Attorney's Manual describes the Department's policy for disclosure of exculpatory and impeachment information. *See USAM* §9-5.001. Prosecutors must familiarize themselves with each of these provisions and controlling case law that interprets these provisions. This District's discovery policy offers prosecutors flexibility depending on the circumstances of each case to employ a "Rule 16 Plus" or "Strict Rule 16" approach to disclosing discoverable information.[2] This District's discovery policy is subject to legal precedent and court orders. Special consideration should be given to the local rules of the District Court for the District of Montana. This policy provides prospective guidance only and is not intended to have the force of law or to create or confer any rights, privileges or benefits. See *U.S. v. Caceres*, 440 U.S. 741 (1979).

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[1] When asked by a DOJ discovery working group on how many occasions during 2008 - 2009 a district court had found a violation of a discovery or *Brady/Giglio* obligations, all districts responded to this question and 11 components responded: 13 districts reported such findings in that time frame. This translates into approximately one such finding for every 4,800 cases filed by USAOs. For components, 83% had no adverse findings, 13% reported a single adverse discovery decision within the last year, while one component reported two. Where mistakes in discovery are made, prompt and complete candor to the court and the parties must be undertaken.

[2] For the purposes of this memorandum, "discovery" or "discoverable information" includes information required to be disclosed by Fed.R.Crim.P. 16 and 26.2, the Jenks Act, Brady and Giglio and additional information disclosable pursuant to USAM § 9-5.001.

This discovery policy does not govern disclosure in cases involving terrorism and national security.[3]

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[3]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

GATHERING AND REVIEWING DISCOVERABLE INFORMATION

A. Where to Look - The Prosecution Team

Department of Justice policy states:

> It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all members of the prosecution team. Members of the prosecution team 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. This search duty also extends to information prosecutors are required to disclose under Federal Rules of Criminal Procedure 16 and 26.2 and the Jencks Act.

In most cases, "the prosecution team" will include the agents and law enforcement officers within the district of Montana. In multi-district investigations, investigations that include both Assistant United States Attorneys and prosecutors from a Department litigating component or other United States Attorney's Office (USAO), and parallel criminal and civil proceedings, this definition will necessarily be adjusted to fit the circumstances. In addition, in complex cases that involve parallel proceedings with regulatory (SEC, FDIC, EPA, etc), or other non-criminal investigative or intelligence agencies, the prosecutor should consider whether the relationship with the other agency is close enough to make it part of the prosecution team for discovery purposes.

Some factors to be considered in determining whether to review potentially discoverable information from another federal agency include:

- Whether the prosecutor and the agency conducted a joint investigation or shared resources related to investigating the case;
- 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;
- Whether the prosecutor knows of and has access to discoverable information held by the agency;
- Whether the prosecutor has obtained other information and/or evidence from the agency;
- The degree to which information gathered by the prosecutor has been shared with the agency;

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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.

- Whether a member of an agency has been made a Special Assistant United States Attorney;
- The degree to which decisions have been made jointly regarding civil, criminal, or administrative charges; and
- The degree to which the interests of the parties in parallel proceedings diverge such that information gathered by one party is not relevant to the other party.

Many cases arise out of investigations conducted by multi-agency task forces or otherwise involving state law enforcement agencies. In such cases, prosecutors should consider (1) whether state or local agents are working on behalf of the prosecutor or are under the prosecutor's control; (2) the extent to which state and federal governments are part of a team, are participating in a joint investigation, or are sharing resources; and (3) whether the prosecutor has ready access to the evidence.

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

B. What to Review

To ensure that all discovery is disclosed on a timely basis, generally all potentially discoverable material within the custody or control of the prosecution team should be reviewed.[4]

1. The Investigative Agency's Files: With respect to Department of Justice law enforcement agencies, with limited exceptions,[5] the prosecutor should be granted access to the substantive case file and any other file or document the prosecutor has reason to believe may contain discoverable information related to the matter being prosecuted.[6] Therefore, the prosecutor can personally review the file or documents or may choose to request production of potentially discoverable materials from the case agents. With respect to outside agencies, the prosecutor should request access to files and/or production of all potentially discoverable material. The investigative agency's entire investigative file, including documents such as FBI Electronic Communications (ECs), inserts, emails, etc. should be reviewed for discoverable information. If such information is contained in a document that the agency deems to be an "internal" document such as an email, an insert, an administrative document, or an EC, it may not be necessary to produce the internal document, but it will be necessary to produce all of the discoverable information contained in it. Prosecutors should also discuss with the investigative

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[4] How to conduct the review is discussed below

[5] Exceptions to a prosecutor's access to Department law enforcement agencies' files are documented in agency policy, and may include, for example, access to non-testifying source's files.

[6] Nothing in this policy alters the Department's Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses contained in USAM §9-5.100.

agency whether files from other investigations or non-investigative files such as confidential source files might contain discoverable information. Those additional files or relevant portions thereof should also be reviewed as necessary.

2. Confidential Informant (CI)/Witness (CW)/Human Source (CHS)/Source (CS) Files: The credibility of cooperating witnesses or informants will always be at issue if they testify during a trial. Therefore, prosecutors are entitled to access to the agency file for each testifying CI, CW, CHS, or CS. Those files should be reviewed for discoverable information and copies made of relevant portions for discovery purposes. The entire informant/source file, not just the portion relating to the current case, including all proffer, immunity and other agreements, validation assessments, payment information, and other potential witness impeachment information should be included within this review.

If a prosecutor believes that the circumstances of the case warrant review of a non-testifying source's file, the prosecutor should follow the agency's procedures for requesting the review of such a file.

Prosecutors should take steps to protect the non-discoverable, sensitive information found within a CI, CW, CHS, or CS file. Further, prosecutors should consider whether discovery obligations arising from the review of CI, CW, CHS, and CS files may be fully discharged while better protecting government or witness interests such as security or privacy via a summary letter to defense counsel rather than producing the record in its entirety.

Prosecutors must always be mindful of security issues that may arise with respect to disclosures form confidential source files. Prior to disclosure, prosecutors should consult with the investigative agency to evaluate any such risks and to develop a strategy for addressing those risks or minimizing them as much as possible, consistent with discovery obligations.

3. Evidence and Information Gathered During the Investigation: Generally, all evidence and information gathered during the investigation should be reviewed, including anything obtained during searches or via subpoenas, etc. As discussed more fully below in Step 2, in cases involving a large volume of potentially discoverable information, prosecutors may discharge their disclosure obligations by choosing to make the voluminous information available to the defense.

4. Documents or Evidence Gathered by Civil Attorneys and/or Regulatory Agency in Parallel Civil Investigations: If a prosecutor has determined that a regulatory agency such as the SEC is a member of the prosecution team for purposes of defining discovery obligations, that agency's files should be reviewed. Of course, it a regulatory agency is not part of the prosecution team but is conducting an administrative investigation or proceeding involving the same subject matter as a criminal investigation, prosecutors may very well want to ensure that those files are reviewed not only to locate discoverable information but to locate inculpatory information that may advance the criminal case. Where there is an ongoing parallel civil proceeding in which Department civil attorneys are participating, such as a *qui tam* case, the civil case file should also be reviewed.

5. Substantive Case-Related Communications: "Substantive" case-related communications may contain discoverable information. Those communications that contain discoverable information should be maintained in the case file or otherwise

preserved in a manner that associates them with the case or investigation. "Substantive" case-related communications are most likely to occur (1) among prosecutors and/or agent, (2) between prosecutors and/or agents and witnesses and/or victims, and (3) between victim-witness coordinators and witnesses and/or victims. Such communications may be memorialized in emails, memoranda, or notes. "Substantive" communications include factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or interactions with witnesses/victims, and factual issues relating to credibility. Communications involving case impressions or investigative or prosecutive strategies without more would not ordinarily be considered discoverable, but substantive case-related communications should be reviewed carefully to determine whether all or part of a communication (or the information contained therein) should be disclosed.

Prosecutors and victim-witness coordinators should not use email, texting or other informal stored electronic communication media to communicate with agents, witnesses and/or victims. If such communication occurs and it contains "substantive" case-related information, the email, text or other informal stored electronic communication data must be preserved and maintained in the relevant case file.

Prosecutors should also remember that with few exceptions (*see, e.g.,* Fed.R.Crim.P. 16(a)(1)(B)(ii)), the format of the information does not determine wither it is discoverable. For example, material exculpatory information that the prosecutor receives during a conversation with an agent or a witness is no less discoverable than if that same information were contained in an email. When the discoverable information contained in an email or other communication is fully memorialized elsewhere, such as in a report of interview or other document(s), then the disclosure of the report of interview or other document(s) will ordinarily satisfy the disclosure obligation.

6. Potential *Giglio* Information Relating to Law Enforcement Witnesses: Prosecutors must utilize the district's *Giglio* procedure described in Crpsyn Memo dated June 4, 2002 to request information relating to the witness' credibility from the witness' personnel file. In addition, prosecutors must have a candid conversation with each law enforcement witness - inquiring about potential *Giglio* information.

7. Potential *Giglio* Information Relating to Non-Law Enforcement Witnesses and Fed.R.Evid. 806 Declarants: All potential *Giglio* information known by or in the possession of the prosecution team relating to non-law enforcement witnesses should be gathered and reviewed. That information includes, but is not limited to:

- Prior inconsistent statements.
- Statements or reports reflecting witness statement variations (see below)
- Benefits provided to witnesses including:
  - Dropped or reduced charges
  - Immunity
  - Expectations of downward departures or motions for reduction of sentence, and actual reductions of sentence - in this District and other districts.
  - Assistance in a state or local criminal proceeding

- Consideration regarding forfeiture of assets
- Stays of deportation or other immigration status considerations
- S-Visas
- Monetary benefits
- Non-prosecution agreements
- 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
- Relocation assistance
- Consideration or benefits to culpable or at risk third-parties

• Other known conditions that could affect the witness's bias such as:
  - Animosity toward defendant
  - Animosity toward a group of which the defendant is a member or with which the defendant is affiliated
  - Relationship with victim
  - Known but uncharged criminal conduct (that may provide an incentive to curry favor with a prosecutor)
• Prior acts under Fed.R.Evid. 608
• Prior convictions under Fed.R.Evid. 609
• Known substance abuse or mental health issues or other issues that could affect the witness's ability to perceive and recall events.

8. Information Obtained in Witness Interviews: Although not required by law, generally speaking, witness interviews [7] should be memorialized by the agent.[8] Agent and prosecutor notes and original recordings should be preserved, and prosecutors should confirm with agents that substantive interviews should be memorialized. When a prosecutor participates in an interview with an investigative agent, the prosecutor and agent should discuss note-taking responsibilities and memorialization before the interview begins (unless the prosecutor and the agent have established an understanding through prior course of dealing). Whenever possible, prosecutors should not conduct an interview without an agent present to avoid the risk of making themselves a witness to a statement and being disqualified from handling the case if the statement becomes an issue. If exigent circumstances make it impossible to secure the presence of an agent during an interview, prosecutors should try to have another office employee present. Interview memoranda of witnesses expected to testify, and of individuals who provided relevant information but are not expected to testify, should be reviewed.

a. Witness Statement Variations and the Duty to Disclose: Some witnesses' statements will vary during the course of an interview or investigation. For example, they may initially deny involvement in criminal activity, and the

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[7] "Interview" as used herein refers to a formal question and answer session with a potential witness conducted for the purpose of obtaining information pertinent to a matter or case. It does not include conversations with a potential witness for the purpose of scheduling or attending to other ministerial matters. Potential witnesses may provide substantive information outside of a formal interview, however. Substantive, case related communications are addressed above.

[8] In those instances in which an interview was audio or video recorded, further memorialization will generally not be necessary.

information they provide may broaden or change considerably over the course of time, especially if there are a series of debriefings that occur over several days or weeks. Material variances in a witness's statements should be memorialized, even if they are within the same interview, and they should be provided to the defense as *Giglio* information.

b. Trial Preparation Meetings with Witnesses: Trial preparation meetings with witnesses generally need not be memorialized. However, prosecutors should be particularly attuned to new or inconsistent information disclosed by the witness during a pre-trial witness preparation session. New information that is exculpatory or impeachment information should be disclosed consistent with the provisions of USAM §9-5.001 even if the information should be disclosed in a witness preparation session. Similarly, if the new information represents a variance from the witness's prior statements, prosecutors should consider whether memorialization and disclosure is necessary consistent with the provisions of subparagraph (a) above.

c. Agent Notes: Agent notes should be reviewed if there is a reason to believe that the notes are materially different from the memorandum, if a written memorandum was not prepared, if the precise words used by the witness are significant, or if the witness disputes the agent's account of the interview. Prosecutors should recognize the considerable time expense involved with reviewing agent's notes in a large case and plan accordingly. When a prosecutor determines that he/she must review agent notes, this review should occur prior to indictment. Prosecutors should pay particular attention to agent notes generated during an interview of the defendant or an individual whose statement may be attributed to a corporate defendant. Since notes may contain information that must be disclosed pursuant to Fed.R.Crim.P. 16(a)(1)(A)(c) or may themselves be discoverable under Fed.R.Crim.P. 16(a)(1)(B). *(See, e.g., Untied States v. W.R. Grace*, 401 F.Supp. 1087 (2005)), agent notes of all interviews in a case will be made available for review by defense counsel under the Rule 16 Plus approach.

C. Conducting the Review

Having gathered the information described above, prosecutors must ensure that the material is reviewed to identify discoverable information. It would be preferable if prosecutors could review the information themselves in every case, but such review is not always feasible or necessary. The prosecutor is ultimately responsible for compliance with discovery obligations. Accordingly, the prosecutor should develop a process for review of pertinent information to ensure that discoverable information is identified. Because the responsibility for compliance with discovery obligations rests with the prosecutor, the prosecutor's decision about how to conduct this review is controlling. This process may involve agents, paralegals, agency counsel, and computerized searches. Although prosecutors may delegate the process and set forth criteria for identifying *potentially* discoverable information , prosecutors should not delegate the disclosure determination itself. In cases involving voluminous evidence obtained from third parties, prosecutors should consider providing defense access to the voluminous documents to avoid the possibility that a well-intentioned review process nonetheless fails to identify material discoverable evidence. Such broad disclosure may not be feasible in national security cases involving classified information.

MAKING THE DISCLOSURES

A. Considerations Regarding the Scope and Timing of the Disclosures

Providing broad and early discovery often promotes the truth-seeking mission of the District 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 consideration. But when considering providing discovery beyond that required by the discovery obligations or providing discovery sooner than required, prosecutors should always consider any appropriate countervailing concerns in the particular case, including, but not limited to: protecting victims and witnesses from harassment or intimidation; protecting the privacy interests of witnesses; protecting privileged information; protecting the integrity of ongoing investigations; protecting the trial from efforts at obstruction; protecting national security interests; investigative agency concerns; enhancing the likelihood of receiving reciprocal discovery by defendants; any applicable legal or evidentiary privileges; and other strategic considerations that enhance the likelihood of achieving a just result in a particular case.

When the disclosure obligations are not clear or when the considerations above conflict with the discovery obligations, prosecutors may seek a protective order from the court addressing the scope, timing, and form of disclosures.

B. Rule 16 Plus Approach

The District's Rule 16 Plus approach allows broad discovery disclosures well beyond the legally required disclosures established by Fed.R.Crim.P. 16 and 26.2, 18 U.S.C. § 3550 (the Jencks Act), *Brady* and *Giglio*. Prosecutors should employ the District's Rule 16 Plus approach to discovery disclosures in most cases. [9] It will be made clear to the defendant that, however broad, disclosures under the Rule 16 Plus approach may not include all evidence or references to evidence which the government has in its possession.

In fact, it is rarely in the Government's best interest to represent to a defendant that he or she has an "open file", "everything in our possession", or a "complete report" of the investigative agency. Too often some item will surface prior to trial that the defendant does not have a right to inspect (i.e., an overlooked memorandum of a witness interview) but the defense bar argues that they relied upon the wholesale access representation to their detriment.

C. Strict Rule 16 Approach

Prosecutors, in their discretion and on case-by-case basis, may provide less disclosure than under the Rule 16 Plus approach if they determine that to do so would be in the best interest of the government. It will be made clear to the defendant when such a course is pursued that disclosure under the Strict Rule 16

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[9] The District's form discovery letter which describes disclosures under the Rule 16 Plus approach and the Strict Rule 16 approach is attached to this Memorandum. The form letter allows a prosecutor to choose language consistent with the District's discovery policy depending on the approach utilized in the particular case.

approach is a) limited to the specific case and b) does not include all evidence or references to evidence which the government has in its possession.

The Strict Rule 16 approach requires disclosure of only that evidence required to be disclosed by Rules 16 and 26.2, Federal Rules of Criminal Procedure, the Jencks Act, 18 U.S.C. §3500, and case law recognizing defendant's due process rights, i.e., *Brady* [*Brady v. Maryland*, 373, U.S. 83, 87 (1967)] and *Giglio* [*Giglio v. United States*, 405 U.S. 150, 154 (1972)].

Memoranda of interviews, investigative reports or other material not required to be disclosed will not be disclosed. Although the statute does not require disclosure until after the witness has testified, Prosecutors are encouraged to provide statements of witnesses within the meaning of the Jencks Act, Title 18 U.S.C. § 3500(e), on the morning of the first day of trial. If Jencks material is extensive or voluminous prosecutors should provide such material within the week before trial to avoid any disruption in the trial that may be caused by the defendant's need to review the Jencks disclosures.

The definition of the term *statement* will be strictly construed to include *only* a) verbatim statements of a witness, b) recorded statements (audio, visual, stenographic), c) testimony of the witness before the Grand Jury, or d) non-verbatim summaries adopted by the witness. FBI 302s, DEA 6s, and similar reports are usually not within this definition and should not be turned over to the defense under the Jencks Act unless the witness has read the summary and approved or adopted its content. These reports of an interview are mere summaries. Any attempt by a defendant to obtain a Court order compelling their production should be strongly resisted. *United States v. Hicks,* 103 F.3d 837, 841 (9th Cir. 1996).

Of course, if these reports or memoranda contain *Brady or Giglio* material then they must be disclosed, in pertinent part, in a timely fashion. It is the responsibility of the AUSA to thoroughly review memoranda of interviews and reports to determine if any such exculpatory evidence exists.

D. Supervisory Approval of Discovery

In those instances where a prosecutor is considering withholding information that would normally be discoverable (such as national security information, privileged information or information that might subject a person to bodily harm) the prosecutor must obtain approval from the Criminal Chief to withhold such information. To seek such approval, the prosecutor must submit an e-mail to the Criminal Chief detailing the information and reasons for not disclosing. The Criminal Chief will consult the District's Ethics Officer. The District's Ethics Officer will consult PRAO. After receiving the opinion of the District's Ethic Officer, the Criminal Chief will approve or deny the request to withhold information by reply e-mail. A copy of the Criminal Chief's reply e-mail will be placed in the case file.

E. Timing

Exculpatory information, regardless of whether the information is memorialized, must be disclosed to the defendant reasonably promptly after discovery. Impeachment information, which depends on the prosecutor's decision on who is or may be called as a government witness, will typically be disclosed at a

reasonable time before trial to allow the trial to proceed efficiently. *See* USAM §9-5.001. Section 9-5.001 also notes, however, that the witness security, national security, or other issues may require that disclosures of impeachment information be made at a time and in a manner consistent with the policy embodied in the Jencks Act. Each judge in Montana has a detailed pretrial order which governs the timing of discovery in cases before that Court. Prosecutors must ensure that government discovery is completed in the manner and within the deadlines set in each Court's pretrial order.

In deciding when and in what format to provide discovery, prosecutors should always consider security concerns and the other factors set forth in subparagraph (A) above. Prosecutors should also ensure that they disclose Fed.R.Crim.P. 16(a)(1)(E) materials in a manner that triggers the reciprocal discovery obligations in Fed.R.Crim.P. 16(b)(1).

Discovery obligations are continuing, and prosecutors should always be alert to developments occurring up to and through trial of the case that may impact their discovery obligations and require disclosure of information that was previously not disclosed.

F. Form of Disclosure

There may be instances when it is not advisable to turn over discoverable information in its original form, such as when the disclosure would create security concerns or when such information is contained in attorney notes, internal agency documents, confidential source documents, Suspicious Activity Reports, etc. If discoverable information is not provided in its original form and is instead provided in a letter to defense counsel, including particular language, where pertinent, prosecutors should take great care to ensure that the full scope of pertinent information is provided to the defendant.

MAKING A RECORD

One of the most important steps in the discovery process is keeping good records regarding disclosures. Prosecutors must make a record of when and how information is disclosed or otherwise made available. This is best accomplished by Bates stamping every page provided to the defense and documenting disclosure in the District's form evidence receipt letter. While discovery matters are often the subject of litigation in criminal cases, keeping a record of the disclosures confines the litigation to substantive matters and avoids time-consuming disputes about what was disclosed. These records can also be critical when responding to petitions for post-conviction relief, which are often filed long after the trial of the case. Keeping accurate records of the evidence disclosed is no less important than the other steps discussed above, and poor records can negate all of the work that went into taking the first three steps.