United States Attorney's Office
for the
Eastern District of North Carolina

XIII. CRIMINAL DISCOVERY POLICY[1]

The following discovery guidance is subject to legal precedent, court orders, and local rules. It provides prospective guidance only and does not create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party, or witness in any administrative, civil, or criminal matter. See United States v. Caceres, 440 U.S. 741 (1979).[2]

[1] See the Criminal File Standardization Manual (2010) re: Discovery files.

[2] Discovery issues pertaining to cases involving terrorism and other national security issues are governed by Section III herein.

I. INTRODUCTION.

The discovery obligations of an Assistant United States Attorney[3] ("AUSA") are established by Fed. R. Crim. P. 16, 26.2, Fed. R. Evid. 404(b), 18 U.S.C. § 3500, Eastern District of North Carolina ("EDNC") Local Criminal Rule 16.1(b), Department of Justice ("DOJ") policies, any court orders entered in a particular case, applicable rules of professional conduct, and Brady v. Maryland, 373 U.S. 83 (1963), and its progeny. All AUSAs in the EDNC are expected to be familiar with and comply with such discovery obligations. In addition, as explained in detail below, it is the policy of this office to provide expansive discovery beyond what the rules, statutes, and case law mandates.

Under Local Criminal Rule 16.1(b), EDNC, within twenty (21) days of indictment or initial appearance, whichever comes later (the starting point of the speedy trial clock), the Government is obligated to provide discovery to the defense.[4] This office has a modified "open file" policy, which is better described as "expansive discovery." This means that a prosecutor, for internal office purposes only, should handle decisions regarding which disclosures to make as if a rebuttable presumption exists requiring that the defense be given access to everything of an evidentiary nature that is in the custody or control of our office.[5] However, this does not mean that our files are literally turned over to the defense. Our case files contain many things, such as prosecutive memoranda, that are part of our deliberative process and should not be shared outside the office. Furthermore, as noted by the Deputy Attorney General:

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[3]As used in this policy statement, AUSA includes Special Assistant United States Attorneys and DOJ trial counsel who prosecute criminal cases in the Eastern District of North Carolina.

[4]Courts have not interpreted Brady and its progeny to require of discovery to a defendant in the pre-indictment phase of a case. However, informal pre-indictment discovery may be appropriately given in connection with negotiations for a pre-indictment resolution to the case. A memorandum to the file, or cover letter listing all documents and materials provided to defense counsel, and the date and manner such discovery was provided, is crucial and mandatory on every occasion that informal discovery is provided. Moreover, if discovery is provided in an electronic medium, attorneys should maintain an exact duplicate of what is disclosed to defense counsel so that they can properly respond to any discovery disputes which may arise. Grand jury testimony may not be provided as informal discovery.

[5]For a discussion of the scope of evidence deemed to be in the custody or control of our office, you must read the Section II of this guidance memorandum, entitled "Collection and Review of Possibly Discoverable Evidence and Information."

> Prosecutors should never describe the discovery being provided as 'open file.' Even if the prosecutor intends to provide expansive discovery, it is always possible that something will be inadvertently omitted from production and the prosecutor will then have unintentionally misrepresented the scope of materials provided. Furthermore, because the concept of the 'file' is imprecise, such a representation exposes the prosecutor to broader disclosure requirements than intended or to sanction for failure to disclose documents, e.g. agent notes or internal memos, that the cour may deem to have been part of the 'file.'

In essence, under the EDNC policy, a prosecutor will typically provide the defense, during the time provided for discovery by the local rule, access to all memoranda of interviews (e.g., FBI 302s), evidentiary documents (whether we plan to introduce them or not), physical evidence, expert reports (e.g., lab reports), and audio/videotapes. The principal ways in which such expansive pretrial discovery goes beyond that required by the statutes and rules are that: (1) the defense often gets access to "Jencks" materials early;[6] and (2) discovery is provided of evidence that may not be used in the Government's case-in-chief. The addresses, telephone numbers, and social security number of witnesses should be redacted from copies of documents provided to the defense.

There are many advantages to expansive pretrial discovery. It eliminates haggling over discovery and allows the Government and the court to concentrate on the central issues of the case. It encourages timely agreements to plead guilty. It eliminates appeal issues and avoids planting in one's case a potential post-conviction time bomb that explodes when the defendant later discovers something that the Government did not give the defense and that the defendant can now argue is exculpatory in some way. Furthermore, in the long term, such a policy fosters and supports a reputation of candor and fair dealing for all of the AUSAs in this office. Some prosecutors tend to discount the

[6]As part of our expansive discovery policy, the prosecutor may, but is not required to, give such early access to grand jury transcripts of non-defendant witnesses who are prospective trial witnesses or whose grand jury testimony contains information relevant to the government's case or material to preparing the defense, without seeking a court order. See Appendix 13-2 Standing Order of the USDC-EDNC, filed March 5, 1985. (If the defendant testified before the grand jury, a transcript of his/her testimony must be provided during the discovery period, pursuant to Fed. R. Crim. P. 16(a)(1)(B)(iii).)

tactical and resource management advantage provided by expansive discovery. However, this office rejects those arguments, and believes that the ends of justice and the proper management of our limited resources support an expansive approach to discovery practice.

Nevertheless, some cases may not be appropriate for this broad approach to discovery, because of national security issues, witness security concerns, or legitimate fears that obstruction of justice may occur. Discovery practice in cases involving national security should be in accordance with Section IV of this memorandum. In cases involving witness security concerns or obstruction of justice dangers, it is within the discretion of the AUSA to limit pretrial discovery to that required by the applicable statutes, rules, and case law, e.g., Fed. R. Crim. P. 16, 26.2, Fed. R. Evid. 404(b), 18 U.S.C. § 3500, EDNC Local Criminal Rule 16.1(b), DOJ policies, and Brady v. Maryland, 373 U.S. 83 (1963), and its progeny. However, this discretion should be exercised sparingly.

II. COLLECTION AND REVIEW OF POSSIBLY DISCOVERABLE EVIDENCE AND INFORMATION.

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(B)(2). 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 (see below). This search duty is one which you must take very seriously and which goes to the heart of our obligations under federal law.

A. The "Prosecution Team"

In most cases, the "prosecution team" will include the agents and law enforcement officers within the relevant district working on the case. However, in multi-district investigations, investigations that include both AUSAs and prosecutors from a DOJ 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 agencies (§, 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 a part of the prosecution team for discovery purposes. You should err on the side of including the agency within the scope of your team.

Some factors to be considered in determining whether to review potentially discoverable information from another federal agency include, but are not limited to:

- 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;

- 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 in this office arise out of investigations conducted by multi-agency task forces or otherwise involve state and local law enforcement agencies. In such cases, prosecutors should consider (1) whether state or local agents and officers are working on behalf of the prosecutor or are under the prosecutor's control; (2) the extent to which local, state and the 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. Courts will generally evaluate the role of a state or local law enforcement agency on a case-by-case basis. In the Fourth Circuit, evidence that must be disclosed under Rule 16 is specifically limited "to documents within the federal government's actual possession, custody, or control." United States v. Pinto, 905 F.2d 47 (4th Cir. 1990). However, prosecutors must be cognizant of the scope and membership of their investigative team and of the more expansive responsibilities which arise when partnering with state and local law enforcement.[7]

As noted above, prosecutors should 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 materials within the custody or control of the prosecution team should be reviewed. The review process should cover the following areas:

1. Investigative Agency's Files: With respect to DOJ Law enforcement agencies, with limited exceptions,[8] the prosecutor should be granted

[7]Prosecutors should also be aware that in recent years, as the result of some notorious cases, expansive discovery obligations have been imposed on the prosecution in the state court system in North Carolina. When partnering with state and local investigators, prosecutors must be aware that those obligations may have led to the creation and/or maintenance of reports, memoranda, etc. which would not otherwise be prepared in that fashion. Also, these obligations may have serious implications relative to the security of witnesses, particularly if the matter was pending in state court before being adopted federally.

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

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.[9] 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 ("EC"), inserts, emails, and the like, 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 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 Information ("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 files, 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 the 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 file.

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files.

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

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 the CI, CW, CHS, or CW 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 from 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 pursuant to subpoenas, or the like. As discussed more fully below, 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 §, is a member of the prosecution team for purposes of defining discovery obligations, that agency's files should be reviewed. Of course, if 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 DOJ civil attorneys are participating, such as a qui tam case, the civil files should also be reviewed.

In addition, because habeas corpus motions are typically handled by our civil division, you should check to ensure that cooperating co-

defendants that have already been sentenced have not filed any frivolous habeas corpus motions challenging their guilt.

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 agents; (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 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 whether it is discoverable. For example, material exculpatory information that the prosecutor receives during a conversation with an agent or a witness is not 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 obligations.

6. Potential Giglio Information Relating to Law Enforcement Witnesses: Prosecutors should have candid conversations with the law enforcement officers with whom they work regarding any potential Giglio issues, and they should follow the procedure established in USAM §9-5.100 whenever necessary before calling the law enforcement employee as a witness. See also, Section XIII of this Manual.

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 (possibly including inconsistent attorney proffers, see United States v. Triumph Capital Group, 544 F.3d 149 (2nd Cir. 2008));

- 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;
  -Assistance in a state or local criminal proceeding;
  -Considerations regarding forfeiture of assets;
  -Stays of deportation or other immigration status considerations;
  -S-Visas;
  -Monetary benefits or payments;
  -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 the defendant;
  -Animosity toward a group of which the defendant is a member or with which the defendant is affiliated;
  -Relationship with a 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 should always be memorialized by the agent in an official report within a reasonable time after the interview has taken place. Under Fourth Circuit law, the Government need not preserve the rough interview notes of a government agent when those notes have been incorporated into a formal report.[10] United States v. Hall, 93 F.3rd 126,131 (4th Cir. 1996); United States v. Hinton, 719 F.2d 711, 722 (4th Cir. 1983). 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. Prosecutors should never 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 (and this should be extremely rare), prosecutors should try to have another office employee present as a witness. 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 information they provide

[10]Under North Carolina state court practice, rough interview notes of states and local investigators must be maintained. You should talk with state and local investigators involved in your cases to ensure that you understand how their respective agencies deal with this issue as matters are brought into federal court.

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 that is revealed in a witness preparation session should be disclosed. 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. This may be done by writing a letter to defense counsel summarizing the Brady or Giglio material that surfaced during the trial preparation meeting.

c. Agent Notes: Agent notes (if they have been maintained) 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 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. Such 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.. United States v. Clark, 385 F.3d 609, 619-20 (6th Cir. 2004) and United States v. Almohandis, 307 F.Supp.2d 253, 255 (D.Mass. 2004).

C. The Actual 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 never 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. Indeed, many national security cases involve classified information which is handled and disclosed pursuant to the Classified Information Procedures Act.

D. Making the Disclosures

The Department's disclosure obligations are generally set forth in Fed.R.Crim.P. 16 and 26.2, 18 U.S.C. §3500 (the Jencks Act), Brady, and Giglio (collectively referred to herein as "discovery obligations"). Prosecutors must familiarize themselves with each of these provisions and controlling case law that interprets these provisions. In addition, prosecutors should be aware that Section 9-5.001 details the Department's policy regarding the disclosure of exculpatory and impeachment information and provides broader disclosures than required by Brady and Giglio. Likewise, the EDNC's expansive discovery policy (see Section I above) provides for broader discovery than that set forth in the laws above. If a prosecutor chooses this course, the defense should be advised that the prosecutor is electing to produce discovery beyond what is required under the circumstances of the case but is not committing to any discovery obligation beyond the discovery obligations set forth above.

1. Considerations Regarding the Scope and Timing of the Disclosures: Providing broad and early discovery generally promotes the truth-seeking mission of the DOJ 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. 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 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.

2. 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 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 witness security, national security, or other issues may require that disclosure of impeachment information be made at a time and in a manner consistent with the policy embodied in the Jencks Act (as codified in 18 U.S.C. § 3500 and Fed. R. Crim. P. 26.2). 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.

The Jencks Act grants to the defense a right to production of any prior statements of a Government witness relating to the subject matter of the testimony only after the witness has testified on direct examination. However, in the interest of fairness and trial efficiency the courts have encouraged the Government to deliver the material to defense counsel at some earlier point. It is office policy, unless the threat of witness harassment is too great, to make Jencks material available during the initial discovery period, or at least on the Friday before the beginning of the term of court in which the trial will be held. If the court should order

pretrial disclosure of witnesses' statements, the AUSA should immediately notify the Criminal Division Chief so that appellate relief can be considered.

The Federal Rules of Criminal Procedure now require production of Jencks material at pretrial suppression hearings and detention hearings, if requested by the defense.[11] Defendants have the right at such hearings to demand prior statements of the Government witnesses at the hearing (usually agents), including any grand jury testimony, which relates to the subject matter of their testimony at the suppression hearing. If there is a timely request by the defense, the AUSA should make available any written statement of the agent on the subject matter of the agent's testimony, but the AUSA should insist that defense counsel return the statements to the AUSA at the end of the hearing. The defendant has no right to defeat the timing provisions of the Jencks Act as it applies to trial by obtaining and keeping material made available at a pretrial hearing. The statements could easily be circulated to the possible prejudice of the Government and innocent persons referred to therein.

With regard to trial, there is another issue concerning the Jencks Act. Under the letter of the Act, a memorandum, such as FBI 302, memorializing an agent's interview with a witness is not a statement of the witness interviewed unless signed or otherwise adopted or approved by the witness. For several practical reasons, however, it the policy of this office to turn over such memoranda in the same manner as if they were Jencks Act material. First, if the memoranda contain the slightest inconsistency with the witness's trial testimony, it is arguably Brady material. Second, there is authority from the Fourth Circuit that turning over the agent's memorandum of an interview obviates the need to turn over any contemporaneous raw notes of the interview. U.S. v. Hall, 93 F.3rd 126,131 (4th Cir. 1996); United States v. Hinton, 719 F.2d 711, 722 (4th Cir. 1983). Third, the judges of our court are accustomed to the defense

[11]The courts are split on whether a prosecutor must provide Brady material in advance of a suppression hearing. Although the Fourth Circuit has not definitively ruled on the issue, on at least two occasions it has assumed, arguendo, that it does apply without addressing the issue. See United States v. McCoy, 348 Fed. App'x. 900, 902 (4th Cir. 2009); United States v. Williams, 10 F.3d 1070, 1077 (4th Cir. 1993). In light of these cases and DOJ policy, our office requires "[a] prosecutor [to]. . . disclose information that . . . might have a significant bearing on the admissibility of prosecution evidence." USAM § 9-5.001(C)(2).

having access at trial to such agents' memoranda.

When relevant materials come into an agent's possession after the expiration of the discovery period, the agent must immediately transmit those to the AUSA and the AUSA, in turn, must make discovery to the defendant. See *supra* Appendix 6-2 (8/23/01 Bruce Memorandum - Request for Agency Cooperation in Procedural Matters). Otherwise, the court may grant a defense objection to use of the evidence on the basis of untimely discovery.

3. 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, prosecutors should take great care to ensure that the full scope of pertinent information is provided to the defendant.

E. Making a Record

One of the most important steps in the discovery process is keeping good records regarding disclosures. Prosecutors should make a record of when and how information is disclosed or otherwise made available. 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.

When witness statements, or any other items provided in discovery, are delivered to defense counsel for trial, a cover letter itemizing the documents turned over should be prepared.[12] To avoid any later dispute as to whether all of the required material was, in fact, turned over, a line for signature and date of

[12]Because it is not always practicable to itemize each individual document turned over in discovery, the cover letter should, at the very least, list the bates numbers of the materials disclosed. For example, if a prosecutors provides a CD containing 9,234 pages of discovery, the cover letter should note that the enclosed CD contains discovery which has been number 1-9,234.

receipt may be added to the letter, and "bates-stamping" or its equivalent should be used. See N:\Criminal\Criminal Manual\Criminal Manual Forms\ Letter Transmitting Discovery Documents and N:\Criminal\Criminal Manual\Criminal Manual Forms\Discovery Notice, which is used only in rare instances. Especially in large-document cases, and in any case where over 100 pages of discovery will be produced, the AUSA should have staff scan all evidentiary documents into the computer, format the computer file to add page numbers to the scanned material, and provide such discovery to defense counsel on a CD. An identical copy of the CD or other electronic medium should be maintained for our records. Early coordination with the Litigation Support Specialist will help ensure a smooth and timely discovery production.

III. DISCOVERY GUIDANCE PERTAINING TO CASES INVOLVING NATIONAL SECURITY ISSUES.

Cases involving national security, including terrorism, espionage, counterintelligence, and export enforcement, can present unique and difficult criminal discovery issues. The DOJ 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.

IV. RESPONSES TO PRETRIAL DEFENSE MOTIONS.

Under EDNC Local Criminal Rule 12.1, all pretrial motions must be filed no later than 30 days after the beginning of the speedy trial clock and responded to within 14 days after they are filed. With regard to any disputes regarding discovery issues, EDNC Local Rule 12.2(d) requires that the motion include a "statement that agreement could not be reached concerning the discovery or inspection that is the subject of the motion and the reasons given for the same." Magistrate judges typically issue a pretrial scheduling order confirming these dates. Although most motions are filed by the defendant in a criminal case, the deadlines apply to any motions the Government may need to file. Form responses to standard defense motions are available on our computer system. See N:CRLaw/mod_resp and CRLaw/pleading and CRLaw/forms.[13]

[13] While many of these forms, such as jury instructions, have been updated and are available on the EDNC intranet, these directories may continue to be useful until all are incorporated in the EDNC intranet Criminal Division Resources.

AUSAs and legal assistants should set up a system to ensure responses to all motions are timely filed. See also Fed. R. Crim. P. 12 and 47. Judges sometimes hold a pretrial conference (Fed. R. Crim. P. 17.1) and issue an order setting out discovery deadlines as well as other issues that will promote an expeditious trial. In all pleadings filed with the court, it is the AUSA's responsibility to comply with the privacy protection policies set out *supra* in Appendix 6-1. "Go-by" forms provided which were filed prior to June, 2004, must be reviewed for compliance with this policy and to be sure all citations have been updated, especially the Local Rule numbers which were revised in 2003.

A. Response to Defendant's Motion to Compel Discovery

See N:\Criminal\Criminal Manual\Criminal Manual Forms\Response to Motion to Compel Discovery .

B. Other Crimes Evidence *(Fed. R. Evid. 404(b))*

Frequently, in order to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, the Government will offer evidence of other uncharged conduct by the defendant. Though not admissible to prove propensity, such evidence is admissible for the aforementioned purposes under Rule 404(b) of the Federal Rules of Evidence after the Court finds that the probative value of such evidence outweighs its prejudicial effect. Rule 404(b) requires pretrial notice of any evidence to be offered under the rule. See N:\Criminal\Criminal Manual\Criminal Manual Forms\Notice of Government's Intent to Present Evidence Pursuant to Rule 404(b) - Request Ruling Pre-Trial; N:\Criminal\Criminal Manual\Criminal Manual Forms\Notice of Government's Intent to Present Evidence Pursuant to Rule 404(b) - Request Ruling at Trial.

C. Discovery of Affirmative Defenses *(Fed. R. Crim. P. 12.1, 12.2, 12.3)*

The AUSA bears the burden to request, in writing, that the defendant give notice of any intended alibi defense as specifically set forth in Fed. R. Crim. P. 12.1. On the other hand, the defendant has a duty, under Fed. R. Crim. P. 12.2 to give notice of any insanity defense or expert mental condition evidence or request for a mental examination; and, under Fed. R. Crim. P. 12.3, the defendant has the duty to give notice if a defense of actual or believed exercise of public authority will be asserted. See Fed. R. Crim. P. 12.4 as to disclosure of corporate parties in criminal cases. See N:\Criminal\Criminal Manual\Criminal Manual Forms\Government's Request for Notice of Alibi.

D. N:\Criminal\Criminal Manual\Criminal Manual Forms\Response to Defendant's Motion for Disclosure of Favorable Material and Incorporated Memorandum of Law

E. N:\Criminal\Criminal Manual\Criminal Manual Forms\Response to Defendant's Request to Preserve Evidence and Rough Notes

F. N:\Criminal\Criminal Manual\Criminal Manual Forms\Government's Request for Protective Order

V. CONCLUSION

While each case is different and will necessarily involve specific and unique considerations, the general approach of a prosecutor in the EDNC should be to provide expansive discovery whenever and wherever possible subject, of course, to important countervailing considerations such as witness safety and national security. Any questions or uncertainties regarding the application of this discovery policy in a particular case or circumstance should be raised with the AUSA's supervisor and/or the Senior Litigation Counsel.