Rule 16 and Brady Material

Local Criminal Rule 16 requires us, as part of pretrial discovery, to provide defense counsel with certain material. The following should be provided at the time of arraignment, even though Rule 16 allows it to be done thereafter within seven (7) days of a defendant's request:

1. Relevant written or recorded statements or confessions of the defendant;
2. The grand jury testimony of the defendant;
3. The rap sheet of the defendant;
4. Reports of relevant physical or mental examinations and scientific tests;
5. Exculpatory evidence.

If early disclosure of Rule 16 material would subject a witness to harassment or intimidation, the AUSA should make an in camera request of the Court to withhold disclosure for that reason until the time of trial or some other appropriate time.

You will note that Rule 16 is in accord with the due process rule of Brady v. Maryland, 373 U.S. 83 (1963) where the Supreme Court stated that the government must disclose exculpatory evidence.

This Office has long taken the position that Rule 16 applies only to substantive evidence that affirmatively exculpates the defendant, and not to "impeachment" material that does not affirmatively exculpate the defendant. (Accordingly, the office

Rule 16 form was modified, on May 22, 2009 - based on USAM 9-5.001B and Kyles v. Whitley, 514 U.S. 419 (1995) - to require the AUSA's signature below a listing of exculpatory evidence then being provided.)

Therefore, impeachment material such as prior inconsistent statements of government witnesses, United States v. Starusko, 729 F.2d 256 (3d Cir. 1984), immunity agreements, United States v. Oxman, 740 F.2d 1298 (3d Cir. 1984), plea agreements, witness "rap sheets," etc., should not be turned over at the time of arraignment. The Third Circuit has held that Brady is satisfied when such impeachment material is "disclosed the day that the government witnesses are scheduled to testify in Court" in compliance with the Jencks Act. United States v. Higgs, 713 F.2d 39, 44 (3d Cir. 1983); see also, United States v. Kaplan, 554 F.2d 557 (3d Cir. 1977); United States v. Pflaumer, 774 F.2d 1124 (3d Cir. 1985). However, it is Office practice to disclose impeachment information at the same time as Jencks material is provided. (As set forth in the "Jencks Act" section of this manual, this often occurs on the Friday before a Monday trial.) And USAM 9-5.001 provides that impeachment information "will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently."

In the event that early disclosure of impeachment material is sought by the defendant through pretrial motion, it is the policy of this Office to oppose the motion.

The following materials should never be disclosed at the time of arraignment per Rule 16 unless plainly exculpatory.

1. Grand jury transcripts, except the transcript of the defendant;
2. Witness immunity matters;
3. Witness plea bargains;
4. Witness FBI rap sheets;
5. Memoranda of witness interviews; and
6. IRS special agent reports.

If you believe that any of the foregoing materials contain exculpatory evidence, the matter should be brought to the immediate attention of your Section Chief who will consult with the Chief of the Criminal Division and the United States Attorney.

It is the mandate of this Office to fully comply with the requirements of Local Criminal Rule 16 and Brady. However, it is also important that the integrity of the Grand Jury, Grand Jury witnesses and reports of law enforcement agencies, be afforded confidentiality.

In order to ensure full compliance with our discovery obligations, each AUSA should be thoroughly familiar with not only Rule 16, but also Rule 26.2, Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972), the Jencks Act (18 U.S.C. § 3500) and USAM §§ 9-5.001 (“Policy Regarding Disclosure of Exculpatory and Impeachment Information”) and 9-5.100 (“Policy Regarding the Disclosure to Prosecutors of Potential Impeachment

Information Concerning Law Enforcement Witnesses ("Giglio Policy")").[1] In addition, with the following exceptions, AUSAs

[1] 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.

should adhere to the 1/4/10 “Guidance for Prosecutors Regarding Criminal Discovery” by Deputy Attorney General David W. Ogden (distributed to AUSAs via 1/5/10 email, entered in the Criminal Resource Manual at 165, and available to the public at http://www.justice.gov/dag/discovery-guidance.html):

1. In assessing the need to review potentially discoverable information from other agencies (Guidance, pp. 2-3), AUSAs should be mindful that, in United States v. Risha, 445 F.3d 298, 303-06 (3d Cir. 2006) the Court established a 3 factor “cross-jurisdiction constructive knowledge” test to determine “whether the prosecutor knew or should have known of the materials”:

> (1) whether the party with knowledge of the information is acting on the government’s “behalf” or is under its “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 entity charged with constructive possession has “ready access” to the evidence.

2. The Guidance (p. 8) indicates that if witness trial prep sessions reveal "new information [which] represents a variance from

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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.

the witness's prior statements, prosecutors should consider whether memorialization and disclosure is necessary..." Some elaboration is needed since witnesses frequently provide new information during trial prep sessions.

Obviously if the new information learned during a trial prep constitutes Brady or impeachment information (as described in USAM §§ 9-5.001 and 5.100), it must be memorialized and disclosed, preferably via an agent's report. Alternatively, a letter from the AUSA to defense counsel may serve this purpose, but it should be drafted with care to avoid making the prosecutor a witness (e.g., by referencing the information as to which an identified agent would testify).

If the new information constitutes, not Brady/impeachment evidence, but rather additional details to what was previously reported/disclosed, or even new matters incriminatory to the defendant, which the witness was not previously asked about, there are good reasons why a new memorandum need not be generated:

a. The standard practice is that written memoranda are not created regarding trial prep interviews;

b. Creation of written memoranda for all additional details revealed in trial prep sessions would be a substantial burden for an AUSA in the midst of preparing for trial;

c. There is no legal requirement to document such information. The Jencks Act requires production of statements which exist; it does not require the preparation of statements;

d. Even if interview memoranda were prepared, they would not be discoverable under a strict application of the term "statement" as defined by the Jencks Act (18 U.S.C. § 3500(e)); and

e. The creation/disclosure of written summaries of new details provided by a witness at a prep session would likely result in an expectation - by the courts and defense bar - that our office will assume this unnecessary burden as a general rule.

There may be occasions, however, when an AUSA may choose to memorialize/disclose new trial prep information. For example, this may be warranted where:

i. There is a close question regarding whether the new information is inconsistent with a prior memorandum of interview, such that the court may view the new material as impeachment evidence;

ii. The new information is of such a nature (e.g., a dramatic change in the testimony of a key witness) that trial interruption or mistrial might result from a defense claim of unfair surprise, or the AUSA believes a concern for fairness compels disclosure; or

iii. Disclosure of the new information might induce a guilty plea.

3. With regard to review of agents' notes (Guidance, p. 8), AUSAs should be aware that, while the failure to preserve interview notes does not necessarily preclude admission of evidence based thereon, United States v. Ramos, 27 F.3d 65, 68-9 (3d Cir. 1994),

the Third Circuit has required that the government maintain and, upon motion, make available to the district court both rough notes and drafts of reports of its agents to facilitate the district court's determination of whether they should be produced. United States v. Ammar, 714 F.2d 238, 259 (3d Cir. 1983); United States v. Vella, 562 F.2d 275, 276 (3d Cir. 1977). And Rule 16 requires production of an agent's notes of an interview with the defendant. United States v. Molina-Guevara, 96 F.3d 698, 705 (3d Cir. 1996).

4. The Guidance suggests (pp. 8-9) that "[i]n 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." This option is encouraged since it, by permitting defense counsel to examine a large quantity of documents, relieves the prosecutor of the burden of doing so. AUSAs should remember the Third Circuit's conclusion in United States v. Pelullo, 399 F.3d 197, 212 (3d Cir. 2005):

> Brady and its progeny permit the government to make information within its control available for inspection by the defense, and impose no additional duty on the prosecution team members to ferret out any potentially defense-favorable information from materials that are so disclosed.

5. The Guidance statement (p. 9) that "[i]n most jurisdictions, reports of interview (ROIs) of testifying witnesses are not considered Jencks material . . ." is inapplicable here

since this Office has historically considered such reports (e.g., FBI 302s, DEA 6s and IRS MOIs) to be discoverable as Jencks material for such witnesses, even though these interview summaries do not meet the strict definition of “statement” in 18 U.S.C. § 3500(e).

You should always be mindful that it is the responsibility of the AUSA to ensure compliance with the government’s disclosure obligations. While case agents, paralegals, legal assistants, etc., may be asked to help, the AUSA may not delegate this disclosure responsibility to anyone else. AUSAs should always remember that the discoverability of an item is not dependent upon its format. (E.g., a witness' "statement" may be expressed in an e-mail or voice-message; and exculpatory information can be contained in an oral remark. See Guidance at pp. 5-6 ("Substantive Case-Related Communications").) And, in order to avoid subsequent disputes regarding what was provided or made available to the defense, AUSAs should document such matters via the Jencks/Brady form letters or otherwise. (Some AUSAs may find it helpful, in meeting their disclosure obligation, to utilize the form letters to counsel and case agent and Brady/Giglio/Discovery checklist, all of which are available in the shared directory. The case agent letter in particular, which advises the agent to assess all investigative material (including internal communications) and direct the AUSA's attention to anything potentially disclosable under USAM 9-5.100 et

seq., is useful to demonstrate an AUSA's good faith should information unknown to the prosecution go undisclosed.)