Memorandum

Subject	Date
Criminal Discovery Policy	October 15, 2010

To	From
Criminal Division AUSAs Asset Forfeiture Unit AUSAs	ROSA EMILIA RODRIGUEZ-VELEZ United States Attorney

This memorandum sets forth some basic principles which shall be followed by all Assistant U.S. Attorneys in the Criminal Division and the Asset Forfeiture Unit in order to meet discovery obligations. The following guidelines should be read in conjunction with Rules 16 and 26.2 Fed.R.Crim.P.; *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); 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")). As more fully discussed below, AUSAs should adhere to the January 4, 2010, "Guidance for Prosecutors Regarding Criminal Discovery" by Deputy Attorney General David W. Ogden. This memorandum is not intended to have the force of law or to create or confer any rights, privileges or benefits to third parties.

Introduction

As criminal prosecutors, you must be familiar with the statutes, rules and case law which impose discovery obligations in all our cases. In the exercise of your prosecutorial discretion, you are encouraged to go beyond these legal mandates, in our search for justice and truth. Although these guidelines do not cover every situation you will confront, the general principles of fair play should guide your analysis on a case by case basis. You should always consult our office Discovery Coordinator, Senior Litigation Counsel Antonio R. Bazán, and your direct supervisors if you have any doubts as to disclosure obligations in a particular case. In the end, it is our office's reputation of fair dealing which is on the line in all your disclosure decisions.

A. Gathering and Reviewing Discoverable Materials

There are various types of discoverable materials. Rule 16 materials include: Defendant's oral statements made to law enforcement in response to interrogation by a person the defendant knew was law enforcement; defendant's written or recorded statements, including grand jury testimony; defendant's prior record; documents and objects for use in our case-in-chief or which are material to preparing the defense; reports of examinations and tests; and expert witnesses, including summary of opinion, bases and reasons, qualifications.

In addition to Rule 16 materials, we must also disclose materials required by Arraignment Order and Standard Discovery Requests, which typically include: evidence favorable to defendant, including impeachment evidence; our intent to use Rule 404(b) evidence; "mail cover" reports; notice of intent to seek judicial notice; results of intercepts of wire, oral or electronic communication containing relevant statements by defendant, intended to be used in our case-in-chief, or which are material to preparation of the defense; notice of our intent to use evidence pursuant to Fed. R. Crim. P. 12(b)(4)(B) -- essentially, evidence we will use in our case-in-chief, in order to allow the defendant to file a suppression motion.

Moreover, regardless of whether the defendant opts for the standard discovery requests, the Arraignment Order will require, within a certain number days (agreed upon by defense and prosecution and set forth in the arraignment order) before a hearing or trial, disclosure of a witnesses' statements covered by the Jencks Act or Fed. R. Crim. P. 26.2.

We have constitutional obligations, as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), and other case law, to disclose exculpatory and impeachment information when such information is material to guilt or punishment. Exculpatory and impeachment information is deemed material to a finding of guilt when there is a reasonable probability that effective use of that information will result in an acquittal. Prosecutors must take a broad view of materiality and err of the side of disclosure. The Department of Justice has adopted a policy that requires us to go beyond the strict requirements of *Brady* and *Giglio* and other relevant case law. In particular:

1. Exculpatory information - information that is inconsistent with any element of the crime or which establishes a recognized affirmative defense, regardless of whether the prosecutor believes the information is admissible evidence or will make a difference between conviction or acquittal.

2. Impeachment information - information that either casts a substantial doubt on the accuracy of any evidence the prosecutor intends to rely on to establish an element (including but not limited to witness testimony) or which might have a significant bearing on the admissibility of prosecution evidence. This is regardless of whether the prosecutor believes the information is admissible as evidence or will make a difference between conviction and acquittal.

3. Admissibility of the exculpatory or impeachment information - our disclosure requirement applies even when the information subject to disclosure is not itself admissible evidence.

4. Cumulative impact - if the cumulative impact of several pieces of information meets the disclosure requirements, disclose all of the information even if the pieces, considered separately, do not meet the requirements.

See United States Attorney's Manual sections 9-5.001.

The Rules of Professional Conduct also impose disclosure requirements on us. Rule 3.8(d) states:

> The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when a prosecutor is relieved of this responsibility by a protective order of the tribunal.

See Rule 3.8(d), Model Rules of Professional Conduct.

Witnesses' Statements - Jencks Act and Rule 26.2. The Jencks Act, 18 U.S.C. § 3500, and Fed. R. Crim. P. 26.2 require disclosure of a witness's statements that relate to the subject matter of the witness's testimony at trial or a hearing. Both the Jencks Act and Rule 26.2 define "statement" similarly. Specifically, a statement includes: a **written** statement that the witness makes and signs or otherwise adopts and approves; a substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in any recording or any transcription of a recording; and grand jury testimony.

Generally, an agent's report of interview (e.g., FBI "302" or "DEA-6"), is not considered a statement of the witness who was interviewed, unless, as noted above, the report contains a substantially verbatim recital of the witness's statement, or the witness reviews and adopts the report.[1] A witness may be deemed to have adopted the report or notes that were taken during an interview if the witness agrees with an agent's oral recitation of his notes or report to see if the notes or report is correct. Rule 26.2(c) provides that where a statement of a witness contains some material that is relevant to the case, but other material that is either privileged or does not relate to the subject matter of the witness's testimony, the government may request the trial court to review in camera the statement in its entirety and excise any privileged or unrelated portions of the statement before it is disclosed to the defense. This implies that the government may not redact such a statement on its own.

Notes of interviews (agents and prosecutors). In the First Circuit**,** it remains an open question whether law enforcement agents are required to maintain their notes, after they have used them to prepare a more formal and complete summary of the interview. *United States v. Colon-Diaz*, 521 F.3d 29, 40 (1st Cir.2008).[2] If, however, an agent's notes contain *Brady* or *Giglio* material that is **not** included in the

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[1] Investigative reports (e.g., FBI 302s, DEA 6s) are not statements because they are not a verbatim account of the witness statements, *see United States v. Newton,* 891 F.2d 944, 953-54 (1st Cir.1989) or because the statements, as expressed in the forms are not signed or otherwise adopted by the witnesses. *See United States v. Neal,* 36 F.3d 1190, 1198-99 (1st Cir.1994), *cert. denied sub nom., Kenney v. United States,* 519 U.S. 1012, 117 S.Ct. 519, 136 L.Ed.2d 407 (1996); *United States v. Gonzalez-Sanchez,* 825 F.2d 572, 586-87 (1st Cir.1987).

[2] In footnote 8, the Court stated: "Although this outcome is dictated on the specific facts of this case, we take the opportunity to remind the Government that we do not take Jencks Act violations lightly. If the rough notes existed in the first place, it would have been much wiser for the Government to have preserved them, considering the likelihood that the notes would be requested at a later time and the possibility of sanctions for contravening the Act. *See* 18

agent's formal summary of the interview, the notes remain relevant, and the *Brady/Giglio* material must be disclosed. Similarly, **a prosecutor's notes** of a witness interview (as opposed to notes containing mental impressions, personal beliefs, trial strategy and legal conclusions) may have to be disclosed, or the relevant information contained therein, if the notes reflect exculpatory or impeachment information.

You should be mindful that the government may **not** limit its obligation to disclose exculpatory or impeachment evidence of which it is aware either by declining to make a written record of the information in the first place, or by omitting the information in a final draft of the memorandum of interview and destroying the notes that contain that information. The substantive demands of *Brady* and *Giglio* may not be circumvented by the manner in which the government treats or packages exculpatory information.

There are certain materials which are not subject to the disclosure requirements described above. Rule 16 generally does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or by an agent in connection with the investigation or prosecution of a case. *See* Fed. R. Crim. P. 16(a)(2). An agent's report, however, may contain information favorable to the defendant. It may also contain information that might be deemed a "statement" for purposes of the Jencks Act or Rule 26.2. That is, to the extent it relates to the subject matter of the agent's testimony, or contains a substantially verbatim recital of another witness's oral statements, the relevant portions of the report may be subject to disclosure.

Pursuant to the expansive discovery practice encouraged by the Department's recent guidance, you may wish to consider disclosing the agent's report, regardless of whether the law and the rules would require disclosure. Discuss this with the agent and your supervisor before making the disclosure.

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.

U.S.C.A. § 3500(d). As in *United States v. Lieberman*, 608 F.2d 889, 897 n. 13 (1st Cir.1979), we need not decide today whether government agents always have a Jencks Act duty to preserve rough interview notes where such notes are subsequently incorporated into a more formal report. *See United States v. Melo*, 411 F.Supp.2d 17, 21-24 (D.Mass.2006) (discussing the split in our sister circuits on this question). The Government should bear in mind that this remains an open question in our circuit, and should accordingly err on the side of caution.

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.

B. Conducting the Review

It is your obligation to locate and disclose all discoverable materials noted above, including information that is exculpatory and/or impeaching of a prosecution witness, that is within the possession of the "prosecution team." This team includes the agents and law enforcement officers who helped to develop the case or worked with or under the supervision of the prosecutor during the investigation. The "prosecution team," however, may at times include other agencies.

It is your responsibility to review all evidence and other potentially discoverable material gathered during the investigation, whether in our custody or the custody or control of the other members of the prosecution team. In particular, emphasis should be given to gathering exculpatory/impeachment information and witnesses' statements. Specifically, you should review the following: (a) the agency's investigative files; (b) the CI/CW/CHS/CS files, keep in mind that the way these files are kept vary by agency; (c) evidence/information obtained via subpoena, search warrants, or other legal process; (d) electronically-stored evidence, including e-mails, hard drives, disks and other storage hardware; (e)

evidence/information gathered by civil or regulatory agencies in parallel investigations; (f) substantive communications/correspondence including e-mails, text messages, and letters, between and among prosecutors, agents, witnesses, victims, victim-witness coordinators, etc.; (g) potential *Giglio* information about non-law enforcement witnesses.

You should investigate a confidential informant, or a witness who has agreed to cooperate pursuant to a plea or immunity agreement, very thoroughly. Among other things, you should investigate and disclose any information obtained in the following areas when you are going to have a confidential informant or cooperating witness testify at trial or a hearing: (a) the witness's relationship with the defendant; (b) the witness's motivation for cooperating/testifying; (c) drug and alcohol problems; (d) all benefits the witness is receiving; (e) any notes, diaries, journals, e-mails, letters, or other writings by the witness; (f) prison files, tape recordings of telephone calls, and e-mails, if the informant is in custody; (g) criminal history.

It is your responsibility to ensure that the agents understand the government's obligations with respect to exculpatory and/or impeachment information. To aid in this regard, you should send a *Brady/Giglio* material request letter which restates our responsibilities under *Brady*, *Giglio*, and DOJ policy, and calls for the agency to look for and disclose to this Office anything that might be construed as exculpatory or impeachment material. In the event the investigation is being worked by more than one agency, one of these letters should be sent to the lead agent from each such agency.

We also have an obligation to seek out potential impeachment information about law enforcement agents and other members of the prosecution team who are expected to testify. To that end, a "*Giglio*" letter should be sent to the supervisor or other agency-designated contact of any member of the prosecution team who may be a witness in the case. This letter is aimed at discovering impeachment information on agents, officers, and government employees who are potential witnesses in the case. It calls for the agency to review the individual's personnel file.

Finally, when preparing a witness for a hearing or trial, be very aware of our <u>continuing obligation</u> to disclose information that might be exculpatory or have impeachment value. Thus, if a witness provides information that conflicts in <u>material ways</u> with information the witness has previously provided, or conflicts with material information provided by other witnesses, we should disclose that conflict to the defendant.

C. <u>Making the Disclosures</u>[3]

As documents are gathered during the course of an investigation, you should make a complete and organized record of what has been gathered by the prosecution team. You should Bates label the documents. This process can be done very quickly with office software. Scan the originals and Bates label the electronic version. The originals should be kept in the order and condition in which they were obtained. . If a production or seizure of records is too voluminous for scanning, you should make the documents available for review by defense counsel. You should have a record system that will allow you to determine the source of the documents and how they were obtained. It is important that we can

[3] Please refer to the USAO-DPR Standard Operating Procedures for Discovery Exchange.

determine if records were obtained via the grand jury, in order to ensure that we comply with the secrecy requirements of Rule 6 of the Federal Rules of Criminal Procedure.

The Department of Justice has guidelines for obtaining and handling evidence pursuant to grand jury subpoena. *See* United States Attorney's Manual section 9-11.254; *Federal Grand Jury Practice Manual*, Chapter 6 (October 2008). Specifically, please remember the following: (a) Identify a records custodian; (b) maintain a log of subpoenas issued for documents and other objects; (c) bates label documents; (d) make a return to the grand jury of the documents returned. Finally, as soon as possible after arraignment, file a motion with the presiding district court judge for authorization to disclose grand jury materials to the defense.

If you have used a search warrant in the investigation, material related to the warrant, including affidavits, orders and the warrant itself, must be disclosed so that the defense can pursue a motion to challenge the constitutionality of the search and suppress evidence obtained in the search. Moreover, if the affiant is to be a witness at the trial, the affidavit is in all likelihood a Jenck's Act statement. Before disclosing a search warrant affidavit, be sure that it is not sealed. Where the substance of the affidavit should not be made public -- as in where the affidavit may refer to an ongoing, covert criminal investigation -- you may ask for an order allowing the limited release of the material to defense counsel, but prohibiting defense counsel from copying the material or making it public.

A formal response should be filed with the court every time we disclose discovery materials to the defense. The materials themselves are not given to the court. In our formal responses, we should respond to the applicable standard requests by identifying (including, in cases involving numerous documents, by Bates numbers) which documents or other materials respond to which discovery requests. You should not specify grand jury transcripts or other grand jury materials in the Response we file with the court, because the responses are publicly available. If you are dealing with a complex, document-intensive case, you can provide a list of "hot documents," that is, documents that are certain to be introduced as exhibits in the government's case-in-chief. Finally, you should notify our intent to use 404(b) evidence in the response. Always keep in your files an exact copy of everything that has been disclosed, and in the form that it was disclosed.

In a case where there are legitimate concerns about the safety of an informant or witness, it may be appropriate to apply to the court for a protective order limiting distribution and copying of material disclosed or about to be disclosed. There have been occasions when a witness's statement or grand jury testimony has been copied and distributed in a jail or to other potential defendants. Obviously, this may jeopardize the safety of the witness. In situations where this kind of concern is justified, courts have ordered defense counsel not to make copies of certain discovery material and not to let that material out of their personal custody. In these instances, the lawyers may review the material in question with their clients, but may not provide the client with the documents or transcripts themselves. In any case with a confidential informant or cooperating witness, such as drug cases, you **must** discuss with the agent the timing of any disclosure that would reveal the identity of the confidential informant or cooperating witness, before the disclosure is made. This will allow the agent to take steps to safeguard the witness.

D. Timing of Disclosures

There are certain instances when you will have to disclose exculpatory and impeachment information prior to indictment. In applying for a search warrant, we have a duty to disclose exculpatory or impeachment information if that information would defeat a finding of probable cause. This duty to disclose arises under *Franks v. Delaware*, 438 U.S. 154 (1978). This duty to disclose impeachment information would apply to any confidential informant on whose statements a search warrant affidavit was based. It would also apply, however, to the affiant as well. Again, the standard for measuring whether to disclose exculpatory or impeachment information, particularly about a law enforcement officer, is whether the exculpatory or impeachment information would defeat probable cause.

Case law does not require that the government disclose exculpatory or impeachment information to a grand jury. Department of Justice policy, however, mandates the presentation of evidence that substantially negates the target's guilt in any grand jury proceeding. *See* USAM 9-11.233.

We must comply with the applicable law and discovery orders regarding the timing of disclosures. In addition, being aware of the timing requirements should remind us to *gather* the discovery materials as early as possible in the course of an investigation and any resulting prosecution. The following are the applicable deadlines for making disclosure:

1. Rule 16 and additional materials covered by the standard discovery requests - within 5 days of arraignment.

2. Witnesses' Statements - within a certain number of days (agreed upon by defense counsel and prosecution) before trial and any hearing covered by Rule 26.2.

3. Exculpatory materials discovered after the initial 5-day disclosure - disclose reasonably promptly after the material is discovered.

4. Impeachment material discovered after the initial 5-day disclosure - disclose at a reasonable time before the trial or hearing to allow the trial or hearing to proceed efficiently, unless other interests such as protecting the witness's safety or national security require later disclosure.

5. Sentencing considerations - exculpatory or impeachment information that casts doubt on proof of a material matter relevant to sentencing, even if unrelated to proof of guilt, must be turned over no later than the date of the filing of the court's initial presentence investigation report.

There may be situations where delayed disclosure of discovery materials may be justified. These situations may include instances where the integrity of an ongoing investigation may be compromised by a disclosure, the safety of a witness may be compromised, or national security interests may be implicated. In such situations, it may be prudent to delay disclosure of material for a reasonable time. You should consult with your supervisor if you wish to delay any disclosure of discovery materials that may otherwise be required by law, rule, or the arraignment order. Please refer to the "Certification of Discovery Compliance," which must be filled out by all Criminal AUSAs to certify that all pertinent disclosures have been made.

E. Conclusion

You are encouraged to take these guidelines to heart as you assess your discovery obligations from now on. The principles of justice, truth and fair play should dictate your assessment of each case, keeping in mind that there should be uniformity in the way we determine the scope and timing of our disclosures. If we adhere to the basic principles outlined herein, we will successfully meet the higher standards of professionalism and ethics expected from federal prosecutors. Failure to follow this discovery policy swill be reflected in your performance evaluations. This policy becomes effective immediately and revokes any prior policy inconsistent with the same.