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**United States Attorney's Office**  
**Eastern District of Tennessee**

**CRIMINAL DISCOVERY POLICY**

October 15, 2010

**INTRODUCTION**

All Assistant U.S. Attorneys in the Eastern District of Tennessee are expected to be fully familiar and comply with all discovery obligations imposed by the Federal Rules of Criminal Procedure, statutes (including the Jencks Act, 18 U.S.C. § 3500), the discovery and scheduling orders entered in each case as well as their obligations under *Brady v. Maryland*, 373 U.S. 93 (1963), *Giglio v. United States*, 405 US 150 (1972), *United States v. Presser*, 844 F. 2d 1275 (6th Cir. 1988) and their progeny. Additionally, all AUSAs should be familiar with the following materials:

- USAM § 9-6.200 (noting in part: “The Attorney General Guidelines for Victim Witness Assistance 2000 provide that prosecutors should keep in mind that the names, addresses, and phone numbers of victims and witnesses are private and should reveal such information to the defense only pursuant to Federal Rule of [Criminal] Procedure 16, any local rules, customs or court orders, or special prosecutorial need.”),
- USAM 9-5.001 (DOJ “policy requires disclosure by prosecutors of information beyond that which is ‘material’ to guilt as articulated in [Brady and its progeny]),” and USAM 9-5.100 (Policy regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses),
- *Federal Criminal Discovery*  
<http://dojnet.doj.gov/usao/eousa/ole/usabook/disc/index.htm>, (resource addressing legal and policy issues).

**DISCOVERY POLICY**

This memorandum sets forth the general discovery policy of the United States Attorney's Office for the Eastern District of Tennessee, applicable to all criminal cases brought by this office. It is the policy of this office to not only meet our legal obligations with respect to discovery in criminal cases, but to provide defendants as much discovery material as possible, consistent with our obligation to protect the interests of the United States, including most significantly our national security interests<sup>1</sup> and the safety of victims and witnesses. Absent

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<sup>1</sup> Cases involving national security, including terrorism, espionage, counterintelligence, and export enforcement, can present unique and difficult criminal discovery issues. The Department of Justice has

strong case-specific reasons, AUSAs should also follow the best practices outlined below. However, it should be noted that the guidance provided in this policy is subject to legal precedent, court orders, and local rules. It 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 United States v. Caceres*, 440 U.S. 741 (1979).

### **General Discovery Principles**

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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 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.

1. Defendants in criminal cases have a right to a fair trial. Discovery is an integral part of providing each defendant with that fair trial.
2. It is in the interests of the United States for criminal cases to proceed in a fair, prompt, and efficient manner. The interests of the United States are usually also served by early and informed plea discussions.
3. In complying with a defendant's right to a fair trial, attorneys for the government must also recognize and serve several additional rights and interests of the United States. These include the government's paramount interest in protecting national security, and in protecting national security information. The United States also has a responsibility to protect the rights and interests of crime victims and witnesses, and to protect the integrity of on-going investigations and sensitive law enforcement information.
4. With these principles in mind, it is the responsibility of the AUSA assigned to each case to timely provide all discovery as required by the Federal Rules of Criminal Procedure, court order, case law or Department policy. Beyond required discovery, it is the office policy that each AUSA should make a case-by-case determination as to whether providing additional discovery will promote the truth seeking process taking into consideration the sometimes competing interests mentioned above.
5. It is against the policy of this office to provide, or to claim to provide, "open-file" discovery. Rather, as noted, the AUSA assigned to each case is responsible for knowing the applicable discovery obligations, identifying and mastering all discoverable facts, and making a fact specific decision in each case about what information must be disclosed, what information must not be disclosed, what information may and perhaps should be disclosed, and when disclosure should take place. This responsibility may not be delegated to paralegals, agents, secretaries or any other persons.
6. As noted, discovery of exculpatory material is governed by both the Constitutional requirements of *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, and the more expansive requirements of USAM § 9-5.001. AUSAs must be familiar with the governing USAM provisions, and are encouraged to err on the side of disclosure with respect to all exculpatory information.
7. Discovery of impeachment material is governed by both the Constitutional requirements of *United States v. Giglio*, 405 U.S. 150 (1972) and its progeny, as well as the more expansive standards of USAM § 9-5.001. AUSAs must comply with Section 9-5.001, and are encouraged to err on the side of disclosure with respect to impeachment information.
8. Our discovery obligation is a continuing one, and remains fully effective through both the sentencing and direct-appeal phases of any criminal case.
9. The government must be able to track and document its production of all discovery material, both to ensure that proper disclosures are made and to ensure that we can

substantiate the disclosures made. Therefore, all cases under indictment must contain within the case file a complete and timely record of the information that has been provided or made available to the defense, a record of what information has been deliberately withheld in the face of a defense request and why, and a written document identifying the information that will be provided at a later date and the anticipated time of production.

10. The United States has a compelling interest in protecting the security and privacy of crime victims and witnesses. Therefore, all documents produced in discovery must be redacted to remove identifying information such as Social Security numbers, dates of birth, drivers' licenses numbers, etc. In cases where there is a specific need to produce such identifying information to the defense, or where the administrative costs of redaction are exorbitant, the unredacted discovery must be produced under the authority of a protective order, and should generally be produced with a distinctive watermark affixed.

### **Best Practices**

11. Rule 16 discovery should be produced as soon after arraignment as possible (and no later than required under the discovery and scheduling order entered in the case).
12. When voluminous records are produced in discovery they should be provided in electronic format and an exact copy should be retained for the file. Alternatively, if paper copies are provided, copies produced in discovery should be Bates numbered.
13. Congress has expressed a strong commitment to the safety and security of government witness, through its enactment of the Jencks Act, 18 U.S.C. § 3500. Under that Act, the United States may not be required to produce statements of its witnesses prior to the witness's testimony. This statute enables prosecutors to protect its witnesses from harassment, threats, harm and efforts to obstruct justice. The Department has also long recognized these interests. *See* USAM § 9-6.200 (noting in part: "The Attorney General Guidelines for Victim Witness Assistance 2000 provide that prosecutors should keep in mind that the names, addresses, and phone numbers of victims and witnesses are private and should reveal such information to the defense only pursuant to Federal Rule of [Criminal] Procedure 16, any local rules, customs or court orders, or special prosecutorial need.") Nonetheless, often these concerns are not operative in a case, and other interests, such as the interests of the government in an efficient trial, may predominate. AUSAs should consider in each case whether the interests of the United States are best served by producing Jencks Act material or even reports of witness interviews well in advance of trial, for reasons such as facilitating plea discussions or facilitating an efficient trial, or instead whether the interests of the United States are best served by more closely following the disclosure provisions of the Jencks Act and delaying production of witness statements until close to, or even during, trial, in order to protect the integrity of the case, to protect the integrity of ongoing investigations, or to protect our witnesses from harassment. When an AUSA concludes that the interests of the United States or the criminal justice system are best served by early disclosure, the

AUSA should also consider whether those interests are best served by making discovery available for inspection but not copying, or by producing copies of statements pursuant to a protective order, or some other intermediate form of production. On the other hand, when an AUSA concludes that the interests of the United States or the criminal justice system are best served by delaying production of Jencks statements or other discovery material, the AUSA should consider whether some limited form of production might still protect the interests of the United States, such as producing discovery material relative to some of the witnesses, or making the material available pursuant to a protective order, or making the material available close to but still prior to trial. When an AUSA determines that it is in the best interests of the United States to withhold Jencks Act statements of witnesses until a point later than two calendar days prior to the witness testifying, the AUSA must consult with his or her immediate supervisor about that determination.

14. When there are good faith reasons to delay or refuse production of other discovery material, including exculpatory material or impeachment material, AUSAs should consider making the disclosure pursuant to a protective order that delays production or limits the use and distribution of materials provided in discovery.
15. In all but the most unusual case, AUSAs should not participate in any witness interviews without an agent present at all times.
16. AUSAs should not engage in substantive email communication with law enforcement agents and witnesses, and should advise agents of our office policy against such communications.
17. Prior to trial, AUSAs should identify and review all information gathered in the investigation prior to trial, including all relevant agency files pertaining to their case, such as 1A files and informant files, and all relevant information contained in the files of other members of the “prosecution team” such as referring agencies and task force partners.

### **Approvals**

18. Pursuant to USAM § 9-5.001, AUSAs are required to produce exculpatory material reasonably promptly after it is discovered. This requires disclosure earlier than does *Brady's* requirement to turn over exculpatory material at a point at which the defense is able to make reasonable use of the information at trial. To the extent an AUSA desires to delay the disclosure of exculpatory material until a point later than required under the USAM, the AUSA must obtain the approval of both the AUSA's immediate supervisor and the chief of the Criminal Division. In no event may disclosure be delayed beyond a point at which the defense is able to make reasonable use of the information at trial.
19. Pursuant to USAM § 9-5.001, AUSAs must obtain approval from their immediate supervisor not to disclose impeachment information before trial or not to disclose exculpatory information reasonably promptly because of its classified nature.

20. An AUSAs must obtain the approval of his or her immediate supervisor before seeking a court order denying discovery of material covered by Rule 16 or Rule 26.2.