Memorandum

Subject:	Policy on Discovery and Disclosures: The Office of the United States Attorney For the Eastern District of Wisconsin	Date:	October 15, 2010

To:	All Assistant United States Attorneys All Paralegal Specialists, Legal Assistants, and Other Members of the Professional Support Staff	From:	James L. Santelle United States Attorney Eastern District of Wisconsin

Introduction

This document sets forth the general discovery and disclosure policy for criminal cases being prosecuted by the Office of the United States Attorney for the Eastern District of Wisconsin. The policy does not create or confer any rights enforceable by any party to any criminal matter. *See United States v. Caceres*, 440 U.S. 741 (1979); *United States v. Fernandez*, 231 F.3d 1240, 1246 (9th Cir. 2000); *United States v. Piervinanzi*, 23 F.3d 670, 682 (2d Cir. 1994).

The discovery obligations of federal prosecutors in this district are generally established by Federal Rules of Criminal Procedure 12, 16, and 26.2; 18 U.S.C. § 3500; *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); Criminal Local Rule 12(a) and 16; and the United States Attorneys' Manual (USAM) §§ 9-5.001 and 9-5.100. Federal prosecutors must be familiar with these authorities and with the case law interpreting them; they must also undertake an analysis of how the various rules apply to the particular facts and circumstances of each individual case. In addition, prosecutors in this district must be familiar with the office's detailed *Giglio* policy.

This statement of policy is divided into three sections. The first identifies and describes the general categories of information that the United States will disclose in criminal prosecutions in this district. The second section identifies the sources and locations that prosecutors should search to obtain that information. The final section of this document discusses the scope and timing of disclosures of discoverable material.

I. Discoverable Information

Discoverable information can usefully be divided into three general categories: (1) materials required to be disclosed under Fed. R. Crim. P. 16; (2) exculpatory and impeachment information; and (3) witness statements.[1]

A. Rule 16 Materials

The Federal Rules of Criminal Procedure identify a number of types of information and materials subject to disclosure in criminal cases, as follows:

- Defendant's oral statements made in response to interrogation by a person the defendant knew was a government agent.
  Fed. R. Crim. P. 16(a)(1)(A).

- Defendant's written or recorded statements, including any grand jury testimony relating to the charged offense.
  Fed. R. Crim. P. 16(a)(1)(B).

- Statements by an organizational defendant.
  Fed. R. Crim. P. 16(a)(1)(C).

- Defendant's prior record.
  Fed. R. Crim. P. 16(a)(1)(D).

- Documents and objects that the United States intends to introduce in its case-in-chief or that are material to preparing the defense.
  Fed. R. Crim. P. 16(a)(1)(E).

- Reports of examinations and tests.
  Fed. R. Crim. P. 16(a)(1)(F).

- Written summary of anticipated expert witness testimony, along with description of witness qualifications and bases for opinion.
  Fed. R. Crim. P. 16(a)(1)(G).

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[1]These three broad categories do not necessarily encompass everything that the United States may be required to disclose in a given case. Under some circumstances, for example, the United States may be required to disclose the identity of confidential informants, *see United States v. Wilburn*, 581 F.3d 618, 622-23 (7th Cir. 2009), or be required to make certain evidentiary disclosures prior to trial, *see, e.g.*, Fed. R. Evid. 404(b).

B. Exculpatory and Impeachment Information

1. *Brady* and *Giglio*

Federal prosecutors have a constitutional obligation to disclose exculpatory and impeachment information when such evidence is material either to guilt or to punishment. *See Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972). Evidence is material to guilt when there is a reasonable probability that effective use of the information will result in acquittal. Similarly, evidence is material to punishment when there is a reasonable probability that a sentencing court's consideration of the evidence will result in a different sentence. The constitutional disclosure obligations of the United States exist regardless of whether a defendant has made a request for such information.

2. United States Department of Justice Policy

The United States Department of Justice has adopted a policy that requires broader disclosure of exculpatory and impeachment information than that called for under *Brady* and *Giglio*. *See* USAM § 9-5.001. Under the broader policy:

- Exculpatory information includes any "information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense."

- Impeachment information includes "information that either casts a substantial doubt upon the accuracy of any evidence–including but not limited to witness testimony–the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence."

- Exculpatory and impeachment material must be disclosed regardless of whether it is likely to make the difference between conviction and acquittal.

- The disclosure obligations of the United States exist without regard to whether the information is admissible.

- If the cumulative impact of several pieces of information satisfies the disclosure requirements, then the information must be disclosed even if the individual pieces viewed in isolation do not meet those standards.

3. Rules of Professional Conduct for Attorneys

Applicable rules of professional conduct impose many of the same duties upon prosecutors to disclose exculpatory and impeachment information. *See* Wis. SCR 20:3.8(f)(1). Those rules also, however, impose additional, post-conviction responsibilities, as follows:

- If a prosecutor learns of new, credible, and material evidence that creates a reasonable likelihood that a convicted defendant did not commit an offense for which he was convicted, the prosecutor must disclose that evidence to an appropriate court or authority. *See* Wis. SCR 20:3.8(g)(1).

- If the conviction was obtained in the prosecutor's jurisdiction, then the prosecutor must (i) make reasonable efforts to disclose that evidence to the defendant; and (ii) make reasonable efforts to determine whether the defendant was convicted of an offense that the defendant did not commit. *See* Wis. SCR 20:3.8(g)(2).

- If a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the situation. *See* Wis. SCR 20:3.8(h).

C. Witness Statements: 18 U.S.C. § 3500 (Jencks Act) and Fed. R. Crim. P. 26.2

The Jencks Act, 18 U.S.C. § 3500, requires the United States to disclose witness statements that relate to the subject matter of the witness's trial testimony. Rule 26.2 also requires disclosure of witness statements and applies not only at trial but also at suppression hearings, preliminary hearings, sentencing hearings, revocation hearings, detention hearings, and hearings in connection with § 2255 proceedings. Fed. R. Crim. P. 26.2.

The Jencks Act and Rule 26.2 define "statement" similarly:

- A written statement that the witness makes and signs or otherwise adopts;
- A substantially verbatim, contemporaneously recorded recital of the witness's oral statement; and
- Grand jury testimony.
- Agents' reports of interviews generally are not considered "statements" under the Jencks Act or Rule 26.2 when the reports merely summarize what was said by the interviewee. *See United States v. Blas*, 947 F.2d 1320, 1327 (7th Cir. 1991).
- If, however, an agent's report is "deemed to reflect fully and without distortion the witness's own words," the report will be considered a "statement." *United States v. Johnson*, 200 F.3d 529, 534-35 (7th Cir. 2000) (quoting *United States v. Allen*, 798 F.2d 985, 994 (7th Cir. 1986)).
- Similarly, if an agent reads his report back to the witness and the witness states his agreement or approval, that assent constitutes an adoption of the statement. *See id.*

II. Sources and Location of Discoverable Information

A. Who: The Prosecution Team

Prosecutors must seek all discoverable information from all members of the "prosecution team." The prosecution team typically is comprised of the prosecutor and other members of his or her office, as well as the federal, state, and local law enforcement agents and officers participating in the investigation and prosecution of a particular criminal case. The prosecution team may, under some circumstances, be broader and extend, for example, to a litigating component of the United States Department of Justice or a regulatory agency.

A prosecutor's obligation to seek potentially discoverable information from another agency or component turns on the circumstances of a particular case. In determining whether the relationship with an agency/component is such as to make it part of the prosecution team for discovery purposes, the prosecutor should assess the following factors, among others:

- Whether the prosecutor and the agency/ component conducted a joint investigation;
- The degree to which the agency/ component was involved in the actual prosecution of the case;
- The degree to which the agency was involved in making decisions regarding criminal, civil, or administrative charges;
- Whether the prosecutor knows of and has access to discoverable information held by the agency;
- Whether the prosecutor has obtained other case-related information from the agency; and
- Whether the prosecutor has shared case-related information with the agency.

Prosecutors also should assess whether there is a specific reason to believe that the intelligence community or particular military components may be in possession of discoverable information. For guidance on this determination, prosecutors should consult Acting Deputy Attorney General Gary G. Grindler's September 29, 2010, memorandum entitled, "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."

B. What: Information and Material to be Reviewed

- **The investigative agency's case files.** Prosecutors should not only search the investigative agency's substantive files but also should determine whether files from other investigations contain discoverable information.

- **Confidential informant / confidential witness / confidential source files.** The prosecutors' search should also extend to files that are not necessarily case-specific. Prosecutors should examine prosecutive and agency files for each testifying confidential informant, witness, or source. The credibility of such witnesses will always be an issue at trial. With that in mind, prosecutors should review these files for proffer, immunity, and similar agreements; assessments of reliability and credibility; payment information; and other information that could potentially be used to impeach a witness.

- **Evidence obtained during the investigation.** Prosecutors should review all evidence and information obtained during the investigation, including all evidence and information obtained via subpoena, searches, surveillance, and witness interviews. In cases involving a large volume of such evidence, prosecutors may satisfy their disclosure obligations by making the evidence available for the defendant's inspection.

- **Information obtained by civil attorneys or regulatory agencies during parallel proceedings.** If a prosecutor determines that a litigating component of the United States Department of Justice or a regulatory agency is part of the prosecution team, the files of that component or agency should be reviewed for potentially discoverable information.

- **"Substantive" case-related communications.** Case-related communications–including those memorialized in e-mails, voice mails, texts, memoranda, letters, or notes–may be discoverable. As a general matter, "substantive" communications are those that contain factual reports or information. Such communications may be discoverable. Non-substantive communications or those that involve case impressions or discussions of investigative or prosecutive strategy ordinarily are not discoverable.

    - The distinction between substantive and non-substantive communications is consistent with and serves to protect traditional privileges, such as those that arise between attorneys and their clients and those that surround the deliberative processes of the Executive Branch.

    - Communications that include discoverable information should be

maintained in the case file or in another manner that allows preservation for later disclosure.

- **Potential *Giglio* information relating to non-law enforcement witnesses.** All potential *Giglio* material that is in the possession of or is known by the prosecution team should be reviewed. Potential information includes:

  - record of prior criminal convictions
  - prior instances of material misconduct
  - immunity agreements
  - dismissed charges
  - plea and /or cooperation agreements
  - expectations for sentencing consideration
  - payments received by law enforcement
  - relocation assistance
  - prior inconsistent statements
  - circumstances that could impact on the witness's bias toward the defendant

- **Potential *Giglio* information relating to law enforcement witnesses.** The obligation of prosecutors to disclose *Giglio* information extends as well to law enforcement witnesses. To that end, prosecutors should discuss with federal, state, and local case agents any potential *Giglio* issues and should follow the procedures (a) set forth in USAM § 9-5.100, and (b) more specifically established in this office's *Giglio* Policy Memorandum.

III. Disclosure of Discoverable Information: Scope and Timing

It is the general policy of the Office of the United States Attorney for the Eastern District of Wisconsin to disclose discoverable material as early as is practicable. Recognizing that early disclosure – as well as broad disclosure – often furthers the truth-seeking mission of the United States Department of Justice and leads to efficient resolution of cases, this office in each case weighs those interests along with the need to protect, for example, the safety and privacy of victims and witnesses; privileged information; and the integrity of ongoing investigations. It is this balance of concerns that in each case determines the scope and timing of disclosure.

Recognizing that the scope and timing of disclosures will vary depending upon the circumstances of individual cases, this office generally will adhere to the following disclosure principles:[2]

A. Rule 16 Material

- The United States will disclose all material discoverable under Fed. R. Crim. P. 16(a)(1)(A), (B), (C), (D), and (F) without a request of the defendant and will do so as soon as is reasonably practicable, typically within five (5) days of arraignment in cases which have not been designated as complex.

- Upon the request of a defendant, the United States will permit the defendant to inspect and to copy or photograph tangible items listed in Fed. R. Crim. P. 16(a)(1)(E).

- The United States will disclose materials discoverable under Fed. R. Crim. P. 16(a)(1)(G) not later than fifteen (15) days prior to the commencement of trial.

B. Exculpatory and Impeachment Information

- The United States will disclose all exculpatory material reasonably promptly after the discovery such material.

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[2]Although the Local Rules of the United States District Court for the Eastern District of Wisconsin refer to the district's "open file" policy, the prosecutors and professional staff of the Office of the United States Attorney no longer describe the discovery being provided as coming from or exhaustive of an "open file." As the Deputy Attorney General's January 4, 2010, memorandum explained, because the concept of the "file" is imprecise, referring to the office's disclosure principles as an "open file" arguably exposes the United States to broader disclosure requirements than intended or mandated by law or to sanction for failure to disclose documents (*e.g.*, agent notes or internal memorandums) that the Court may deem to be a part of the "file."

- The United States will disclose all impeachment information at a reasonable time before the trial or hearing to allow the trial or hearing to proceed efficiently and to allow the defendant to make effective use of the information.

C. Witness Statements

- With the exception of grand jury transcripts, the United States will disclose all statements that are discoverable under 18 U.S.C. § 3500 and Fed. R. Crim. P. 26.2 within a reasonable time to allow effective defense use of such statements at the relevant trial or pretrial hearing.

- No later than (1) one business day before the commencement of trial, the United States will disclose transcripts of any grand jury testimony provided by witnesses it intends to call at trial.

D. Special Considerations

Special rules may impact the manner of disclosure certain types of cases. In child pornography cases, for example, evidence or material containing images of child pornography may not be copied or reproduced. *See* 18 U.S.C. § 3509(m). The United States will discharge its disclosure obligations in such cases by providing a reasonable opportunity to inspect, view, and examine the material in government offices.

Similarly, cases involving national security–including terrorism, espionage, counterintelligence, and export enforcement–can present unique and difficult criminal discovery issues with far reaching implications for national security and the nation's intelligence community. 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 entitled, "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, their supervisors, and the National Security Division of the Department of Justice for specific guidance on discovery obligations related 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 the National Security Division about whether to request a prudential search of the pertinent IC elements(s). All prudential search requests and other discovery requests of the IC must be coordinated with and through the National Security Division.

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 some specific reason to believe that one or more elements of the IC possess discoverable material in the following types 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

- Those in which one or more targets are currently or have previously been associated with an intelligence agency.

For these cases–or for any other cases in which the prosecutors, case agents, or supervisors making actual decisions on investigations or prosecutions have specific reason to believe than an element of the IC possesses discoverable material–the prosecutor should consult with the National Security Division about whether to make through the National Security Division a request that the pertinent IC element conduct a prudential search. If neither the prosecutor nor any other member of the prosecution team has reason to believe than an element of the IC possesses discoverable material, then a prudential search generally is not necessary.

Note: Regardless of the manner, timing, and breadth of discovery in any particular case, prosecutors should consistently make and maintain records of what information is disclosed, when it is disclosed, and how it is disclosed.