Memorandum

Subject	Date
Discovery Policy, District of Vermont	October 14, 2010

To

Criminal AUSAs

From

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This memorandum sets forth this office's overall discovery policy in criminal cases. The practices set forth herein do not cover every issue an AUSA will be faced with in making discovery decisions but are meant to provide a comprehensive framework for approaching discovery issues. The policies are not meant to preclude an AUSA from providing more discovery than is required to be produced under this policy. The Criminal Chief and the Discovery Coordinator are available to assist in properly meeting discovery obligations.[1]

The Government's disclosure obligations are generally set forth in Fed. R. Crim. 16 and 26.2, 18 U.S.C. § 3500 (the Jencks Act), *Brady*, and *Giglio*. AUSAs should be aware that USAM Section 9-5.001 and the 2010 DAG Memorandum detail DOJ policy regarding disclosure of exculpatory and impeachment information and provide for broader and more comprehensive disclosure than required by *Brady* and *Giglio*.

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,

[1] This policy is not intended to have the force of law or to create or confer any rights, privileges, or benefits to defendants. *United States v. Caceres*, 440 U.S. 741 (1979).

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.

I. Discovery Generally

AUSAs are advocates for justice. Accordingly, AUSAs are responsible for insuring they have fulfilled their discovery obligations from the date of indictment until sentencing. An AUSA should not delegate to his/her legal assistant or paralegal the identification or production of discovery in a criminal case.

AUSAs are encouraged to be liberal in their reading of Rule 16 and in the production of discovery. Generous discovery is permitted, and appropriate in some cases. Failure to timely produce discovery reflects poorly on the AUSA, the U.S. Attorney's Office and may result in exclusion of evidence or other sanctions. Discovery violations that result in sanctions or admonishment by the district court may require notification to the Office of Professional Responsibility.

If it is certain that an item falls within the disclosure obligations of Rules 12, 16 and 404(b), Jencks, *Brady*, or *Giglio* as discussed below, you should, of course, produce it or make it

available for inspection. There is no need to attribute the items produced to these discovery categories, or to explain the implications of information. An AUSA also should not forget to request reciprocal discovery under Rule 16 (e.g., experts) and reverse-Jencks under Rule 26.2.

As a general matter, AUSAs should withhold information, not otherwise required to be produced, for a legitimate purpose such as to protect the safety of a witness, an ongoing investigation, or because of valid agency confidentiality concerns. If there is no need to protect the materials obtained during the investigation, AUSAs should produce them or make them available for inspection. The prosecution team then need not waste time and energy drawing discovery lines, segregating items, keeping track of items not produced, etc. Finally, any "non-discoverable" assessment may be proved wrong in light of the way the trial plays out (hindsight). By producing material, the government is covered. In essence, default should be disclosure. Prior to trial, the AUSA should review the information not disclosed with the Criminal Chief.

AUSAs should try to have all potentially discoverable material logged in the Office's case management system, described below, prior to indictment. In order to facilitate this goal, AUSAs should meet with case agents prior to indictment to review all discovery matters and make sure the Office is prepared to satisfy its obligations. Discovery should be part of the investigative team's work, and that work should be done in consultation with our investigatory partners.

AUSAs should not refer to expansive disclosure as "open file" discovery to protect against the defense complaining that a misrepresentation was made about the scope of discovery if an inadvertent omission occurs or if an AUSA's definition of "file" is different from the defense attorney's.

II. Prosecution Team

AUSAs are obliged to identify all potentially discoverable material, including exculpatory and impeachment information, in the possession of members of the "prosecution team." Generally, the "prosecution team" includes federal agents, state and local law enforcement officers and other government officials participating in the investigation, as described in more detail in USAM § 9-5.001 and the DAG memorandum. In determining who should be considered part of the prosecution team, an AUSA must determine whether the relationship is close enough to warrant inclusion for discovery purposes. When in doubt, the AUSA should consult with the Criminal Chief and/or the Discovery Coordinator.

Considerations in determining whether an investigative agency or other prosecutorial entity should be considered part of the "prosecution team":

a. Whether the AUSA/case agent conducted a joint investigation or shared resources relating to the investigation with the agency or entity;

b. Whether the agency or entity played an active role in the AUSA's case;

c. The degree to which decisions have been made jointly regarding the agency's or entity's investigation and yours;

d. Whether the AUSA has ready access to the agency or entity's evidence; and

e. Whether the AUSA has control over or has directed action by the agency or entity.

III. Timing of Discovery

The Local Rules for the District of Vermont contemplate at least two stages of discovery: initial discovery and witness discovery. Initial discovery must be provided within 14 days of arraignment. This production includes all Rule 16 material, a witness list, and *Brady* disclosures. Witness discovery should generally be made available no later than 14 days prior to the trial, at the same time as *Giglio* information is due under the local rules. As described below, the default is to make all witness information available.

At the same time, AUSAs should withhold information for good reason, as described above. AUSAs should make use of protective orders and court review in meeting discovery obligations in such circumstances. For example, tactical considerations occasionally alter the timing, but not the obligation, of discovery production. Sometimes production must be delayed to protect an ongoing investigation or a witness' safety. Many witnesses in gun, violent crime, or drug cases would prefer if their statements and/or grand jury material not be shared in the jail or in the neighborhood. AUSAs should consider making witness statements or grand jury available for review in the Office to facilitate a plea, and seek a protective order if going to trial. If legitimate questions about the need to disclose exist, AUSAs should seek permission to withhold from the court via an ex parte filing under seal. In these situations, consult the Criminal Chief.
Under the Jencks Act material need not be produced until after the witness testifies. In practice, the Office provides Jencks Act materials before trial to expedite the proceeding.

IV. Rules 16, 12-12.3

A. **Rule 16**

Fed. R. Crim. P. 16 is one cornerstone of the government's discovery obligations. Its discovery mandate includes: written, recorded or oral statements of the defendant, individual or corporate; the defendant's prior criminal record; all documents and tangible objects material to the defense or to be used in the government's case in chief or which were obtained from or belong to the defendant; all reports of examinations and tests; and a summary of the testimony and qualifications of all expert witnesses. The government's discovery obligations do not include

internal government documents made by the AUSA or agent in connection with the investigation or prosecution. The Office takes the position that rough notes of interviews with the defendant should be disclosed under Rule 16, even if the final report is disclosed.

As importantly, Rule 16(b) provides for reciprocal disclosures by the defendant as regards documents and tangible objects, test and examination reports and expert testimony. Reciprocal discovery is required by the Local Rules and is demanded in the Office's form discovery letter.

B. **Rules 12-12.3**

Fed. R. Crim. P. 12(d)(1) provides for government notice to the defense of intent to use any evidence that may be subject to suppression motions under Rule 12(b)(3). Generally, such evidence is also subject to disclosure under Rule 16.

Fed. R. Crim. P. 12.1 requires notice by the defendant of an intent to use an alibi defense, which includes the places the defendant claims to have been at the time of the crime and the names and addresses of alibi witness. Notice is triggered by a written government demand and must come within ten days of demand. Such a demand should be in the government's initial discovery letter. Note that the government then has reciprocal obligations to disclose the witnesses who either will place the defendant at the scene of the crime or rebut the defense alibi witnesses.

Fed. R. Crim. P. 12.2 requires defense notice of an insanity defense or of expert testimony regarding a mental disease or defect bearing on guilt. The obligation is self-executing. Demand it anyway in the government's initial discovery letter.

Fed. R. Crim. P. 12.3 requires similar defense notice and reciprocal government disclosure regarding the defense's intent to claim that the defendant was acting with public authority on behalf of a law enforcement or a federal intelligence agency. Again, demand it in the discovery letter.

V. Jencks Act

The Jencks Act, 18 U.S.C. § 3500, and Fed. R. Crim. P. 26.2 require the production of all statements of government witnesses in the possession of the government, whether in written or taped form, that relate to the subject matter of their testimony. A "statement" means either a written statement signed or otherwise adopted by the witness, any recording that is a substantially verbatim recital of an oral statement or any statement to the grand jury. 18 U.S.C. § 3500(e). Therefore, Jencks Act materials may include agent reports, grand jury transcripts, witness's signed statements, witness's depositions and tapes of witnesses.

The Jencks Act requirement has also been extended to pre-trial suppression, detention, sentencing, violation of supervised release and habeas corpus hearings. Fed. R. Crim. P. 26.2(g). Sanctions for non-production can include striking that witness's testimony or a mistrial.

Agent reports of witness interviews are not Jencks as to the witness, unless they are substantially verbatim recitals of what the witness said or the witness reviews and adopts that report as his own. Nonetheless, it is Office policy to produce such reports, because conceivably it is Jencks as to the agent should the agent appear as a witness regarding that interview. More importantly, often some facet of the interview report, by inclusion or exclusion, can be argued to be contrary to some facet of the witness's expected trial testimony, thereby rendering the report discoverable under *Giglio*.

Oral statements of a witness are not Jencks. However, for similar reasons they will be produced, through a letter from the AUSA, if they arguably constitute *Brady*/*Giglio* material. Of course, written, recorded or oral statements of the defendant are discoverable under Rule 16(a)(1).

Under the statute, Jencks material need not be produced until after the government witness testifies. In practice, the Office provides Jencks Act materials before trial to expedite the proceeding.

Note that *Brady* trumps Jencks. If a Jencks statement contains *Brady* information, the *Brady* information within the report should be disclosed without regard to the usual Jencks Act timing requirements. Finally, be sure to seek reverse-Jencks discovery from the defense. Fed. R. Crim. P. 26.2.

VI. *Brady* and *Giglio*

If a piece of evidence arguably is, or may be, exculpatory or lead to a defense, it must be produced to the defense. This includes evidence that may impeach, or lead to impeachment of, a government witness. The *Brady* doctrine also extends to the preservation of exculpatory physical evidence, and to the need to correct false testimony by a government witness.

Under *Brady* and *Giglio*, the government's production obligations apply only to material information, that is, information that might affect the court's confidence in result of the case. If the evidence helps the defense, may be reasonably argued to help the defense, could in hindsight be seen to help the defense, or could lead to evidence in any of these categories, the presumption should be in favor of production of all evidence.

Brady applies to what the AUSA knows or should have known. That is, the AUSA must make inquiry of all agencies on the "prosecution team" and all "related" files, civil or criminal, within the United States Attorney's Office.

Under our Local Rules, the Office has an obligation to produce all *Brady* information with initial discovery within 14 days of arraignment. Any *Brady* information discovered after that should be produced immediately. *Giglio* or impeachment information must be supplied no later than 14 days prior to jury selection.

VII. Law Enforcement Personnel Files

Defense lawyers may make *Brady*/*Giglio* requests relating to the personnel files of federal or local law enforcement witnesses. We are then obligated at least to make inquiries about the existence of discoverable materials in these sensitive and private files. It is a best practice to initiate such inquiries with federal agents on our own, through our *Giglio* Coordinator, Greg Waples, prior to trial.

It is hoped and expected that investigative agents will inform AUSAs about any matters in their history that could provide impeachment cross-examination for the defense. AUSAs must diplomatically ask agents and other investigators about this.

Upon receipt of arguable *Brady*/*Giglio* information about an agent, an AUSA should consult the Criminal Chief not only about discovery but about how this affects the charges and evidence in the case.

If it is determined that this information is or may be discoverable, in some cases the AUSA should not turn the material contained in a personnel file directly over to the defense without first having submitted it to the court for in camera review, a court order directing disclosure, and, perhaps, a protective order limiting the use and dissemination of this material by the defense. *See* Fed. R. Crim. P. 16(d)(1).

VIII. Rule 404(b)

The Local Rules require notice 14 days before jury selection of the evidence that will be offered under Fed. R. Evid. 404(b), i.e. other bad acts evidence. The Local Rule is more demanding than the language of Rule 404(b). According to the 1991 Amendment Advisory Committee Notes, this obligation extends not only to evidence in the government's case in chief but also to evidence for impeachment or possible rebuttal. The court should be alerted to issues relating to Rule 404(b) or other important evidentiary matters in a trial memorandum or motion in limine.

IX. Agent and AUSA Notes

Most federal law enforcement agents preserve their rough notes of witness interviews. Arguably, inconsistencies between those notes and the finished interview report may constitute *Brady* or *Giglio* impeachment of the witness or of the agent. AUSAs should review rough notes for potential disclosure if they have not been incorporated into a finished report. Notes that have been incorporated into a finished report should be reviewed if either 1) the AUSA has reason to believe that the agent's report may not fairly depict what happened in the interview, such as the witness telling the AUSA information different from the report, or 2) precision with regard to the matter at issue is likely to be contested at trial, such as the precise words the witness gave when she heard the defendant confess to the crime.

AUSA notes generally should not be produced. However, if the AUSA notes contain "substantially verbatim" recitals of what the witness says, arguably they could be subject to Jencks disclosure. On the other hand, AUSA summaries of and reactions to what the witness

says, even containing brief quotes, should not be discoverable under Jencks. Of course, a *Brady* or *Giglio* revelation by a witness whether memorialized in AUSA or agent notes, or not, must be disclosed. If any question arises regarding AUSA notes themselves, the AUSA should consult with the Criminal Chief

It is a best practice for the AUSA to help actively manage the report process for interviews the AUSA attends. One agent should be designated as the note taker and report writer. The AUSA may want to consult with the agent during the interview and particularly just before the interview ends to confirm that the agent has documented and remembers key features of the interview. Any questions can then be resolved with the witness prior to the completion of the interview.

As a general matter, the Office does not require that agents document grand jury or trial preparation meetings after a witness has been interviewed previously. If the witness is meeting with the government for the first time, an agent should document the meeting, even if grand jury or trial is close at hand. Moreover, if the witness provides materially different information in a preparation session, the government should document the inconsistency in the grand jury or disclose the inconsistencies in a letter to the defense prior to trial.

X. Interviews of Non-testifying Witnesses

While interview reports, grand jury testimony, and rough notes of non-testifying witnesses are not covered by the Jencks Act or Rule 16, AUSAs should be sensitive to the possibility that they contain *Brady*/*Giglio* information. In many cases, it is a best practice to make these reports available to the defense prior to trial. In any event, they should be carefully reviewed.

XI. Agent Files with Confidentiality Concerns

While AUSAs have the obligation to review and consider for production all material in files of an agency that is part of the prosecution team, the AUSA need not disclose all relevant documents or the actual records themselves. In many circumstances, the agencies have valid concerns about the information or the form of the information. AUSAs should consult with agents about their confidentiality concerns as part of the pre-indictment meeting.

Moreover, AUSAs should review informant files for all testifying informants and should consider reviewing files for non-testifying informants. Nevertheless, the agency may have concerns about the form and method of disclosing information in the informant file. *Brady* and *Giglio* only require the disclosure of certain information; due process does not require all agency files to be disclosed wholesale. AUSAs should consult the Criminal Chief if they have questions.

XII. Emails and Other Electronic Information

AUSAs should be aware (and make sure that your agents are aware) that e-mails, text messages and recorded voice mails by testifying agents or other witnesses are subject to the Jencks Act,

Brady, and *Giglio* just as any other writings or recordings would be. This applies to electronic communications written to you, as well as electronic communications written to others if within the possession of the government (e.g., electronic communications from a testifying agent to another agent, from a testifying agent to a regulatory agency, from a testifying agent to a witness, from a testifying witness to an agent, etc.).

Because of the convenience of using e-mails for communication purposes, or for other reasons, you may choose to continue to have agents communicate with you or with others by e-mail. Should you so choose, be aware and, again, make sure your agents are aware, that any such e-mails may later be produced to the defense. Agents should be reminded that they should not write anything that they would not write in a formal report. Alternatively, you may choose to agree with your agents that they should not communicate with you or others by e-mail, perhaps with the exception of scheduling meetings or calls, in other words, avoiding substantive electronic communications.

Should you choose to communicate electronically, you should be sure to have a procedure in place by which you retain copies of all substantive electronic communications for future production. For example, you may want to set up a separate "Case Folder" in Outlook for each investigation, into which you move all substantive e-mails received from agents or other potential witnesses so that you can later review and, if appropriate, produce copies. Alternatively, you may want to develop a practice of immediately printing and putting in the case file a hard copy of any such e-mail. Regardless of the method, you should have a retention plan that will ensure that you will be in a position to fully comply with your Jencks obligations at the time of trial.

In addition, you should be sure that your agents are aware that, if they are even potentially going to be testifying at trial, you will need copies from them of all substantive electronic communications that they have sent to others during the investigation/prosecution about the investigation/prosecution, including substantive electronic communications to fellow agents and others (e.g., other e-mails on which you are not in the distribution chain and otherwise do not have in your possession). In addition, you will need copies from them of all substantive electronic communications that they received from other testifying (or potentially testifying) witnesses, as those electronic communications may be Jencks material of those other witnesses and thus subject to production. Should your agents communicate with others electronically, they likewise will need to develop their own retention mechanism so that they have all such electronic communications available for your pre-trial review.

There will be certain electronic communications that ultimately need not be turned over as Jencks material. Nevertheless, however innocuous they may seem at the time, all substantive electronic communications from or adopted by testifying witnesses should be maintained for later pre-trial review, reviewed, and, if appropriate, submitted for in camera review by the Court and/or production.

XIII. Documenting Discovery

AUSAs are required to document all discovery productions through a cover or transmittal letter, which sets forth in sufficient detail what is being produced. A copy of the cover/transmittal letter and copy of the discovery provided should be maintained in a "discovery" file. Discovery disputes often arise during the pendency of a case and the Office must be able to prove what was produced and when. Maintaining a complete and up-to-date discovery file is therefore critical to resolving pre-trial, mid-trial or post-trial discovery issues. Even production of newly discovered documents or *Brady* during trial should be memorialized. Defense lawyers (even assuming they are also the lawyers on appeal) will not remember a mid-trial production six months or more later. Moreover, the AUSA and her legal assistant should use the Casemap log described below to manage discovery effectively. The Office's form discovery letter is located at Form A-56 in the Criminal Division Manual.

XIV. Case Management System

In order to assist AUSAs with criminal discovery, Office policy requires AUSAs and support staff to collect and log all potentially discoverable material in each case.

Legal assistants should immediately receive all potentially discoverable material during the investigation, whether the result of subpoena, law enforcement investigation, or voluntary production. All paper documents received by the Office should be either scanned and uploaded into IPRO (in which case, documents would be automatically Bates numbered through the program), or scanned as a .pdf and manually Bates numbered and logged. Paper copies of the Bates numbered documents should be maintained in the file. It isn't necessary to print out copies of Bates numbered documents maintained in IPRO unless the AUSA would like this done. If an AUSA needs to review paper records prior to scanning and logging, the legal assistant should provide the AUSA with a copy marked "working copy." AUSAs should seek to have all materials scanned for cases involving more than 200 pages of potentially discoverable paper.

Legal assistants have the obligation to input basic information in the log in Casemap whether documents have been scanned into IPRO or have been Bates numbered with Adobe Acrobat (.pdf). Casemap "logs" are created in individual Casemap cases under the "Objects - Documents" tab. In some cases, AUSAs may want to add to these descriptions or create the document descriptions themselves as they review the documents. AUSAs, agents, and paralegals may wish to make greater use of Casemap by adding information in Casemap fields beyond those in the template.

Other material should be logged but not scanned. First, to the extent that evidence remains in the hands of law enforcement, it should be logged as such. These items should be logged in the specific Casemap case under the "Other Physical Evidence" tab. Such logging would be appropriate for physical evidence or voluminous search documents (important documents from the search should be obtained by the AUSA and scanned). Second, we now often receive electronic evidence, such as cell phone records, recordings, or computer data. Such information should be saved on a disk and logged, though scanning is not necessary. (If the AUSA wishes to use electronic information as a potential trial exhibit, it should be scanned at some point so that it

can be offered at trial in paper form.) These CDs and DVDs should also be logged under the "Other Physical Evidence" tab.

AUSAs should try to review scanned documents using the electronic tools available, and even to try to use Casemap to assist in that review process.

Not only do AUSAs need to log information received, they need to seek to identify all potentially discoverable material and collect all material the Office should have in its files or log these items and identify where they may be reviewed by the defense. This identification and collection process often requires the AUSA to become familiar with the record-keeping systems of the law enforcement agencies involved in the investigation to make sure that the AUSA is aware of all the available information. AUSAs should make it their normal practice to visit the investigative agencies' office(s) to view the physical evidence and review their case files to ensure that all reports and evidence are logged and that we are in possession of copies of evidence when appropriate. Moreover, the AUSA must determine which agencies are part of the "prosecution team," and thus which agency files are deemed available to the prosecutor. Any AUSAs with prosecution team questions should consult with the Criminal Chief.

As noted above, AUSAs are encouraged to meet with the agents from all agencies within the prosecution team about discovery matters prior to indictment. The legal assistant or paralegal should provide the AUSA with a Casemap log, as well as either (1) redacted copies of the documents included in the log, or (2) ensure that the AUSA is able to view these redacted copies online in IPRO. The AUSA should then indicate on the log which documents are to be provided at that time and if there are any additional redactions needed. Ultimately, it is the AUSA's responsibility to indicate what should be produced and redacted. The legal assistant or paralegal will then prepare the log to include only the documents chosen by the AUSA and burn a CD to include only those documents. The CD/DVD and records index should be attached to and enclosed with the Rule 16 discovery letter. AUSAs should then use the Casemap log to assist with discovery from the time of the Rule 16 discovery letter shortly after arraignment. The log should continue to be a reference throughout the pretrial process so that the AUSA can track what has been provided and what has been withheld.