

A Summary of Responses to a
National Survey of Rule 16 of the
Federal Rules of Criminal Procedure and
Disclosure Practices in Criminal Cases

Final Report to the Advisory Committee on Criminal Rules

Appendices

Federal Judicial Center

February 2011

- Appendix A: Advisory Committee's 2007 Proposed Rule 16
Amendment and Committee Note
- Appendix B: Compendium of U.S. District Court Local Rules
and Standing Orders Addressing Brady Material
and Tables
- Appendix C: Tables
- Appendix D: Methods
- Appendix E: Survey Instruments

Appendix A: Advisory Committee’s Proposed 2007 Rule 16 Amendment and Committee Note

Rule 16. Discovery and Inspection

(a) GOVERNMENT’S DISCLOSURE.

(1) INFORMATION SUBJECT TO DISCLOSURE.

* * * *

(H) *Exculpatory or Impeaching Information.* Upon a defendant’s request, the government must make available all information that is known to the attorney for the government or agents of law enforcement involved in the investigation of the case that is either exculpatory or impeaching. The court may not order disclosure of impeachment information earlier than 14 days before trial.

COMMITTEE NOTE

Subdivision (a)(1)(H). New subdivision (a)(1)(H) is based on the principle that fundamental fairness is enhanced when the defense has access before trial to any exculpatory or impeaching information known to the prosecution. The requirement that exculpatory and impeaching information be provided to the defense also reduces the possibility that innocent persons will be convicted in federal proceedings. See generally ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION 3-3.11(a) (3d ed. 1993), and ABA MODEL RULE OF PROFESSIONAL CONDUCT 3.8(d) (2003). The amendment is intended to supplement the prosecutor’s obligations to disclose material exculpatory or impeaching information under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), *Kyles v. Whitley*, 514 U.S. 419 (1995), *Strickler v. Greene*, 527 U.S. 263, 280–81 (1999), and *Banks v. Dretke*, 540 U.S. 668, 691 (2004).

The rule contains no requirement that the information be “material” to guilt in the sense that this term is used in cases such as *Kyles v. Whitley*. It requires prosecutors to disclose to the defense all exculpatory or impeaching information known to any law enforcement agency that participated in the prosecution or investigation of the case without further speculation as to whether this information will ultimately be material to guilt.

The amendment distinguishes between exculpatory and impeaching information for purposes of the timing of disclosure. Information is exculpatory under the rule if it tends to cast doubt upon the defendant’s guilt as to any essential element in any count in the indictment or information. Because the disclosure of the identity of witnesses raises special concerns, and impeachment information may disclose a witness’s identity, the rule provides that the court may not order the disclosure of information that is impeaching but not exculpatory earlier than 14 days before trial. The government may apply to the court for a protective order concerning exculpatory or impeaching information under the already-existing provision of Rule 16(d)(1), so as to defer disclosure to a later time.

Appendix B: Compendium of U.S. District Court Local Rules and Standing Orders Addressing *Brady* Material

Middle District of Alabama

STANDARD ORDER ON CRIMINAL DISCOVERY

. . . (1) Disclosure by the Government. At arraignment, or on a date otherwise set by the court for good cause shown, the government shall tender to defendant the following:

. . . (B) *Brady* Material. All information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, without regard to materiality, within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963).

(C) *Giglio* Material. The existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective witnesses, within the scope of *Giglio v. United States*, 405 U.S. 150 (1972).

Southern District of Alabama

LR16.13 CRIMINAL DISCOVERY

. . . (b) Initial Disclosures.

(1) Disclosure by the Government. At arraignment, or on a date otherwise set by the court for good cause shown, the government shall tender to defendant the following:

. . . (B) *Brady* Material. All information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, without regard to materiality, within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963).

(C) *Giglio* Material. The existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective witnesses, within the scope of *Giglio v. United States*, 405 U.S. 150 (1972).

Eastern District of Arkansas

PRETRIAL ORDER FOR CRIMINAL CASES

. . . BRADY/GIGLIO

The Government must comply with its Constitutional obligation to disclose any information known to it that is material to the guilt or punishment of the defendant whether or not the defendant requests it. *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v.*

United States, 405 U.S. 150 (1972). *Brady* and *Giglio* information must be disclosed in time for effective use at trial. *In re United States (United States v. Coppa)*, 267 F.3d 132, 142 (2d Cir. 2001); *United States v. Olson*, 697 F.2d 273 (8th Cir. 1983). *Cf. United States v. Higgs*, 713 F.2d 39, 44 (3d Cir. 1983).

Northern District of California

16-1. PROCEDURES FOR DISCLOSURE AND DISCOVERY IN CRIMINAL ACTIONS.

(a) Meeting of Counsel. Within 14 days after a defendant's plea of not guilty, the attorney for the government and the defendant's attorney shall confer with respect to a schedule for disclosure of the information as required by FRCrimP 16 or any other applicable rule, statute or case authority. The date for holding the conference can be extended to a day within 21 days after entry of plea upon stipulation of the parties. Any further stipulated delay requires the agreement of the assigned Judge pursuant to Civil L.R. 7-12.

17.1-1. PRETRIAL CONFERENCE

. . . (b) Pretrial Conference Statement. Unless otherwise ordered, not less than 4 days prior to the pretrial conference, the parties shall file a pretrial conference statement addressing the matters set forth below, if pertinent to the case:

. . . (3) Disclosure of exculpatory or other evidence favorable to the defendant on the issue of guilt or punishment;

District of Connecticut

APPENDIX STANDING ORDER ON DISCOVERY

In all criminal cases, it is Ordered:

(A) Disclosure by the Government. Within ten (10) days from the date of arraignment, government and defense counsel shall meet, at which time the attorney for the government shall furnish copies, or allow defense counsel to inspect or listen to and record items which are impractical to copy, of the following items in the possession, custody or control of the government, the existence of which is known or by the exercise of due diligence may become known to the attorney for the government or to the agents responsible for the investigation of the case:

. . . (10) All information concerning the existence and substance of any payments, promises of immunity, leniency, or preferential treatment, made to prospective government witnesses, within the scope of *Giglio v. United States*, 405 U.S. 150 (1972) and *Napue v. Illinois*, 360 U.S. 264 (1959).

(11) All information known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963).

Northern District of Florida

Rule 26.3. DISCOVERY – CRIMINAL

. . . (D) Other Disclosure Obligations of the Government.—The government’s attorney shall provide the following within five (5) days after the defendant’s arraignment, or promptly after acquiring knowledge thereof:

(1) *Brady* Material.—All information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, without regard to materiality, that is within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963) and *United States v. Agurs*, 427 U.S. 97 (1976).

(2) *Giglio* Material. The existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective witnesses, within the scope of *Giglio v. United States*, 405 U.S. 150 (1972) and *Napue v. Illinois*, 360 U.S. 264 (1959).

Southern District of Florida

Rule 88.10. CRIMINAL DISCOVERY

. . . C. The government shall reveal to the defendant and permit inspection and copying of all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Agurs*, 427 U.S. 97 (1976).

D. The government shall disclose to the defendant the existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective government witnesses, within the scope of *Giglio v. United States*, 405 U.S. 150 (1972), and *Napue v. Illinois*, 360 U.S. 264 (1959).

. . . Q. Schedule of Discovery.

. . . 2. Discovery which is to be made in connection with trial shall be made not later than fourteen days after the arraignment, or such other time as ordered by the court.

Middle District of Georgia

STANDARD PRETRIAL ORDER

. . . DISCOVERY AND INSPECTION UNDER BRADY AND RULE 16; DISCLOSING IMPEACHING INFORMATION AND EXCULPATORY EVIDENCE

A defendant has a right only to discovery of evidence pursuant to Rule 16 of the Federal Rules of Criminal Procedure or *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. *Brady* prohibits the United States from suppressing evidence favorable to a defendant if that evidence is material either to guilt or to punishment. *Brady*, 373 U.S. at p.87. Because the credibility of a witness may determine guilt or innocence, impeaching evidence is material to guilt and thus falls within the *Brady* rule. See *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Williams v. Dutton*, 400 F.2d 797, 800 (5th Cir. 1968), *cert. denied*, 393 U.S. 1105 (1969).

UPON REQUEST, the United States is directed to disclose Rule 16 evidence and *Brady* evidence other than impeaching information as soon as reasonably possible. In accordance with the usual practice in this court, the United States is directed to disclose impeaching information about a witness no later than the evening before the witness' anticipated testimony. The United States need not furnish defendant with *Brady* information which the defendant has or, with reasonable diligence, the defendant could obtain himself. *United States v. Slocum*, 708 F.2d 587, 599 (11th Cir. 1983).

UPON REQUEST, the United States is also directed to disclose impeaching information about any non-witness declarant no later than the evening before the United States anticipates offering the declarant's statements in evidence.

. . . REVEALING "THE DEAL"

Where the government fails to disclose evidence of any understanding or agreement as to future prosecution of a key government witness, due process may require reversal of the conviction. *Giglio v. United States, supra*; *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L.Ed.2d 1217 (1959); *Smith v. Kemp*, 715 F.2d 1459, 1463 (11th Cir.), *cert. denied*, 464 U.S. 1003, 104 S. Ct. 510, 78 L.Ed.2d 699 (1983); *Williams v. Brown*, 609 F.2d 216, 221 (5th Cir. 1980). The government has a duty to disclose such understandings for they directly affect the credibility of the witness. This duty of disclosure is even more important where the witness provides the key testimony against the accused. See *Giglio*, 405 U.S. at 154–55, 92 S. Ct. at 766. *Haber v. Wainwright*, 756 F.2d 1520, 1523 (11th Cir. 1985).

. . . Accordingly, UPON REQUEST, the United States is directed to comply fully with *Giglio, supra*, and its progeny by disclosing the existence and substance of any such promises of immunity, leniency or preferential treatment. In accordance with the policy of *Brady v. Maryland, supra*, the United States is directed to furnish to the defendant such requested information within a reasonable period of time from the date of this order.

Northern District of Georgia

STANDARD CRIMINAL ORDER

. . . IV. Standard Rulings

The following rulings are made in this case and are intended to obviate the need for standard, non-particularized motions on these subjects. Any party who disagrees with these standard rulings may file a particularized motion for relief therefrom, including a motion to compel or for a protective order.

. . . B. *Discovery and Disclosure of Evidence Arguably Subject to Suppression and of Evidence Which Is Exculpatory and/or Impeaching*: Upon request of the defendant, the government is directed to comply with FED. R. CRIM. P. 16 and with FED. R. CRIM. P. 12 by providing notice as specified in section II.B, *supra*. The government is also directed to provide all materials and information that are arguably favorable to the defendant in compliance with its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and their progeny. Exculpatory material as defined in *Brady* and *Kyles v. Whitley*, 514 U.S. 419, 434 (1995), must be provided sufficiently in advance of trial to allow a defendant to use it effectively. Impeachment material must be provided no later than production of the *Jencks* Act statements.

Southern District of Georgia

LCrR 16.1. PRETRIAL DISCOVERY AND INSPECTION IN CRIMINAL CASES

Within seven (7) days after arraignment, the United States Attorney and the defendant's attorney shall confer and, upon request, the government shall:

. . . (f) Permit defendant's attorney to inspect and copy or photograph any evidence favorable to the defendant.

District of Hawaii

CrimLR 16.1. STANDING ORDER FOR ROUTINE DISCOVERY IN CRIMINAL CASES

. . . (a) *The Government's Duty*. A request for discovery set out in this paragraph and in *Fed.R.Crim.P. 16* is entered for the defendant to the government by this rule so that the defendant need not make a further request for such discovery. If the defendant does not request such discovery, he or she shall file a notice to the government that he or she does not request such discovery within five (5) days after arraignment. If such a notice is filed, the government is relieved of any discovery obligations to the defendant imposed by this paragraph or *Fed.R.Crim.P. 16*. If the defendant does not file such a notice, within seven (7) days after arraignment unless otherwise ordered by the court or promptly upon subsequent discovery, the government shall permit the defendant to inspect and copy or

photograph, or, in the case of the defendant's criminal record, shall furnish a copy, and provide the information listed in the subparagraphs enumerated immediately below. Upon providing the information required in the enumerated subparagraphs below, the government shall file and serve notice of compliance with discovery mandated under this paragraph.

. . . 7. *Brady* material, as it shall be presumed that defendant has made a general *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215, 1963 U.S. LEXIS 1615 (1963) request. Specific requests shall be made in writing to the government or by motion . . .

. . . (g) Impeachment Material.

1. Order of Production. The production of the following is hereby ordered: cooperation agreements, plea agreements, impeachment material, promises of leniency, under *Giglio v. United States*, 405 U.S. 150 (1972), and its progeny, and records of criminal convictions which may be admissible under Fed. R. Evid. 609.

2. Time of Production. Impeachment material under this rule shall be provided as ordered by the court.

District of Idaho

PROCEDURAL ORDER

In order to provide for the just determination of every criminal proceeding, the Board of Judges for the District Court for the District of Idaho has adopted a uniform Procedural Order to be used in criminal proceedings. United States Magistrate Judges are authorized to enter the Procedural Order at the time of the arraignment of a defendant pursuant to 28 U.S.C. § 636 (b)(1)(A).

. . . I. DISCOVERY

. . . 5. The Court strongly encourages the government to produce any information currently in its possession and described in the following paragraphs within seven (7) calendar days of the date of the arraignment on the indictment, in conjunction with the material being produced under Part I, paragraph 1 of this Procedural Order. As to any materials not currently in the possession of the government, including information that may not be exculpatory in nature at the time of the arraignment but as the case proceeds towards trial may become exculpatory because of subsequent events, then the government shall, as soon as practicable and at a minimum for the defendant to make effective use of it at trial, disclose the information. If the government has information in its possession at the time of the arraignment, but elects not to disclose this information until a later time in the proceedings, the court can consider this as one factor in determining whether the defendant can make effective use of the information at trial.

A. Disclose all material evidence within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Agurs*, 427 U.S. 97 (1976), and *Kyles v. Whitley*, 514 U.S. 419 (1995), and their progeny.

- B. Disclose the existence and substance of any payments, promises of immunity, leniency, preferential treatment or other inducements made to prospective witnesses, within the scope of *Giglio v. United States*, 405 U.S. 150 (1972), and *Napue v. Illinois*, 362 U.S. 264 (1959), and their progeny.

District of Kansas

GENERAL ORDER OF SCHEDULING AND DISCOVERY

In the interests of justice and judicial economy, the Court enters the following general order of discovery and scheduling which will apply to the charges and to any superseding charges in this case. In general, the court will order the parties to comply with Rules 12, 12.1, 12.2, 16 and 26.2 of the Federal Rules of Criminal Procedure, with *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763 (1972) and their progeny, and with Title 18, U.S.C. § 3500, as well as Rule 404(b), Federal Rules of Evidence.

Unless otherwise specified, a request is not necessary to trigger the operation of this Order, notwithstanding Rule 16's "upon request" language. Thus, the absence of a request may not be asserted as a reason for noncompliance. A principal purpose of this order is to make self-executing the disclosure and discovery provisions of the Rules, thereby reducing or eliminating the filing of "boilerplate" discovery motions and motions for extension of time. Counsel are expected to communicate with each other regarding discovery and nothing in this order is intended to deter the voluntary exchange of information between counsel at times sooner than those specified.

Disclosure by the Government

No later than 30 days after arraignment, the government shall comply with Rule 16.

Pursuant to *Brady* and *Giglio* and their progeny, the government shall produce any and all evidence in its possession, custody or control which would tend to exculpate the defendant (that is, evidence which is favorable and material to a defense), or which would constitute impeachment of government witnesses, or which would serve to mitigate punishment, if any, which may be imposed in this case. This includes and is not limited to the following:

1. Any evidence tending to show threats, promises, payments or inducements made by the government or any agent thereof which would bear upon the credibility of any government witness.
2. Any statement of any government witness which is inconsistent with a statement by the witness which led to the indictment in this case.
3. Any statement of any government witness which the attorney for the government knows or reasonably believes will be inconsistent with the witness' testimony at trial.

4. Any prior conviction of any government witness, which involved dishonesty or false statement, or for which the penalty was death or imprisonment in excess of one year under the law under which he was convicted.

5. Any pending felony charges against any government witness.

6. Any specific instances of the conduct of any government witness which would tend to show character for untruthfulness.

Subject to the requirements of *Brady*, *Giglio* and pursuant to 18 U.S.C. Section 3500 and Rule 26.2, the government may decline to disclose pretrial statements of any of its witnesses until each such witness has concluded his or her direct examination at trial. At that time, the government shall produce the witness' prior statement that is in its possession relating to the witness' testimony. The Court nevertheless urges the government to provide the statements at least 48 hours prior to the witness' scheduled appearance . . .

Western District of Kentucky

SCHEDULING ORDER

. . . 4. To the extent required by *Giglio v. United States*, 405 U.S. 150 (1972) and *United States v. Presser*, 844 F.2d 1275 (6th Cir. 1988), the United States is ordered to provide to defendant with *Giglio* material which shall include but not be limited to production of criminal records of government witnesses, deals, promises of leniency, bargains or other impeachment material. To the extent required by *Brady v. Maryland*, 373 U.S. 83 (1963) and *Presser*, the United States shall disclose any *Brady* material of which it has knowledge in the following manner:

- (a) pretrial disclosure of any *Brady* material discoverable under Rule 16(a)(1);
- (b) disclosure of all other *Brady* material "in time for effective use at trial."

If the United States has knowledge of *Brady* rule evidence and is unsure as to the nature of the evidence and the proper time for disclosure, it may request an in camera hearing for the purpose of resolving this issue. Failure to disclose *Brady* material at a time when it can be used effectively may result in a recess or a continuance so that the defendant may properly utilize such evidence.

5. Grand Jury materials shall not be disclosed except to the extent required by *Brady*, *Giglio* and the Jencks Act.

Western District of Louisiana

CRIMINAL SCHEDULING ORDER

The purpose of this order is to reduce or eliminate the use of boilerplate, formula motions and responses for discovery of matters authorized by the Federal Rules of

Criminal Procedure, federal statutes, or well-settled case law as applied by this court in the vast majority of criminal cases.

The above-named defendant having been arraigned this date in open court, the following orders are entered:

. . . II. DISCOVERY

. . . (c) Not less than 7 days prior to trial:

(1) The government shall reveal to the defendant and permit inspection and copying of all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Agurs*, 427 U.S. 97 (1976), and *Kyles v. Whitley*, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995).

(2) The government shall disclose to the defendant the existence and nature of any payments, promises or immunity, leniency, preferential treatment, or other inducements made to prospective government witnesses, within the scope of *Giglio v. United States*, 405 U.S. 150 (1972), and *Napue v. Illinois*, 362 U.S. 264 (1959) . . .

District of Massachusetts

RULE 116.1 DISCOVERY IN CRIMINAL CASES

(A) Discovery Alternatives.

(1) Automatic Discovery. In all felony cases, unless a defendant waives automatic discovery, all discoverable material and information in the possession, custody, or control of the government and that defendant, the existence of which is known, or by the exercise of due diligence may become known, to the attorneys for those parties, must be disclosed to the opposing party without formal motion practice at the times and under the automatic discovery procedures specified in this Local Rule.

. . . (C) Automatic Discovery Provided By The Government.

(1) Following Arraignment. Unless a defendant has filed the Waiver, within twenty-eight (28) days of arraignment—or within fourteen (14) days of receipt by the government of a written statement by the defendant that no Waiver will be filed—the government must produce to the defendant:

. . . (2) Exculpatory Information. The timing and substance of the disclosure of exculpatory evidence is specifically provided in L.R. 116.2.

RULE 116.2 DISCLOSURE OF EXCULPATORY EVIDENCE

(A) Definition. Exculpatory information includes, but may not be limited to, all information that is material and favorable to the accused because it tends to:

- (1) Cast doubt on defendant's guilt as to any essential element in any count in the indictment or information;
- (2) Cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief, that might be subject to a motion to suppress or exclude, which would, if allowed, be appealable pursuant to *18 U.S.C. § 3731*;
- (3) Cast doubt on the credibility or accuracy of any evidence that the government anticipates offering in its case-in-chief; or
- (4) Diminish the degree of the defendant's culpability or the defendant's Offense Level under the United States Sentencing Guidelines.

(B) Timing of Disclosure by the Government. Unless the defendant has filed the Waiver or the government invokes the declination procedure under Rule 116.6, the government must produce to that defendant exculpatory information in accordance with the following schedule:

- (1) Within the time period designated in L.R. 116.1(C)(1):

- (a) Information that would tend directly to negate the defendant's guilt concerning any count in the indictment or information.

- (b) Information that would cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief and that could be subject to a motion to suppress or exclude, which would, if allowed, be appealable under *18 U.S.C. § 3731*.

- (c) A statement whether any promise, reward, or inducement has been given to any witness whom the government anticipates calling in its case-in-chief, identifying by name each such witness and each promise, reward, or inducement, and a copy of any promise, reward, or inducement reduced to writing.

- (d) A copy of any criminal record of any witness identified by name whom the government anticipates calling in its case-in-chief.

- (e) A written description of any criminal cases pending against any witness identified by name whom the government anticipates calling in its case-in-chief.

- (f) A written description of the failure of any percipient witness identified by name to make a positive identification of a defendant, if any identification procedure has been held with such a witness with respect to the crime at issue.

- (2) Not later than twenty-one (21) days before the trial date established by the judge who will preside:

- (a) Any information that tends to cast doubt on the credibility or accuracy of any witness whom or evidence that the government anticipates calling or offering in its case-in-chief.

(b) Any inconsistent statement, or a description of such a statement, made orally or in writing by any witness whom the government anticipates calling in its case-in-chief, regarding the alleged criminal conduct of the defendant.

(c) Any statement or a description of such a statement, made orally or in writing by any person, that is inconsistent with any statement made orally or in writing by any witness the government anticipates calling in its case-in-chief, regarding the alleged criminal conduct of the defendant.

(d) Information reflecting bias or prejudice against the defendant by any witness whom the government anticipates calling in its case-in-chief.

(e) A written description of any prosecutable federal offense known by the government to have been committed by any witness whom the government anticipates calling in its case-in-chief.

(f) A written description of any conduct that may be admissible under *Fed. R. Evid. 608(b)* known by the government to have been committed by a witness whom the government anticipates calling in its case-in-chief.

(g) Information known to the government of any mental or physical impairment of any witness whom the government anticipates calling in its case-in-chief, that may cast doubt on the ability of that witness to testify accurately or truthfully at trial as to any relevant event.

(3) No later than the close of the defendant's case: Exculpatory information regarding any witness or evidence that the government intends to offer in rebuttal.

(4) Before any plea or to the submission by the defendant of any objections to the Pre-Sentence Report, whichever first occurs: A written summary of any information in the government's possession that tends to diminish the degree of the defendant's culpability or the defendant's Offense Level under the United States Sentencing Guidelines.

(5) If an item of exculpatory information can reasonably be deemed to fall into more than one of the foregoing categories, it shall be deemed for purposes of determining when it must be produced to fall into the category which requires the earliest production.

RULE 116.6 DECLINATION OF DISCLOSURE AND PROTECTIVE ORDERS

(A) **Declination.** If in the judgment of a party it would be detrimental to the interests of justice to make any of the disclosures required by these Local Rules, such disclosures may be declined, before or at the time that disclosure is due, and the opposing party advised in writing, with a copy filed in the Clerk's Office, of the specific matters on which disclosure is declined and the reasons for declining. If the opposing party seeks to challenge the declination, that party shall file a motion to compel that states the reasons

why disclosure is sought. Upon the filing of such motion, except to the extent otherwise provided by law, the burden shall be on the party declining disclosure to demonstrate, by affidavit and supporting memorandum citing legal authority, why such disclosure should not be made. The declining party may file its submissions in support of declination under seal pursuant to L.R. 7.2 for the Court's in camera consideration. Unless otherwise ordered by the Court, a redacted version of each such submission shall be served on the moving party, which may reply.

(B) Ex Parte Motions for Protective Orders. This Local Rule does not preclude any party from moving under L.R. 7.2 and ex parte (i.e. without serving the opposing party) for leave to file an ex parte motion for a protective order with respect to any discovery matter. Nor does this Local Rule limit the Court's power to accept or reject an ex parte motion or to decide such a motion in any manner it deems appropriate.

Adopted September 8, 1998; effective December 1, 1998.

RULE 116.7 DUTY TO SUPPLEMENT

The duties established by these Local Rules are continuing. Each party is under a duty, when it learns that a prior disclosure was in some respect inaccurate or incomplete to supplement promptly any disclosure required by these Local Rules or by the Federal Rules of Criminal Procedure.

Adopted September 8, 1998; effective December 1, 1998.

RULE 116.8 NOTIFICATION TO RELEVANT LAW ENFORCEMENT AGENCIES OF DISCOVERY OBLIGATIONS

The attorney for the government shall inform all federal, state, and local law enforcement agencies formally participating in the criminal investigation that resulted in the case of the discovery obligations set forth in these Local Rules and obtain any information subject to disclosure from each such agency.

Adopted September 8, 1998; effective December 1, 1998.

Eastern District of Michigan

STANDING ORDER FOR DISCOVERY AND INSPECTION AND FIXING MOTION CUT-OFF DATE IN CRIMINAL CASES

. . . To eliminate unnecessary motions for discovery and to expedite the trial and eliminate delays in the presentation of evidence and the examination of witnesses, this order is entered in all criminal cases in this district. Nothing in this order shall be construed to impose any obligation on any party not otherwise provided by law.

. . . 1. Conference and Disclosure. Within ten (10) days from the date of arraignment, or such other date as may be set by the Judge to whom the case is assigned, government and defense counsel shall meet and confer, or government counsel shall file the attached Discovery Notice. Upon request of defense counsel the government shall:

. . . (b) Permit defense counsel to inspect, copy or photocopy any exculpatory evidence within the meaning of *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Agurs*, 427 U.S. 97 (1976).

A list of the items of evidence so inspected shall be made and such list signed by all counsel and copies of the items so disclosed shall be initialed or otherwise marked. Government counsel is reminded that the government proceeds at its peril if there is a failure to disclose such evidence.

Nothing herein shall be deemed to require the disclosure of Jencks Act material prior to the time that the Jencks Act requires its disclosure, nor shall government counsel be required to automatically disclose the names of government witnesses.

2. Disclosure Declined. If, in the judgment of government counsel, it would be detrimental to the interests of justice to make any disclosure set forth in paragraph 1 and requested by defense counsel, disclosure may be declined, and defense counsel so advised. The declination shall be made or confirmed in writing. If a defendant seeks to challenge the declination, he or she shall move forthwith for relief.

3. Continuing Duty. The duty of disclosure an discovery described in this order is continuing . . .

Western District of Michigan

STANDING ORDER REGARDING DISCOVERY IN CRIMINAL CASES

Unless otherwise ordered in a particular case, the parties in all criminal proceedings in this Court must comply with the following requirements:

. . . D. The government shall reveal to the defendant and permit inspection and copying all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Agurs*, 427 U.S. 97 (1976).

E. The government shall obtain and copy impeachment information relating to its witnesses that is within the ambit of the Jencks Act and within the ambit of *Brady*, including any prior criminal record of any alleged informant who will testify for the government at trial, so that the documents are available for effective use at the time of trial. This Court cannot compel the government to disclose Jencks Act statements prior to trial. *United States v. Presser*, 844 F.2d 1275, 1283 (6th Cir. 1988). The Sixth Circuit Court of Appeals has noted, however, the “the better practice . . . is for the government to produce such material well in advance of trial so that defense counsel may have an adequate opportunity to examine that which is not in dispute and the court may examine

the rest in camera, usually in chamber.” *United States v. Minsky*, 963 F.2d 870, 876 (6th Cir. 1992). This Court urges the government to follow the recommendation of the Sixth Circuit and produce Jencks Act and other impeachment material in a timely fashion.

. . . This order is designed to exhaust the discovery to which a defendant is ordinarily entitled and to avoid the necessity of counsel for the defendant(s) filing routine motions for routine discovery. Accordingly, counsel for the defendant(s) shall make a request of the government for each item of discovery sought and be declined the same prior to the filing of any motion. . .

. . . Unless otherwise indicated above, the parties must comply with this order within 21 days of the initial arraignment. Failure to abide by this order may result in the imposition of sanctions.

Western District of Missouri

DISCOVERY ORDER

To ensure that commencement of discovery is not delayed following arraignment and that the parties are adequately prepared to discuss pre-trial deadlines at the scheduling conference, the following schedule is established for the commencement of discovery.¹

. . . III. EVIDENCE FAVORABLE TO THE DEFENSE²

A. BRADY EVIDENCE

Within ten days from the date of arraignment, the government is directed to disclose all evidence favorable to the defendant within the meaning of *Brady v. Maryland*.

B. GIGLIO IMPEACHMENT EVIDENCE

No later than fifteen days prior to trial, the government is directed to disclose all evidence which may tend to adversely affect the credibility of any person called as a witness by the government pursuant to *Giglio v. United States* and *United States v. Agurs*, including the arrest and/or conviction record of each

1. During the arraignment, defense counsel requested all discovery to which their client may be entitled pursuant to the Federal Rules of Criminal Procedure, the Federal Rules of Evidence and the United States Constitution. The government requested reciprocal discovery to which it is entitled pursuant to the Federal Rules of Criminal Procedure, the Federal Rules of Evidence and the United States Constitution.

2. The parties are to be prepared to disclose to the Court at the final pretrial conference the method used to determine whether any favorable evidence exists in the government’s investigative file. The government is advised that if any portion of the government’s investigative file or that of any investigating agency is not made available to the defense for inspection, the Court will expect that trial counsel for the government or an attorney under trial counsel’s immediate supervision who is familiar with the *Brady/Giglio* doctrine will have reviewed the applicable files for purposes of ascertaining whether evidence favorable to the defense is contained in the file.

government witness, any offers of immunity or lenience, whether made directly or indirectly, to any government witness in exchange for testimony and the amount of money or other remuneration given to any witness.

STIPULATIONS AND ORDERS

...

III. EVIDENCE FAVORABLE TO THE DEFENSE

1. Brady/Giglio Evidence

The government states that it does not have evidence in its possession favorable to defendant(s):

[and/or]

The government states that it has evidence in its possession favorable to defendant(s):

STIPULATION: The government agrees to provide discovery within 10 days of all evidence in its possession which is favorable to a defendant. If favorable evidence comes into the government's possession in the future, the government agrees to disclose it promptly. Although most instances of favorable evidence to the defense will be immediately apparent to the government (e.g., exculpatory evidence and impeachment evidence), this stipulation recognizes that at times the government will not necessarily be aware of the nature of a particular defense. Therefore, defense counsel has a responsibility to alert the government as to the nature and type of evidence that it believes may prove to be favorable to the defense which might not otherwise be apparent to the government.

...

3. Witness Inducements

The government has not made promises to witness(es) in exchange for testimony.

[or]

The government has made promises to witness(es) in exchange for testimony.

STIPULATION: The government agrees to provide discovery at least 10 days before trial of (a) the name(s) and address(es) of the witness(es) to whom the government has made a promise, (b) all promises or inducements made to

any witness(es), (c) all agreements entered into with any witness(es), and (d) the amount of money or other remuneration given to any witness(es). If the witness is represented by counsel, the government also will provide discovery of the attorney's name, address, and telephone number. As an alternative to providing witness-address information, the government agrees to make the witness(es) available for interview if the witness(es) agree(s) to being interviewed. If such evidence is not immediately available, the government will promptly disclose it upon receipt.

...

XII. CONCLUSION

ORDERED that all requests for discovery and inspection agreed to or ordered above are continuing requests and orders, and any such information and/or material coming into the knowledge or possession of any party before or during trial shall be promptly made available to opposing counsel.

NOTE: The parties acknowledge that the above-executed stipulations are intended to eliminate the need for pretrial discovery motions and responses. They are not intended to be used to exclude the introduction of evidence by either side at trial unless a complaining party can show bad faith on the part of the offending party, real prejudice to the complaining party, or both.

District of Nebraska

ORDER FOR PROGRESSION OF A CRIMINAL CASE

Upon arraignment of Defendant this date and the entry of plea of not guilty,

IT IS ORDERED:

... 3. If after compliance with Rule 16 there is necessity for the filing of pretrial motions, they shall be filed by (date), and that time limit will not be extended by the court except for good cause shown. In this connection, the United States Attorney shall disclose *Brady v. Maryland* (and its progeny) material as soon as practicable. Should the Defendant nonetheless file a motion for such disclosure, such motion shall state with specificity the material sought. In the event that any motions are filed seeking bills of particulars or discovery of facts, documents, or evidence, as part of the motion the moving party shall recite that counsel for the movant has conferred with opposing counsel regarding the subject of the motion in an attempt to reach agreement on the contested matters without the involvement of the court and that such attempts have been unsuccessful. The motion shall further state the dates and times of such conferences.

District of New Hampshire

Rule 16.1. ROUTINE DISCOVERY

The parties shall disclose the following information without waiting for a demand from the opposing party.

. . . (d) Exculpatory and Impeachment Material. The government shall disclose any evidence material to issues of guilt or punishment within the meaning of *Brady v. Maryland*, 373 U.S. 83 (1963), and related cases, and any impeachment material as defined in *Giglio v. United States*, 405 U.S. 150 (1972), and related cases, at least twenty-one (21) days before trial. For good cause shown, the government may seek approval to disclose said material at a later time.

District of New Jersey

ORDER FOR DISCOVERY AND INSPECTION

. . . 1. *CONFERENCE*. Within ten (10) days from the date hereof, the United States Attorney or one of his assistants and the defendant's attorney shall meet and confer, and the government shall:

. . . (f) Permit defendant's attorney to inspect, copy or photograph any exculpatory evidence within the purview of *Brady v. Maryland*.

District of New Mexico

RULE 16.1 DISCOVERY OF EVIDENCE

The Parties will comply with the Standard Discovery Order. A copy of the Order is attached to these Rules.

STANDARD DISCOVERY ORDER

. . . 6. DISCLOSURE OF *BRADY*, *GIGLIO* AND *JENCKS* ACT MATERIALS. The government shall make available to the Defendant by the time required by applicable law all material for which discovery is mandated by *Brady v. Maryland*, 373 U.S. 83 (1963), by *Giglio v. United States*, 405 U.S. 150 (1972), and by the Jencks Act, 18 U.S.C. § 3500, and Rules 12(i) and 26.2.

Northern District of New York

14.1 DISCOVERY

. . . (b) Fourteen (14) days after arraignment, or on a date that the Court otherwise sets for good cause shown, the government shall make available for inspection and copying to the defendant the following:

. . . 2. *Brady* Material. All information and material that the government knows may be favorable to the defendant on the issues of guilt or punishment, within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963).

. . . (d) No less than fourteen (14) days prior to the start of jury selection, or on a date the Court sets otherwise for good cause shown, the government shall tender to the defendant the following:

1. *Giglio* Material. The existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective witnesses, within the scope of *Giglio v. United States*, 405 U.S. 150 (1972).

2. Testifying Informant's Convictions. A record of prior convictions of any alleged informant who will testify for the government at trial.

. . . (f) It shall be the duty of counsel for all parties immediately to reveal to opposing counsel all newly discovered information, evidence, or other material within the scope of this Rule, and there is a continuing duty upon each attorney to disclose expeditiously. The government shall advise all government agents and officers involved in the action to preserve all rough notes.

Eastern District of North Carolina

Rule 16.1. MOTIONS RELATING TO DISCOVERY AND INSPECTION

. . . (b) Criminal Pre-Trial Conference. Within twenty-one (21) days after indictment or initial appearance, whichever comes later, the United States Attorney shall arrange and conduct a pre-trial conference with counsel for the defendant. At the pre-trial conference and upon the request of counsel for the defendant, the Government shall permit counsel for the defendant:

. . . (7) to inspect, copy or photograph any exculpatory evidence.

Middle District of North Carolina

LOCAL CRIMINAL RULE 16.1 DISCOVERY MOTIONS

Discovery motions filed by a defendant who is represented by counsel must include a statement that counsel has fully reviewed the government's case file before bringing the motion or a statement that such file is not available for counsel's review. The filing of a discovery motion which does not include such certification may cause the court to deny the motion, to disapprove payment to court-appointed counsel in regard to a motion made unnecessary by examination of the file, or to impose other sanctions under LCrR57.3 in the discretion of the court.

District of North Dakota

PRETRIAL ORDER (CRIMINAL)

. . . II. DISCOVERY: The following discovery rules shall apply:

. . . d) The Government shall disclose to the Defendant any exculpatory material discoverable under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny.

District of the Northern Mariana Islands

LCrR 17.1.1—PRETRIAL CONFERENCE

On request of any party or on the court's motion, one or more pretrial conferences may be held. The agenda shall consist of the following items, so far as applicable:

. . . c. Production of evidence favorable to the defendant on the issue of guilt or punishment as required by *Brady v. Maryland*, 373 U.S. 83 (1963), and related authorities;

Western District of Oklahoma

LCrR16.1 DISCOVERY CONFERENCE

(a) Time for Discovery Conference. Counsel for the parties shall meet and confer at a discovery conference within ten (10) days after a plea of not guilty is entered.

(b) Joint Statement. Within three (3) days following completion of the required discovery conference, the parties shall file with the Court Clerk a joint statement memorializing the discovery conference. (The Joint Statement of Discovery Conference shall conform to the form provided herein as Appendix V.) . . .

APPENDIX V. JOINT STATEMENT OF DISCOVERY CONFERENCE

. . . Counsel met for purposes of exchanging discovery materials in accordance with the Federal Rules of Criminal Procedure as supplemented by the Local Criminal Court Rules and any orders of this Court and, as a result of the conference, the undersigned counsel report the following:

. . . 5. The fact of disclosure of all materials favorable to the defendant or the absence thereof within the meaning of *Brady v. Maryland* and related cases: Counsel for plaintiff expressly acknowledges continuing responsibility to disclose any material favorable to defendant within the meaning of *Brady* that becomes known to the Government during the course of these proceedings.

Western District of Pennsylvania

Rule 16.1. DISCOVERY AND INSPECTION

B. Timing. Upon a defendant's request, the government shall make available the Rule 16 material at the time of the arraignment. If discovery is not requested by the defendant at the time of the arraignment, the government shall disclose such material within seven (7) days of a defendant's request. The government shall file a receipt with the Court which sets forth the general categories of information subject to disclosure under Rule 16, as well as any exculpatory evidence, and the items provided under each category.

C. Exculpatory Evidence. At the time of arraignment, and subject to a continuing duty of disclosure thereafter, the government shall notify the defendant of the existence of exculpatory evidence, and permit its inspection and copying by the defendant.

Eastern District of Tennessee

DISCOVERY AND SCHEDULING ORDER

. . . The government shall reveal to the defendant and permit inspection and copying of all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Agurs*, 427 U.S. 97 (1976) (exculpatory evidence), and *United States v. Bagley*, 473 U.S. 667 (1985) (impeachment evidence). Timing of such disclosure is governed by *United States v. Presser*, 844 F.2d 1275 (6th Cir. 1988).

It shall be the continuing duty of counsel for both sides to immediately reveal to opposing counsel all newly discovered information or other material within the scope of this order.

Upon a sufficient showing, the Court may at any time, upon motion properly filed, order that the discovery or inspection provided for by this order be denied, restricted or deferred, or make such other order as is appropriate. It is expected by the Court, however, that counsel for both sides shall make every good faith effort to comply with the letter and spirit of this order.

Middle District of Tennessee

LcrR16.01. DISCOVERY AND INSPECTION

(a) Discovery in Criminal Cases.

. . . (2) Standing Discovery Rule. On or before fourteen (14) days from the date of the arraignment of a defendant, the parties shall confer and the following shall be accomplished:

. . . d. The government shall reveal to the defendant and permit inspection and copying of all information and material known to the government

which may be favorable to the defendant on the issues of guilt or punishment within the scope of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), and *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L.Ed.2d 342 (1976).

Western District of Texas

Rule CR-16 DISCOVERY AND INSPECTION

(a) Discovery Conference and Agreement.

- (1) The parties need not make standard discovery requests, motions, or responses if, not later than the deadline for filing pretrial motions (or as otherwise authorized by the court), they confer, attempt to agree on procedures for pretrial discovery, and sign and file a copy of the Disclosure Agreement Checklist appended to this rule.

... (b) Timing of Discovery.

- (1) Discovery deadlines. Unless otherwise ordered by the court, or agreed to by the parties in writing:
 - (A) The parties must provide discovery in connection with pretrial release or detention not later than the commencement of a hearing on pretrial release or detention;
 - (B) The parties must provide discovery in connection with a pretrial hearing, other than a pretrial release or detention hearing, not later than 48 hours before the hearing; and
 - (C) The parties must provide discovery in connection with trial, whether agreed to by the parties or otherwise required, not later than: The parties must provide discovery in connection with trial, whether agreed to by the parties or otherwise required, not later than:
 - (i) 14 days after arraignment; or
 - (ii) if the defendant has waived arraignment, within 14 days after the latest scheduled arraignment date.
- (2) Earlier disclosure. The court encourages prompt disclosure, including disclosure before the deadlines set out in this rule.
- (3) Disclosure after motions deadline. The disclosure of information after the expiration of a motions deadline usually provides good cause for an extension of time to file motions based on that information.
- (4) Continuing duty to disclose. The parties have a continuing duty to disclose promptly to opposing counsel all newly discovered information the party is required to disclose, or has agreed to disclose in the Disclosure Agreement Checklist.

PARTIES' DISCLOSURE AGREEMENT CHECKLIST

Disclosed	Will Disclose/Refuse to	Not	Comments
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. . . Rule 16 material:

. . . Exculpatory material . . .

(*Brady*)

Impeachment material

(*Giglio*. . .)

District of Vermont

Rule 16. DISCOVERY

At the time of arraignment, the court will issue to all parties a standard Criminal Pretrial Order, which sets forth this court's criminal discovery procedures.

(a) Discovery from the Government. Unless the court orders otherwise, the government must make the following materials available to the defendant for inspection and copying within 14 days of arraignment:

. . . (2) *Brady Material*. All information and material known to the government that may be favorable to the defendant on the issues of guilt or punishment, as provided by *Brady v. Maryland*, 373 U.S. 83 (1963);

(3) *Names and Addresses of Witnesses*. A list of the names and addresses of witnesses the government intends to call in its case in chief. The government may withhold the names and/or addresses of those witnesses about whom it has substantial concerns. If names and/or addresses are withheld, the government must notify the defense of the number that have been withheld . . .

(d) Government Pretrial Disclosures. Unless the court orders otherwise for good cause, the government must provide to the defendant not less than 14 days prior to the start of jury selection:

(1) *Giglio Material*. All material within the scope of *Giglio v. United States*, 405 U.S. 150 (1972), including but not limited to information relating to:

(A) the existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to a testifying witness;

(B) the content of substantially inconsistent statements that a witness has made concerning issues material to guilt or punishment; and

(C) any criminal conviction of a witness or other instance of misconduct, of which the government has knowledge, and which may be used to impeach a witness pursuant to Fed. R. Evid. 608 and 609.

Western District of Washington

Rule 16. DISCOVERY AND INSPECTION

. . . (a) Discovery Conference

At every arraignment at which the defendant enters a plea of not guilty, or other time set by the court, the attorney for the defendant shall notify the court and the attorney for the United States, on the record, or thereafter in writing, whether discovery by the defendant is requested. If so requested, within fourteen days after said attorney for the defendant and the attorney for the government shall confer in order to comply with Rule 16 Fed.R.Crim.P., and make available to the opposing party the items in their custody or control or which by due diligence may become known to them. This conference shall be in person. If, however, it is impractical to meet in person, the conference may be conducted via telephone.

(1) Discovery from the government. At the discovery conference the attorney for the government shall comply with the government's obligations under Rule 16 including, but not limited to, the following:

. . . (K) Advise the attorney for the defendant and provide, if requested, evidence favorable to the defendant and material to the defendant's guilt or punishment to which he is entitled pursuant to *Brady v. Maryland* and *United States v. Agurs* . . .

Northern District of West Virginia

LR Cr P 16.01. PRETRIAL DISCOVERY AND INSPECTION.

. . . (b) Standard Discovery Request Form: At arraignment or upon filing of an information or indictment, counsel for the defendant may file standard requests for discovery. An Arraignment Order and Standard Discovery Request form is available on the Court's website. Counsel for the government and counsel for the defendant shall sign the form for entry by the magistrate judge.

. . . (d) Time for Government Response: Unless the parties agree otherwise, or the Court so orders, within 10 days of the Standard Discovery Request, the government must provide the requested material to counsel for the defendant and file with the clerk a written response to each of defendant's requests.

LR Cr P 16.05. EXCULPATORY EVIDENCE

Exculpatory evidence as defined in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), as amplified by *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L.Ed.2d 481 (1985), shall be disclosed at the time the disclosures described in LR Cr P 16.01 are made. Additional *Brady* material not known to the government at the time of disclosure of other discovery material, as described above, shall be disclosed immediately in writing setting forth the material in detail.

LR Cr P 16.06. RULE 404(b), GIGLIO AND ROVIARO EVIDENCE

No later than fourteen days before trial, the government shall disclose all Notice of Federal Rule of Evidence 404(b) evidence, *Giglio* material and any *Roviaro* witness not previously turned over in discovery. See *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L.Ed.2d 104 (1972); *Roviaro v. United States*, 353 U.S. 53, 77 S. Ct. 623, 1 L.Ed.2d 639 (1957).

Southern District of West Virginia

LR Cr P 16.1. ARRAIGNMENT AND STANDARD DISCOVERY REQUESTS

(a) Standard Discovery Request Form

At arraignment on an indictment, or on an information or complaint in a misdemeanor case, counsel for the defendant and the government may make standard requests for discovery as contained in the Arraignment Order and Standard Discovery Request form available from the clerk and on the court's website. The form shall be signed by counsel for the defendant and the government and entered by the magistrate judge.

. . . (c) Time for government response

Unless the parties agree otherwise, or the court so orders, within 10 days of the Standard Discovery Request, the government must provide the requested material to counsel for the defendant and file with the clerk a written response to each of defendant's requests.

ARRAIGNMENT ORDER AND STANDARD DISCOVERY REQUESTS

. . . 1. On Behalf of the Defendant, the Government Is Requested to: (defense counsel must initial all applicable sections)

. . . h. Disclose to defendant all evidence favorable to defendant, including impeachment evidence, and allow defendant to inspect, copy or photograph such evidence.

Eastern District of Wisconsin

Criminal L. R. 16. DISCOVERY AND INSPECTION.

(a) Open File Policy.

(1) At arraignment, the government must state on the record to the presiding judge whether it is following the open file policy as defined in Criminal L. R. 16(a)(2). If the government states that it is following the open file policy and the defense accepts such discovery materials, then the defense's discovery obligations under Fed. R. Crim. P. 16(b) arise without further government motion or request and both parties must be treated for all purposes in the trial court and on appeal as if each had filed timely written motions requesting all materials required to be produced under Fed. R. Crim. P. 16(a)(1)(A), (B), (C), (D), (E), (F), and (G), and 16 (b)(1)(A), (B), and (C), and invoking Fed. R. Crim. P. 16(c). If the government is following the open file policy, the government need not respond to and the Court must not hear any motion for discovery under Fed. R. Crim. P. 16(a) or 16(b) unless the motion complies with subsection (b) of this rule.

(2) As defined by the United States Attorney's Office, the "open file policy" means disclosure without defense motion of all information and materials listed in Fed. R. Crim. P. 16(a)(1)(A), (B), (C), (D), and (F); upon defense request, material listed in Fed. R. Crim. P. 16(a)(1)(E); material disclosable under 18 U.S.C. § 3500, other than grand jury transcripts; reports of interviews with witnesses the government intends to call in its case-in-chief relating to the subject matter of the testimony of the witness; relevant substantive investigative reports; and all exculpatory material. The government retains the authority to redact from open file material anything (i) that is not exculpatory and (ii) that the government reasonably believes is not relevant to the prosecution, or would jeopardize the safety of a person other than the defendant, or would jeopardize an ongoing criminal investigation. The defense retains the right to challenge such redactions by motion to the Court.

(3) Unless these items contain exculpatory material, "open file materials" do not ordinarily include material under Fed. R. Crim. P. 16(a)(1)(G), government attorney work product and opinions, materials subject to a claim of privilege, material identifying confidential informants, any Special Agent's Report (SAR) or similar investigative summary, reports of interviews with witnesses who will not be called in the government's case-in-chief, rebuttal evidence, documents and tangible objects that will not be introduced in the government's case-in-chief, rough notes used to construct formal written reports, and transcripts of the grand jury testimony of witnesses who will be called in the government's case-in-chief.

. . . (6) If the government elects not to follow the open file policy described in Criminal L. R. 16(a)(2), discovery must proceed pursuant to Fed. R. Crim. P. 16 and Criminal L. R. 12(a)(3).

Appendix B

Table 1: Scope of Disclosure in District Court Local Rules and Orders Requiring Disclosure of Exculpatory and Impeachment Information¹

District	Approach 1 Defined Scope of Disclosure ² (within the scope of <i>Brady v. Maryland</i>)				Approach 2 Open-Ended Scope of Disclosure ³
	Group 1 Exculpatory material: specific definition ⁴	Group 2 Exculpatory material: general definition ⁵	Group 3 Impeachment material: specific definition ⁶	Group 4 Impeachment material: general definition ⁷	
Alabama Middle ⁸	X		X		
Alabama Southern ⁹	X		X		
Arkansas Eastern	X			X	
California Northern					X Four days prior to the pretrial conference, parties must file a pretrial conference statement addressing the “disclosure of exculpatory or other evidence favorable to the defendant on the issue of guilt or punishment.” N.D. Cal., Crim. L. R. 16-1 and 17.1-1.
Connecticut	X		X		
Florida Northern ¹⁰	X		X		

District	Approach 1 Defined Scope of Disclosure ² (within the scope of <i>Brady v. Maryland</i>)				Approach 2 Open-Ended Scope of Disclosure ³
	Group 1 Exculpatory material: specific definition ⁴	Group 2 Exculpatory material: general definition ⁵	Group 3 Impeachment material: specific definition ⁶	Group 4 Impeachment material: general definition ⁷	
Florida Southern	X		X		
Georgia Middle	X			X	
Georgia Northern	X			X	
Georgia Southern					X Upon request, the government shall permit defendant's attorney to inspect and copy or photograph "any evidence favorable to the defendant." S.D. Ga., L. Crim. R. 16.
Hawaii		X		X	
Idaho		X		X	
Kansas	X			X	
Kentucky Western		X		X	
Louisiana Western	X			X	
Massachusetts ¹¹	X			X	

	Approach 1				Approach 2
	Defined Scope of Disclosure ² (within the scope of <i>Brady v. Maryland</i>)				
	Group 1 Exculpatory material: specific definition ⁴	Group 2 Exculpatory material: general definition ⁵	Group 3 Impeachment material: specific definition ⁶	Group 4 Impeachment material: general definition ⁷	Open-Ended Scope of Disclosure ³
District					
Michigan Eastern		X			
Michigan Western	X		X		
Missouri Western	X		X		
Nebraska		X		X	
New Hampshire	X			X	
New Jersey		X			
New Mexico		X		X	
New York Northern	X		X		
North Carolina Eastern					X Upon request of counsel for defendant, the Government shall permit the counsel for defendant to inspect, copy or photograph "any exculpatory evidence." E.D.N.C., Rule 16.1.

	Approach 1				Approach 2
	Defined Scope of Disclosure ² (within the scope of <i>Brady v. Maryland</i>)				
	Group 1 Exculpatory material: specific definition ⁴	Group 2 Exculpatory material: general definition ⁵	Group 3 Impeachment material: specific definition ⁶	Group 4 Impeachment material: general definition ⁷	Open-Ended Scope of Disclosure ³
District					X Discovery motions filed by a defendant who is represented by counsel must include a statement that counsel has “fully reviewed the government’s case file” before bringing the motion or a statement that such file is not available for counsel’s review. M.D.N.C., L. Crim. R. 16.1.
North Carolina Middle					
North Dakota		X			
Northern Mariana Islands	X				
Oklahoma Western	X				
Pennsylvania Western					X The government shall notify the defendant of the existence of “exculpatory evidence”, and permit its inspection and copying by the defendant. W.D. Pa., L. Crim. R. 16.
Tennessee Eastern	X			X	

	Approach 1				Approach 2
	Defined Scope of Disclosure ² (within the scope of <i>Brady v. Maryland</i>)				
District	Group 1 Exculpatory material: specific definition ⁴	Group 2 Exculpatory material: general definition ⁵	Group 3 Impeachment material: specific definition ⁶	Group 4 Impeachment material: general definition ⁷	Open-Ended Scope of Disclosure ³
Tennessee Middle	X				
Texas Western		X		X	
Vermont	X		X		
Washington Western	X				
West Virginia Northern		X		X	
West Virginia Southern					X On behalf of the defendant, the government is requested to disclose to defendant "all evidence favorable to defendant, including impeachment evidence", and to allow defendant to inspect, copy or photograph such evidence. S.D. W. Va., L. R. Crim. P. 16.1 and Arraignment Order and Standard Discovery Requests.
Wisconsin Eastern					X If the government is following the "open file policy" it must disclose . . . "all exculpatory material." E.D. Wis., Crim. L. R. 16.

1. This table compares approaches used to establish the scope of the government's obligations to disclose exculpatory information and/or impeachment material in the thirty-eight districts with a local rule and/or order adopting language either codifying, altering or supplementing one or more of the constitutional tenets established by *Brady v. Maryland* and its progeny cases (e.g., *Giglio*).
2. Thirty-one local rules or orders establish the scope of the government's obligation to disclose exculpatory and/or impeachment information by incorporating the parameters established by *Brady v. Maryland* and its progeny case law, either explicitly requiring the disclosure to be within the scope of *Brady*, citing *Brady* alone or with other relevant case law, or including definitional language incorporating the basic scope parameters established by *Brady* and *Giglio* and their progeny cases.
3. Seven local rules or orders have established an open-ended scope of disclosure by requiring broad disclosure of any exculpatory material and no reference to "*Brady*" or "*Giglio*" material and/or no citation to *Brady v. Maryland*, *United States v. Giglio*, or other relevant cases.
4. Twenty-one districts have rules and/or orders that specifically define the scope of disclosure of exculpatory material by incorporating all or part of the *Brady* description of information or material that may be "favorable to an accused" and "material either to guilt or punishment" and/or by providing examples of "*Brady*" material. Except for the District of Massachusetts, these rules or orders explicitly require the disclosure to be within the scope of *Brady v. Maryland*, or provide citations to *Brady* alone or with other relevant cases.
5. Ten districts have rules and/or orders that very generally define the scope of the government's disclosure obligations for exculpatory material by requiring the disclosure of "*Brady*" material or exculpatory material in general. These rules or orders explicitly require the disclosure to be within the scope of *Brady v. Maryland*, or provide citations to *Brady* alone or with other relevant cases.
6. Fourteen districts have rules and/or orders that specifically define the scope of disclosure of impeachment material by incorporating all or part of the *Giglio* description of "evidence affecting credibility" that is potentially useful in impeaching government witnesses and/or by providing examples of "*Giglio*" material or information. Except for the District of Massachusetts, these rules or orders explicitly require the disclosure to be within the scope of *United States v. Giglio*, or provide citations to *Giglio* alone or with other relevant cases.
7. Nine districts have rules and/or orders that very generally define the scope of the government's disclosure obligations for impeachment material by requiring the disclosure of "*Giglio*" material or exculpatory material in general. These rules or orders explicitly require the disclosure to be within the scope of *United States v. Giglio*, or provide citations to *Giglio* alone or with other relevant cases.
8. In addition to requiring the government to disclose all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment with the scope of *Brady v. Maryland*, M.D. Ala. *Standard Order on Criminal Discovery* requires disclosure of exculpatory material "without regard to materiality."
9. In addition to requiring the government to disclose all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment with the scope of *Brady v. Maryland*, S.D. Ala. Local Rule 16.13 Criminal Discovery explicitly requires disclosure of exculpatory material "without regard to materiality."
10. In addition to requiring the government to disclose all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment with the scope of *Brady v. Maryland*, N.D. Fla. Rule 26.3 Discovery-Criminal explicitly requires disclosure of exculpatory material "without regard to materiality."
11. Although the District of Massachusetts' local rules regarding discovery in criminal cases do not explicitly reference *Brady* or other relevant case law, Local Rule 116.2 provides a definition of exculpatory information which incorporates the basic scope parameters established by *Brady* and *Giglio*: "Exculpatory information includes, but may not be limited to, all information that is material and favorable to the accused because it tends to cast doubt on defendant's guilt as to any essential element . . . cast doubt on the credibility or accuracy of any evidence that the government anticipates offering in its case-in-chief. . . ." D. Mass. Local Rule 116.2(A).

Appendix B

Table 2: Time frame for Disclosure in District Court Local Rules and Orders Requiring Disclosure of Exculpatory and Impeachment Material¹

District	Group A ² Time frame applies to both disclosure of <i>Brady</i> (exculpatory) and <i>Giglio</i> (impeachment) material	Group B ³ Time frame applies only to disclosure of <i>Brady</i> (exculpatory) material	Group C ⁴ Time frame applies only to disclosure of <i>Giglio</i> (impeachment) material	Group D ⁵ No time frame specified in the rule
Alabama Middle	X (at arraignment, or on a date otherwise set by the court for good cause shown)			
Alabama Southern	X (at arraignment, or on a date otherwise set by the court for good cause shown)			
Arkansas Eastern	X (in time for effective use at trial)			
California Northern		X (within 14 days after a defendant's plea of not guilty, or if the parties stipulate within 21 days after entry of plea they shall stipulate to a disclosure schedule)		
Connecticut	X (within 14 days from the date of arraignment)			

District	Group A ² Time frame applies to both disclosure of <i>Brady</i> (exculpatory) and <i>Giglio</i> (impeachment) material	Group B ³ Time frame applies only to disclosure of <i>Brady</i> (exculpatory) material	Group C ⁴ Time frame applies only to disclosure of <i>Giglio</i> (impeachment) material	Group D ⁵ No time frame specified in the rule
Florida Northern	X (within 5 days after the defendant's arraignment, or promptly after acquiring knowledge thereof)			
Florida Southern	X (not later than 14 days after the arraignment, or such other time as ordered by the court)			
Georgia Middle		X (as soon as reasonably possible)	X (the evening before the witness's anticipated testimony)	
Georgia Northern		X (sufficiently in advance of trial to allow a defendant to use it effectively)	X (no later than production of the Jenck's Act statements (i.e., after direct examination of the government witness at issue))	
Georgia Southern		X (within 7 days after arraignment)		

District	Group A ² Time frame applies to both disclosure of <i>Brady</i> (exculpatory) and <i>Giglio</i> (impeachment) material	Group B ³ Time frame applies only to disclosure of <i>Brady</i> (exculpatory) material	Group C ⁴ Time frame applies only to disclosure of <i>Giglio</i> (impeachment) material	Group D ⁵ No time frame specified in the rule
Hawaii		X (within 7 days after arraignment unless otherwise ordered by the court)	X (as ordered by the court)	
Idaho	X (within 7 calendar days of the date of the arraignment on the indictment)			
Kansas	X (no later than 30 days after arraignment)			
Kentucky Western		X (in time for effective use at trial)		
Louisiana Western	X (not less than 7 days prior to trial)			
Massachusetts ⁶	X (within 28 days of arraignment or within 14 days of receipt by the government of a written statement by the defendant that no waiver will be filed)			

District	Group A ² Time frame applies to both disclosure of <i>Brady</i> (exculpatory) and <i>Giglio</i> (impeachment) material	Group B ³ Time frame applies only to disclosure of <i>Brady</i> (exculpatory) material	Group C ⁴ Time frame applies only to disclosure of <i>Giglio</i> (impeachment) material	Group D ⁵ No time frame specified in the rule
Michigan Eastern		X (within 10 days from the date of arraignment or such other date as may be set by the judge to whom the case is assigned)		
Michigan Western		X (within 21 days of the initial arraignment)	X (documents should be available for effective use at the time of trial)	
Missouri Western		X (within 10 days from the date of arraignment)	X (no later than 15 days prior to trial)	
Nebraska		X (as soon as practicable upon arraignment of defendant and entry of a plea of not guilty)		
New Hampshire	X (at least 21 days before trial)			
New Jersey		X (within 10 days from the date hereof—the order of discovery and inspection)		

District	Group A ² Time frame applies to both disclosure of <i>Brady</i> (exculpatory) and <i>Giglio</i> (impeachment) material	Group B ³ Time frame applies only to disclosure of <i>Brady</i> (exculpatory) material	Group C ⁴ Time frame applies only to disclosure of <i>Giglio</i> (impeachment) material	Group D ⁵ No time frame specified in the rule
New Mexico				X (rule refers to case law—“by the time required by the applicable law”)
New York Northern		X (14 days after arraignment or on a date the court otherwise sets for good cause shown)	X (not less than 14 days prior to the start of jury selection, or on a date the court sets otherwise for good cause shown.)	
North Carolina Eastern		X (at the pretrial conference which shall take place within 21 days after indictment or initial appearance, whichever comes later)		
North Carolina Middle				X
North Dakota				X
Northern Mariana Islands		X (at pretrial conference held on request of any party or on court’s motion)		

District	Group A ² Time frame applies to both disclosure of <i>Brady</i> (exculpatory) and <i>Giglio</i> (impeachment) material	Group B ³ Time frame applies only to disclosure of <i>Brady</i> (exculpatory) material	Group C ⁴ Time frame applies only to disclosure of <i>Giglio</i> (impeachment) material	Group D ⁵ No time frame specified in the rule
Oklahoma Western		X (at discovery conference to be held within 10 days of the appearance before Magistrate Judge where a plea of not guilty was entered)		
Pennsylvania Western		X (at time of arraignment)		
Tennessee Eastern	X (in time for use at trial ⁷)			
Tennessee Middle		X (on or before 14 days from the date of the arraignment of a defendant)		
Texas Western	X (14 days after arraignment; or if the defendant has waived arraignment, within 14 days after the latest scheduled arraignment date ⁸)			
Vermont		X (within 14 days of arraignment)	X (not less than 14 days prior to the start of jury selection)	

District	Group A ² Time frame applies to both disclosure of <i>Brady</i> (exculpatory) and <i>Giglio</i> (impeachment) material	Group B ³ Time frame applies only to disclosure of <i>Brady</i> (exculpatory) material	Group C ⁴ Time frame applies only to disclosure of <i>Giglio</i> (impeachment) material	Group D ⁵ No time frame specified in the rule
Washington Western		X (at discovery conference to be held within 14 days of every arraignment at which defendant enters a plea of not guilty)		
West Virginia Northern		X (within 10 days of arraignment or filing of an information and indictment)		
West Virginia Southern	X (within 14 days from the date of the "Arraignment Order and Standard Discovery Request Form" required to be entered at arraignment on an indictment, or on an information or complaint in a misdemeanor case)			
Wisconsin Eastern		X (at arraignment)		

1. This table identifies and categories the time frame for pretrial disclosure of *Brady* and/or *Giglio* evidence (if any) in the thirty-eight local rules or orders adopting language either codifying, altering or supplementing one or more of the constitutional tenets established by *Brady v. Maryland* and its progeny cases (e.g., *Giglio*).
2. Fourteen districts have a local rule and/or order that establishes a time frame that applies to the pretrial disclosure of both *Brady* (exculpatory) material and/or *Giglio* (impeachment) evidence. For identification of the specific time frames applied in these fourteen rules or orders, see Table 2A.
3. Twenty-one districts have a local rule and/or order that establishes a time frame that only applies to the pretrial disclosure of *Brady* (exculpatory) material/evidence. For identification of the specific time frames applied in these twenty-one rules or orders, see Table 2B.
4. Seven of the twenty-one districts that have a local rule or order with a timing provision for disclosing exculpatory material have a separate time frame that only governs the pretrial disclosure of *Giglio* (impeachment) evidence/material. For identification of the specific time frames applied in these seven rules or orders, see Table 2C.
5. Three of the thirty-eight local rules or orders requiring pretrial disclosure of exculpatory and/or impeachment material do not establish a disclosure time frame for either type of evidence.
6. D. Mass. L. R. 116.2(B) establishes different disclosure time frames for different categories of exculpatory material. Although pretrial disclosure of exculpatory and/or impeachment information could potentially fall within time frames requiring disclosure within twenty-eight days of arraignment or no later than twenty-one days before trial, the time frame requiring disclosure within twenty-eight days of arraignment was listed in this table because the rule specifically provides that “[i]f an item of exculpatory information can reasonably be deemed to fall into more than one of the foregoing categories, it shall be deemed for purposes of determining when it must be produced to fall into the category which requires the earliest production.” L.R. 116.2(B)(1)(2) & (5).
7. E.D. Tenn. Discovery and Scheduling Order references *United States v. Presser*, 844 F.2d 1275 (6th Cir. 1988), for the timing of disclosure of exculpatory and impeachment evidence.
8. W.D. Tex. Rule CR-16 is the only rule or order, except for D. Mass. L. R. 116.2(b), that addresses disclosure of exculpatory and impeachment material prior to other court proceedings other than trial (i.e., pretrial release or detention hearing—no later than commencement of the hearing; any other pretrial hearing—not later than forty-eight hours before the hearing). Rule CR-16(b)(1)(A) & (B).

Appendix B

Tables 2A–2C: Comparison of Time Frames for Disclosure in the District Court Local Rules and Orders Requiring Disclosure of Exculpatory and Impeachment Material¹

TABLE 2A: Time frame for disclosure of <i>Brady</i> and <i>Giglio</i> evidence/material										
District	At arraignment	Within 5 days after arraignment	Within 7 days after arraignment	Within 14 days after arraignment	Within 28 days after arraignment	Within 30 days after arraignment	At least 21 days before trial	Not less than 7 days prior to trial	In time for effective use at trial	
Alabama Middle	X									
Alabama Southern	X									
Arkansas Eastern									X	
Connecticut			X							
Florida Northern		X								
Florida Southern				X						
Idaho			X							
Kansas						X				
Louisiana Western								X		
Massachusetts ²					X					
New Hampshire							X			
Tennessee Eastern									X	
Texas Western				X						
West Virginia Southern				X						

TABLE 2B: Time frame for disclosure of only Brady (exculpatory) material³

	At arraignment	As soon as reasonably possible	As soon as practicable upon arraignment and entry of guilty plea	Within 7 days after arraignment	Within 10 days after arraignment	Within 10 days after not guilty plea entered	Within 14 days after arraignment	Within 14 days after not guilty plea	Within 21 days after arraignment	Within 21 days after indictment or initial appearance, whichever comes later	Within 10 days from order of discovery and inspection	At pretrial conference held on any party's request or court's motion	In time for effective use at trial
District													
California Northern								X					
Georgia Middle		X											
Georgia Northern													X
Georgia Southern				X									
Hawaii				X									
Kentucky Western													X
Michigan Eastern					X								
Michigan Western									X				
Missouri Western					X								
Nebraska			X										
New Jersey											X		
New York Northern							X						
North Carolina Eastern ⁴										X			

TABLE 2B: Time frame for disclosure of only Brady (exculpatory) material³

District	At arraignment	As soon as reasonably possible	As soon as practicable upon arraignment and entry of guilty plea	Within 7 days after arraignment	Within 10 days after arraignment	Within 10 days after not guilty plea entered	Within 14 days after arraignment	Within 14 days after not guilty plea	Within 21 days after arraignment	Within 21 days after indictment or initial appearance, whichever comes later	Within 10 days from order of discovery and inspection	At pretrial conference held on any party's request or court's motion	In time for effective use at trial
Northern Mariana Islands												X	
Oklahoma Western					X								
Pennsylvania Western	X												
Tennessee Middle							X						
Vermont							X						
Washington Western							X						
West Virginia Northern					X								
Wisconsin Eastern	X												

TABLE 2C: Time frame for disclosure of only Giglio (impeachment) material

District	Evening before witness's anticipated testimony	No later than production of Jenck's Act statements	As ordered by the court	No later than 15 days prior to trial	Not less than 14 days prior to jury selection	In time for effective use at trial
Georgia Middle	X					
Georgia Northern		X				
Hawaii			X			
Michigan Western						X
Missouri Western				X		
New York Northern					X	
Vermont					X	

1. As shown in Table 2 *infra*, except for three districts (D.N.M., M.D.N.C., D.N.D.), all of the “broader” disclosure rules and orders in the remaining thirty-five districts establish a specific pretrial time frame in which the government must disclose to the defendant *Brady* (exculpatory) material and/or *Giglio* (impeachment) material. Based upon explicit language in these rules and orders, a disclosure time frame was applied to both exculpatory and impeachment material in fourteen districts, and only to disclosure of exculpatory material in twenty-one districts. In seven of the twenty-one districts with a timing requirement for disclosing only exculpatory material, the districts’ rule and/or order also has a separate time frame that applies only to the disclosure of impeachment material. Tables 2A, 2B, and 2C identify the different time frames imposed by the rules and orders in each of these three categories of districts.

2. D. Mass. L. R. 116.2(B) establishes different disclosure time frames for different categories of exculpatory material. Although pretrial disclosure of exculpatory and/or impeachment information could potentially fall within time frames requiring disclosure within twenty-eight days of arraignment or no later than twenty-one days before trial, the time frame requiring disclosure within twenty-eight days of arraignment was listed in this table because the rule specifically provides that “[i]f an item of exculpatory information can reasonably be deemed to fall into more than one of the foregoing categories, it shall be deemed for purposes of determining when it must be produced to fall into the category which requires the earliest production.” L.R. 116.2(B)(1)(2) & (5).

3. Seven of the twenty-one districts with time frames for disclosure of exculpatory material only also have a separate timing provision that establishes a different time frame for disclosure of impeachment material. See Table 2C, which identifies the specific time frames that apply only to disclosure of impeachment material.

Appendix B

Table 3: Elimination of the *Brady* Materiality Requirement in Local Rules and Orders Requiring Disclosure of Exculpatory and Impeachment Information¹

District	Group A Explicit elimination of <i>Brady</i> materiality requirement ²	Group B Implicit elimination of <i>Brady</i> materiality requirement ³
Alabama Middle	<p style="text-align: center;">X</p> <p>At arraignment, or on a date otherwise set by the court for good cause shown, the government shall tender to defendant . . . All information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, without regard to materiality, within the scope of <i>Brady v. Maryland</i>, 373 U.S. 83 (1963). M.D. Ala., Standing Order on Criminal Discovery.</p>	
Alabama Southern	<p style="text-align: center;">X</p> <p>At arraignment, or on a date otherwise set by the court for good cause shown, the government shall tender to defendant. . . All information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, without regard to materiality, within the scope of <i>Brady v. Maryland</i>, 373 U.S. 83 (1963). S.D. Ala., L. R. 16.13.</p>	
Arkansas Eastern		
California Northern		<p style="text-align: center;">X</p> <p>Four days prior to the pretrial conference, parties must file a pretrial conference statement addressing the “disclosure of exculpatory or other evidence favorable to the defendant on the issue of guilt or punishment.” N.D. Cal., Crim. L. R. 16-1 and 17.1-1.</p>
Connecticut		
Florida Northern	<p style="text-align: center;">X</p> <p>The government’s attorney shall provide . . . within five days after the defendant’s arraignment, or promptly after acquiring knowledge thereof . . . All information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, without regard to materiality, that is within the scope of <i>Brady v. Maryland</i>, 373 U.S. 83 (1963), and <i>United States v. Agurs</i>, 427 U.S. 97 (1976). N.D. Fla., Rule 26.3.</p>	

*A Summary of Responses to a National Survey of Rule 16 of the Federal Rules of Criminal Procedure and
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District	Group A Explicit elimination of <i>Brady</i> materiality requirement ²	Group B Implicit elimination of <i>Brady</i> materiality requirement ³
Florida Southern		
Georgia Middle		
Georgia Northern		
Georgia Southern		X Upon request, the government shall permit defendant's attorney to inspect and copy or photograph "any evidence favorable to the defendant." S.D. Ga., L. Crim. R. 16.
Hawaii		
Idaho		
Kansas		
Kentucky Western		
Louisiana Western		
Massachusetts		
Michigan Eastern		
Michigan Western		
Missouri Western		
Nebraska		
New Hampshire		
New Jersey		
New Mexico		
New York Northern		
North Carolina Eastern		X Upon request of counsel for defendant, the Government shall permit the counsel for defendant to inspect, copy or photograph "any exculpatory evidence." E.D.N.C., Rule 16.1.
North Carolina Middle		X Discovery motions filed by a defendant who is represented by counsel must include a statement that counsel has "fully reviewed the government's case file" before bringing the motion or a statement that such file is not available for counsel's review. M.D.N.C., L. Crim. R. 16.1.
North Dakota		

*A Summary of Responses to a National Survey of Rule 16 of the Federal Rules of Criminal Procedure and
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District	Group A Explicit elimination of <i>Brady</i> materiality requirement ²	Group B Implicit elimination of <i>Brady</i> materiality requirement ³
Northern Mariana Islands		
Oklahoma Western		
Pennsylvania Western		X The government shall notify the defendant of the existence of “exculpatory evidence,” and permit its inspection and copying by the defendant. W.D. Pa., L. Crim. R. 16.
Tennessee Eastern		
Tennessee Middle		
Texas Western		
Vermont		
Washington Western		
West Virginia Northern		
West Virginia Southern		X On behalf of the defendant, the government is requested to disclose to defendant “all evidence favorable to defendant, including impeachment evidence,” and to allow defendant to inspect, copy or photograph such evidence. S.D. W. Va., L. R. Crim. P. 16.1 and Arraignment Order and Standard Discovery Requests.
Wisconsin Eastern		X If the government is following the “open file policy” it must disclose . . . “all exculpatory material.” E.D. Wis., Crim. L. R. 16.

1. This table identifies the local rules and orders that explicitly or implicitly require the disclosure of exculpatory or impeachment material *without regard to materiality* in the thirty-eight districts with a local rule and/or order adopting language either codifying, altering or supplementing one or more of the constitutional tenets established by *Brady v. Maryland* and its progeny cases (e.g., *Giglio*).

2. Three districts (M.D. Ala., S.D. Ala., N.D. Fla.) have rules or orders that explicitly require disclosure of exculpatory material “without regard to materiality,” while also requiring the disclosure of information “favorable to the defendant on the issues of guilt or punishment” to be “within the scope of *Brady v. Maryland*.” The potential for confusion exists because this language seems to be inconsistent if one interprets “within the scope of *Brady v. Maryland*” to include the *Brady* materiality requirement.

3. Seven local rules or orders implicitly suggest that *Brady* materiality is not required because the rule establishes an open-ended scope of disclosure by broadly requiring disclosure of “any exculpatory evidence” or “any evidence favorable to the defendant,” with no mention of materiality, *Brady v. Maryland*, or any of the *Brady* progeny cases.

Appendix B

Table 4: “Defense Request” Disclosure Prerequisite in District Court Rules and Orders Requiring Disclosure of Exculpatory and Impeachment Information¹

District	Formal request by defendant for <i>Brady</i> or <i>Giglio</i> material			Formal request by defendant for Fed. R. Crim. P. 16 discovery material		
	Group A Required ²	Group B Not required ³	Group 1 Required ⁴	Group 2 Not required ⁵	Group 3 Unable to determine ⁶	
Alabama Middle		X (implicit)		X (implicit)		
Alabama Southern		X (implicit)		X (implicit)		
Arkansas Eastern		X (explicit)	X			
California Northern		X (implicit)		X (implicit)		
Connecticut		X (implicit)			X	
Florida Northern		X (implicit)	X			
Florida Southern		X (implicit)			X	
Georgia Middle	X		X			
Georgia Northern	X		X			
Georgia Southern	X		X			
Hawaii		X (explicit)		X (explicit)		
Idaho		X (implicit)	X			
Kansas		X (implicit)		X (explicit)		
Kentucky Western		X (implicit)	X			

District	Formal request by defendant for Brady or Giglio material			Formal request by defendant for Fed. R. Crim. P. 16 discovery material		
	Group A Required ²	Group B Not required ³	Group 1 Required ⁴	Group 2 Not required ⁵	Group 3 Unable to determine ⁶	
Louisiana Western		X (implicit)			X	
Massachusetts		X (explicit)		X (implicit)		
Michigan Eastern	X		X			
Michigan Western		X (implicit)	X			
Missouri Western		X (implicit)	X			
Nebraska		X (implicit)	X			
New Hampshire		X (explicit)		X (explicit)		
New Jersey		X (implicit)			X	
New Mexico		X (implicit)		X (explicit)		
New York Northern		X (implicit)		X (implicit)		
North Carolina Eastern	X		X			
North Carolina Middle		X (implicit)			X	
North Dakota		X (implicit)	X			
Northern Mariana Islands		X (implicit)			X	
Oklahoma Western		X (implicit)			X	
Pennsylvania Western		X (implicit)	X			
Tennessee Eastern		X (implicit)			X	

District	Formal request by defendant for <i>Brady</i> or <i>Giglio</i> material		Formal request by defendant for Fed. R. Crim. P. 16 discovery material		
	Group A Required ²	Group B Not required ³	Group 1 Required ⁴	Group 2 Not required ⁵	Group 3 Unable to determine ⁶
Tennessee Middle		X (implicit)			X
Texas Western		X (explicit)		X (explicit)	
Vermont		X (implicit)		X (implicit)	
Washington Western	X		X		
West Virginia Northern		X (implicit)	X		
West Virginia Southern		X (implicit)			
Wisconsin Eastern		X (implicit)	X ⁷	X (explicit) ⁸	

1. This table identifies whether the thirty-eight local rules or orders adopting language either codifying, altering or supplementing one or more of the constitutional tenets established by *Brady v. Maryland* and its progeny cases (e.g., *Giglio*) explicitly require the defendant to make a formal request for *Brady* and/or *Giglio* material (contrary to Supreme Court case law interpreting *Brady*) and/or whether the local rules or orders explicitly state that defendant does not have to make a formal request to receive Fed. R. Crim. P. 16(a) disclosures from the government (contrary to the defense request prerequisite required by Fed. R. Crim. P. 16). First, each district's local rule and/or order is placed in either Group A or B depending on whether the local rule or order addresses whether or not the defendant is required to make a formal request for *Brady/Giglio* material or "exculpatory" and/or "impeachment" material. Next, each local rule or order is also placed into either Group 1, 2, or 3, depending on whether the local rule addresses whether or not the defendant is required to make a formal request for Fed. R. Crim. P. 16(a) discovery material.

2. Six districts have a rule and/or order that explicitly requires the defendant to make a formal request for *Brady* and/or *Giglio* material or "exculpatory" and/or "impeachment" material.

3. Rule and/or order explicitly states that the defendant does not have to make a formal request for *Brady* and/or *Giglio* material [identified as "(explicit)"—five districts]; or the rule and/or order implicitly negates the need for a formal request from defendant for *Brady* and/or *Giglio* material by specifically requiring disclosure by the government of *Brady* and/or *Giglio* information or "exculpatory" or "impeachment" material within a specified time frame with no mention of whether a defense request is needed [identified as "(implicit)"—twenty-seven districts].

4. Seventeen districts have a rule and/or order that explicitly requires the defendant to make a formal request for Fed. R. Crim. P. 16(a) material.

5. Rule and/or order explicitly states that defendant does not have to make a formal request for Fed. R. Crim. P. 16(a) discovery material [identified as “(explicit)”—six districts]; or the rule and/or order implicitly negates the need for a formal request from defendant for Rule 16(a) material by specifically requiring disclosure by the government of Rule 16(a) material within a specified time frame with no mention of whether a defense request is needed [identified as “(implicit)”—six districts]. These twelve districts can be considered part of a grouping of districts referred to as “automatic disclosure districts”—the government must disclose all required Rule 16(a) discovery material to the defendant regardless of whether the defense has requested it, including any exculpatory and impeachment material required to be disclosed pursuant to *Brady* and *Giglio* as defined in the rule or order.
6. Unable to determine because the rule or order does not specifically address Fed. R. Crim. P. 16(a) disclosure by the government.
7. Defense request needed for disclosure of materials listed in Fed. R. Crim. P. 16(a)(1)(E)—documents and objects. E.D. Wis. Crim. L.R. 16(a)(2).
8. Defense request not needed for disclosure of all information and material listed in Fed. R. Crim. P. 16(a)(1)(A), (B), (C), (D), and (F). E.D. Wis. Crim. L.R. 16(a)(2).

Appendix C: Tables

Appendix C: Contents

Table 1 Response Rates to the Survey	5
Table 2 Judges' Status	5
Table 3 Judges' Years on the Bench	5
Table 4 Attorney Status	6
Table 5 Attorneys' Years of Experience	6
Table 6 Does your district have a local rule, standing order, or other policy requiring disclosure by the prosecution to the defense?.....	6
Table 7 Are there significant differences between your local rule, order, or policy and Rule 16?	6
Table 8 Do the federal prosecutors in your district understand their pretrial discovery and disclosure obligations pursuant to local rule or, if no local rule, their constitutional disclosure obligations?	7
Table 9 Do federal prosecutors in your district follow a consistent approach to disclosure?	8
Table 10 Does your district's local rule require federal prosecutors to disclose exculpatory or impeaching information without regard to materiality?	9
Table 11 Has elimination of the materiality requirement in your district reduced problems or confusion?	9
Table 12 Does your district require federal prosecutors to disclose within a fixed time after indictment or arraignment?	9
Table 13 Has the timing requirement in your district caused problems for federal prosecutors?.....	10
Table 14 Is the timing requirement in your district important to the defense?	10
Table 15 How often in the past 5 years have you been unable to obtain cooperation from a witness because of the your district's timing requirement?.....	11
Table 16 Does your district require federal prosecutors to disclose before trial government witness statements that could be used to impeach?	11
Table 17 Does your district require defense counsel to disclose before trial anticipated defense witness statements that could be used to impeach?.....	11
Table 18 Number of cases in the past 5 years in which you believe your district's local rule requirements of disclosure of exculpatory information resulted in threats or harm to a prosecution witness.....	12

Table 19 Number of cases in the past 5 years in which you believe your district’s requirements of disclosure of <i>Giglio</i> information resulted in threats or harm to a prosecution witness.....	12
Table 20 Number of cases in the past 5 years in which the prosecution requested a protective order prohibiting or delaying required disclosure based on witness safety or other security concerns.	13
Table 21 Number of cases in the past 5 years in which you believe the government failed to provide exculpatory or <i>Giglio</i> information in compliance with the local rule.....	14
Table 22 Number of cases in the past 5 years in which you believe the suspected violation was due to materiality concerns.	14
Table 23 Number of cases in the past 5 years in which the defense alleged that the government failed to comply with disclosure obligations.	15
Table 24 Number of cases in the past 5 years in which the court concluded that the government failed to comply with disclosure obligations.	15
Table 24 (cont’d)	16
Table 25 What was the nature of the most frequent violation by the government?	17
Table 26 What remedial steps were taken by the court?.....	18
Table 26 (cont’d)	19
Table 27 Overall satisfaction with prosecutor compliance with discovery obligations.	20
Table 28 Do the defense attorneys in your district understand their pretrial discovery and disclosure obligations?.....	21
Table 29 Number of cases in the past 5 years in which the court concluded that defense counsel failed to comply with disclosure obligations.	22
Table 29 (cont’d)	23
Table 30 What was the nature of the most frequent violation by the defense?	23
Table 30 (cont’d)	24
Table 31 What remedial steps were taken by the court?.....	25
Table 31 (cont’d)	26
Table 32 Overall satisfaction with defense counsel compliance with discovery obligations.	27
Table 33 Do you favor amending Rule 16?.....	28
Table 34 Do you favor amending Rule 16?.....	28
Table 35 Do you favor amending Rule 16?.....	29
Table 36 Do you favor amending Rule 16?.....	29

Table 37 Why an amendment to Rule 16 is needed.....	30
Table 38 Why an amendment to Rule 16 is <i>not</i> needed.	31
Table 39 Would eliminating the <i>Brady</i> materiality requirement result in changes in the frequency of defense motions for <i>Brady</i> violations?	32
Table 40 Should victim or witness information be disclosed?	33
Table 41 Should victim or witness information be disclosed?	33
Table 42 Should allegations of misconduct by law enforcement witnesses be disclosed? .	34
Table 43 Should allegations of misconduct by law enforcement witnesses be disclosed? .	34
Table 44 Should all impeachment information concerning defense witnesses be disclosed?	35
Table 45 Should all impeachment information concerning defense witnesses be disclosed?	35

Table 1
Response Rates to the Survey

	All Judges ¹	Chief District Judges	Active District Judges	Senior District Judges	Magistrate Judges	All Attorneys	Federal Defenders	Private Attorneys	U.S. Attorneys Offices
Surveys Sent	1,505	91	493	338	583	16,016	1,290	14,726	93
Surveys Received	644	51	238	115	240	5,159	612	4,547	85
Response Rate ¹	43%	56%	48%	34%	41%	32%	47%	31%	91%

¹ Three of the surveys received from judges each represented the responses of an entire district or a group of judges within a district. These surveys and the judges they represent are excluded from the table and the calculation of the response rate.

Table 2
Judges' Status

Judge Status	
Chief District Judge (n=47)	7%
Active District Judge (n=236)	37%
Senior District Judge (n=114)	18%
Magistrate Judge (n=236)	37%

Table 3
Judges' Years on the Bench

	District Judges (n=397)		Magistrate Judges (n=235)	
Less Than 5 Years	10%	5 – 10 Years	25%	27%
5 – 10 Years	25%	11 – 15 Years	17%	23%
11 – 15 Years	17%	15 Years	17%	33%
More Than 15 Years	48%			

Table 4
Attorney Status

Attorney Status	Mean	Median
Private Attorney (n=4,547)	23.7 years	24 years
Federal Defender (n=612)	19.5 years	19 years

Table 5
Attorneys' Years of Experience

Table 6

Does your district have a local rule, standing order, or other policy requiring disclosure by the prosecution to the defense?

	All Judges (n=633)	District Judges (n=397)	Magistrate Judges (n=236)	All Attorneys (n=5,519)	Federal Defenders (n=612)	Private Attorneys (n=4,547)	U.S. Attorney Offices (n=85)
Yes: Rule, Order, or Policy	36%	35%	37%	38%	34%	39%	47%

Table 7

Are there significant differences between your local rule, order, or policy and Rule 16?

	All Judges (n=220)	District Judges (n=135)	Magistrate Judges (n=85)	All Attorneys (n=1,935)	Federal Defenders (n=204)	Private Attorneys (n=1,731)	U.S. Attorney Offices (n=40)
Yes: Significant Differences	25%	25%	24%	34%	38%	33%	25%

Table 8
Do the federal prosecutors in your district understand their pretrial discovery and disclosure obligations pursuant to local rule or, if no local rule, their constitutional disclosure obligations?

Judges	Local Rule			No Local Rule		
	All Judges (n=225)	District Judges (n=138)	Magistrate Judges (n=87)	All Judges (n=403)	District Judges (n=256)	Magistrate Judges (n=147)
Always	47%	50%	41%	47%	51%	40%
Usually	51%	48%	55%	48%	45%	53%
Sometimes	3%	2%	3%	4%	4%	5%
Rarely	-	-	-	<1%	<1%	1%
Never	-	-	-	-	-	-

Defense Attorneys	Local Rule			No Local Rule		
	All Attorneys (n=1,959)	Federal Defenders (n=207)	Private Attorneys (n=1,752)	All Attorneys (n=3,184)	Federal Defenders (n=403)	Private Attorneys (n=2,781)
Always	23%	3%	26%	12%	2%	13%
Usually	59%	59%	59%	48%	33%	50%
Sometimes	15%	28%	13%	28%	41%	26%
Rarely	3%	9%	3%	11%	22%	10%
Never	<1%	-	<1%	<1%	1%	<1%

U.S. Attorneys	Local Rule	No Local Rule
	U.S. Attorney Offices (n=40)	U.S. Attorney Offices (n=45)
Always	80%	78%
Usually	20%	22%
Sometimes	-	-
Rarely	-	-
Never	-	-

Table 9
Do federal prosecutors in your district follow a consistent approach to disclosure?

	Local Rule			No Local Rule		
	All Judges (n=225)	District Judges (n=138)	Magistrate Judges (n=87)	All Judges (n=402)	District Judges (n=257)	Magistrate Judges (n=145)
Always	32%	37%	25%	35%	35%	34%
Usually	56%	54%	60%	53%	56%	48%
Sometimes	9%	7%	13%	9%	7%	14%
Rarely	2%	1%	2%	2%	2%	3%
Never	-	-	-	-	-	-

	Local Rule			No Local Rule		
	All Attorneys (n=1,960)	Federal Defenders (n=207)	Private Attorneys (n=1,753)	All Attorneys (n=3,183)	Federal Defenders (n=403)	Private Attorneys (n=2,780)
Always	16%	2%	18%	9%	1%	10%
Usually	50%	42%	52%	40%	24%	42%
Sometimes	24%	34%	22%	29%	37%	28%
Rarely	8%	18%	7%	17%	28%	16%
Never	2%	4%	2%	4%	9%	3%

Table 10
Does your district's local rule require federal prosecutors to disclose exculpatory or impeaching information without regard to materiality?

	All Attorneys (n=1,936)	Federal Defenders (n=205)	Private Attorneys (n=1,721)	U.S. Attorney Offices (n=40)
Yes: Disclosure Required	46%	23%	49%	28%

Table 11
Has elimination of the materiality requirement in your district reduced problems or confusion?

	All Attorneys (n=881)	Federal Defenders (n=48)	Private Attorneys (n=833)	U.S. Attorney Offices (n=10)
Reduced Problems in Most Cases	39%	38%	40%	10%
Reduced Problems in Some Cases	32%	27%	32%	20%
Has Not Made a Difference	23%	25%	23%	60%
Other Response	6%	10%	6%	10%

Table 12
Does your district require federal prosecutors to disclose within a fixed time after indictment or arraignment?

	All Judges (n=222)	District Judges (n=136)	Magistrate Judges (n=86)	All Attorneys (n=1,936)	Federal Defenders (n=206)	Private Attorneys (n=1,730)	U.S. Attorney Offices (n=40)
Yes: Fixed Time Requirement	64%	64%	64%	60%	54%	61%	58%

Table 13
Has the timing requirement in your district caused problems for federal prosecutors?

	All Judges (n=142)	District Judges (n=87)	Magistrate Judges (n=55)	U.S. Attorney Offices (n=23)
No Problems	41%	41%	40%	26%
Caused Minor Problems in Some Cases	39%	40%	38%	48%
Caused Minor Problems in Most Cases	1%	2%	-	-
Caused Serious Problems in Some Cases	3%	3%	2%	17%
Caused Serious Problems in Most Cases	-	-	-	-
No Opinion	11%	7%	16%	4%
Other Response	5%	6%	4%	4%

Table 14
Is the timing requirement in your district important to the defense?

	All Attorneys (n=1,160)	Federal Defenders (n=112)	Private Attorneys (n=1,048)
Timing is Very Important in Most Cases	62%	62%	62%
Timing is Very Important in Some Cases	33%	28%	33%
Timing is Not Very Important	3%	4%	3%
Other Response	3%	6%	2%

Table 15
How often in the past 5 years have you been unable to obtain cooperation from a witness because of the your district's timing requirement?

	U.S. Attorney Offices (n=40)
Always	-
Usually	-
Sometimes	15%
Rarely	45%
Never	40%

Table 16
Does your district require federal prosecutors to disclose before trial government witness statements that could be used to impeach?

	All Judges (n=217)	District Judges (n=134)	Magistrate Judges (n=83)
Yes: Disclosure is Required	61%	60%	61%

Table 17
Does your district require defense counsel to disclose before trial anticipated defense witness statements that could be used to impeach?

	All Judges (n=220)	District Judges (n=136)	Magistrate Judges (n=84)
Yes: Disclosure is Required	30%	26%	37%

Table 18

Number of cases in the past 5 years in which you believe your district's local rule requirements of disclosure of exculpatory information resulted in threats or harm to a prosecution witness.

	All Judges (n=209)	District Judges (n=131)	Magistrate Judges (n=78)
None	73%	76%	67%
1	7%	8%	6%
2 – 4	11%	10%	13%
5 – 10	7%	5%	12%
11 – 20	1%	2%	1%
More than 20	<1%	-	1%

Table 19

Number of cases in the past 5 years in which you believe your district's requirements of disclosure of *Giglio* information resulted in threats or harm to a prosecution witness.

	All Judges (n=211)	District Judges (n=134)	Magistrate Judges (n=77)
None	73%	73%	74%
1	5%	6%	3%
2 – 4	15%	16%	13%
5 – 10	5%	4%	8%
11 – 20	1%	1%	1%
More than 20	<1%	-	1%

Table 20
Number of cases in the past 5 years in which the prosecution requested a protective order prohibiting or delaying required disclosure based on witness safety or other security concerns.

	Local Rule			No Local Rule		
	All Attorneys (n=1,960)	Federal Defenders (n=209)	Private Attorneys (n=1,751)	All Attorneys (n=3,181)	Federal Defenders (n=402)	Private Attorneys (n=2,779)
None	52%	42%	53%	56%	49%	57%
1	15%	17%	15%	14%	14%	14%
2 – 4	24%	27%	23%	21%	27%	20%
5 – 10	6%	7%	6%	6%	7%	6%
11 – 20	2%	4%	2%	2%	1%	2%
More than 20	2%	3%	1%	1%	3%	1%

	Local Rule	No Local Rule
	U.S. Attorney Offices (n=40)	U.S. Attorney Offices (n=44)
None	38%	41%
1	3%	11%
2 – 4	18%	16%
5 – 10	20%	11%
11 – 20	8%	11%
More than 20	15%	9%

Table 21
Number of cases in the past 5 years in which you believe the government failed to provide exculpatory or Giglio information in compliance with the local rule.

	Local Rule			No Local Rule		
	All Attorneys (n=1,946)	Federal Defenders (n=203)	Private Attorneys (n=1,743)	All Attorneys (n=3,159)	Federal Defenders (n=397)	Private Attorneys (n=2,762)
None	52%	26%	55%	40%	16%	43%
1	15%	7%	16%	16%	11%	17%
2-4	22%	37%	20%	28%	35%	27%
5-10	7%	17%	6%	11%	26%	9%
11-20	1%	4%	1%	3%	7%	2%
More than 20	2%	7%	1%	2%	6%	2%

Table 22
Number of cases in the past 5 years in which you believe the suspected violation was due to materiality concerns.

	Local Rule			No Local Rule		
	All Attorneys (n=924)	Federal Defenders (n=150)	Private Attorneys (n=774)	All Attorneys (n=1,889)	Federal Defenders (n=332)	Private Attorneys (n=1,557)
None	30%	26%	31%	22%	16%	24%
1	27%	15%	29%	24%	14%	26%
2-4	32%	42%	30%	38%	41%	37%
5-10	8%	10%	7%	12%	20%	10%
11-20	2%	2%	1%	3%	5%	3%
More than 20	2%	5%	1%	1%	4%	<1%

Table 23
Number of cases in the past 5 years in which the defense alleged that the government failed to comply with disclosure obligations.

	Local Rule U.S. Attorney Offices (n=40)	No Local Rule U.S. Attorney Offices (n=45)
None	25%	33%
1	5%	9%
2 – 4	30%	22%
5 – 10	10%	7%
11 – 20	5%	4%
More than 20	25%	24%

Table 24
Number of cases in the past 5 years in which the court concluded that the government failed to comply with disclosure obligations.

Judges	Local Rule			No Local Rule		
	All Judges (n=217)	District Judges (n=136)	Magistrate Judges (n=81)	All Judges (n=400)	District Judges (n=257)	Magistrate Judges (n=143)
None	61%	59%	65%	74%	67%	87%
1	10%	12%	6%	10%	12%	5%
2 – 4	22%	23%	21%	14%	18%	6%
5 – 10	5%	4%	7%	3%	3%	2%
11 – 20	<1%	1%	-	-	-	-
More than 20	<1%	1%	-	-	-	-

Table 24 (cont'd)

Defense Attorneys	Local Rule			No Local Rule		
	All Attorneys (n=1,946)	Federal Defenders (n=202)	Private Attorneys (n=1,744)	All Attorneys (n=3,164)	Federal Defenders (n=398)	Private Attorneys (n=2,766)
None	79%	64%	80%	78%	65%	80%
1	11%	16%	11%	12%	14%	11%
2 – 4	8%	15%	7%	8%	13%	7%
5 – 10	1%	3%	1%	2%	5%	2%
11 – 20	<1%	<1%	<1%	<1%	2%	<1%
More than 20	<1%	<1%	<1%	<1%	<1%	<1%

U.S. Attorneys	Local Rule		No Local Rule	
	U.S. Attorney Offices (n=40)	U.S. Attorney Offices (n=44)	U.S. Attorney Offices (n=44)	U.S. Attorney Offices (n=44)
None	65%	70%	70%	70%
1	10%	18%	18%	18%
2 – 4	8%	7%	7%	7%
5 – 10	7%	5%	5%	5%
11 – 20	-	-	-	-
More than 20	-	-	-	-

Table 25
What was the nature of the most frequent violation by the government?

Judges	Local Rule			No Local Rule		
	All Judges (n=80)	District Judges (n=52)	Magistrate Judges (n=28)	All Judges (n=103)	District Judges (n=85)	Magistrate Judges (n=18)
Scope of Disclosure	26%	25%	29%	31%	32%	28%
Failure to Disclose on Time	61%	65%	54%	41%	40%	44%
Failure to Disclose at All	8%	8%	7%	19%	19%	22%
Other	5%	2%	11%	9%	9%	6%

Defense Attorneys	Local Rule			No Local Rule		
	All Attorneys (n=425)	Federal Defenders (n=76)	Private Attorneys (n=349)	All Attorneys (n=696)	Federal Defenders (n=138)	Private Attorneys (n=558)
Scope of Disclosure	29%	28%	29%	30%	25%	32%
Failure to Disclose on Time	29%	36%	28%	21%	19%	21%
Failure to Disclose at All	36%	30%	38%	44%	49%	42%
Other	6%	7%	5%	5%	7%	5%

U.S. Attorneys	Local Rule	No Local Rule
	U.S. Attorney Offices (n=14)	U.S. Attorney Offices (n=13)
Scope of Disclosure	36%	15%
Failure to Disclose on Time	43%	31%
Failure to Disclose at All	14%	46%
Other	7%	8%

Table 26
What remedial steps were taken by the court?

Judges	Local Rule			No Local Rule		
	All Judges (n=84)	District Judges (n=56)	Magistrate Judges (n=28)	All Judges (n=104)	District Judges (n=86)	Magistrate Judges (n=18)
No Action Taken	13%	9%	21%	4%	2%	11%
Ordered Immediate Disclosure	76%	80%	68%	71%	71%	72%
Ordered a Continuance	43%	43%	43%	39%	42%	28%
Excluded Evidence	12%	13%	11%	18%	21%	6%
Gave Jury Instruction	4%	5%	-	7%	8%	-
Admonished Prosecutor	21%	20%	25%	17%	17%	17%
Held Prosecutor in Contempt	-	-	-	<1%	1%	-
Reported Prosecutor to DOJ Office of Professional Responsibility	2%	4%	-	2%	1%	6%
Reported Prosecutor to the State Bar	2%	4%	-	-	-	-
Other Steps Taken	13%	13%	14%	13%	16%	-
Defense Attorneys	Local Rule			No Local Rule		
	All Attorneys (n=415)	Federal Defenders (n=73)	Private Attorneys (n=342)	All Attorneys (n=699)	Federal Defenders (n=138)	Private Attorneys (n=561)
No Action Taken	23%	32%	21%	34%	36%	34%
Ordered Immediate Disclosure	65%	55%	67%	58%	53%	60%
Ordered a Continuance	26%	33%	24%	24%	33%	22%
Excluded Evidence	9%	12%	9%	8%	11%	7%
Gave Jury Instruction	2%	1%	2%	5%	7%	5%
Admonished Prosecutor	17%	21%	16%	13%	13%	13%
Held Prosecutor in Contempt	<1%	-	<1%	<1%	-	<1%
Reported Prosecutor to DOJ Office of Professional Responsibility	<1%	-	<1%	<1%	-	<1%
Reported Prosecutor to the State Bar	<1%	-	<1%	<1%	-	<1%
Other Steps Taken	12%	14%	11%	11%	12%	10%

Table 26 (cont'd)

U.S. Attorneys	Local Rule U.S. Attorney Offices (n=14)	No Local Rule U.S. Attorney Offices (n=13)
No Action Taken	29%	23%
Ordered Immediate Disclosure	64%	54%
Ordered a Continuance	57%	23%
Excluded Evidence	50%	15%
Gave Jury Instruction	14%	8%
Admonished Prosecutor	57%	46%
Held Prosecutor in Contempt	-	-
Reported Prosecutor to DOJ Office of Professional Responsibility	7%	8%
Reported Prosecutor to the State Bar	7%	-
Other	7%	62%

Table 27
Overall satisfaction with prosecutor compliance with discovery obligations.

Judges	Local Rule			No Local Rule		
	All Judges (n=223)	District Judges (n=138)	Magistrate Judges (n=85)	All Judges (n=402)	District Judges (n=257)	Magistrate Judges (n=145)
Very Satisfied	55%	59%	48%	55%	56%	54%
Satisfied	35%	33%	39%	35%	35%	35%
Neither Satisfied nor Dissatisfied	10%	8%	13%	8%	7%	10%
Dissatisfied	<1%	<1%	-	2%	2%	2%
Very Dissatisfied	-	-	-	-	-	-

Defense Attorneys	Local Rule			No Local Rule		
	All Attorneys (n=1,955)	Federal Defenders (n=205)	Private Attorneys (n=1,750)	All Attorneys (n=3,183)	Federal Defenders (n=402)	Private Attorneys (n=2,781)
Very Satisfied	18%	5%	20%	10%	3%	11%
Satisfied	42%	31%	44%	30%	19%	32%
Neither Satisfied nor Dissatisfied	23%	31%	22%	26%	27%	26%
Dissatisfied	14%	27%	12%	26%	38%	24%
Very Dissatisfied	2%	6%	2%	7%	13%	7%

U.S. Attorneys	Local Rule	No Local Rule
	U.S. Attorney Offices (n=40)	U.S. Attorney Offices (n=45)
Very Satisfied	90%	89%
Satisfied	10%	11%
Neither Satisfied nor Dissatisfied	-	-
Dissatisfied	-	-
Very Dissatisfied	-	-

Table 28
Do the defense attorneys in your district understand their pretrial discovery and disclosure obligations?

Judges	Local Rule			No Local Rule		
	All Judges (n=224)	District Judges (n=138)	Magistrate Judges (n=86)	All Judges (n=399)	District Judges (n=257)	Magistrate Judges (n=142)
Always	11%	12%	9%	15%	12%	22%
Usually	67%	70%	62%	64%	67%	57%
Sometimes	18%	14%	24%	16%	16%	18%
Rarely	4%	4%	5%	4%	5%	3%
Never	-	-	-	<1%	<1%	<1%

Defense Attorneys	Local Rule			No Local Rule		
	All Attorneys (n=1,946)	Federal Defenders (n=205)	Private Attorneys (n=1,741)	All Attorneys (n=3,180)	Federal Defenders (n=403)	Private Attorneys (n=2,777)
Always	11%	8%	12%	9%	10%	9%
Usually	66%	67%	66%	63%	68%	62%
Sometimes	19%	22%	19%	24%	20%	24%
Rarely	4%	3%	4%	4%	2%	5%
Never	-	-	-	<1%	-	<1%

U.S. Attorneys	Local Rule	No Local Rule
	U.S. Attorney Offices (n=40)	U.S. Attorney Offices (n=45)
Always	3%	2%
Usually	15%	18%
Sometimes	30%	27%
Rarely	38%	53%
Never	15%	-

Table 29
Number of cases in the past 5 years in which the court concluded that defense counsel failed to comply with disclosure obligations.

Judges	Local Rule			No Local Rule		
	All Judges (n=214)	District Judges (n=136)	Magistrate Judges (n=78)	All Judges (n=399)	District Judges (n=255)	Magistrate Judges (n=144)
None	64%	57%	77%	68%	57%	88%
1	7%	8%	4%	8%	10%	4%
2 – 4	20%	25%	12%	19%	26%	6%
5 – 10	7%	7%	6%	5%	6%	2%
11 – 20	<1%	1%	-	-	-	-
More than 20	<1%	<1%	1%	<1%	1%	-

Defense Attorneys	Local Rule			No Local Rule		
	All Attorneys (n=1,948)	Federal Defenders (n=206)	Private Attorneys (n=1,742)	All Attorneys (n=3,176)	Federal Defenders (n=401)	Private Attorneys (n=2,775)
None	95%	94%	95%	97%	95%	97%
1	3%	5%	3%	3%	4%	2%
2 – 4	2%	2%	2%	<1%	<1%	<1%
5 – 10	<1%	-	<1%	<1%	-	<1%
11 – 20	<1%	-	<1%	-	-	-
More than 20	<1%	-	<1%	-	-	-

Table 29 (cont'd)

	U.S. Attorneys	Local Rule U.S. Attorney Offices (n=40)	No Local Rule U.S. Attorney Offices (n=44)
None		43%	50%
1		8%	9%
2-4		28%	18%
5-10		13%	14%
11-20		8%	7%
More than 20		3%	2%

Table 30

What was the nature of the most frequent violation by the defense?

Judges	Local Rule			No Local Rule		
	All Judges (n=75)	District Judges (n=57)	Magistrate Judges (n=18)	All Judges (n=126)	District Judges (n=109)	Magistrate Judges (n=17)
Scope of Disclosure	11%	11%	11%	21%	21%	24%
Failure to Disclose on Time	47%	47%	44%	44%	45%	35%
Failure to Disclose at All	41%	40%	44%	33%	31%	41%
Other	1%	2%	-	2%	3%	-

Table 30 (cont'd)

Defense Attorneys	Local Rule			No Local Rule		
	All Attorneys (n=98)	Federal Defenders (n=13)	Private Attorneys (n=85)	All Attorneys (n=110)	Federal Defenders (n=19)	Private Attorneys (n=91)
Scope of Disclosure	26%	31%	25%	25%	26%	25%
Failure to Disclose on Time	43%	62%	40%	41%	37%	42%
Failure to Disclose at All	31%	8%	34%	32%	37%	31%
Other	1%	-	1%	2%	-	2%

U.S. Attorneys	Local Rule	No Local Rule
	U.S. Attorney Offices (n=23)	U.S. Attorney Offices (n=22)
Scope of Disclosure	9%	-
Failure to Disclose on Time	39%	45%
Failure to Disclose at All	48%	55%
Other	4%	-

Table 31
What remedial steps were taken by the court?

Judges	Local Rule			No Local Rule		
	All Judges (n=76)	District Judges (n=58)	Magistrate Judges (n=18)	All Judges (n=127)	District Judges (n=110)	Magistrate Judges (n=17)
No Action Taken	20%	17%	28%	14%	14%	18%
Ordered Immediate Disclosure	78%	83%	61%	76%	80%	53%
Ordered a Continuance	21%	21%	22%	18%	19%	12%
Excluded Evidence	9%	10%	6%	12%	14%	-
Gave Jury Instruction	1%	2%	-	2%	3%	-
Admonished Defense Counsel	14%	14%	17%	9%	9%	12%
Held Defense Counsel in Contempt	1%	2%	-	-	-	-
Reported Defense Counsel to the State Bar	-	-	-	-	-	-
Other	3%	-	11%	4%	4%	6%

Defense Attorneys	Local Rule			No Local Rule		
	All Attorneys (n=100)	Federal Defenders (n=14)	Private Attorneys (n=86)	All Attorneys (n=110)	Federal Defenders (n=19)	Private Attorneys (n=91)
No Action Taken	20%	21%	20%	15%	16%	14%
Ordered Immediate Disclosure	55%	57%	55%	57%	42%	60%
Ordered a Continuance	15%	14%	15%	8%	11%	8%
Excluded Evidence	28%	29%	28%	23%	26%	22%
Gave Jury Instruction	3%	-	3%	-	-	-
Admonished Defense Counsel	10%	14%	9%	8%	5%	9%
Held Defense Counsel in Contempt	-	-	-	-	-	-
Reported Defense Counsel to the State Bar	-	-	-	<1%	-	1%
Other	2%	-	2%	5%	11%	3%

Table 31 (cont'd)

U.S. Attorneys	Local Rule U.S. Attorney Offices (n=23)	No Local Rule U.S. Attorney Offices (n=22)
No Action Taken	65%	45%
Ordered Immediate Disclosure	70%	59%
Ordered a Continuance	4%	14%
Excluded Evidence	35%	41%
Gave Jury Instruction	-	-
Admonished Defense Counsel	17%	27%
Held Defense Counsel in Contempt	-	-
Reported Defense Counsel to the State Bar	-	-
Other	-	-

Table 32
Overall satisfaction with defense counsel compliance with discovery obligations.

Judges	Local Rule			No Local Rule		
	All Judges (n=222)	District Judges (n=138)	Magistrate Judges (n=84)	All Judges (n=401)	District Judges (n=257)	Magistrate Judges (n=144)
Very Satisfied	33%	36%	30%	31%	28%	37%
Satisfied	46%	48%	42%	49%	54%	39%
Neither Satisfied nor Dissatisfied	19%	15%	26%	18%	14%	24%
Dissatisfied	2%	1%	2%	2%	3%	<1%
Very Dissatisfied	-	-	-	-	-	-

Defense Attorneys	Local Rule			No Local Rule		
	All Attorneys (n=1,934)	Federal Defenders (n=206)	Private Attorneys (n=1,728)	All Attorneys (n=3,162)	Federal Defenders (n=402)	Private Attorneys (n=2,760)
Very Satisfied	24%	25%	24%	23%	27%	22%
Satisfied	50%	53%	50%	49%	52%	48%
Neither Satisfied nor Dissatisfied	25%	20%	25%	28%	21%	29%
Dissatisfied	<1%	<1%	<1%	<1%	-	<1%
Very Dissatisfied	<1%	<1%	-	<1%	-	<1%

U.S. Attorneys	Local Rule	No Local Rule
	U.S. Attorney Offices (n=40)	U.S. Attorney Offices (n=45)
Very Satisfied	-	-
Satisfied	10%	9%
Neither Satisfied nor Dissatisfied	18%	20%
Dissatisfied	43%	47%
Very Dissatisfied	30%	24%

Table 33
Do you favor amending Rule 16?

	All Judges (n=617)	District Judges (n=389)	Magistrate Judges (n=228)	All Attorneys (n=5,133)	Federal Defenders (n=611)	Private Attorneys (n=4,522)
Favor Amending Rule 16	51%	50%	54%	93%	98%	93%

Table 34
Do you favor amending Rule 16?

Judges	Local Rule			No Local Rule		
	All Judges (n=218)	District Judges (n=135)	Magistrate Judges (n=83)	All Judges (n=399)	District Judges (n=254)	Magistrate Judges (n=145)
Favor Amending Rule 16	60%	60%	60%	46%	44%	50%

Defense Attorneys	Local Rule			No Local Rule		
	All Attorneys (n=1,955)	Federal Defenders (n=209)	Private Attorneys (n=1,746)	All Attorneys (n=3,178)	Federal Defenders (n=402)	Private Attorneys (n=2,776)
Favor Amending Rule 16	92%	97%	92%	94%	99%	93%

Table 37
Why an amendment to Rule 16 is needed.

Judges	Local Rule			No Local Rule		
	All Judges (n=131)	District Judges (n=81)	Magistrate Judges (n=50)	All Judges (n=185)	District Judges (n=113)	Magistrate Judges (n=72)
It will reduce the possibility that innocent persons will be convicted	42%	46%	36%	34%	35%	32%
Many disclosure violations pass undiscovered or without remedy	38%	37%	42%	43%	40%	47%
It will eliminate the confusion surrounding the use of materiality as a disclosure obligation	74%	75%	72%	77%	78%	76%
Current remedies for prosecutorial misconduct are rarely employed	25%	22%	30%	21%	18%	25%
It will reduce variations that currently exist in the circuits	44%	46%	40%	45%	46%	44%
Other Reasons	9%	6%	14%	8%	4%	13%
Defense Attorneys						
	Local Rule			No Local Rule		
	All Attorneys (n=1,801)	Federal Defenders (n=202)	Private Attorneys (n=1,599)	All Attorneys (n=2,986)	Federal Defenders (n=396)	Private Attorneys (n=2,590)
It will reduce the possibility that innocent persons will be convicted	65%	73%	64%	68%	76%	67%
Many disclosure violations pass undiscovered or without remedy	63%	77%	62%	72%	84%	70%
It will eliminate the confusion surrounding the use of materiality as a disclosure obligation	76%	86%	75%	77%	83%	76%
Current remedies for prosecutorial misconduct are rarely employed	48%	69%	46%	56%	69%	54%
It will reduce variations that currently exist in the circuits	45%	37%	46%	45%	44%	45%
Other Reasons	9%	10%	8%	11%	12%	11%

Table 38
Why an amendment to Rule 16 is *not* needed.

Judges	Local Rule			No Local Rule		
	All Judges (n=87)	District Judges (n=54)	Magistrate Judges (n=33)	All Judges (n=214)	District Judges (n=141)	Magistrate Judges (n=73)
There is no demonstrated need for change	75%	76%	73%	75%	69%	88%
The current remedies for prosecutorial misconduct are adequate	55%	52%	61%	50%	55%	38%
Recent reforms by the Department of Justice will significantly decrease disclosure violations	14%	9%	21%	15%	17%	11%
It will not address the real need for increasing the frequency and severity of sanctions for violations	5%	4%	6%	4%	3%	5%
It will not reduce the possibility that innocent persons will be convicted	8%	11%	3%	7%	9%	4%
Other Reasons	7%	9%	3%	7%	11%	1%

Defense Attorneys	Local Rule			No Local Rule		
	All Attorneys (n=154)	Federal Defenders (n=7)	Private Attorneys (n=147)	All Attorneys (n=192)	Federal Defenders (n=6)	Private Attorneys (n=186)
There is no demonstrated need for change	55%	57%	55%	52%	17%	53%
The current remedies for prosecutorial misconduct are adequate	31%	29%	31%	39%	50%	38%
Recent reforms by the Department of Justice will significantly decrease disclosure violations	11%	14%	11%	6%	-	6%
It will not address the real need for increasing the frequency and severity of sanctions for violations	12%	29%	11%	15%	17%	15%
It will not reduce the possibility that innocent persons will be convicted	6%	-	6%	5%	17%	5%
Other Reasons	6%	-	7%	8%	17%	8%

Table 39
 Would eliminating the *Brady* materiality requirement result in changes
 in the frequency of defense motions for *Brady* violations?

	Local Rule			No Local Rule		
	All Attorneys (n=1,931)	Federal Defenders (n=204)	Private Attorneys (n=1,727)	All Attorneys (n=3,122)	Federal Defenders (n=393)	Private Attorneys (n=2,729)
Motions would increase	18%	9%	19%	20%	15%	20%
Motions would stay the same	28%	30%	28%	28%	28%	28%
Motions would decrease	48%	51%	47%	46%	46%	46%
Other	6%	9%	6%	7%	11%	6%

Table 40
Should victim or witness information be disclosed?

	All Judges (n=619)	District Judges (n=390)	Magistrate Judges (n=229)	All Attorneys (n=5,134)	Federal Defenders (n=609)	Private Attorneys (n=4,525)
Disclose this information	33%	33%	33%	88%	90%	88%
Don't Know	24%	23%	26%	6%	6%	6%

Table 41
Should victim or witness information be disclosed?

Judges	Local Rule			No Local Rule		
	All Judges (n=220)	District Judges (n=135)	Magistrate Judges (n=85)	All Judges (n=399)	District Judges (n=255)	Magistrate Judges (n=144)
Disclose this information	28%	27%	28%	36%	35%	36%
Don't Know	27%	25%	29%	12%	22%	24%

Defense Attorneys	Local Rule			No Local Rule		
	All Attorneys (n=1,960)	Federal Defenders (n=208)	Private Attorneys (n=1,752)	All Attorneys (n=3,174)	Federal Defenders (n=401)	Private Attorneys (n=2,773)
Disclose this information	89%	92%	89%	87%	89%	87%
Don't Know	5%	5%	5%	6%	6%	6%

Table 42
Should allegations of misconduct by law enforcement witnesses be disclosed?

	All Judges (n=621)	District Judges (n=391)	Magistrate Judges (n=230)	All Attorneys (n=5,124)	Federal Defenders (n=609)	Private Attorneys (n=4,515)
Disclose this information	36%	36%	36%	88%	93%	88%
Don't Know	13%	12%	15%	3%	2%	3%

Table 43
Should allegations of misconduct by law enforcement witnesses be disclosed?

Judges	Local Rule			No Local Rule		
	All Judges (n=220)	District Judges (n=135)	Magistrate Judges (n=85)	All Judges (n=401)	District Judges (n=256)	Magistrate Judges (n=145)
Disclose this information	35%	37%	33%	36%	35%	37%
Don't Know	14%	11%	19%	12%	12%	12%

Defense Attorneys	Local Rule			No Local Rule		
	All Attorneys (n=1,953)	Federal Defenders (n=208)	Private Attorneys (n=1,745)	All Attorneys (n=3,171)	Federal Defenders (n=401)	Private Attorneys (n=2,770)
Disclose this information	88%	93%	88%	88%	94%	87%
Don't Know	3%	3%	3%	3%	2%	3%

Table 44
Should all impeachment information concerning defense witnesses be disclosed?

	All Judges (n=617)	District Judges (n=387)	Magistrate Judges (n=230)	All Attorneys (n=5,112)	Federal Defenders (n=606)	Private Attorneys (n=4,506)
Disclose this information	52%	54%	48%	42%	32%	44%
Don't Know	19%	16%	24%	11%	13%	10%

Table 45
Should all impeachment information concerning defense witnesses be disclosed?

Judges	Local Rule			No Local Rule		
	All Judges (n=219)	District Judges (n=134)	Magistrate Judges (n=85)	All Judges (n=398)	District Judges (n=253)	Magistrate Judges (n=145)
Disclose this information	50%	51%	47%	53%	55%	49%
Don't Know	22%	16%	32%	17%	15%	20%

Defense Attorneys	Local Rule			No Local Rule		
	All Attorneys (n=1,943)	Federal Defenders (n=206)	Private Attorneys (n=1,737)	All Attorneys (n=3,169)	Federal Defenders (n=400)	Private Attorneys (n=2,769)
Disclose this information	44%	31%	45%	42%	33%	43%
Don't Know	11%	13%	11%	11%	14%	10%

Appendix D: Methods

Sample Identification and Selection

Judges

We selected to receive the survey all district and magistrate judges on the Administrative Office's email list available to court users on the Administrative Office's JNET. The list of district judges includes chief district judges, active district judges, and senior district judges. We selected all district and magistrate judges in order to gather as much information as possible on judicial experience with Rule 16 and with the various local rules, standing orders, and policies governing disclosure.

Attorneys

We selected a sample of private defense attorneys and Federal Defenders (including Community Defenders) through this sequence of steps. We first selected from data available to the Center all criminal cases with retained defense counsel (i.e., no pro se cases) terminated in calendar year 2009 in all districts. From this set of cases, we selected the lead counsel or, in several districts that do not identify a lead counsel, the "Attorney to Be Noticed." If there were multiple defendants, we selected all lead counsel for all defendants. We next separated the private attorneys from the Federal Defenders so that each set of attorneys could be processed individually. From the set of private attorneys, we eliminated duplicate entries (i.e., attorneys associated with more than one case) and eliminated attorneys who did not have an email address or an individual email address. Attorneys in the latter category typically had an email address that went to a firm's general mailbox and did not identify the attorney specifically. In some cases, however, where it was clear that the firm was an attorney in solo practice, we kept the attorney in the sample. We processed the Federal Defenders in a different fashion. Except for duplicate entries, we did not eliminate any Federal Defenders from the sample. If a Federal Defender did not have an email address in the database, or the email address went to a group mailbox, we searched databases on the Administrative Office's JNET to find their individual email addresses. In a very few cases, where these databases did not produce a result, we fashioned an email address based on the rules used to construct Federal Defender email addresses generally. The end result was a sample of 14,726 private attorneys with individual email addresses and 1,290 Federal Defenders with individual email addresses.

We considered sampling from among these two groups of attorneys, but decided against further sampling for several reasons. First, we could not be sure of the response from the private attorneys. Past experience at the Center has shown

that response rates among private attorneys can be as low as 10 percent. Smaller districts, with fewer attorneys, might not be represented in sufficient numbers and we might lose the experiences of attorneys practicing in smaller districts. Second, with respect to Federal Defenders, our search of the JNET databases showed that there is some level of turnover in the Federal Defender offices. Since we could not be sure how many Federal Defenders in our sample were still Federal Defenders, we decided that the prudent course was to survey all. Again, we were not sure what response rate to expect and, by including all, we helped ensure that smaller districts would be represented among the survey responses.

United States Attorneys

At the request of the Department of Justice, we sent the online survey link to a contact person in the Department who forwarded the link to each U.S. Attorney's office. According to this agreement, an official in that office would complete the first two sections of the survey, to represent the collective experiences of the attorneys in the office. Consequently, we would have one survey from each U.S. Attorney's office that responded. The Department of Justice completed the third section of the survey, dealing with possible amendments to Rule 16, as a means of expressing the policy views of the Department.

Survey Administration and Data Preparation

Online Survey

Each prospective respondent received an email that explained the purpose of the survey and a link to the online survey designed for their group. The surveys were designed to be completed online and survey responses were accumulated in a database for later analysis. The survey software also kept track of who had responded to the survey, so that a reminder could be sent to those who had not responded. We sent the initial email to prospective respondents during the week of June 1, 2010, and a reminder several weeks later.

Data Preparation

Our preparation of the three data sets for analysis began in mid-July. In addition to the usual data processing that must be performed on any set of raw data, we had to resolve several issues about which surveys to use in the final analysis. First, each of the three data sets contained duplicate entries that resulted from one or more unsuccessful attempts by a respondent to complete the survey online before a final, successful completion of the survey. We identified these respondents and removed the earlier, incomplete attempts from the final data set. Another type of duplicate entry was unique to the attorney data set and occurred when survey re-

cipients forwarded the email to other attorneys who also completed the survey. Since these latter attorneys were not in our sample, we identified and eliminated their responses from the final dataset.

Second, we received emails from two chief district judges that a representative judge would respond for all district and magistrate judges in their respective districts. We received an email from a third chief district judge that a representative magistrate judge would respond for all magistrate judges in that district. Many of the questions in the judge survey deal with the respondent's experiences on the bench and, because we did not know if district representatives would report their experiences, an amalgam of judges' experiences, or something in between, we eliminated these three surveys from the results presented here.

After resolving these data issues, we had responses from 644 district and magistrate judges, 5,159 attorneys, and 85 U.S. Attorney offices. Appendix C, Table 1, contains a breakdown of the response rates for these three groups.

Appendix E: Survey Instruments

E1: A National Survey of District and Magistrate Judges

E2: A National Survey of Criminal Defense Attorneys

E3: A National Survey of Federal Prosecutors

RULE 16 PRETRIAL DISCLOSURE PROCEDURES AND PRACTICES

A NATIONAL SURVEY OF DISTRICT AND MAGISTRATE JUDGES

For the Advisory Committee on Criminal Rules of the
Judicial Conference of the United States

Administered by the Federal Judicial Center

Demographic Information

The information in this section will help us to analyze survey responses in terms of which respondents are from large or small districts; those who have been on the bench for a long or relatively short time; as well as by judge type: active, senior, or magistrate judge. No individual judge will be identified in any of the analyses or reports we produce.

Your District: _____

- 1) What is your current status?
 - a) Chief district judge
 - b) Active district judge
 - c) Magistrate judge
 - d) Senior judge

- 2) How long have you been on the federal bench?
 - a) Less than 5 years
 - b) 5-10 years
 - c) 11-15 years
 - d) More than 15 years

- 3) Does a local rule, standing order or other policy in your district require disclosure by the prosecution to the defense that extends beyond the requirements of *Brady v. Maryland*, *Giglio v. United States*, Rule 16 (Discovery and Inspection), or Rule 26.2 (Producing a Witness's Statement)? For example, your district may have specific time requirements for disclosure or mandate automatic disclosure.
 - a) If yes, [Go to Part I]
 - b) If no, [Go to PART II]

I. DISTRICT SPECIFIC LOCAL COURT RULES, STANDING ORDERS OR OTHER POLICIES REGARDING PRETRIAL DISCLOSURE

This section seeks your views on pretrial disclosure procedures and practices by federal prosecutors and defense counsel in your district, including questions addressing your district's local rule or standing order regarding disclosure in criminal cases.

- 4) In your opinion, do federal prosecutors who appear before you understand their pretrial discovery and disclosure obligations pursuant to your district's local rule or standing order?
 - a) Always
 - b) Usually
 - c) Sometimes
 - d) Rarely
 - e) Never

- 5) In your opinion, do federal prosecutors who appear before you follow a consistent policy or approach with respect to their pretrial discovery and disclosure obligations pursuant to your district's local rule or standing order?
 - a) Always
 - b) Usually
 - c) Sometimes
 - d) Rarely
 - e) Never

- 6) In your opinion, do federal prosecutors who appear before you understand their federal constitutional disclosure obligations, i.e., *Brady v. Maryland*, *Giglio v. United States*, and their progeny?
 - a) Always
 - b) Usually
 - c) Sometimes
 - d) Rarely
 - e) Never

7) In your opinion, in practice, are the differences between your local rule or standing order and the requirements of the United States Constitution and Rule 16 significant or not significant?

- a) Significant
- b) Not Significant

Please explain:

8) Does your district require federal prosecutors to disclose to the defense exculpatory or *Giglio* information within a fixed time after indictment or arraignment?

- a) Yes [Go to Question 9]
- b) No [Go to Question 10]

9) Do you believe that this timing requirement has caused problems for the prosecution? Please choose the response that best represents your views.

- a) The timing of disclosure has caused minor problems in some cases.
- b) The timing of disclosure has caused minor problems in most cases.
- c) The timing of disclosure has caused serious problems in some cases.
- d) The timing of disclosure has caused serious problems in most cases.
- e) The timing has caused no problems.
- f) No opinion.
- g) Other: Please explain.

10) Does your district require federal prosecutors to disclose to the defense before trial government witness statements that could be used to impeach?

- a) Yes
- b) No

11) Does your district require the defense to disclose to prosecutors before trial statements by anticipated defense witnesses that could be used to impeach?

- a) Yes
- b) No

12) Please estimate the number of cases in the past five years in which you believe that your district's requirements regarding the disclosure of exculpatory information by the government resulted in threats or harm to a prosecution witness.

- a) 0 (None)
- b) 1
- c) 2-4
- d) 5-10
- e) 11-20
- f) More than 20

13) Please estimate the number of cases in the past five years in which you believe that your district's requirements regarding pretrial disclosure of Giglio information by the government resulted in threats or harm to a prosecution witness.

- a) 0 (None)
- b) 1
- c) 2-4
- d) 5-10
- e) 11-20
- f) More than 20

14) If your district currently has a local rule or standing order that eliminates the *Brady* materiality requirement for disclosure of exculpatory information by prosecutors, did the rule change affect the frequency of defense motions filed to challenge the scope of disclosure? Please select one answer:

- a) Motions challenging the scope of disclosure increased.
- b) Motions challenging the scope of disclosure stayed the same.
- c) Motions challenging the scope of disclosure decreased.
- d) I was not on the bench before the rule was adopted.
- e) In my district no such rule has been adopted.

15) Please estimate the number of cases in the past five years in which you concluded that the prosecution failed to comply with its disclosure obligations pursuant to your district's local rule or standing order.

- a) 0 (None) [Go to Question 18]
- b) 1
- c) 2-4
- d) 5-10
- e) 11-20
- f) More than 20

16) What was the nature of the most frequent violation?

- a) Matter concerned the scope of disclosure.
- b) Matter concerned the failure to disclose on time.
- c) Matter concerned the failure to disclose at all.
- d) Other: _____

17) Please indicate the remedial steps, if any, that you took upon concluding that the prosecution had violated its disclosure obligations under your district's local rule or standing order. Check all that apply.

- a) No action taken
- b) Ordered immediate disclosure
- c) Ordered a continuance
- d) Excluded evidence
- e) Gave jury instruction
- f) Admonished federal prosecutor in open court and/or in a written opinion
- g) Held federal prosecutor in contempt
- h) Reported federal prosecutor to the Department of Justice Office of Professional Responsibility
- i) Reported federal prosecutor to the state's Bar Counsel or other disciplinary body
- j) Other: Please explain

- 18) Overall, how satisfied are you with **federal prosecutor compliance with their discovery obligations in your district?**
- a) Very satisfied
 - b) Satisfied
 - c) Neither Satisfied nor Dissatisfied
 - d) Dissatisfied
 - e) Very Dissatisfied
- 19) In your opinion, do defense counsel who appear before you understand their discovery and disclosure obligations, including their obligation to provide reciprocal pretrial discovery under Rule 16(b) and reverse-*Jencks Act* material pursuant to Rule 26.2?
- a) Always
 - b) Usually
 - c) Sometimes
 - d) Rarely
 - e) Never
- 20) Please estimate the number of cases in the past five years in which you concluded that defense counsel failed to disclose reverse-*Jencks Act* material or other reciprocal discovery to the prosecution.
- a) 0 (None) [**Go to Question 23**]
 - b) 1
 - c) 2-4
 - d) 5-10
 - e) 11-20
 - f) More than 20
- 21) What was the nature of the most frequent violation?
- a) Matter concerned the scope of disclosure.
 - b) Matter concerned the failure to disclose in a timely manner.
 - c) Matter concerned the failure to disclose at all.
 - d) Other: _____

- 22) Please indicate the remedial steps, if any that you took upon concluding that defense counsel had violated their disclosure obligations under your district's local rule or standing order. Check all that apply.
- a) No action taken
 - b) Ordered immediate disclosure
 - c) Ordered a continuance
 - d) Excluded evidence
 - e) Gave jury instruction
 - f) Admonished defense counsel in open court and/or in a written opinion
 - g) Held defense counsel in contempt
 - h) Reported defense counsel to the state's Bar Council or other disciplinary body
 - i) Other: Please explain
- 23) Overall, how satisfied are you with defense counsel compliance with their disclosure obligations under the Federal Rules?
- a) Very satisfied
 - b) Satisfied
 - c) Neither Satisfied nor Dissatisfied
 - d) Dissatisfied
 - e) Very Dissatisfied

[GO TO PART III]

II. DISCLOSURE PROCEDURES AND PRACTICES PURSUANT TO THE UNITED STATES CONSTITUTION and RULES 16 AND 26.2.

This section seeks your views on specific pretrial disclosure procedures and practices by federal prosecutors and defense counsel in your district pursuant to the Constitution and Rules 16 and 26.2.

- 24) In your opinion, do federal prosecutors who appear before you understand their federal constitutional disclosure obligations (i.e., *Brady v. Maryland*, *Giglio v. United States*, and their progeny)?
- a) Always
 - b) Usually
 - c) Sometimes
 - d) Rarely
 - e) Never
- 25) In your opinion, do federal prosecutors who appear before you follow a consistent policy or approach with respect to the disclosure of exculpatory and *Giglio* information?
- a) Always
 - b) Usually
 - c) Sometimes
 - d) Rarely
 - e) Never
- 26) Please estimate the number of cases in the past five years in which you concluded that the prosecutor failed to comply with the Constitution's requirements regarding the disclosure of exculpatory or *Giglio* information.
- a) 0 (None) [Go to Question 29]
 - b) 1
 - c) 2-4
 - d) 5-10
 - e) 11-20
 - f) More than 20

- 27) What was the nature of the most frequent violation?
- a) Matter concerned the scope of disclosure.
 - b) Matter concerned the failure to disclose in a timely manner.
 - c) Matter concerned the failure to disclose at all.
 - d) Other: _____
- 28) Please indicate the remedial steps, if any that you took upon concluding that the prosecution had failed to comply with the Constitution's requirements regarding the disclosure of exculpatory or *Giglio* information. Check all that apply.
- a) No action taken
 - b) Ordered immediate disclosure
 - c) Ordered a continuance
 - d) Excluded evidence
 - e) Gave jury instruction
 - f) Admonished federal prosecutor in open court and/or in a written opinion
 - g) Held federal prosecutor in contempt
 - h) Reported federal prosecutor to the Department of Justice Office of Professional Responsibility
 - i) Reported federal prosecutor to the state's Bar Counsel or other disciplinary body
 - j) Other: Please explain
- 29) Overall, how satisfied are you with **federal prosecutor compliance with their discovery obligations in your district?**
- a) Very satisfied
 - b) Satisfied
 - c) Neither Satisfied nor Dissatisfied
 - d) Dissatisfied
 - e) Very Dissatisfied
- 30) In your opinion, do defense counsel who appear before you understand their discovery and disclosure obligations, including their obligation to provide reciprocal pretrial discovery under Rule 16(b) and reverse-*Jencks Act* material pursuant to Rule 26.2?
- a) Always
 - b) Usually
 - c) Sometimes
 - d) Rarely
 - e) Never

31) Please estimate the number of cases in the past five years in which you concluded that defense counsel failed to disclose reverse-*Jencks Act* material or other reciprocal discovery to the prosecution?

- a) 0 (None) [Go to Question 34]
- b) 1
- c) 2-4
- d) 5-10
- e) 11-20
- f) More than 20

31) What was the nature of the most frequent violation?

- a) Matter concerned the scope of disclosure.
- b) Matter concerned the failure to disclose in a timely manner.
- c) Matter concerned the failure to disclose at all.
- d) Other: _____

32) Please indicate the remedial steps, if any, that you took upon concluding that the defense counsel failed to disclose reverse-*Jencks Act* material or other reciprocal discovery to the prosecution. Check all that apply.

- a) No action taken
 - b) Ordered immediate disclosure
 - c) Ordered a continuance
 - d) Excluded evidence
 - e) Gave jury instruction
 - e) Admonished defense counsel in open court and/or in a written opinion
 - f) Held defense counsel in contempt
 - h) Reported defense counsel to the state's Bar Counsel or other disciplinary body
- Other: Please explain:

33) Overall, how satisfied are you with **defense counsel compliance with their disclosure obligations under the Federal Rules?**

- a) Very Satisfied
- b) Satisfied
- c) Neither Satisfied nor Dissatisfied
- d) Dissatisfied
- e) Very Dissatisfied

[GO TO PART III]

III. POTENTIAL AMENDMENTS TO RULE 16

- 34) Do you favor amending Rule 16 to address pretrial disclosure of exculpatory and *Giglio* information?
- a) Yes [Go to Question 36]
 - b) No [Go to Question 37]
- 35) Which of the following statements describes your view? Please check all that apply and if desired, provide any other comments in the box below.
- a) An amendment **is needed** because it will reduce the possibility that innocent persons will be convicted in federal proceedings.
 - b) An amendment **is needed** because many disclosure violations pass undiscovered or without remedy.
 - c) An amendment **is needed** because it will eliminate the confusion surrounding the use of materiality as a measure of a prosecutor's pretrial disclosure obligations.
 - d) An amendment **is needed** because the current remedies for prosecutorial misconduct are rarely employed.
 - e) An amendment **is needed** because it will reduce the variations that currently exist in the circuits.
 - f) Other: _____
- 36) Which of the following statements describes your view? Please check all that apply and if desired, provide any other comments in the box below.
- a) An amendment **is not needed** because there is no demonstrated needed for change.
 - b) An amendment **is not needed** because the current remedies for prosecutorial misconduct are adequate.
 - c) An amendment is not needed because the recent reforms put into place by the Department of Justice will significantly decrease disclosure violations so that an amendment to Rule 16 is no longer needed to increase compliance.
 - d) An amendment **is not needed** because it does not address what is really needed to stop abuse of disclosure obligations by prosecutors—increasing the frequency and severity of sanctions against prosecutors for failure to disclose such evidence.
 - e) An amendment is not needed because it will not reduce the possibility that innocent persons will be convicted in federal proceedings.
 - f) Other: _____

In 2007, the Advisory Committee on Criminal Rules proposed the following amendment to Rule 16, which was not approved by the Judicial Conference's Standing Committee on Rules of Practice and Procedure. Although the amendment as written was not approved by the Standing Committee, the Advisory Committee is continuing to study this issue. The remaining questions of the survey address potential amendments to Rule 16.

Rule 16. Discovery and Inspection

(a) GOVERNMENT'S DISCLOSURE.

(1) INFORMATION SUBJECT TO DISCLOSURE.

...

(H) *Exculpatory or Impeaching Information.* Upon a defendant's request, the government must make available all information that is known to the attorney for the government or agents of law enforcement involved in the investigation of the case that is either exculpatory or impeaching. The court may not order disclosure of impeachment information earlier than 14 days before trial.

37) What effect, if any, do you think this amendment might have on the privacy and security of cooperating witnesses?

Please explain:

38) What effect, if any, do you think this amendment might have on the privacy and security of crime victims?

Please explain:

39) In your opinion, should information about a victim's or witness's background that would not be admissible in evidence (e.g., mental health treatment information)—and that the prosecutor believes does not bear directly on the witness' testimony—be disclosed?

- a) Yes
- b) No
- c) Don't Know

40) In your opinion, should all allegations of misconduct against law enforcement witnesses, —including those found not to be substantiated by an internal investigation—be disclosed?

- a) Yes
- b) No
- c) Don't Know

41) With respect to defense witnesses, should all impeachment information in the possession of the defense be disclosed to the prosecution prior to trial?

- a) Yes
- b) No
- c) Don't Know

42) If you favor an amendment to Rule 16 different from that proposed in 2007, what language would you suggest?

Please explain:

If you have any other comments or suggestions regarding the previously proposed amendment to Rule 16 or discovery disclosure in general that have not been covered in this survey, please provide them here:

Thank you for completing this survey. If you have any questions about the survey, please contact Loral Hooper (lhooper@fjc.gov; 202-502-4093) or Marie Leary (mleary@fjc.gov; 202-502-4069).

RULE 16 PRETRIAL DISCLOSURE PROCEDURES AND PRACTICES

A NATIONAL SURVEY OF CRIMINAL DEFENSE ATTORNEYS

For the Advisory Committee on Criminal Rules of the
Judicial Conference of the United States

Administered by the Federal Judicial Center

Demographic Information

The information in this section will help us analyze survey responses based on type of attorney, years of practice, and district. No individual attorney will be identified in any of the analyses or reports we produce.

- 1) How many years have you practiced law?

_____ years

- 2) In which federal district do you primarily practice? If you practice in more than one, please indicate the one in which you spend the most time.

- 3) Which of the following best describes you? (Please check all that apply)

- a) Federal Public Defender/Community Defender
- b) CJA Panel Attorney
- c) Retained Criminal Defense Attorney

- 4) Does a local rule, standing order or other policy in your district require disclosure by the prosecution to the defense that extends beyond the requirements of *Brady v. Maryland*, *Giglio v. United States*, Rule 16 (Discovery and Inspection), or Rule 26.2 (Producing a Witness's Statement)? For example, your district may have specific time requirements for disclosure or mandate automatic disclosure.

- a) If yes, [Go to Part I]
- b) If no, [Go to PART II]

I. DISTRICT-SPECIFIC LOCAL COURT RULES, STANDING ORDERS OR OTHER POLICIES REGARDING PRETRIAL DISCLOSURE

This section seeks your views on pretrial disclosure procedures and practices by federal prosecutors and defense counsel in your district, including questions addressing your districts local rule or standing order regarding disclosure in criminal cases.

- 5) In your opinion, do the federal prosecutors in your district understand their pretrial discovery and disclosure obligations pursuant to your district's local rule or standing order?
- a) Always
 - b) Usually
 - c) Sometimes
 - d) Rarely
 - e) Never
- 6) In your opinion, do the federal prosecutors in your district follow a consistent policy or approach with respect to pretrial disclosure to the defense of exculpatory and *Giglio* information?
- a) Always
 - b) Usually
 - c) Sometimes
 - d) Rarely
 - e) Never
- 7) Does your district's local rule or standing order require federal prosecutors to disclose exculpatory or impeaching information to the defense **without regard to materiality** as defined by *Brady v. Maryland* and its progeny?
- a) Yes [Go to Question 8]
 - b) No [Go to Question 10]

- 8) Do you believe that the elimination of the materiality requirement has reduced problems in obtaining disclosure of exculpatory and impeaching information from the prosecution? Please select one answer.
- a) Eliminating materiality has reduced problems in some cases.
 - b) Eliminating materiality has reduced problems in most cases.
 - c) Eliminating materiality has not made a difference.
 - d) Other: Please explain:
- 9) In your opinion, has the elimination of the materiality requirement affected how often you challenge the scope of disclosure in any of your cases?
- a) Motions challenging the scope of disclosure have increased.
 - b) Motions challenging the scope of disclosure have stayed the same.
 - c) Motions challenging the scope of disclosure have decreased.
 - d) Other: Please explain:
- 10) Does your district require federal prosecutors to disclose to the defense exculpatory or *Giglio* information within a fixed time after indictment or arraignment?
- a) Yes [Go to Question [11]
 - b) No [Go to Question [12]
- 11) Do you believe that the requirement of disclosure within a fixed time after indictment or arraignment is important to the defense? Please select one response.
- a) The timing requirement is very important in some cases.
 - b) The timing requirement is very important in most cases.
 - c) The timing requirement is not very important.
 - d) Other: Please explain:

- 12) Please estimate the number of your cases in the past five years in which the government has requested a protective order prohibiting or delaying disclosure based on witness safety or other security considerations.
- a) 0 (None)
 - b) 1
 - c) 2-4
 - d) 5-10
 - e) 11-20
 - f) More than 20
- 13) Please estimate the number of your cases in the past five years in which you believe the government has failed to provide exculpatory or *Giglio* information in compliance with your local rule or standing order.
- a) 0 (None) [Go to Question 15]
 - b) 1
 - c) 2-4
 - d) 5-10
 - e) 11-20
 - f) More than 20
- 14) Please estimate the number of these cases in which you believe the suspected violation was attributable to materiality concerns (e.g., the prosecutor believed that the information at issue was unreliable or only minimally negated guilt).
- a) 0 (None)
 - b) 1
 - c) 2-4
 - d) 5-10
 - e) 11-20
 - f) More than 20
- 15) Please estimate the number of your cases in the past five years in which the court concluded that the government failed to comply with its disclosure obligations pursuant to your district's local rule or standing order.
- a) 0 (None) [Go to Question 18]
 - b) 1
 - c) 2-4
 - d) 5-10
 - e) 11-20
 - f) More than 20

- 16) What was the nature of the most frequent violation?
- a) Matter concerned the scope of disclosure.
 - b) Matter concerned the failure to disclose on time.
 - c) Matter concerned the failure to disclose at all.
 - d) Other: _____
- 17) Please indicate the remedial steps, if any, the court took in these cases upon concluding that the prosecution had violated its disclosure obligations under your district's local rule or standing order. Check all that apply.
- a) No action taken
 - b) Court ordered immediate disclosure
 - c) Court ordered a continuance
 - d) Court excluded evidence
 - e) Court gave jury instruction
 - f) Court admonished federal prosecutor in open court and/or in a written opinion
 - g) Court held federal prosecutor in contempt
 - h) Court reported federal prosecutor to the Department of Justice Office of Professional Responsibility
 - i) Court reported federal prosecutor to the state's bar counsel or other disciplinary body
 - j) Other: Please explain
- 18) Overall, how satisfied are you with **federal prosecutor compliance** with your district's disclosure rules?
- a) Very Satisfied
 - b) Satisfied
 - c) Neither Satisfied nor Dissatisfied
 - d) Dissatisfied
 - e) Very Dissatisfied
- 19) In your opinion, in practice, are the differences between your local rule or standing order and the requirements of the United States Constitution and Rule 16 significant or not significant?
- a) Significant
 - b) Not Significant

Please explain:

- 20) In your opinion, do defense counsel in your district understand their discovery and disclosure obligations, including their obligation to provide reciprocal discovery under Rule 16(b) and reverse-*Jencks Act* material pursuant to Rule 26.2?
- a) Always
 - b) Usually
 - c) Sometimes
 - d) Rarely
 - e) Never
- 21) Please estimate the number of your cases in the past five years in which the court concluded that defense counsel failed to disclose reverse-*Jencks Act* material or other reciprocal discovery to the prosecution.
- a) 0 (None) [Go to Question 24]
 - b) 1
 - c) 2-4
 - d) 5-10
 - e) 11-20
 - f) More than 20
- 22) What was the nature of the most frequent violation?
- a) Matter concerned the scope of disclosure.
 - b) Matter concerned the failure to disclose on time.
 - c) Matter concerned the failure to disclose at all.
 - d) Other: _____
- 23) Please indicate the remedial steps, if any, the court took in these cases upon concluding that defense counsel had violated their disclosure obligations under your district's local rule or standing order. Check all that apply.
- a) No action taken
 - b) Court ordered immediate disclosure
 - c) Court ordered a continuance
 - d) Court excluded evidence
 - e) Court gave jury instruction
 - f) Court admonished defense counsel in open court and/or in a written opinion
 - g) Court held defense counsel in contempt
 - h) Court reported defense counsel to the state's Bar Council or other disciplinary body
 - i) Other: Please explain

- 24) Overall, how satisfied are you with **defense counsel compliance** with their disclosure obligations under the Federal Rules?
- a) Very satisfied
 - b) Satisfied
 - c) Neither Satisfied nor Dissatisfied
 - d) Dissatisfied
 - e) Very Dissatisfied

II. DISCLOSURE PROCEDURES AND PRACTICES PURSUANT TO THE UNITED STATES CONSTITUTION AND RULES 16 AND 26.2

This section seeks your views on specific pretrial disclosure procedures and practices by federal prosecutors and defense counsel pursuant to the Constitution, Rule 16, and Rule 26.2.

- 25) In your opinion, do federal prosecutors in your district understand their federal constitutional disclosure obligations (i.e., *Brady v. Maryland*, *Giglio v. United States*, and their progeny)?
- a) Always
 - b) Usually
 - c) Sometimes
 - d) Rarely
 - e) Never
- 26) In your opinion, do federal prosecutors in your district follow a consistent policy or approach with respect to pretrial disclosure to the defense of exculpatory and *Giglio* information?
- a) Always
 - b) Usually
 - c) Sometimes
 - d) Rarely
 - e) Never
- 27) Please estimate the number of your cases in the past five years in which the government requested the court enter a protective order prohibiting or delaying disclosure of exculpatory or *Giglio* information based on witness safety or other security considerations.
- a) 0 (None).
 - b) 1
 - c) 2-4
 - d) 5-10
 - e) 11-20
 - f) More than 20

- 28) Please estimate the number of your cases in the past five years in which you believe the government failed to comply with its obligations to disclose exculpatory or *Giglio* information.
- a) 0 (None) [Go to Question 30]
 - b) 1
 - c) 2-4
 - d) 5-10
 - e) 11-20
 - f) More than 20
- 29) Please estimate the number of these cases in which you believe the suspected violation was attributable to *Brady* materiality concerns (e.g., the prosecutor believed that the information at issue was unreliable or only minimally negated guilt).
- a) 0 (None)
 - b) 1
 - g) 2-4
 - h) 5-10
 - i) 11-20
 - j) More than 20
- 30) Please estimate the number of your cases in the past five years in which the court concluded that the government failed to comply with its obligations to disclose exculpatory and *Giglio* information.
- a) 0 (None) [Go to Question 33]
 - b) 1
 - c) 2-4
 - d) 5-10
 - e) 11-20
 - f) More than 20
- 31) What was the nature of the most frequent violation?
- a) Matter concerned the scope of disclosure.
 - b) Matter concerned the failure to disclose on time.
 - c) Matter concerned the failure to disclose at all.
 - d) Other

- 32) Please indicate the remedial steps, if any, the court took in these cases upon concluding that the prosecution had violated its disclosure obligations. Check all that apply.
- a) No action taken
 - b) Court ordered immediate disclosure
 - c) Court ordered a continuance
 - d) Court excluded evidence
 - e) Court gave jury instruction
 - f) Court admonished federal prosecutor in open court and/or in a written opinion
 - g) Court held federal prosecutor in contempt
 - h) Court reported federal prosecutor to Department of Justice Office of Professional Responsibility
 - i) Court reported federal prosecutor to the state's bar counsel or other disciplinary body
 - j) Other: Please explain
- 33) Overall, how satisfied are you with **federal prosecutor compliance** with the government's disclosure obligations under the Constitution?
- a) Very Satisfied
 - b) Satisfied
 - c) Neither Satisfied nor Dissatisfied
 - d) Dissatisfied
 - e) Very Dissatisfied
- 34) In your opinion, do defense counsel understand their discovery and disclosure obligations, including their obligation to provide reciprocal discovery under Rule 16(b) and reverse-*Jencks Act* material pursuant to Rule 26.2?
- a) Always
 - b) Usually
 - c) Sometimes
 - d) Rarely
 - e) Never

- 35) Please estimate the number of your cases in the past five years in which the court concluded that defense counsel failed to disclose reverse-*Jencks Act* material or other reciprocal discovery to the prosecution.
- a) 0 (None) [**Go to Question 38**]
 - b) 1
 - c) 2-4
 - d) 5-10
 - e) 11-20
 - f) More than 20
- 36) What was the nature of the most frequent violation?
- a) Matter concerned the scope of disclosure.
 - b) Matter concerned the failure to disclose on time.
 - c) Matter concerned the failure to disclose at all.
 - d) Other: _____
- 37) Please indicate the remedial steps, if any, the court took in these cases upon concluding that defense counsel had violated their disclosure obligations. Check all that apply.
- a) No action taken
 - b) Court ordered immediate disclosure
 - c) Court ordered a continuance
 - d) Court excluded evidence
 - e) Court gave jury instruction
 - f) Court admonished defense counsel in open court and/or in a written opinion
 - g) Court held defense counsel in contempt
 - h) Court reported defense counsel to the state's Bar Council or other disciplinary body
 - i) Other: Please explain
- 38) Overall, how satisfied are you with **defense counsel compliance** with their disclosure obligations under the Federal Rules?
- a) Very satisfied
 - b) Satisfied
 - c) Neither Satisfied nor Dissatisfied
 - d) Dissatisfied
 - e) Very Dissatisfied

III. POTENTIAL AMENDMENTS TO RULE 16

39) Do you favor amending Rule 16 to address pretrial disclosure of exculpatory and *Giglio* information?

- a) Yes [Go to Question 40]
- b) No [Go to Question 41]

40) Which of the following statements describes your view? Please check all that apply and if desired, provide any other comments in the box below.

- a. An amendment is **needed** because it will reduce the possibility that innocent persons will be convicted in federal proceedings.
- b. An amendment is **needed** because many disclosure violations pass undiscovered or without remedy.
- c. An amendment is **needed** because it will eliminate the confusion surrounding use of materiality as a measure of a prosecutor's pretrial disclosure obligations.
- d. An amendment is **needed** because the current remedies for prosecutorial misconduct are rarely employed.
- e. An amendment is **needed** because it will reduce the variations that currently exist in the circuits.
- f. Other: _____

41) Which of the following statements describes your view? Please check all that apply and if desired, provide any other comments in the box below.

- a. An amendment is **not needed** because there is no demonstrated need for change.
- b. An amendment is **not needed** because the current remedies for prosecutorial misconduct are adequate.
- c. An amendment is **not needed** because the recent reforms put into place by the Department of Justice will significantly decrease disclosure violations so that an amendment to Rule 16 is no longer needed to increase compliance.
- d. An amendment is **not needed** because it does not address what is really needed to stop abuse of disclosure obligations by prosecutors—increasing the frequency and severity of sanctions against prosecutors for failure to disclose such evidence.
- e. An amendment is **not needed** because it will not reduce the possibility that innocent persons will be convicted in federal proceedings.
- f. Other: _____

In 2007, the Advisory Committee on Criminal Rules proposed the following amendment to Rule 16, which was not approved by the Judicial Conference's Standing Committee on Rules of Practice and Procedure. Although the amendment as written was not approved by the Standing Committee, the Advisory Committee is continuing to study this issue. The remaining questions of the survey address potential amendments to Rule 16.

Rule 16. Discovery and Inspection

(a) GOVERNMENT'S DISCLOSURE.

(1) INFORMATION SUBJECT TO DISCLOSURE.

...

(H) *Exculpatory or Impeaching Information.* Upon a defendant's request, the government must make available all information that is known to the attorney for the government or agents of law enforcement involved in the investigation of the case that is either exculpatory or impeaching. The court may not order disclosure of impeachment information earlier than 14 days before trial.

42) What effect, if any, do you think this amendment might have on the privacy and security of cooperating witnesses?

Please explain:

43) What effect, if any, do you think this amendment might have on the privacy and security of crime victims?

Please explain:

44) Do you believe that a rule change eliminating the *Brady* materiality requirement would result in any change to the frequency of motions by defense counsel for *Brady* violations?

- a) Motions challenging the scope of disclosure would increase.
- b) Motions challenging the scope of disclosure would stay the same.
- c) Motions challenging the scope of disclosure would decrease.
- d) Other:

- 45) In your opinion, should information about a victim's or witness's background that would not be admissible in evidence (e.g., mental health treatment information)—and that the prosecutor believes does not bear directly on the witness's testimony—be disclosed?
- a) Yes
 - b) No
 - c) Don't Know
- 46) In your opinion, should all allegations of misconduct against law enforcement witnesses—including those found not to be substantiated by an internal investigation—be disclosed?
- a) Yes
 - b) No
 - c) Don't Know
- 47) With respect to defense witnesses, should all impeachment information in the possession of the defense be disclosed to the prosecution prior to trial?
- a) Yes
 - b) No
 - c) Don't Know
- 48) If you favor an amendment to Rule 16 different from that proposed in 2007, what language would you suggest?
- Please explain:
- 49) If you have any other comments or suggestions regarding the previously proposed amendment to Rule 16 or discovery disclosure in general that have not been covered in this survey, please provide them here.

Thank you for completing this survey. If you have any questions about the survey, please contact Laural Hooper (lhooper@fjc.gov; 202-502-4093) or Marie Leary (mleary@fjc.gov; 202-502-4069).

RULE 16 PRETRIAL DISCLOSURE PROCEDURES AND PRACTICES

A NATIONAL SURVEY OF FEDERAL PROSECUTORS

For the Advisory Committee on Criminal Rules of the
Judicial Conference of the United States

Administered by the Federal Judicial Center

Demographic Information

No individual attorney will be identified in any of the analyses or reports we produce.

- 1) How many years have you been a federal prosecutor?

_____ years

- 2) In which federal district do you primarily practice?

- 3) Does a local rule, standing order or other policy in your district require disclosure by the prosecution to the defense that extends beyond the requirements of *Brady v. Maryland*, *Giglio v. United States*, Rule 16 (Discovery and Inspection), or Rule 26.2 (Producing a Witness's Statement)? For example, your district may have specific time requirements for disclosure or mandate automatic disclosure.

- a) If yes, [Go to Part I]
b) If no, [Go to PART II]

I. DISTRICT SPECIFIC LOCAL COURT RULES, STANDING ORDERS OR OTHER POLICIES REGARDING PRETRIAL DISCLOSURE

This section seeks your views on pretrial disclosure procedures and practices by federal prosecutors and defense counsel in your district, including questions addressing your district's local rule or standing order regarding disclosure in criminal cases.

- 4) In your opinion, do the federal prosecutors in your district understand their pretrial disclosure obligations pursuant to your district's local rule or standing order?
 - a) Always
 - b) Usually
 - c) Sometimes
 - d) Rarely
 - e) Never

- 5) Does your district's local rule or standing order require federal prosecutors to disclose exculpatory or impeaching information to the defense **without regard to materiality** as defined in *Brady v. Maryland* and its progeny?
 - a) Yes [Go to Question 6]
 - b) No [Go to Question 7]

- 6) Do you believe that elimination of the materiality requirement has reduced problems or confusion in the prosecution's pre-trial discovery analysis? Please select one answer.
 - a) Eliminating materiality has reduced problems in some cases.
 - b) Eliminating materiality has reduced problems in most cases.
 - c) Eliminating materiality has not made a difference.
 - d) Other: Please explain:

- 7) Does your district require federal prosecutors to disclose to the defense exculpatory or *Giglio* information within a **fixed time** after indictment or arraignment?
 - a) Yes [Go to Question 8]
 - b)

- 8) Do you believe that this timing requirement has caused problems for the prosecution?
- a) The timing of disclosure has caused minor problems in some cases.
 - b) The timing of disclosure has caused minor problems in most cases.
 - c) The timing of disclosure has caused serious problems in some cases.
 - d) The timing of disclosure has caused serious problems in most cases.
 - e) The timing of disclosure has caused no problems.
 - f) No opinion.
 - g) Other: Please explain:
- 9) In the past five years, how often have you been unable to obtain cooperation from a witness because of the **timing** of disclosure to the defense required by local rule or standing order?
- a) Always
 - b) Usually
 - c) Sometimes
 - d) Rarely
 - e) Never
- 10) Please estimate the number of your cases in the past five years in which you have requested a protective order prohibiting or delaying the disclosure otherwise required by your local rule or standing order based on witness safety or other security considerations.
- a) 0 (None)
 - b) 1
 - c) 2-4
 - d) 5-10
 - e) 11-20
 - f) More than 20
- 11) Please estimate the number of your cases in the past five years in which the defense has alleged that the government failed to provide exculpatory or *Giglio* information in compliance with your local rule or standing order.
- a) 0 (None)
 - b) 1
 - c) 2-4
 - d) 5-10
 - e) 11-20
 - f) More than 20

- 12) Please estimate the number of your cases in the past five years in which the court concluded that the government failed to comply with its disclosure obligations pursuant to your district's local rule or standing order.
- a) 0 (None) [**Go to Question 15**]
 - b) 1
 - c) 2-4
 - d) 5-10
 - e) 11-20
 - f) More than 20
- 13) What was the nature of the most frequent violation of your district's local rule or standing order?
- a) Matter concerned the scope of disclosure.
 - b) Matter concerned the failure to disclose on time.
 - c) Matter concerned the failure to disclose at all.
 - d) Other: _____
- 14) Please indicate the remedial steps, if any, the court took in these cases upon concluding that the prosecution had violated its disclosure obligations under your district's local rule or standing order. Check all that apply.
- a) No action taken
 - b) Court ordered immediate disclosure
 - c) Court ordered a continuance
 - d) Court excluded evidence
 - e) Court gave jury instruction
 - f) Court admonished federal prosecutor in open court and/or in a written opinion
 - g) Court held federal prosecutor in contempt
 - h) Court reported federal prosecutor to Department of Justice Office of Professional Responsibility (OPR)
 - i) Court reported federal prosecutor to the state's bar counsel or other disciplinary body
 - j) Other: Please explain

15) Overall, how satisfied are you with **federal prosecutor compliance** with your district's disclosure rules?

- a) Very Satisfied
- b) Satisfied
- c) Neither Satisfied nor Dissatisfied
- d) Dissatisfied
- e) Very Dissatisfied

16) In your opinion, in practice, are the differences between your local rule or standing order and the requirements of the United States Constitution and Rule 16 significant or not significant?

- a) Significant
- b) Not Significant

Please explain:

[GO To Part II]

II. PRETRIAL DISCLOSURE PROCEDURES AND PRACTICES PURSUANT TO THE UNITED STATES CONSTITUTION AND RULES 16 AND 26.2

This section seeks your views on specific disclosure procedures and practices by federal prosecutors and defense counsel pursuant to the Constitution, Rule 16, and Rule 26.2.

- 17) In your opinion, do federal prosecutors in your district understand their federal constitutional disclosure obligations (i.e., *Brady v. Maryland*, *Giglio v. United States*, and their progeny)?
- a) Always
 - b) Usually
 - c) Sometimes
 - d) Rarely
 - e) Never
- 18) In your opinion, do federal prosecutors in your district follow a consistent policy or approach with respect to disclosure of exculpatory and *Giglio* information?
- a) Always
 - b) Usually
 - c) Sometimes
 - d) Rarely
 - e) Never
- 19) Please describe how federal prosecutors in your district determine whether information is material under the Constitution?
- 20) Please estimate the number of cases in the past five years in which you requested the court enter a protective order prohibiting or delaying disclosure otherwise required by the Constitution based on witness safety or other security considerations.
- a) 0 (None)
 - b) 1
 - c) 2-4
 - d) 5-10
 - e) 11-20
 - f) More than 20

- 21) Please estimate the number of your cases in the past five years in which the defense has alleged that the government failed to provide exculpatory or *Giglio* information (including cases in which the defense also alleged a violation of a local discovery rule).
- a) 0 (None)
 - b) 1
 - c) 2-4
 - d) 5-10
 - e) 11-20
 - f) More than 20
- 22) Please estimate the number of your cases in the past five years in which the court concluded that the government failed to comply with its disclosure obligations under the Constitution.
- a) 0 (None) [Go to Question 25]
 - b) 1
 - c) 2-4
 - d) 5-10
 - e) 11-20
 - f) More than 20
- 23) What was the nature of the most frequent violation of the constitutional disclosure obligations?
- a) Matter concerned the scope of disclosure.
 - b) Matter concerned the failure to disclose on time.
 - c) Matter concerned the failure to disclose at all.
 - d) Other: _____

24) Please indicate the remedial steps, if any, the court took in these cases upon concluding that the prosecution had violated its disclosure obligations under the Constitution. Check all that apply.

- a) No action taken
- b) Court ordered immediate disclosure
- c) Court ordered a continuance
- d) Court excluded evidence
- e) Court gave jury instruction
- f) Court admonished federal prosecutor in open court and/or in a written opinion
- g) Court held federal prosecutor in contempt
- h) Court reported federal prosecutor to the Department of Justice Office of Professional Responsibility (OPR)
- i) Court reported federal prosecutor to the state's bar counsel or other disciplinary body
- j) Other: Please explain

19) Overall, how satisfied are you with **federal prosecutor compliance** with the government's disclosure obligations under the Constitution?

- a) Very Satisfied
- b) Satisfied
- c) Neither Satisfied nor Dissatisfied
- d) Dissatisfied
- e) Very Dissatisfied

20) In your opinion, do defense counsel in your district understand their discovery and disclosure obligations, including their obligation to provide reciprocal pretrial discovery under Rule 16(b) and reverse-*Jencks Act* material pursuant to Rule 26.2?

- a) Always
- b) Usually
- c) Sometimes
- d) Rarely
- e) Never

- 21) Please estimate the number of your cases in the past five years in which the court concluded that defense counsel failed to disclose reverse-*Jencks Act* material or other reciprocal discovery to the prosecution.
- a) 0 (None) [Go to Question 30]
 - b) 1
 - c) 2-4
 - d) 5-10
 - e) 11-20
- 22) What was the nature of the most frequent violation?
- a) Matter concerned the scope of disclosure.
 - b) Matter concerned the failure to disclose on time.
 - c) Matter concerned the failure to disclose at all.
 - d) Other: _____
- 23) Please indicate the remedial steps, if any, the court took in these cases upon concluding that defense counsel had violated its disclosure obligations. Check all that apply.
- a) No action taken
 - b) Court ordered immediate disclosure
 - c) Court ordered a continuance
 - d) Court excluded evidence
 - e) Court gave jury instruction
 - f) Court admonished defense counsel in open court and/or in a written opinion
 - g) Court held defense counsel in contempt
 - h) Court reported defense counsel to the state's Bar Council or other disciplinary body
 - i) Other: Please explain
- 24) Overall, how satisfied are you with **defense counsel compliance** with their disclosure obligations under the Federal Rules?
- a) Very satisfied
 - b) Satisfied
 - c) Neither Satisfied nor Dissatisfied
 - d) Dissatisfied
 - e) Very Dissatisfied

III. POTENTIAL AMENDMENTS TO RULE 16

25) Do you favor amending Rule 16 to address pretrial disclosure of exculpatory and *Giglio* information?

- a) Yes [Go to Question 32]
- b) No [Go to Question 33]

26) Which of the following statements describes your view? Please check all that apply and if desired, provide any other comments in the box below.

- a. An amendment is **needed** because it will reduce the possibility that innocent persons will be convicted in federal proceedings.
- b. An amendment is **needed** because many disclosure violations pass undiscovered or without remedy.
- c. An amendment is **needed** because it will eliminate the confusion surrounding use of materiality as a measure of a prosecutor's pretrial disclosure obligations.
- d. An amendment is **needed** because the current remedies for prosecutorial misconduct are rarely employed.
- e. An amendment is **needed** because it will reduce the variations that currently exist in the circuits.
- f. Other: _____

27) Which of the following statements describes your view? Please check all that apply and if desired, provide any other comments in the box below.

- a. An amendment is **not needed** because there is no demonstrated need for change.
- b. An amendment is **not needed** because the current remedies for prosecutorial misconduct are adequate.
- c. An amendment is **not needed** because the recent reforms put into place by the Department of Justice will significantly decrease disclosure violations so that an amendment to Rule 16 is no longer needed to increase compliance.
- d. An amendment is **not needed** because it does not address what is really needed to stop abuse of disclosure obligations by prosecutors—increasing the frequency and severity of sanctions against prosecutors for failure to disclose such evidence.
- e. An amendment is **not needed** because it will not reduce the possibility that innocent persons will be convicted in federal proceedings.
- f. Other: _____

In 2007, the Advisory Committee on Criminal Rules proposed the following amendment to Rule 16, which was not approved by the Judicial Conference's Standing Committee on Rules of Practice and Procedure. Although the amendment as written was not approved by the Standing Committee, the Advisory Committee is continuing to study this issue. The remaining questions of the survey address potential amendments to Rule 16.

Rule 16. Discovery and Inspection

(a) GOVERNMENT'S DISCLOSURE.

(1) *INFORMATION SUBJECT TO DISCLOSURE.*

...

(H) *Exculpatory or Impeaching Information.* Upon a defendant's request, the government must make available all information that is known to the attorney for the government or agents of law enforcement involved in the investigation of the case that is either exculpatory or impeaching. The court may not order disclosure of impeachment information earlier than 14 days before trial.

28) What effect, if any, do you think this amendment might have on the privacy and security of cooperating witnesses?

Please explain:

29) What effect, if any, do you think this amendment might have on the privacy and security of crime victims?

Please explain:

30) Do you believe that a rule change eliminating the *Brady* materiality requirement would result in any change to the frequency of motions by defense counsel for *Brady* violations?

- a) Motions challenging the scope of disclosure would increase.
- b) Motions challenging the scope of disclosure would stay the same.
- c) Motions challenging the scope of disclosure would decrease.
- d) Other:

- 31) In your opinion, should information about a victim's or witness's background that would not be admissible in evidence (e.g., mental health treatment information)—and that the prosecutor believes does not bear directly on the witness's testimony—be disclosed?
- a) Yes
 - b) No
 - c) Don't Know
- 32) In your opinion, should all allegations of misconduct against law enforcement witnesses—including those found not to be substantiated by an internal investigation—be disclosed?
- a) Yes
 - b) No
 - c) Don't Know
- 33) With respect to defense witnesses, should all impeachment information in the possession of the defense be disclosed to the prosecution prior to trial?
- a) Yes
 - b) No
 - c) Don't Know
- 34) If you favor an amendment to Rule 16 different from that proposed in 2007, what language would you suggest?
- Please explain:
- 35) If you have any other comments or suggestions regarding the previously proposed amendment to Rule 16 or discovery disclosure in general that have not been covered in this survey, please provide them here.

Thank you for completing this survey. If you have any questions about the survey, please contact Laural Hooper (lhooper@fjc.gov; 202-502-4093) or Marie Leary (mleary@fjc.gov; 202-502-4069).