No.

In the Supreme Court of the United States

MARY WILKERSON - PETITIONER

v.

UNITED STATES OF AMERICA - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

APPENDIX V

PETITION FOR A WRIT OF CERTIORARI OF
MARY WILKERSON, PETITIONER

APPENDIX

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APPENDIX T

Affidavit – Chris Hall, Computer Tech
CJA Authorized
Doc. 446@A
Exhibit A for Motion for Prosecutorial Misconduct

Chris Hall Computer Consulting
1501 Third Ave
Albany, GA 31707
(229) 881-6212

August 24, 2015

To whom it may concern:

I was asked by Mr. Ledford to provide this letter regarding the technical issues we've encountered. I have independently provided various IT consulting services for numerous small businesses for over 13 years now. I consider myself to be experienced and knowledgeable with different aspects of small business IT requirements, but working on this case was the first time I have ever worked with electronic discovery, or any legal discovery for that matter. I have discussed this with the court already in several hearings.

As a reminder to the court, I originally only agreed to help Mr. Ledford get in contact with professional e-discovery service providers since I understood the technical terms involved and Mr. Ledford did not. The court is aware of our many attempts to get help from professional e-discovery service providers. These attempts spanned over a year as options were denied and we would continue to look for other options. As the court knows, with all the legal procedures involved in making a request through motions and then waiting for a response, a great deal of time passes. I was disappointed at each denial of getting a professional e-discovery service provider to help Mr. Ledford. I was equally thrilled at each new option that we found or that the court offered to us. As I've told the court before, I did not want to get further involved in the case and never asked Mr. Ledford if I could provide the technical assistance that was needed. I kept thinking each new option would be the appropriate technical help Mr. Ledford needed and my job as a go-between would then be over.

I finally thought we had a solution to our problem when the National Defender's Office in California agreed to help Mr. Ledford with by hosting the e-discovery data and helping Mr. Ledford search the data up until and throughout the trial. We attended several remote connection conference calls with the e-discovery expert in the California office just so that they had a very good idea of the amount of data involved. I recall them showing us how to count documents in each database. I then spent over a week copying the discovery data to encrypted hard drives to send to the California office so they could load and host the data for searching. Although, once the California office had the data in hand, they contacted us and informed us that unfortunately they would not be able to host such a large amount of data after all. In addition, there was a government shutdown about this same time and the California office also told us their budget had been cut and they would not be able to provide the help they had agreed to.

It wasn't until another motion request by Mr. Ledford to Judge Sands that the Judge then set up a conference call with the California office. The result of that call was that the California office would send us a laptop on loan with the Concordance software pre-installed. They also agreed to provide a limited amount of help to Mr. Ledford and whatever technical person he decided to work with. Since so much time had passed and I had become more familiar with what kind of help Mr. Ledford needed, I agreed to provide that technical service. I agreed to help mostly due to the fact that Mr. Ledford and Mrs. Wilkerson had completely run out of options and I was the last resort.

There are many details being left out but I think it's important to note that even with the laptop and software and limited amount of help from the California office, we still struggled immensely trying to learn and understand the e-discovery searching process. It turns out the laptop provided by the California office wasn't even powerful enough to handle searching such a large amount of data. The searches for key terms would take five to fifteen minutes or more for a simple keyword search. The searches should only take seconds, according to what we were told by the various e-discovery service providers that we spoke with. The specifications of the laptop were low by today's standards. Upon my recommendation, Mr. Ledford purchased a more powerful laptop which, after another motion request to Judge Sands, we were able to transfer a temporary license of the Concordance software and were then finally able to perform searches in a reasonable fashion. I think it's also very important to note that after all of the struggles we went through to just obtain the tools, so much time had passed that we only had two months to learn and use the Concordance software before the start of the trial.

Up until that point we had been trying our best to search the e-discovery data with simple search tools available in the Windows operating systems. It was very tedious and slow and we didn't even have a Bates Number Index Guide for most of that time to even understand what data we were seeing on the produced hard drives and media. Mr. Ledford asked over a year before the trial if there was some type of index guide to help understand what was contained in all of the data. The government told him that at that time there was no index guide.

I cannot stress enough how much we have struggled and continue to struggle with working with the produced e-discovery. Even with the help we received, we still cannot search one hundred percent of the Concordance load files. Like I said earlier, just because we have been provided load files it doesn't mean they are easily searchable. There are many steps and much time needed to make the load files searchable. I would guess that we are only able to search eighty percent of the produced Concordance load files due to not having the files fully prepared in the beginning. Again, we only had two months before the start of the trial before we were able to use the Concordance load files with any effectiveness. We spent many late hours during the trial still trying to search the data to help Mrs. Wilkerson with her defense.

The initial amount of e-discovery data was enormous, but subsequent productions of e-discovery kept coming un until not long before the trial. Mr. Ledford filed another motion about the last production of discovery at such a late date. Mr. Ledford asked me to testify to the court once more about not only the trouble we continued to have with the original huge amount of

data, but also how the trouble kept compounding with each new production of discovery. I recall Mr. Hearns telling the court that we shouldn't be having much trouble searching the data. I believe he said the data is "easily searchable" because the government provided the discovery in Concordance load files and we had the right tools, including the Concordance software and hardware and professional IT assistance. I testified to the court that just because we were provided the load files does not mean that the data is easily searchable.

As I've said, we initially received help from the National Defender's Office in California with preparing the original e-discovery productions to make it searchable with Concordance. I had no part in helping prepare the data in the beginning. To be honest, I did not even know there was much preparation needed. I thought it was as simple as Mr. Hearns stated. I thought that since we had Concordance load files from the government and we now had the Concordance software, we should just be able to search the data with no problems. I was wrong but wouldn't know it until much later. When the California office originally sent the laptop with Concordance installed, we were in fact able to perform searches on the data. We had no idea of the effort it took to prepare those load files. We only knew that it took quite some time before they sent the data back to us with the laptop. The problem then was that the laptop was not powerful enough. So as far as preparing the load files to be searchable, it at first seemed to be as easy as Mr. Hearns stated. Actually, it's nowhere near that easy. Maybe an experienced e-discovery professional who has spent years working with Concordance might find it easy. But I found it extremely difficult. I'll try to explain.

With the latest production of e-discovery not long before the start of the trial, Mr. Ledford was granted continuance to give us some time to search the additional data. This was nice but the truth was that at that time we had only been able to search a fraction of the original data. But we did use the time to try to prepare the latest production of discovery to search in Concordance. We contacted the e-discovery professional in the California office and told him about the latest production of discovery and that we needed help loading it into Concordance. It was then that I became aware that even with having load files there is still much preparation needed. We did another remote connection and he attempted to train me to prepare the load files, in case I needed to do it again. According to him, for each set of load files, a database has to be created before it can be searched with the Concordance software. He said there were twelve databases that needed to be created for the latest production. So I told him I would watch him on the remote connection as he created the first database, then I would get him to train me on the next. I wish I could explain the steps in creating a database from the load files, but it has been so long that I don't fully remember, because I never received the training. I recall there being steps about mapping the data so that the native, text, and image files would all be able to connect. Anyway, after one and a half hours of watching, I asked about how much time he expected it would take. He said he was only halfway through with creating the first database and there were eleven more to go. I asked if he thought I would be able to finish the databases myself, and he said maybe, but it would take a tremendous amount of time. I then explained the situation to Mr. Ledford, and we asked the e-discovery professional from the California office how much time would it take him to complete the databases, and he told us probably two weeks, but he was not going to be able to get to it for another week due to being

out of town. I believe it was at this time that Mr. Ledford filed the motion for continuance, and I testified once more about the troubles we were having.

When Mr. Hearns said the data is in load files and is easily searchable, this may be true for the government, but it was definitely not the case for us.

I was also asked by Mr. Ledford to help determine a reasonably accurate total calculation of electronic discovery produced. Even with Mr. Ledford's limited technical knowledge, he understood this was not a simple request. He has seen me struggle through the experience of learning about e-discovery and load files and how to work with them. He has seen me struggle to provide technical assistance regarding the e-discovery and load files even up to this day. I quickly told him it would be impossible for me to provide an exact number, but I would certainly make an attempt to provide an educated assumption.

It was very difficult to try to determine the exact number of documents or files or pages included in the electronic discovery. Again, I'm sure this is due to my limited experience and skillset of working with e-discovery. To attempt to calculate an accurate total of e-discovery produced, I had to rely on help provided before and during the trial from the third parties mentioned. I also did quite a bit of online research to further my understanding on the types of files included with Concordance load files and how best to determine the number of files involved.

It took me nearly two weeks of working various hours while calculating the e-discovery and I still wasn't able to go through all of the discovery productions to determine an accurate total amount produced. I had to cease tabulating the discovery because it was just taking too much time. I am only able to make an educated assumption based on the totals I was able to calculate.

In my opinion, the total number of "documents" in the produced discovery is just over 2.4 million. Also in my opinion, the overall total number of electronic files in the produced discovery is between 6 million and 6.5 million. This overall total is also a conservative assumption and could in fact be significantly less than the actual total. To say there are only 2.4 million electronic documents to search through is misleading. In my opinion there are well over 6 million electronic files or pages to search through.

We are all familiar with documents as we work with them on a daily basis. We know that a document, whether electronic, such as a PDF file or a hard copy can contain single or multiple pages. We can have one document but it might contain hundreds of pages. When one document is scanned and produced as e-discovery each of its pages will be a separate searchable file. So now instead of searching for keywords in one file, it's searching hundreds of files.

Then we have load files. In addition to a document containing multiple pages or files, load files compound that amount even more. I am by no means an expert about load files but I have

learned a little. When a hard copy of a document is scanned for e-discovery productions, there may be several versions of each page of the document saved in load files. The different versions saved are what make tools like Concordance so helpful. One version of each page will be a basic image of the page, obviously so we can see what the page looks like in it's original form. But a picture of the page is not searchable for text so that's when a text version of the file is created. While scanning the page, a feature called Optical Character Recognition (OCR) is used in which the scanner recognizes the shapes of letters in a document and recreates the document's words and paragraphs into a text file that would then be searchable for text keywords.

There are also are native files. For electronic files produced as e-discovery, the native file will also be saved a version of the document in the load files. Common documents like PDFs, Word documents, Excel spreadsheets, and even emails will be saved in their native format so that the file can be opened in the same program it was created with. As I've said before, even one electronic file can have many pages to search through once it is opened. This is how an overwhelming amount of 2.5 million documents can turn into an unbelievable amount with over 6 million actual files or pages to search.

That's where computer search tools like Concordance help so much. It can quickly search hundreds, thousands, or millions of documents, with the right setup of course. This is all great, but please keep in mind that up until two months before the trial, we did not have Concordance. We were using simple Windows search tools that were only slightly helpful. We spent a large amount of time opening files individually just to see what they were and reading through them. Remember, we did not even have a Bates Number Index Guide for most of this time. For the majority of the time before trial, we were randomly looking through over six million files.

Most recently Mr. Ledford asked if I could do a search for medical records, and even gave me a few names of which to search. I believe the list of names was pulled from some recent evidence media that I haven't been asked to work with yet. I was told the names were from the Evidence Disk or Victim Impact Statements. I was unable to find search results for any of the names in the e-discovery we have loaded for searching in Concordance, but a member of Mr. Ledford's staff and I did find just a few medical records. However, these medical records seem to have all of the patients' and doctors' information redacted.

I worked many hours helping with this case, as the court is fully aware and assisted in my compensation. Both Mr. Ledford and I were very conservative when tendering billable hours to the government. There was much more of my time involved with this case that we did not submit as billable time. We did not want in any way to take advantage of the government. This was an unbelievably enormous task to try and provide adequate technical assistance for this case. I did my best, but in my professional opinion, my best was not good enough to provide Mr. Ledford and Mrs. Wilkerson the e-discovery technical assistance that this case required. It's been said several times that Mr. Ledford and Mrs. Wilkerson had enough time, the necessary tools, and the expert IT assistance needed to adequately search the e-discovery files. I respectfully disagree. The tools were obtained too late which left us not enough time. I have

said from the very beginning that I had no experience with Concordance or in the e-discovery field. I agreed to help Mr. Ledford because he had no other options. I may be considered an IT expert regarding small business consulting services, but I am no expert with e-discovery. It was a very interesting experience, and I ended up learning quite a bit about Concordance and e-discovery, but the truth is Mr. Ledford and Mrs. Wilkerson did not have adequate expert IT assistance related to Concordance and searching the e-discovery data.

Sincerely,

Chris Hall

Chris Hall
Chris Hall Computer Consulting

APPENDIX U

E-mail FDA Information Technology Instructing
FDA Investigators on Use of Search Software
Using "Search Words"
(Exhibit 1 of Motion to Dismiss)
Doc. 201@1

From: Thomas, Phyllis
Sent: Monday, March 25, 2013 9:36 AM
To: Brillhart, Darcy E; Campbell, Philip S; Gaul, Sandra; Gray, Janet B; Neligan, Robert P; Satterwhite, Lesley; Zablan Jr., Russell
Subject: FW: Data call - ACTION REQUIRED!
Attachments: PCA Data Collection 3 21 2013 FOB Only.xlsx

Hi Everyone, please read the message below and let me know if you have any information pertaining to the data needed. Thanks

Phyllis E. Thomas
Information Technology Specialist
Food & Drug Administration, Atlanta
OC/OA/OIM/DIO/FOB/OPT 2
Work: 404-253-2237

BB: 770-329-3888

Fax: 404-253-1212
Phyllis.Thomas@FDA.HHS.GOV

From: Rivas, Elaine M
Sent: Sunday, March 24, 2013 2:16 PM
To: OIM-DOI-FOB OPTeam2 Atlanta
Subject: Fw: Data call - ACTION REQUIRED!

Please get on this data call first thing Monday morning. The majority of the users involved are in ATL.

Thanks - Elaine

From: Ponticello, Carl
Sent: Thursday, March 21, 2013 03:46 PM
To: Oliver, Michael; Rivas, Elaine M
Cc: Nelson, Richard
Subject:

Mike, Elaine,

Once again, we have been asked by HQ Security and Legal to assist with data discovery. This in regards to an ongoing DOJ action with Peanut Corporation of America. We were tasked with determining how much data is available for field staff that participated in the PCA action. **This is in regards to a litigation that will begin next**

week, so there is a crunch to get this done ASAP. They would like us to complete this by next week Friday, March 29.

I have attached spreadsheet has the list of names of the staff that were involved. These are all new names and do not appear on the previous searches. Right now, we are in Phase 1, so we do not need copies of the files and emails. We just need the amount of data that is available. Here are the instructions on the scope:

Scope of Phase 1: Identify the volume of data available (megabyte, gigabyte, terabyte) either on the network, hard drive and backup media for the custodians and media types listed in the table below. If no data can be found, indicate by entering "N/A". The names of the individual may or may not be spelled correctly. Should you encounter any issues with spelling, update the table with the correct spelling of name and communicate name change to all parties involved in the collection of data. Should multiple custodians be found to have identical or similar spelling of name, contact me for confirmation?

Time Period for the search terms: From January 2003 through present.

<u>Here are the search terms that we are looking for this time around:</u>
Search terms (all search terms should include the phrase "NOT ConAgra" to minimize the number of documents that are unrelated to PCA)

- "Peanut Corporation of America"
- PCA
- "Peanut Corp."
- "Tidewater Blanching"
- Tidewater
- Plainview
- Blakely
- "Golden Peanut Company"
- "Golden Peanut"
- Cubero
- "Martin-Cubero"
- "Martin Cubero"
- "Austin Peanut Butter Crackers"
- "Austin PB Crackers"
- "Keebler Peanut Butter Crackers"
- "Keebler PB Crackers"
- Austin AND crackers
- Keebler AND crackers
- Kellogg* and crackers
- "P.P. Sales"
- "P.P.Sales"
- "PP Sales"
- "PPSales"
- "Deibel Laborator*"
- "Deibel Lab*"
- Deibel
- "J. Leek Laborator*"
- "J. Leek Lab*"

- "J. Leek"
- Parnell*
- "Parnell's Pride"
- Salmonella
- Sal. (whole word only)
- Sal+
- Sal-
- "S. Tennessee"
- "S. Typhimurium"
- "S. Anatum"
- "Re-test"
- Retest
- "Peanut butter"
- PB
- "Peanut Paste"
- "Mexican Peanut Paste"
- "Mexican Paste"
- Parnell
- Kilgore
- Lightsey
- Wilkerson
- McFay
- Sams
- Hardrick
- Garrocho
- Kimbrel
- "Grey Adams"
- "Richard Silverman"
- "Silverman, Richard"
- "Hunter Sims"
- "Sims, Hunter"

Carl

Chief, FOB, DOI, OIM
US Food & Drug Administration
P: 718-662-5513
F: 718-662-5532

APPENDIX V

Transcript – October 23, 2014
Juror Misconduct Hearing 1
Doc. 591

REDACTED TRANSCRIPT

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

THE UNITED STATES OF AMERICA	:	
vs.	:	
STEWART PARNELL, MICHAEL PARNELL, MARY WILKERSON,	:	CASE NO.: 1:13-CR-12 (WLS)
Defendants.	:	

COURT INQUIRY AS TO ALLEGED JUROR MISCONDUCT

BEFORE THE HONORABLE JUDGE W. LOUIS SANDS
ON THURSDAY, OCTOBER 23, 2014
AT THE C.B. KING UNITED STATES COURTHOUSE
ALBANY, GEORGIA

APPEARANCES:

ON BEHALF OF GOVERNMENT:	**ALAN DASHER** **MARY ENGLEHART** **PATRICK HEARN**
ON BEHALF OF DEFENDANTS: STEWART PARNELL -	**KENNETH HODGES** **THOMAS J. BONDURANT** **JUSTIN LUGAR** **SCOTT AUSTIN**
MICHAEL PARNELL -	**EDWARD TOLLEY** **DEVIN SMITH**
MARY WILKERSON -	**TOM LEDFORD**
REPORTED BY:	Sherry C. Parker, CCR License # B-2339

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EXHIBITS

matter that you or any other juror had reached a verdict on any basis other than the evidence presented in the courtroom?

JUROR 34: No, sir.

THE COURT: Now, I want you to listen carefully because I'm going to now go over a matter that I think you need to be aware of, and I want to ask you about it.

Now, one of the instructions that I gave in the trial of the case -- I think I -- my recollection is the first day of the trial --

JUROR 34: Uh-huh.

THE COURT: -- and before you all went out for your first recess or for your break for lunch, and I have my own notes because I handwrote it. So I don't have an official transcription, but I'm satisfied that it would substantially say the following. And it says: Jurors, as I have explained to you, this case is expected to be extended, including jury selection, which will probably take all of today and possibly into tomorrow. It is very important that you closely follow and abide by all of my instructions. You are instructed that until you are excused you shall not discuss this case or these proceedings with anyone, including other jurors, any members of your family or allow any juror to discuss this with you. Any violation of this instruction is to be reported directly to me at your earliest opportunity, without discussing it with anyone else. You need only tell one of the Court Officers that you

need to communicate with me and I will speak to you directly.

Each of you is further noticed and advised that a violation of these instructions can subject the violator to contempt and to sanctions of the Court. The purpose of this is to ensure that the case proceeds according to the law and the rules of the Court so that each party, the Government and each Defendant, might have the benefit of the fair and impartial trial each is entitled to under our Constitution.

Now, I went ahead and I had some other things also that you wouldn't have any contact with Counsel or their employees and that sort of thing.

Now, do you recall the Court telling you that? All of you?

JUROR 34: Yes, sir.

THE COURT: Now, did you ever advise the Court of anyone making -- of any juror or any other person making any sort of statement to you about this case or about any Defendant?

JUROR 34: No, sir.

THE COURT: Did you tell the Court about any statement made by any juror to you?

JUROR 34: No, sir.

THE COURT: About this case?

JUROR 34: No, sir.

THE COURT: Or about any Defendant?

JUROR 34: No, sir.

you gave to Mr. --

JUROR 34: Yes, sir.

THE COURT: -- I believe to Mr. Hodges. All right. You do?

JUROR 34: Uh-huh.

THE COURT: All right. I did not show that to you all, if you all want to look at it to make sure it's an accurate copy, but that's exactly what it is.

MR. HODGES: Yes.

THE COURT: All right. I thought we should mark these as exhibits for this portion. Just call it Court 1, so we can mark documents accordingly for this proceeding.

Now, this affidavit, as the Court understands it, arose from some contact that you had with Ms. Wilkerson, Ms. Mary Wilkerson, the Defendant --

JUROR 34: Yes, sir.

THE COURT: -- one of the Defendants in this case.

Now, first of all, I'm going to ask you, did you know Ms. Wilkerson prior to this?

JUROR 34: No, sir.

THE COURT: And just tell me how this came about, what were the circumstances, and when this occurred?

JUROR 34: I ran into her and I just asked her if I could introduce myself to her and I spoke to her.

THE COURT: Where did you run into her?

judged and I didn't know what to do.

THE COURT: Okay. Were those the words you said to her, that you thought you did as much as you could for her?

JUROR 34: Yes, sir.

THE COURT: Now, I don't want my words now. I want to know your words.

JUROR 34: Right. Yeah, those are my words.

THE COURT: Okay. And when you say doing for her, what did you think you was -- what had you done for her?

JUROR 34: As far as help -- I felt like they was all pre-judged and -- because...

THE COURT: That who was all --

JUROR 34: The comments that were made.

THE COURT: That who was all pre-judged?

JUROR 34: All of them were.

THE COURT: So you think all the jurors were pre-judged about what?

JUROR 34: Not all of them, but there was several of them that made comments that they were all guilty and this was even prior before we were selected, and...

THE COURT: Okay. Well, so you just walked up out of nowhere and said I did what I could for you, you thought they were pre-judged? That's what you did?

JUROR 34: Sir?

THE COURT: That's what happened?

THE COURT: What was it? What did you talk about different?

JUROR 34: About our kids running, you know, stuff like that, and that was it.

THE COURT: Okay. So she had no response at all when you said that she had been pre-judged or they had been pre-judged?

JUROR 34: No, I told -- and I just -- I was kind of upset, you know. I felt like -- I was the one that was upset.

THE COURT: All right. But even when --

JUROR 34: Emotional. Uh-huh.

THE COURT: Even when you told her that --

JUROR 34: Yes, sir.

THE COURT: -- she didn't say she appreciated it or she understood it or she had --

JUROR 34: No, she told me she appreciated it.

THE COURT: I mean, so she really didn't say -- I don't -- when I ask you what was said --

JUROR 34: Yeah.

THE COURT: -- I don't want you deciding what you think was important and what you think --

JUROR 34: Right.

THE COURT: -- was not important. It's just I want to know, as best you can, exactly what was said because it's important for all of us to know what that was.

THE COURT: And -- well, your opinion about who was pre-judged, was that about everybody or --

JUROR 34: I felt like that it was everybody.

THE COURT: Okay. But, were you concerned enough to say that to anybody, other than the Defendant Wilkerson?

JUROR 34: I didn't say it to anyone else other than her.

THE COURT: Well, why didn't you say something to the others? I'm not saying you need to be justified, I'm just asking why. Why didn't you contact the other Defendants and express your concerns to them?

JUROR 34: Well, I didn't know how to contact them.

THE COURT: Okay. And so you would have if you had known how?

JUROR 34: Probably.

THE COURT: Okay. Now, what was the next thing that happened with regard to this information that you -- about this information, what you had expressed to Ms. Wilkerson? What happened after that?

JUROR 34: I didn't really tell her as far as how it happened or how I felt they were pre-judged, I just told her I just felt like they were pre-judged.

THE COURT: Okay. And so still, when was the next thing anything else happened?

JUROR 34: Sir?

THE COURT: When was the next time anything else happened about this, that came up about the jury deliberations, in your opinion?

JUROR 34: When Mr. Ken Hodges called me.

THE COURT: Okay. And when did he call you? Say going back to the -- you say a few days after the trial, you saw --

JUROR 34: Mary Wilkerson.

THE COURT: -- Ms. Wilkerson. So how much later after the -- that conversation with Ms. Wilkerson did Mr. Hodges call you, or contact you? I don't know whether he called you or how he contacted you.

JUROR 34: Probably October 3rd, around October 3rd, he gave me a call.

THE COURT: Okay. And so, how long before that October 3rd had you had your conversation with Ms. Wilkerson

JUROR 34: I hadn't had a conversation with her since then.

THE COURT: Yeah. I'm asking relationship -- you know that on October 3rd, you were contacted by Mr. Hodges.

JUROR 34: Uh-huh.

THE COURT: Right?

So how long before the 3rd of October had the conversation between you and Ms. Wilkerson taken place?

JUROR 34: Oh, it had been since the trial was over

tell me whether the -- what was said. Take your time, don't worry. Don't be rushing, we've got plenty of time. I want to know what was said in each of the conversations that you've had, as fully and as much detail as you can. Because --

JUROR 34: Right.

THE COURT: -- the affidavit is very general --

JUROR 34: Oh, I understand.

THE COURT: -- and I'm covering that specifically. So I'll give you time now to just kind of say it in your words, is what I'm saying.

JUROR 34: We were just talking and I was just telling him that, you know, there was some that made a remark about they were all guilty because they killed nine people. And I asked them well, how do you know that? And said the onliest way you could know that is you'd had to research or watch TV or... I was pretty much telling them -- I pretty much told Ken Hodges that.

THE COURT: Now, but, I -- you lost me again. When you say that -- saying they're guilty because they killed nine people, and the only way you could know that is to research that or television. Is that you saying that or they're saying that? I mean --

JUROR 34: No.

THE COURT: -- you understand why I'm asking you?

JUROR 34: Oh, yes, sir.

THE COURT: It's important to know who said what.

JUROR 34: -- there's a Juror 35. I don't know 35's last name. 35's one of the jury members and 35's the one who made that remark.

THE COURT: What remark?

JUROR 34: That they were -- they killed nine people, they're all guilty. 35 even made that comment before we were ever selected. And I really didn't know what to do because this is my first time serving as a juror. And then there was remarks also made by Juror 89 about people that were sleeping. Well, if you missed it, you can watch the news. Just...

THE COURT: What I'm getting back to, this business about research on the matter.

JUROR 34: Uh-huh.

THE COURT: Is that your statement about how -- the only way people could know those things was by research or did someone say they were researching?

JUROR 34: That's what I told them, I said well the onliest way you'd have to -- you would know that, you would have to research it.

THE COURT: That's what you said --

JUROR 34: I said that to them, yes.

THE COURT: -- to the person who said that?

JUROR 34: Uh-huh.

THE COURT: They didn't say to you that they had been

researching?

JUROR 34: Right.

THE COURT: That's important --

JUROR 34: Uh-huh.

THE COURT: -- to know. That's -- because we're trying to find out whether someone did something that they were not supposed to do --

JUROR 34: Right.

THE COURT: -- that would have affected the rights of other persons to a fair trial. So...

JUROR 34: Okay.

THE COURT: So it may sound like I'm being nitpicky, to use a real common term.

JUROR 34: Uh-huh.

THE COURT: But it's important so we know exactly what happened and --

JUROR 34: Right.

THE COURT: -- from what you know, as best you can remember. Nobody has a perfect memory. Most folks -

JUROR 34: Right.

THE COURT: Most folks don't; I understand that. But in terms of as best you can give it to us --

JUROR 34: Uh-huh.

THE COURT: -- I want to know what was said by whom. Now, when you say this statement was made by

Juror 35 --

JUROR 34: Uh-huh.

THE COURT: -- and I think for the record, that would probably be Juror 35; does that sound right to you?

JUROR 34: Uh-huh.

THE COURT: Okay. I think -- nobody has a different idea --

MR. HODGES: I think that's the right one.

THE COURT: -- there was any other Juror 35; right? But I understand, you're saying you only know 35 by her first name.

The statement you say 35 made, when did that statement occur? And tell me again, the setting. What were the circumstances? And just tell me --

JUROR 34: Okay.

THE COURT: -- who said what and --

JUROR 34: Okay. Juror 35 -- Juror 35 was sitting beside me the entire time we was out, before we were ever selected or while -- that we were being picked. She made that comment to me.

THE COURT: Again, tell me --

JUROR 34: 35 made the comment, they're all guilty, they killed nine people, so they're all guilty.

THE COURT: Okay. Now, was 35 sitting on your right or your left, or what?

JUROR 34: 35 was sitting on my left.

THE COURT: On your left? Okay.

And when 35 said that, was 35 -- who was -- 35 was talking specifically to you?

JUROR 34: I told 35 that 35 couldn't say that because 35 didn't -- we hadn't even been selected yet to -- or anything.

THE COURT: What -- how long -- far along in the process, as best you can tell, did that statement take place?

JUROR 34: 35 said that like the second day we were here.

THE COURT: Okay. You said the second day. And how -- where -- what part of the day was it?

JUROR 34: On a Tuesday, it was during -- it took four days to select the jurors.

THE COURT: Yeah.

JUROR 34: So it was like the second day.

THE COURT: But there were -- questions were being asked. Do you recall what was being covered, roughly, at the time?

JUROR 34: Sir?

THE COURT: Do you recall roughly what was being talked about as far as the questions at the time? The questions that the Court was asking around the time that 35 made that comment to you?

JUROR 34: We didn't know what the Courts were doing at the time.

they killed nine people, and I was like how do you know?

THE COURT: Okay.

JUROR 34: And I was like, you can't say that yet.

THE COURT: Okay. And when you said how do you know and you can't say that, what --

JUROR 34: Right. 35 didn't say anything else to me about it then.

THE COURT: Okay. Now, you're -- do you remember that after the -- during the jury selection there was a time that a number of jurors, including yourself --

JUROR 34: Uh-huh.

THE COURT: -- were brought here into the --

JUROR 34: Sir?

THE COURT: That were brought in here, into this room --

JUROR 34: Uh-huh.

THE COURT: -- in the chair where you're sitting right now, and asked whether you had heard anything about this case at all?

JUROR 34: I hadn't heard anything about this case at all at the time.

THE COURT: Or anybody talk about the case? You were asked kind of -- it wasn't just -- it was a wide-open question.

JUROR 34: Say that again, now.

THE COURT: It was a wide-open question, it wasn't --

-- I don't know, I was kind of scared to.

THE COURT: What do you mean you were scared to? What were you scared of?

JUROR 34: I just hadn't ever served as a juror before and didn't understand -- or I guess I didn't understand.

THE COURT: What about it didn't you understand?

JUROR 34: I didn't realize I could tell on people.

THE COURT: What do you mean tell on people?

JUROR 34: Like when 35 made that comment.

THE COURT: But why did you think you could tell on 35 after the trial was over? After everything was over with and nothing could be done about it, what was -- what was that doing if that was not telling on 35 when you talked to Mr. Hodges?

JUROR 34: Because I felt bad about everything and --

THE COURT: But, so you didn't feel bad --

JUROR 34: -- and I realized I could and...

THE COURT: You didn't -- why did you realized you could?

JUROR 34: I don't know, I just -- I don't know, really.

THE COURT: All right. Let 34 have a copy of the affidavit. Make sure you have a copy to look at it.

(Whereupon, document tendered to Juror 34)

THE COURT: Now, in Paragraph 3 of your affidavit,

since they expressed their opinions about this. Now you say this now means that at some other time somebody said something else. Which is it?

JUROR 34: I heard -- I've heard them say they did their own research, then I --

THE COURT: Whom? Of whom?

JUROR 34: I don't know who.

THE COURT: There were twelve people, who were the them?

JUROR 34: I don't know who it was because we was just sitting in there and...

THE COURT: Juror 34, you spent six weeks with twelve jurors --

JUROR 34: Uh-huh.

THE COURT: -- in the jury room and you hear all this discussion, and someone says something that you find inappropriate that they must be doing their own research and they can't do it; but you have no idea who said it?

JUROR 34: I have no idea who said it.

THE COURT: So what specifically did these people that you don't know who said it say, in the exact words they said it, to the best you can recall?

JUROR 34: All they did, they said they done research, and that was it.

THE COURT: Okay. And what research did they say they

had done?

JUROR 34: On this case.

THE COURT: I mean, what research did they say they had done? Did they say I did research and here's what my findings are? What did they say?

JUROR 34: They said they done research, and they killed nine people, and...

THE COURT: No. 34, you are -- and I'm not arguing with you --

JUROR 34: Right.

THE COURT: -- or trying to suggest anything bad about your purpose. But, it is difficult for the Court to tell the difference between what you characterize something as being and what people say. I want to know what the people said, so the Court and the parties can decide -

JUROR 34: Right.

THE COURT: -- what, if anything, that means to this case.

JUROR 34: Pretty much, that's all they said. I mean, they didn't --

THE COURT: I mean, if I ask you this, you understand when I say quote -- quote what was said about whoever. What did they say? Tell me.

JUROR 34: That's all they said.

THE COURT: No. No, that's not all. What did they

say? I'm asking you again so that I can make sure I understand.

JUROR 34: They just said they done research and they're guilty, they killed nine people.

THE COURT: No. Someone said they --

JUROR 34: Uh-huh.

THE COURT: -- saying a person said something would have to say they did research, or I know they did research. They wouldn't say they done research or what you just said; that's your characterization. What was said?

JUROR 34: They really didn't say.

THE COURT: They really didn't say what?

JUROR 34: What they had -- or what they researched.

THE COURT: That's my point. That's what I want to understand. The difference of saying -- if someone said I've done research --

JUROR 34: Uh-huh.

THE COURT: -- nobody said what that research was; is that correct?

JUROR 34: They said it was on this case.

THE COURT: I understand what they say it was about, they could have said it could have been about the moon.

JUROR 34: Right.

THE COURT: But what was said about the research?

JUROR 34: That was -- as far as I -- they researched the case and it was -- they're all pretty much guilty, is all

pretty much they said.

THE COURT: That's what was said?

JUROR 34: Uh-huh.

THE COURT: Okay. Now, the other thing I wanted to know about was when this -- you know, you say you don't recall who said it, so did one person say this?

JUROR 34: Yes. I can't remember who, though.

THE COURT: Was this a male juror or a female juror?

JUROR 34: I think it -- . It's .

THE COURT: It was a male juror. You don't remember who it was, but they said they had done research?

JUROR 34: Right.

THE COURT: Okay. Now, when in the jury deliberations -- that took several days, and we were on break because of those days -- when did -- was this statement made?

JUROR 34: This is when there was the eighteen of us that were back -- were in there.

THE COURT: This was back when all --

JUROR 34: Uh-huh.

THE COURT: I think there were sixteen.

JUROR 34: But this is during -- when we still had the alternates.

THE COURT: This statement was made while there were alternate jurors?

JUROR 34: Sir?

THE COURT: The alternate jurors were there?

JUROR 34: Yeah. Uh-huh.

THE COURT: But the jury -- do you recall -- you understand, though, the deliberations were about would have only had twelve jurors deliberating?

JUROR 34: Right.

THE COURT: So while the jurors were deliberating, this statement was not made?

JUROR 34: No. This was made during when there was the eighteen of us that were in there.

THE COURT: Okay. So there was no voting or anything taking place --

JUROR 34: Right. No vote.

THE COURT: -- during that? Okay.

So, and I think I may understand it. If I'm right, you agree -- you can tell me; if not, don't. When you say jury deliberation, you're including all the time you all would be in the room --

JUROR 34: Yes.

THE COURT: -- by yourselves?

JUROR 34: Uh-huh.

THE COURT: Okay. I understand.

And not just when you all were discussing specifically to decide --

JUROR 34: Right. This is when we wasn't supposed to

be even discussing the case.

THE COURT: Okay. All right. I understand. But, when you said the eighteen --

JUROR 34: Right.

THE COURT: -- that gives me a better understanding of the context of what was said.

Was there any response by other jurors or yourself to that juror saying that I've done research and --

JUROR 34: No, I didn't say anything.

THE COURT: You didn't say -- did anybody else enter into any discussion with the -- that juror?

JUROR 34: No.

THE COURT: So that I understand it, and I think it -- I may have gone through most of what I need to ask you about, then I'm going to give the attorneys the opportunity to suggest any questions they may have later.

So while you all were going over the, the verdict form and discussing each Defendant in each count, that statement had been made before then and not during that time?

JUROR 34: Uh-huh. That's right.

THE COURT: Is that right?

JUROR 34: Uh-huh.

THE COURT: All right. We're going to take a short break, anyway, at this time.

Juror 34, don't discuss what you've said in here

JUROR 34: Uh-huh.

THE COURT: Okay. And when you say when they were sleeping, was that during the deliberations or that was while the trial was going on?

JUROR 34: Uh-huh.

THE COURT: Okay. And so 89 says to them, if you -- don't worry about going to sleep, you can find out by watching the news?

JUROR 34: Right.

THE COURT: So did -- what, if anybody, said in response to that?

JUROR 34: They just laughed.

THE COURT: Did anybody ever indicate at any time that they were being informed by watching the news?

JUROR 34: Uh-uh.

THE COURT: Okay. Now, let's return to your affidavit because there's a couple things I want to get clarified. Now, you told me that when you say the eighteen, but I reminded you I think there were sixteen jurors.

JUROR 34: Right, it wasn't.

THE COURT: But, that's not a problem, I understand. That this statement was made about this person said they killed nine people, or something to that effect.

JUROR 34: Yes, sir. Uh-huh.

THE COURT: I'm not trying to quote you exactly, but

just so you know what statement I was talking about. You said that happened at that stage of it.

JUROR 34: Uh-huh.

THE COURT: Now, in your affidavit though, you say, I believe, down at Paragraph 5 -- this is after -- Paragraph 6, that you -- first of all, I'm sorry, Paragraph 3, you talked about this research that a juror had done. And you told me a few minutes ago that this statement was made while there was the sixteen of you --

JUROR 34: Uh-huh.

THE COURT: Okay. Now, then looking at Paragraph 4, it says one of the things that was mentioned was that the salmonella that came from Peanut Corporation of America caused nine deaths. Now, when you say one of the things was mentioned, are you talking about what this person mentioned or what someone else separately mentioned?

JUROR 34: Sir?

THE COURT: Are you talking about what the juror who made this statement while the sixteen of you were there --

JUROR 34: Yes. Uh-huh.

THE COURT: -- is that the same statement you're talking about?

JUROR 34: Uh-huh.

THE COURT: Okay. So -- okay.

And then you say, in the next paragraph, number 5, you

get a time and place, and who.

JUROR 34: Uh-huh.

THE COURT: Now, you say this discussion of deaths...

JUROR 34: Now, we didn't really have a discussion of a death.

THE COURT: Yeah, but see, but your affidavit says after discussion of the deaths, all jurors voted guilty; and that's what I want to understand. I know that that's a very short statement, so I want you to --

JUROR 34: Right.

THE COURT: -- to fill in the -- all the facts about it, is what I'm saying, so we understand what you mean by all the discussions -- after the discussions about death. First of all, when did the discussion take place?

JUROR 34: There really wasn't a discussion of a death.

THE COURT: Okay. So what about it then that occurred?

JUROR 34: It was just when Juror 35 mentioned the deaths of the nine people, that was it.

THE COURT: Okay. And when did 35 mention that?

JUROR 34: 35 mentioned that to me before we was ever selected.

THE COURT: Yeah, I know, but we're not talking about that.

you remember?

JUROR 34: 35 was just saying because of the nine deaths.

THE COURT: Okay.

JUROR 34: That was about it.

THE COURT: Now, did 35 say they're guilty because of the nine deaths or that they caused nine deaths? In other words, again, I want to know, as best you recall, what 35 words were. I know how you understood --

JUROR 34: As far as I recall --

THE COURT: -- how you understood 35, but what did 35 say?

JUROR 34: I understood 35 stated they killed nine people, so...

THE COURT: Okay. And did 35 specify who killed nine people, or 35 just said they did?

JUROR 34: Just all -- 35 said they all did.

THE COURT: They killed nine people; okay. Did anybody say anything in response to what 35 said?

JUROR 34: No.

THE COURT: Okay. Now, again, going back to understanding that there were twelve of you there and this was while the twelve of you were considering the case. And you told me earlier that when there was a first vote taken, some people voted not guilty. Now, do you recall whether the statement that

you say Juror 35 made, was it made before that first vote was taken or was it made after that first vote was taken?

JUROR 34: Before the first, I mean --

THE COURT: Pardon? I'm sorry?

JUROR 34: From the beginning.

THE COURT: In other words, 35 made the statement even before the vote was taken?

JUROR 34: Uh-huh.

THE COURT: Okay. And when that vote was taken, you've told me that some people --

JUROR 34: Right.

THE COURT: -- voted not guilty.

JUROR 34: They still -- only two of us.

THE COURT: Only two of you --

JUROR 34: Uh-huh.

THE COURT: -- voted not guilty after 35 made that statement?

JUROR 34: Uh-huh.

THE COURT: Okay. All right.

JUROR 34: We wanted -- we pretty much wanted to see evidence, but where 35 just pretty much already had her opinion.

THE COURT: Okay. I understand you understood that 35's mind was made up and -

JUROR 34: Right, 35's mind was made up.

THE COURT: Okay. So, but this statement was made,

there was a vote, and you said there two of you all who voted not guilty?

JUROR 34: Uh-huh.

THE COURT: Okay. And then what happened? Did you all continue to deliberate?

JUROR 34: We did, and they just pretty much, well here's the evidence, so we wound up going with guilty.

THE COURT: Okay. But -- so, but you all discussed the -- when you say deliberate, you all actually discussed the evidence, as I --

JUROR 34: Yeah.

THE COURT: Am I correct?

JUROR 34: Uh-huh.

THE COURT: Did you all look at the exhibits?

JUROR 34: Yes.

THE COURT: And discussed people's testimony; is that right?

JUROR 34: Do what? Yeah.

THE COURT: You discussed the testimony of the witnesses?

JUROR 34: Uh-huh.

THE COURT: Now -- now, at any other time was this statement made about there being nine deaths --

JUROR 34: No.

THE COURT: -- caused?

APPENDIX W

Transcript Excerpts – November 12, 2014
Juror Misconduct Hearing 2
Doc. 592

REDACTED TRANSCRIPT

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

THE UNITED STATES OF AMERICA	:	
vs.	:	
STEWART PARNELL, MICHAEL PARNELL, MARY WILKERSON,	:	CASE NO.: 1:13-CR-12 (WLS)
Defendants.	:	

COURT INQUIRY AS TO ALLEGED JUROR MISCONDUCT
-Continued from October 23, 2014-

BEFORE THE HONORABLE JUDGE W. LOUIS SANDS
ON WEDNESDAY, NOVEMBER 12, 2014
AT THE C.B. KING UNITED STATES COURTHOUSE
ALBANY, GEORGIA

APPEARANCES:

ON BEHALF OF GOVERNMENT:	**ALAN DASHER** **PATRICK HEARN**
ON BEHALF OF DEFENDANTS: STEWART PARNELL -	**THOMAS J. BONDURANT** **KENNETH HODGES**
MICHAEL PARNELL -	**EDWARD TOLLEY** **DEVIN SMITH**
MARY WILKERSON -	**TOM LEDFORD**
REPORTED BY:	Sherry C. Parker, CCR License # B-2339

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any opinion about the case, meaning about the guilt or innocence of anybody?

JUROR 35: No.

THE COURT: Any Defendant? Any person at all?

JUROR 35: No.

THE COURT: Did you make such a statement to anybody?

JUROR 35: No.

THE COURT: Did anybody in your presence, another juror or anyone else for that matter, during the jury selection ever make a statement in your presence indicating their opinion about the guilt or innocence of any Defendant?

JUROR 35: No.

THE COURT: Among those things, did you hear any statement or discussion about any deaths having been caused at all in this case by anybody?

JUROR 35: With a juror?

THE COURT: Right.

JUROR 35: No

THE COURT: Do you hear anyone else outside of a juror make any such a statement?

JUROR 35: No.

THE COURT: Did you make such a statement?

JUROR 35: No.

THE COURT: Okay. Now, just to get down to the heart of this matter, do you recall Juror 34?

process, that is before you all were seated as a jury to hear the evidence in the case, did you hear any statement made by anybody that the opinion -- their opinion, that the Defendants were guilty and that they had caused the deaths -- they had caused some deaths. Anything of that nature? That's not a quote, but any statement of that nature did you hear stated by anybody?

JUROR 37: That's saying that the party was guilty?

THE COURT: Uh-huh.

JUROR 37: Well, I can't recall no names, but you know, people was -- some of them was saying it. But I just can't call no names or who was saying it because, like I say, shucking and jiving -- we did a lot of shucking and jiving in there. And then, you know some of us will holler out and say he told us don't talk about the case.

THE COURT: Okay.

JUROR 37: And we'd laugh about it.

THE COURT: Okay. Now, when you say someone told us don't talk about the case, when did that happen?

JUROR 37: I can't recall, basically at first when it started happening, when we first started out.

THE COURT: Okay. When you say when we first started out, again, remember what I'm saying. Is that during the jury -- when you were on the jury or during the jury selection?

JUROR 37: During the jury selection, yes.

asking you about now is any statements made by you or anybody else before you --

JUROR 37: Okay.

THE COURT: -- were in the box and in the jury room.

JUROR 37: Oh, yeah. A lot of statements were made before we got in the jury.

THE COURT: Okay.

JUROR 37: And mine -- I kept saying I don't know nothing about the case until I got here and started hearing it from them.

THE COURT: Okay.

JUROR 37: Right.

THE COURT: Okay. Started hearing the evidence in the case?

JUROR 37: Right.

THE COURT: Okay. Now, to make sure we're clear again, you stated that Juror 35 had not stated at that time --

JUROR 37: No.

THE COURT: -- before you all were selected --

JUROR 37: No.

THE COURT: -- 35 did not make any comment that you heard about --

JUROR 37: No, because I didn't know 35 then.

THE COURT: Okay.

THE COURT: Okay. That's when you all were seated out in -- when you were seated out on the benches in the courtroom?

JUROR 37: Right.

THE COURT: Okay. Now, when you say just talking around, what do you mean by that?

JUROR 37: Like I said, when I first come up here, I never knew anything about the case. All these years it was going on, I never knew anything about it but a lot of people out there knew about it. And I told them that was my first time hearing it, so that's why some people was saying guilty, they guilty, do this, do that, do that, like that.

THE COURT: When you say some people, is that while you all are sitting there in the courtroom --

JUROR 37: Right.

THE COURT: -- while court's in session?

JUROR 37: No, while we was being -- getting ready to be selected.

THE COURT: Okay. Okay.

JUROR 37: Uh-huh.

THE COURT: Yeah, that's --

JUROR 37: Because it was so many of them in there.

THE COURT: Yeah. Okay. I understand.

JUROR 37: That's the only way I can say, you know.

THE COURT: Okay. Now, I -- what I'm trying to

unintentional, shall be immediately brought to -- made known to the Court.

All right. Now, do you recall me giving that instruction --

JUROR 37: Yes.

THE COURT: -- by the Court?

All right. Now, so with that in mind, now you say that while y'all were on recess or when court wasn't in session, people was making statements?

JUROR 37: Yes.

THE COURT: Now, were these people in a conversation with you, or are you talking about other conversations of other people that you are overhearing?

JUROR 37: Well, in the section where I was sitting, you know, like I say, joking around, saying this and that. I didn't know nothing about the case, but most of the people that was around me, they knew about it, and I told them this was my first time hearing about it.

THE COURT: What did they say they knew about it? Did they say what they knew about it?

JUROR 37: Like them people killed them people, they did this, they did that. And then I said, well y'all don't know that, you know. And then we threw stuff in about they had it going on but they got greedy, and all stuff like that. We was saying stuff like that, but I was putting my little input in it,

too.

THE COURT: Okay. What, if anything, did you say?

JUROR 37: Like I told them, I didn't nothing about the case.

THE COURT: Okay.

JUROR 37: All I know is what y'all saying, how y'all that, you -- they got -- you know, they got to prove it before you can prosecute them. So, stuff like that.

THE COURT: Okay. Now, when you say what they were saying, do you remember any specific person that said they killed people?

JUROR 37: I didn't know, all I knew the people when we was sitting out there. But the only -- the older lady, I can't remember her name, and then the little young guy, that's the little young, dark-skinned guy, I don't remember his name, but I know faces. And that's all mostly was said, you know. Some was saying fry them, they need to fry them, all this and that. But...

THE COURT: Okay. Let's take it one step at a time.

JUROR 37: Okay.

THE COURT: You said the dark person who had said this, was that person later on the jury?

JUROR 37: No. No, it wasn't -- none of them that was sitting with me got pulled in.

THE COURT: None -- of the people that you heard

-- are you fully understanding the questions that I'm asking?

JUROR 35: Yeah, I understand now. I was thinking about in this jury room, not in the courtroom.

THE COURT: Okay.

JUROR 35: Okay.

THE COURT: All right. And, of course, as I asked you too, in the jury room was -- did you make any such statement that somebody --

JUROR 35: The only statement I made while we were in the jury room, we need to look at the evidence in order to come to the decision that we did.

THE COURT: Okay. And that's -- that was during the deliberations?

JUROR 35: Right.

THE COURT: Okay. All right. Let me ask you something else, did you -- now, you all were given instructions almost every day, I'm sure every day --

JUROR 35: Uh-huh. Not to talk about it.

THE COURT: Each time not to talk about the case.

JUROR 35: Uh-huh.

THE COURT: And not to do any research or anything --

JUROR 35: Right.

THE COURT: -- about the case. Do you recall anyone indicating that they had done any type of research on this case?

JUROR 35: No.

Any violation with this instruction is to be reported directly to me at your earliest opportunity without discussing it with anyone else. You need only tell one of the Court Officers that you need to communicate with me and I will speak to you directly.

Each of you is further noticed and advised that a violation of this instruction can subject the violator to contempt and other sanctions by the Court. The purpose of this is to ensure that the case proceeds according to the law and rules of the Court so that each party, the Government and each Defendant, might have the benefit of the fair and impartial trial each is entitled to under our Constitution.

You are also reminded and instructed that you should not personally engage with Counsel, parties or members of their staff, nor they with you. Any violation, even if innocent or unintentional, shall be immediately made known to the Court.

And with that, do you recall me giving that instruction to all of you early in the case?

JUROR 35: Yes.

THE COURT: All right. The Court did that just to refresh your memory.

Now, going back to that time when these -- this selection process that I described to you was ongoing, did you make any statement to anybody or any -- to a juror or anybody else about having any opinion about this case -- about any --

MR. HODGES: Juror 34, Your Honor.

THE COURT: Juror 34. I'm sorry. I keep -- I apologize for getting 34's name -- but, Juror 34, a fellow juror in the case?

JUROR 35: A person named ?

THE COURT: Juror 34. 34's last name is Juror 34.

MR. DASHER: Juror 34.

THE COURT: Juror 34.

JUROR 35: I know Juror 34.

THE COURT: Okay. You recall 34 being on the jury --

JUROR 35: Yes.

THE COURT: -- with you?

JUROR 35: Uh-huh.

THE COURT: Okay. And were you all sitting near or next to each other at all during the jury process; do you recall? The jury selection process?

JUROR 35: No, not that I know of.

THE COURT: Okay. Do you recall who you sat beside?

JUROR 35: Juror 37. I might have sat beside 37 one time.

THE COURT: Okay. May have sat beside who one time?

JUROR 35: Juror 34, I might have.

THE COURT: Okay. Okay. So you're not saying that you didn't, you just don't remember?

JUROR 35: I just don't remember.

JUROR 35: I didn't know how many deaths was caused. No, I didn't tell 34 that.

THE COURT: Do you recall telling 34 anything?

JUROR 35: 34 was discussing -- what did 34 say? Only thing I remember saying to 34, that we have the evidence, we need to go by the evidence that the lawyers had, and that's it.

THE COURT: Okay. But, when did that -- when did you make that statement?

JUROR 35: After everybody had to go back to the courtroom.

THE COURT: Okay.

JUROR 35: And make our demnation (ph) about what was going on.

THE COURT: Okay. Okay.

JUROR 35: Okay.

THE COURT: That's what I'm going to need to be very clear about.

JUROR 35: Okay.

THE COURT: So we all know you're not a lawyer and other jurors are not lawyers.

JUROR 35: No. No.

THE COURT: So things that we take routinely understood is not necessarily the same way you all see it.

JUROR 35: And I told them to go through the file, we need to go through the file --

don't know, fifteen, twenty minute conversation with Juror 93. And in short, it was in direct contrast to everything 93 testified to today. 93 said that there were other jurors that indicated they were predisposed, 93 said there was discussions of death and 93 did confirm that someone said they had done their own outside research.

So I don't know how the Court wants to deal with that, but I will state in my place or testify under oath as to the substance of that conversation. Unfortunately, I didn't record it or have a witness to it; it was on the telephone. And I asked Juror 93 if 93 would sign an affidavit and 93 said 93 would. And then the next day when I got to Albany to get the affidavits, I tracked 93 down and 93 said, well, I'm in Americus. And I said, I'll come to you. And 93 said, well, I'd rather not. And I said, well, if you're called to come back to court, will you come back and tell the truth? And 93 said, absolutely.

But 93 would not make eye contact with me here today and, quite frankly, I was stunned. And I'm sure other Counsel that's sitting here can tell you that prior to your calling 93 in here I had told them that Juror 93 was going to come in here and say the same thing Juror 34 said because that's exactly what 93 had told me.

THE COURT: Well, of course, it always becomes problematic when Counsel becomes a witness. It's difficult.

Anybody else, other than Juror 93?

MR. LEDFORD: If it please the Court, Your Honor, there's Juror 42. I've had no contact with 42 or any of these jurors other than in the courthouse, the courtroom, during this trial but -- as Ms. Wilkerson's attorney. But Juror 42 may have called a Mr. Chris Hall. Mr. Chris Hall is the computer or technical assistant that the Court has approved to help us on this case.

Now, he's from Albany and he contacted me several days after the verdict was in and he said that he, on Saturday -- I believe that the verdict came in on a Friday, to the best of my recollection, and it was the day after the verdict. I believe it was -- had to be a Saturday he told me, it happened on a Saturday, that his phone -- he was not home, but his phone apparently had been called or his number had been called. And when he went to -- got home and saw that had happened, he picked it up or saw a return call number or something on the phone, and it was a number he recognized or found out to be Juror 42. Now, he did not call 42 back.

Juror 42 knows him somehow. I'm not sure of the details and he didn't elaborate on it during the trial, but -- and he was not there, I don't think, the week of jury selection, Your Honor. But he believes it to have come from Juror 42 house the day after the verdict. And so, I wanted the Court to be aware of that. If you might consider calling and seeing if

APPENDIX X

U. S. DEPARTMENT OF JUSTICE
Criminal Division Discovery Policy
October 2010

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

October 18, 2010

MEMORANDUM

TO: All Criminal Division Attorneys

FROM: Lanny A. Breuer
Assistant Attorney General

SUBJECT: Criminal Division Policy Regarding Discovery Practices

INTRODUCTION

This policy is intended to provide guidance on the Criminal Division's discovery practices and rules related to disclosure.[1] It is designed to facilitate Criminal Division (CRM) Attorneys' compliance with disclosure obligations, to identify common discovery-related issues of which all CRM Attorneys should be aware, and to ensure that CRM Attorneys have adequate resources and guidance available to enable them to make appropriate disclosure decisions, either on their own or in consultation with the leadership of their section and the Division. In general, this policy encourages earlier and more liberal disclosure by Division prosecutors than either the Constitution or law requires. This policy is also intended to be sufficiently flexible to give attorneys discretion where permitted by law and to account for the fact that CRM Attorneys operate in jurisdictions throughout the nation that have different discovery rules and practices.

Overview of the Policy

The discovery obligations of CRM Attorneys are established by the Federal Rules of Criminal Procedure, 18 U.S.C. § 3500 (the Jencks Act), *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), relevant case law, the Department of Justice's policy on the disclosure of exculpatory and impeachment information, applicable Local Rules of Criminal Procedure, discovery orders entered in particular cases, and the rules governing professional conduct. All CRM Attorneys must comply with the authorities set forth above. In addition, as set forth more fully in this guidance, it is the policy of the Criminal Division to provide discovery beyond what the rules, statutes, and case law mandate. When faced with a close call as to whether certain information should be disclosed, CRM Attorneys should err on the side of

[1] This policy guidance is intended to satisfy the January 4, 2010 directive from the Deputy Attorney General to develop a discovery policy with which CRM prosecutors must also comply. *See* "Requirement for Office Discovery Policies in Criminal Matters," Memorandum dated January 4, 2010. The guidance, which is solely prospective, is for internal CRM use only and does not create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party, or witness in any administrative, civil, or criminal matter.

Exhibit "A"

disclosure. While there may well be important reasons – such as the need to protect a witness or to safeguard ongoing investigations of other people or other crimes – for withholding information that does not have to be disclosed, as a general rule, CRM Attorneys should provide expansive discovery whenever and wherever possible, recognizing that this approach may facilitate plea negotiations or otherwise expedite litigation. In the long term, moreover, expansive discovery will foster and support a reputation for candor and fair dealing among CRM Attorneys.

This policy is divided into two major parts. Part I of the policy describes a number of matters that CRM Attorneys should discuss with case agents during the course of an investigation to ensure that all discoverable material is appropriately identified and preserved. Part II of the policy describes the discovery process and provides guidance to CRM Attorneys on what should be gathered for review, what should be disclosed, when it should be disclosed, and how it should be disclosed. Incorporated within Part II is the substantive guidance provided by the Deputy Attorney General in his January 4, 2010 memorandum entitled "Guidance for Prosecutors Regarding Criminal Discovery," as well as additional substantive guidance specifically applicable to CRM Attorneys.

Interaction with Policies and Practices of the USAOs

Because the Criminal Division, like other Main Justice components, litigates in every federal jurisdiction in the United States, and frequently in partnership with local United States Attorneys' Offices (USAOs), CRM Attorneys do not operate under just one circuit's law or one set of local rules. As such, CRM Attorneys should in all cases consult with the USAO for the district in which they are litigating to discuss local policies and practice and, where appropriate, to develop a plan for how to handle discovery. The following general principles apply to all investigations and cases in which CRM Attorneys are involved:

- **Applicability of CRM Policy:** In general, CRM Attorneys should follow the discovery practices of the Criminal Division. If a conflict arises in cases being worked jointly with a USAO between local discovery practice and CRM Division practice, then the CRM Attorney should discuss the conflict with the AUSA. If, after discussing it with the AUSA, the CRM Attorney believes that a particular aspect of local discovery practice should be followed, the CRM Attorney should seek approval from his or her Deputy Chief or Section Chief to depart from Criminal Division policy. In deciding whether or not to grant such approval, the Deputy Chief or Section Chief should consider a variety of factors, including but not limited to: whether the CRM Attorney is the lead attorney on the case; whether the departure from Criminal Division policy is nonetheless consistent with the overall goal of providing expansive discovery; whether specific case-related considerations justify the departure from Criminal Division policy; and whether the departure is necessary to maintain a positive working relationship with the USAO. In those instances in which the Deputy Chief or Section Chief believes that departure from the Criminal Division policy is unwarranted, and he or she is unable to resolve the policy conflict with his or her supervisory counterpart in the USAO, the conflict should be raised with the CRM front office for appropriate action.

- **Supervisory Consultation:** CRM Attorneys are responsible for keeping their supervisors informed of any discovery conflicts or issues that arise. A CRM Attorney should consult his or her supervisor any time the CRM Attorney has a question or doubt about discovery practice or guidelines.

    - If there is any question regarding applicable ethics rules, the CRM Attorney should consult with the Criminal Division's Ethics Advisors and/or the Department's Professional Responsibility Advisory Office.

    - If any agent or agency is resistant to complying with a CRM discovery practice applicable to the investigation, the CRM Attorney's supervisor should be notified immediately.

SPECIFIC PRACTICES

PART I: Investigative Practices

I. Start of Investigation

A. Prosecution Team Coordination. In all cases, as early as possible and long before indictment, CRM Attorneys should work with investigators and any participating AUSAs to plan for how discovery obligations will be addressed and satisfied.

B. Instructions to Agent at Start of Investigation. CRM Attorneys are responsible for ensuring (in coordination with the relevant AUSAs, if any), that all agents working on criminal matters are aware of the discovery policies and practices governing the criminal investigation. Specifically, CRM Attorneys (again, in coordination with the relevant AUSAs) should provide the following guidance to investigators, either orally or in writing. A sample guidance letter can be found at Appendix A.

1. Witness Interviews

Although not required by law, generally speaking, witness interviews[2] should be memorialized by the agent.[3] Agent and prosecutor notes and original recordings should be preserved, and CRM Attorneys should confirm with agents that substantive interviews will be memorialized. When a CRM Attorney participates

[2] "Interview" as used herein refers to a formal question and answer session with a potential witness conducted for the purpose of obtaining information pertinent to a matter or case. It does not include conversations with a potential witness for the purpose of scheduling or attending to other ministerial matters. Potential witnesses may provide substantive information outside of a formal interview, however. Substantive, case-related communications are addressed below. Trial preparation meetings with witnesses are also separately addressed below.

[3] In those instances in which an interview is audio or video recorded, further memorialization will generally not be necessary, other than, of course, memorialization of the fact that such an interview occurred.

in an interview with an investigative agent, the CRM Attorney and agent should discuss note-taking responsibilities and memorialization before the interview begins (unless the CRM Attorney and the agent have established an understanding through prior course of dealing). Whenever possible, CRM Attorneys should not conduct an interview without an agent present, to avoid the risk of making themselves a witness to a statement and being disqualified from handling the case if the statement becomes an issue. If exigent circumstances make it impossible to secure the presence of an agent during an interview, CRM Attorneys should make every attempt to have another office employee present.

2. **Rough Interview Notes**

   a. Agents should be asked to retain all rough notes of interviews (whether taken by hand or on computer), even if notes are described, consolidated, or otherwise formalized in a final investigative report, including a final MOI, FBI-302, DEA-6, or ROI (collectively, "MOI").

   b. Notes should not be taken on pre-existing question outlines or other documents that may be inappropriate to provide to the defense.

3. **Correspondence Practices**

   a. Agents should be instructed that all correspondence relating to the investigation must be retained with the case file.

   b. Correspondence includes:
      i. Formal written correspondence;
      ii. Informal written correspondence; and
      iii. Emails, including any emails to or from witnesses.

4. **Specific Email Practices**

   a. Because email communications may not be as complete as investigative reports and may have the unintended effect of circumventing an agency's procedures for writing and reviewing reports, agents should be encouraged to memorialize all substantive written communications between agents and prosecutors in the form of an MOI or similar formal investigative report, and not in the form of email. Substantive written communications include factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or interactions with witnesses/victims, and factual issues relating to credibility.

   b. Agents should be instructed that this policy is not intended to discourage emails between agents and CRM Attorneys regarding investigative strategies or legal issues, nor is it intended to discourage the efficient practices of sending

formal investigative reports as email attachments to prosecutors or of using email for scheduling (e.g., a witness interview, grand jury time, etc.).

c. If, notwithstanding the CRM Attorney's requests to the agent, substantive information pertaining to a case or witness is communicated in an email, the CRM attorney should save and print out the email and maintain the printed email in the case file for review and possible production. Alternatively, the agent who authored or received the email should be advised to write an MOI that reflects the substantive information contained therein.

II. Pre-Indictment

A. Instructions to Case Agent Regarding Materials to be Gathered

1. CRM Attorneys (in coordination with the relevant AUSAs, if any) should ask the case agent to gather all discovery materials outlined in Part II below. The request should be made sufficiently in advance of indictment so that the gathering and review process can be completed before the indictment is returned. If the nature of the case makes that timing impossible, the request should be made as early as practicable.

2. CRM Attorneys are responsible for monitoring agent compliance to ensure that discovery can be made available in accordance with Part II, below.

B. Instructions to Victim/Witness Coordinator Regarding Statements by Victims or Witnesses

1. In cases involving victims, CRM Attorneys (in connection with the relevant AUSA, if any) should give the relevant victim/witness coordinator a list of victims prior to indictment. CRM Attorneys should also instruct the victim/witness coordinator to provide the CRM Attorney with any statements the victims may make about the offense.

2. CRM Attorneys should instruct the victim-witness coordinator and the case agent to record all benefits or services provided to the victim-witness, including non-monetary benefits or assistance.

PART II: Discovery and Disclosure

I. Step 1: Gathering and Reviewing Discoverable Information

A. Where to Look–The Prosecution Team

Department policy states:

> It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant.

USAM § 9-5.001. This search duty also extends to information CRM Attorneys are required to disclose under Federal Rules of Criminal Procedure 16 and 26.2 and the Jencks Act.

In most cases, "the prosecution team" will include the prosecutors, agents, and law enforcement officers working directly on the case. In multi-district investigations, investigations that include both CRM Attorneys and AUSAs, and parallel criminal and civil proceedings, this definition will necessarily be adjusted to fit the circumstances. In addition, in complex cases that involve parallel proceedings with regulatory agencies (SEC, FDIC, EPA, etc.), or other non-criminal investigative or intelligence agencies, the CRM Attorney should consider whether the relationship with the other agency is close enough to make it part of the prosecution team for discovery purposes. Some factors to be considered in determining whether to review potentially discoverable information from another federal agency include:

- Whether the CRM Attorney and the agency conducted a joint investigation or shared resources related to investigating the case;
- Whether the agency played an active role in the prosecution, including conducting arrests or searches, interviewing witnesses, developing prosecutorial strategy, participating in targeting discussions, or otherwise acting as part of the prosecution team;
- Whether the CRM Attorney knows of and has access to discoverable information held by the agency;
- Whether the CRM Attorney has obtained other information and/or evidence from the agency;
- The degree to which information gathered by the CRM Attorney has been shared with the agency;
- Whether a member of an agency has been made a Special Assistant United States Attorney;

- The degree to which decisions have been made jointly regarding civil, criminal, or administrative charges; and
- The degree to which the interests of the parties in parallel proceedings diverge such that information gathered by one party is not relevant to the other party.

Many cases arise out of investigations conducted by multi-agency task forces or otherwise involving state law enforcement agencies. In such cases, CRM Attorneys should consider (1) whether state or local agents are working on behalf of the prosecutors or are under the prosecutors' control; (2) the extent to which state and federal governments are part of a team, are participating in a joint investigation, or are sharing resources; and (3) whether the prosecutors have ready access to the evidence. Courts will generally evaluate the role of a state or local law enforcement agency on a case-by-case basis. Therefore, CRM Attorneys should make sure they understand the law in the relevant circuit and the local USAO's practice regarding discovery in cases in which a state or local agency participated in the investigation or on a task force that conducted the investigation.

CRM Attorneys are encouraged to err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes. Carefully considered efforts to locate discoverable information are more likely to avoid future litigation over *Brady* and *Giglio* issues and avoid surprises at trial.

B. What to Review

To ensure that all discovery is disclosed on a timely basis, generally all potentially discoverable material within the custody or control of the prosecution team should be reviewed.[4] The review process should cover the following areas:

1. The Investigative Agency's Files: With respect to Department of Justice law enforcement agencies, with limited exceptions,[5] the CRM Attorney should be granted access to the substantive case file and any other file or document the CRM Attorney has reason to believe may contain discoverable information related to the matter being prosecuted.[6] Therefore, the CRM Attorney can personally review the file or documents or may choose to request production of potentially discoverable materials from the case agents. With respect to outside agencies, the CRM Attorney should request access to files and/or production of all potentially discoverable material. The investigative agency's entire investigative file, including documents such as FBI Electronic Communications (ECs), inserts, emails, etc. should be reviewed for discoverable information. If such information

[4] How to conduct the review is discussed below.

[5] Exceptions to a CRM Attorney's access to Department law enforcement agencies' files are documented in agency policy, and may include, for example, access to a non-testifying source's files.

[6] Nothing in this guidance alters the Department's Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses contained in USAM §9-5.100.

is contained in a document that the agency deems to be an "internal" document such as an email, an insert, an administrative document, or an EC, it may not be necessary to produce the internal document, but it will be necessary to produce all of the discoverable information contained in it. CRM Attorneys should also discuss with the investigative agency whether files from other investigations or non-investigative files such as confidential source files might contain discoverable information. Those additional files or relevant portions thereof should also be reviewed as necessary.

2. Confidential Informant (CI)/Witness (CW)/Human Source (CHS)/Source (CS) Files: The credibility of cooperating witnesses or informants will always be at issue if they testify during a trial. Therefore, CRM Attorneys are entitled to access to the agency file for each testifying CI, CW, CHS, or CS. Those files should be reviewed for discoverable information and copies made of relevant portions for discovery purposes. The entire informant/source file, not just the portion relating to the current case, including all proffer, immunity, and other agreements, validation assessments, payment information, and other potential witness impeachment information should be included within this review.

   If a CRM Attorney believes that the circumstances of the case warrant review of a non-testifying source's file, the CRM Attorney should follow the agency's procedures for requesting the review of such a file.

   CRM Attorneys should take steps to protect the non-discoverable, sensitive information found within a CI, CW, CHS, or CS file. Further, CRM Attorneys should consider whether discovery obligations arising from the review of CI, CW, CHS, and CS files may be fully discharged while better protecting government or witness interests such as security or privacy via a summary letter to defense counsel rather than producing the record in its entirety.

   CRM Attorneys must always be mindful of security issues that may arise with respect to disclosures from confidential source files. Prior to disclosure, CRM Attorneys should consult with the investigative agency to evaluate any such risks and to develop a strategy for addressing those risks or minimizing them as much as possible, consistent with discovery obligations. This strategy may well include the seeking of protective orders from the court in appropriate cases.

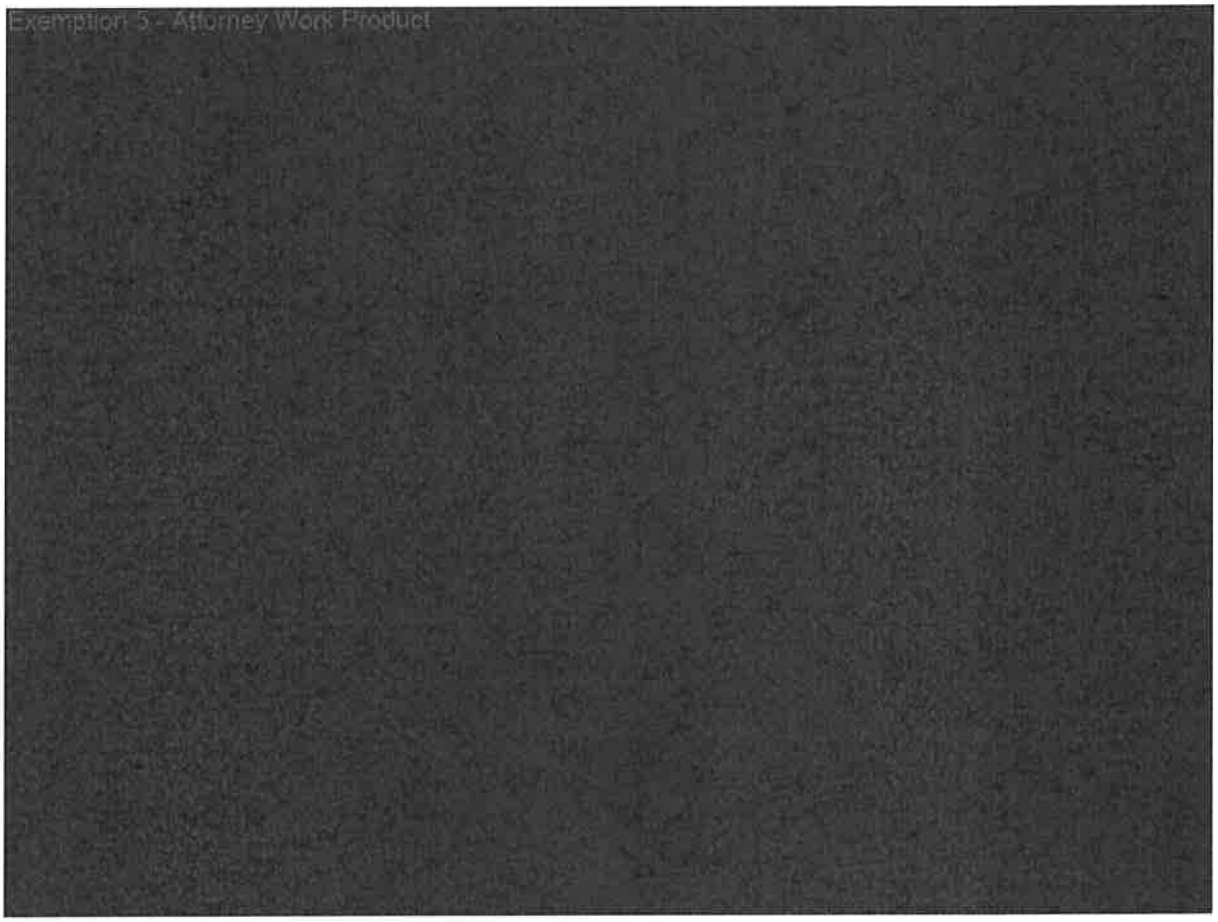
3. Evidence and Information Gathered During the Investigation: Generally, all evidence and information gathered during the investigation should be reviewed, including anything obtained during searches or via subpoenas, etc. As discussed more fully below in Step 2, in cases involving a large volume of potentially discoverable information, CRM Attorneys may discharge their disclosure obligations by choosing to make the voluminous information available to the defense.

4. Documents or Evidence Gathered by Civil Attorneys and/or Regulatory Agencies in Parallel Civil Investigations: If a CRM Attorney has determined that a regulatory agency such as the SEC is a member of the prosecution team for purposes of defining discovery obligations, that agency's files should be reviewed. Of course, if a regulatory agency is not part of the prosecution team but is conducting an administrative investigation or proceeding involving the same subject matter as a criminal investigation, CRM Attorneys may very well want to ensure that those files are reviewed not only to locate discoverable information, but also to locate inculpatory information that may advance the criminal case. Where there is an ongoing parallel civil proceeding in which Department civil attorneys are participating, such as a *qui tam* case, the civil case files should also be reviewed.

5. Substantive Case-Related Communications: "Substantive" case-related communications may contain discoverable information. Those communications that contain discoverable information should be maintained in the case file or otherwise preserved in a manner that associates them with the case or investigation. "Substantive" case-related communications are most likely to occur (1) among prosecutors and/or agents, (2) between prosecutors and/or agents and witnesses and/or victims, and (3) between victim-witness coordinators and witnesses and/or victims. Such communications may be memorialized in emails, memoranda, or notes. "Substantive" communications include factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or interactions with witnesses/victims, and factual issues relating to credibility. Communications involving case impressions or investigative or prosecutive strategies without more would not ordinarily be considered discoverable, but substantive case-related communications should be reviewed carefully to determine whether all or part of a communication (or the information contained therein) should be disclosed.

6. Potential *Giglio* Information Relating to Law Enforcement Witnesses: CRM Attorneys should have candid conversations with the federal agents with whom they work regarding any potential *Giglio* issues, and they should follow the procedure established in USAM § 9-5.100 whenever necessary before calling a law enforcement employee as a witness. CRM Attorneys should be familiar with circuit and district court precedent and local practice regarding obtaining *Giglio* information from state and local law enforcement officers.

   The following questions, among others, should be asked of all testifying law enforcement witnesses. Note that the following questions are quite broad; an affirmative answer to any of these questions does not necessarily mean that a *Giglio* disclosure is necessary. The issue of when and whether a *Giglio* disclosure is required is governed by USAM § 9-5.100:



All Sections within the Criminal Division have an attorney designated as that Section's *Giglio* coordinator. At least two weeks before a trial begins in which a federal, state, or local law enforcement witness is expected to testify, and as soon as practicable before a suppression or sentencing hearing begins in which such a witness is expected to testify, the CRM Attorney should give the *Giglio* coordinator the name and employing agency of every law enforcement witness who is expected to testify. In addition, the CRM Attorney should let the *Giglio* coordinator know whether the CRM Attorney desires a formal request to the employing agency of the law enforcement witness for all potential *Giglio* material on the witness in the agency's files.

7. Potential *Giglio* Information Relating to Non-Law Enforcement Witnesses and Fed. R. Evid. 806 Declarants: All potential *Giglio* information known by or in the possession of the prosecution team relating to non-law enforcement witnesses should be gathered and reviewed. That information includes, but is not limited to:

- Prior inconsistent statements (possibly including inconsistent attorney proffers, *see United States v. Triumph Capital Group*, 544 F.3d 149 (2d Cir. 2008)
- Statements or reports reflecting witness statement variations (see below)
- Benefits provided to witnesses including:
  - Dropped or reduced charges
  - Immunity
  - Expectations of downward departures or motions for reduction of sentence
  - Assistance in a state or local criminal proceeding
  - Considerations regarding forfeiture of assets
  - Stays of deportation or other immigration status considerations
  - S-Visas
  - Monetary benefits
  - Non-monetary benefits or services
  - Assistance in obtaining benefits or services
  - Non-prosecution agreements
  - Letters to other law enforcement officials (e.g., state prosecutors, parole boards) setting forth the extent of a witness's assistance or making substantive recommendations on the witness's behalf
  - Relocation assistance
  - Consideration or benefits to culpable or at risk third-parties
- Other known conditions that could affect the witness's bias such as:
  - Animosity toward defendant
  - Animosity toward a group of which the defendant is a member or with which the defendant is affiliated
  - Relationship with victim
  - Known but uncharged criminal conduct (that may provide an incentive to curry favor with a prosecutor)
- Prior acts under Fed. R. Evid. 608
- Prior convictions under Fed. R. Evid. 609
- Known substance abuse or mental health issues or other issues that could affect the witness's ability to perceive and recall events.

8. Information Obtained in Witness Interviews: Interview memoranda of witnesses expected to testify, and of individuals who provided relevant information but are not expected to testify, *should* be reviewed.

   a. Witness Statement Variations and the Duty to Disclose: Some witnesses' statements will vary during the course of an interview or investigation. For example, they may initially deny involvement in criminal activity, and the information they provide may broaden or change considerably over the course of time, especially if there are a series of debriefings that occur over several days or weeks. Material variances in a witness's statements should be memorialized, even if they are within the same interview, and they should be provided to the defense as *Giglio* information.

   b. Trial Preparation Meetings with Witnesses: Trial preparation meetings with witnesses generally need not be memorialized. However, CRM Attorneys should be particularly attuned to new or inconsistent information disclosed by the witness during a pre-trial witness preparation session. New information that is exculpatory or impeachment information should be disclosed consistent with the provisions of USAM §9-5.001 even if the information is first disclosed in a witness preparation session. Similarly, if the new information represents a variance from the witness's prior statements, CRM Attorneys should consider whether memorialization and disclosure is necessary or consistent with the provisions of subparagraph (a) above.

   c. Agent Notes: Agent notes should be reviewed if there is a reason to believe that the notes are materially different from the memorandum, if a written memorandum was not prepared, if the precise words used by the witness are significant, or if the witness disputes the agent's account of the interview. CRM Attorneys should pay particular attention to agent notes generated during an interview of the defendant or an individual whose statement may be attributed to a corporate defendant. Such notes may contain information that must be disclosed pursuant to Fed. R. Crim. P. 16(a)(1)(A)-(C) or may themselves be discoverable under Fed. R. Crim. P. 16(a)(1)(B). *See, e.g., United States v. Clark*, 385 F.3d 609, 619-20 (6th Cir. 2004) and *United States v. Vallee*, 380 F.Supp.2d 11, 12-14 (D. Mass. 2005).

      In addition, agent notes of witness interviews should be reviewed for potential *Brady* and *Giglio* information, particularly when the notes are from an interview of a witness who is expected to testify pursuant to an agreement with the government, such as a cooperating co-conspirator.

9. Information Possessed by the Intelligence Community: Cases involving national security, including terrorism, espionage, counterintelligence, and export enforcement, can present unique and difficult criminal discovery issues. The Department of Justice has developed special guidance for those cases, which is contained in Acting Deputy Attorney General Gary G. Grindler's September 29,

2010, memorandum, "Policy and Procedures Regarding the Government's Duty To Search for Discoverable Information in the Possession of the Intelligence Community or Military in Criminal Investigations." CRM Attorneys should consult that memorandum and their supervisors regarding discovery obligations relating to classified or other sensitive national security information. As a general rule, in those cases where the CRM Attorney, after conferring with other members of the prosecution team, has a specific reason to believe that one or more elements of the Intelligence Community (IC) possess discoverable material, he or she should consult the National Security Division (NSD) regarding whether to request a prudential search of the pertinent IC element(s). All prudential search requests and other discovery requests of the IC must be coordinated through NSD.

Although discovery issues relating to classified information are most likely to arise in national security cases, they may also arise in a variety of other criminal cases, including narcotics cases, human trafficking cases, money laundering cases, and organized crime cases. In particular, it is important to determine whether the CRM Attorney, or another member of the prosecution team, has specific reason to believe that one or more elements of the IC possess discoverable material in the following kinds of criminal cases:

- Those targeting corrupt or fraudulent practices by middle or upper officials of a foreign government;
- Those involving alleged violations of the Arms Export Control Act or the International Emergency Economic Powers Act;
- Those involving trading with the enemy, international terrorism, or significant international narcotics trafficking, especially if they involve foreign government or military personnel;
- Other significant cases involving international suspects and targets; and
- Cases in which one or more targets are, or have previously been, associated with an intelligence agency.

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

II. Step 2: Conducting the Review

Having gathered the information described above, CRM Attorneys must ensure that the material is reviewed to identify discoverable information. It would be preferable if CRM Attorneys could review the information themselves in every case, but such review is not always feasible or necessary. The CRM Attorney is ultimately responsible for compliance with discovery obligations. Accordingly, the CRM Attorney should develop

a process for review of pertinent information to ensure that discoverable information is identified. Because the responsibility for compliance with discovery obligations rests with the CRM Attorney, the CRM Attorney's decision about how to conduct this review is controlling. This process may involve agents, paralegals, agency counsel, and computerized searches. Although CRM Attorneys may delegate the process and set forth criteria for identifying *potentially* discoverable information, CRM Attorneys should not delegate the disclosure determination itself. In cases involving voluminous evidence obtained from third parties, CRM Attorneys should consider providing defense access to the voluminous documents to avoid the possibility that a well-intentioned review process nonetheless fails to identify material discoverable evidence. Such broad disclosure may not be feasible in national security cases involving classified information.

III. Step 3: Making the Disclosures

The Department's disclosure obligations are generally set forth in Fed. R. Crim. P. 16 and 26.2, 18 U.S.C. § 3500 (the Jencks Act), *Brady*, and *Giglio* (collectively referred to herein as "discovery obligations"). CRM Attorneys must familiarize themselves with each of these provisions and controlling case law that interprets these provisions. In addition, CRM Attorneys should be aware that USAM § 9-5.001 details the Department's policy regarding the disclosure of exculpatory and impeachment information and provides for broader disclosures than required by *Brady* and *Giglio*. CRM Attorneys are also encouraged, as set forth below, to provide discovery broader and more comprehensive than the discovery obligations. If a CRM Attorney chooses this course, the defense should be advised that: (1) the fact that certain non-discoverable materials are provided does not obligate the government to provide all non-discoverable materials; and (2) the fact that certain non-discoverable materials are provided should not be taken as a representation as to the existence or non-existence of other non-discoverable materials.

CRM Attorneys should also remember that with few exceptions (*see, e.g.*, Fed. R. Crim. P. 16(a)(1)(B)(ii)), the format of the information does not determine whether it is discoverable. For example, material exculpatory information that the prosecutor receives during a conversation with an agent or a witness is no less discoverable than if that same information were contained in an email. When the discoverable information contained in an email or other communication is fully memorialized elsewhere, such as in a report of interview or other document(s), then the disclosure of the report of interview or other document(s) will ordinarily satisfy the disclosure obligation.

A. Considerations Regarding the Scope and Timing of the Disclosures: Providing broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases. It also provides a margin of error in case the CRM Attorney's good faith determination of the scope of appropriate discovery is in error. CRM Attorneys are encouraged to provide broad and early discovery. But when considering providing discovery beyond that required by the discovery obligations or providing discovery sooner than required, CRM Attorneys should always consider any appropriate countervailing concerns in the

particular case, including, but not limited to: protecting victims and witnesses from harassment or intimidation; protecting the privacy interests of witnesses; protecting privileged information; protecting the integrity of ongoing investigations; protecting the trial from efforts at obstruction; protecting national security interests; investigative agency concerns; enhancing the likelihood of receiving reciprocal discovery by defendants; any applicable legal or evidentiary privileges; and other strategic considerations that enhance the likelihood of achieving a just result in a particular case.

CRM Attorneys should never describe the discovery being provided as "open file." Even if the CRM Attorney intends to provide expansive discovery, it is always possible that something will be inadvertently omitted from production and the CRM Attorney will then have unintentionally misrepresented the scope of materials provided. Furthermore, because the concept of the "file" is imprecise, such a representation exposes the CRM Attorney to broader disclosure requirements than intended or to sanction for failure to disclose documents, e.g., agent notes or internal memos, that the court may deem to have been part of the "file."

When the disclosure obligations are not clear or when the considerations above conflict with our discovery obligations, CRM Attorneys may seek a protective order from the court addressing the scope, timing, and form of disclosures.

B. Timing: Exculpatory information, regardless of whether the information is memorialized, must be disclosed to the defendant reasonably promptly after discovery. Impeachment information, which depends on the CRM Attorney's decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently. *See* USAM § 9-5.001. Section 9-5.001 also notes, however, that witness security, national security, or other issues may require that disclosures of impeachment information be made at a time and in a manner consistent with the policy embodied in the Jencks Act. CRM Attorneys should be attentive to controlling law in the circuit and district in which they are practicing governing disclosure obligations at various stages of litigation, such as pre-trial hearings, guilty pleas, and sentencing.

CRM Attorneys should consult the local discovery rules for the district in which a case has been indicted. Many districts have broad, automatic discovery rules that require Rule 16 materials to be produced without a request by the defendant and within a specified time frame, unless a court order has been entered delaying discovery, as is common in complex cases. CRM Attorneys must comply with these local rules, applicable case law, and any final court order regarding discovery. In the absence of guidance from such local rules or court orders, CRM Attorneys should make Rule 16 materials available as soon as is reasonably practical and, in any event, no later than a reasonable time before trial. In deciding when and in what format to provide discovery, CRM Attorneys should always consider security concerns and the other factors set forth in subparagraph (A) above. CRM Attorneys should also ensure

that they disclose Fed. R. Crim. P. 16(a)(1)(E) materials in a manner that triggers the reciprocal discovery obligations in Fed. R. Crim. P. 16(b)(1).

CRM Attorneys normally should provide Jencks material to the defense at least five (5) days before trial, absent a USAO policy or discovery order to the contrary. In situations where a trial date is not actually set until a calendar call fewer than five (5) days before trial, CRM Attorneys should make the Jencks disclosure as soon as the trial date is established. With supervisory approval, CRM Attorneys may delay a Jencks disclosure if necessary to protect victims or witnesses from harassment or intimidation, to protect the integrity of ongoing investigations, to protect the trial from efforts at obstruction, or to protect national security interests. CRM Attorneys should also be prepared to make Jencks disclosures at detention hearings, sentencing hearings, and any other hearing listed in Rule 26.2(g). CRM Attorneys should also consider whether, in appropriate cases, earlier Jencks disclosure would be prudent.

Discovery obligations are continuing, and CRM Attorneys should always be alert to developments occurring up to and through trial of the case that may impact their discovery obligations and require disclosure of information that was previously not disclosed.

C. **Form of Disclosure**: There may be instances when it is not advisable to turn over discoverable information in its original form, such as when the disclosure would create security concerns or when such information is contained in attorney notes, internal agency documents, confidential source documents, Suspicious Activity Reports, etc. If discoverable information is not provided in its original form and is instead provided in a letter to defense counsel, including particular language where pertinent, CRM Attorneys should take great care to ensure that the full scope of pertinent information is provided to the defendant. CRM Attorneys must also be cognizant that if the information is not located in a document, *Brady* and *Giglio* material must nevertheless be reduced to writing and disclosed.

1. Hard Copy Documents. If the government possesses original paper documents, the CRM Attorney may, at the outset, choose whether to provide the defense with electronic copies, paper copies, or access to original documents. The CRM Attorney normally should provide the defense with access to original paper documents upon request.

    a. While reviewing original documents, the defense normally should have access to a copier to make a reasonable amount of copies for free.

    b. If documents are not scanned, the defense may pay for a copy service to make copies. The local USAO or investigative agency normally should be consulted to obtain the names of approved copy services.

    c. The investigative agency *must not* keep track of what documents the defense is copying.

d. The investigative agency *must* keep track of the defense's *access* to all documents. It is recommended that the agent present the defense with a list of the bates numbers to which the defense is being given access and ask for a signature of the reviewing defense attorney.

2. Electronically Stored Information. CRM Attorneys should consider the disclosure of electronically stored information ("ESI") on a case-by-case basis, in consultation with the agents and the relevant USAO.

   a. If documents are in electronic form, the CRM Attorney should consider providing electronic copies on DVD.

   b. For electronic evidence seized by warrant, CRM Attorneys should consider having a tech agent pull word processing documents, spreadsheets, databases, emails and other substantive files off of drives and provide that data on disc.

   c. For an entire computer imaged pursuant to warrant, CRM Attorneys should consider making a forensic image available to the defense by allowing the defense to supply a blank hard drive onto which the tech agent would copy the forensic image. (As described below in paragraph (d)(i), there is an open question as to what portions of imaged computers to disclose to the defense if the warrant authorizes the government to review only limited files.)

   d. CRM Attorneys must disclose ESI in accordance with the same discovery provisions governing disclosure of non-ESI, including Rules 16 and 26.2, *Brady*, and *Giglio*. Similarly, CRM Attorneys who know, or have reason to believe, that otherwise discoverable ESI includes child pornography, should provide counsel for the defendant a reasonable opportunity to inspect the contraband pursuant to 18 U.S.C. § 3509(m). If the otherwise discoverable ESI contains other forms of contraband, the CRM Attorneys should consider either providing the defendant with an opportunity to inspect the materials, or providing a copy of the materials to the defendant subject to a protective order.

      i. In those cases where the complete contents of ESI have not been reviewed by the government, either because of limitations in the scope of a warrant or because of the volume of stored material, the CRM Attorney should consider whether there is a statutory or other prudential reason for not disclosing the unexamined ESI. If the CRM Attorney determines that non-disclosure is warranted, the attorney should notify defense counsel of the non-disclosure and the basis for the non-disclosure.

   e. Be prepared to work with the defense to ensure it can review ESI. You may need to provide access to a terminal and/or technical assistance, especially if the defense lacks financial resources.

3. Large Volumes of Documents. When providing the defense with access to a large number of bankers boxes of documents, consider providing a general index of documents (e.g., "search records," "bank records," "phone records" will often suffice). Also, when dealing with massive amounts of data and a defense lacking resources, consider whether to provide the defense with "hot docs" or search terms. Consult with your supervisor before disclosing such work product.

D. What to Disclose: CRM Attorneys bear ultimate responsibility for disclosure decisions. Disclosure of records and physical objects collected as part of the investigation should be as broad as possible, in order to avoid situations where withheld records or objects are later determined to be relevant to the government's case in chief or to the preparation of the defense. That said, as noted above, the government's discovery policy is not "open file" discovery, and this term should never be used to describe it. CRM Attorneys should consult with any participating AUSAs before making disclosures.

1. Materials that must be disclosed:
   a. *Brady*, Jencks, and *Giglio* materials.
   b. All materials required by Fed. R. Crim. P. 16 and 26.2, including statements of the defendant under Rule 16(a)(1)(A) and (B).
   c. Exculpatory and impeachment materials required by USAM § 9-5.001.
   d. Additional materials or information required by any discovery order entered by the court.

2. Additional materials for which disclosure should be strongly considered, even where they do not fall into the categories described in paragraph 1 above, include:
   a. Materials obtained pursuant to grand jury subpoena.
   b. Documents provided voluntarily by potential witnesses, including cooperating defendants/targets.
   c. Search warrant materials.
   d. Other relevant materials collected in the course of the investigation.

3. What may be withheld (unless they contain *Brady* or *Giglio* material):
   a. CRM Attorney notes (but see subsection 4 below).
   b. Agent rough notes, where they are formalized in a final MOI (but see subsection 4 below).
   c. Other materials subject to attorney/client, work product (not including witness MOIs), or deliberative process privileges (but see subsection 4 below).
   d. Reports and grand jury transcripts of non-testifying witnesses, unless they are transcripts of employees of an organizational defendant, disclosure of which is governed by Fed. R. Crim. P. 16(a)(1)(C).
   e. Other materials collected in the course of the investigation that are not arguably relevant to the case charged.

4. Special considerations governing MOIs and rough notes:

   a. CRM Attorneys should disclose all MOIs reflecting interviews of testifying trial witnesses, even though in many jurisdictions their disclosure is not required as Jencks material. For this reason, when disclosing MOIs, the MOIs should not be described to opposing counsel as "Jencks" material. MOIs should be redacted to remove any non-discoverable information that concerns other cases or investigations, as well as any sensitive personal information such as social security numbers, home addresses, telephone numbers, and birthdates. With supervisory approval, CRM Attorneys may withhold otherwise non-discoverable portions of MOIs of testifying witnesses (i.e., portions of MOIs that do not contain *Brady*, *Giglio*, Jencks, or Rule 16 material) if necessary to protect victims and witnesses from harassment or intimidation, protect the integrity of ongoing investigations, protect the trial from efforts at obstruction, or protect national security interests. CRM Attorneys should consider filing a motion in limine to prevent the improper use of the MOIs by defense counsel at trial. A sample motion in limine can be found at Appendix B.

   b. If an MOI of a non-testifying witness contains *Brady* or *Giglio* material, including inconsistencies between non-testifying witnesses or between a non-testifying witness and a testifying witness, that *Brady* or *Giglio* material must be disclosed. If an MOI of a non-testifying witness contains no known *Brady* or *Giglio* material, CRM Attorneys should consider whether disclosure might still be made to avoid inadvertent non-disclosure of material that may be pertinent to some defense or inconsistent with evidence as it develops at trial.

   c. CRM Attorneys must inform the defense if the agent's rough notes are materially inconsistent with the final MOI. This may be done by letter, or by providing the defense with a copy of the rough notes.

   d. CRM Attorneys must review their own notes, if any, of witness interviews to ensure all necessary disclosures are made.

   e. If the agent's notes or final MOI materially contradict the CRM Attorney's notes or memory, the CRM Attorney must disclose the contradictions.

5. Expert witness discovery

   a. CRM Attorneys should research circuit case law to determine whether outside expert witnesses are considered part of the prosecution team. *See, e.g., United States v. Stewart*, 433 F.3d 273, 297-99 (2nd Cir. 2006) (expert not part of prosecution team despite broad role, including testimony). Note that government employee experts will almost always be considered part of the prosecution team.

b. If experts are deemed part of the prosecution team, the CRM Attorney normally should ask the expert to provide the government with all case-related materials and any other information in his or her possession that could be exculpatory or impeachment material.

c. CRM Attorneys may need to disclose draft expert reports:

   i. Pursuant to the *Jencks* Act, if, under applicable circuit precedent, a draft report qualifies as a statement that has been "adopted or approved" by the expert witness.

   ii. Pursuant to *Brady* or *Giglio* if there are material differences between the draft and the final report.

   iii. But note that effective December 2010, the Federal Rules of Civil Procedure are being amended to make clear that draft expert reports are subject to work product protection. This civil rule change may impact the question of whether the disclosure of draft expert reports in criminal cases is necessary.

d. Correspondence from the expert to the government normally should be disclosed as *Jencks* material, unless it contains any *Brady* or *Giglio* material (which would necessitate earlier disclosure).

e. CRM Attorneys normally should compile and disclose to the defense evidence upon which the expert relied.

6. Sentencing

   a. Exculpatory and impeachment information that casts doubt upon proof of an aggravating factor at sentencing, but that does not relate to proof of guilt, must be disclosed no later than the court's initial presentence investigation. *See* USAM 9-5.001(D)(3).

7. Disclosures when guilty plea expected

   a. Even when a guilty plea is expected, CRM Attorneys, consistent with relevant circuit case law, should disclose to the defense any substantial exculpatory evidence of which they are personally aware that directly negates the guilt of the defendant.

   b. Although the Supreme Court held in *United States v. Ruiz*, 536 U.S. 622 (2002), that the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant, CRM Attorneys should consult circuit case law to determine whether other discovery must be made available to the defense

prior to the entry of a guilty plea in the case of a pre-indictment plea agreement where the defendant does not waive the right to receive such discovery.

8. Specialized discovery issues

   a. A number of specialized discovery issues are implicated in cases involving wiretaps, child pornography, or the death penalty. In such cases, the CRM Attorney will have a number of additional considerations to take into account during the discovery process. Specialized guidance concerning discovery obligations and procedures involving wiretaps, child pornography, and the death penalty can be found in USABook or online at http://10.173.2.12/usao/eousa/ole/tables/subject/all.htm.

IV. Step 4: Making a Record

One of the most important steps in the discovery process is keeping good records regarding disclosures. CRM Attorneys should make a record of when and how information is disclosed or otherwise made available. While discovery matters are often the subject of litigation in criminal cases, keeping a record of the disclosures confines the litigation to substantive matters and avoids time-consuming disputes about what was disclosed. These records can also be critical when responding to petitions for post-conviction relief, which are often filed long after the trial of the case. Keeping accurate records of the evidence disclosed is no less important than the other steps discussed above, and poor records can negate all of the work that went into taking the first three steps.

In all cases, the goal is to be able in court to identify when discovery of each item was provided. CRM Attorneys should:

A. Describe discovery by cover letter to the defense. The cover letter normally should list the bates numbers of the materials disclosed.

B. Where discovery is provided on disc, a copy of the disc normally should be maintained and designated as read-only so there is a static copy of what was disclosed.

CONCLUSION

While each case is different and will necessarily involve specific and unique considerations, the general approach of the CRM Attorney should be to provide expansive discovery whenever and wherever possible subject, of course, to important countervailing considerations such as witness safety and national security. Any questions or uncertainties regarding the application of this discovery policy in a particular case or circumstance should be raised with a Deputy Chief or Section Chief.