2012 FEDERAL CRIMINAL DISCOVERY OUTLINE & 2014 Supplement
2014 Orientation Seminar for Assistant Federal Defenders

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I. THOROUGH DISCOVERY

A. Other than *Brady* material, no constitutional right to discovery. *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S. Ct. 837, 845 (1977). *See also United States v. Ruiz*, 536 U.S. 622, 629 (2002), citing *Weatherford*.

B. Limited discovery can be expanded by effective motion drafting.

1. Tie motions to facts of case. *See United States v. Breit*, 767 F.2d 1084, 1091 (4th Cir. 1985).

2. Avoid "form" discovery motions.

3. Be specific. For an excellent discussion of general versus specific requests, *see Chaney v. Brown*, 730 F.2d 1334 (10th Cir. 1984), *cert. denied*, 105 S. Ct. 601 (1985).

   See also United States v. Mack, 892 F.2d 134 (1st Cir. 1989) (blanket request phrased in language of rule too broad to show request for field test results and later lab tests relied on by government at trial).

4. Support with law. Sources: Cases; Federal Rules of Criminal Procedure, commentary and annotations; ABA Standards and Model Rules.

5. File early--supplement later if necessary.

6. Cover all aspects of case.

C. Don't be lulled into inaction by a reassuring prosecutor.

II. OPEN FILE DISCOVERY

A. Always ask what it includes

B. Always ask who will provide the information

C. Always ask when you will receive it

D. Send letter to prosecutor detailing every document you received

III. FEDERAL RULES OF CRIMINAL PROCEDURE - RULE 16

A. Rule 16 is main criminal discovery tool. *See United States v. Griggs*, 111 F. Supp. 2d 551 (M.D. Pa. 2000) for case discussing need to interpret broadly to achieve fundamental fairness. *See also* the Advisory Committee Note to 1974 Amendment, stating: "broad discovery contributes to the fair and efficient administration of criminal justice . . . ."

B. Rule is mandatory direction to government to inspect and copy (see *United States v. Jeffers*, 570 F.3d 557, 572 (4th cir. 2009) certain information, but only upon defense request.

1. Rule 16(a)(1)(A) states that, upon request, the government must disclose a defendant's "relevant" oral statement made in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

2. Rule 16(a)(1)(B) contains the written or recorded statement disclosure rules.

3. Rule 16(a)(1)(C) contains the "organizational" defendant statements which state that, upon request, the government must disclose a defendant's written or oral statements which meet the requirements of (a)(1)(A) and (a)(1)(B) and which were made by a person who could legally bind the defendant.

4. Rule 16(a)(1)(D) contains the rules regarding disclosure of a defendant's prior record.

5. Rule 16(a)(1)(E) contains the rules regarding disclosure of documents and objects.

6. Rule 16(a)(1)(F) contains the rules regarding disclosure of examinations and tests.

7. Rule 16(a)(1)(G) contains the rules regarding disclosure of experts.

C. Rule 16 (a)(1)(B)(i) requires the government to furnish to the defense:

1. All relevant written or recorded statements made by the defendant which are in the custody or control of the government and which are known to the

government or by the exercise of due diligence may become known to the government.

a. Standard does not create high threshold; production has "become 'practically a matter of right.'" *United States v. Yunis*, 867 F.2d 617, 621-22 (D.C. Cir. 1989) (*quoting United States v. Haldeman*, 559 F.2d 31, 74 n. 80 (D.C. Cir. 1976)).

b. This section should include draft transcripts of tape recordings in addition to tapes themselves. *United States v. Shields*, 767 F. Supp. 163 (N.D. Ill. 1991).

c. Due diligence requires government to disclose statements made to local police officers; *United States v. Diggs*, 801 F. Supp. 441, 446-47 (D. Kan. 1992); *United States v. Mitchell*, 613 F.2d 779, 781 (10th Cir. 1980); or statements made to relevant non-law enforcement agency. *United States v. Safavian*, 233 F.R.D. 12 (D.D.C. 2005).

d. Includes relevant statements from other cases. *United States v. Thomas,* 239 F.3d 163, 166-67 (2d Cir. 2001) (requiring disclosure of transcript of defendant's statements made during prior administrative hearing on subject of arrest); *United States v. Bailey*, 689 F. Supp. 1463, 1467-68 (N.D. Ill. 1987) (requiring government to turn over tapes of defendant made in another case).

e. Includes taped telephone conversations in prison. *United States v. Lanoue*, 71 F.3d 966, 973-74 (1st Cir. 1996)(Tape recording of defendant's conversations in jail after arrest should have been produced under rule 16(a)(1)(B)).

f. Includes prior statements on INS forms. *United States v. Silien*, 825 F.2d 320, 323 (11th Cir. 1987)(Prior statement made by defendant on INS forms was relevant and discoverable under now Rule 16(a)(1)(B)).

g. Includes law enforcement notes taken during and after defendant interviews. *United States v. Hackett*, 2011 U.S. Dist. LEXIS 127123 (September 30, 2011 N.D. W. Va.)*; United States v. Ferguson*, 478 F. Supp. 2d 220 (D. Conn. 2007); *United States v. W. R. Grace*, 401 F. Supp. 2d 1087 (D. Montana 2005); *United States v.*

Vallee, 380 F. Supp. 2d 11 (D. Mass. 2005). *But see United States v. Van Nguyen*, 456 F. Supp. 2d 1366 (N.D. Ga. 2006).

h. *Test seems to be whether other agencies are "closely aligned with prosecution." See United States v. Libby (*yes Scooter*),* 429 F. Supp. 2d 1 (D.D.C. 2006); *United States v. Griggs*, 111 F. Supp. 2d 551 (M.D. Pa. 2000)(Defense moved to compel discovery of notes taken by law enforcement agent at the time of his arrest. The court noted that the notes were taken by a state police officer not an agent of the federal government. However, because of the fundamental unfairness of making disclosure contingent upon the employer of the interviewer, the court ordered disclosure of the notes in circumstances "which are unfair on their face.").

D. Rule 16 (a)(1)(B)(ii) requires the government to furnish to the defense:

1. Written records containing the substance of relevant oral statements made by defendant to a person defendant knew to be a government agent in response to interrogation, before and after arrest.

a. *See United States v. Alvarez*, 987 F.2d 77, 85-86 (1st Cir. 1993), *cert. denied*, 114 S. Ct. 147 (1993)(remand for new trial based on government's violation of R. 16 by failing to disclose oral statement of defendant to Customs agent until trial).

b. *But see United States v. Flores & Garza*, 63 F.3d 1342, 1365-66 (5th Cir. 1995)(outburst to co-defendant made in front of agent need not be disclosed under Rule 16)

E. Rule 16 (a)(1)(A) requires the government to furnish to the defense:

1. The substance of any relevant oral statements not reduced to writing where statements were made by defendant to a person defendant knew to be a government agent.

2. Statement must have been made in response to interrogation, before or after arrest.

3. Government must intend to "use" statement. Government need not intend to introduce statement at trial.

4. Defendants generally not entitled to their oral statements made to a third person which were later repeated to government agents. *United States v. Walk*, 533 F.2d 417 (9th Cir. 1975); *In re United States*, 834 F.2d 283 (2d Cir. 1987). *But see United States v. Mitchell*, 613 F.2d 779 (10th Cir. 1980), *cert denied*, 445 U.S. 919 (1980) (Rule 16 requires disclosure of defendant's oral statements made to probation officer who gave statements to government); *United States v. Manetta*, 551 F.2d 1352 (5th Cir. 1977)(defendant's oral statement to prison employee discoverable in insanity case). *See also United States v. Fort*, 472 F.3d 1106, 1112 (9th Cir. 2007)(states generally that defendant's oral statements to local law enforcement officers must be disclosed).

5. However, where a written record is contemplated at time defendant's oral statement is made, Rule 16 applies. *United States v. Feinberg*, 502 F.2d 1180 (7th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975). *Cf. United States v. Colletti*, 984 F.2d 1339 (3d Cir. 1992)(citing *Feinberg* approvingly but refusing to order disclosure where written record was not verbatim, but merely a summary).

6. Written statements made by defendant to third person who gave them to a government agent who put in a report are discoverable. *United States v. Caldwell*, 543 F.2d 1333, (D.C. Cir. 1974), *cert. denied*, 423 U.S. 1087 (1976).

7. All grand jury testimony of the defendant, "which relates to the offense charged." Note testimony at other grand juries may "relate" under either your theory or government theory. Make clear in motion.

8. Generally, defendant is only entitled to co-conspirator or co-defendant statements, admissible against defendant under F.R.E. 801(d)(2)(E) if the government does not intend to call the coconspirator as a witness. *United States v. Walker*, 922 F. Supp. 732 (N.D.N.Y. 1996)(requiring disclosure of co-conspirator statements for all persons the government does not intend to call at trial); *United States v. Percevault*, 490 F.2d 126 (3d Cir. 1974); *United States v. McMillen*, 489 F.2d 229 (7th Cir. 1972). *Contra United States v. Randolph*, 456 F.2d 132 (3d Cir. 1972).

Most courts have rejected the argument that a defendant is entitled to a co-conspirator′s statements on the theory that they are equivalent to the statements of the defendant. *See* ***In re United States***, 834 F.2d 283 (2d Cir. 1987)(reversing Judge Weinstein on government mandamus). ***But see United States v. Thevis***, ~~3~~4-F.R.D. 57 (N.D. Ga. 1979); ***United States v. Brighton Building & Maintenance Co.***, 435 F. Supp. 222, 233 (N.D. Ill. 1977).

9. Disclosure of co-defendant statements is discretionary, but refusal to order will not be error unless specific motion was made. So make the MOTION!!! *United States v. Rivera*, 6 F.3d 431 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1098 (1994).

10. "Booking" statements held admissible, *United States v. Regilio*, 669 F.2d 1169 (7th Cir. 1981) and discoverable in *United States v. McElroy*, 697 F.2d 459 (2d Cir. 1982).

D. Rule 16(a)(1)(D) - Permits discovery of defendant's "rap" sheet - request from FBI, Probation Office and state; need to subpoena underlying records; prepare motions in limine and motions to defend against recidivist statutes like Armed Career Criminal..

E. Defense entitled to all documents under 16(a)(1)(E) which:

1. Are material to the defense. Standard "not a heavy burden," ***United States v. Caro***, 597 F.3d 608 (4th Cir. 2010)(great definition of Rule 16 materiality); ***United States v. Lee***, 573 F.3d 155 (3d Cir. 2009)(defense entitled to rely on exhibits government gives it, even if incomplete); ***United States v. Stein***, 488 F. Supp. 2d 350 (S.D.N.Y. 2007) and ***United States v. Finnerty***, 411 F. Supp. 2d 428 (S.D.N.Y. 2006); ***United States v. Lloyd***, 992 F.2d 348 (D.C. Cir. 1993)(government witnesses' tax returns discoverable and material under now 16(a)(1)(E)); ***United States v. Lee***, 573 F.3d 155 (3d Cir. 2009)(new trial required government failed to copy back side of its exhibit which was inculpatory).

2. Court must review tapes for materiality. *United States v. Muniz-Jaquez*, 718 F.3d 1180 (9th Cir. 2013).

OR

3. **The government intends to introduce in its case-in-chief.** Thus, cases hold defendants are entitled to perform independent drug tests on drugs obtained from the defendant. ***United States v. Butler***, 988 F.2d 537 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 413 (1993). *See also United States v. Giardina*, 2005 U.S. Dist. LEXIS 28374 (W.D. Penn. 2005). But the Supreme Court has held that 16 (a)(1)(C) is not the appropriate vehicle for obtaining discovery in selective prosecution cases. ***United States v. Armstrong,*** 116 S. Ct. 1480 (1996).

4. **Note no due diligence requirement.** ***United States v. Stein***, 424 F. Supp. 2d 720 (S.D.N.Y. 2006)(defendants not entitled to IRS civil audit files not in possession of prosecution team); ***United States v. Chalmers***, 410 F. Supp. 2d 278 (S.D.N.Y. 2006)(prosecution must disclose material documents in possession of government agency "so closely aligned with the prosecution as to be considered part of the prosecution team"). *See also United States v. Kaiser*, 2010 U.S. Dist. LEXIS 1771 (S.D.N.Y. January 11, 2010).

5. **Obtain originals of fingerprints and handwriting exemplars.**

6. **Request all lineup photos, photographic show-ups and reports stating results of such and the circumstances surrounding them in preparation for possible motions to suppress.** ***See, e.g., United States v. Taylor***, 707 F. Supp. 696, 705 (S.D.N.Y. 1989)(denying full request for description of procedure but allowing discovery of "tangible identification evidence" under Rule 16(a)(1)(C).

7. **Request drug dog training and handling records.** ***United States v. Blacksmith***, 2007 WL 613958 (D.S.D. Feb. 22, 2007)(authorizing in camera review for materiality) (unreported).

8. **Request information available to government showing similar activities by persons other than the defendant, such as bank robberies.** ***United States v. Stever***, 603 F.3d 747 (9th Cir. 2010)(other similar marijuana growing operations known to government must be disclosed).

9. **Look for cases where shoe is on the other foot.**
See ***United States v. Richards,*** 659 F.3d 527 (6th Cir. 2011);
United States v. Libby, 429 F. Supp. 2d 1 (D.D.C. 2006);

In *United States v. Poindexter*, 727 F. Supp. 1470 (D.D.C. 1989),court authorized discovery of documents from meetings among government officials devoted to Iran-Contra activities. Case also held government must identify which documents out of thousands of pages it intended to rely upon at trial; giving all documents and saying it "may" rely on all of them was insufficient. (No kidding). *See also United States v. Bortnovsky*, 820 F.2d 572 (2d Cir. 1987)(error to deny defendant's motion for bill of particulars where government turned over 4000 pages without specifying which documents were allegedly false); *United States v. Washington*, 819 F. Supp. 358 (D. Vermont 1993), *aff'd* 48 F.3d 73 (2d Cir.), *cert. denied*, 115 S. Ct. 2596 (1995)(discussing when order requiring government to tell what material it does not intend to use would be appropriate).

F. Defense entitled under 16(a)(1)(F) to results or reports of tests and exams which are in the possession or control of the government and are known to the government or by the exercise of due diligence may become known to the government and which:

1. Are material to the defense or the government intends to introduce in its case-in-chief.

2. Does require exercise of due diligence.

3. Request results of all lab tests. *United States v. Taylor*, 707 F. Supp. 696 (S.D.N.Y. 1989).

4. Request results of handwriting, hair, fingernail, voice, etc. comparisons.

5. Request samples on which to conduct independent tests. *United States v. Noel*, 708 F. Supp. 177 (W.D. Tenn. 1989); *United States v. Butler*, 988 F.2d 537, 543 (5th Cir. 1993).

6. Not sufficient for government to argue materials were released to prior lawyer. *United States v. Long*, 817 F. Supp. 79 (D. Kan. 1993).

7. Narcotic dog's training records, standards, etc., are discoverable. *United States v. Cedano-Arellano*, 332 F.3d 568 (9th Cir. 2003).

8. **Courts split on whether defendants are entitled to underlying data or lab protocols.** *United States v. Siegfried*, 2000 US Dist LEXIS 10411 (N.D. Ill. July 18, 2000)(yes on lab testing protocols); *United States v. Price*, 75 F.3d 1440 (10th Cir. 1996)(no on underlying test data because Rule 16(a)(1)(D) only applies to test results).

H. **Rule 16(a)(1)(G) - Rule requires government to furnish upon defendant's request, written summary of expert testimony government intends to use during case in chief. Rule is reciprocal upon request.**

1. **Rule requires notice of expert's qualifications, so can determine whether witness actually is expert.**

2. **Rule requires disclosure of summary of expected testimony and list of cases in which witness has testified (at least in some courts).** *See United States v. Capleton*, 199 F.R.D. 25 (D. Mass. 2001).

3. **Rules requires disclosure of summary of bases of expert's opinion, whether or not expert prepares report.** *United States v. Charley*, 189 F.3d 1251 (10th Cir. 1999) (In child sexual abuse case, prosecution refused to disclose summaries of expert reports under old 16(a)(1)(E) because it said all of its witnesses were testifying to facts as lay witnesses; court held the health care professionals were experts and the prosecution erred in refusing to turn over summaries, error held harmless); *United States v. Thompson*, 923 F. Supp. 144 (S.D. Ind. 1996)(Under old Rule 16(a)(1)(E), government required to produce IRS auditor's calculations showing how he arrived at his figures; *United States v. Zanfordino*, 833 F. Supp 429 (S.D.N.Y. 1993)(Although prior to old Rule 16(a)(1)(E), case helpful on analysis of why underlying data of government expert is material under now 16(a)(1)(E) and broad reading of rules).

4. **Rule contains no timing provisions, but notes contemplate "timely" disclosure.** Few cases so far make clear defense should not wait until close to trial to make request, *see, e.g.*, *United States v. Von Willie*, 59 F.3d 922 (9th Cir. 1995).

5. **Cases ordering disclosure.** *United States v. W.R. Grace*, 526 F.3d 499 (9th Cir. 2008)(en banc)(requiring government disclosure of all expert witnesses, underlying documents and summaries of testimony); *United States v. Jackson*,

51 F.3d 646 (7th Cir. 1995)(use of agents as experts in drug courier profile); *United States v. Michel-Diaz*, 205 F. Supp. 2d 1155 (D. Montana 2002)(Rule 57(b) gives courts power to order more discovery than rule required to tailor discovery order to purposes behind rules).

6. Who is an expert? *See generally United States v. Eiland,* 2006 US Dist. LEXIS 72019 (D.D.C. Oct. 2, 2006) for discussion of how to determine whether someone is an expert in government agent context. *See also United States v. Caballero*, 277 F.3d 1235 (10th Cir. 2002)(Prosecution called INS (now ICE) employees to testify about various INS procedures, without giving prior notice under the Rule, claiming they were not expert witnesses. Tenth Circuit found no expert testimony because it was simply the witnesses' personal experience). In *United States v. Finley*, 301 F.3d 1000 (9th Cir. 2003), prosecution objected to adequacy of defense notice of psychological expert as well as nature of opinion; court struck testimony. The Ninth Circuit reversed in a refreshingly commonsense opinion, reviewing the law on when an expert opinion exceeds the knowledge of a layperson and discussing the notice specificity requirements). *See also United States v. Jones*, 739 F.3d 364 (7 th Cir. 2014).

I. Rule 16(a)(2) - Exceptions to government disclosure:

1. Government work-product.

a. Government may waive.

b. May be overcome by undue hardship.

c. May be superseded by *Brady*. *United States v. Musick*, 291 Fed. Appx. 706, 727 (6th Cir. 2008)*; United States v. Starusko*, 729 F.2d 256 (3d Cir. 1984), cited approvingly in *United States v. Baker*, 2011 U.S. Dist. LEXIS 60451 (W.D. Pa. June 6, 2011). *But see United States v. Presser*, 844 F.2d 1275 (6th Cir. 1988)(impeachment evidence falling within Jencks material only discoverable under Jencks Act).

d. Government internal notes may be discoverable at trial as Jencks statements. *United States v. North American Reporting Co.*, 740 F.2d 50 (D.C. Cir. 1984), *cert. denied*, 106 S. Ct. 273. *But see*

United States v. Roach, 28 F.3d 729 (8th Cir. 1994)(internal reports or memoranda prepared by government attorneys in connection with a case investigation are not discoverable under Rule 16).

e. Local law enforcement reports may not be discoverable. *See, e.g.*, *United States v. Fort*, 472 F.3d 1106 (9th Cir. 2007); *United States v. Messina*, 2011 U.S. Dist. LEXIS 87360 (E.D. N.Y. August 8, 2011); *United States v. Cherry*, 876 F. Supp. 547 (S.D.N.Y. 1995). *But see* cases holding reports made prior to federal government's involvement are discoverable -*United States v. Green*, 144 F.R.D. 631 (W.D.N.Y. 1992); *United States v. Gatto*, 729 F. Supp. 1478 (D.N.J. 1989).

2. Witness statements which are only discoverable pursuant to Jencks (18 U.S.C. § 3500).

3. For "good cause," such as national security, the court may agree to inspect documents ex parte. *United States v. Moussaoui*, 591 F.3d 263, 281 (4th Cir. 2010).

3. Inadvertence not a defense to non-disclosure, although defendant must show prejudice. *United States v. Accetturo*, 966 F.2d 631 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1053 (1993).

J. Reciprocal Discovery Under R. 16(b)

1. Reciprocal discovery triggered by defendant request under 16(a)(1)(E), (F) or (G). Government must make request. Rule does not specify if request must be in writing. NOTE: Reciprocal discovery obligations do not arise until after government has

complied with its own discovery obligations. *United States v. Kraselnic*, 702 F. Supp. 480 (D.N.J. 1988). For more recent case, citing *Kraselnic*, see *United States v. Dailey*, 155 F.R.D. 18 (D.R.I. 1994). NOTE ALSO: Reciprocal discovery obligations not triggered by *Brady* requests alone. *United States v. Marenghi*, 893 F. Supp. 85 (D. Maine 1995).

2. Beware of *Taylor v. Illinois*, 484 U.S. 400 (1988), which held that preclusion of testimony was appropriate sanction for defense counsel's failure to disclose the names of alibi witnesses until second day of trial when counsel knew about the witnesses one week earlier and had been permitted to amend the

witness list on the first day of trial. *See also United States v. Rodriguez Cortes*, 949 F.2d 532 (1st Cir. 1991)(court did not abuse discretion in precluding admission of defense documents as sanction for reciprocal discovery violation).

3. **Substantive Change to Reciprocal Discovery Rules - Rule 16(b)(1)(A) and (b)(1)(B)** have changed the wording of what the defense must disclose *from* documents and tests the defense intends to **"introduce"** at trial *to* documents and tests the defense intends to **"use"** at trial. This language is clearly much broader.

4. **Under 16(b)(1)(A), defense must give copies of documents only if they are:**

   a. Within the defendant's control (no due diligence requirement); and

   b. The defendant intends to introduce them at trial. *Kraselnic* holds that statements of witnesses need not be produced before trial where defense had not yet decided who it would call as witnesses. And *United States v. Moore*, 208 F.3d 577 (7th Cir. 2000) holds that defense need not disclose handwritten note of defendant where note used solely to impeach prosecution witness and not as evidence in defendant's case-in-chief.

5. **Under 16(b)(1)(B), defense must give copies of examinations and tests only if they are:**

   a. Within the defendant's control (no due diligence requirement); and

   b. The defendant intends to introduce the evidence at trial or the tests relate to the testimony of a witness the defendant intends to call at trial.

6. **Rule does not cover expert's verbatim notes of defendant's answers to expert's questions.** *United States v. Dennison*, 937 F.2d 559 (10th Cir. 1991).

7. **Rule does not require disclosure of oral opinion of defense experts.** Rule covers tangible evidence only. *United States v. Peters*, 937 F.2d 1422 (9th Cir. 1991).

8. Under 16(b)(1)(C), defense must give summary of expert's testimony if:

   a. Defense intends to use the testimony under Fed. R. Evid. 702, 703 and 705 "as evidence at trial."

   b. Summary must include opinions of witness, bases and underlying reasons for opinion and witness' qualifications.

9. Three exceptions to reciprocal discovery:

   a. Work-product

   b. Reverse Jencks Act - Fed. R. Crim. P. 26.2 - Witness statements not disclosable until after direct-examination.

   c. Fifth Amendment privilege of defendant - not available to government.

10. Under *United States v. Nobles*, 422 U.S. 225 (1975), impeachment of government witness may be conditioned upon disclosure of defense investigator's interview notes, but only after defense witness' direct examination. *Middleton v. United States*, 401 A.2d 109 (D.C. App. 1979); *United States v. Felt*, 502 F. Supp. 71 (D.D.C. 1980).

K. Rule 16(c) - Continuing Duty to Disclose - Once party gives some information under R. 16, party has obligation to apprise opponent of any changes affecting information. *United States v. Formanczyk*, 949 F.2d 526 (1st Cir. 1991).

L. Rule 16(d)(2) - Sanctions

1. Court must impose least severe sanction that will accomplish compliance with discovery order. *United States v. Brown*, 592 F.3d 1088, 1090 (10th Cir. 2009).

2. Voir dire of witness outside presence of jury may cure error. *United States v. Millhouse*, 346 Fed. Appx. 868 (3d Cir. 2009)(unpublished).

3. Suppression of evidence should be limited to circumstances in which it is necessary to serve remedial objectives. *United States v. Case*, 654 F. Supp. 2d 747, 756 (E.D. Tenn. 2009).

4. Government's failure to disclose report containing relevant oral statements justified court's striking officer's testimony entirely. *United States v. Derington*, 229 F.3d 1243 (9th Cir. 2000); *United States v. Khellil*, 678 F. Supp.2d 713, 735-36 (N.D. Ill. 2009)(expert summaries not disclosed).

III. FEDERAL RULE OF CRIMINAL PROCEDURE 12.1

A. **Requires defense to give notice of alibi defense only if government requests in writing.** Government's request must include time, date & place where offense was committed. Failure to comply does not trigger need to respond. *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996); *United States v. Saa*, 859 F.2d 1067 (2d Cir. 1989). For more recent case, citing *Saa*, *see* *United States v. Rivera*, 2011 U.S. Dist. LEXIS 40190 (E.D. N.Y. April 13, 2011).

B. **Refusal to respond to proper written request may result in witness exclusion, even where continuance would cure error.** *United States v. Bissonette*, 164 F. 3d 1143 (8th Cir. 1999)*; United States v. Johnson*, 970 F.2d 907 (D.C. Cir. 1992) This is especially true for the defense. Compare *United States v. Quesada-Bonilla*, 952 F.2d 597 (1st Cir. 1991) (prosecution's failure to tell defense about alibi rebuttal witnesses as required under the Rule did not justify witness exclusion since defendant did not request continuance).

C. **Beware of amended Rule 12.1(b)(1)(B) (Dec 1, 2008) requiring defense to make showing of need if government "intends to rely on a victim's testimony" in rebuttal).**

IV. FEDERAL RULE OF CRIMINAL PROCEDURE 12.2

A. **Always requires defense to give notice of its intent to use an insanity defense or of a defendant's intent to introduce expert testimony relating to defendant's mental state, regardless of whether government so requests.** Absent good cause, failure to give proper notice of this defense could result in an exclusion of your witnesses, but not in exclusion of defendant's testimony. *Alicea v. Gagnon*, 675 F.2d 913 (7th Cir. 1982).

B. Make sure notice is timely. Know your court. *Compare* ***United States v. Cameron***, 907 F.2d 1051 (11th Cir. 1989)(although notice of intent to rely on insanity defense was late, government was clearly aware of defendant's intent and had been granted opportunity to examine defendant) with ***United States v. Weaver***, 882 F.2d 1128 (7th Cir. 1989)(court struck notice filed one week before trial where defendant did not have expert witness to support his defense that prison had destroyed his moral character).

C. Not clear what mental defenses are covered. *Compare* ***United States v. Hill***, 655 F.2d 512 (3d Cir. 1981)(rule does not apply to testimony relating to defendant's susceptibility to entrapment) with ***United States v. Sullivan***, 919 F.2d 1403 (10th Cir. 1990)(rule does apply).

D. RULE 12.2(c) REQUIRES COURTS TO ORDER GOVERNMENT MENTAL EXAM OF CLIENT IN INSANITY CASES UPON GOV REQUEST.

E. RULE 12.2 (c) PERMITS COURTS TO ORDER GOVERNMENT MENTAL EXAM OF CLIENT IN MENTAL STATE CASE WHERE DEFENSE USING EXPERT UPON GOV REQUEST.

F. Examination may not violate defendant′ s privilege. ***United States v. Lujan,*** 530 F. Supp.2d 1224 (D. N.M. 2008)(motions made in capital case involving experts testifying at sentencing phase; court finds that defendant does have a fifth amendment privilege against self-incrimination and a sixth amendment right to notice of scope and nature of government′ s intended mental examination of defendant, but that neither right is violated by ordering examination under 12.2).

United States v. Taylor, 2008 WL 471686 (E.D. Tenn. February 15, 2008)(court rejected argument in mental state with expert case that gov exam would violate fifth and sixth amendments). See also ***United States v. Johnson***, 383 F. Supp. 2d 1145 (N.D. Iowa 2005)(comprehensive discussion of state of law, ultimately allowing government psychiatric exam of defendant without counsel present prior to conviction in capital case where information is given to a team of "taint" prosecutors not otherwise involved in the case; this case also shifts the burden from the government to the defense to show that questions on "offense-specific details are not necessary").

V. FEDERAL RULE OF CRIMINAL PROCEDURE 12.3

A. Requires defendants give notice of intent to rely on defense they believed they were acting on behalf of a law enforcement agency. No government request required. Notice must include the name of the agency, name of the person authorizing the actions and the time the actions were allegedly authorized. If the agency was a federal agency, it must be filed under seal. (Guess we know who wrote this rule.)

B. Failure to comply may result in exclusion of witnesses. *United States v. Seeright*, 978 F.2d 842 (4th Cir. 1992).

VI. WITNESS STATEMENTS - JENCKS ACT (18 U.S.C. § 3500) AND FEDERAL RULE OF CRIMINAL PROCEDURE 26.2

A. Requires disclosure of relevant part of witness' statement after direct examinations. This includes FBI 302 reports, DEA-6 reports, etc. and underlying notes.

MAKE MOTION FOR ALL REPORTS CONTAINED ON FBI AGENT COMPUTER'S "I-DRIVE"

B. To qualify as statement, Jencks and 26.2 require:

1. Written by the witness; and

2. Signed, adopted or approved by the witness; or

3. Substantially verbatim transcript made contemporaneously with witness' oral statement; or

4. Witness' grand jury testimony.

C. Make motion for Jencks material before or during suppression hearing. Entitled under Fed. R. Crim. P. 12(i) and 26.2(g). *See United States v. Salsedo*, 477 F. Supp. 1235 (E.D. Cal. 1979), vacated on other grounds, *sub nom. United States v. Torres*, 622 F.2d 465 (9th Cir. 1980). *Cf. United States v. Adams*, 870 F.2d 1140 (6th Cir. 1989)(may be entitled to discovery on vindictive prosecution claim); *United States v. Kerley*, 787 F.2d 1147 (7th Cir. 1986)(entitled to discovery on selective prosecution claim where can show some evidence of the defense). *See also United States v. Heidecke*, 900 F.2d 1155 (7th Cir. 1990); *United States v. Blackley*, 986 F. Supp. 616 (D.D.C. 1997); and *United States v. Armstrong*, 517 U.S. 456, 468-69 (1996).

D. Make motion for Jencks material at detention hearings. Entitled under Fed. R. Crim. P. 46(i) and 26.2(g).

E. Make motion for Jencks material at sentencing hearings. Entitled under Fed. R. Crim. P. 32(e) and 26.2(g). *United States v. Rosa*, 891 F.2d 1074 (3d Cir. 1989). *See also* *United States v. Alvarez*, 334 Fed. Appx. 995 (11th Cir. July 1, 2009). But see *United States v. Slaughter*, 1994 U.S. App. LEXIS 27324 (D.D.C. September 22, 1994) and *United States v. Radix Laboratories, Inc.*, 963 F.2d 1034, 1039 (7th Cir. 1992) (Jencks Act not applicable at sentencing).

F. Make motion for Jencks material in § 2255 proceedings. Entitled under Fed. R. Crim. P. 26.2(g) and Rule 8 of the Rules Governing Proceedings Under 28 U.S.C. § 2255.

G. Ask for early disclosure of Jencks. Although rule does not allow court to order, some courts have. *See, e.g.*, *United States v. MacFarlane*, 759 F. Supp. 1163 (W.D. Pa. 1991). Court may always pressure government, *United States v. Izzi*, 613 F.2d 1205 (1st Cir. 1980); *United States v. Percevault*, 490 F.2d 126 (2d Cir. 1974). Be aware court may also expect defense to disclose early.

H. Agent's rough notes generally considered producible under 26.2. *United States v. Ramos*, 27 F.3d 65 (3d Cir. 1994)(rough notes must always be kept, but failure to keep by state police working with DEA who were unaware of DEA policy (?!) was not reversible where not in bad faith and no showing notes were exculpatory); *United States v. Gaston*, 608 F.2d 607 (5th Cir. 1979)(per curiam); *United States v. Rippy*, 606 F.2d 1150 (D.C. Cir. 1979); *United States v. Paoli*, 603 F.2d 1029 (2d Cir. 1979). *But see* *United States v. Mena*, 863 F.2d 1522 (11th Cir. 1989) (Jencks Act does not give defendant right to view rough notes of agent's interview of defendant for impeachment purposes where substance of defendant's statement was made available in agent's final report) and *United States v. Grunewald*, 987 F.2d 531 (8th Cir. 1993)(no error to refuse disclosure of rough notes where court reviewed typed report and notes and found no differences).

I. Make motion for preservation of agent's notes early.

J. Agent reports are discoverable where the agent testifies, but not where the witness who is the subject of the report testifies without adopting report. *United States v. Newman*, 849 F.2d 156 (5th Cir. 1988); *United States v. Cole*, 634 F.2d 866 (5th

Cir.), *cert. denied*, 452 U.S. 918 (1981); ***United States v. Layton***, 564 F.Supp. 1391 (D. Ore. 1983). But if the reports contain material relevant to impeachment (government witness' prior criminal acts) then they should be discoverable under *Brady*. ***United States v. Dekle***, 768 F.2d 1257, 1263 (11th Cir. 1985). ***But see United States v. Ruiz***, 702 F. Supp. 1066 (S.D.N.Y. 1989).

K. **Better practice not to receive Jencks material in front of jury.** Make motion before trial. ***Gregory v. United States***, 369 F.2d 185 (D.C. Cir. 1966); ***United States v. Gardin***, 382 F.2d 601 (2d Cir. 1967). *See also* ***Beaudine v. United State***s, 414 F.2d 397 (5th Cir. 1969).

L. **Don't let government hide behind work-product.** Prosecutor's notes of witness interview may be Jencks if read back to witness for corrections. ***Goldberg v. United States***, 425 U.S. 94 (1976).

M. **Request "case summary memos" from agents.**

N. **Request any notes used by witnesses when testifying before grand jury.** ***United States v. Wallace***, 848 F.2d 1464 (9th Cir. 1988).

O. **Diary of witness may be Jencks material.** ***United States v. Rivera Pedin***, 861 F.2d 1522 (11th Cir. 1988).

P. **Prosecutor may not unilaterally decide what material is relevant under Jencks.** Where there is a dispute, court must review in camera. ***United States v. Smith***, 984 F.2d 1084 (10th Cir. 1993); ***United States v. Rewald***, 889 F.2d 836 (9th Cir. 1989); ***United States v. Rivera Pedin***, 861 F.2d 1522 (11th Cir. 1988); ***United States v. Allen***, 798 F.2d 985 (7th Cir. 1986).

Q. **Be on the look out for potential destruction of evidence.** ***Compare United States v. Ramirez***, 174 F.3d 584 (5th Cir. 1999)(tape recordings made and taped over by Bureau of Prisons were "within the possession of the United States" under Jencks and should have been disclosed; court remanded for hearing on whether tapes were erased in bad faith); with ***United States v. Capers***, 61 F.3d 1100 (4th Cir. 1995), which held that where evidence showed no government employee was aware of notebook kept by government witness, failure to disclose notebook (which was destroyed by witness before trial) was not a Jencks violation.

R. **Tape recordings made and taped over by Bureau of Prisons** were within possession of U. S. under Jencks and should have been disclosed. *United States v. Ramirez*, 174 F.3d 584 (5th Cir. 1999).

S. **Some courts have held Jencks does not apply to co-conspirator statements.** *United States v. Williams-Davis*, 90 F.3d 490 (10th Cir. 1996).

VII. *BRADY V. MARYLAND*, **373 U.S. 83 (1963)** - Due process requires disclosure of evidence upon request where the evidence "is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution."

A. **Always file a *Brady* motion. Brady should be interpreted liberally on side of disclosure.** *Kyles v. Whitley, 115 S. Ct. 1555 (1995); Johnson v. Gibson,* 169 F.3d 1239 (10th Cir. 1999); *United States Attorney's Manual, Section 9-5.000 et seq.*

B. ***Brady* may override *Jencks* and work-product.** *United States v. Starusko*, 729 F.2d 256, 263 (3d Cir. 1984); *Chavis v. North Carolina*, 637 F.2d 213 (4th Cir. 1980); *United States v. Poindexter*, 727 F. Supp. 1470 (D.D.C. 1989); *United States v. Gleason*, 265 F. Supp. 880 (S.D.N.Y. 1967); *United States v. Recognition Equipment, Inc.*, 711 F. Supp. 1, 15 (D.D.C. 1989); *United States v. Ruiz*, 702 F. Supp. 1066 (S.D.N.Y. 1989).

But see United States v. Campagniola, 592 F.2d 852 (5th Cir. 1979)(stating, without deciding the issue, that *Brady* may be compatible with Jencks); *United States v. Bencs*, 28 F.3d 555 (6th Cir. 1994), *cert. denied* 115 S. Ct. 915 (1995) (Jencks over *Brady*); *United States v. Hart*, 760 F. Supp. 653 (E.D. Mich 1991) (same).

C. **Brady material generally need not be disclosed before plea if other due process protections in place.** *United States v. Ruiz*, 536 U.S. 622 (2002)(at least where government required to give defendant information regarding factual innocence before plea, no other *Brady* disclosure required). *Cf. Ferrara v. United States*, 456 F.3d 278 (1st Cir. 2006)(only when defendant's "misapprehension [of evidence] results from some particularly pernicious form of impermissible conduct" is due process implicated at the plea stage - here plea was vacated in habeas case).

D. **Materiality - Same standard in all cases under *Bagley***

1. **The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding**

would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1985); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987).

2. In *Kyles v. Whitley*, 115 S. Ct. 1555 (1995), the Court interpreted "reasonable probability" to mean "when the Government's . . . suppression 'undermines confidence in the outcome of the trial.'" *Kyles* focuses the test on the reliability of the verdict.
Without expressly so holding, *Bagley* overruled the three-tiered analysis of materiality established in *United States v. Agurs*, 427 U.S. 97 (1976), replacing it with one standard of materiality for no request, general requests and specific requests under *Brady*.

3. *Bagley* also establishes that the same test of materiality applies to impeachment and exculpatory evidence under *Brady*.

4. Specificity of requests remains practically important even though not required. *United States v. DeCologero,* 530 F.3d 36 (1st Cir. 2008)(no relief without request for specific materials); *United States v. Pelullo,* 399 F.3d 197, 218 (3d Cir. 2005)(where prosecutor has no reason to know of *Brady* material in file unrelated to case, defendant must make specific request); *Johnson v. Gibson,* 169 F.3d 1239 (10th Cir. 1999)(specific request can lower threshold of materiality required); *United States v. Hanna*, 55 F.3d 1456 (9th Cir. 1995). Because the standard for dealing with specific requests is unclear, *Brady* requests should be as specific and as closely tied to the facts as possible. *United States v. Rivas*, 377 F.3d 195 (2d Cir. 2004)(remanded for new trial where government failed to disclose a witness' statement that could be seen as exculpatory under the defense theory despite the government's claim that statement was inculpatory).

5. *Brady* evidence can be oral, need not be reduced to writing. *United States v. Rodriguez,* 496 F.3d 221 (2d Cir. 2007).

E. Prosecution must exercise some efforts to obtain exculpatory material, at least from other government investigative agencies involved in investigation or prosecution of case, *See Kyles v. Whitley*, *supra; United States v. Fahie,* 419 F.3d 249 (3d Cir. 2005); *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980); *United States v. Bryant*, 439 F.2d, 642 (D.C. Cir. 1971). In general, the test applied is whether or not the agency is considered to be "an arm of the prosecution."

1. **Police are an arm of the prosecution for *Brady* purposes.** *United States v. Price,* 566 F.3d 900 (9th Cir. 2009); *United States v. Brooks*, 966 F.2d 1500 (D.C. Cir. 1992)(defense may make showing requiring government search of police files); *United States v. Perdomo*, 929 F.2d 967 (3d Cir. 1991)(prosecutor must search local records for information re key witness' background); *East v. Scott*, 55 F.3d 996 (5th Cir. 1995)(prosecution must conduct investigation of witnesses' criminal backgrounds); *Walker v. Lockhart*, 763 F.2d 942 (8th Cir. 1985)(transcript of taped conversation); *Freeman v. Georgia*, 599 F.2d 65 (5th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980)(police concealment of eyewitness); *United States v. Boyd*, 883 F. Supp. 1277 (N.D. Ill. 1993), *aff'd*, 55 F.3d 239 (7th Cir. 1995) (in El Rukn case, all members of investigative team, including police officers were part of prosecution team); *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995)(fact that defense knew others had previously been arrested for crime did not relieve prosecution of obligation of disclosing information).

   But cf. *United States v. Moeno-Morales,* 334 F.3d 140 (1st Cir. 2003); *Blackmon v. Scott*, 22 F.3d 560 (5th Cir.), *cert. denied* 115 S. Ct. 915 (1994) (information related by witness about defendant's personality was information already known to defendant and not discoverable under *Brady*); *United States v. Moore*, 25 F.3d 563 (7th Cir.), *cert. denied*, 115 S. Ct. 671 (1994) (prosecution not required to seek out witness prior conviction where prosecution had no knowledge of conviction); *Morgan v. Salamack*, 735 F.2d 354, 358 (2d Cir. 1984) (prosecutor not required to obtain police records which were not in files to provide defense with impeachment evidence against government witness); *United States v. Young*, 20 F.3d 758 (7th Cir. 1994) (where government diligently searched records known to it, not required to seek out witness' unknown criminal history in another state); *United States v. Dominguez-Villa*, 954 F.2d 562 (9th Cir. 1992) (analogizes to duty under old Rule 16(a)(1)(C) - no due diligence requirement).

2. **DEA agent**, *United States v. Blanco*, 392 F.3d 382 (9th Cir. 2004)(DEA knowledge of informant's immigration status was relevant impeachment); *United States v. Morell*, 524 F.2d 550 (2d Cir. 1975) (suppression of a confidential file on informant). Cf. *Carvajal v. Dominguez*, 542 F.3d 561 (7th Cir. 2008)(Section 1983 case assumes DEA agent was arm of prosecution).

3. **Medical examiner**, *Paradis v. Ararve*, 240 F.3d 1169 (9th Cir. 2001)(prosecution's notes re medical examiner's opinion on time of death were potentially exculpatory on issue in case and subject to disclosure); *Foster v. Delo*, 54 F.3d 463 (8th Cir. 1995); *Martinez v. Wainwright*, 621 F.2d 184 (5th Cir. 1980)(murder victim's FBI rap sheet).

4. **U.S. Post Office**, *United States v. Deutsch*, 475 F.2d 55 (5th Cir. 1977)(personnel files).

5. **Parole officer is not an arm of the prosecution for *Brady* purposes**. *Pina v. Henderson*, 752 F.2d 47 (2d Cir. 1985).

6. **In general, FBI records are treated as if in the constructive possession of the prosecution**. *United States v. Brooks*, 966 F.3d 1500 (D.C. Cir. 1992)(prosecution must search FBI records); *Briggs v. Raines*, 652 F.2d 862, 865 (2d Cir. 1985)(homicide victim's rap sheet).

7. **CIA affidavit containing exculpatory material**. *United States v. Diaz-Munoz*, 632 F.2d 1330 (5th Cir. 1980).

8. **Some disagreement exists regarding prosecution's duty to disclose information contained in public records**. Cases holding there is a duty: *Johnson v. Dretke*, 394 F.3d *332* (5th Cir. 2004); *United States v. Isgro*, 974 F.2d 1091 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1581 (1993) (prosecution required to disclose transcript of key witness containing inconsistent statements, Jencks Act does not apply to trial transcripts in public domain). *See generally Banks v. Dretke,* 124 S. Ct. 1256, 1272-73 (2004).

   Contra: Bell v. Bell, 512 F.3d 223 (6th Cir. 2008); *United States v. Senn*, 129 F.3d 886 (7th Cir. 1997); *United States v. Bi-CoPowers, Inc.*, 741 F.2d 730, 736 (5th Cir. 1984)(no general public record exception to *Brady*).

9. ***Brady* may be satisfied, however, if a prosecutor discloses how to obtain a public record**. *Chavis v. North Carolina*, 637 F.2d 213 (4th Cir. 1980). *Cf. Banks v. Dretke*, 540 U.S. 668 (2004)(giving defendant just enough to "seek out" evidence does not meet due process standard).

10. **Where defendant makes plausible argument as to why government documents may contain exculpatory material, court may grant request.** *United States v. Lov-It Creamery, Inc.*, 704 F. Supp. 1532 (E.D. Wis. 1989) (corporation's IRS file discoverable to show defendant's lack of intent to profit).

F. **Request negative exculpatory statements such as statements by informed witnesses that fail to mention your client.** *United States v. Furlett*, 1991 U.S. Dist. LEXIS 17220 (N.D. Ill. Nov. 25, 1991)(ordering production of statements of witnesses in a position to know who did not identify defendant); *Jones v. Jago*, 575 F.2d 1164 (6th Cir. 1978), or eyewitness' failure to identify defendant. *United States v. Torres*, 719 F.2d 549 (2d Cir. 1985); *Ganci v. Berry*, 702 F. Supp. 400 (E.D.N.Y. 1988), aff'd, 896 F.2d 543 (2d Cir. 1990). **But cf.** *United States v. Rhodes*, 569 F.2d 384 (5th Cir. 1978)(must be a complete failure to identify defendant, no "dithering").

See also *Strickler v. Greene*, 119 S. Ct. 1936 (1999) (death penalty habeas; Court found prosecution withheld materially exculpatory evidence relating to eyewitness accounts, but refused to reverse because petitioner failed to show that there was "a reasonable probability that his conviction or sentence would have been different had these materials been disclosed"); *Sherman v. Helling*, 194 F.3d 937 (8th Cir. 1999)

(Prosecution's failure to disclose police memorandum containing information that key witness was unable to identify defendant was material and exculpatory and required a new trial, **27 years later!**)

G. **Identify in your motion and request all aspects casting doubt upon the witness' credibility,** citing *Brady*, *Bagley, Giglio v. United States*, 405 U.S. 150 (1972) and *Kyles v. Whitley*, including:

1. **Prior inconsistent statements.** *Goudy v. Basinger,* 604 F.3d 394 (7th Cir. 2010) (habeas case, prior misidentification); *United States v. Hanna*, 55 F.3d 1456 (9th Cir. 1995)(discrepancies between law enforcement officers and reports and grand jury testimony); *United States v. Peters*, 732 F.2d 1004 (1st Cir. 1984)(grand jury witness statements in FBI reports, held not material in light of overwhelming evidence of guilt, but material and reversible in sentencing phase); *King v. Ponte*, 717 F.2d 635 (1st Cir. l983)(same); *United States v. Weintraub*, 871 F.2d 1257 (5th Cir. 1989)(same).

2. **Bias.** See generally *United States v. Abel*, 469 U.S. 45 (1984).

a) Hostility. *United States v. Aviles-Colon,* 536 F.3d 1 (1st Cir. 2008)(DEA report containing information regarding ongoing hostility between defendant and leader of drug conspiracy); *United States v. Sipe,* 388 F.3d 471 (5th Cir. 2004)(witness' dislike of defendant); *United States v. Sperling*, 726 F.2d 69 (2d Cir. 1984) (tape of pre-trial conversation indicating that government witness motivated by revenge).

b) Pecuniary or other interest. *Bell v. Bell,* 460 F.3d 739 (6th Cir. 2006)(disclosure required where, although no express agreement between prosecution and witness, prosecution knew of witness' expectation for deal and fulfilled that expectation); *United States v. Blanco,* 391 F.3d 382 (9th Cir. 2004)(fact that investigating agency kept evidence of informant's immigration benefits from prosecution did not justify nondisclosure); *United States v. Strifler*, 851 F.2d 1197 (9th Cir. 1988)(information contained in witness' probation file should have been disclosed because it related to his motives for informing as well as his tendency to overcompensate for problems and to lie).

c) Kinship with person adverse to client.

d) Favors from prosecution such as telephone calls, conjugal visits, etc. *United States v. Salem*, 578 F.3d 682 (7th Cir. 2009)(witnesses' involvement in uncharged murder should have been disclosed as motive to testify to avoid murder charges); *See* El Rukn cases, *United States v. Andrews*, 824 F. Supp. 1273 (N.D. Ill. 1993); *United States v. Burnside*, 824 F. Supp. 1215 (N.D. Ill. 1993); *United States v. Boyd*, 883 F. Supp. 1227 (N.D. Ill. 1993).

3. Character of witness. *United States v. Brumel-Alvarez*, 991 F.2d 1452 (9th Cir. 1992) (reversible error not to disclose government memorandum written to government agent highly critical of key government informant); *United States v. Bernal-Obeso*, 989 F.2d 331 (9th Cir. 1993)(remand to determine whether government witness lied to DEA about his prior criminal record).

4. Witness' capacity to observe.

a) Logistics. *Ballinger v. Kerby*, 3 F.3d 1371 (10th Cir. 1993)(failure to produce photo tending to impeach witness's statement he could see out of window was *Brady* violation).

b) Use of alcohol or drugs. *United States v. Robinson*, 583 F.3d 1265 (10th Cir. 2009)(CI's drug use was Brady based on CI's centrality to case); *King v. Ponte*, 717 F.2d 635 (1st Cir. 1983)(witness under heavy medication as treatment for unstable mental condition); *Williams v. Whitley*, 940 F.2d 132 (5th Cir. 1991)(sole eyewitness had been to methadone clinic within 2 hours of crime).

c) Hypnosis. *Jean v. Rice*, 945 F.2d 82 (4th 1991)(State's failure to disclose that two of its key witnesses had been hypnotized and that tape recordings and records of hypnosis procedures existed, was error).

5. Testimony which is inconsistent with other evidence. *Mesarosh v. United States*, 352 U.S. 1 (1956); *Jaramillo v. Stewart,* 340 F.3d 877 (9th Cir. 2003)(witness's testimony would have contradicted other witnesses); *Leka v. Poruondo*, 257 F.3d 89 (2d Cir. 2001)(inconsistent evidence - here eyewitness - need not be wholly exculpatory nor completely hidden by prosecution to violate *Brady*); *Johnson v. Brewer*, 521 F.2d 556 (8th Cir. 1975); *Clemmons v. Delo*, 124 F.3d 944 (8th Cir. 1997)(*Brady* violation where prosecution failed to disclose witness' memo accusing third party of committing crime); *Ganci v. Berry*, 702 F. Supp. 400 (E.D.N.Y. 1988), *aff'd*, 896 F.2d 543 (2d Cir. 1990)(statements of witnesses describing perpetrator's eye color different than defendant's).

6. Prior bad acts.

7. Presentence reports of witnesses or co-defendants. *See United States v. McGee,* 408 F.3d 966 (7th Cir. 2005)(defendant may request in camera review of PSI to determine if it contains *Brady* material); *United States v. McKinney*, 758 F.2d 1036, 1048 (5th Cir. 1985) (portion of the report relating to the witness' criminal record). Some courts have developed a two-tiered analysis for the disclosure of presentence reports:

a) Material which is exculpatory must be disclosed. *United States v. Figurski*, 545 F.2d 389 (4th Cir. 1976).

b) Material which merely impeaches the witness is discoverable only where there is a reasonable likelihood of affecting the trier of fact. *United States v. Anderson*, 724 F.2d 596, 598 (7th Cir. 1984)(quoting *Figurski*, 545 F.2d at 391-92).

c) After *Bagley*, this distinction would no longer seem to be viable, unless the courts determine that the privacy interests at stake warrant greater protection with regard to disclosure of presentence reports.

8. **Autopsy reports**. *Anderson v. South Carolina*, 709 F.2d 887 (4th Cir. 1983)(per curiam).

9. **Witness' inability to recall, including drug use**. *United States v. Robinson*, 956 F.2d 1388 (7th Cir.), *cert. denied*, 113 S. Ct. 654 (1992).; *Conley v. United States*, 332 F. Supp.2d 302 (D. Mass. 2004).

H. **Obtain all relevant information on agents who interviewed your client, including, if possible:**

1. **The agents' background or training;**

2. **Prior transcripts of cases in which the agent testified**. *See United States v. Meyer*, 398 F.2d 66 (9th Cir. 1968); *McConnell v. United States*, 393 F.2d 404 (5th Cir. 1968).

3. **Agents' personnel files.** *United States v. Booth*, 309 F.3d 566 (9th Cir. 2002); *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991). *But see United States v. Herring,* 83 F.3d 1120 (9th Cir. 1996). *See* Section I. below.

I. **Request all material which tends to impeach a government witness**, *United States v. Bagley*, 473 U.S. 667(1985); *Giglio v. United States*, 405 U.S. 150 (1972); *Boone v. Paderick*, 541 F.2d 447 (4th Cir. 1976), *cert. denied*, 430 U.S. 959 (1977); including:

1. **Any formal or informal promises to reward a witness.** *Banks v. Dretke,* 540 U.S. 668 (2004); *Bagley*, 473 U.S. 667 (1985); *Harris v. Lafler*, 553 F.3d 1028 (6th Cir. 2009)(police officers' promises to witness must be

disclosed regardless of whether police failed to tell prosecution; prosecution has due diligence obligation to discover evidence); *Tassin v. Cain*, 517 F.3d 770 (5th Cir. 2008). This includes informal understandings. *See Blanton v. Blackburn*, 494 F. Supp. 895 (M.D. La. 1980), *aff'd without opinion*, 654 F.2d 719 (5th Cir. 1981)(informal plea agreement, witness denied existence).

But see *Bell v. Bell,* 512 F.3d 223 (6th Cir. 2008)(although tacit agreements must be disclosed, a witness's expectation is not enough without some assurance or promise by prosecution); *Shabazz v. Artuz*, 336 F.3d 154 (2d Cir. 2003)(prosecution's intent insufficient to mandate disclosure unless communicated to witness).

2. Witness' parole or probation status. *Davis v. Alaska*, 415 U.S. 308 (9th Cir. 1974); *Reutter v. Solem*, 888 F.2d 578 (8th Cir. 1989)(prosecution must disclose that key witness had applied for sentence commutation and was scheduled to appear before parole board shortly); *Meeks v. United States*, 163 F.2d 599 (9th Cir. 1947).

3. Promises as to witness' civil tax or administrative liability. *United States v. Shaffer*, 789 F.2d 682 (9th Cir. 1986); *United States v. Wolfson*, 437 F.2d (2d Cir. 1970); *United States v. Dawes*, 1990 US Dist. LEXIS (D. Kan. Oct. 15).

4. Help in forfeiture proceedings. *United States v. Parness*, 408 F. Supp. 440 (S.D.N.Y. 1975).

5. Money or other reward. *United States v. Thornton*,1 F.3d 149 (3d Cir.), *cert. denied*, 114 S. Ct. 483 (1993); *Wheeler v. United States*, 351 F.2d 946 (1st Cir. 1965).

6. Living expenses.

7. Medical treatment. *United States v. Robinson*, 583 F.3d 1265 (10th Cir. 2009)(prosecution's failure to disclose involuntary commitment of its star witness six days before trial was error).

8. Transportation expenses.

9. Witness protection program. *United States v. Edwards*, 191 F. Supp.2d (D.D.C. 2002)(defendant entitled to relevant portions of witness protection or

psychiatric reports); *United States v. LaFuente*, 991 F.2d 1406 (8th Cir. 1993) (remand to determine if fact was material), *appeal after remand*, 54 F.3d 457 (8th Cir.) *cert. denied*, 64 U.S.L.W. (1995); *United States v. Librach*, 520 F.2d 550 (8th Cir. 1975). *Cf. United States v. Marino*, 658 F.2d 11 6th Cir. 1981)(fact that witness was participating in the witness protection program did not damage witness' credibility or diminish the accuracy of information given).

10. Any type of informant status or files. *Banks v. Dretke,* 540 U.S. 668 (2004); *United States v. Halbert*, 668 F.2d 489, 496 (10th Cir.), *cert. denied*, 456, U.S. 934 (1982); *United States v. Disston*, 582 F.2d 1100 (7th Cir. 1978); *United States v. Phillips*, 854 F.2d 273(7th Cir. 1988)(informer files).

11. Threats for failure to testify. *Banks v. Dretke,* 540 U.S. 668 (2004); *United States v. Sutton*, 542 F.2d 1239 (4th Cir. 1976).

12. Witness' tax returns - especially for informant. See Internal Revenue Code § 6103(i)(1)(2). *United States v. Lloyd,* 992 F.3d 348 (D.C. Cir. 1993)(remanded for hearing); *United States v. Wigoda*, 521 F.2d 1221 (7th Cir. 1975)(in camera inspection); *Johnson v. Sawyer*, 640 F. Supp. 1126 (D. Tex. 1986)(tax returns may be disclosed).

13. Prior criminal convictions. *Turner v. Schriver,* 327 F. Supp. 2d 174 (E.D.N.Y. 2004)*; East v. Scott*, 55 F.3d 996 (5th Cir. 1995)(prosecution has duty to investigate its witnesses' criminal histories); *United States v. Montes-Cardenas*, 746 F.2d 771 (11th Cir. 1984); *United States v. Recognition Equipment, Inc*, 711 F. Supp. 1, 14 (D.D.C. 1989).

14. FBI rap sheets. *Martinez v. Wainwright*, 621 F.2d 184 (5th Cir. 1980)(of homicide victim); *Briggs v. Paines*, 652 F.2d 862 (9th Cir. 1981)(same); *Perkins v. LeFeore*, 691 F.2d 616 (2d Cir. 1982)(of witness). *Cf. Boyer v. Redmann*, 553 F. Supp. 219 (D. Del. 1982)(no obligation to produce victim's rap sheet absent specific request.)

15. Reports of polygraph tests performed upon government witnesses. *United States v. Edwards*, 191 F. Supp. 2d 88 (D.D.C. 2002). This applies to oral as well as written reports. *Carter v. Rafferty*, 826 F.2d 1299 (3d Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988). *But see Wood v. Bartholomew*, 116 S. Ct. 7 (1995)(no *Brady* violation found where prosecution failed to

disclose that codefendant testifying for prosecution was not completely truthful on polygraph).

16. **Fact that witness was target of investigation and threatened with prosecution, even if witness never charged.** *Moynihan v. Manson*, 419 F. Supp. 1139 (D. Conn. 1976), *aff'd without opinion*, 559 F.2d 1204 (2d Cir.), *cert. denied*, 434 U.S. 939 (1977).

17. **"El Rukn" type benefits -- free telephones, contact and conjugal visits, alcohol, clothing, failure to prosecute for drug use.** Also goes to bias.

18. **Agreement to forego psychiatric evaluation of witness.** *Silva v. Brown,* 416 F.3d 980 (9th Cir. 2005).

J. **Request witness' personnel file.** *United States v. Dominguez-Villa*, 954 F.2d 562 (9th Cir. 1992)(limited to federal personnel only); *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991)(defense has right to request that prosecution review FBI agent's personnel files for past instances of dishonesty or misconduct under *Brady*); *United States v. Garrett*, 542 F.2d 23 (6th Cir. 1976); *United States v. Deutsch*, 475 F.2d 55 (5th Cir. 1973); *United States v. Austin*, 492 F. Supp. 502 (N.D. Ill. 1980). *Cf. United States v. Muse*, 708 F.2d 513 (10th Cir. 1983)(request for personnel files was overly broad and superfluous in light of other *Brady* requests for impeachment evidence).

K. **Request rules and regulations governing procedure in a case to determine if they were followed.**

L. **Request any psychiatric treatment of witness.** *United States v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1983); *United States v. Smith*, 77 F.3d 511 (D.C. Cir. 1996)(Government failure to disclose witness's psychiatric history and plea agreement was material under *Brady* and *Kyles*; case remanded). *Cf. United States v. Burns*, 668 F.2d 855 (5th Cir. 1982)(where defendant requested psychiatric records indicating drug and alcohol related problems, he was not entitled to receive records regarding group transactional therapy for personal problems); *United States v. Driver*, 798 F.2d 248 (7th Cir. 1986)(psychological report not material.)

M. **Defensive Maneuvers**

1. **Request in camera review of any material the government refuses to disclose.** District court required to review specific documents to determine whether or not they contain exculpatory evidence. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *United States v. Phillips*, 854 F.2d 273 (7th Cir. 1988)(court examined entire contents of FBI informant file to determine if government summary was accurate and complete); ***Application of Storer Communications, Inc***, 828 F.2d 330 (6th Cir. 1987)(case remanded for in camera inspection of prosecutor's files); ***United States v. Gaston***, 608 F.2d 607 (5th Cir. 1979) (FBI reports of interviews of government witnesses). *See also* ***Spicer v. Roxbury Correctional Institute***, 194 F.3d 547 (4th Cir. 1999)(Information defense counsel gave prosecutor pursuant to plea negotiations about what his client knew and information client gave to prosecutor when his counsel was not present differed on whether client saw defendant at scene of crime; the court found discrepancy was material and impeaching, violating *Brady* and requiring a new trial or dismissal of the indictment); ***United States v. Dupruy***, 760 F.2d 1492 (9th Cir. 1985) prosecutor's confidential notes of negotiations with co-defendants for plea agreements); ***United States v. Anderson***, 724 F.2d 596 (7th Cir. 1984)(witness' presentence report); ***United States v. Diaz-Munoz***, 632 F.2d 1330 (5th Cir. 1980)(CIA affidavit).

2. **The court is not required, however, to conduct an exploratory search through the government files to ensure compliance with *Brady*.** ***United States v. McKinney***, 758 F.2d 1036 (5th Cir. 1985). *But see* ***United States v. Griggs***, 713 F.2d 672 (11th Cir. 1983)(in camera review of prosecutor's files for witness' exculpatory statements); ***United States v. Strifler***, 851 F.2d 1197 (9th Cir. 1988), *cert. denied*, 489 U.S. 1032 (1989)(same).

3. **Investigate to determine whether agents deliberately circumvented *Brady*.** Concealment to circumvent disclosure was prohibited in ***Jones v. City of Chicago***, 856 F.2d 985 (7th Cir. 1988)(case worth reading just to warm your heart). *See also* ***United States v. Galvis - Valderamma***, 841 F. Supp. 600 (D.N.J. 1994)(Government failure to disclose portion of case agent's report containing statements of defendant helpful to defense was material; government may not "avoid *Brady* obligations by failing to take the minimal steps necessary to acquire the requested information").

4. **Agree, if necessary, to a protective order to prevent claim of danger to witnesses.**

N. **Request that the order be continuing.** *United States v. Lord*, 710 F. Supp. 615 (E.D. Va. 1989)(duty is continuing through day of sentencing); *United States v. Greichunous*, 572 F. Supp. 220 (N.D. Ill. 1983)(where a defendant relies on the government's undertaking to disclose *Brady* material when discovered", disclosure on the eve of trial of information which the government had for months is more likely to prejudice defense than where he had no expectation of receiving the evidence at an earlier time).

O. **If government wrongfully withholds possibly exculpatory information, request that:**

1. **The case be dismissed,** *United States v. Chen*, 605 F.2d 433 (9th Cir. 1979); *United States ex rel. Merritt v. Hicks*, 492 F. Supp. 99 (D.N.J. 1980).

OR

2. **The material be stricken.** *United States v. Butts*, 535 F. Supp. 608 (E.D. Pa. 1982);

OR

3. **The case be continued to permit review of the information and further investigation.** Make your record. *See United States v. Olson*, 697 F.2d 273 (8th Cir. 1983)(conviction reversed and remanded where defense requested and was denied a continuance). *Compare United States v. Watts,* 95 F.3d 617 (7th Cir. 1996)(no error where defendant failed to request a continuance); *United States v. Ellsworth*, 647 F.2d 957 (9th Cir. 1981)(no error where defense failed to request a recess, continuance, postponement or mistrial upon receipt of tardily disclosed evidence); *United States v. Hemmer*, 561 F. Supp. 386 (D. Mass. 1983), *aff'd*, 729 F.2d 10 (1st Cir. l984)(same).

4. **Absent bad faith, failure to preserve potentially useful evidence does not violate due process - police have no constitutional duty to conduct particular tests.** *Arizona v. Youngblood*, 488 U.S. 51 (1988). *But see United States v. Cooper*, 983 F.2d 928 (9th Cir. 1993)(in meth case, destruction of lab equipment required dismissal where defense was that lab did not have capacity to produce meth).

5. If you discover the nondisclosure after the case is over, you may file a habeas or motion for new trial based on newly discovered evidence. The non-disclosure of documents may be sufficient "cause" in a habeas petition to explain the failure to raise the issue below or on direct appeal. *Parkus v. Delo*, 33 F.3d 933 (8th Cir. 1994).

6. In *United States v. Johnson*, 26 F.3d 669, 683 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 344 (1994) the court said: "In the future, we will not hesitate to order a new trial if the government fails to make timely disclosure of all *Brady/Giglio* material." Time has not borne this out.

P. Timing of Disclosure:

1. *Brady* does not mandate pre-trial disclosure. *United States v. Knight*, 867 F.2d 1289 (11th Cir. 1989). But courts may order pretrial disclosure. *United States v. Cerna*, 633 F. Supp. 2d 1053 (N.D. Cal. 2009)(court may order pre-trial disclosure of non-Jencks Brady material); *United States v. Hart*, 760 F. Supp. 653 (E.D. Mich. 1991); *United States v. Coggs*, 752 F. Supp. 849 (N.D. Ill. 1991).

2. Prejudice to defendant determines whether or not the disclosure was timely. Evidence must be disclosed in time to be used meaningfully. *United States v. Gil*, 297 F.3d 93 (2d Cir. 2002)(two days before trial too late); *Leka v. Portuondo*, 257 F.3d 89 (2d Cir. 2001)(limited disclosure of important evidence three days before trial was "too little, too late"); *United States v. Fisher*, 106 F.3d 622 (5th Cir. 1997)(*Brady* violation where government belatedly disclosed report containing impeachment of government's key witness).

3. The inquiry under *Brady* focuses on what information has been requested and how that information is to used. *Youngblood v. West Virginia,* 126 S. Ct. 2188 (2006)(after conviction, defense found evidence that note supporting defense of consent had been shown to trooper who requested it be destroyed, Court remanded over strong dissent); *United States v. Higgs*, 713 F.2d 39 at 41-42, *cert. denied*, 464 U.S. 1048.

4. Due process may not be violated when material evidence is introduced in time for the jury to become aware of it, so make a record of prejudice! No violation has been found in numerous cases, including where:

a. Exculpatory evidence was revealed during cross-examination of government's first witness. ***United States v. Smith, Grading and Paving, Inc.***, 760 F.2d 527 (4th Cir. 1985), *cert. denied sub nom. Dellinger v. United States*, 474 U.S. 1005.

b. Discovery during trial that witness was a paid police informant, ***United States v. Adams***, 914 F.2d 1404 (10th Cir. 1990).

5. **Violation of due process found where exculpatory statement made to FBI by a person who was not a witness at trial, was disclosed at trial and two insurance policies were accidentally sent to jurors during jury deliberations.** ***United States v. Greishunous***, 572 F. Supp. 220 (N.D. Ill. 1985)(new trial granted).

Q. **Sentencing Guidelines - *Brady* by its terms clearly applies to sentencing information.** ***United States v. Weintraub***, 871 F.2d 1257 (5th Cir. 1989); ***United States v. Lord***, 710 F. Supp. 615 (E.D. Va. 1989), *aff'd without op.*, 902 F.2d 1567 (4th Cir. 1990). Specificity around specific offense characteristics or adjustments is important.

VIII. OTHER MOTIONS

A. **Fed. R. Evid. 404(b) - Motion to reveal any prior similar acts of defendant the government intends to introduce in its case-in- chief or in rebuttal.** Base motion on Fed. R. Evid. 104 (admissibility is for court); Fed. R. Crim. P. 12(b) (any legal matter may be raised pre-trial) and 12(d) (defendant may request government intent to use R. 16 discoverable evidence).

B. **Fed. R. Evid. 801(d)(2)(E) - Motion to reveal statements the government intends to use as coconspirator statements.**

1. These should be discoverable pre-trial so that a hearing can be held as to the admissibility of the statements. *See, e.g.,* ***United States v. James***, 590 F.2d 575 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979); ***United States v. Santiago***, 582 F.2d 1128 (7th Cir. 1978). *But cf.* ***Bourjaily v. United States***, 483 U.S. 171 (1987)(court can consider hearsay itself and determination is just like any other evidentiary determination); ***United States v. DeOrtiz***, 907 F.2d 629 (7th Cir. 1990)(en banc), *cert. denied*, 111 S. Ct. 684 (1991)(same).

2. Motion should be made under Fed. R. Evid. 806 when coconspirators will not be testifying. *See, e.g.,* ***United States v. Jackson***, 345 F.3d 59, 70-71 (2d Cir. 2003, cited in ***United States v. Flores***, 2011 U.S. Dist. LEXIS 155061 (N.D. Cal. March 24, 2011). *But see contra* ***United States v. Green***, 178 F.3d 1099, 1109 (10th Cir. 1999); ***United States v. Mullins***, 22 F.3d 1365, 1372 (6th Cir. 1994).

C. **Motion to produce informer**. Government need only produce at trial where production relevant and helpful to a fair determination of the case. ***Roviaro v. United States***, 353 U.S. 53 (1957). *See* ***United States v. Raddatz***, 447 U.S. 667 (1980), where court held rule does not apply at suppression hearing. Government has obligation to take reasonable steps to keep track of informer. ***United States v. Rothbart***, 653 F.2d 462 (10th Cir. 1981); ***United States v. Mann***, 590 F.2d 361 (1st Cir. 1978); ***United States v. Leon,*** 487 F.2d 389 (9th Cir. 1973), *cert. denied*, 417 U.S. 933 (1974). But defense must show actual prejudice to obtain dismissal. ***United States v. Valenzuela- Bernal***, 458 U.S. 858 (1982).

D. **Motion for psychiatric examination of government witness.** ***United States v. Barnard***, 490 F.2d 907 (9th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974).

E. **Motion for government press releases**. Where publicity is an issue, the source of the publicity is important. See 28 C.F.R. ╝50.2; ABA Standards on Fair Trial and Free Press; *Rideau v. Louisiana*, 373 U.S. 723 (1963).

F. **Motion for agency rules and regulations**. Look for violations to support a motion to suppress. Beware of *United States v. Cacares*, 440 U.S. 741 (1979).

G. **Motion to reveal existence of electronic surveillance**. Must make pre-trial. *Alderman v. United States*, 394 U.S. 165 (1969).

1. **If it exists, move for production of tapes - request enhancement if not audible.**

2. **Review to determine if surveillance was properly minimized**.

3. **Review court order authorizing the surveillance and supporting affidavit**. *United States v. Dorfman*, 542 F. Supp. 345, *aff'd*, 690 F.2d 1217 (7th Cir. 1982).

4. **Review for compliance with all technical aspects of Title III.** *See, e.g.,* ***United States v. Ojeda-Rios***, 495 U.S. 257 (1990)(failure to comply with Title III tape sealing requirement required reasonable explanation by government).

H. **Generally, don't waive preliminary hearing - can use to lock in specific testimony - entitled to transcript.**

I. **Motion for grand jury minutes.** Must show some evidence of a "particularized need," such as evidence of prosecutorial misconduct, ***United States v. Budzanoski***, 462 F.2d 443 (3d Cir.), *cert. denied*, 409 U.S. 949 (1972) or that evidence would be exculpatory or impeaching. ***United States v. Cerone***, 452 F.2d 274 (7th Cir. 1971), *cert. denied*, 405 U.S. 964 (1972). A more recent case that does a good job of laying out when grand jury transcripts may be discoverable pre-trial is ***United States v. Rodriguez-Torres***, 570 F. Supp. 2d 237 (D. P.R. 2008). NOTE that under ***Bank of Nova Scotia v. United States***, 487 U.S. 250 (1988) motions to dismiss indictments for prosecutorial misconduct may only be granted "'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." *Quoting United States v. Mechanick*, 475 U.S. 66, 78 (1986)(O'Connor, J., concurring).

J. **Request list of government witnesses.** Court has discretion to compel disclosure if defendant can show particularized need. ***United States v. Cannone***, 528 F.2d 296 (2d Cir. 1975); ***Will v. United States***, 389 U.S. 90 (1967)***; United States v. Climatemp, Inc.***, 482 F. Supp. 376 (N.D. Ill. 1979), *aff'd sub nom. United States v. Reliable Sheet Metal Works, Inc.*, 705 F.2d 461 (7th Cir.), *cert. denied sub nom. Fakter v. United States*, 103 S.Ct. 3116 (1983); ***United States v. Jackson***, 508 F.2d 1001 (7th Cir. 1975); ***United States v. Shoher***, 555 F. Supp. 346 (S.D.N.Y. 1983).

K. **Defense generally entitled to order requiring preservation of agent's rough notes.** Make early motion for preservation of these notes for discovery of potential *Brady* material. ***United States v. Ramirez***, 954 F.2d 1035 (5th Cir.), *cert. denied*, 112 S. Ct. 3010 (1992) (agent's destruction of rough notes violated Rule 16 and court could have precluded agent's testimony); ***United States v. Robinson***, 546 F.2d 309 (9th Cir. 1976), *cert. denied*, 430 U.S. 918 (1977); ***United States v. Lewis***, 511 F.2d 798 (D.C. Cir. 1975); ***United States v. Ramos***, 27 F.3d 65 (3d Cir. 1994).

IX. BILL OF PARTICULARS - RULE 7(f)

A. Granting is discretionary - *United States v. Addonizio*, 451 F.2d 49 (3d Cir.), *cert. denied*, 405 U.S. 936 (1972).

B. Purpose:

1. To describe charge.

2. To minimize surprise.

3. To protect against double jeopardy.

C. Cannot save fatal indictment. *Russell v. United States*, 369 U.S. 749 (1962).

D. Requests should be granted where failure causes surprise or denies opportunity for meaningful defense preparation. *United States v. Davidoff*, 845 F.2d 1151 (2d Cir. 1988); *United States v. Alegria*, 1991 U.S. Dist. LEXIS 16079 (S.D.N.Y. Nov. 6, 1991); *United States v. Thevis*, 474 F. Supp. 117 (N.D. Ga. 1979), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982); *United States v. Bearden*, 423 F.2d 805 (5th Cir.), *cert. denied*, 400 U.S. 836 (1970); *United States v. Barket*, 380 F. Supp. 1018 (W.D. Mo. 1974).

Typical requests include:

1. Circumstances surrounding action or making of statement, *United States v. Feinberg*, 502 F.2d 1180 (7th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975), including:

a) Persons present. *Thevis*, *supra*; *United States v. Eilberg*, 465 F. Supp. 1076 (E.D. Pa. 1979); *United States v. Fine*, 413 F. Supp. 740 (W.D. Wis. 1976); *United States v. Ahmad*, 53 F.R.D. 194 (M.D. Pa. 1971).

b) Dates. *See* cases cited above.

c) Locations. *United States v. Honneus*, 508 F.2d 566 (1st Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); *United States v. Orsini*, 406 F. Supp. 1264 (E.D.N.Y. 1976); *United States v. Smith*, 65 F.R.D. 464 (N.D. Ga. 1974).

E. Particularly important in complex cases, such as RICO. *United States v. Davidoff*, 845 F.2d 1151 (2d Cir. 1988)(RICO); *United States v. Neapolitan*, 791 F.2d 489 (7th Cir.), *cert. denied sub nom. Massino v. United States*, 479 U.S. 940 (1986)(RICO); *United States v. McDonnell*, 696 F. Supp. 356 (N.D. Ill. 1988)(RICO); *United States v. Recognition Equipment, Inc.*, 711 F. Supp. 1 (D.D.C. 1989)(government contractor mail fraud).

F. When other legitimate information is sought, fact that evidentiary details or the government's theory of the case may also be revealed is insufficient reason to deny defendant's request. *United States v. Grace*, 401 F. Supp. 2d 1103 (D. Mont. 2005); *United States v. Anderson*, 31 F. Supp. 2d 933 (D. Kan. 1998)*; United States v. Greater Syracuse Board of Realtors*, 438 F. Supp. 376 (N.D.N.Y. 1977); *United States v. Kendall*, 665 F.2d 126 (7th Cir. 1981), *cert. denied*, 455 U.S. 1027 (1982).

X. DEPOSITIONS - RULE 15

A. Rule 15 depositions are rarely ordered unless it appears a witness will die or disappear. For a case where depositions were ordered, *see United States v. McDade*, 1994 US Dist. LEXIS 5334 (E.D. Pa. 4/18/94). For a more recent case where some depositions were granted and others were denied *see United States v. Vilar*, 568 F. Supp. 2d 429 (S.D.N.Y. 2008); *see also In re Grand Jury Proceedings*, 697 F. Supp. 2d 262 (D.R.I. 2010).

XI. SUBPOENAS - RULE 17

A. "In forma pauperis" subpoenas routinely granted by most courts. If not routinely granted, you must show:

1. Defendant unable to pay; and,

2. Necessary to adequate defense. *United States v. Chapman*, 954 F.2d 1352 (7th Cir. 1991)*; United States v. Garza*, 664 F.2d 135 (7th Cir. 1981), *cert. denied*, 102 S.Ct. 1620 (1982). Some courts require a proffer of requested testimony before will approve subpoena. *See, e.g., United States v. Hernandez-Urista*, 9 F.3d 82 (10th Cir. 1993)(denying subpoena because no proffer submitted to meet requirement of particularized need).

B. Rule 17(c) permits early return of subpoenas - must show above requirements and:

1. That evidence not otherwise procurable in advance;

2. That cannot properly prepare without evidence; and

3. That you are not on a fishing expedition. *See generally* ***United States v. Nixon***, 418 U.S. 683 (1974); ***United States v. Caro***, 597 F.3d 608 (4th Cir. 2010); ***United States v. Arditti***, 955 F.2d 331 (5th Cir. 1992).

XII. PRE-TRIAL CONFERENCE - RULE 17.1

Practice varies - request if you think it will engender additional discovery or better disposition.

XIII. FREEDOM OF INFORMATION ACT

Generally takes too long to obtain information for use at trial. Useful in lengthy case or for collateral attack. Note that under ***United States Dep't of Justice v. Julian***, 486 U.S. 1 (1988), defendants serving prison terms may obtain their pre-sentence reports under FOIA.

DISCOVERY OUTLINE UPDATE - 2014

By: Carol A. Brook, Executive Director
Federal Defender Program, Chicago

NEW SECTION: SELECTIVE PROSECUTION/RACIAL PROFILING – Although the Supreme Court has created an extremely difficult standard in these cases, federal defenders have continued to persevere in the best defense tradition. That perseverance has resulted in several short term victories, and promises more to come. ***See United States v. Tuitt***, 68 F. Supp. 2d 4 (D. Mass. 1999) (allowing discovery on a crack selective prosecution claim in a thoughtful opinion on the subject), followed by ***United States v. Daniels***, 142 F. Supp. 2d 140 (D. Mass. 2001) (denying motion to dismiss for selective prosecution due to fact that defense could not show similarly situated poor white neighborhoods where government failed to prosecute crack cases!) More recently federal defenders across the country have filed many successful motions for discovery in phony stash house cases (see below). Gun cases are next.

United States v. Bass, 122 S. Ct. 2389, 536 U.S. 862 (2002) (In death penalty case, defense presented DOJ statistics showing that the United States charges African Americans with death-eligible offenses more than twice as often as it charges whites and that the United States enters into plea bargains more frequently with whites than with African Americans. The Sixth Circuit upheld the district court's order dismissing the death penalty notice where DOJ refused to comply with court order requiring discovery of information relative to government charging practices in death cases, but Supreme Court reversed saying "raw statistics regarding overall charges say nothing about charges brought against *similarly situated defendants* [under Armstrong].")

United States v. Armstrong, 116 S.Ct 1480, 517 U.S. 456 (1996) (Although defendant entitled to obtain discovery in case alleging selective prosecution of African Americans in crack cases if defendant can produce some evidence that similarly situated white persons were not prosecuted, defendant not entitled to that discovery under Rule 16 (a)(1)(C))

United States v. Abraham Brown et al., 12 CR 632 (N.D. Ill. October 3, 2014)(Castillo, C.J.) (defendants proffered sufficient evidence to support motion seeking discovery of racial profiling/selective prosecution in phony stash house cases)

United States v. Paxton, 2014 U.S. Dist. LEXIS 56857 (N.D. Ill. April 17, 2014)(defendants proffered sufficient evidence to support motion seeking discovery of racial profiling/selective prosecution in phony stash house cases)

See detailed stories about racial disparities in phony stash house cases across the country in *USA Today*
athttp://www.usatoday.com/story/news/nation/2014/07/20/atf-stash-house-stings-racial-profiling/12800195/ and
http://www.usatoday.com/story/news/nation/2013/06/27/atf-stash-houses-sting-usa-today-investigation/2457109/

United States v. Al Hedaithy, 392 F.3d 580 (3d Cir. 2004) (district court found defense had presented sufficient evidence to warrant discovery, but determined that even if all facts were as the defense said, there would be no equal protection violation; the Third Circuit disagreed with the court's process and held first, that the defense had **not** made a sufficient showing to warrant discovery and second, that the district court erred in finding there would be no equal protection violation if the discovery showed the decision to prosecute defendant was based upon race or ethnicity)

United States v. Lewis, 517 F.3d 20 (1st Cir. 2008) (Showing how wonderfully persistent the federal defenders are, this challenge was brought by Boston Federal Defender office requesting discovery on claim that persons who were African American and Muslim were being selectively prosecuted; claim rejected, court found insufficient evidence of disparate treatment)

United States v. Wallace, 389 F. Supp. 2d 799 (E.D. Mich. 2005) (Here too the Federal Defender office, this time in Detroit, brought a selective prosecution challenge. They showed that of the 61 pending federal firearms cases brought under Operation Safe Neighborhoods, 55 of the defendants were African American. Again, the challenge was rejected based on insufficient evidence showing that similarly situated white persons were not prosecuted and based on lack of evidence of discriminatory intent). *See also* **United States v. Thorpe**, 471 F.3d 652 (6th Cir. 2006) (reversing district court's grant of discovery based on defendant's claim of selective prosecution under Project Safe Neighborhoods)

United States v. Duque-Nava, 315 F. Supp. 2d 1144 (D. Kan. 2004) (court found that traffic stop study conducted by John Lambert of New Jersey fame, although flawed, sufficient to show discriminatory effect, but not sufficient to show discriminatory intent, which court made clear would be almost impossible to prove in its courtroom), see also companion case of **United States v. Alcaraz-Arellano**, 302 F. Supp. 2d 1217 (D. Kan. 2004) (using same study, court found insufficient evidence of both discriminatory effect and intent)

RULE 16(a)(1)(E) - DOCUMENTS

United States v. Anderson, 416 F. Supp. 2d 110 (D.D.C. 2006) (government must specify which documents it intends to use under the rule)

United States v. Falkowitz, 214 F. Supp. 2d 365 (S.D.N.Y. 2002) (mandatory disclosure of documents not required, court has discretion to order)

BUT CONSIDER RULE 12(b)(4)(B) which requires government to give notice of intent to use evidence in case in chief if defendant requests for purposes of considering suppression motions:

United States v. de la Cruz-Paulino, 61 F.3d 986 (1st Cir. 1995); **United States v. Smith**, 2008 WL 1932145 at *5 (3d Cir. 2008); **United States v. Cheatham**, 500 F. Supp. 2d 528 (W.D. Penn. 2007) (All holding that the provisions of Rule 16 (a)(1)(E) do not meet the notice requirements of Rule 12(b)(4)(B), but cautioning that Rule 12 was not intended as a discovery device)

BRADY V. MARYLAND

Ethical Rules:

A. Model Rule 3.8(d) - Prosecution must timely disclose "all evidence or information known to [them] that tends to negate guilt . . . or mitigates the offense." No materiality requirement.

B. ABA Formal Opinion 09-454 (July 8, 2009): Prosecution's ethical obligations broader than its legal obligations, citing *Cone v. Bell*, 129 S. Ct. 1783 (2009); *Kyles v. Whitley*, 115 S. Ct. 1555 (1995).

United States Attorney's Manual, Section 9-5000 *et seq*., requiring prosecutors "to go beyond the minimum obligations required by the Constitution and establish[ing] broader standards for the disclosure of exculpatory and impeachment information." No enforcement mechanism, aspirational only, but worth citing.

Department of Justice Memoranda from Deputy Attorney General David W. Ogden dated January 4, 2010, establishing guidance for prosecutors regarding criminal discovery, at www.justice.gov/dag.

Smith v. Cain, 132 S. Ct. 627 (2012) (In the second *Brady* case out of New Orleans in a year, Chief Justice Roberts definitively holds that the failure to disclose a detective's notes indicating that the main eyewitness had earlier said he could not identify the murderers required reversal; case emphasizes that "reasonable probability" does NOT mean that the defendant would likely have received a different verdict, only that "the likelihood of a different result is great enough to 'undermine[] confidence in the outcome'")

Cash v. Maxwell, 132 S. Ct. 611 (2012) (case denying cert and upholding 9th Circuit ruling reversing state court's ruling that no credible evidence showed police informer lied when facts showed that the informer had testified in at least 24 different cases to an identical fact pattern and had been called a liar by various police officers and prosecutors; statement of Justice Sotomayor worth reading)

Connick v. Thompson, 131 S. Ct. 1350 (2011) (In sec. 1983 case, despite conceded significant *Brady* violation (or violations), including the prosecution's withholding of a blood sample that showed the perpetrator had a different blood type than the defendant, the Court held there was an insufficient pattern of violations to find a failure to properly train and that the DA's office could rely on things like law school, bar exam preparation, supervisory review of assistants' actions and CLE (hah!))

Phillips v. Ornoski, 2012 U.S. App. LEXIS 5518 (9th Cir. March 16, 2012) (prosecution's failure to disclose significant benefits, including immunity, given to a crucial witness as well as allowing witness to perjure herself was material to one aspect of the case - but not all! and required reversal on that aspect alone)
United States v. Shaygan, 652 F.3d 1297 (11th Cir. 2011) (government's failure to disclose that

two of its witnesses were confidential informants resulted in recall of witnesses and instruction by court to jury, jury found defendant not guilty on all counts - struggle for sanctions against government still proceeding)

District Attorney's Office v. Osborne, 129 S. Ct. 2308 (2009)*(Brady* does not extend to post-conviction proceedings). Cf. **D'Amario v. Davis**, 2010 WL 537807 (D. Colo. 2010)(limiting *Osborne*)

Youngblood v. West Virginia, 126 S. Ct. 2188 (2006)(after conviction in sexual assault case, defense determined that a note that supported defense of consent had previously been shown to state trooper who had requested it be destroyed; Supreme Court in interesting sparring between majority and Justice Scalia, remanded to state court to obtain the benefit of the full court's view of the *Brady* issue, since only the dissent had written an opinion on why it thought the note was *Brady* material)

Banks v. Dretke, 124 S. Ct. 1256 (2004) (**In open file capital case**, government's failure to disclose facts that witness was a paid police informant and that a pretrial transcript showed coaching of another witness were impeaching and material facts, violating *Brady* regardless of government's good or bad faith – a rule that "prosecutor may hide, defendant must seek," is untenable)

United States v. Ruiz, 122 S. Ct. 2450 (2002)(Overruling the 9th Circuit, the Supreme Court here holds that the constitutional requirement that impeachment information be disclosed before trial does **not** apply in plea agreement situations and that the Fifth and Sixth Amendments do **not** require prosecutors to disclose any impeachment information before a plea is entered. So much for voluntary pleas.)

United States v. Rodriguez, 496 F.3d 221 (2d Cir. 2007)(fact that government did not make written notes of witness's lies does not exempt government from turning over the information under *Brady* - interesting discussion of whether simply telling the defense that a witness lied, without giving the defense the specifics of the lies, meets Brady's requirements)

United States v. Stevens, 2009 WL 652596 (D.D.C. April 7, 2009)(granting government's motion to vacate conviction based on its failure to disclose exculpatory evidence to the defense); see 2009 WL 6525927 (D.D.C. Jan. 21, 2009) for history of Senator Stevens' case

For a full history of the shameful saga of the Ted Stevens case, see "Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, Dated April 7, 2009," filed by Henry F. Schuelke & William Shields, March 15, 2012 (514 pages) and resulting **"Fairness in Disclosure of Evidence Act of 2012," (S. 2197),** introduced by Senator Lisa Murkowski

United States v. Cerna, 633 F. Supp.2d 1053 (N.D. Cal. 2009)(court may order pre-trial disclosure of non-Jencks Brady material)

United States v. Yevakpor, 419 F. Supp. 2d 242 (N.D.N.Y. 2006)(**"**Given the current state of affairs in our nation, when surveillance occurs both with and without our knowledge, a great danger to liberty would exist if Government could pick and choose segments of recordings for use in prosecution, destroy the remainder, and then argue that the defense must show that the destroyed evidence contained exculpatory or otherwise potentially useful and relevant information.")

Ferrara v. United States, 456 F.3d 278 (2d Cir. 2008)(Wholly exculpatory evidence may be required to be disclosed prior to plea if it makes plea unknowing).

United States v. Rodriguez, 496 F.3d 221 (2d Cir. 2007)(exculpatory oral statements must be disclosed under Brady, evidence need not be itself admissible if would lead to admissible evidence.)

Gantt v. Roe, 389 F.3d 908 (9th Cir. 2004) (Brady violation found despite fact that defense could have discovered it themselves, that fact does not "absolve" prosecution from its responsibilities)

United States v. Ellsworth, 333 F.3d 1 (1st Cir. 2003)(Noting that the circuits are split on whether Brady requires the disclosure of evidence that would not be admissible at trial, the First Circuit sides with the majority of courts and holds that even inadmissible evidence is subject to Brady if it is "so promising a lead to strong exculpatory evidence that there could be no justification for withholding it.")

Leka v. Portuondo, 257 F.3d 89 (2d Cir. 2001)(The prosecution withheld testimony of eyewitness, a former police officer. The court held that the suppressed testimony was material. The court noted the testimony would have likely had a seismic impact on the outcome of the trial given the credibility of a former police officer appearing as a defense witness. The court further noted that the eventual limited disclosure of the eyewitness testimony was "too little, too late.")

DESTRUCTION OF EVIDENCE

United States v. Ramirez, 174 F.3d 584 (5th Cir. 1999)(where key prison telephone tapes of calls were erased by the prison, government's argument that it did not know of the existence of the tapes was questionable, requiring remand for a hearing on government's knowledge and intent)

United States v. Gomez, 191 F.3d 1214 (10th Cir. 1999) (Customs' destruction of marijuana day before indictment where it had given notice to defendant and prosecution of anticipated destruction 60 days earlier at time of seizure was in conformity with established procedure and not in bad faith – court suggests government consider modifying its drug destruction procedures).

MOTION FOR LIST OF WITNESSES

United States v. Falkowitz, 214 F. Supp. 2d 365 (S.D.N.Y. 2002) (in non-violent, complex document case, defense made sufficient showing of need for list of witnesses)

United States v. Savin, 2001 U.S. Dist. LEXIS 2445 (S.D.N.Y. March 13, 2001) (court granted motion for witnesses based upon duration of alleged conspiracy and location of various witnesses)

United States v. Rueb, 2001 U.S. Dist. LEXIS 943 (S.D.N.Y. Feb. 6, 2001) (court granted motion for witnesses based upon voluminous nature of materials to review to prepare cross-examination, and considering limited nature of appointed counsels' resources)

United States v. Edelin, 128 F. Supp. 2d 23, 31 (D.D.C .2001) (Defendants requested additional discovery, including plea agreements and other witness information which had been sealed by the court to protect potential witnesses. The court determined that the defendants were dangerous and a threat to the government witnesses and ordered that the release of this information would "needlessly jeopardize the safety of potential witnesses and government informants.")

United States v. Gasparik, 141 F. Supp. 2d 361 (S.D.N.Y. 2001) (In securities fraud case, government attempted to call witness it failed to include in its witness list. The defense argued that allowing this testimony created unfair surprise and prejudice as defense had reasonably relied upon the witness list the government supplied. The court ruled that the witness could not be called in the government's case-in-chief, but could be called as a rebuttal witness.)

RULE 7(F) - BILL OF PARTICULARS

United States v. Sampson, 2006 U.S. Dist. LEXIS 57881 (E.D. Va. August 17, 2006) (court granted motion for bill of particulars in fraud case, noting that it is especially important that the defendant have knowledge of which specific documents were fraudulent, what was fraudulent about them and the dates of the allegations)

United States v. Savin, 2001 U.S. Dist. LEXIS 2445 (S.D.N.Y. March 13, 2001) (court granted motion for bill of particulars, ruling that government's production of 85 boxes of documents containing over 100,000 pages of material did not meet its obligations to provide notice of the means and methods of the alleged conspiracy)

NATIONAL SECURITY

United States v. Moussaoui, 2003 U.S. Dist. LEXIS 17253 (E.D. Va. Oct. 2, 2003), on remand from 336 F.3d 279 (4th Cir. 2003) (Citing the fundamental right to compel production of witnesses who could provide favorable testimony, the district court struck the prosecution's death notice where prosecution refused to produce witnesses, citing national security)
United States v. Lindh, 198 F. Supp. 2d 739 (E.D. Va. 2002) (Holding that Rule 16 authorizes

issuance of a protective order when national security issues are present)

NEW SECTION – ADAM WALSH ACT - 18 U.S.C. 3509(m) provides:

(1) In any criminal proceeding, any property or material that constitutes child pornography (as defined by section 2256 of this title) shall remain in the care, custody, and control of either the Government or the court.

(2)(A) Notwithstanding Rule 16 of the Federal Rules of Criminal Procedure, a court shall deny, in any criminal proceeding, any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography (as defined by section 2256 of this title), so long as the Government makes the property or material reasonably available to the defendant.

(2)(B) For the purposes of subparagraph (A), property or material shall be deemed to be reasonably available to the defendant if the Government provides ample opportunity for inspection, viewing, and examination at a Government facility of the property or materials by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial.

United States v. O'Rourke, 470 F. Supp. 2d 1049 (D. Ariz. 2007) (fact that statute limits Rule 16 discovery available to defendants in internet child pornography cases is permissible even though statute prohibits government from copying computer hard drives or other material deemed to be "child pornography")

United States v. Knellinger, 471 F. Supp. 2d 640 (E.D.VA 2007) (finding that "§3509(m) requires, at a minimum, whatever opportunity for viewing is mandated by the Constitution)