From: [redacted]
Sent: Sunday, July 23, 2017 9:01 PM
To: John Siffert
Subject: Pre-Trial Expert Discovery

Dear John,

Following up on our conversation of the other evening, and writing to you in your capacity as a member of the federal criminal rules committee, I would like to suggest that Rule 16 of the federal criminal rules be amended so that experts are required by Rule 16 to make the same sort of detailed pre-trial reports and disclosures as are required in federal civil cases by Rule 26 of the Federal Rules of Civil Procedure. As it stands now, the expert discovery provisions of Rule 16 of the criminal; rules are couched in much vaguer language than the parallel provisions of Rule 26 of the civil rules, and the result is (as the caselaw and everyday experience both attest) that the pre-trial expert disclosures in federal criminal cases are frequently much more minimal than the comparable expert disclosures in civil cases. Since it is obvious that one cannot meaningfully challenge an expert's testimony without substantial pre-trial discovery, the result is that counsel are frequently blindsided by expert testimony given in criminal cases. This may be part of the reason why, according to the Innocence Project, inaccurate expert testimony was a factor in over half of the wrongful convictions later reversed by DNA testing done by the Innocence Project. And, according to the National Registry of Exonerations maintained by the University of Michigan, of the more than 2,000 criminal convictions reversed since 1989 on the basis of post-conviction factual exoneration, the single largest factor common to the wrongful convictions was inaccurate expert testimony.

In June of 2016, the National Commission on Forensic Science overwhelmingly approved a recommendation to the Department of Justice that the Department, notwithstanding the vague language of Rule 16, voluntarily agree to make the same kind of disclosures in federal criminal cases as Rule 26 of the federal civil rules mandates in civil cases. The NCFS recommendation is attached below. In response, the Department issued a Memorandum in January of this year largely agreeing with that recommendation and, indeed, reminding federal prosecutors of prior DOJ memos suggesting much the same. That memo is also attached below. None of this, however, has the force of law, and high-level Department officials have admitted to me that, in fact, there has been very wide variance among U.S. Attorney's Offices, and even among individual AUSAs, as to how much or little has to be disclosed before an expert witness is called to testify in a federal criminal case. Even where very little was disclosed, moreover, the vagueness of Rule 16 has resulted in few defense counsel challenging even the most bare-bones expert disclosures and, in those few cases where such challenges have been made, they have very, very rarely succeeded: -- hence the need to revise Rule 16. At the same time, the Department's positive attitude, as reflected in its memo attached below, suggests that it would not strenuously oppose the suggested revision of Rule 16 (except perhaps to claim it was "unnecessary"). And, frankly, I cannot think of a single reason why the policy considerations that led the framers of Rule 26 to draft specific requirements for expert disclosures do not apply with the same or even greater force in the criminal context. Accordingly, the two rules should be made more or less identical.

Thank you for considering this proposal.

Jed Rakoff

NATIONAL COMMISSION ON FORENSIC SCIENCE

NIST National Institute of Standards and Technology U.S. Department of Commerce

Recommendations to the Attorney General
Pretrial Discovery

Subcommittee
Reporting and Testimony
Status
Adopted by the Commission

Date of Current Version	08/05/16
Approved by Subcommittee	11/05/16
Approved by Commission	21/06/16
Action by Attorney General	[*dd/mm/yy*] 05/01/17

Commission Action
On June 21, 2016, the Commission voted to adopt this Recommendation by a more than two-thirds majority affirmative vote (78% yes, 18% no, 3% abstain)

Recommendations
The National Commission on Forensic Science recommends that the Attorney General take the following actions:

- **Recommendation #1: The Attorney General should direct federal prosecutors, when they intend to offer expert testimony on forensic science test results and conclusions, to provide to the court and defense counsel, reasonably in advance of trial, a report prepared by this expert that contains:**
  - **(i) a statement of all opinions the witness will express and the basis and reasons for them;**
  - **(ii) the facts or data considered by the witness in forming them;**
  - **(iii) any exhibits that will be used to summarize or support them;**
  - **(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;**
  - **(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and**
  - **(vi) a statement of the compensation to be paid the witness.**

With three modifications, this Recommendation tracks Federal Rule of Civil Procedure 26(a)(2)(B). Because of speedy trial and case management concerns, "reasonably in advance of trial" has been substituted for the 90-days-before-trial disclosure requirement of the Civil Rule, but the Commission expects that "reasonably in advance of trial" will usually mean at least a few weeks before trial and with sufficient time for the defense to consult with and/or secure expert assistance. Also, although the Civil Rule requires "a *complete* statement of all opinions," the Recommendation excises the word "complete" in the belief that it is at best confusing and at worst

unnecessarily burdensome. Finally, the Commission intends that the listing requirement of (v) take effect prospectively, as not all forensic experts may have kept such lists in the past.

- **Recommendation #2: The Attorney General should direct federal prosecutors to allow the defendant full access to the expert's case record.**

As depositions of an adversary's expert witnesses are not permitted in federal criminal cases, access to the expert's underlying case record is proposed to mitigate the absence of discovery depositions and to allow the adversary party to examine the underlying data on which the expert's opinions are based (subject to any judicial protective order).

- **Recommendation #3: To the extent the aforementioned disclosures exceed what is presently required by federal law, the Attorney General should authorize federal prosecutors to condition such additional disclosures on the defense's agreeing to provide the same broad disclosures if the defense intends to offer forensic expert testimony.**

Federal Rule of Criminal Procedure 16(b)(1)(C) requires a defendant who intends to offer expert testimony to give the government the same kind of disclosure that the government is required to give the defendant under 16(a)(1)(G). But because the discovery proposed by the Commission's recommendations would go beyond what is required by 16(a)(1)(G), it seems only fair for the government, if it chooses, to condition such additional disclosure on the defendant's agreement that it will make the same broad disclosures if it intends to offer forensic expert testimony of its own (subject to any claim of privilege upheld by the court).

Commentary

The need for pretrial discovery of forensic evidence in criminal cases is critical—for both the prosecution and defense—because "it is difficult to test expert testimony at trial without advance notice and preparation."[1] Indeed, in a number of the cases in which convicted defendants were subsequently exonerated by DNA testing, the failure to disclose exculpatory forensic evidence played a role in the wrongful convictions.[2] There are many other advantages to comprehensive discovery as well. Even in the case of DNA, according to President Bush's DNA Initiative[3], "[e]arly disclosure can have the following benefits: [1] Avoiding surprise and unnecessary delay. [2] Identifying the need for defense expert services. [3] Facilitating exoneration of the innocent and encouraging plea negotiations if DNA evidence confirms guilt." These benefits likewise apply to other forensic evidence. Providing forensic science test results, opinions, and conclusions reasonably in advance of trial is also critical to facilitating a comprehensive and scientific review of the data. Such disclosures will allow opposing experts to sufficiently review the scientific findings to provide appropriate guidance to counsel and help form their own opinions.

Nevertheless, notwithstanding the great need for pretrial disclosure, discovery regarding forensic evidence intended to be offered in criminal cases is not required to be nearly as

[1] Fed. R. Crim. P. 16 (1975), advisory committee's note.
[2] *See* Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 108 (2011).
[3] National Institute of Justice, President's DNA Initiative: Principles of Forensic DNA for Officers of the Court (2005).

expansive or as timely as in civil litigation. Ironically, this is despite the fact that, under federal law, experts can be deposed in civil cases but not in criminal cases, so that the need for substantial pretrial written disclosure would seem to be even greater in criminal cases than in civil cases if trial by ambush is to be avoided. Historically, this disparity has been justified on three grounds: substantial pretrial discovery in criminal actions will (1) encourage perjury, (2) lead to the intimidation of witnesses, and (3) be a one-way street because of the Fifth Amendment privilege against self-incrimination.[4] With forensic evidence, however, these traditional arguments against criminal discovery lose whatever force they might otherwise have. The first argument fails because "it is virtually impossible for evidence or information of this kind to be distorted or misused because of its advance disclosure."[5] Also, there is no evidence that the intimidation of experts is a major problem, both because in federal practice, the expert is often a government employee, and because the evidence can often be reexamined, if necessary, by another expert.[6] Finally, the Self-incrimination Clause, as presently interpreted by the Supreme Court, is not an impediment to the prosecution's obtaining pretrial discovery regarding forensic science that the defendant intends to offer.[7]

Although Federal Rule of Criminal Procedure 16(a)(1)(G) requires the government, on defendant's request, to provide a summary of a forensic expert's "opinions, the bases and reasons for those opinions, and the witness's qualifications," this provision, perhaps because of the aforementioned history, has often been narrowly interpreted by the government and the courts. By contrast, Federal Rule of Civil Procedure 26(a)(2) not only sets forth in much greater detail what disclosures regarding expert testimony must be made prior to trial but also provides that such disclosure, absent court order, must be made well in advance of trial. The need for meaningful and timely discovery in relation to expert testimony is particularly acute in the case of forensic science, where questionable forensic science has often gone unchallenged. The Commission is therefore of the view that the Attorney General, both as a matter of fairness and also to promote the accurate determination of the truth, should require her assistants to make pretrial disclosure of forensic science more in keeping with what the federal civil rules presently require than the more minimal requirements of the federal criminal rules. *See* Recommendation #1, above. Further, in the absence of depositions, the defendant should have access to the expert's case record. *See* Recommendation #2, above. Finally, to the extent permitted by law, the defense should also be reciprocally required to make these enhanced disclosures. *See* Recommendation #3, above.

It should be noted that the foregoing recommendations, designed to achieve the purposes summarized above, are a direct application to the particularities of *federal* practice of the Views Document on Discovery adopted by this Commission on August 11, 2015. Application to *state* practice might require different modifications.

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[4] *See* 2 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 252, at 36-37 (2d ed. 1982).

[5] Commentary, ABA Standards for Criminal Justice, Discovery and Procedure Before Trial 67 (Approved Draft 1970).

[6] 2 Wayne LaFave & Jerod Israel, Criminal Procedure § 19.3, at 490 (1984) ("Once the report is prepared, the scientific expert's position is not readily influenced, and therefore disclosure presents little danger of prompting perjury or intimidation.").

[7] *See* Williams v. Florida, 399 U.S. 78, 85 (1970) ("At most, the [discovery] rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial."); United States v. Nobles, 422 U.S. 225, 234 (1975) (compelled production of defense investigator's notes does not violate the Fifth Amendment because it involved no compulsion of the defendant).

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

January 5, 2017

MEMORANDUM FOR DEPARTMENT PROSECUTORS
DEPARTMENT FORENSIC SCIENCE PERSONNEL

FROM: Sally Q. Yates
Deputy Attorney General

SUBJECT: Supplemental Guidance for Prosecutors Regarding Criminal Discovery Involving Forensic Evidence and Experts

Forensic evidence is an essential tool in helping prosecutors ensure public safety and obtain justice for victims of crime. When introduced at trial, such evidence can be among the most powerful and persuasive evidence used to prove the government's case. Yet it is precisely for these reasons that prosecutors must exercise special care in how and when forensic evidence is used. Among other things, prosecutors must ensure that they satisfy their discovery obligations regarding forensic evidence and experts, so that defendants have a fair opportunity to understand the evidence that could be used against them.

In January 2010, then-Deputy Attorney General David Ogden issued a memorandum entitled *Guidance for Prosecutors Regarding Criminal Discovery* (the "Ogden Memo"), which provided general guidance on gathering, reviewing, and disclosing information to defendants.[1] Given that most prosecutors lack formal training in technical or scientific fields, the Department has since determined that it would be helpful to issue supplemental guidance that clarifies what a prosecutor is expected to disclose to defendants regarding forensic evidence or experts. Over the past year, a team of United States Attorneys, Department prosecutors, law enforcement personnel, and forensic scientists worked together to develop the below guidance, which serves as an addendum to the Ogden Memo.

All Department prosecutors should review this guidance before handling a case involving forensic evidence. In addition, any individuals involved in the practice of forensic science at the Department, especially those working at our law enforcement laboratories, should familiarize themselves with this guidance so that they can assist prosecutors when the government receives a request for discoverable material in a case. Thank you for your attention to this issue and for the work you do every day to further the proud mission of this Department.

[1] Memorandum from David W. Ogden, Deputy Attorney General, to Department Prosecutors, *Guidance for Prosecutors Regarding Criminal Discovery*, January 4, 2010, available at http://dojnet.doj.gov/usao/eousa/ole/usabook/memo/ogden_memo.pdf.

SUPPLEMENTAL GUIDANCE FOR PROSECUTORS REGARDING CRIMINAL DISCOVERY INVOLVING FORENSIC EVIDENCE AND EXPERTS[1]

Forensic science covers a variety of fields, including such specialties as DNA testing, chemistry, and ballistics and impression analysis, among others. As a general guiding rule, and allowing for the facts and circumstances of individual cases, prosecutors should provide broad discovery relating to forensic science evidence as outlined here. Disclosure of information relating to forensic science evidence in discovery does not mean that the Department concedes the admissibility of that information, which may be litigated simultaneously with or subsequent to disclosure.

The Duty to Disclose, Generally

The prosecution's duty to disclose is generally governed by Federal Rules of Criminal Procedure 16 and 26.2, the Jencks Act (18 U.S.C. §3500), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). In addition, §9-5.001 of the United States Attorney's Manual describes the Department's policy for disclosure of exculpatory and impeachment material.

Rule 16 of the Federal Rules of Criminal Procedure establishes three disclosure responsibilities for prosecutors that may be relevant to forensic evidence. First, under Fed. R. Crim. P. 16(a)(1)(F), the government must, upon request of the defense, turn over the results or reports of any scientific test or experiment (i) in the government's possession, custody or control, (ii) that an attorney for the government knows or through due diligence could know, and (iii) that would be material to preparing the defense or that the government intends to use at trial. Second, under Fed. R. Crim. P. 16(a)(1)(G), if requested by the defense, the government must provide a written summary of any expert testimony the government intends to use at trial. At a minimum, this summary must include the witness's opinions, the bases and reasons for those opinions, and the expert's qualifications. Third, under Fed. R. Crim. P. 16(a)(1)(E), if requested by the defense, the government must produce documents and items material to preparing the defense that are in the possession, custody, or control of the government. This may extend to records documenting the tests performed, the maintenance and reliability of tools used to perform those tests, and/or the methodologies employed in those tests.

Both the Jencks Act and *Brady/Giglio* may also come into play in relation to forensic evidence. For example, a written statement (report, email, memo) by a testifying forensic witness may be subject to disclosure under the Jencks Act if it relates to the subject matter of his or her testimony. Information providing the defense with an avenue for challenging test results may be *Brady/Giglio* information that must be disclosed. And, for forensic witnesses employed by the government, *Giglio* information must be gathered from the employing agency and reviewed for possible disclosure.

These are the minimum requirements, and the Department's discovery policies call for disclosure beyond these thresholds.

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[1] This document is not intended to create, does not create, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.

The Duty to Disclose in Cases with Forensic Evidence and Experts

The Department's policy to provide discovery over and above the minimum legal thresholds applies to cases with forensic evidence. Rule 16's disclosure requirements – disclosing the results of scientific tests (16(a)(1)F)), the witness' written summary (16(a)(1)(G)), and documents and items material to preparing the defense (16(a)(1)(E)) – are often jointly satisfied when presenting expert forensic testimony, since disclosure of the test results, the bases for those results, and the expert's qualifications will often provide all the necessary information material to preparation of the defense. But, depending on the complexity of the forensic evidence, or where multiple forensic tests have been performed, the process can be complicated because it may require the prosecutor to work in tandem with various forensic scientists to identify and prepare additional relevant information for disclosure. Although prosecutors generally should consult with forensic experts to understand the tests or experiments conducted, responsibility for disclosure ultimately rests with the prosecutor assigned to the case.

In meeting obligations under Rule 16(a)(1)(E), (F), and (G), the Jencks Act, and *Brady/Giglio*, and to comply with the Department's policies of broad disclosure, the prosecutor should be attuned to the following four steps:

1. First, the prosecutor should obtain the forensic expert's laboratory report, which is a document that describes the scope of work assigned, the evidence tested, the method of examination or analysis used, and the conclusions drawn from the analyses conducted. Depending on the laboratory, the report may be in written or electronic format; the laboratory may routinely route the report to the prosecutor, or the prosecutor may need to affirmatively seek the report from the forensic expert or his or her laboratory. In most cases the best practice is to turn over the forensic expert's report to the defense if requested. This is so regardless of whether the government intends to use it at trial or whether the report is perceived to be material to the preparation of the defense. If the report contains personal information about a victim or witness, or other sensitive information, redaction may be appropriate and necessary. This may require court authorization if the forensic expert will testify, as the report likely will be considered a Jencks Act statement. (See the Additional Considerations section below.)

2. Second, the prosecutor should disclose to the defense, if requested, a written summary for any forensic expert the government intends to call as an expert at trial. This statement should summarize the analyses performed by the forensic expert and describe any conclusions reached. Although the written summary will vary in length depending on the number and complexity of the tests conducted, it should be sufficient to explain the basis and reasons for the expert's expected testimony. Oftentimes, an expert will provide this information in an "executive summary" or "synopsis" section at the beginning of a report or a "conclusion" section at the end. Prosecutors should be mindful to ensure that any separate summary provided pursuant to Rule 16(a) should be consistent with these sections of the report. Further, any changes to an expert's opinion that are made subsequent to the initial disclosure to the defense ordinarily should be made in writing and disclosed to the defense.

3. Third, if requested by the defense, the prosecutor should provide the defense with a copy of, or access to, the laboratory or forensic expert's "case file," either in electronic or hard-copy form. This information, which may be kept in an actual file or may be compiled by the forensic expert, normally will describe the facts or data considered by the forensic expert, include the underlying documentation of the examination or analysis performed, and contain the material necessary for another examiner to understand the expert's report. The exact material contained in a case file varies depending on the type of forensic analysis performed. It may include such items as a chain-of-custody log; photographs of physical evidence; analysts' worksheets or bench notes; a scope of work; an examination plan; and data, charts and graphs that illustrate the results of the tests conducted.

   In some circumstances, the defense may seek laboratory policies and protocols. To the extent that a laboratory provides this information online, the prosecutor may simply share the web address with the defense. Otherwise, determinations regarding disclosure of this information should be made on a case-by-case basis in consultation with the forensic analysts involved, taking into account the particularity of the defense's request and how relevant the request appears to be to the anticipated defenses.

4. Fourth, the prosecutor should provide to the defense information on the expert's qualifications. Typically, this material will include such items as the expert's curriculum vitae, highlighting relevant education, training and publications, and a brief summary that describes the analyst's synopsis of experience in testifying as an expert at trial or by deposition. The prosecutor should gather potential *Giglio* information from the government agency that employs the forensic expert. If using an independent retained forensic expert, the prosecutor should disclose the level of compensation as potential *Giglio* information; the format of this disclosure is left to the discretion of the individual prosecuting office.

Disclosure should be made according to local rules but at least as soon as is reasonably practical and, of course, reasonably in advance of trial. It is important that the prosecutor leave sufficient time to obtain documents and prepare information ahead of disclosure. When requesting supporting documents from a laboratory's file regarding a forensic examination, the prosecutor should consult the guidelines set by the laboratory for the manner in which discovery requests should be made, and for the time required for them to process and deliver the materials to the prosecutor. Further, if multiple forensic teams have worked on a case, the prosecutor should build in sufficient time to consult with, and obtain relevant materials from, each relevant office or forensic expert.

Additional Considerations

Certain situations call for special attention. These may include cases with classified information or when forensic reports reveal the identities of cooperating witnesses or undercover officers, or disclose pending covert investigations. In such cases, when redaction or a protective order may be necessary, prosecutors should ordinarily consult with supervisors.

Laboratory case files may include written communications, including electronic communication such as emails, between forensic experts or between forensic experts and prosecutors. Prosecutors should review this information themselves to determine which communications, if any, are protected and which information should be disclosed under *Brady/Giglio*, Jencks, or Rule 16. If the circumstances warrant (for example, where review of a case file indicates that tests in another case or communications outside the case file may be relevant), prosecutors should request to review additional materials outside the case file. At the outset of a case, prosecutors should ensure that they and all forensic analysts involved are familiar with and follow the Deputy Attorney General's memorandum entitled "Guidance on the Use, Preservation, and Disclosure of Electronic Communications in Federal Criminal Cases": http://dojnet.doj.gov/usao/eousa/ole/usabook/memo/dag_ecom.pdf.

Finally, when faced with questions about disclosure, prosecutors should consult with a supervisor, as the precise documents to disclose tend to evolve, based especially upon the practice of particular laboratories, the type and manner of documentation at the laboratory, and current rulings from the courts.