

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

UNITED STATES OF AMERICA

VERSUS

CRIMINAL NO. 1:08-cr-132-WJG-RHW-01

**GREGORY BRENT WARR and
LAURA JEAN WARR**

MOTION TO CLARIFY AND TO MODIFY THE DISCOVERY ORDER

The Accused, Gregory Brent Warr, files this Motion to Clarify and to Modify the Order Regarding Discovery and in support would show the following:

1.

On January 28, 2009, United States Chief Magistrate Judge John Roper entered the standing Order Regarding Discovery. The Order entered in this case has a time-honored status and was adopted by this Court over twenty years ago as the standing Order Regarding Discovery in pending criminal cases.

2.

When the subject Order Regarding Discovery was adopted, Rule 16(a)(1) of the Federal Rules of Criminal Procedure was made a part of the subject Order. Prior to its amendment in December of 2002, Rule 16(a)(1)(A) related to the statement of the defendant; Rule 16(a)(1)(B) related to the defendant's prior record; Rule 16(a)(1)(C) related to documents and tangible objects and Rule 16(a)(1)(D) related to reports of examinations and tests. A copy of Rule 16 of

the Federal Rules of Criminal Procedure as it was couched prior to its amendment in December, 2002, is attached hereto as Exhibit A.

3.

By Amendment dated November 2, 2002, which became effective December 1, 2002, Rule 16 was recast. Now, Rule 16a(1)(A) relates to the defendant's oral statement; Rule 16a(1)(B) relates to the defendant's written or recorded statement; Rule 16(a)(1)(C) relates to an organizational defendant; Rule 16(a)(1)(D) relates to a defendant's prior record; Rule 16(a)(1)(E) relates to documents and objects; Rule 16(a)(1)(F) relates to reports of examinations and tests and Rule 16(a)(1)(G) relates to expert testimony. A copy of the current Rule 16 is attached hereto as Exhibit B. The current Order does not address the amended Rule 16(a)(1)(E) or Rule 16(a)(1)(F), although the intent of the Order is to cover those subsections.

4.

The Accused, Gregory Brent Warr, moves this Court to modify the existing Order Regarding Discovery, particularly paragraph 1(a) to read that the United States Attorney shall make available to defendant within thirty days of this Order any evidence described in Rule 16(a)(1)(A), (B), (C), (D), (E) and (F). This clarification is necessary to establish uniformity between the current standing Order and the amendment to Rule 16.

5.

Furthermore, the Accused would show that the current Rule 16(a)(1)(G) addresses expert testimony. However, the Order Regarding Discovery is unclear as to the duties of the Government and the Defendant under Rule 16(a)(1)(G) regarding expert testimony. The Accused, Gregory Brent Warr, requests that this Court amend the Order Regarding Discovery to address Rule 16(a)(1)(G) (expert testimony) by providing scheduling deadlines for the

Government to designate its expert witnesses and to otherwise comply with Rule 16(a)(1)(G) and for the Defendant to designate its expert witnesses and to otherwise comply with Rule 16(a)(1)(G).

WHEREFORE, premises considered, the Accused, Gregory Brent Warr, moves this Court to clarify the standing Order Regarding Discovery to the extent set forth above and to amend the Scheduling Order to address the issue of expert testimony as set forth in Rule 16(1)(a)(G).

Respectfully submitted this 11th of February, 2009.

GREGORY BRENT WARR

BY: OWEN, GALLOWAY & MYERS

/s/ JOE SAM OWEN, MSB #3965

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CERTIFICATE OF SERVICE

I, JOE SAM OWEN, of the law firm of Owen, Galloway & Myers, PLLC, counsel for BRENT WARR, do hereby certify that I have this date electronically filed the above and foregoing Motion with the Clerk of the Court using the ECF system which sent notification of such filing to all counsel of record.

SO CERTIFIED THIS 11th day of February, 2009.

/s/ JOE SAM OWEN, MSB #3965

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FEDERAL RULES:

CRIMINAL PROCEDURE
HABEAS CORPUS RULES
MOTION ATTACKING SENTENCE RULES
ALIEN TERRORIST REMOVAL
EVIDENCE
APPELLATE PROCEDURE
SUPREME COURT RULES

TITLE 18—CRIMES AND CRIMINAL PROCEDURE
CONSTITUTION OF THE UNITED STATES
TITLE 8—Sections 1321 to 1350—Chapter 12, Pt. VIII—
IMMIGRATION AND NATIONALITY GENERAL
PENALTY PROVISIONS
TITLE 15—Section 1644—FRAUDULENT USE OF
CREDIT CARDS
TITLE 21—Chapter 13—DRUG ABUSE PREVENTION
AND CONTROL
TITLE 26—Chapter 53—MACHINE GUNS, DESTRUCTIVE
DEVICES, AND CERTAIN OTHER FIREARMS
—Sections 7201 to 7217—PROCEDURE &
ADMINISTRATION—CRIMES
TITLE 28—Chapter 58—UNITED STATES SENTENCING
COMMISSION
—Chapter 153—HABEAS CORPUS
—Chapter 154—SPECIAL HABEAS CORPUS
IN CAPITAL CASES
—Chapter 175—CIVIL COMMITMENT AND
REHABILITATION OF NARCOTIC ADDICTS
TITLE 31—Chapter 53, Subch. II—MONETARY
INSTRUMENTS TRANSACTIONS
TITLE 41—Sections 51 to 58—ANTI-KICKBACK
ACT OF 1986
TITLE 46 App.—Chapter 38—MARITIME DRUG LAW
ENFORCEMENT
TITLE 49—Sections 1155, 46306 to 46318, & 46501 to
46507—FEDERAL AVIATION CRIMINAL
PENALTIES

ADVISORY COMMITTEE NOTES ON RULES

Summary of Features on back cover

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unable to pay for it, the court *may* direct the government to pay for travel and subsistence expenses for both the defendant and the defendant's attorney. In either case, the current rule requires the government to pay for the transcript. Under the amended rule, if the government requested the deposition, the court *must* require the government to pay reasonable subsistence and travel expenses and the cost of the deposition transcript. If the defendant is unable to pay the deposition expenses, the court *must* order the government to pay reasonable subsistence and travel expenses and the deposition transcript costs—regardless of who requested the deposition. Although the current rule places no apparent limits on the amount of funds that should be reimbursed, the Committee believed that insertion of the word "reasonable" was consistent with current practice.

Rule 15(f) is intended to more clearly reflect that the admissibility of any deposition taken under the rule is governed not by the rule itself, but instead by the Federal Rules of Evidence.

HISTORICAL NOTES

References in Text

The Federal Rules of Evidence, referred to in subsec. (e), are set out in Title 28, Judiciary and Judicial Procedure.

Effective and Applicability Provisions

1975 Acts. Amendments of this rule embraced in the order of the United States Supreme Court on Apr. 22, 1974, and the amendments of this rule made by section 3 of Pub.L. 94-64, effective Dec. 1, 1975, pursuant to section 2 of Pub.L. 94-64.

Rule 16. Discovery and Inspection

(a) Governmental Disclosure of Evidence.

(1) Information Subject to Disclosure.

(A) **Statement of Defendant.** Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial. Upon request of a defendant which is an organi-

zation such as a corporation, partnership, association or labor union, the government must disclose to the defendant any of the foregoing statements made by a person who the government contends (1) was, at the time of making the statement, so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to the subject of the statement, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the person was involved.

(B) **Defendant's Prior Record.** Upon request of the defendant, the government shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(C) **Documents and Tangible Objects.** Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) **Reports of Examinations and Tests.** Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(E) **Expert Witnesses.** At the defendant's request, the government shall disclose to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government shall, at the defendant's request, disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 as evidence at trial on the issue of the

defendant's mental condition. The summary provided under this subdivision shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications.

(2) **Information Not Subject to Disclosure.** Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) **Grand Jury Transcripts.** Except as provided in Rules 6, 12(i) and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

[(4) **Failure to Call Witness.**] (Deleted Dec. 12, 1975)

(b) **The Defendant's Disclosure of Evidence.**

(1) **Information Subject to Disclosure.**

(A) **Documents and Tangible Objects.** If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) **Reports of Examinations and Tests.** If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony.

(C) **Expert Witnesses.** Under the following circumstances, the defendant shall, at the government's request, disclose to the government a written summary of testimony that the defendant intends to use under Rules 702, 703, or 705 of the

Federal Rules of Evidence as evidence at trial: (i) if the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) if the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. This summary shall describe the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications.

(2) **Information Not Subject To Disclosure.** Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's agents or attorneys.

[(3) **Failure to Call Witness.**] (Deleted Dec. 12, 1975)

(c) **Continuing Duty to Disclose.** If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence or material.

(d) **Regulation of Discovery.**

(1) **Protective and Modifying Orders.** Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) **Failure To Comply With a Request.** If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

(e) **Alibi Witnesses.** Discovery of alibi witnesses is governed by Rule 12.1.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, § 3(20)-(28), 89 Stat. 374, 375; Dec. 12, 1975, Pub.L. 94-149, § 5, 89 Stat. 806; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994.)

Proposed Amendment of Rule

Effective December 1, 2002, absent contrary Congressional action, this rule is amended to read as follows:

(a) Government's Disclosure.

(1) Information Subject to Disclosure.

(A) Defendant's Oral Statement. Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

(B) Defendant's Written or Recorded Statement. Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:

(i) any relevant written or recorded statement by the defendant if:

- the statement is within the government's possession, custody, or control; and

- the attorney for the government knows—or through due diligence could know—that the statement exists;

(ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and

(iii) the defendant's recorded testimony before a grand jury relating to the charged offense.

(C) Organizational Defendant. Upon a defendant's request, if the defendant is an organization, the government must disclose to the defendant any statement described in Rule 16(a)(1)(A) and (B) if the government contends that the person making the statement:

(i) was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defen-

dant's director, officer, employee, or agent; or

(ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent.

(D) Defendant's Prior Record. Upon a defendant's request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows—or through due diligence could know—that the record exists.

(E) Documents and Objects. Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:

(i) the item is material to preparing the defense;

(ii) the government intends to use the item in its case-in-chief at trial; or

(iii) the item was obtained from or belongs to the defendant.

(F) Reports of Examinations and Tests. Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the government's possession, custody, or control;

(ii) the attorney for the government knows—or through due diligence could know—that the item exists; and

(iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.

(G) Expert Testimony. Upon a defendant's request, the government must give the defendant a written summary of any testimony the government intends to use in its case-in-chief at trial under Federal Rules of Evidence 702, 703, or 705. The summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

(2) Information Not Subject to Disclosure. Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) Grand Jury Transcripts. This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rules 6, 12(h), 16(a)(1), and 26.2.

(b) Defendant's Disclosure.

(1) Information Subject to Disclosure.

(A) Documents and Objects. If a defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial.

(B) Reports of Examinations and Tests. If a defendant requests disclosure under Rule 16(a)(1)(F) and the government complies, the defendant must permit the government, upon request, to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.

(C) Expert Testimony. If a defendant requests disclosure under Rule 16(a)(1)(G) and the government complies, the defendant must give the government, upon request, a written summary of any testimony the defendant intends to use as evidence at trial under Federal Rules of Evidence 702, 703, or 705. The summary must describe the witness's opinions, the bases and reasons for these opinions, and the witness's qualifications.

(2) Information Not Subject to Disclosure. Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:

(A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or

(B) a statement made to the defendant, or the defendant's attorney or agent, by:

(i) the defendant;

(ii) a government or defense witness; or

(iii) a prospective government or defense witness.

(c) Continuing Duty to Disclose. A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court if:

(1) the evidence or material is subject to discovery or inspection under this rule; and

(2) the other party previously requested, or the court ordered, its production.

(d) Regulating Discovery.

(1) Protective and Modifying Orders. At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect *ex parte*. If relief is granted, the court must preserve the entire text of the party's statement under seal.

(2) Failure to Comply. If a party fails to comply with this rule, the court may:

(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;

(B) grant a continuance;

(C) prohibit that party from introducing the undisclosed evidence; or

(D) enter any other order that is just under the circumstances.

ADVISORY COMMITTEE NOTES

1944 Adoption

Whether under existing law discovery may be permitted in criminal cases is doubtful, *United States v. Rosenfeld*, 57 F.2d 74, C.C.A.2d certiorari denied 52 S.Ct. 642, 286 U.S. 556, 76 L.Ed. 1290. The courts have, however, made orders granting to the defendant an opportunity to inspect impounded documents belonging to him, *United States v. B. Goadde and Co.*, 40 F.Supp. 523, 534, E.D.Ill. The rule is a restatement

**FEDERAL
CRIMINAL RULES
HANDBOOK**

2009

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RULE 16
DISCOVERY AND INSPECTION

(a) Government's Disclosure.

(1) Information Subject to Disclosure.

(A) *Defendant's Oral Statement.* Upon a defendant's request, the government must disclose the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

(B) *Defendant's Written or Recorded Statement.* Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:

(i) any relevant written notice or recorded statement by the defendant if:

* the statement is within the government's possession, custody, or control; and

* the attorney for the government knows—or through due diligence could know—that the statement exists;

(ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and

(iii) the defendant's recorded testimony before a grand jury relating to the charged offense.

(C) *Organizational Defendant.* Upon a defendant's request, if the defendant is an organization, the government must disclose to the defendant any statement described in Rule 16(a)(1)(A) and (B) if the government contends that the person making the statement:

(i) was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee, or agent; or

(ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that

person's position as the defendant's director, officer, employee, or agent.

(D) *Defendant's Prior Record.* Upon a defendant's request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows—or through due diligence could know—that the record exists.

(E) *Documents and Objects.* Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:

- (i) the item is material to preparing the defense;
- (ii) the government intends to use the item in its case-in-chief at trial; or
- (iii) the item was obtained from or belongs to the defendant.

(F) *Reports of Examinations and Tests.* Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

- (i) the item is within the government's possession, custody, or control;
- (ii) the attorney for the government knows—or through due diligence could know—that the item exists; and
- (iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.

(G) *Expert Testimony.* At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, give to the defendant a written summary of testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on

the issue of the defendant's mental condition. The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

(2) Information Not Subject to Disclosure. Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) Grand Jury Transcripts. This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rules 6, 12(h), 16(a)(1), and 26.2.

(b) Defendant's Disclosure.

(1) Information Subject to Disclosure.

(A) Documents and Objects. If a defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial.

(B) Reports of Examinations and Tests. If a defendant requests disclosure under Rule 16(a)(1)(F) and the government complies, the defendant must permit the government, upon request, to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.

(C) Expert Testimony. The defendant must, at the government's request, give to the government a written

summary of any testimony that the defendant intends to use under Rules 702, 703, and 705 of the Federal Rules of Evidence as evidence at trial if—

- (i) the defendant requests disclosure under subdivision (a)(1)(G) and the government complies, or
- (ii) the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

The summary must describe the witness's opinions, the bases and reasons for these opinions, and the witness's qualifications.

(2) Information Not Subject to Disclosure. Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:

(A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or

(B) a statement made to the defendant, or the defendant's attorney or agent, by:

- (i) the defendant;
- (ii) a government or defense witness; or
- (iii) a prospective government or defense witness.

(c) Continuing Duty to Disclose. A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other part or the court if:

(1) the evidence or material is subject to discovery or inspection under this rule; and

(2) the other party previously requested, or the court ordered, its production.

(d) Regulating Discovery.

(1) Protective and Modifying Orders. At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect *ex parte*. If relief is granted, the court must preserve the entire text of the party's statement under seal.

(2) Failure to Comply. If a party fails to comply with this rule, the court may:

(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;

(B) grant a continuance;

(C) prohibit that party from introducing the undisclosed evidence; or

(D) enter any other order that is just under the circumstances.

[Adopted Dec. 26, 1944, effective March 21, 1946; amended Feb. 28, 1966, effective July 1, 1966; Apr. 22, 1974, effective Dec. 1, 1975; July 31, 1975, effective Dec. 1, 1975; Dec. 12, 1975; Apr. 28, 1983, effective Aug. 1, 1983; Mar. 9, 1987, effective Aug. 1, 1987; Apr. 30, 1991, effective Dec. 1, 1991; Apr. 22, 1993, effective Dec. 1, 1993; Apr. 29, 1994, effective Dec. 1, 1994; Apr. 11, 1997, effective Dec. 1, 1997; amended Apr. 29, 2002, effective Dec. 1, 2002; amended Nov. 2, 2002, effective Dec. 1, 2002.]

AUTHOR'S COMMENTARY ON RULE 16

PURPOSE AND SCOPE

Rule 16 is the primary rule governing pretrial discovery in criminal cases. In addition, Rule 12.1 governs disclosure of alibi witnesses, Rule 12.2 disclosure of expert testimony relating to mental condition, Rule 12.3 disclosure of evidence of a public authority defense, Rule 17 subpoenas for witnesses and evidence at trial, and Rule 26.2 governs the disclosure of witness statements. Prosecutors also have constitutional discovery obligations independent of the rules.

SUMMARY OF DISCOVERY RULES FOR DEFENDANTS IN FEDERAL CRIMINAL CASES

Before discussing in detail the range of discovery provided by Rule 16, it may be helpful to provide an overview of all the avenues available to defendants seeking discovery in criminal cases. They include:

Rule 16: Gives defendant access to defendant's statements, tangible evidence, and experts' qualifications, reports, materials and information relied upon to render an opinion.

Brady Materials: Due process requires disclosure of any evidence favorable to the accused that is possessed by the prosecution and is material to either guilt or punishment.¹

Giglio Materials: Due process requires that the prosecution disclose all information that may be used to impeach its witnesses, such as promises to, payments or plea bargains with the witnesses.²

Henthorn Materials: The defense may make a motion for

[Rule 16]

¹See *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

²See *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).