

**Subject: Re: discovery in criminal cases in DC**

**Date: 8/19/2003, 4:11 PM**

**From: FMulhauser@aol.com**

**To: Judgewatchers@aol.com**

Ms. Sassower--

I note you sent a lengthy set of requests to the U.S. Attorney seeking discovery in your criminal case. Unlike the major opportunity for pretrial discovery afforded by the federal rules in civil cases, and unlike the rules in some other states for criminal cases, statutory discovery in DC in criminal cases is quite limited. See the extract from the Court rules below. Under the Constitution, the prosecution has additional responsibilities of disclosure, such as of exculpatory material as mandated by Brady v. Maryland.

As we do not represent you or know the details of your case, and as in general we do not practice criminal law, nothing in the foregoing (or attached) paragraphs is furnished as legal advice, but solely for your use as background information. For legal advice, consult an attorney qualified to practice criminal law in the District of Columbia.

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D.C. SUPERIOR COURT RULES OF CRIMINAL PROCEDURE  
Current with amendments received through 1/1/2003

**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 attorney for 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 organization 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 prosecutor.

(C) **Documents and Tangible Objects.** Upon request of the defendant the prosecutor 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 prosecutor 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 prosecutor, 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 Witness.** At the defendant's request, the government shall disclose to the defendant a written summary of the testimony of any expert witness that the government intends to use 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 of any expert witness the government intends to use as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subparagraph 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 subparagraphs (a)(1)(A), (B), (D), and (E), 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 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(e) and 26.2, and subparagraph (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

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

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

(A) **Documents and Tangible Objects.** If the defendant requests disclosure under paragraph (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 paragraph (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 of any expert witness that the defendant intends to use as evidence at trial: (i) if the defendant requests disclosure under subparagraph (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 paragraph 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.

**(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 Witness.** Discovery of alibi witnesses is governed by Rule 12.1 of the criminal rules of this court.

**(f)** In the case of a defendant who is detained pursuant to D.C. Code §§ 23-1322(b) or 23-1329(b), a request for discovery under this rule may be made after thirty days following the initial order of detention or at any time after the detention hearing pursuant to D.C. Code § 23-1322(d), whichever is later.

[Amended effective March 31, 1995; July 1, 1995; May 26, 1998; February 16, 2000.]

**Comment**

Subsection (f) modifies the federal rule by explicitly providing for discovery prior to indictment in cases in which the defendant is detained before the trial pursuant to D.C. Code §§ 23-1322(b) or 23-1329(b). A party seeking discovery before indictment must make a reasonable *bona fide* effort to obtain discovery from the opposing party informally pursuant to Rule 16-II before filing a motion to compel discovery. Nothing in this subsection limits the judge's discretion under subsection (d) to restrict, defer or deny a request for discovery upon a sufficient showing. This subsection is not intended to discourage the informal exchange of information between the parties by mutual agreement at any time after the commencement of a criminal case. The rule is intentionally silent on the question of the Court's authority to order

preindictment discovery in other categories of cases.

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#### **RULE 16-II. INFORMAL DISCOVERY**

It shall be the duty of every defense counsel, whether appointed or retained, to consult with the prosecutor assigned to the case in order to seek informal discovery. Such consultation shall take place prior to the time for the filing of pretrial motions as required in Criminal Rule 47-I(c). The clerk shall not accept motions for bills of particulars and for discovery under Rules 7(f) and 16 respectively of these rules unless defense counsel certifies in writing that he has made a bona fide attempt to secure the necessary relief from the prosecutor on a voluntary basis and that the prosecutor has not complied with such request.

#### **Comment**

This rule has been added to require counsel's certification that he has made a request for discovery from the prosecutor prior to the filing of a motion for discovery or a bill of particulars.