**DISCOVERY POLICY**
**United States Attorney's Office**
**District of Alaska**

**PROTECTED INFORMATION**
**ATTORNEY CLIENT PRIVILEGE/WORK PRODUCT DOCTRINE**
**FOIA/PRIVACY ACT PROTECTED - 5 U.S.C. § 552(b)**

## I. Introduction

The Discovery Policy of the District of Alaska is designed to assist all Assistant United States Attorney's in meeting their legal and ethical obligations to provide appropriate discovery in criminal cases.[1] This policy and the guidance contained herein do not create or confer any rights, privileges, or benefits on any person. *See United States v. Caceres*, 440 U.S. 741 (1979).

This discovery policy provides district specific guidance on gathering, reviewing and producing information to criminal defendants in accordance with each prosecutor's disclosure obligations as enumerated and defined in the following:

a. Federal Rules of Criminal Procedure Rules 12 and 16;
b. *Jencks Act* and Federal Rule of Criminal Procedure 26.2;
c. *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and their progeny;
d. USAM 9-5.001 (Disclosure of Exculpatory and Impeachment Information);
e. USAM 9-5.100 (Potential Impeachment Information on Law Enforcement Witnesses);
f. District of Alaska Local Criminal Rules;
g. Case Specific Discovery Orders

Prosecutors in the District of Alaska are encouraged to provide broad and early disclosure of information and materials to the extent that broad and early discovery promotes the just resolution of a case and does not jeopardize witness safety, national security, or an ongoing criminal investigation.[2] Consistent with the law and the sound exercise of prosecutorial discretion, there may be legitimate reasons to withhold or delay disclosure in order to protect witnesses, to safeguard investigations of other people or other crimes committed by the defendant, or to preserve a

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1This policy applies equally to Assistant United States Attorneys, Special Assistant United States Attorneys, and any DOJ attorney working on a criminal case in the District of Alaska. This discovery policy does not govern disclosure in cases involving and national security. Discovery concerning national security cases will be conducted in accordance with the policy articulated in Acting Deputy Attorney General Grindler's September 29, 2010 memorandum on this subject.

2Prosecutors should not refer to this districts broad discovery practice as "open file discovery" as this term is inexact and potentially misleading. Our files should not ever be completely open (to preserve attorney-client privileged information and the work product doctrine) and there may be times when another government agency might have some material or information of which you are not aware.

legitimate trial strategy. Keep in mind, however, that expansive discovery may facilitate plea negotiations or otherwise expedite litigation. In the long term, moreover, expansive discovery will foster our office's reputation for candor and fair dealing.

This policy does not attempt to answer every discovery question that may arise in a particular case. Prosecutors are therefore encouraged to consult with our district's discovery coordinator, office supervisors and others throughout DOJ when faced with new or challenging discovery issues.[3] Prosecutors who seek to deviate from this policy must always obtain supervisory approval.

The responsibility to produce all discoverable information in a criminal case lies with the AUSA assigned to the case. To fulfill this responsibility, AUSAs should consider several matters:

- **What & When**: What are the policies, rules, statutes and case law that define what must be produced and when must it be produced? (*See II. Laws, Rules and Policy Governing the Production of Discoverable Information (What Must Be Produced and When?)*)

- **Who is part of the prosecution team**: AUSAs are obligated to produce information that is within the possession of the prosecution team; thus, defining the scope of the prosecution team is critical. (*See III. Who is Part of the Prosecution Team: Gathering and Reviewing Potentially Discoverable Information*)

- **Where to look**: Once the prosecution team has been identified, AUSAs must ensure that all discoverable information is located, reviewed and produced as required, including agency investigative and administrative files, CI files, emails, PSRs, law enforcement *Giglio*, etc. (*See IV. Potential Sources of Discoverable Information*)

- **How to produce and track**: AUSAs must decide in what form to produce the discovery (Bates numbered, hard copy, e-copy, available for inspection, redacted, etc), and **must keep a detailed record of all discovery produced**. (*See V. Manner of Production and Record-keeping*)

## II. Laws, Rules and Policy Governing the Production of Discoverable Information (What Must Be Produced and When?)

AUSAs must produce all discoverable information in accordance with federal law, the local rules, case specific discovery orders in criminal cases and DOJ policy. For the purposes of this memorandum, "discovery" or "discoverable information" is not limited to Federal Rule of Criminal

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3 On January 4, 2010, Deputy Attorney General Ogden issued a memorandum entitled "Guidance for Prosecutors Regarding Criminal Discovery" ("DAG Ogden Criminal Discovery Guidance." All AUSAs must also be familiar with this guidance.

Procedure 16 information, but includes all information and materials the government must disclose to the defendant pursuant to the Jencks Act; Federal Rule of Criminal Procedure 26.2; Federal Rules of Evidence 404(b) and 413-414; *Brady*, *Giglio*, *Henthorn*, USAM 9-5.001 and 9-5.100; and the local rules.

### A. Federal Rule of Criminal Procedure 16

**1.** Defendant's oral statements made to law enforcement in response to interrogation by a person the defendant knew was law enforcement.

**2.** Defendant's written or recorded statements, including grand jury testimony.

**3.** Statements by organizational defendant.

**4.** Defendant's prior record.

**5.** Documents and objects for use in our case-in-chief or which are material to preparing the defense.

**6.** Reports of examinations and tests.

**7.** Expert witnesses - summary of opinion, bases and reasons, qualifications

### B. Disclosure of *Brady/Giglio*

The constitutional guarantee to a fair trial, as interpreted by *Brady* and *Giglio* and their progeny, requires AUSAs to disclose to the defense any evidence that is material to guilt or punishment. *Brady*, 373 U.S. at 87; *Giglio*, 405 U.S. at 154. *Brady* and *Giglio* information must be disclosed to the defense regardless of whether the defense makes a request for such information. On October 19, 2006, the Department issued an amendment to the U.S. Attorney's Manual that "requires AUSAs to go beyond the minimum obligations required by the Constitution and establishes broader standards for disclosure of exculpatory and impeachment information." The details of the requirements are set forth in USAM § 9-5.001. In short, the policy requires disclosure of "information beyond that which is 'material' to guilt as articulated in *Kyles v. Whitley*, 514 U.S. 419 (1995)," and encourages AUSAs to "err on the side of disclosure." This policy requires the prosecution team to produce "information," not just "evidence," and counsels that the assigned AUSA(s) must consider the cumulative impact of items of information.

#### 1. Exculpatory Information

All exculpatory information known to or in the possession of the prosecution team, regardless of whether the information is memorialized, should be disclosed to the defendant reasonably promptly after its discovery. In accordance with the directives of USAM 9-5.001,

AUSAs should go beyond the Constitutional requirements and take a broad view of materiality when determining what must be disclosed:

> A prosecutor must disclose information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime.

USAM 9-5.001 C 1. This includes, but is not limited to, exculpatory information contained in interview memoranda of testifying and non-testifying witnesses and in internal emails, memos, and other reports. It also includes exculpatory information learned by any other means, regardless of whether or not the information is memorialized in writing. The exculpatory information need not be provided in its original form, *e.g.*, it is sufficient to send a letter to defense counsel advising of the exculpatory information in lieu of providing a copy of the original source document or recording, etc, which could be an email, letter, or other document or source. However, if the information is sent by letter as opposed to the original source material, the AUSA should consult the discovery coordinator or his/her supervisor and keep a record of the source material and be prepared to produce it for the court.

### 2. Impeachment Information

*Giglio v. United States*, 405 U.S. 150 (1972), and its progeny, address the Government's obligation to turn over evidence that could by used to impeachment the credibility of a government witnesses. USAM 9-5.001 goes beyond *Giglio's* requirements and requires AUSAs to disclose anything that is material to the witness's credibility, or "that casts a substantial doubt upon the accuracy of any evidence ... the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence." USAM 9-5.001. The information should be disclosed "regardless of whether the information ... would itself constitute admissible evidence." USAM 9-5.001.

Examples of what must be turned over include inconsistent statements, promises of leniency or immunity made to a witness, plea/cooperation agreements entered into with a witness; any benefit provided to the witness by the Government; payments to a witness; any information that may be indicative of the witness's bias including, but not limited to, the witness's incarceration, probation, or supervised release status; the prior criminal record ("rap" sheet) of a witness, and other prior bad acts a witness (*see* Federal Rules of Evidence 607, 608(b) and 609).

For a fuller discussion of inconsistent statements *see* D. Witness Interviews, "*Brady* and *Giglio* in Interviews of Testifying and Non-testifying Witnesses," and "Interviews of Non-testifying Individuals," below.

### 3. Timing of Disclosure

**a. Pre-Charge Disclosures**.

**(1) Grand Jury:**

Exculpatory Information. Although the Supreme Court has held that there is no constitutional requirement that the government disclose exculpatory evidence to the grand jury, *see United States v. Williams*, 504 U.S. 36, 52-54 (1992), USAM 9-11.233 requires AUSAs to disclose to the grand jury "substantial evidence that directly negates the guilt of a subject of the investigation."

Impeachment Information: Although there is no legal duty to seek out impeachment information from the prosecution team or present impeachment information to a grand jury, if an AUSA is aware of significant impeachment information relating to a testifying witness, the AUSA should consider disclosing it to the grand jury, taking into account the witness's role in the case and nature of the impeachment information, among other things.

**(2) Affidavits:**

Exculpatory Information. If an AUSA is aware of substantial exculpatory information at the time he or she is preparing an affidavit in support of a search warrant, complaint, seizure warrant, or TIII, the AUSA should disclose the information in the affidavit unless the AUSA obtains supervisory approval not to do so.

Impeachment Information. If at the time an AUSA is preparing an affidavit in support of a search warrant, complaint, seizure warrant or TIII, the AUSA is aware of impeachment information relating to the affiant or other person relied upon in the affidavit such as a confidential informant, the AUSA should disclose the information in the affidavit unless the AUSA obtains supervisory approval not to do so. A prior judicial finding of a lack of credibility of an affiant or person relied upon in the affidavit should be disclosed in the affidavit.

**b. Post- Charge Disclosures:**

**(1) Exculpatory Information:** After a defendant is charged, exculpatory information should be disclosed reasonably promptly upon its discovery. USAM 9-5.001 D 1. If an AUSA discovers exculpatory information after conviction, sentencing and appeal, the AUSA should discuss the proper way to handle the matter with a supervisor.

**(2) Impeachment information** should be disclosed as follows:

**(a) Pre-Trial Hearings**: Impeachment information relating to government witnesses who will testify at a preliminary/detention hearing, motion to suppress, or

other pre-trial hearing should be disclosed sufficiently in advance of the hearing to allow the hearing to proceed efficiently.

(**b) Guilty Pleas**: The Supreme Court has held that there is no constitutional requirement that the government disclose impeachment information prior to a guilty plea. *United States v. Ruiz*, 536 U.S. 622 (2002). Nonetheless, if the AUSA is aware of impeachment information so significant that it undermines the AUSA's confidence in the defendant's guilt, the AUSA should disclose the information to the defense and advise their supervisor.

**(c) Trial**: Impeachment information should be disclosed "at a reasonable time before trial to allow the trial to proceed efficiently." USAM 9-5.001 D 2. To the extent that impeachment information is contained within a written Jencks Act witness statement, the statement shall be provided along with all other Jencks Act material no later than the Friday before trial when trial starts on Monday. For complex and multi-week trials, Jencks materials should be provided earlier as discussed below.

(**d) Sentencing**: USAM 9-5.001 D 3 requires: "Exculpatory and impeachment information that casts doubt upon proof of an aggravating factor at sentencing, but that does not relate to proof of guilt, should be disclosed no later than the court's initial presentence investigation." Thus, AUSAs should disclose such information no later than the date the court issues its preliminary presentence (PSR) investigation. If additional favorable information becomes apparent after the initial PSR is issued, it should be disclosed promptly.

**(e) Post-conviction evidentiary hearings:** (probation/supervised release revocations, habeas actions) Impeachment information should be disclosed at a reasonable time before the hearing to allow the hearing to proceed efficiently.

### C. Impeachment Information Relating to Law Enforcement Witnesses

In some cases AUSAs may encounter *Henthorn* (add citation) or *Giglio* issues with respect to law enforcement witnesses who will be the affiant or a witness at a hearing or trial. For example, an agent may have been found to have committed misconduct, or may be the subject of a pending internal or criminal investigation. USAM 9-5.100 contains the Department's policy on obtaining and disclosing *Giglio* or *Henthorn* information relating to law enforcement witnesses. This office has a *Henthorn* coordinator to assist AUSAs with requests relating to law enforcement witnesses.

All potential impeachment information obtained from a law enforcement witness or the witness's agency should be carefully protected and only disclosed to those with a need to know.

**1. Requesting and Reviewing Personnel and Disciplinary Files.** When requested by an AUSA, the *Henthorn* coordinator officer will request information from the witness's agency. If it is a federal agency, the agency official will conduct a review of the agent's personnel and disciplinary files and disclose any impeaching information from the file to the requesting

*Henthorn* officer. If it is a state or local agency that does not have a person qualified to conduct *Henthorn* reviews, the agency will likely be asked to produce the records to the *Giglio* officer for review. Because gathering and reviewing *Henthorn* records takes time, AUSAs should make their request to the coordinator no later than two weeks prior to trial. If a *Henthorn* request has been made but not responded to before trial begins, the AUSA should advise the court.

**2. Disclosure of Potential Impeachment Information to the Court or Defense Counsel.** Once the agency discloses any *Henthorn* information to the *Henthorn* coordinator, the coordinator, in consultation with the prosecuting AUSA, will review the material to determine whether it should be disclosed to the court for an *ex parte, in camera* review or to defense counsel. The *Henthorn* coordinator will disclose the materials to the AUSA that appear to be potential *Brady* or *Giglio*. Before the AUSA discloses any material either to the court for an *ex parte, in camera* review, or to defense counsel, the AUSA should discuss the matter fully with one of the *Henthorn* coordinator. If it is determined that disclosure should occur, the *Henthorn* coordinator or prosecuting AUSA should notify the agent or agency before disclosure occurs, and give them an opportunity to be fully heard on the matter.[4]

If an AUSA asks the court to conduct an *ex parte, in camera* review of potential *Giglio* information, the AUSA should ensure that the AUSA's *ex parte, in camera* presentation to the court, and the potential *Henthorn* information reviewed by the court are made part of the court record, under seal if appropriate, so that it can be reviewed by the appellate court if necessary. The AUSA should provide the *Henthorn* coordinator and the law enforcement agency with any pleadings or documents that are filed with the court regarding a law enforcement witness's potential impeachment information, as well as with any court rulings on potential impeachment information so that the *Henthorn* coordinator can handle the information in a consistent fashion in future cases.

**3. Protective Orders.** AUSAs should seek protective orders of sensitive potential impeachment information in appropriate cases to prohibit disclosures by defense counsel or the defendant to third parties not involved in the case.

**4. Securely Maintaining Sensitive Agency Material.** All potential impeachment information received from an agency pursuant to a *Henthorn* request should be securely maintained and should not be shared with any person who does not have a need to know. The AUSA should keep a copy of all potential *Henthorn* information received from a *Henthorn* coordinator in the case file. *Henthorn* material disclosed to the court or to defense should be clearly marked in the criminal case file, so it is clear what was disclosed to the court. Because *Henthorn* information is sensitive, *Henthorn* information in a criminal case file should be kept in a sealed yellow envelope when it is not in use. Consult a *Henthorn* coordinator for more details on proper storage and security of *Henthorn* information.

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4 In some cases, an agent may be unaware that there is a pending investigation of their alleged misconduct. In such cases, the *Henthorn* coordinator and the AUSA should be careful to discuss the matter only with the agency, and not with the agent.

## D. Witness Interviews

### 1. Interviews of Testifying Witnesses (302s, DEA-6s, etc.)

Absent unusual circumstances such as potential serious threats to witness safety, national security, or an ongoing criminal investigation, AUSAs should produce reports of testifying witness interviews and written witness statements to the defense prior to the trial and/or any hearings covered by the JenksAct/Rule 26.2. Interview reports of testifying witnesses should be produced sufficiently in advance of the witness's testimony to permit defense counsel to make effective use of the information. AUSAs have discretion to determine how far in advance of the testimony the reports will be disclosed based upon the particular circumstances of their case and any reciprocal discovery agreements they may reach with defense counsel. In no case shall reports of witness interviews be provided later than the time-frame for providing Jencks Act/Rule 26.2 statements as outline below.

Absent supervisory approval, it is the policy of our district to provide written reports of witness interviews regardless of whether the reports qualify as statements as defined by the Jencks Act, contain *Brady* or *Giglio* information, or are discoverable under any other law, rule, or policy.

#### a. Jencks Act/Rule 26.2

Jencks Act/Rule 26.2 statements shall be provided sufficiently in advance of the witness's testimony to permit defense counsel to make effective use of the information. For purposes of trial, Jencks Act material should be provided no later than the Friday before trial when trial begins on Monday. For complex and multi-week trials, Jencks Act materials should be provided earlier as dictated by the number of witnesses, complexity of issues, and volume of material.

Although this policy requires broad and early production of reports of witness interviews, AUSAs should nonetheless be familiar with the law's requirements and be prepared to object to the improper use or treatment of such reports as "witness statements" to the extent that they do not qualify as statements under the Jencks Act.

(1) Be careful not to characterize a witness interview as a Jencks Act statement in discovery letters or court pleadings if the interview does not fit the Jencks Act definition of a witness statement.

(2) Because witness interview reports are not Jencks material unless the witness has adopted the memorandum as his statement, AUSAs should continue to object to use of the report in cross examination as if it were the witness' statement.

The Jencks Act defines "witness statements" as ... "(1) a written statement made by [a] witness and signed or otherwise adopted or approved by him; (2) a stenographic, mechanical,

electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by [the] witness and recorded contemporaneously with the making of such oral statement; or (3) a statement, however taken or recorded, or a transcription thereof, if any, made by [a] witness to a grand jury." 18 U.S.C. § 3500 (e). ADD NINTH CIRCUIT case law here. The Eleventh Circuit has held that reports of witness interviews such as DEA-6's, FBI 302's, etc, that are not substantially verbatim and that have not been reviewed and adopted by the witness are not Jencks material and are not required by law to be produced as such. *U.S. v. Jordan*, 316 F.3d 1215 (11th Cir. 2003).

### b. *Brady* and *Giglio* in Interviews of Testifying Witnesses

This policy requires production of testifying witness interview reports regardless of whether they contain *Brady* or *Giglio*. Part of the rationale for early production is that *Brady* and *Giglio* is not always readily identifiable, especially when the defense is not readily apparent. Furthermore, sometimes it is only the cumulative effect that renders the information relevant in the context of *Brady* or *Giglio*.

Because AUSAs are sometimes required by the court to respond to defense requests that are specific to *Brady* and *Giglio,* AUSAs should review witness interviews for potential *Brady* or *Giglio.* A witness interview may contain favorable information if it contains information that the witness will receive a benefit from cooperating, that indicates the witness has given materially conflicting information or information that materially conflicts with another witness statement, failed to tell the whole truth from the beginning, or failed to advise the interviewing agent of certain facts during an interview.

AUSAs should be particularly sensitive to the potential for inconsistent statements if the same potential witness has been interviewed repeatedly. Some cooperating witnesses may not tell all they know the first time they are interviewed. If a witness initially denies or minimizes his knowledge of or involvement in criminal activity, and thereafter provides information that is materially broader or different, the fact that the witness provided materially different information should be memorialized, even if the variance occurs within the same interview.

### c. *Brady* and *Giglio* in Agent Notes

Although it is not necessary to produce an agent's handwritten notes as part of Rule 16 discovery or the Jencks Act, it is necessary to preserve them in the event that the accuracy of the related formal report become an issue.

It is not necessary for AUSAs to review agent notes related to each potential witness interview. However, AUSAs should review the agent's notes of all testifying witnesses and critical interviews, including any interview of a defendant, and the notes relating to any report of interview of which the defense has questioned the accuracy. If the notes contain favorable information that is not memorialized in formal report or any information that is materially inconsistent with the formal report, the notes or the information should be produced.

### d. The Duty to Disclose Material Inconsistencies Learned During Pre-trial Witness Interviews.

Trial preparation sessions with witnesses generally do not need to be memorialized (DAG Ogden's Criminal Discovery Guidance p.8). However, AUSAs need to be attuned to new or inconsistent information disclosed by a witness. New information that is exculpatory or impeaching (see USAM §§ 9-5.001 and 5.100) must be memorialized and disclosed. The preferred disclosure method is through an agent's report. Alternatively, an AUSA may draft a letter identifying the exculpatory or impeaching information. AUSAs should be mindful of not making themselves witnesses and should therefore insure that an agent is present during these sessions (and that letters to defense counsel reference the information as to which an identified agent would testify).

If the new information is not Brady or impeachment evidence, but rather contain additional details concerning what was previously reported/disclosed, or new information incriminatory to the defendant, that the witness was not previously asked about, there are a number of reasons why a new memorandum need not be generated:

- The standard practice is that written memoranda are not created regarding trial prep. interviews;
- Creation of written memoranda for all additional details revealed in trial prep sessions would be a substantial burden for an AUSA in the midst of preparing for trial;
- There is no legal requirement to document such information. The Jencks Act requires production of statements which exist; it does not require the preparation of statements;
- Even if interview memoranda were prepared, they would not be discoverable under a strict application of the term "statement" as defined by the Jencks Act (18 U.S.C. § 3500(e)); and
- The creation/disclosure of written summaries of new details provided by a witness at a prep session would likely result in an expectation - by the courts and defense bar - that our office will assume this unnecessary burden as a general rule.

There may be occasions, however, when an AUSA may choose to memorialize/disclose new trial prep information. For example, this may be warranted where:

- There is a close question regarding whether the new information is inconsistent with a prior memorandum of interview, such that the court may view the new material as impeachment evidence;
- The new information is of such a nature (e.g., a dramatic change in the testimony of a key witness) that trial interruption or mistrial might result from a defense claim of unfair surprise, or the AUSA believes a concern for fairness compels disclosure; or

- Disclosure of the new information might induce a guilty plea.

### 2. Interviews of Non-Testifying Individuals

Although reports of interviews of non-testifying individuals should be reviewed, AUSAs are not required to produce interview reports of non-testifying individuals unless the reports contain exculpatory information or information inconsistent with or otherwise impeaching of a testifying witness or the government's theory of the case.

### 3. Supervisory Approval Required to Deviate from Policy

If an AUSA believes it is appropriate to deviate from this policy, the AUSA should seek supervisory approval.

## E. Discoverability of Prosecutor's Notes

A prosecutor's notes of witness interviews are usually protected from discovery by privilege rules and Federal Rule of Criminal Procedure 16(a)(2). AUSAs should be mindful, however, that notes that contain substantially verbatim quotes of what a witness said during an interview (potential Jencks Act), or favorable information (*Brady/Giglio*), may contain information that is discoverable. If the discoverable information in the AUSA's notes is contained in other materials provided to the defense (e.g., 302s, agent's notes, letter to defense), it will often suffice to provide the other materials to the defense. It is possible, however, that if the exact nature of the information contained in the notes becomes an issue in the case, the court may review the notes *in camera*.[5] AUSAs should avoid having substantive interaction with witnesses without an agent or other person present who can serve as a witness to the exchange. If an issue arises in a case regarding the contents or discoverability of a prosecutor's notes, consult with a supervisor.

## F. Similar Act Evidence: Federal Rules of Evidence 404(b) and 413-414

Because early production of 404(b) evidence may facilitate the early resolution of a case, AUSAs should consider whether providing early disclosure of 404(b) evidence to the defense will help resolve the case. In any event, AUSAs shall identify produce 404(b) evidence prior to trial and, absent extenuating circumstances, shall identify the evidence they intend to use in the government's trial brief. Be aware that delayed or late production of 404(b) evidence to the defense may result in a delay of the trial or in the court excluding the use of such evidence completely.

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5 *See United States v. Jones*, 620 F. Supp.2d 113 (D. Mass. 2009); *United States v. Jones*, 2010 WL 565478 (D. Mass. February 19, 2010); *United States v. Livingstone*, 576 F.3d 881 (8th Cir. 2009); *United States v. Reid*, 300 Fed.Appx. 50 (2d Cir. 2008); *United States v. Campos*, 20 F.3d 1171 (5th Cir. 1994 ) (unpublished).

### G. Charts and Summaries

Charts and summaries that will be used in Opening Statement should be produced prior to trial in sufficient time to allow the defense an opportunity to review these materials and raise any objections prior to the presentation of opening statements. Charts and Summaries that will be used later in the trial should be produced to the defense in a manner that will avoid undue delay of the trial and in a manner that will allow the defendant sufficient an opportunity to review them and raise any objections.

## III. Who is Part of the Prosecution Team: Gathering and Reviewing Potentially Discoverable Information

### A. Prosecution Team

When gathering discoverable information, AUSAs should collect from the members of the prosecution team all information that is required to be produced by Federal Rules of Criminal Procedure Rules 12 and 16; the *Jencks Act* and Federal Rule of Criminal Procedure 26.2; FRE 404(b) and 413-14; and *Brady* and *Giglio*. In USAM 9-5.001, "prosecution team" is defined as including "federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant." The AUSA needs to know which agencies have played a role in the investigation and make all reasonable inquiries to ascertain what pertinent case information exists. When identifying members of the prosecution team, AUSAs should err on the side of inclusiveness, in accordance with DOJ guidance.

In complex cases involving task forces, multi-district investigations, parallel proceedings, or other non-criminal investigative or regulatory agencies, AUSAs should examine the relationship of all entities to determine "whether the relationship with the other agency is close enough to make it part of the prosecution team for discovery purposes." *See* DAG Ogden's Criminal Discovery Guidance for factors that may aid in determining whether an entity should be considered part of the prosecution team.

### B. Obligation of AUSA to Review Potentially Discoverable Information

When practical, AUSAs should make every effort to personally review all discoverable information before it is produced, even if the information is gathered and organized by others working on the case including legal assistants, paralegals, agents, analysts, or other law enforcement personnel. In cases involving voluminous documents or computerized information, personal review by the AUSA may be impossible. In such instances, the AUSA is advised to meet with those who will be assisting in gathering discovery to develop a discovery gathering plan and should thereafter oversee the gathering and production of discovery to ensure that all discoverable information is identified and produced, or made available to the defense for inspection and copying. Ultimate responsibility for the production of all discoverable information lies with the AUSA(s) assigned to the case.

## IV. Potential Sources of Discoverable Information

The AUSA should seek out discoverable information from the prosecution team. The gathering process should include a review of the following potential sources of discoverable information:

**A. Investigative Agency's Files**. All substantive case-related information in the possession of an agent who is part of the investigative team should be reviewed by the AUSA to determine whether it should be disclosed as part of discovery. The search for information should not be limited to formal investigative reports such as FBI 302's, DEA-6's, IRS MOI's, etc., but should also include an agent's handwritten notes. The investigative agency may also have substantive case-related information in other formats or locations that an agent may not consider to be part of the "investigative" file, such as electronic communications (EC's), searchable electronic databases, inserts, emails, or other forms of electronic communications. It may not be necessary to disclose the information in its original format, but AUSAs should review the information in its original format, whenever possible.

**B. Confidential Informant (CI)/Witness (CW)/Human Source (CHS) Files**. These files will likely contain *Giglio* information which should be disclosed to the defense or to the court for a ruling on whether it should be disclosed to the defense. AUSAs should make arrangements with the investigative agency possessing the file(s) to review the file(s) personally, whenever possible. If the file is located out of the district, AUSAs may consider asking an AUSA in the district where the file is located for assistance in reviewing the file.

**C. Evidence and Information Gathered During the Investigation.** AUSAs should review all evidence and information gathered during the course of the investigation, including, but not limited to, information and evidence gathered via search warrant, subpoena (grand jury, administrative, inspector general, etc), Title III wiretaps, consensual /monitorings, surveillance, and witness interviews. In cases involving voluminous documents or computerized information, personal review by the AUSA may be impossible. In such instances, the AUSA is advised to meet with those who will be assisting in gathering discovery to develop a discovery gathering plan and should thereafter oversee the gathering and production of discovery to ensure that all discoverable information is identified and produced, or made available to the defense for inspection and copying. Ultimate responsibility for the production of all discoverable information lies with the AUSA(s) assigned to the case.

**D. Documents or Evidence Gathered by Civil Attorneys and/or Regulatory Agencies in Parallel Civil Investigations**. If civil attorneys and/or regulatory agencies involved in parallel civil investigations are deemed to be part of the prosecution team, AUSAs should also gather and review any and all information and evidence from them that could be discoverable using the criteria set forth in DAG Ogden's Criminal Discovery Guidance.

**E. Substantive Case-Related Communications** (emails, tweets, text messages, memoranda, notes). Substantive case-related communications should be reviewed and disclosed in accordance with our office Policy Regarding Emails from and Among Agents and Witnesses.

**F. Personnel and Disciplinary Files that May Contain Potential *Brady or Giglio* or *Henthorn* Information Relating to Law Enforcement Witnesses**. AUSAs should determine whether each potential law enforcement witness has on or off duty instances of misconduct, including pending investigations, that may qualify as potential impeachment or exculpatory information. *See* discussion in section II C, above.

**G. Handwritten Notes of Agents.** AUSAs should review the agent's notes of critical interviews, which would include any interview of a defendant, and the notes relating to any report of interview the accuracy of which the defense has questioned. *See also* II D 1 c, above.

**H. Presentence Reports**. If an AUSA has a witness who is or was a defendant in federal court, in most cases there will be a Presentence Report (PSR) relating to that witness. The PSR may contain Jencks, *Brady*, or *Giglio* that may need to be disclosed at the appropriate time. AUSAs should notify and consult with a supervisor, and then follow this procedure:

1. Review the PSRs of witnesses for potential Jencks, *Brady* or *Giglio*. If the witness was a defendant in another district, the AUSA should contact the other district to get the PSR.

2. Identify what, if any, information in the PSR is arguably *Brady/Giglio*/Jencks.

3. If the AUSA identifies information that he or she believes should be disclosed and that information has not been disclosed elsewhere and is not readily available from another source, the AUSA should prepare a disclosure motion and order requesting either an *in camera* review or disclosure.

4. Attach as Exhibit(s) to the motion the PSR(s) with the material we seek to disclose highlighted. We want the judge to have the entire PSR, but be able to easily discern what we believe should be disclosed.

5. Prepare a separate motion and order to SEAL the disclosure motion and exhibits.

6. File the disclosure motion and proposed order with the TRIAL judge (not the sentencing judge) along with the motion and order to seal.

7. When the disclosure order is signed, serve defense counsel with the material from the PSR covered by the order and serve a COPY of the ORDER on defense counsel. The Order is drafted so that it should not need to be sealed.

With regard to Jencks material, the case law is clear that a testifying witness's entire PSR is NOT the witness's Jencks material. That is, failing to object to the PSR is not equivalent to the witness's adoption of the entire PSR as a statement under the Jencks Act.

## V. Manner of Production and Record-Keeping

### A. Manner of Production

**1. Documents:** AUSAs should maintain a record of discovery provided to the defense. Generally, all documentary evidence should be bates numbered. Whenever possible, discoverable documents should be scanned and produced electronically in a format that allows the documents to be searched by a word or name. Disks containing electronic data should be well-labeled so that they can readily be identified. If the discoverable documents in a case are too voluminous to be scanned, the documents should be made available to the defense for inspection and copying, and a record should be made of when the documents were made available and when the defense reviewed the documents.

**2. Non-documentary evidence** should be made available to the defense for inspection and photographing.

**3. Video and Audio Recorded Conversations** should be duplicated and produced to the defense.

### B. Recording-Keeping

AUSAs should keep a written record in the criminal case file of all discovery produced to the defense and all evidence made available for inspection and copying. When discovery is provided or made available by an AUSA, the AUSA should use a discovery production receipt to memorialize in detail the discovery that was provided or the items or material that was made available for inspection or copying. All signed production receipts should be maintained in the criminal case file.

### C. Privacy Protection: Redacting Documents

All personal identifiers should be redacted in whole or in part from discovery, including, but not limited to, names of minors, dates of birth, social security numbers, taxpayer identification numbers, home street addresses, telephone numbers, Medicare or Medicaid ID numbers, financial account numbers, or any other identifier which may improperly disclose private or sensitive information. Federal Rule of Criminal Procedure 49.1, which contains direction for redacting documents filed with the court, should also be used as a starting point for the redaction of documents that will be produced in discovery.

If the volume of discovery in a particular case is so voluminous that redaction process is not practical during the discovery phase, AUSAs may wish to consider seeking a protective order at the

discovery stage that will address privacy protection. If the case goes to trial, the sensitive information should be redacted from exhibits prior to their introduction in court.