U.S. Department of Justice
Southern District of Alabama
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CRIMINAL DISCOVERY POLICY

I. Policy Summary and Background

On January 4, 2010, the Deputy Attorney General issued a memorandum entitled Guidance for Prosecutors Regarding Criminal Discovery along with a separate directive that USAOs promulgate discovery policies governing several enumerated issues. This discovery policy implements the directives of the Deputy Attorney General.

This policy provides internal guidance to the United States Attorney's Office for the Southern District of Alabama and is designed to encourage consistency and uniformity, to the extent possible, in the discovery practice within the office.[1] As additional guidance from the Department is received, this policy will be revised and adapted, as needed.

All AUSAs are required to be familiar with this policy and practice law in compliance therewith. Any deviation from this policy requires supervisory approval by the United States Attorney, the First Assistant, the Criminal Chief, or the Deputy Criminal Chief. Any questions should be resolved by consulting the Criminal Chief, other supervisor, or the Discovery Coordinator.

The government's disclosure obligations are generally set forth in –

Fed.R.Crim.P. 12 (Pleadings and Pretrial Motions)
Fed.R.Crim.P. 16 (Discovery and Inspection)
Fed.R.Crim.P. 26.2 (Producing a Witness's Statement)
18 U.S.C. § 3500 (*Jencks* Act)
Brady v. Maryland, 373 U.S. 83 (1963) and its progeny
Giglio v. United States, 405 U.S. 150 (1972) and its progeny
USAM 9-5.001 (Disclosure of Exculpatory and Impeachment Information)
USAM 9-5.100 (Impeachment Information of Law Enforcement Witnesses)
USABook at http://dojnet.doj.gov/usao/eousa/ole/usabook/disc/index.htm
Local Rules – Local Rule 16.13 on Criminal Discovery

[1] This policy, which is solely prospective, is for internal office use only and does not create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party, or witness in any administrative, civil, or criminal matter. *See* United States v. Caceres, 440 U.S. 741 (1979).

Directives contained in the memoranda of the United States Attorney: Implementation of Revised *Brady/Giglio* Policy as to Law Enforcement Witnesses (May 3, 2010), Electronic Discovery Policy (February 17, 2010), and the *Brady/Giglio* Policy (revised December 2009).

AUSAs should be familiar with and use the model forms and go-bys posted on our office intranet under Criminal Division, Discovery, including –

Discovery Checklist
Model Letter: Pre-Indictment Discovery and Disclosure Responsibilities
Model Letter: Pre-Trial Discovery and Disclosure Responsibilities
Model: *Giglio* Request
Model: Standard Discovery Letter
Model: Standard Discovery Letter (Child Exploitation cases)
Model: Joint Motion for Protective Order
Model: Protective Order

This policy complies with the USAM 9-5.001, 9-5.100, and the Guidance for Prosecutors Regarding Criminal Discovery, therefore, in some respects, this office policy requires broader production than the law and local rules. It counsels AUSAs to provide broad and early discovery 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. This policy does *not* constitute "open file" discovery, and this term should never be used by AUSAs to describe the type of discovery disclosures employed by this office.

Cases involving national security, including terrorism, counterintelligence, export enforcement, and espionage, can present unique and difficult criminal discovery issues with far reaching implications for national security and the nation's intelligence community. AUSAs prosecuting these types of cases should consult with the Criminal Chief, of other supervisor, the National Security Division of the Department, and following the guidance set forth in the Department's memorandum dated September 29, 1010, entitled Policy and Procedures Regarding Discoverable Information in the Possession of the Intelligence Community or Military in Criminal Investigations.

Additional Department guidance on Federal Criminal Discovery is located on USABook at http://dojnet.doj.gov/usao/eousa/ole/usabook/disc/index.htm. To date, the Federal Discovery Blue Book on USABook contains five completed chapters:

Chapter 3: Possession of the Government – the "Prosecution Team"
Chapter 4: Rule 16 – Government's Obligations
Chapter 5: *Jencks* Act
Chapter 8: *Brady/Giglio* Information
Chapter 12: Defendant's Discovery Obligations

The responsibility to identify and produce all discoverable information in a criminal case lies with the primary AUSA assigned to the case and cannot be delegated without the express permission of the district court. Local Rule 16.13(b)(2)(C). As used in this policy, "AUSA" includes Special Assistant U.S. Attorneys and Department of Justice attorneys working on a case in this district. To fulfill this responsibility, AUSAs should consider several matters:

- **What and 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, PSI's, law enforcement *Giglio*, etc. *See IV. Potential Sources of Discoverable Information.*

- **How to produce and track:** AUSAs must comply with this office's electronic discovery policy promulgated February 17, 2010, and must keep a detailed record of all discovery produced. *See V. Manner of Production and Record-keeping.*

II. Laws, Rules, and Policies 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, and Department policy. For the purposes of this policy, "discovery" or "discoverable information" is *not* limited to Fed.R.Crim.P. 16 information, but includes *all* information and materials the government must disclose to the defendant pursuant to Fed.R.Crim.P. 12, 16, 26.2, the *Jencks* Act, Fed.R.Evid. 404(b), 413, and 414; *Brady*, *Giglio*, USAM 9-5.001; USAM 9-5.100; and the district court's Local Rule 16.13.

Each AUSA is responsible for ensuring that information subject to disclosure is obtained and timely disclosed in the appropriate manner, in accordance with this policy, to the defense and/or the court. If questions arise, the AUSA shall seek advice from the Criminal Chief or other supervisor, the Discovery Coordinator, the Professional Responsibility Officer, the Department's Professional Responsibility Advisory Office, or EOUSA's Office of General Counsel, as appropriate.

A. Federal Rules of Criminal Procedure Rule 12 and 16

In accordance with the policies of this office and Local Rule 16.13, AUSAs must produce at arraignment, or make available for inspection, upon the defendant's request, all materials and items required to be produced or identified by Fed.R.Crim.P. 12(b)(4) and 16, including "an inventory of items seized from the defendant by law enforcement officials which the government intends to introduce at trial. Other guidance is located on USABook, Criminal Discovery, at Section 4, Rule 16 – Government's Obligations. Local Rule 16.13(b)(1)(A) provides that the government, at arraignment, or on a date otherwise set by the Court for good cause shown, shall tender to the defendant the following:

> (A) Fed.R.Crim.P. 16(a) Information. All discoverable information within the scope of Rule 16(a) of the Federal Rules of Criminal Procedure, *together with a notice pursuant to Fed.R.Crim.P. 12(d) of the government's intent to use this evidence.*

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 or information that might lead to admissible 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 USAM that "requires AUSAs to go beyond the minimum obligations required by the Constitution and establishes broader standards for disclosure of exculpatory and impeachment information." *See* USAM § 9-5.001. Additional guidance is located on USABook, Criminal Discovery, Section 8, entitled *Brady/Giglio* Information. 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." It also requires the prosecution team to produce "information," not just "evidence," and counsels that the AUSA(s) must consider the cumulative impact of items of information.

Local Rule 16.13(b)(1)(B) and (C) provide that, at arraignment, the government shall tender the following to the defendant:

> (B) *Brady* Material. All information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, without regard to materiality, within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963).
>
> (C) *Giglio* Material. The existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective witnesses, within the scope of *United States v. Giglio*, 405 U.S. 150 (1972).

Our written internal office policies and documents regarding *Brady/Giglio* issues are located on our intranet: *Brady/Giglio* Policy, Implementation of Revised *Brady/Giglio* Policy as to Law Enforcement Witnesses, and the Model: *Giglio* Request.

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 USAM 9-5.001, AUSAs should go beyond the Constitutional requirements and take a broad view of materiality when determining what must be disclosed. USAM 9-5001 C 1 provides:

> 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.

This includes, but is not limited to, exculpatory information contained in interview memoranda of testifying and non-testifying witnesses and in internal emails, memoranda, and other reports. 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.

2. Impeachment Information

Giglio v. United States, 405 U.S. 150 (1972), and its progeny, require the government to disclose to the defendant anything known to the government which would adversely impact the outcome of a trial in a material way. 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 impeachment information that *must* be disclosed include –

(a) inconsistent statements;
(b) promises of leniency or immunity made to a witness;
(c) plea/cooperation agreements entered into with a witness;
(d) payments to a witness;
(e) any information that may be indicative of a 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 material acts of misconduct of a witness.

(f) any benefit provided to a witness, including:
- dropped or reduced charges
- immunity
- a promise to be lenient on or not bring charges against a cooperating witness's family member or other person of significance to the cooperator.
- expectations of downward departures or motion for reduction of sentence
- assistance in a state or local criminal proceeding
- considerations regarding forfeiture of assets
- stays of deportation or other immigration status considerations
- S-Visas
- monetary benefits
- non-monetary benefits or services
- assistance in obtaining benefits or services
- non-prosecution agreements
- letters to other law enforcement officials (*e.g.*, state prosecutors, parole boards, regulatory agencies) setting forth the extent of a witness's assistance or making substantive recommendations on the witness's behalf
- relocation assistance
- consideration or benefits to culpable or at risk third parties

(g) other known conditions that could affect the witness's bias such as:
- animosity toward the defendant
- animosity toward a group of which the defendant is a member or with which the defendant is affiliated
- relationship with victim
- known by uncharged criminal conduct (that may provide an incentive to curry favor with a prosecutor)

(h) prior acts under Fed.R.Evid. 608

(i) prior convictions under Fed.R.Evid. 609

(j) known substance abuse or mental health issues or other issues that could affect the witness's ability to perceive and recall events.

3. Timing of Disclosure

a. Pre-Charge Disclosures

(i) 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 disclose to the grand jury of "substantial evidence that directly negates the guilt of a subject of the investigation."

Impeachment Information. There is no legal duty to seek out impeachment information from the prosecution team or present impeachment information to a grand jury. But, 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 the nature of the impeachment information.

(ii) Affidavits

Exculpatory Information. If an AUSA – who is preparing an affidavit in support of a search warrant, complaint, seizure warrant, or Title III wiretap – is aware of substantial exculpatory information, the AUSA should disclose the information in the affidavit unless the AUSA obtains approval from the Criminal Chief or other supervisor not to do so.

Impeachment Information. If an AUSA – who is preparing an affidavit in support of a search warrant, complaint, seizure warrant, or Title III wiretap – is aware of impeachment information relating to the affiant or other person relied upon in the affidavit such as a confidential informant, and the impeachment information is sufficient to undermine the court's confidence in the probable cause, the AUSA should disclose the information in the affidavit unless the AUSA obtains approval from the Criminal Chief or other supervisor. A known 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

(i) 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 with the Criminal Chief or other supervisor the proper way to handle the matter.

(ii) Impeachment Information

(a) Pre-Trial Hearings

Impeachment information relating to government witnesses who will testify at preliminary, detention, suppression, or other pre-trial hearings should be disclosed sufficiently in advance of the hearing to allow the hearing to proceed efficiently.

(b) Guilty Pleas

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 the Criminal Chief or other 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. Local Rule16.13(b)(1)(C) requires that *Giglio* impeachment information be provided at arraignment.

(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." AUSAs should disclose such information no later than the date the court issues its preliminary presentence investigation report (PSI). If additional favorable information becomes apparent after the PSI is issued, it should be disclosed promptly.

(e) Post-conviction evidentiary hearings

In probation/supervised release revocations, and 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

AUSAs may encounter *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* information relating to law enforcement witnesses.

As set forth in the office *Brady/Giglio* Policy, all *Brady/Giglio* matters are overseen by the *Brady/Giglio* Coordinator, who is available to provide guidance to the AUSAs. In every case, the AUSA should strictly follow the steps outlined in the Implementation of Revised *Brady/Giglio* Policy as to Law Enforcement Witnesses memorandum, and forward to the lead case agent a Pre-Indictment Discovery and Disclosure Responsibilities letter. A model letter is located on our intranet.

If a defendant announces his/her intention to proceed to trial, the AUSA shall notify the *Brady/Giglio* Coordinator who will make the *Giglio* request as to any United States trial witness employed by one of the Department's own investigative agencies. For law enforcement trial witness(es) employed by other federal, state, or local law enforcement agencies, the request for *Giglio* information shall be made by the AUSA to the appropriate agency contact using the Model *Giglio* request letter. The AUSA shall inform the *Brady/Giglio* Coordinator of all responses, except negative responses, from the agency. The necessary documents are located on our intranet. These documents should *not* be given to anyone outside this office, or produced in discovery.

Prior to any disclosure of any *Giglio* information pertaining to law enforcement officials, the AUSA shall confer with the *Brady/Giglio* Coordinator who will confer with the agency employing the affected official and shall consider the views of that agency regarding disclosure. This office will make the final determination as to the appropriate course of action, which may include no disclosure, disclosure, seeking *ex parte in camera* review by the court, or seeking a protective order. *See* this office's written *Brady/Giglio* Policy, and the Implementation of Revised *Brady/Giglio* Policy as to Law Enforcement Witnesses, located on the office intranet, for more detailed information and guidance on *Giglio* issues, including the confidentiality requirements for all *Giglio* records.

D. Witness Interviews

1. Interviews of Testifying Witnesses

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 witness statements to the defense at arraignment, or as soon after arraignment as possible to permit defense counsel to make effective use of the information. Production of witness interview reports is required regardless of whether the reports qualify as *Jencks* Act statements, contains *Brady* or *Giglio* information, or are discoverable under any other law, rule, or policy. This policy provides for earlier and broader production than is required by the *Jencks* Act[2], and our local rules. Deviation from this policy requires approval of the Criminal Chief or other supervisor.

a. *Jencks* Act/Rule 26.2

The *Jencks* Act – 18 U.S.C. § 3500(e)[3] – 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.

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[2] Fed.R.Crim.P. 26.2 and the *Jencks* Act do not require disclosure of witness statements until *after* the witness has testified on direct examination in a hearing or trial.

[3] Reports of witness interviews (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. *See United States v. Jordan*, 316 F.3d 1215 (11th Cir. 2003).

AUSAs should 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.

- 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.

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

Local Rule 16.13(b)(2)(A) provides –

(A) The government shall anticipate the need for, and arrange for the transcription of, the grand jury testimony of all witnesses who will testify in the government's case in chief, if subject to Fed.R.Crim.P. 26.2 and 18 U.S.C. § 3500. *Jencks* Act materials and witnesses' statements shall be provided as required by Fed.R.Crim.P. 26.2 and 18 U.S.C. § 3500. However, the government, and where applicable, the defendant, are requested to make such materials and statements available to the other party sufficiently in advance as to avoid any delays or interruptions at trial.

AUSAs are responsible for requesting the grand jury transcripts through the proper internal procedures. AUSAs are reminded that any documents or notes that are read back to a witness and affirmed or adopted by the witness become *Jencks* Act materials and must be disclosed.

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* information. *Brady* and *Giglio* information is not always readily identifiable, especially when the defense is not readily apparent. Sometimes, it is only the cumulative effect that renders the information relevant in the context of *Brady* or *Giglio*.

Since AUSAs are occasionally required by the court to respond to defense requests that are specific to *Brady* and *Giglio*, AUSAs should review witness interviews for potential *Brady*/*Giglio* information. A witness interview may contain favorable information if contains information that the witness (a) will receive a benefit from cooperating, (b) has given materially conflicting information or information that materially conflicts with another witness statement, (c) failed to tell the whole truth from the beginning, or (d) 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 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/her 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, and should be disclosed as *Giglio* information.

Memorializing Favorable Information and the Duty to Disclose: The duty to disclose to the defendant the substance of what a witness has said during interviews, debriefings, or informal discussions cannot be avoided by failing to memorialize these events. If any such events occur that are not memorialized in an interview report, the AUSA should determine what the witness said during the session and disclose the content of the witness' statements to the defense. AUSAs should emphasize to agents the importance of memorializing all impeaching information.

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

Although it is not necessary to produce an agent's handwritten notes as part of discovery or the *Jencks* Act, it is necessary to preserve them in the event the accuracy of the formal report becomes an issue. The local rule imposes a duty upon the United States to advise "all its agent to preserve all rough notes." Local Rule 16.13(b)(2)(B).

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 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 a formal report or any information that is materially inconsistent with the formal report, the information should be produced.

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

AUSAs should disclose information learned during pre-trial witness preparation that is materially inconsistent with information provided by the same or a different government witness. All new information learned during a pre-trial preparation session is not necessarily impeachment information. New information that qualifies as impeachment information may be disclosed through a report of the interview prepared by the agent, or through a letter, or email from the AUSA to the defense. Regardless, the AUSA and the agent should reach a clear understanding of who will memorialize the information, and the AUSA should ensure that the inconsistency is disclosed to the defense in a timely manner. The best practice would be to have the agent memorialize the inconsistency. The duty to disclose the substance of what a witness has said during a pre-trial preparation session cannot be avoided by failing to memorialize it.

2. Interviews of Non-Testifying Individuals

An AUSA is not required to disclose, but may, in their discretion disclose interview reports of non-testifying individuals. Before any such disclosure, the AUSA should review the reports to determine if disclosure would jeopardize witness safety or ongoing investigations, invoke legitimate privacy concerns, or lead to obstruction of justice. Where possible, AUSAs should review interview reports of non-testifying individuals to determine if they contain information that otherwise requires disclosures. AUSAs shall disclose interview reports of non-testifying individuals if the reports contain exculpatory information or information inconsistent with or otherwise impeaching of a testifying witness or the government's theory of the case.

The agent's report of the interview of a non-testifying witness should be produced as *Jencks* Act material of the agent, if the agent will testify and the statement of the non-testifying witness "relates to the subject matter" of the agent's testimony. If there is an issue of early disclosure which has the potential of involving the safety of a witness or a victim, AUSAs are required to discuss the matter with the Criminal Chief, or other supervisor, to decide whether to seek a protective order or authorization of non-disclosure, as appropriate. This office policy is not intended to expand the disclosure requirements of the *Jencks* Act.

3. Supervisory Approval Required to Deviate from Policy

If an AUSA believes it is appropriate to deviate from this policy, the AUSA should seek approval from the Criminal Chief or other supervisor.

E. Expert Witnesses

AUSAs should be familiar with the requirements of Fed.R.Crim.P. 16(a)(1)(G) relating to the discovery requirements for expert witnesses, which provides as follows:

> Expert witnesses.– 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 government 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.

Consistent with this rule, AUSAs must disclose the expert's report(s) and any evidence relied upon by the expert in preparing the report. AUSAs must disclose draft

expert reports or portions of the reports that contain *Jencks* Act statements. A difference between the draft report and the final report prepared by the expert witness could be considered *Brady* or *Giglio* information thereby warranting disclosure. All relevant, case-related correspondence, whether written or electronic, between the AUSA and the expert witness normally should be disclosed as *Jencks* Act material.

F. Discoverability of Prosecutor's Notes

A prosecutor's notes of witness interviews are usually protected from discovery by privilege rules and Fed.R.Crim.P. 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, letter to defense), it will often suffice to provide the other materials to the defense. However, 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*. 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 regarding the discoverability or contents of a prosecutor's notes, the AUSA should consult with the Criminal Chief or other supervisor.

G. Similar Act Evidence: Fed.R.Evid. 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 404(b) evidence to the defense will help resolve the case. In any event, AUSAs shall produce 404(b) evidence at arraignment in accordance with the Local Rule 16.13(b)(H). Even though Fed.R.Evid. 413 and 414 are not specifically mentioned in the Local Rule, AUSAs prosecuting sexual assault cases (Rule 413) and child molestation cases (Rule 414), are reminded that the similar crimes evidence in these cases should be produced at arraignment.

H. Charts and Summaries: Fed.R.Evid. 1006

Trial charts and summaries should be produced one business day before they will be used. The district court's Local Rule is silent as to charts and summaries, however, AUSAs shall comply with the requirements of Fed.R.Evid. 1006, which provides –

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

Fed.R.Evid. 1006.

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 Fed.R.Crim.P. 12, 16, and 26.2; Fed.R.Evid. 404(b), 413, 414; the *Jencks* Act; 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 the prosecution team, AUSAs should err on the side of inclusiveness in accordance with Department guidance. In 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* Guidance for Prosecutors Regarding Criminal Discovery for factors to determine whether an entity is 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 responsibly for the production of all discoverable information lies with the primary AUSA 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 discovery. It may not be necessary

to disclose information in its original format, but AUSAs should review the information in its original format, whenever possible. *See* Guidance for Prosecutors Regarding Criminal Discovery at page 4 for more details and guidance on AUSAs access to Department of Justice law enforcement agencies substantive case files.

B. Confidential Informant (CI), Confidential Witness (CW), and Confidential Human Source (CHS) Files – These files may contain *Giglio* information which should be disclosed to the defense or to the court, *in camera and ex parte*, for a ruling on whether it should be disclosed to the defense. When possible, AUSAs should make arrangements with the investigative agency possessing the file(s) to review the file(s) personally. *See* Guidance for Prosecutor Regarding Criminal Discovery for more details and guidance on this issue.

C. Evidence and Information Gathered During the Investigation – AUSAs should review all evidence/information gathered during the course of the investigation, including, but not limited to, information/evidence gathered via search warrant, subpoena (grand jury, administrative, inspector general, trial, etc.), Title III wiretaps, consensual monitorings, surveillance, and witness interviews. If the volume of evidence makes it impractical for the AUSA to review all the evidence, this obligation may be satisfied by making the evidence available to the defense for inspection and copying.

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 the Guidance for Prosecutors Regarding Criminal Discovery memorandum.

E. Substantive Case-Related Communications – As a result of the duties imposed upon AUSAs to disclose material, documents and information described in this policy, AUSAs should refrain from communicating with other AUSAs, agents, or witnesses through any electronic means, including, but not limited to email and text messages, especially where those communications involve trial or investigative strategy, witness statements, witness credibility, or trial exhibits. Substantive case-related communications may contain discoverable information, and should be reviewed and disclosed if they meet the requirements of Rule 16, *Brady/Giglio*, *Jencks* Act, etc.

AUSAs "should advise investigative agents that, unless circumstances dictate otherwise, substantive written communications from agents about cases should be in the form of a formal investigative report, rather than an email." *See* Implementation of Revised *Brady/Giglio* Policy as to Law Enforcement Witnesses

F. Personnel and Disciplinary Files that May Contain Potential *Brady* or *Giglio* Information Relating to Law Enforcement Witnesses – AUSAs should follow this office's *Brady/Giglio* Policy to 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.

G. Handwritten Notes of Agents – AUSAs should review the agent's notes of critical interviews, which would include any interviews of a defendant, and the notes relating to any report of interview the accuracy of which the defense has questioned.

H. Presentence Investigation Reports (PSIs) – If an AUSA has a witness who is/was a defendant in federal court, there will be a PSI relating to that person. The PSI may contain *Jencks* Act or *Brady/Giglio* information that may need to be disclosed at the appropriate time. Proper authorization from the court must be obtained to disclose any relevant information contained in a PSI. AUSAs should consult with the Criminal Chief, or other supervisor, and then follow this procedure:

- Review the PSI's of witnesses for potential *Jencks* Act, *Brady* or *Giglio* information. If the witness was a defendant in another district, the AUSA should contact the other district to obtain the PSI then identify what, if any, information in the PSI is arguably *Jencks* Act, *Brady* or *Giglio* information.

- If the AUSA identifies information that he/she believes should be disclosed and that information has not been disclosed elsewhere and is not readily available from another source, the AUSA should file a motion for disclosure, and proposed order, with the court requesting either an *in camera* review or disclosure. The motion, attachments, and proposed order should be filed under seal. The motion for disclosure should be filed with the trial judge, not the sentencing judge.

- Attachments to the motion for disclosure should include the PSI with the portions we seek to disclose highlighted. We want the judge to have the entire PSI, but be able to easily discern what we believe should be disclosed.

- When the disclosure order is signed, serve defense counsel with the material from the PSI covered by the order and serve a copy of the order on defense. The order should be drafted so that is should not need to be sealed.

A witness's entire PSI is *not* the witness's *Jencks* Act statement, and failing to object to the PSI is not equivalent to the witness's adoption of the entire PSI as a statement under *Jencks*. But, the witness's PSI may contain *Jencks* Act material which is most likely to appear in the defendant's version of the offense. AUSAs should examine the PSI to determine if any information: (a) falls within the *Jencks* Act definition of statement – was it written by the defendant, a quote, or a substantially verbatim recital of an oral statement; and (b) relates to the subject matter of the witness's testimony. Even if it is not *Jencks* Act material, it may be subject to disclosure as *Brady/Giglio* information.

V. Manner of Production and Record-Keeping

A. Manner of Production

1. Documents – AUSAs should adhere to this office's Electronic Discovery Policy, dated February 17, 2010, which provides that this office's electronic discovery policy shall be implemented through the following practices and procedures:

- In all criminal cases, to the extent practicable, discovery provided to defendants and the United States Probation office shall be provided in electronic format.

- Initial discovery provided at arraignment shall include a hard copy of the office's standard initial discovery letter, a hard copy of the indictment, and an electronic copy of all discoverable material. Additional discovery shall be provided in electronic format, by e-mail, by facsimile, or in hard copy, as appropriate.

- The United States Probation Office shall be provided with a hard copy of the indictment and an electronic copy of all discoverable material.

- A file copy of all discovery materials (whether text, audio, video, or otherwise) shall be maintained in the physical criminal case file.

- A copy of all discovery material shall be saved in the commons directory, placed in a separate electronic file for each attorney and a separate electronic file for each case. Each such electronic file shall be identified by case number and defendant name. Such an electronic file shall not be password protected and shall be appropriately deleted electronically as the criminal file is purged.

2. Non-documentary evidence – All discoverable non-documentary evidence shall be made available to the defense for inspection and/or photographing.

3. Video and Audio Recorded Conversations – All video and audio recorded conversations should be duplicated and produced to the defense.

B. Record-Keeping

AUSAs should keep a written record in the criminal case file of all discovery produced and all evidence made available for inspection and copying. AUSAs should use the standard initial discovery letter to document the production of discovery.

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. Fed.R.Crim.P. 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. The court's Standing Order No. 30 describes how parties must comply with the E-Government Act of 2002 regarding privacy. If, because of the volume of discovery, the redaction process is so time-consuming that the production of discovery will be delayed, AUSAs may consider seeking a protective order at the discovery stage. A go-by motion for protective order, and protective order in a recent case are available on the office intranet.

D. Motions for Discovery

AUSAs are to be mindful of the requirement set forth in the local rule regarding the filing of motions for discovery. Local Rule 16.13(d) provides, as follows:

> (d) Motions for Discovery. No attorney shall file a discovery motion without first conferring with opposing counsel, and no motion will be considered by the Court unless it is accompanied by a certification of such conference and a statement by the moving party's good faith efforts to resolve the subject matter of the motion by agreement with opposing counsel. No discovery motions shall be filed for information or material within the scope of this Rule unless it is a motion to compel, a motion for protective order or a motion for an order modifying discovery. *See* Fed.R.Crim.P. 16(d). Discovery requests made pursuant to Fed.R.Crim.P. 16 and this Local Rule require no action on the part of this Court and should not be filed with the Court, unless the party making the request desires to preserve the discovery matter for appeal.