# DISCOVERY POLICY

## United States Attorney's Office
## Southern District of South Florida

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Guidance Regarding Discovery for the Southern District of Florida

# GUIDANCE REGARDING DISCOVERY FOR THE SOUTHERN DISTRICT OF FLORIDA

## Introduction

The following policy regarding discovery in criminal prosecutions in the Southern District of Florida ("Discovery Policy") is promulgated subject to applicable authorities on discovery in the federal criminal justice system, including Federal Rules of Criminal Procedure 12.1, 12.2, 12.3, 12.4, 12(b)(3), 12(b)(4), 16 and 26.2; Title 18, United States Code, Section 3500 (Jencks Act); Rule 88.10 of the Local Rules for the Southern District of Florida; the district's Standing Discovery Order; and case law, including *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), *Napue v. Illinois*, 360 U.S. 264 (1959), *United States v. Agurs*, 427 U.S. 97 (1976), *United States v. Bagley*, 473 U.S. 667 (1985), and *Kyles v. Whitley*, 514 U.S. 419 (1995). It also is subject to all applicable Department of Justice policies, including those stated in Deputy Attorney General David W. Ogden's January 4, 2010, memorandum, "Guidance for Prosecutors on Criminal Discovery" (the "Ogden Memo"),[1] and in the United States Attorney's Manual at Section 9-5.001 *et seq.*

This Discovery Policy is designed to provide all federal prosecutors[2] working on prosecutions in the Southern District of Florida with assistance in fairly and efficiently exercising sound prosecutorial judgment and discretion in providing discovery. The Discovery Policy recognizes that the production of discovery must be balanced with the need to protect victims, witnesses, human sources of information, law enforcement and intelligence techniques, and national security. The production of discovery must also take into account applicable privileges, statutory

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[1] http://www.justice.gov/dag/discovery-guidance.pdf

[2] Although references are made throughout this policy to AUSAs, this policy is equally applicable to SAUSAs in the Southern District of Florida.

requirements and legal prescriptions for privacy or confidentiality, including but not limited to the Privacy Act, the Right to Financial Privacy Act, grand jury secrecy, protection of tax return information, and protection of intercepted electronic communications. Accordingly, this Discovery Policy recognizes that each criminal case presents its own unique facts and circumstances, all of which must be considered when providing discovery and making disclosure decisions.

Nonetheless, in accordance with Department of Justice policy, *see, e.g.*, USAM § 9-5.001,[3] AUSAs are encouraged, whenever practicable, to provide discovery that is *broader* and *more comprehensive* than the discovery obligations created by applicable rules, statutes, and case law.

Providing broad discovery often promotes the truth-seeking mission of the Department and can foster a fair and speedy resolution of cases. It also provides a margin of error in case the AUSA's good faith determination of the scope of appropriate discovery is in error. And, in a larger sense, an expansive approach to discovery also maintains and enhances the Office's reputation for candor and fair dealing, which benefits all AUSAs and the people of the District, whom we represent.

Accordingly, AUSAs are given the discretion to provide discovery beyond that which is required by law and Department of Justice policies. The decision in any particular case on whether, how much, and when to provide materials in excess of that which is required will rest with the assigned AUSA, although consultation with supervisors is encouraged. In making this decision, the AUSA should always consider any appropriate case-specific countervailing concerns, such as: protecting victims and witnesses from harassment or intimidation; the privacy interests of witnesses; protecting privileged information; safeguarding the integrity of ongoing investigations; protecting the trial from efforts at obstruction; protecting national security interests; investigative agency

[3] http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm#9-5.001

concerns;[4] enhancing the likelihood of receiving reciprocal discovery from defendants; any applicable legal or evidentiary privileges; and other considerations that enhance the likelihood of achieving a just result in a particular case.

When faced with a close call as to whether certain information should be disclosed, AUSAs should ordinarily err on the side of disclosure, or should at least consider whether it is appropriate to submit the material in question for *ex parte* consideration by the court. In addition, when the AUSA's disclosure obligations conflict with the countervailing concerns discussed above, AUSAs should consider whether it is appropriate to seek a Rule 16 protective order from the court addressing the scope, timing, and form of the disclosure.

Notwithstanding the foregoing, when an AUSA elects to produce discovery that is broader than what is legally required, the AUSA should advise the defense that there is no commitment to any discovery obligation beyond that set forth in the applicable governing law. Indeed, this Discovery Policy is not intended to, does not, and may not be relied upon to create any substantive or procedural rights enforceable at law by any person in any administrative, civil, or criminal matter or case, nor are any limitations or additional legal duties hereby placed on the otherwise lawful litigative prerogatives of the United States, the United States Department of Justice, the United States Attorney's Office, or any AUSA. This Discovery Policy is not intended to have the force of law or federal regulation and does not create or confer any rights, privileges, or benefits to any party or person. *See, e.g., United States v. Caceres*, 440 U.S. 741 (1979); *United States v. Bagnell*, 679 F.2d 826, 832 (11th Cir. 1982).

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[4] Although agency concerns are important, they are not controlling. As explained later in this policy, the ultimate decision on whether something must be disclosed is to be made by the AUSA and this Office.

All federal prosecutors conducting criminal prosecutions in the Southern District of Florida should read and maintain a copy of this discovery policy, along with the Ogden Memo, and be mindful of both when making discovery. Prosecutors should ensure that lead law enforcement officers working on federal criminal prosecutions in the Southern District of Florida also are apprised of this policy.

## I. Obligation to Gather and Review Information from the Prosecution Team

A prosecutor's obligation to disclose *Brady*, *Giglio*, and other discovery material does not stop with the prosecutor's personal knowledge, but extends to all members of the prosecution team. *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995); *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999). Members of the prosecution team include federal, state and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant. *See, e.g.*, *Kyles*, 514 U.S. at 437; *Stephens v. Hall*, 407 F.3d 1195, 1203 (11th Cir. 2005).

Department policy specifically reiterates these obligations:

> It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant.

USAM § 9-5.001 at ¶ B(2). This search duty also extends to information prosecutors are required to disclose under Federal Rules of Criminal Procedure 16 and 26.2 and the Jencks Act, and to both pre-trial and post-trial court proceedings.

In most cases, "the prosecution team" will include those agents and law enforcement officers in the Southern District of Florida who have been working on the case. In other cases, for example,

multi-district investigations, investigations that include both AUSAs from this Office and either AUSAs from other districts, SAUSAs, or attorneys from the Department, or in parallel criminal and civil proceedings, this definition must necessarily be adjusted to fit the circumstances. In addition, in complex cases that involve parallel proceedings with regulatory agencies (SEC, FDIC, EPA, etc.), or other noncriminal investigative or intelligence agencies, an AUSA should consider whether the relationship with the other agency is close enough to make that agency part of the prosecution team for discovery purposes.[5]

A variety of factors thus determine what government actors and agencies comprise the prosecution team and whose records must be reviewed for potentially discoverable items and information. Among the factors that an AUSA should consider are the following:

- Whether the prosecutor and the agency conducted a joint investigation or shared resources related to investigating the case;
- Whether the agency played an active role in the prosecution, including conducting arrests or searches, interviewing witnesses, developing prosecutorial strategy, participating in targeting discussions, or otherwise acting as part of the prosecution team;
- Whether the prosecutor knows of and has access to discoverable information held by the agency;

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[5] The topic of parallel proceedings defies brief encapsulation. A good discussion can be found in Chapter 12 of *Federal Grand Jury Practice* (Oct. 2008) (also known as the *Grand Jury Manual*) which is published by the Office of Legal Education and found online in USABook. This Office's Parallel Proceedings Practice Guidelines can be found in Circular 08-CIV-04 and should be reviewed by every prosecutor handling a criminal case as to which there is the prospect of parallel civil or administrative proceedings. Because defining the nature and limits of the "prosecution team" in a parallel proceedings situation may be especially challenging and nuanced, prosecutors should consult with supervisors in such situations, both to make a correct determination and to insure office-wide uniformity of practice. If a prosecutor determines that the prosecution team includes a representative of a regulatory agency involved in a parallel proceeding, then that agency's files should be reviewed for discovery materials.

- Whether the prosecutor has obtained other information and/or evidence from the agency;
- The degree to which information gathered by the prosecutor has been shared with the agency;
- Whether a member of an agency has been made a Special Assistant United States Attorney;[6]
- The degree to which decisions have been made jointly regarding civil, criminal, or administrative charges; and
- The degree to which the interests of the parties in parallel proceedings diverge such that information gathered by one party is not relevant to the other party.

In cases involving multi-agency task forces or involving state law enforcement agencies or state prosecutors, an AUSA should consider (1) whether state or local actors are working on behalf of the AUSA or are under the AUSA's control; (2) the extent to which the federal government and state or local governments are part of a team, are participating in a joint investigation, or are sharing resources; and (3) whether the AUSA has ready access to the evidence, files, or information held by state and local government actors.

The "prosecution team" analysis must ordinarily be performed on a case-by-case basis, and AUSAs are encouraged to err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes. Carefully considered efforts to locate discoverable information are more likely to avoid future litigation over *Brady* and *Giglio* issues and avoid unwelcome surprises at trial.

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[6] Any Assistant State Attorney ("ASA") who is acting as a SAUSA should not use any of their unique state law tools in furtherance of a federal case. For example, ASAs have the authority to subpoena witnesses to the State Attorney's Office to give statements, and those subpoenas confer the equivalent of use and derivative use immunity on that witness. Using unique state authority to further a federal case could open the door for creative defense counsel to try to impose the far more expansive state criminal discovery rules on that particular federal prosecution.

## II. Conducting the Discovery Review and Production

All evidence and other potentially discoverable material gathered during the investigation, whether in USAO custody or the custody or control of other members of the prosecution team, should be reviewed to determine if disclosure is required. Where possible, the AUSA handling the case should personally conduct this review. However, in many cases, it is not practical or even possible for the AUSA to personally conduct this review. In those cases, the AUSA should develop and oversee a review process so that discoverable information is identified and produced or made available to the defense. This process may involve agents, support staff, agency counsel, and computerized searches, but since the AUSA is ultimately responsible for compliance with discovery obligations, the AUSA's decision about how to conduct this review is controlling. In addition, because responsibility rests with the AUSA, the ultimate decisions on disclosures must be made by the AUSA.[7]

Disclosure of records and physical objects collected as part of an investigation should be as broad as practicable in order to avoid situations where withheld records or objects are later determined to be relevant to the government's case-in-chief or to the preparation of the defense. Accordingly, in cases involving voluminous evidence obtained from third parties, AUSAs should consider providing defense access to that evidence to avoid the possibility that a well-intentioned review process nonetheless fails to identify material discoverable evidence.

Although the government's discovery policy is intended to be broad and encompassing, it is not "open file" discovery, and this term should never be used to describe it. Describing the

[7] AUSAs are encouraged to seek guidance from their supervisors concerning any disclosure questions.

government's discovery policy as "open file" discovery could be misleading because, for example: even if the prosecutor intends to provide expansive discovery, certain information or documents contained in the government's "file" may warrant – and sometimes require – redaction or other protection from disclosure;[8] the potential always exists that something will be inadvertently omitted from production; and the concept of the "file" is imprecise and can expose the government to broader disclosure requirements than intended or can result in sanctions for failure to disclose items (such as AUSA notes, agent notes, or internal memoranda) that might normally be protected from disclosure but that a court may deem to have been part of the "file" that was ostensibly made "open" to the defense.

When conducting a discovery review, AUSAs always should remember that the issues of discovery and admissibility are analytically distinct. For example, the fact that a document may be inadmissible at trial does not mean that the document or the information contained within it are not subject to disclosure. Conversely, because information must be disclosed to the defense under applicable discovery rules does not mean that it is necessarily admissible at trial. When appropriate, AUSAs should give careful consideration to filing *in limine* motions preventing the improper use at trial of materials provided in discovery.

### A. *Review of the Investigative File*

All substantive case-related evidence and information in the possession of an agent who is

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[8] In addition to legal privileges and work-product protections, other legal obligations may also require non-disclosure or redaction of certain information or documents. For example, the disclosure of tax returns and tax information is controlled strictly by statute, and AUSAs must follow those statutory requirements when providing discovery. *See* 26 U.S.C. § 6103(a) & (h)(4); *see also* Circular 08-CRM-51 (Guidelines for Maintenance of Tax Returns and Tax Information); Circular 08-CRM-49 (Guidelines for Tracking, Storing and Handling Tax Information).

part of the investigative or prosecution team should be reviewed to determine whether it should be disclosed as part of discovery.[9] The search for information should not be limited to formal investigative reports such as FBI 302's, DEA-6's, IRS MOI's, etc. In addition to such reports, the investigative agency may also have substantive case-related information in other formats or locations, such as electronic communications (EC's), searchable electronic databases, inserts, emails, or other forms of electronic communication, that an agent may not consider to be part of the "investigative" file.

The discovery review should include examination of internal law enforcement documents which may not themselves be discoverable, but which may nonetheless contain discoverable information. Where discoverable information is contained in an otherwise undiscoverable document or format, the discoverable information should ordinarily be provided in discovery through a separate document, such as a letter to defense counsel. Where such discovery is provided in a format different from the original, AUSAs should be familiar with the original-format material and are responsible to ensure that the government's disclosure is an accurate and complete production of the discoverable information and material found in the otherwise non-discoverable

[9] Steps should also be taken to ensure that all evidence that the government may use at trial or that may be subject to discovery (whether pursuant to discovery rules, *Brady*, *Giglio*, the Jencks Act or some other requirement) is properly preserved. For example, Local Rule 88.10(g) and paragraph G of the Standing Discovery Order require the government to instruct its agents and officers involved in the case to preserve all rough notes. The prosecutor should ensure that prosecution team members understand that all of their notes must be preserved, regardless of how informal, and that this obligation applies to notes whose contents are later incorporated into more formal investigative reports. Prosecutors' notes should also be preserved. Prosecutors should consider what note-taking procedures will be utilized during trial-preparation sessions with witnesses, and they should understand that while their own notes may carry certain attorney work-product protections, the *information* prosecutors learn, whether memorialized in notes or not, is always subject to *Brady* and *Giglio* analysis and may need to be disclosed.

original-format material.

Because different law enforcement agencies have their own practices and procedures for maintaining a file for an investigation, a prosecutor conducting a discovery review should know or learn, for each law enforcement agency within the prosecution team, what potentially discoverable materials may be contained in each such law enforcement agency's investigative files pertaining to a particular federal criminal prosecution. To ensure compliance with the government's disclosure obligations, each component of the prosecution team should give the AUSA access to all information in its investigative files pertaining to that prosecution.

**B.** ***Preservation and Review of Substantive Communications***

Substantive case-related communications may contain discoverable information, and, if they do, they should be maintained in connection with the case or investigation. Substantive case-related communications include factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or interactions with witnesses/victims, and factual issues relating to credibility. These communications are most likely to occur (1) among prosecutors and/or agents, (2) between prosecutors and/or agents and witnesses and/or victims, and (3) between victim-witness coordinators and witnesses and/or victims, and such communications may be memorialized in emails, reports, memoranda, and/or notes.[10]

[10] If substantive case-related information is communicated in an email, the AUSA should save, print out, or otherwise document that email and maintain it with the case file for discovery review and possible production. Such a procedure will ensure that the email or, at a minimum, its substantive content, will remain with the case file even should the file be reassigned to another AUSA. While the use of email for informal or piecemeal substantive case-related communications between agents and AUSAs is discouraged, this policy is not intended to discourage such efficient practices as sending formal investigative reports, memoranda, or letters as email attachments or using email for scheduling. Although the use of emails between agents and AUSAs to communicate about investigative strategies and legal issues is not prohibited, caution should be used whenever

Communications involving case impressions or investigative or prosecutive strategies, without more, ordinarily would not be considered discoverable. Regardless, these communications, as well as all substantive case-related communications, should be preserved and reviewed carefully to determine whether all or part of any such communication (or the information contained therein) should be disclosed in discovery.

AUSAs should also remember that with few exceptions (*see, e.g.*, Fed. R. Crim. P. 16(a)(1)(B)(ii)), the format of the information does not determine whether it is discoverable. For example, material exculpatory information that the AUSA receives during a conversation with an agent or a witness is no less discoverable than if that same information were contained in an email or report. When the discoverable information contained in an email or other communication is fully memorialized elsewhere, such as in a report of interview, then the disclosure of that report will ordinarily satisfy the disclosure obligation.

Regardless of the form in which substantive case-related information is communicated or found, and regardless of whether a physical or electronic document containing such substantive communications is discoverable, all such documents and communications should be preserved, gathered, and reviewed to determine whether they are discoverable, either in whole or in part.

### C. *Review of Confidential Informant, Confidential Witness, Confidential Human Source, and Confidential Source Files*

Law enforcement agencies' confidential informant (CI), confidential witness (CW),

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engaging in such communications in writing because substantive information can often enter the communications and create issues regarding the discoverability of the actual communication, whether pursuant to *Jencks* or otherwise, despite the discussion of investigative strategies and legal theories.

confidential human source (CHS), and confidential source (CS) files, like other internal agency materials, are subject to discovery review and analysis.

AUSAs should ensure that such files, whether located in this district or elsewhere, are reviewed for discoverable material and that copies are made of relevant portions for discovery purposes.[11] The entire informant/source file, not just the portion relating to the current case, including all proffer, immunity, and other agreements, validation assessments, payment information, and other potential witness impeachment information should be included within this review.

AUSAs should take steps to protect non-discoverable, sensitive information found within a CI, CW, CHS, or CS file. For example, rather than producing the entire record concerning such a source, an AUSA should consider discharging the government's discovery obligations through the use of a summary letter that fully discloses the pertinent discoverable information arising from the review, but that better protects the government or witness interests (for example, security or privacy) that are at stake.

AUSAs must always remain mindful of safety and security issues that may arise with respect to disclosures from confidential source files. Prior to disclosure, prosecutors should consult with the investigative agency to evaluate any such risks and to develop a strategy, consistent with discovery obligations, for addressing and minimizing those risks.

### D. *Information Relating to Law Enforcement Witnesses, Including Personnel and Disciplinary Files, that May Contain Potential Brady or Giglio Material*

In some cases, an AUSA may encounter *Giglio* issues with respect to a law enforcement

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[11] Ordinarily, those portions of the investigative file addressing a non-testifying source's involvement in the case should be made available to, and reviewed by, the AUSA. If the AUSA believes that the circumstances of the case also warrant review of the non-testifying source's file, the prosecutor should follow the pertinent agency's procedures for requesting review of that file.

agent or officer who will be an 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. Where such circumstances arise, they are governed by USAM § 9-5.100,[12] which contains the Department's policy on obtaining and disclosing *Giglio* information relating to law enforcement witnesses, and Circular 10-CRM-01 (District Law Enforcement *Giglio* Policy).[13] The Chief of the Criminal Division is this Office's *Giglio* officer/"Requesting Official," charged with assisting AUSAs with requests for *Giglio* information concerning law enforcement officers.

**E. *National Security and Classified Information***

Cases involving national security, including terrorism, espionage, counterintelligence, and export enforcement, can present unique and difficult criminal discovery issues. The Department of Justice has developed special guidance for those cases, which is contained in Acting Deputy Attorney General Gary G. Grindler's September 29, 2010, memorandum, "Policy and Procedures Regarding Discoverable Information in the Possession of the Intelligence Community or Military in Criminal Investigations" (the "Grindler Memo"). Prosecutors should consult that memorandum and their supervisors (including, in appropriate circumstances, supervisors in the Office's Public Integrity & National Security Section) regarding discovery obligations relating to classified or other sensitive national security information. As a general rule, in those cases where the prosecutor, after conferring with other members of the prosecution team, has a specific reason to believe that one or more elements of the Intelligence Community (IC) possess discoverable material, he or she should consult the National Security Division (NSD) of the Department of Justice regarding whether to

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[12] http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm#9-5.100

[13] http://district.usa.doj.gov/fls/Circulars/Criminal/10crm01.wpd

request a prudential search of the pertinent IC element(s). All prudential search requests and other discovery requests of the IC must be coordinated through NSD.[14]

Although discovery issues relating to classified information are most likely to arise in national security cases, those issues may also arise in a variety of other criminal cases, including narcotics cases, human trafficking cases, money laundering cases, and organized crime cases. In particular, it is important to determine whether the prosecutor, or another member of the prosecution team, has specific reason to believe that one or more elements of the IC possess discoverable material in the following kinds of criminal cases:

- Those targeting corrupt or fraudulent practices by middle or upper officials of a foreign government;
- Those involving alleged violations of the Arms Export Control Act or the International Emergency Economic Powers Act;
- Those involving trading with the enemy, international terrorism, or significant international narcotics trafficking, especially if they involve foreign government or military personnel;
- Other significant cases involving international suspects and targets; and
- Cases in which one or more targets are, or have previously been, associated with an intelligence agency.

For these cases, or for any other case in which the prosecutors, case agents, or supervisors making actual decisions on an investigation or case have a specific reason to believe that an element

[14] Where potentially discoverable national security or classified information is identified, AUSAs may need to deviate from the Office's general discovery policies and should follow the guidelines set forth in the Grindler Memo. In addition, prosecutors should recognize that the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. III, establishes a distinct framework for litigating discovery issues that involve classified/national-security information, and any AUSA considering the use of CIPA or the disclosure of such information should consult with that AUSA's supervisor and supervisors in the Office's Public Integrity & National Security Section, and must additionally consult with and obtain approval from NSD's Counterespionage Section.

of the IC possesses discoverable material, the prosecutor should consult with NSD regarding whether to make – through NSD – a request that the pertinent IC element conduct a prudential search. If neither the prosecutor, nor any other member of the prosecution team, has a reason to believe that an element of the IC possesses discoverable material, then a prudential search generally is not necessary.

### F. *AUSAs and the United States Attorney's Office Are Ultimately Responsible for Making Decisions Concerning Discovery Disclosures*

During the course of discovery, if the AUSA and case agent are unable to decide or agree whether any particular information is discoverable, the matter should be addressed to and resolved promptly by supervisors from the United States Attorney's Office and the respective law enforcement agency. An AUSA must always remember that, although the concerns of a case agent and agency are important, they are not controlling; the AUSA and the United States Attorney's Office are responsible for making the ultimate decision on whether an item or information must be disclosed to the defense.

## III. Disclosing Materials and Information

The material and information that a federal prosecutor is required to disclose in a case is governed by a variety of rules, statutes, and constitutional obligations. In the Southern District of Florida, Local Rule 88.10 and the district's Standing Discovery Order further refine prosecutorial disclosure obligations and establish a timetable for many of the government's discovery disclosures. Because Local Rule 88.10 and the Standing Discovery Order establish a general umbrella framework and schedule for discovery disclosures, the following discussion will generally follow the format they establish, although constitutionally-required discovery obligations will be addressed first.

### A. *Constitutional Discovery Obligations*

*Brady and Giglio Overview*

The topic of the prosecution's duty to disclose and provide both exculpatory and impeachment matter (*i.e.*, matter favorable to the accused and material to guilt or punishment) has been addressed extensively and in depth in case law and other authorities. For a detailed and thorough treatment of the duties of prosecutors and law enforcement in this regard, see the Department of Justice monograph, *BRADY and GIGLIO Issues*, at USA Book, on the Department of Justice intranet.

All federal prosecutors must be aware of the Department of Justice policy that prosecutors generally must take a broad view of materiality and err on the side of disclosing potentially exculpatory and impeaching evidence. This policy is set forth in Section 9-5.001 of the U.S. Attorney's Manual, which also prescribes circumstances for the disclosure of exculpatory and impeachment information beyond that which is constitutionally and legally required. Local Rule 88.10(c)-(d) and paragraphs C and D of the Standing Discovery Order also address discovery pursuant to *Brady*, *Giglio*, and their progeny, and they establish a discovery schedule for the disclosure of such materials and information. *See infra* (discussing the discovery schedule established by the Local Rules and the Standing Discovery Order).

Because *Brady* and *Giglio* issues can be fact-intense and intricate, AUSAs should consult liberally with their supervisors on such issues as they arise.

*Disclosing Material Variances in a Witness's Statements*

When disclosing information pursuant to *Brady* and *Giglio*, AUSAs should pay particular

attention to the statements of testifying witnesses. Some witnesses' statements will vary during the course of an interview or investigation. For example, they may initially deny or minimize their involvement in criminal activity, or the information they provide may broaden or change considerably over the course of time, especially if there are a series of debriefings that occur over several days or weeks. AUSAs should be particularly sensitive to these concerns in dealing with cooperating witnesses and defendants, and with situations where the same potential witness has had multiple interviews or trial preparation sessions. Material variances in a witness's statements should be memorialized, *even if they are within the same interview*, and they should be provided to the defense as *Giglio* information

AUSAs should be particularly vigilant for new or inconsistent information disclosed by the witness during a pre-trial preparation session. New information that is exculpatory or impeachment information should be disclosed consistent with the provisions of USAM § 9-5.001, even if the information is first learned in a trial preparation session with a witness. Similarly, if the new information represents a variance from the witness's prior statements, AUSAs should consider whether memorialization and disclosure is necessary. Remember, however, that all new information learned during a pre-trial preparation session is not necessarily impeachment information.

The duty to disclose *Giglio* information arising from witness interviews, debriefings, trial preparation sessions, or informal discussions cannot be avoided by failing to memorialize the statements. This impeachment information may be disclosed through a report prepared by the agent, or through a letter from the AUSA to the defense. Where possible, the best practice is to have the agent memorialize the inconsistency, but in either event, the AUSA should ensure that the inconsistency is disclosed to the defense in a timely manner, and that the disclosure is documented

in the case file.

### B. *Discovery Duties Imposed by Procedural Rules, the District's Standing Discovery Order, and Related Statutory Provisions*

In addition to the constitutional due-process requirements of *Brady* and *Giglio*, the prosecution is required, pursuant to Rules 16 and 26.2 of the Federal Rules of Criminal Procedure, the Jencks Act, and Local Rule 88.10, to disclose specified items to the accused on timetables set forth therein.[15]

*Rule 16, Local Rule 88.10, and the Standing Discovery Order*

Pursuant to Rule 16 of the Federal Rules of Criminal Procedure, Local Rule 88.10, and the Standing Discovery Order, the prosecution must provide the defendant with the following evidentiary items and information:[16]

1. Written or recorded statements made by the defendant. Local Rule 88.10(a)(1); Standing Discovery Order ("SDO") ¶ A.1; *see also* Fed. R. Crim. P. 16(a)(1)(B).

> **PRACTICE NOTE (A):** Unlike Rule 16, the Standing Discovery Order and Local Rule 88.10 do not limit the obligation to disclose written or recorded statements of the defendant to those that are "relevant" statements. *See United States v. Noriega*, 764 F. Supp. 1480 (S.D. Fla. 1991) (Hoeveler, J.) ("The [Rule 16] relevancy requirement is a relatively low hurdle to clear where a defendant seeks production of his own

[15] Additional rules and statutory provisions can also give rise to additional government disclosure obligations. *See, e.g.*, Fed. R. Crim. P. 12.4 (requiring a disclosure statement identifying any organization that is a victim of the alleged crime), 12.1(b) (disclosure of witnesses negating defendant's alibi), 12.1(c) (same), 12.3(a)(4)(C) (disclosure of witnesses opposing public authority defense), 12.3(b) (same). AUSAs should be cognizant of such rules and their differing timetables for providing discovery. *See, e.g.*, Fed. R. Crim. P. 12.4(c) (requiring that disclosure statement identifying any organization that is a victim of the alleged crime be filed "upon the defendant's initial appearance").

[16] Unlike Rule 16, the Standing Discovery Order and the Local Rules for the Southern District of Florida generally do not require a defendant to initiate a discovery request before the government's discovery obligations arise.

statements, with disclosure practically a matter of right even without a showing of materiality. In accordance with this view of the Rule, the standing discovery order entered by this court requires production of written or recorded statements of the defendant without reference to their relevancy.") (quotations and citations omitted). Where a defendant is known to have made a recorded or written statement in an unrelated ongoing investigation, or where there are other written or recorded defendant statements that would not be discoverable under Rule 16's "relevant" provision, the prosecutor must evaluate the government's disclosure obligations concerning those statements. If the statements would be discoverable under the terms of the rules, but there is a need to protect a witness or an ongoing unrelated investigation, or some other reason warrants non-disclosure, a motion pursuant to Fed. R. Crim. P. 16(d)(1) for protective or modifying order may be appropriate. In such circumstances, the AUSA should consult with a supervisor as to how to proceed. Unless a Rule 16(d)(1) order is sought and obtained, however, the AUSA should comply with the disclosure obligations imposed by Local Rule 88.10 and the Standing Discovery Order, whether or not the pertinent statements are deemed "relevant" within the meaning of Fed. R. Crim. P. 16(a)(1)(B), unless supervisory approval to the contrary is provided as the government considers pursuit of other legal avenues of relief.

**PRACTICE NOTE (B):** The prosecutor should ensure that a member of the prosecution team has carefully listened to all video and audio recordings, including preamble material or post-conversation material. Such a review does more than simply uncover a defendant's recorded statements; it can disclose additional statements made by other parties that must be subjected to discoverability analysis, including for *Brady*, *Giglio*, or *Jencks* purposes. Oftentimes, for example, a confidential source or other witness who will testify at trial will be heard talking to an agent or to him or herself before or after the conversation with the defendant, and those statements may be discoverable independent of the statements made by the defendant.

**PRACTICE NOTE (C):** In the case of an organizational defendant, *e.g.*, a corporation, any written or recorded statement of an organizational agent or a person acting in an agency capacity with ability to legally bind an organizational defendant is attributable to that organizational defendant and must be disclosed as a statement of the defendant. *See* Fed. R. Crim. P. 16(a)(1)(C).

2. The substance of any oral statement, made by the defendant before or after arrest in response to interrogation by a person then-known to the defendant to be a law enforcement agent, that the government intends to offer as evidence at trial. Local Rule 88.10(a)(2); SDO ¶ A.2; Fed. R. Crim. P. 16(a)(1)(A).

**PRACTICE NOTE (A):** Prosecutors should ensure that the prosecution team conducts a diligent review for any and all statements made by the defendant not only in formal interviews but also incidentally or otherwise at the time of arrest, transportation, booking or any other interaction with then-known-to-be law enforcement personnel. Oftentimes, a statement by a defendant, made in passing or informally at the time of arrest or questioning, may be significant direct evidence at trial, important in cross-examination, or otherwise discoverable. Failure to disclose any such statement may potentially preclude the statement's use at trial.

3. Grand Jury testimony *of the defendant* relating to the charged offense. Fed. R. Crim. P. 16(a)(1)(B)(iii); Local Rule 88.10(a)(3); SDO ¶ A.3.

**PRACTICE NOTE (A):** Grand Jury testimony of *witnesses who will testify for the government at trial* must also be recorded, preserved, and transcribed, *see* Local Rule 88.10(j); SDO ¶ J, for *Jencks* analysis and later production pursuant to Fed. R. Crim. P. 26.2 and 18 U.S.C. § 3500. Such statements may also be independently discoverable (in whole or in part) pursuant to *Brady* and *Giglio.* It is the policy of the United States Attorney's Office for the Southern District of Florida to record all testimony in the Grand Jury and to preserve that testimony for ten years.

4. The defendant's arrest, detention and conviction record. Local Rule 88.10(a)(4); SDO ¶ A.4; Fed. R. Crim. P. 16(a)(1)(D).

**PRACTICE NOTE (A):** The prosecution team should be aware that local police records may differ from NCIC records. It may also be helpful to search for arrest and criminal history records of the defendant under other known names or aliases.

5. All books, papers, documents, photographs, tangible objects, buildings or places or portions or copies thereof which are material to the preparation of a defense, which the prosecution intends to offer as evidence in its case in chief, or which were obtained from or belong to the defendant. Fed. R. Crim. P. 16(a)(1)(E); Local Rule 88.10(a)(5); SDO ¶ A.5. In addressing this discovery obligation, AUSAs should be cognizant that, in certain situations, evidence that is inculpatory may also be material to the preparation of the defense. *See United States v. Marshall*, 132 F.3d 63, 67-68 (D.C. Cir. 1998); *United States v. Jordan*, 316 F. 3d 1215, 1250-51 (11th Cir.

2003).

> **PRACTICE NOTE (A):** Many discovery disputes can be avoided by including within discovery not only every item that is required under Rule 16(a)(1)(E) and Local Rule 88.10(a)(5), but also every item obtained or acquired in a search or seizure or at an evidence scene.

6. Results or reports of physical or mental examinations and of all scientific tests or experiments made in connection with the prosecution. Local Rule 88.10(a)(6); SDO ¶ A.6; Fed. R. Crim. P. 16(a)(1)(F). This includes fingerprint, palmprint, DNA, blood and semen, photographic analysis, ballistic tests, or other forensic examination. If any latent fingerprints or palmprints have been identified by a government expert as those of the defendant, copies of those latent fingerprints or palmprints shall be furnished to the defense for independent expert examination. Local Rule 88.10(m); SDO ¶ M.

> **PRACTICE NOTE (A):** Local Rule 88.10 and the Standing Discovery Order require the government to preserve a representative sample of all seized contraband for testing by a designated, appropriately-registered defense expert should such a test be requested. *See* Local Rule 88.10(k); SDO ¶ K. Upon a defense request, such a sample must be delivered to that chemist.
>
> **PRACTICE NOTE (B):** When evidentiary items are submitted for destructive or form-altering testing, efforts should be made, where practicable, to preserve samples for potential independent testing by the defense.

7. A record of the prior convictions of any alleged informant who will testify for the government at trial. Local Rule 88.10(e)(4); SDO ¶ E. *See also, supra,* Item No. 4 Practice Note.

8. Disclosure of whether the defendant was identified in any lineup, showup, photospread, or similar identification proceedings and production of any pictures utilized or resulting therefrom.

> **PRACTICE NOTE (A):** The disclosure should include *negative* and *positive* identifications, and the physical means used for identification (*e.g.*, photospread, video recording or photograph of lineup, or voice exemplar/audio recording).
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> **PRACTICE NOTE (B):** Members of the prosecution team should consider and analyze

how identification was made, including voice identification, giving consideration to the extent and nature of the witness's opportunity and ability to observe and identify the defendant.

9. Rule 404(b) Evidence: The Local Rules and the Standing Discovery Order require the government to advise the defendant of its intention to introduce extrinsic act evidence pursuant to Federal Rule of Evidence 404(b), regardless of how it intends to use the extrinsic act evidence at trial, *i.e.*, during its case in chief, for impeachment, or for possible rebuttal. Local Rule 88.10(h); SDO ¶ H; *see also* Fed. R. Evid. 404(b) (containing notice requirement). Furthermore, the government must apprise the defense of the general nature of the evidence of the extrinsic acts.

There can often be confusion and disputes as to what constitutes Rule 404(b) evidence, especially on the issue of whether "inextricably intertwined" uncharged "bad acts" are 404(b) evidence, or part of the charged offense and admissible independent of Fed. R. Evid. 404(b). Rather than risk suppression for failure to disclose material that a court may later find to be 404(b) evidence, or risk exclusion on 404(b) discretionary grounds of material that could have been admitted independently as part of the charged offense, prosecutors should consider a disclosure that meets Rule 404(b) notice requirements, but that does not concede that the evidence is either extrinsic or governed by Rule 404(b). *See also United States v. Carrasco*, 381 F.3d 1237 (11th Cir. 2004) (government's failure to provide 404(b) notice resulted in reversal of a conviction). This may be accomplished through a stated reservation that even though the prosecution believes that the evidence it is seeking to introduce is not Rule 404(b) evidence, the government is disclosing it in an abundance of caution as 404(b) evidence and reserving the right to argue its true nature and basis for admissibility at a later date.

**PRACTICE NOTE (A):** When providing a discovery response or Rule 404(b) notice,

prosecutors should advise the defense that all material provided or made available to the defense for inspection and copying, as well as all statements disclosed to the defense, may be offered at trial, under Fed. R. Evid. 404(b) or otherwise (including as intrinsic evidence of the charged crime or under the inextricably-intertwined doctrine). This notification should be in addition to, not in lieu of, a description of the general nature of pertinent extrinsic acts evidence.

**PRACTICE NOTE (B):** The Standing Discovery Order and Local Rule 88.10 explicitly address Fed. R. Evid. 404(b), but there can be other evidentiary rules with advance-notice and disclosure requirements. AUSAs should be mindful of such rules, which include, but may not be limited to, Fed. R. Evid. 413, 807, 902(11) and (12), and of the deadlines and advance-notice prescriptions therein.

10. Electronic Surveillance:

- Disclosure must be made of whether the defendant is an aggrieved person, as defined in 18 U.S.C. § 2510(11), of any electronic surveillance, and, if so, the circumstances of that electronic surveillance must be set forth in detail. Local Rule 88.10(I); SDO ¶ I.
- As explained earlier, *see supra* ¶¶ 1 & 5, the prosecution must turn over in discovery all recorded statements of the defendant and all tape recorded evidence which the prosecution intends to introduce as evidence at trial. Local Rules 88.10(a)(1) & 88.10(a)(5); SDO ¶¶ A.1 & A.5; *see also* Fed. R. Crim. P. 16(a)(1)(E). This includes all such evidence related to Court-ordered electronic surveillance, including translations of such recorded statements.

**PRACTICE NOTE (A):** Translation of recorded conversations, especially in voluminous investigations, is often an issue that presents large strategic and economic challenges. It is difficult to translate every recorded conversation in an investigation, or to do so prior to indictment, especially where a defendant is in the process of committing a serious and sometimes dangerous offense. Prosecutors should consult their supervisors and the supervisors of the investigating agency, if needed, to insure that accurate translations of foreign language wiretaps are available for discovery. Prosecutors should consider if it will be helpful and appropriate to apprise the court of the number and complexity of the tapes to be translated and the time necessary for the defendant to review the tapes.

- Title III Recordings: Under 18 U.S.C. § 2518(9), the government is required to furnish a defendant with a copy of the court order and accompanying application under which a Title III interception was authorized or approved. This disclosure must be made ten days before the contents of any wire, oral, or electronic communication is received in evidence in any trial, hearing, or other proceeding in a federal or state court, unless the court waives the ten-day period upon a showing by the government that compliance is not possible and that the defendant will not be prejudiced.[17]

  **PRACTICE NOTE (A):** In order to provide discovery of Court-ordered electronic surveillance, the prosecutor should first file a motion pursuant to 18 U.S.C. § 2518(8)(d) seeking to unseal the application and order and to obtain judicial authorization to provide copies of all applications, orders, affidavits, and recorded conversations to the defendant.

- Pen Registers, Trap and Trace devices, and court-ordered tracking devices which are to be used as evidence at trial must be disclosed. Fed. R. Crim. P. 16(a)(1)(E); Local Rule 88.10(a)(5); SDO ¶ A.5. Ordinarily, prosecutors should also produce court orders, applications, and affidavits that were used to obtain authority to employ such investigative methods.

11. Access to inspect any vehicle, vessel, or aircraft allegedly used in the commission of a charged offense. Local Rule 88.10(l); SDO ¶ L. An AUSA is further required to assist such defense inspection by advising the government custodian of the vehicle, vessel, or aircraft that the inspection has been ordered by the Court.

[17] AUSAs should note that the statutory timetable for the disclosure of these Title III items is different than the timetable for discovery under Local Rule 88.10(q) and the Standing Discovery Order.

12. Expert Witnesses: *Upon request of the defendant*, the prosecutor must disclose a written summary of testimony the prosecution reasonably expects to offer at trial pursuant to Rules 702, 703, or 705 of the Federal Rules of Evidence; the summary must describe the witnesses' opinions, the bases and reasons therefor, and the witnesses' qualifications. *See* Local Rule 88.10(n); SDO ¶ N; Fed. R. Crim. P. 16(a)(1)(G).

> **PRACTICE NOTE (A):** This provision is one for *reciprocal* discovery, and Local Rule 88.10, the Standing Discovery Order, and Rule 16 all provide that any defendant who seeks and obtains discovery pursuant thereto must, on government request, similarly disclose defense expert information. Prosecutors should not unilaterally provide government expert discovery without determining, preferably by letter inquiry with an explicitly responsive letter from defense counsel, whether the defense requests expert discovery (and thereby becomes bound to make reciprocal defense expert discovery upon government request). When making such an inquiry, AUSAs are encouraged to inform the defense that the government expects to offer expert testimony at trial in a specified field and that the government stands ready to furnish expert discovery to the defense upon receiving a defense request that binds the defense to provide reciprocal expert discovery. AUSAs should be alert to the prospect of defendants in multi-defendant cases taking different positions as to requesting (and thus becoming bound to reciprocate with) expert material, and should consult with a supervisor should that occur.
>
> **PRACTICE NOTE (B):** When preparing the required expert testimony summary, an AUSA should be sure to make the summary accurate and thorough. It is a good practice to have the expert review the summary before it is provided to the defense to ensure accuracy and completeness. An inaccurate or incomplete summary could lead to limitation or exclusion of the expert testimony, and it can also cause the AUSA to lose credibility with the jury if the government's own expert disavows parts of an unreviewed summary when testifying.
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> **PRACTICE NOTE (C):** Whether the defense discloses its experts in discovery or not, the prosecution should consider the appropriateness of requesting a hearing, pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to determine the admissibility of any defense expert testimony for relevance, reliability, and helpfulness to the jury.

13. Search warrants: In a case where a defendant has standing to challenge the evidence arising from a criminal search warrant, the AUSA shall identify the search warrant to that defendant by its magistrate judge number and shall produce to that defendant a copy of the search warrant,

with supporting application, affidavit, and return. If any of those items have been sealed, the AUSA must address the pertinent sealing issues before production. Courtesy copies of the items produced or notification of the availability of the items should also ordinarily be provided to codefendants. For further guidance on this topic, refer to Circular 08-CRM-47 (Search Warrants - Discovery).[18]

*Discovery Timetable Under Local Rule 88.10 and the Standing Discovery Order*

Under the Standing Discovery Order, the government is required to provide the defense with all of the discovery required under the Standing Discovery Order and under Local Rule 88.10 – including disclosure of *Brady* material and information concerning any inducements that were made to prospective government witnesses that are within the scope of *Giglio*, *see* Local Rule 88.10(C)-(D) – "on or before fourteen (14) days from the date of" the Standing Discovery Order. SDO at 1; *see also* Local Rule 88.10(q)(2) ("Discovery which is to be made in connection with trial shall be made not later than fourteen (14) days after the arraignment, or such other time as ordered by the court.").

Additional, shorter timetables apply to discovery obligations – including *Brady* and *Giglio* obligations –that arise in connection with pre-trial matters. "Discovery which is to be made in connection with a bail or pre-trial detention hearing shall be made not later than the commencement of the hearing," while discovery in connection with other pre-trial hearings "shall be made not later than forty-eight (48) hours prior to the hearing." Local Rule 88.10(q)(1).

In connection with post-trial hearings, including sentencing hearings, the government's discovery disclosures "shall be made not later than seven (7) days prior to the hearing." Local Rule 88.10(q)(3). However, the provisions of Local Rule 88.8 concerning pre-sentence investigation

[18] http://district.usa.doj.gov/FLS/Circulars/Criminal/08crm47.wpd

reports supersede any contrary requirement. *Id.*

Finally, the government has a continuing duty to "immediately" supplement the discovery that it is required to make under the Local Rules and the Standing Discovery Order with "all newly discovered information or other material" that falls within the scope of either Local Rule 88.10 or the Standing Discovery Order. Local Rule 88.10(q); SDO at 4.

Where the schedule established by either Local Rule 88.10 or the Standing Discovery Order poses a safety or security issue as to prospective government witnesses, prosecutors may want to seek a protective or modifying order pursuant to Rule 16 or the Standing Discovery Order. Fed. R. Crim. P. 16(d)(1); SDO at 4. The court may permit an *ex parte* written statement in support of such a request. Fed. R. Crim. P. 16(d)(1).

*The Jencks Act (18 U.S.C. § 3500) and Rule 26.2*

Title 18, United States Code, Section 3500 and Rule 26.2 of the Federal Rules of Criminal Procedure require the government to disclose to the defense, no later than the beginning of cross-examination, any "statement" (which is specifically defined under both the stature and the rule) of a testifying witness that relates to the subject matter of the witness's testimony.[19] In order to expedite trials and make for orderly cross-examination of witnesses, the prosecutor will often agree to provide defense counsel with witness statements earlier than required. When this is done often depends on a variety of factors, including: the length of the pre-trial period; security or witness-tampering concerns; when the government finalizes its witness line-up; whether the witness statements are in a foreign language (especially one that the defendant or defense attorney may not

[19] Pursuant to Fed. R. Crim. P. 26.2(a), the defense is similarly required to turn over its witnesses' statements (except for the defendant's). In order for that defense obligation to arise, however, the prosecutor must ask for the statements.

know); and the length of the trial. Sometimes *Jencks* material is turned over with discovery material. Sometimes it is turned over once trial begins, with the empanelment of the jury. Sometimes, especially during a lengthy trial, *Jencks* materials is turned over a day or so before the witness testifies.

The statement of a witness is defined under Fed. R. Crim. P. 26.2(f) as: a written statement that the witness makes and signs, or otherwise adopts or approves; a substantially verbatim, contemporaneously recorded recital of the witness's oral statement contained in any recording or transcription of a recording; or the witness's statement to a grand jury. *See also* 18 U.S.C. § 3500(e). Government agents' reports of interview ("ROI") of witnesses and agents' summaries of those interviews are not Jencks Act statements *of those witnesses* unless they are (1) substantially verbatim, contemporaneously recorded transcripts, or (2) signed or otherwise adopted by the witness.[20] *See United States v. Jordan*, 316 F.3d 1215, 1255 (11th Cir. 2003). Members of the prosecution team should understand, however, that a practice of agents or attorneys reading back their notes or reports to a witness or asking the witness to confirm the accuracy of something in their notes or reports may risk turning the notes or report into something "otherwise adopted" by the witness, and, hence, producible *Jencks* material.

A more exhaustive discussion of the Jencks Act, Rule 26.2, and their requirements can be found in the Jencks Act chapter[21] of the Federal Criminal Discovery manual, found online in USABook.

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[20] Such a report may, however, be a Jencks Act statement *of the agent* if the agent testifies and if the report relates to the subject matter of the agent's testimony.

[21] http://dojnet.doj.gov/usao/eousa/ole/usabook/disc/05disc.htm

*Treatment of Reports of Interviews as "non-Jencks Jencks"*

Although most agent-prepared ROIs of witnesses are not Jencks Act material of the interviewees under Eleventh Circuit law,[22] AUSAs are encouraged to turn over these reports after thoughtfully and carefully considering whether these ROIs should be turned over as if they were Jencks Act material. If the ROI does not constitute actual Jencks Act material, and if it does not memorialize information that could be deemed discoverable under *Brady, Giglio, Kyles,* or other applicable law, rule, or Department of Justice policy, then the AUSA retains the discretion whether to disclose it or not.

In making this decision, the AUSA must balance the competing interests served by disclosure and non-disclosure. For example, disclosure of the report relieves the AUSA of any mid-trial disclosure obligation that might arise if a witness gives testimony that materially contradicts or varies from the account set out in the ROI, or if, due to developments during the course of trial, information in the ROI might become subject to disclosure under *Brady* or *Giglio*. In addition, information subject to *Brady* or *Giglio* disclosure is not always readily identifiable, especially when the defense changes or only comes to light during the trial, and disclosure of ROIs helps prevent, or at least minimize, issues that could otherwise arise if an undisclosed ROI were deemed to have contained *Brady* or *Giglio* information. Any mid-trial discovery disclosures that might be necessitated by trial developments not only delay the proceedings, but they also may engender judicial displeasure, thereby reducing the AUSA's margin for error when confronted with the honest

[22] 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. *United States v. Jordan*, 316 F.3d 1215 (11th Cir. 2003).

mistakes, new discoveries, and good faith disclosure oversights which sometimes occur during trial. In addition, *Jencks*-type disclosure of the ROIs normally allows the trial to proceed more smoothly, and may help secure stipulations and even a resolution of the case.

On the other hand, there may be good reasons why some or all ROIs should not be produced. For example, in some cases, denying a defendant a chance to tailor his or her defense to counter the government witnesses' anticipated trial testimony may warrant non-disclosure. There also may be situations where a report contains information on other cases, investigations, and/or targets where disclosure of even part of the ROI would be problematic. What is most important is that AUSAs carefully consider this issue and balance the competing interests within the context of each individual case.

If an AUSA is going to use their discretion to disclose non-*Jencks* ROIs, it is important that the ROIs not be described to opposing counsel or the court as "Jencks" material. In addition, AUSAs should be familiar with the law and be prepared to object if the report is improperly used, as if it were the witness's statement, for impeachment purposes during cross-examination. To this end, AUSAs should consider filing a motion in *limine* to prevent the defense from making improper use of the ROIs at trial.

In addition, if ROIs are going to be produced, they should be redacted to remove any non-discoverable information that concerns other cases or investigations, as well as any sensitive personal information such as social security numbers, home addresses, telephone numbers, and birthdates.[23] As in all aspects of discovery, it is important for the AUSA to be mindful of the need

[23] Where more than mere identifying information is being removed, AUSAs should consider whether it is necessary to obtain court approval of the proposed redactions.

to protect victims and witnesses from harassment or intimidation, and to protect the integrity of ongoing investigations.

As with actual Jencks Act material, subject only to court orders or rules, AUSAs have discretion to determine how far in advance of the testimony the ROIs will be disclosed based upon the particular circumstances of their case, including any agreements they may reach with defense counsel.

## IV. Protective and Modifying Orders

When circumstances exist that warrant a deviation from the disclosure obligations set out by rules and statutes, an AUSA may seek relief from or deferral of those obligations. For example, Rule 16(d)(1) of the Federal Rules of Criminal Procedure provides: "At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal." The Standing Discovery Order has a similar provision. SDO at 4.

In order for an AUSA to obtain a protective or modifying order, the record must reflect "good cause," including but not limited to, a need to protect:

1) Privacy, such as with the medical records of a victim or witness.

2) Economic interests, such as trade secrets or other financial interests.

3) The status of a person, such as when an individual is a government informant.

4) The safety of a witness.

AUSAs who are considering a request for a Rule 16 protective or modifying order may benefit from consulting supervisors.

## V. Tracking the Discovery Provided

One of the most important steps in the discovery process is making and keeping a complete record of what has been produced to the defense. All AUSAs should make a record of when and how discovery materials are disclosed or otherwise made available. This record is essential for successfully resolving discovery production disputes and for responding to trial objections that seek to exclude evidence based on claimed discovery violations. In addition, such a record can be critical when responding to motions for post-trial relief, appeals, and collateral attacks, which often arise long after trial has been completed.

The exact fashion in which an AUSA maintains a discovery record may change depending on the volume and type of discovery material. For example, the AUSA may maintain a bates-stamped copy of all discovery provided, "read-only" copies of the CDs where discovery was provided to the defense on CD, and/or a thorough written record of the documents and evidence made available for review by defense counsel on various dates.[24] In all but the simplest cases, the discovery record is likely to consist of some combination of these methods.

It is recommended that each time discovery is provided or made available for inspection, the AUSA should memorialize this with a letter describing the discovery being provided therewith. This letter should state with reasonable specificity what was disclosed and/or made available, and where applicable, should list the bates-number range of the materials provided. These letters, and all other

[24] Where the AUSA or case agent is making documents available for inspection by the defense, it is important to remember that neither the AUSA nor the agents should keep track of the specific documents being reviewed or copied by the defense. This practice, sometimes known as "shadow discovery," is not permitted. Instead, the discovery record should only reflect the scope (*e.g.*, by box number, bates stamp range, or some other suitable organizational classification) of the material that was made available for inspection.

records of discovery production, should be maintained with the criminal case file. It may also be advisable to file these discovery letters with the Court as they are being provided to the defense. Submitting the letters as attachments to "notices of filing" will keep the court informed as to the government's good faith efforts to provide discovery. Having the court informed of the real time status of discovery can help to limit discovery disputes and make for smoother pre-trial proceedings.