(Updated October 15, 2010)

DISCOVERY POLICY
MIDDLE DISTRICT OF GEORGIA
OCTOBER 2010

BACKGROUND

On January 4, 2010, Deputy Attorney General Ogden issued a memorandum entitled "Guidance for Prosecutors Regarding Criminal Discovery" ("DAG Ogden Criminal Discovery Guidance." That same date, he issued a memorandum directing that USAOs promulgate discovery policies governing several enumerated issues. This comprehensive discovery policy implements the directives of the Deputy Attorney General.[1]

GENERAL PRINCIPLES

First, the discovery obligations of federal prosecutors in the Middle District of Georgia are established by the Federal Rules of Criminal Procedure, 18 U.S.C. § 3500 (the Jencks Act), *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and relevant case law, the Department of Justice's policy on the disclosure of exculpatory and impeachment information, the Standard Pretrial Order entered by the District Court after a defendant is arraigned, and the State Bar Rules governing professional conduct. We must comply with the authorities set forth above. Thus, the first principle in the discovery policy for this Office is **"obey all rules."**

Second, as a general matter and allowing for the exercise of prosecutorial discretion and subject to the needs of individual cases, prosecutors in this District are required to provide discovery beyond what the rules, statutes, and case law mandate **("expansive discovery").**

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 prosecutor in a case. There may well be good reason for withholding something that does not have to be disclosed, such as the need to protect a witness or safeguard investigations of other people or other crimes committed by the defendant, or to preserve a legitimate

[1] The guidance is subject to legal precedent, court orders, and local rules. It provides prospective guidance only and is not intended to have the force of law or to create or confer any rights, privileges, or benefits. *See United States v. Caceres*, 440 U.S. 741 (1979). This discovery policy does not govern disclosure in cases involving terrorism and national security. Policy concerning these cases will be dependent on guidance currently being developed by the Department.

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

Third, it is required that AUSAs in this District not refer to the office discovery policy as an **"open file"** policy. The concern about using the term "open file" is that it may be misleading and inexact because there are times that a file may contain attorney work product information and other non-discoverable information.[2]

Finally, 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 the Government's Duty To Search for Discoverable Information in the Possession of the Intelligence Community or Military in Criminal Investigations." Prosecutors should consult that memorandum and their supervisors 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 NSD regarding whether to 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.

Although discovery issues relating to classified information are most likely to arise in national security cases, they 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

[2] The decision to discontinue using the term "open file" policy is consistent with the direction given U.S. Attorney Offices from the Deputy Attorney general in his January 4, 2010, Memorandum, Guidance for Prosecutors Regarding Criminal Discovery. A copy of the memorandum is included in the training materials provided AUSAs for the April 2010 training.

- 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 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.

EXCULPATORY AND IMPEACHMENT MATERIAL

1. *BRADY* AND *GIGLIO*

We have constitutional obligations, as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), and other case law, to disclose exculpatory and impeachment information when such information is material to guilt or punishment, **regardless of whether a defendant makes a request for such information**. Exculpatory and impeachment information is deemed material to a finding of guilt when there is a reasonable probability that effective use of that information will result in an acquittal. DOJ policy, however, demands broader disclosure. Prosecutors must take a broad view of materiality and err of the side of disclosure.

2. DOJ POLICY

The Department of Justice has adopted a policy that requires us to go beyond even the strict requirements of *Brady* and *Giglio* and other relevant case law. Specifically:

1. Exculpatory information - information that is inconsistent with any element of the crime or which establishes a recognized affirmative defense, regardless of whether the prosecutor believes the information is admissible evidence or will make a difference between conviction or acquittal.

2. Impeachment information - information that either casts a substantial doubt on the accuracy of any evidence the prosecutor

intends to rely on to establish an element (including but not limited to witness testimony) or which might have a significant bearing on the admissibility of prosecution evidence. This is regardless of whether the prosecutor believes the information is admissible as evidence or will make a difference between conviction and acquittal.

3. Admissibility of the exculpatory or impeachment information - our disclosure requirement applies even when the information subject to disclosure is not itself admissible evidence.

4. Cumulative impact - if the cumulative impact of several pieces of information meets the disclosure requirements, disclose all of the information even if the pieces, considered separately, do not meet the requirements.

See United States Attorney's Manual Section 9-5.001. (A copy is included in the April 2010 training materials.)

3. THE "PROSECUTION TEAM" CONCEPT (WHO IS PART OF THE TEAM?)

In some cases, there may be Brady or Giglio material that an agent knows about but the AUSA does not. In 1995, the U.S. Supreme Court made clear that a defendant is entitled to the disclosure of ***all*** Brady and Giglio material known to ***any member of the prosecution team***. See Kyles v. Whitley, 514 U.S. 419, 437-38 (1995). Thus, if any member of the prosecution team knows of any Brady or Giglio material, the AUSA will be held legally responsible for disclosing that evidence to the defendant, whether or not the AUSA actually knows about the evidence. That is, ***the AUSA's ignorance of such evidence will not prevent a court from penalizing the government*** by suppressing evidence, vacating a sentence, reversing a conviction, or recommending that the AUSA be professionally sanctioned.

The prosecution team includes all "others acting on the government's behalf in the case." Kyles, 514 U.S. at 437. At a minimum, this includes ***all federal, state, and local law enforcement personnel directly involved in the investigation or prosecution of the federal criminal case***.

4. THE AUSA'S RESPONSIBILITIES UNDER *BRADY*

A. Communicating with the Case Agent

As noted above, Brady requires the prosecution to disclose to the defendant all ***"evidence favorable to [him] . . . where***

the evidence is material . . . to guilt," that is, all evidence that could be used by the defendant to make his conviction less likely.[3] Although many criminal investigations do not uncover any Brady material, many do.

Ultimately, in any given case, it is the AUSA who decides, based on the AUSA's professional judgment, what evidence is covered by Brady and must, therefore, be disclosed to the defendant. Plainly, the AUSA is responsible for disclosing any Brady material that the AUSa is aware of.

But, as noted above, the Supreme Court has made clear that a defendant is entitled to the disclosure of all Brady material known to the government, ***even Brady material "known only to police investigators and not to the prosecutor."*** Kyles v. Whitley, 514 U.S. 419, 438 (1995). Thus,

> ***the individual prosecutor has a duty to learn*** of any favorable evidence known to the others acting on the government's behalf in the case, including the police.

Id. at 437.

[3] Brady also requires the prosecution to disclose evidence favorable to the defendant concerning punishment.

Accordingly, the AUSA ***must*** ask the case agent if he/she ***or any other member of the prosecution team*** knows of any Brady material. The office Brady/Giglio form letter to case agents does this. A copy of this letter is included in the training materials for the April 2010 training. The AUSA ***must*** send this letter to the case agent when the criminal file is opened; the letter will help to document the AUSA's fulfillment of the AUSA's "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case." Kyles, 514 U.S. at 437. The AUSA should repeat this inquiry, orally, before all suppression hearings, trials, and sentencing hearings.[4] Under Kyles, the AUSA is ***required*** to make these inquiries.

The primary responsibility for getting Brady material to the AUSA lies with the case agent, which in turn means that the case agent must make sure that *every* member of the prosecution team knows the Brady rule. The case agent can accomplish this task by giving every member of the prosecution team a copy of the office form letter that is mailed to the agent when the file is opened. A copy of this letter is included in the April 2010 training material.

This office has instructed federal law enforcement agencies in this district that if the case agent is unsure whether any evidence or information is covered by Brady, he/she should let the AUSA know about it.

Finally, two things should be kept in mind about potential Brady material that comes to the AUSA's attention: First, the decision to disclose or not disclose potentially exculpatory evidence ultimately rests with the AUSA, and so evidence that is identified as Brady material by the case agent and provided to the AUSA will not necessarily be disclosed to the court or the defendant. Second, potential Brady material that *is* disclosed to the defendant will not necessarily be admissible at trial. The AUSA should make sure that the case agent understands both of these facts.

B. Examples of *Brady* Material

As discussed above, Brady material is defined generally as ***any evidence favorable to an accused that is material to the question of either guilt or punishment***. It is impossible to list all of the different kinds of evidence that the government might be required to disclose under Brady. But the following general categories probably describe most Brady material:

- Evidence tending to show that someone else committed the criminal act.

- Evidence tending to show that the defendant did not have the requisite knowledge or intent.

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[4] In the absence of case law to the contrary, it is the policy of this office that the government's Brady and Giglio obligations extend to only the following three adversarial proceedings: (1) suppression hearings, (2) trials, and (3) sentencing hearings. There is no controlling legal authority holding that Brady and Giglio apply to other adversarial proceedings.

- Evidence tending to show the absence of any element of the offense, or which is inconsistent with any element of the offense (e.g., evidence showing that an alleged interstate wire transfer was actually an intrastate wire transfer).[5]

- Evidence that either casts a substantive doubt upon the accuracy of evidence including but not limited to witness testimony the AUSA intends to rely on to prove an element of any crime charged, or which may have a significant bearing on the admissibility of prosecution's evidence.[6]

- Evidence tending to show the existence of an affirmative defense, such as entrapment or duress.

- Evidence tending to show the existence of past or present circumstances that might reduce the defendant's guideline range under the federal Sentencing Guidelines, support a request for a sentence at the low end of the guideline range or for a downward departure, or make inapplicable to the defendant a mandatory minimum sentence.

C. Looking for *Brady* Material

The government is required only to ***disclose*** the Brady material that the prosecution team knows about. ***The prosecution team is not required to look for unknown Brady material***. That's the defendant's job. Indeed, in many cases there will be no Brady material for anyone to find.

5. THE AUSA'S RESPONSIBILITIES UNDER *GIGLIO*

A. Communicating with the Case Agent

The government's constitutional duty to disclose evidence favorable to the defendant includes ***"evidence affecting [the] credibility" of key government witnesses***. Giglio v. United States, 405 U.S. 150, 154 (1972). This duty exists with respect to

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[5] The AUSA must disclose this information even if he/she does not believe such information will make the difference between conviction and acquittal for a charged crime. USAM § 9-5.001(c).

[6] USAM § 9-5.001(c).

key government witnesses at suppression hearings, trials, and sentencing hearings.

As with Brady material, an AUSA is constitutionally required to disclose all Giglio material that the AUSA ***or any other member of the prosecution team*** is aware of. The AUSA, consequently, "has a duty to learn of any [Giglio material] known to the others acting on the government's behalf in the case, including the police." Kyles v. Whitley, 514 U.S. 419, 437 (1995).

Accordingly, the AUSA ***must*** ask the case agent if he/she ***or any other member of the prosecution team*** knows of any Giglio material on any government witness. The office's mandatory Brady/Giglio form letter to case agents does this. A copy of this is included with the April 2010 training material. The AUSA should repeat this inquiry, orally, before all suppression hearings, trials, and sentencing hearings. Under Kyles, the AUSA is ***required*** to make these inquiries.

The primary responsibility for getting Giglio material to the AUSA on civilian witnesses — i.e., government witnesses other than law enforcement witnesses — lies with the case agent. However, in all likelihood the Court will look to us if an issue arises.

NOTE: The separate subject of Giglio material on ***law enforcement*** witnesses is discussed below. The acquisition by federal prosecutors of evidence that could be used to impeach law enforcement witnesses (particularly evidence of prior agent misconduct) and the disclosure of such evidence to defendants are sensitive matters that are governed by specific

Finally, two things should be kept in mind about potential Giglio material that comes to the AUSA's attention: First, the decision to disclose or not disclose impeachment evidence on a *civilian* government witness ultimately rests with the AUSA, and so evidence that is identified as Giglio material by the case agent and provided to the AUSA will not necessarily be disclosed to the court or the defendant. Second, evidence that *is* disclosed to the defendant will not necessarily be admissible at trial. The AUSA should make sure that the case agent understands both of these facts and the AUSA should consult with the Criminal Chief on all issues concerning Giglio matters.

B. Examples of *Giglio* Material

To decide what evidence is covered by Giglio, one needs to know the ways in which a witness can be impeached. AUSAs should be especially alert to the existence of evidence relating to the first two forms of impeachment described below, namely, a witness's bias and a witness's prior misconduct involving dishonesty.

1. Bias

A witness can be impeached with evidence (including extrinsic evidence) that he/she has a bias against the defendant or in favor of the government. See generally United States v. Abel, 469 U.S. 45 (1984). The sources of such bias are too numerous and varied to catalogue, but here are a few illustrations:

- A witness might dislike the defendant because of some unrelated previous encounter between the two or because of the defendant's race.

- A witness who has some actual or potential exposure to criminal penalties arising from the subject matter of the prosecution may have a pro-government bias resulting from his getting some form of leniency from the government, which may take many forms, such as a plea agreement reducing the witness's potential sentence, an agreement not to seek forfeiture of his property, a decision to place him in the witness security program, or a decision to grant him full transactional immunity. Another form of favorable treatment that could lead to pro-government bias in a government witness is the government's giving him money, gifts, or any other thing of value. With respect to an incarcerated government witness, such favorable treatment may also include his transfer to a more comfortable facility or his receipt of special jailhouse privileges.
- A witness may have a pro-government bias resulting from the government's favorable treatment of a relative or friend who has criminal exposure.

- A witness may have a pro-government bias because he/she fears unfavorable treatment in a related or unrelated proceeding pending before another government agency or court, or because he/she fears that such a proceeding will be instituted.

- A witness may have a pro-government bias because of a social relationship with a member of the prosecution team.

2. Specific Instances of Misconduct Involving Dishonesty

A witness can be impeached with evidence (but *not* extrinsic evidence) of a prior act of misconduct involving dishonesty, even if it has not resulted in a criminal charge or conviction. See generally Fed. R. Evid. 608(b). Examples of such prior misconduct include lying (or failing to disclose material facts) on a job application, tax return, or search warrant affidavit; lying to criminal investigators or in a court proceeding; stealing or otherwise misappropriating property (in certain circumstances); and using an alias.

3. Criminal Conviction

A witness can be impeached with evidence (including extrinsic evidence) of a prior felony conviction. See generally Fed. R. Evid. 609(a)(1). He/She can also be impeached with a prior misdemeanor conviction involving false statement or any other form of dishonesty. See generally Fed. R. Evid. 609(a)(2).

4. Prior Inconsistent Statements

A witness can be impeached with evidence (including extrinsic evidence in most situations) of prior inconsistent statements. See generally Fed. R. Evid. 613. (AUSAs have been in the habit for some time of gathering together the prior statements of government witnesses and turning them over to the defendant. This has been required since 1957, when the Jencks Act (now codified as Fed. R. Crim. P. 26.2) became law.)

5. Untruthful Character

A witness can be impeached by the testimony of a second witness that he/she has a reputation in the community for being untruthful. Similarly, a witness can be impeached by the testimony of a second witness that in the opinion of the second witness, based on the second witness's dealings with and observations of the witness, the witness is generally untruthful. See generally Fed. R. Evid. 608(a).

6. Incapacity

A witness can be impeached with evidence (including extrinsic evidence in most situations) of defects in his physical or mental capacities at the time of the offense or when he/she testifies at a hearing or trial. An example of a physical incapacity is the myopia of an eyewitness to a bank robbery. Examples of mental incapacity are the drunken fog through which an inebriated eyewitness to a bank robbery observed the crime, the sluggishness caused by a witness's use or abuse of controlled substances at the time of trial, and a witness's mental disease or defect.

7. Contradiction

A witness can be impeached with evidence (including extrinsic evidence in most situations) of facts that contradict the witness's testimony.

C. *Giglio* Material on Law Enforcement Witnesses

1. Generally

A law enforcement agent who is called as a witness knows (or certainly should know) whether there is anything that exists that could be used to impeach him. That simple fact taken together with the irrebuttable presumption, established in Kyles v. Whitley, that the AUSA knows everything that any member of the prosecution team knows (whether or not the AUSA has such actual knowledge) means that the AUSA will be held legally responsible for disclosing all Giglio material on law enforcement witnesses, even if the AUSA and the case agent have no idea that such material exists. Hence the AUSA absolutely must find out, one way or another, if there is any Giglio material on any employee of a law enforcement agency — whether federal, ***state, or local*** — who will or might be a witness at any suppression hearing, trial, or sentencing hearing. The two forms of impeachment that will come into play most often with law enforcement witnesses are bias and specific instances of misconduct involving dishonesty, which are discussed above.

2. The Attorney General's Giglio *Policy*

In recognition of the tension that may arise between AUSAs and agents because of Giglio, the Attorney General issued a directive, dated December 9, 1996, entitled *"Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ('[AG's] Giglio Policy')."* This policy was amended on October 19, 2006, to conform to the Department's new policy regarding disclosure of exculpatory and impeachment evidence. (This is included as a separate attachment for the April 2010 training.) By its own terms, the AG's Giglio Policy governs only the DOJ law enforcement agencies (FBI, USMS, DEA, INS). But the Secretary of the Treasury has adopted the AG's Giglio Policy for the Treasury agencies as well. See United States Attorneys' Manual § 9-5.001.

There are three methods an AUSA can use to learn whether there is any potential Giglio material on a law enforcement witness.

First, the AUSA can ask the witness. In this regard, the AG's Giglio Policy provides:

> It is expected that a prosecutor generally will be able to obtain all potential impeachment information directly from potential agency witnesses and/or affiants. Each investigative agency employee **is obligated to inform** prosecutors with whom they work of potential impeachment information as early as possible prior to providing a sworn statement or testimony in any criminal investigation or case.

Second, as noted below, the AUSA can ask the Chief of the Criminal Division whether he/she knows of any Giglio material on the witness.

Third, the AG's Giglio Policy states that the USAO "may *also* decide to request potential impeachment information from the investigative agency." The Policy then goes on to "set forth procedures for those cases in which a prosecutor decides to make such a request." As described below, the AUSA initiates this procedure by simply asking the Criminal Chief to ask the law enforcement witness's agency to look for and identify any potential Giglio material on the witness.

3. This Office's Implementation of the AG's Giglio Policy

Where the AUSA is concerned that there maybe a potential Giglio issue, ***the AUSA must contact the Criminal Chief*** prior to the commencement of ***any*** suppression hearing, trial, or sentencing hearing in which a law enforcement witness (i.e., a member of the "prosecution team") is, or law enforcement witnesses are, expected to testify and give him the name(s) of the law enforcement witness(es).

The AUSA's contact with the Criminal Chief is essential because the Criminal Chief is the clearing house/gatekeeper in the Middle District of Georgia for all Giglio material on law enforcement witnesses.

In that capacity, the Criminal Chief has three functions:

First, the Criminal Chief is the repository of all Giglio materials on law enforcement witnesses in the Middle District of Georgia. Thus, he/she should be asked about, and may already know about, the existence of Giglio material on one or more of the AUSA's law enforcement witnesses. And because the Criminal Chief is the Giglio repository, ***any AUSA who becomes aware of Giglio material on a law enforcement witness, especially an explicit or implicit finding by a judicial officer that a law enforcement witness has made false or misleading statements in an affidavit or while testifying, must provide that information, however the AUSA became aware of it, to the Criminal Chief.***

Second, the Criminal Chief is the "Requesting Official" of the AG's Giglio Policy, which means that he/she is the only person authorized to request potential Giglio material on a law enforcement witness directly from the witness's agency (through his counterpart at the agency, referred to in the AG's Giglio Policy as the "Agency Official"). The Criminal Chief may also direct the request for Giglio material to DOJ's Office of Inspector General and Office of Professional Responsibility.

Finally, the Criminal Chief is the arbiter of any dispute between the case AUSA and the agency as to whether any particular material is covered by Giglio or whether any particular material is close enough to the sweep of Giglio to warrant its

submission to the court *in camera* for the court's determination. ***It is the policy of this office that no potential Giglio material on a law enforcement witness will be disclosed to the court* in camera *or to the defendant unless (1) the law enforcement witness's agency has been given the opportunity to consult with the Criminal Chief and (2) the Criminal Chief approves of the disclosure.***

As a general rule, the AUSA ***must*** initially seek Giglio material on a law enforcement witness by asking the witness directly. Again this is done by using the standard Giglio office form. A copy of this form is included in the training materials for the April 2010 office training. Moreover, ***the AUSA's obligation to ask the law enforcement witness directly about evidence that might be used to impeach him may not be delegated to the case agent.*** The AUSA must also ask the Criminal Chief whether he/she knows of any Giglio material on that witness.

The AUSA has the additional option of asking the Criminal Chief to make a formal request to the witness's agency for Giglio material. This option should be exercised only in certain situations. A formal request to an agency may be appropriate, for example, when the law enforcement witness asserts that there is no potential Giglio material on himself but the AUSA has some reason to doubt that assertion (because the AUSA thinks that the witness doesn't fully appreciate the meaning of Giglio or for reasons that are less benign); when the law enforcement witness asserts that there *is* potential Giglio material on him and describes it (because then it is necessary to confirm the Giglio event and fully explore the circumstances surrounding that event); or when the AUSA simply wants to be absolutely, positively certain that there is no Giglio on the witness.

The AUSA's contact with the Criminal Chief should occur sooner rather than later. Early contact will allow sufficient time for the Criminal Chief to search his repository for any Giglio material on the AUSA's law enforcement witness(es). It will also allow sufficient time for the Criminal Chief to request — and the witness's agency to look for and produce — potential Giglio material on the witness. Early contact will also give the AUSA time to regroup and reorganize the government's investigation or presentation of evidence if it turns out that a law enforcement witness carries so much Giglio baggage that he/she cannot be used as a witness.

Indeed, if any law enforcement employee will be or could be a significant witness in the government's case-in-chief, the AUSA should make contact with the Criminal Chief as early in the investigation as possible (i.e., well before indictment) to determine the Giglio status of that witness. This will help ensure that any agent who has a serious Giglio problem will not become an essential government witness. Once it becomes apparent

that an agent has a serious Giglio problem, the AUSA should consult with the Criminal Chief to determine how to proceed with the prosecution.

6. THE AUSA'S RESPONSIBILITIES CONCERNING THE DISCLOSURE OF *BRADY* AND *GIGLIO* MATERIAL TO THE DEFENDANT

There is no specific time by which the government must disclose Brady and Giglio material to the defendant. Generally "due process requires only that disclosure of exculpatory material be made ***in sufficient time to permit the defendant to make effective use of that material at trial.***" Moreover, if Brady or Giglio material "is within the ambit of the Jencks Act [Fed. R. Crim. P. 26.2], then the express provisions of the Jencks Act control [the timing of] discovery of that kind of evidence" (i.e., disclosure is not required until witness completes his direct examination). **Under DOJ Policy, Giglio materials must be disclosed whether or not the defendant has made a request for such materials.**

DOJ Policy as set forth under USAM 9-5.001 provides that "the government's disclosure will exceed its constitutional obligations". As such, the USAM provision directs disclosure of exculpatory information "reasonably promptly after it is discovered," and that the disclosure of impeachment information be made before trial. Delaying disclosure per the Jencks Act should be done only where necessary due to witness security or national security concerns. Disclosure of exculpatory or impeachment material having to do with sentencing factors should occur in time to be included in the PSR.

An AUSA must obtain the approval of the Criminal Chief not to disclose impeachment information before trial or not to disclose exculpatory information reasonably promptly because of its classified nature. Upon such approval, notice must be provided to the defendant of the time and manner by which disclosure of the exculpatory or impeachment information will be made.

With respect to any material that lies in a Brady or Giglio gray area and thus may or may not be material that the government must disclose to the defendant, the AUSA has three options: (1) disclose the evidence to the defendant, (2) withhold the evidence from the defendant, or (3) submit the evidence in camera and let the district judge decide whether Brady or Giglio applies. As to the third option, the AUSA should probably let the defendant know that the government has made an *in camera* submission to the district judge, without, of course, disclosing the material in question to the defendant. Also, keep in mind that if the district judge decides that the evidence is not covered by Brady or Giglio, and thus need not be disclosed, it does not necessarily follow that the court of appeals will agree. **Remember, DOJ Policy encourages AUSAs to err on the side of disclosure.**

7. MAINTENANCE OF GIGLIO RECORDS

A. Prosecuting Office Records

The USAO for the MDGA will not retain in any system of records that can be accessed by the identity of an employee, potential impeachment information that was provided by an agency, except where the information was disclosed to defense counsel. This policy does not prohibit USAO from keeping motions and court orders and supporting documents in the relevant criminal case file.

B. Copies to Agencies

When potential impeachment information received from Agency Officials has been disclosed to a court or defense counsel, the information disclosed, along with any judicial rulings and related pleadings, shall be provided to the Agency Official that provided the information.

C. Record Retention

When potential impeachment information received from Agency Officials has been disclosed to defense counsel, the information disclosed, along with any judicial rulings and related pleadings, will be retained by the USAO, Criminal Chief, together with any related correspondence or memoranda, in a system of records that can be accessed by the identity of the employee. The Criminal Chief and AUSAs shall preserve the security and confidentiality of potential impeachment information about agents through proper storage and restricted access in this Office. This means that such information shall be maintained in a folder marked "Limited Official Use." The folders shall be treated with the same level of sensitivity as tax return information, i.e., kept in a locked file cabinet.

D. Updating Records

Before any AUSA uses or relies upon information included in the USAO's system of records, the Criminal Chief shall contact the relevant Agency Official(s) to determine the status of the potential impeachment information and shall add any additional information provided to the USAO's system of records.

E. Removal of Records Upon Transfer, Reassignment, or Retirement of Employee

Upon being notified that an employee has retired, been transferred to an office in another judicial district, or been reassigned to a position in which the employee will neither be an affiant nor witness, and subsequent to the resolution of any litigation pending in the prosecuting office in which the employee could be an affiant or witness, the Criminal Chief shall remove from the USAO's system of records any record that can be accessed by the identity of the employee.

8. RULES OF PROFESSIONAL CONDUCT

The ABA Model Rules of Professional Conduct and the Georgia Rules of Professional Conduct, both of which apply to us, also impose requirements regarding exculpatory and impeachment material. Both Rules state:

> The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when a prosecutor is relieved of this responsibility by a protective order of the tribunal.

See Rule 3.8(d), Model Rules of Professional Conduct; Rule 3.8(d), Georgia Rules of Professional Conduct.

Also see March 30, 2010, memorandum from H. Marshall Jarrett, Director, EOUSA, concerning Model Rule 3.8(d).

9. WITNESSES' STATEMENTS - JENCKS ACT AND RULE 26.2

1. What is a statement?

The Jencks Act (18 U.S.C. § 3500) and Fed. R. Crim. P. 26.2 require disclosure of a witness's statements that relate to the subject matter of the witness's testimony at trial or a hearing. Both the Jencks Act and Rule 26.2 define "statement" similarly. Specifically, a statement includes:

5. a **written** statement that the witness makes and signs or otherwise adopts and approves.

6. a substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in any recording or any transcription of a recording.

2. What is not a statement?

Generally, an agent's report of interview (e.g., FBI "302" or "DEA-6"), is not considered a statement of the witness who was interviewed, unless, as noted above,

the report contains a substantially verbatim recital of the witness's statement, or the witness reviews and adopts the report. A witness may be deemed to have adopted the report or notes that were taken during an interview if the witness agrees with an agent's oral recitation of his notes or report to see if the notes or report is correct.

3. Redaction of statements.

Rule 26.2(C) provides that where a statement of a witness contains some material that is relevant to the case, but other material that is either privileged or does not relate to the subject matter of the witness's testimony, the government may call upon the trial court to review in camera the statement in its entirety and excise any privileged or unrelated portions of the statement before it is disclosed to the defense. This implies that the government may not excise such a statement on its own.

PRACTICE TIP: *This rule is one good reason to take separate statements from a single witness for separate investigations or cases*.

4. Notes of interview (agents and prosecutors)

Generally, law enforcement agents are not required to maintain their notes after they have used them to prepare a more formal and complete summary of the interview. If, however, an agent's notes contain *Brady* or *Giglio* material that is not included in the agent's formal summary of the interview, the notes remain relevant and the *Brady/Giglio* material must be disclosed. Similarly, **a prosecutor's notes** of a witness interview (as opposed to notes containing mental impressions, personal beliefs, trial strategy and legal conclusions) may have to be disclosed, or the relevant information contained therein, if the notes reflect exculpatory or impeachment information.

Also, the government may **not** limit its obligation to disclose exculpatory or impeachment evidence of which it is aware either by simply declining to make a written record of the information in the first place or by omitting the information in a final draft of the memorandum of interview and destroying the notes that contain that information. The substantive demands of *Brady* and *Giglio* are not thwarted by the manner in which the government treats or packages exculpatory information. In fact, one of the reasons for the dismissal of the charges in the case against Sen. Stevens of Alaska was the discovery of certain exculpatory information in notes (these were notes of the prosecuting attorneys, not the agents) that had not been included in any more formal documents disclosed to the defense.

5. Applicability of the Jencks Act and Rule 26.2.

The Jencks Act applies to trials. Rule 26.2 applies to:

1. Preliminary hearings;
2. Detention hearings;
3. Suppression hearings;
4. Sentencing hearings;
5. Hearings to consider revocation of probation or supervised release; and
6. 2255 hearings.

E. Materials NOT Subject to Disclosure Requirements

Rule 16 generally does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or by an agent in connection with the investigation or prosecution of a case. See Fed. R. Crim. P. 16(a)(2).

10. GATHERING DISCOVERY MATERIALS

A. Where to Look - the Prosecution Team

We must locate and disclose all discoverable materials noted above, including information that is exculpatory and/or impeaching of a prosecution witness, that is within the possession of the "prosecution team." This team includes the agents and law enforcement officers who helped to develop the case or worked with or under the supervision of the prosecutor during the investigation. The "prosecution team," however, may at times include other agencies. For a more complete discussion of who might be included in the "prosecution team" for discovery purposes, see pages 2-3 of the Deputy Attorney General's January 4, 2010 "Guidance For Prosecutors" memo. Also, cross-reference Section 3 on page 3 of this policy.

B. What to Review/Request

All evidence and other potentially discoverable material gathered during the investigation, whether in our custody or the custody or control of the other members of the prosecution team, should be reviewed. Special care should be given to gathering exculpatory/impeachment information and witnesses' statements, as discussed above. Specifically, you should review, or cause to be reviewed by someone intimately familiar with the law and DOJ policy on the disclosure of exculpatory and impeachment information, the following:

1. ***All*** of the agency's investigative files.

2. ***All*** of the CI/CW/CHS/CS files, by whatever name the agency labels these. Agencies who make use of confidential informants and cooperating individuals

have their own established procedures for retaining information about those witnesses. The agencies may keep multiple files containing different types of records or information. Thus, inquiries to agencies about informants should include a review of every kind of file that might contain information about the individual.

3. Evidence/information obtained via subpoena, search warrants, or other legal process. With respect to electronically-stored evidence, including e-mails, sufficient time must be allotted for a search of hard drives, disks and other storage hardware. These searches may take a long time, so they should be undertaken well before indictment.

4. Evidence/information gathered by civil or regulatory agencies in parallel investigations.

5. Substantive communications/correspondence including e-mails, text messages, and letters, between and among prosecutors, agents, witnesses, victims, victim-witness coordinators, etc.

6. Potential *Giglio* information about non-law enforcement witnesses (including declarants whose hearsay statements the government might seek to introduce at trial). Ask the case agent to run a criminal history report on all non-law enforcement witnesses.

C. Trial Preparation Interviews

When preparing a witness for a hearing or trial, be very aware of our continuing obligation to disclose information that might be exculpatory or have impeachment value. Thus, if a witness provides information that conflicts in material ways with information the witness has previously provided, or conflicts with material information provided by other witnesses, we should disclose that conflict to the defendant.

PRACTICE TIP*: What is the standard? Measure any conflicting information provided by a witness against the standards set forth in the DOJ Policy, United States Attorney's Manual section 9-5.001.*

11. PREPARING DISCOVERY MATERIALS FOR AND MAKING THE DISCLOSURE

A. Bates Labeling/Electronic Storage of Materials (One Option)

1. Bates labeling.

As documents are gathered during the course of an investigation, you should

make a complete and organized record of what has been gathered by the prosecution team. You should Bates label the documents. This process can be done very quickly with office software. **Do not Bates label original documents.** Scan the originals and Bates label the electronic version. The originals should be kept in the order and condition in which they were obtained.

***PRACTICE TIP**: It is recommended that you Bates label the documents in a way that will allow you to determine the source of the documents. (It is also recommended that you keep a record or log containing a description of the documents, the Bates numbers, the source of the documents, and how they were obtained). For example, in an investigation of John Doe, rather than simply Bates labeling all documents in numerical order with no reference to the source, you may wish to Bates label that bank's records as DOE.Bank ABC.0001 - 1000, or in a similar fashion. Documents obtained via search warrant might be labeled DOE.SW.0001-1000. You might use the initials "VP" to indicate voluntary production.*

It is not necessary to include the target's name in the label, and you may ultimately choose to label documents in any manner that fits the needs of your particular case. Whatever system you use, however, please ensure that you have a record system that will allow you, as well as any person who might have to deal with the documents at a later time (including the Office's FOIA contact), to determine the source of the documents and how they were obtained. It is important that we be able to determine if records were obtained via the grand jury, in order to ensure that we comply with the secrecy requirements of Rule 6 of the Federal Rules of Criminal Procedure.

2. Formatting.

You may format the documents using either the .tif or the .pdf file format. You may also choose to use OCR (optical character recognition) for the documents. OCR will allow the documents to be searched for particular words or terms.

***PRACTICE TIP**: The recent trend, particularly in large, document-intensive cases, is to provide documents with OCR. The defense will in all likelihood ask the court for documents to be disclosed in a searchable format. Consult with a member of our litigation support staff or other trained office employee about using either Adobe, eScan-IT, or other software to use OCR on documents.*

B. Grand Jury Materials

1. Handling grand jury materials.

The Department of Justice has guidelines for obtaining and handling evidence pursuant to grand jury subpoena. See United States Attorney's Manual section 9-11.254; *Federal Grand Jury Practice Manual*, Chapter 6 (October 2008). Specific points to remember:

a. Identify a records custodian. Typically this is the agent on the case. This person must be familiar with and have the ability to comply with the security requirements for storing grand jury materials.

b. Subpoena log. Maintain a log of subpoenas issued for documents and other objects. The log should record the date the subpoena was issued, the grand jury to which the documents or objects were subpoenaed, the date they were received, and the date they were returned to the grand jury.

c. Bates label documents. See discussion of Bates labeling in Section 11 above. Remember, do not Bates label the original documents.

d. Make a return to the grand jury of the documents returned.

2. Grand jury report of disclosure.

As soon as practicable after arraignment, file a report of disclosure with the Court. A copy is included with the April 2010 training material.

C. Materials Seized by Search Warrant

If you have used a search warrant in the investigation, material related to the warrant, including affidavits, orders and the warrant itself, must be disclosed so that the defense can pursue a motion to challenge the constitutionality of the search and suppress evidence obtained in the search. Moreover, if the affiant is to be a witness at the trial, the affidavit is in all likelihood a Jenck's Act statement. Before disclosing a search warrant affidavit, be sure that it is not sealed.

If the affidavit has been sealed pursuant to our motion, you must apply for an order to unseal the affidavit before disclosing it to the defense. In those instances where the substance of the affidavit should not be made public, you may ask for an

order allowing the limited release of the material to defense counsel, but prohibiting defense counsel from copying the material or making it public.

1. 404(b) evidence.

Don't forget to note our intent to use 404(b) evidence in the response. Err on the side of providing notice.

***PRACTICE TIP**: You may wish to add a caveat like this:*

It is the position of the United States that the evidence

noted above should not be considered as evidence of other crimes, wrongs, acts under Fed. R. Evid. 404(b), because the evidence "arose out of the same transaction or series of transactions as the charged offense[s], [is] inextricably intertwined with the evidence regarding the charged offense[s], or . . . is necessary to complete the story of the crime [on] trial." United States v. Towne, 870 F.2d 880. 886 (2d Cir. 1989); see also United States v. Chin, 83 F.3d 83, 87-88 (4th Cir. 1996) (holding that acts intrinsic to charged crime do not fall under Rule 404(b)). Notice is provided nevertheless, in the event that the foregoing evidence is deemed to fall under Rule 404(b).

2. Keeping a record.

We should keep in our files an exact copy of everything we have disclosed and in the form that it was disclosed.

CAUTION! *Child pornography may not be released to a defendant, notwithstanding its relevance and the fact that it may constitute evidence. Depictions of child pornography are* ***contraband****, and should receive special handling. Please consult with the Project Safe Childhood POC and CCIPS concerning the release of evidence.*

D. Limiting Disclosures

In a case where there are legitimate concerns about the safety of an informant or witness, it may be appropriate to apply to the court for a protective order limiting distribution and copying of material disclosed or about to be disclosed. There have been occasions when a witness's statement or grand jury testimony has been copied and distributed in a jail or to other potential defendants. Obviously, this may jeopardize the safety of the witness. In situations where this kind of concern is justified, courts have ordered defense counsel not to make copies of certain discovery material and not to let that material out of their personal custody. In these instances, the lawyers may review the material in question with their clients, but may not provide the client with the documents or transcripts themselves.

E. Communication With Agent About Discovery

While perhaps an obvious point, remember to discuss discovery with the case agent before indictment. Issues such as protecting witnesses, turning over the agent's report, redacting certain items of information (such as agency file numbers and the like), and ensuring that all potentially exculpatory or impeachment information has been brought to the attention of the prosecutor in a case, are vitally important.

In any case with a confidential informant or cooperating witness, such as drug cases, you **must** discuss with the agent the timing of any disclosure that would reveal the identity of the confidential informant or cooperating witness, before the disclosure is made. This will allow the agent to take steps to safeguard the witness.

12. TIMING - WHEN DO YOU DISCLOSE THE MATERIALS?

A. Disclosing Exculpatory/Impeachment Information Before Indictment

In applying for a search warrant, we have a duty to disclose exculpatory or impeachment information if that information would defeat a finding of probable cause. This duty to disclose arises not from *Giglio*, but under *Franks v. Delaware*, 438 U.S. 154 (1978). This duty to disclose impeachment information would apply to any confidential informant on whose statements a search warrant affidavit was based. It would also apply, however, to the affiant as well. Again, the standard for measuring whether to disclose exculpatory or impeachment information, particularly about a law enforcement officer, is whether the exculpatory or impeachment information would defeat probable cause.

Case law does not require that the government disclose exculpatory or impeachment information to a grand jury. Department of Justice policy, however, mandates the presentation of evidence that substantially negates the target's guilt in any grand jury proceeding. See USAM 9-11.233.

***Practice Tip**: If you have impeachment information against an affiant law enforcement officer that is substantial enough to negate a finding of probable cause, you should seriously reconsider using that officer as the affiant or whether you should be applying for a search warrant at all. Similarly, if you are aware of evidence that substantially negates a target's guilt, you had better be giving your case a second thought. Why should we present a case for indictment if there is substantial evidence negating guilt?*

B. General Post-Indictment Timing Requirements

Our obligations on when we have to disclose discovery materials are very important. Obviously we must comply with the applicable law and standard court order regarding the timing of disclosures. In addition, being cognizant of the timing requirements should spur us to *gather* the discovery materials as early as possible in the course of an investigation and any resulting prosecution.

C. Delayed Disclosure

Situations may arise where delayed disclosure of discovery materials may be justified. These situations may include instances where the integrity of an ongoing investigation may be compromised by a disclosure, the safety of a witness may be compromised, or national security interests may be implicated. In such situations, it may be prudent to delay disclosure of material for a reasonable time. You should consult with the Criminal Chief if you wish to delay any disclosure of discovery materials that may otherwise be required by law, rule, or the arraignment order.

Also, national security cases involving classified information may be subject to special litigation under the Classified Information Procedures Act (CIPA, 18 U.S.C. Appendix III).