Memorandum

United States Attorney
Districts of Guam and NMI

Subject **Office Policy on Criminal Discovery, Brady and Giglio Disclosures**	Date October 13, 2010
To All AUSAs and SAUSAs	From ALICIA A.G. LIMTIACO United States Attorney

CRIMINAL DISCOVERY POLICY

This memorandum sets forth the Criminal Discovery policy in the Districts of Guam and NMI. This policy does not create new discovery obligations.[1] Its purpose is to ensure compliance with existing discovery obligations and to provide uniform standards for handling discovery within our offices. It does not cover every issue an AUSA will encounter but it is meant to give you a framework.

Prosecutors are encouraged to provide broad and early discovery subject to any countervailing considerations.[2] This discovery policy does not govern disclosure in cases involving terrorism and national security. [3] There are valid case-specific reasons to limit or delay production

[1] This policy is for internal guidance only and is not to be distributed outside of this office or cited in any pleadings. It is protected from disclosure and review by the work product doctrine and other applicable privileges. This policy provides guidance only and is not intended to have the force of law or to create or confer any rights, privileges, or benefits. United States v. Caceres, 440 U.S. 741 (1979).

[2] This policy applies equally to Assistant United States Attorneys, Special Assistant United States Attorneys, and any DOJ attorney working on a criminal cases in our districts.

[3] National Security cases constitute a categorical exception. The Classified Information Procedures Act, 18 U.S.C., Appendix 3, controls the disclosure of classified information in discovery. If your case involves or implicates classified information, contact our offices' National Security Coordinator and ATAC Coordinator at the earliest possible juncture. You should consult with separate Department of Justice guidance regarding the preservation, collection, review, and production of discovery in those cases. See Policy and Procedures Regarding Discoverable Information in the Possession of the Intelligence Community or Military in Criminal Investigations (Memorandum for . . . All United States Attorneys from

of certain discovery to that required by law. These reasons include, but are not limited to, national security, ensuring victim and witness safety, preventing obstruction of justice, preventing the unnecessary disclosure and dissemination of sensitive and/or confidential information, not compromising ongoing investigations, and honoring investigative agency concerns. In such cases, prosecutors should consider submitting potential discovery for in camera review by the court and/or obtaining a protective order governing its handling by the defense.

Prosecutors planning to deviate from the general policy should have specific reasons for doing so and should typically consult with a supervisor and/or the Discovery Coordinator.

To ensure full compliance with our discovery obligations, all prosecutors in both districts must have a working knowledge of a federal prosecutor's discovery obligations. The sources of these obligations include:

* Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972) and their progeny;

* United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991);

* Fed. R. Crim. P., R. 16

* Fed. R. Crim. P. 12.1, 12.2 and 12.3 may impose disclosure obligations when the defendant raises an alibi defense, an insanity defense, or a public authority defense;

* The Jencks Act (18 U.S.C. § 3500 and Fed. R.26.2);

* Federal Rule of Evidence 404(b);

* United States Attorney's Manual (USAM) Sections 9-5.001 ("Policy Regarding Disclosure of Exculpatory and Impeachment Information") and 9-5.100 ("Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Witnesses ('Giglio Policy')");

* Guidance for Prosecutors Regarding Criminal Discovery, (Memorandum for Department Prosecutors from David W. Ogden, Deputy Attorney General, dated January 4, 2010);

* Local Rules and Case Specific Discovery Orders

Gary G. Grindler, Acting Deputy Attorney General, dated September 29, 2010).

These rules, statutes and cases set forth the minimum standards for disclosure. Complying with these discovery obligations is a fundamental duty of all prosecutors in this office.

A. TIMING OF DISCLOSURES

Immediately following indictment, AUSAs should begin making appropriate discovery material available without waiting to get a formal request from the defense. AUSAs are encouraged to disclose all appropriate discovery materials consistent with the following interests:

1. Discovery materials should be disclosed in a time and manner to ensure a fair trial;

2. Discovery materials should be disclosed with sufficient lead time to avoid inconveniencing the trial court and jury;

3. Discovery materials should be disclosed in a time and manner that will minimize the risk of harm, embarrassment, and harassment to witnesses and potential witnesses;

4. Discovery materials should be disclosed in a time and manner that will facilitate "reciprocal discovery" from defense counsel; and

5. Discovery materials should be disclosed in a time and manner that will facilitate the plea negotiation process.

Delayed Disclosure: Situations may arise where delayed disclosure of discovery materials may be justified. These 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. You should consult with your supervisor and FAUSA if you wish to delay any disclosure of discovery materials that may otherwise by required by law, rule, or court 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).

In Camera Review: When appropriate, the AUSA shall, after consultation with supervisor and FAUSA, seek ex parte, in camera review and decision by the court to determine whether certain information (e.g., potential impeachment material) must be disclosed to defense counsel.

Protective Orders: When appropriate in a case where disclosure is made, the AUSA shall, after consultation with supervisor and FAUSA, seek a protective order from the court to limit the use and dissemination of certain information (e.g., potential impeachment material) by defense counsel.

B. DISCLOSURE OF REPORTS OF INTERVIEW FOR TESTIFYING/NON-TESTIFYING WITNESSES

The Jencks Act, 18 U.S.C. § 3500, requires the government to make "witness statements" available to the defense after the witness testifies on direct examination. "Witness statements" include writings that the witness made, signed, or adopted; recordings of the witness; substantially verbatim written recordings by a person interviewing the witness; and grand jury transcripts.

Reports of interview (ROI's) such as FBI 302's and DEA 6's are not considered *Jencks* material unless the ROI contains a verbatim statement of the witness or the witness has adopted it. An agent's ROI is *Jencks* if the agent is going to testify about the subject matter contained in the ROI and you must disclose the ROI as the *Jencks* material of the testifying agent. PRACTICE TIP: An agent's report, however, may contain information favorable to the defendant or information that might be deemed a "statement" for purposes of the Jencks Act or Rule 26.2. To the extent it relates to the subject matter of the agent's testimony, or contains a substantially verbatim recital of another witness's oral statements, the relevant portions of the report may be subject to disclosure.

Non-Testifying Witnesses: usually not required to disclose 3500 material unless it contains Brady information or is otherwise discoverable.

Subject Matter Limitation: technically, disclosure is limited to the scope of the witness's testimony. PRACTICE TIP: It is good practice to turn over all of the information if it relates to the investigation or prosecution, even if the witness testimony will be limited, especially if the witness is the case agent.

Where an ROI contains impeachment or exculpatory information, consideration should be given whether to provide the ROI itself or instead compose a letter to the defense containing the impeachment/exculpatory information.

It is the policy of this Office to disclose witness statements before the start of evidence in the typical case and within the time frame consistent with the district court's trial scheduling order: at least two weeks for Guam and one week for Saipan. In those instances where the identity of the witness is the subject of a protective order, Jencks disclosure should be made the day before the witness testifies, unless otherwise ordered by the presiding judge. In certain cases, particularly complex cases where there is no real threat to the safety of witnesses, the government may disclose witness statements much earlier.

C. PROVIDING DISCLOSURE BEYOND THE REQUIREMENTS OF FED.R.CRIM.P 16 AND 26.2, *BRADY, GIGLIO, JENCKS* ACT, AND USAM §§ 9-5.001 AND 9-5.100

In many cases, prosecutors should consider giving broader and earlier discovery than that which is required because it promotes our truth-seeking mission and helps us achieve speedier case resolutions when the defense realizes the overwhelming nature of our evidence. This practice also

provides prosecutors with a margin of error where, in good faith, we may have erroneously overlooked something discoverable. Attorneys should not call this expansive disclosure "open file" discovery to protect against the defense complaining that a misrepresentation was made about the scope of discovery if an inadvertent omission occurs or if an AUSA's definition of "file" is different from the defense attorney's.

Note: This District employs the philosophy - if it hurts your case, or you have to ask, disclose it!

Disclosure of *Brady/Giglio*

The constitutional guarantee to a fair trial, as interpreted by *Brady* and *Giglio* and their progeny, requires AUSAs to disclose to the defense any evidence that is material to guilt or punishment. *Brady* and *Giglio* information must be disclosed to the defense regardless of whether the defense makes a request for such information. On October 19, 2006, the Department issued an amendment to the USAM that "requires AUSAs to go beyond the minimum obligations required by the Constitution and establishes broader standards for disclosure of exculpatory and impeachment information." USAM § 9-5.001. The policy requires disclosure of "information beyond that which is 'material' to guilt as articulated in *Kyles v. Whitley*, 514 U.S. 419 (1995)," and encourages AUSAs to "err on the side of disclosure."

1. Exculpatory Information

All exculpatory information known to or in the possession of the prosecution team, regardless of whether the information is memorialized, should be disclosed to the defendant reasonably promptly after its discovery. In accordance with USAM 9-5.001, AUSAs should go beyond the Constitutional requirements and take a broad view of materiality when determining what must be disclosed:

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

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

2. Impeachment Information

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

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

D. SCOPE OF PROSECUTION TEAM

AUSAs are obliged to seek all exculpatory and impeachment information from members of the prosecution team. Generally, the "prosecution team" includes federal agents, state and local law enforcement officers and other government officials participating in the investigation. (USAM § 9-5.001).

In determining who should be considered part of the prosecution team, an AUSA must determine whether the relationship is close enough to warrant inclusion for discovery purposes. When in doubt, consult with your supervisor. Examples are:

1. Multi-district investigations – the prosecution team could include the AUSAs and agents from the other district(s).

2. Regulatory agencies – the prosecution team could consist of employees from agencies such as SEC, FDIC, U.S. Trustee, etc. which are non-criminal investigative agencies.

3. State/local agencies – a police officer is a part of the "prosecution team" if the investigation is a multi-agency task force and the AUSA is directing the officer's actions in any way; or if the officer/trooper participated in the investigation or gathered evidence which ultimately led to the charges.

Considerations in determining whether an agency or district should be considered part of the "prosecution team":

a. Whether the AUSA/case agent conducted a joint investigation or shared resources relating to the investigation with the other district or regulatory agency;

b. Whether the other agency/district played an active role in the AUSA's case;

c. The degree to which decisions have been made jointly regarding the other district's or agency's investigation and yours;

d. Whether the AUSA has ready access to the other entity's evidence; and

e. Whether the AUSA has control over or has directed action by the other entity.

The Ninth Circuit has used a relationship test with language such as "participati[on] in the same investigation," and "knowledge of and access to" tests. *United States v. Blanco, 392 F.3d 382, 392-94 (9th Cir. 2004); United States v. Shryock, 342 F.3d 948, 983-84 (9th Cir. 2003); United States v. Wood, 57 F.3d 733, 737 (9th Cir. 1995). For a 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 Regarding Criminal Discovery" memo.*

E. WHAT TO REVIEW ONCE IT IS DETERMINED WHO IS PART OF THE PROSECUTION TEAM AND THEREFORE WHICH MATERIAL IS IN THE CUSTODY OR CONTROL OF THE AUSA

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.

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

2. **All** of the Confidential Informant (CI)/Witness (CW)/Human Source/(CHS) files, by whatever names 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. 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.

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. Ask the case agent to run a criminal history report on all non-law enforcement witnesses.

F. CONFIDENTIAL INFORMANTS/WITNESS TESTIFYING UNDER PLEA OR IMMUNITY AGREEMENT

When a confidential informant or cooperating witness will testify at trial or a hearing, among other things, you should investigate and disclose any information about: relationship with defendant, motivation for cooperating/testifying, drug and alcohol problems, all benefits witness is receiving (e.g., money, expenses paid, immigration status for witness or family, arrests/intervention by law enforcement, taxes on informant payments), writings by witness, prison files, criminal history.

G. CASE-RELATED COMMUNICATIONS THROUGH ELECTRONIC MEDIA SUCH AS EMAIL

Because of the duty imposed upon AUSAs to disclose material, documents and information falling with the ambit of the Rules 16, 26.2 of the Federal Rules of Criminal Procedure, Title 18 United States Code, Section 3500, *Giglio, Brady,* and its progeny, AUSAs should refrain from communicating with other AUSAs, agents or witnesses through any electronic means, including but not limited to email and text messages, especially where those communications involve trial or investigative strategy, witness statements, witness credibility or trial exhibits. Any AUSA who does communicate through these media should be mindful that those communications may be discoverable and disclosable to the defense and the courts. Such media should only be used when the AUSA has no other means of communication available and immediate communication is essential. Keep in mind that electronic records must be printed and stored in the agent/AUSA file just as any other written records would need to be preserved.

H. OBTAINING *GIGLIO* / *HENTHORN* INFORMATION FROM LAW ENFORCEMENT AGENCIES

Giglio Policy (Law Enforcement Witnesses)

1. Overview

It is expected that AUSAs will be familiar with the District's Giglio plan and obtain all potential impeachment information directly from agency witnesses. To formalize this process, the office has a designated Requesting Official concerning *Giglio/Brady*

material. In this capacity, the Requesting Official coordinates all formal requests from the U.S. Attorney's Office to covered law enforcement agencies, to search for impeachment information on potential witnesses. Local law enforcement agencies are included in this policy.

2. Requesting the Information

Once an AUSA determines a law enforcement agency employee will be a witness, a written request to the Requesting Official should be timely submitted. The request should include the name of the agents and case, the nature of the charges, and the expected role of the witness in the case. Timeliness is essential in order to get the information required in time for the testimony. Many agency requests must be routed through headquarters and thus as much lead time as possible is preferred.

3. Submission of Request to Agency

Once the formal request to the agency is made, the agency official will advise the U.S. Attorney's Office of any information pertaining to:

a. A finding of misconduct or similar adjudication that reflects upon the truthfulness or possible bias of the employee including a finding of lack of candor during an administrative inquiry;

b. Any past/pending criminal charge; and

c. Any credible allegation of misconduct that reflects upon the truthfulness or possible bias of the employee.

Any allegation that was not substantiated, not credible, or resulted in exoneration need not be provided by the agency unless:

a. The court issued an order or decision requiring disclosure;

b. The allegation was made by a federal prosecutor or judge.

c. The allegation received publicity;

d. Disclosure is otherwise deemed appropriate.

4. If Potential Impeachment Exists

The requesting official will immediately provide any negative information to the AUSA. The information must be treated as sensitive for purposes of storage and access. The AUSA handling the case will be responsible for determining the extent

to which disclosure to the court and defense counsel is warranted. Where appropriate, the AUSA should seek an ex parte in camera review by the court regarding whether the information must be disclosed. Protective orders should be sought where possible.

I. DISCLOSURE QUESTIONS RELATING TO TRIAL PREPARATION WITNESS INTERVIEWS

When preparing a witness for a hearing or trial, we have a continuing obligation to disclose information that might be exculpatory or have impeachment value. Prosecutors should be alert to any discoverable information learned in those interviews. For example, any previously undisclosed exculpatory information learned in a pre-trial interview must be disclosed to the defense under *Brady*. Any statements that a witness makes during the pre-trial interview, whether or not reduced to writing, that are materially inconsistent with any previous statements made by the witness may be discoverable under *Brady* and *Giglio*. Similarly, any bias that the witness expresses against the defense or in favor of the prosecution during a pre-trial interview may be discoverable under *Brady* and *Giglio*.

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.

J. DISCLOSURE OF AGENT'S NOTES

It is the current law of this circuit that the interview notes of agents are not deemed to be the agent's Jencks material or discoverable pursuant to Rule 16 of the Federal Rules of Criminal Procedure unless they contain "statements" of government witnesses. See United States v. Henke, 222 F.3d 633 (9th Cir. 2000); United States v. Boshell, 952 F.2d 1101 (9th Cir. 1991). If the agent's notes are a faithful representation of what is contained in their formal report (ROI), AUSAs have no duty to disclose the interview notes. Conversely, however, if the notes depart materially from what is contained in the formal report, disclosure should be considered after consultation with an AUSA's supervisor.

Agent notes should be reviewed if there is a reason to believe that the notes are materially different from the memorandum, if a written memorandum was not prepared, if the precise words used by the witness are significant, or if the witness disputes the agent's account of the interview. AUSA should pay particular attention to agent notes generated during an interview of the defendant or an individual whose statement may be attributed to a corporate defendant. Such notes may contain information that must be disclosed pursuant to Fed.R.Crim.P. 16(a)(1)(A)-(C) or may themselves be discoverable under Fed.R.Crim.P. 16(a)(1)(B). *See. e.g.*, United States v. Riley, 189 F.3d 802 (9th cir. 1999) and United States v. Boshell, 952 F.2d 1101 (9th Cir. 1991).

Prosecutors should request that agents preserve their notes of witness interviews. Prosecutors should typically ensure that all agents' rough notes of interviews of testifying witnesses are reviewed for discoverable information prior to trial. Prosecutors should also consider whether the circumstances of a case require review of the rough notes of non-testifying witnesses. These circumstances may be present when (1) the agent did not prepare a written report of the interview, (2) the accuracy of the formal report is called into question, or (3) the non-testifying witness played an important role in the investigation. Rough notes of an agent's interview of a non-defendant witness generally are not discoverable unless they constitution Jencks Act statements (i.e., the witness has signed or otherwise adopted or approved the notes, or the notes contain a substantially verbatim recital of the witness's statement) or contain exculpatory or impeachment information not previously disclosed to the defense.

K. MAINTAINING RECORDS OF DISCLOSURE

Faithful adherence to the discovery and disclosure duties imposed on AUSAs should be accompanied by evidence of the discharge of those duties. Keep good records regarding disclosures. Make a record of when and how information is disclosed or otherwise made available. AUSAs should retain an exact copy of the discovery given to the defense for later reference. For complex cases, consider drafting receipts inventorying any and all documents, statements, reports, or exhibits given to defense counsel and said receipt should be signed by the AUSA and defense counsel.