

U.S. ATTORNEY’S OFFICE - DISTRICT OF KANSAS

DISCOVERY POLICY

It is incumbent upon every AUSA¹ to know the rules, statutes and court decisions that govern the production of discovery. In particular, all AUSAs must be familiar with the Department’s “Guidance for Prosecutors Regarding Criminal Discovery,” which can be found at Section 165 of the Department’s Criminal Resource Manual. This discovery policy seeks to address three major concerns. First, the overriding concern of this office is the prosecution of persons reasonably believed to have committed federal crimes. Second, fairness to the accused in discovery, as provided in federal rules, statutes and court decisions, must be accorded. Finally, the rights of persons who are not parties to the litigation - the witnesses, cooperating individuals and victims - must be protected. Any deviation from the formal discovery procedure potentially impacts on these individuals who have no other protection. Further, continuing investigations and the ultimate ends of justice are endangered by the inappropriate disclosure of information in criminal discovery. In an effort to balance these often competing interests, discovery in all criminal cases

¹This discovery policy applies equally to all SAUSAs who practice in the District of Kansas.

in this district will be provided on either a voluntary² or a statutory³ basis, but in either instance discovery must be provided in accordance with the following policies.

I. DISCOVERY BY THE GOVERNMENT

A. Each criminal AUSA is authorized to establish their own discovery practice within the requirements of rules, case law and court practice. At a minimum, the AUSA must provide all Rule 16 discovery, all Jencks Act materials and all exculpatory information. Rules 16 and 26.2 of the Federal Rules of Criminal Procedure, the Jencks Act, case law and the District

²Voluntary Discovery: If the case AUSA determines that discovery will be produced on a voluntary basis, the following materials should be disclosed:

- materials subject to disclosure under the Federal Rules of Criminal Procedure, 18 U.S.C. § 2518(9) (pertaining to wire taps), *Brady*⁵ and *Giglio*, and any other applicable case law (except *Jencks* statements) should be made available for inspection and/or copying within ten (10) days of the arraignment or upon receipt by government counsel, whichever event occurs later;
- *Jencks* material (18 U.S.C. § 3500 and/or Rule 26.2 pertaining to production of witness statements) should be made available for review and/or copying no later than ten (10) calendar days prior to trial or hearing.

³Statutory Discovery: If the case AUSA obtains approval from his or her supervisor to provide discovery on a statutory basis, the following materials should be disclosed:

- materials subject to disclosure under the Federal Rules of Criminal Procedure,⁶ 18 U.S.C. § 2518(9) (pertaining to wire taps), *Brady*⁷ and *Giglio*, and any other applicable case law (except *Jencks* statements) will be made available for inspection and/or copying at the time provided in the applicable statute, rule or decision, but in any event no later than ten (10) working days prior to trial or immediately upon receipt by government counsel, whichever event occurs later (see Fed. R. Crim. P. 45);
- *Jencks* material (18 U.S.C. § 3500 and/or Rule 26.2) will usually be provided on the first day of trial or hearing or at pre-trial suppression hearings under Rules 12 and 26.2 of Fed.R.Crim. P.

Court's standard order on discovery require us to provide defense counsel with certain material. The following should be provided within the time period set by the District Court Judge in the Pretrial Order or within a reasonable period of time after the Rule 5 hearing if no time is specified in the Pretrial Order:

- i. relevant written or recorded statements of or confessions made by the defendant, the substance any oral statements made by the defendant to a person known by the defendant to be a government agent, any relevant written or recorded statement of the defendant within the government's possession and that portion of any written record containing the substance of any oral statement made by the defendant to a person known by the defendant to be a government agent;
- ii. reports of relevant physical or mental examinations and scientific tests;
- iii. the grand jury testimony of the defendant relating to the offenses charged;
- iv. the defendant's criminal record; and for any witness to be called at trial by the government, any conviction record that is permissible impeachment pursuant to FRE 609;
- v. all documentary or physical evidence the government may use in its case-in-chief or which were obtained from or belonged to the defendant, or are material to the defense;
- vi. all witness statements under Rule 26.2 and 18 U.S.C. § 3500; and

- vii. all exculpatory information under *Brady v. Maryland*, and related cases.
- B. Rule 16 also requires disclosure upon the request of a written summary of expert testimony as early as possible and, to avoid unnecessary continuances or the chance the United States will not be allowed to use the evidence. Production of witness statements are covered by the Jencks Act (18 U.S.C. § 3500) and Federal Rule of Criminal Procedure 26.2. Both of these provisions require production of the statement after the witness has testified on direct examination but production of such statement should, absent exceptional circumstances, occur prior to trial. It should be noted that Jencks Act applies at the “trial of the case,” whereas Rule 26.2 applies at trial, suppression hearings and to the extent specified in the Rules to proceedings such as preliminary hearings, sentencing and detention hearings. Both the statute and the Rule generally define “statement” to include:
- i. a written statement that the witness signs or adopts, including e-mails and text messages authored by agents and other witnesses, to include victims⁴;
 - ii. a substantially verbatim recital of a witness’ oral statement; or
 - iii. a witness’ statement to the grand jury.
- C. If Jencks Act material is developed after that date the material

⁴AUSAs should request that agents and victim/witness personnel employed by law enforcement agencies provide copies of any text messages or e-mails with content not otherwise included in disclosed reports, which discuss substantive, case-related information (as opposed to logistical matters).

should be turned over as soon as practical. An AUSA who does not wish to disclose Jencks materials of an agent witness at a pretrial hearing such as a detention hearing or a preliminary hearing should consider calling another agent as the government's witness at that proceeding.

- D. FRE 404(b) requires reasonable pretrial notice of evidence to be offered under that rule when requested. Given that it would likely be held to be ineffective assistance of counsel not to make such a request, notice should be provided even if no request is made. However, the District Court's General Order of Discovery requires this disclosure at least ten days before trial commences. Prior notice requirements also exist under FRE 807 for the introduction of statements under the residual exception to the hearsay rules and that rule also requires providing the name and address of the declarant. The Constitution, case law, and the court's standard discovery order require us to disclose evidence favorable to the defendant, including misidentifications, exculpatory statements and other *Brady* material.
- E. The judges in our District set a very high standard for pretrial discovery by the United States and have shown very little tolerance for even unintentional failures to meet that standard. Every AUSA must take pretrial discovery obligations seriously, plan ahead for meeting these obligations, and carefully document all disclosures made.

II. CASES INVOLVING NATIONAL SECURITY ISSUES

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
- 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.

III. DISCOVERY BY THE DEFENDANT

Rule 16 also provides that upon demand the defendant must provide discovery to the government of documentary evidence, scientific evidence and experts. A formal demand for such evidence should be made by the United States in writing, and at times it is appropriate to file a motion with the court if the defendant has not complied with this provision of the Court's General Order of Discovery.

IV. BRADY/GIGLIO -

A. *Brady* Obligation. *Brady v. Maryland*, 373 U.S. 83 (1963)

- i. disclose evidence that is favorable to the accused and material⁵ to the determination of guilt or to the appropriate punishment;
- ii. applies to guilt and sentencing phases.

B. *Giglio* Obligation. *Giglio v. United States*, 405 U.S. 150 (1972)

- i. extends *Brady* principles to evidence affecting the credibility of government witnesses;
- ii. *Giglio* material is one form of *Brady* material. *United States v. Bagley*, 473 U.S. 667 (1985).

C. iii. Supreme Court Progeny Cases:⁶

Giglio v. United States, 405 U.S. 150 (1972)(*Brady* principles extended to evidence affecting government witness credibility); *United States v. Agurs*, 427 U.S. 97 (1976) (obligation exists even without a specific request from the defendant when the evidence is of ‘obviously substantial value to the defense’); *United States v. Bagley*, 473 U.S. 667 (1985)(reaffirming *Giglio* and

⁵Please note that DOJ Policy relating to disclosure under *Brady* (USAM 9-5.01), dispenses with the materiality requirement and requires disclosure beyond information that is material to guilt. See § III.I, below.

⁶For much broader consideration and discussion of case law in this area, please utilize the “*Brady* and *Giglio* Issues” outline of AUSA Danies W. Gillogly available at: <http://10.173.2.12/usao/eousa/ole/usabook/bgig/bfif.pdf>.

establishment of *Bagley* standard for “materiality”); *Kyles v. Whitley*, 514 U.S. 419 (1995)(reiterated *Bagley* standard of materiality and identified four aspects of materiality that bear emphasis), *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999)(held petitioner in capital murder case failed to establish ‘reasonable probability’ that had the impeaching information been disclosed then the result would have been different); and *United States v. Ruiz*, 536 U.S. 622 (2002)(Constitution does not require government to disclose impeachment information prior to entering plea agreement with defendant, but the proposed ‘fast-track’ plea agreement agreed to provide ‘any information establishing the factual innocence of the defendant’’).

D. *Brady* Material Includes Exculpatory and Impeachment Material

- i. impeachment material sometimes referred to as *Giglio* material;
- ii. distinction important with respect:
 - (a) timing of disclosure
 - (i) if *Brady* (exculpatory) - disclose promptly;
 - (ii) if *Giglio* (impeachment) - no constitutional or statutory obligation to disclose before trial but see USAM discussed below - disclose in advance of trial.
 - (b) obligations at guilty pleas

- (i) *Brady* material - *exculpatory* information should be disclosed prior to guilty plea per *United States v. Ohiri*, 133 Fed. Appx. 555, 562 (10th Cir. 2005) which distinguishes between impeachment information and exculpatory information and opines that the Supreme Court would find a failure to provide exculpatory information pre-plea would amount to Due Process violation.
- (ii) *Giglio* material - no obligation to disclose prior to guilty plea;
- (iii) consider disclosing prior to guilty plea depending on the facts and circumstances of case; e.g., if witness is only witness or key witness to event.

E. *Brady* Material May Not be Purely Exculpatory

- i. could have some incriminating aspects;
- ii. view of what is “inculpatory” and “exculpatory” may change as case develops, particularly as you learn more about the defense.

F. Prosecutor’s Good or Bad Faith is Technically Irrelevant for *Brady* Analysis

G. DOJ Policy (USAM 9-5.01): because of the hindsight nature of materiality test, under DOJ policy as found in USAM 9-5.01, our pre-trial disclosure practice is far broader than

required under the rules that have developed to analyze post-trial *Brady* challenges.

- i. requires disclosure beyond what is constitutionally required;
- ii. **dispenses with materiality requirement and requires disclosure beyond information that is material to guilt** as set forth in *Kyles v. Whitley*, 514 U.S. 419 (1995), and *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999);
- iii. must disclose information inconsistent with an element of any crime charged against the defendant or that establishes a recognized affirmative defense;
- iv. must disclose impeachment information that either;
 - a. casts a substantial doubt upon the accuracy of any evidence the prosecution intends to rely on to prove an element of any crime charge;
 - b. or might have a significant bearing on the admissibility of prosecution evidence;
 - c. applies to information (not just evidence) regardless of whether the information itself constitutes admissible evidence.
- v. disclosure of exculpatory material to Grand Jury (USAM 9-11.233)
 - a. USAM requires that:

- (I) if prosecutor conducting Grand Jury investigation is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation;
 - (ii) the prosecutor **MUST** present or otherwise disclose such evidence to the Grand Jury before seeking an indictment against that person;
 - (iii) failure to comply with this policy should not result in dismissal of the indictment **BUT**;
 - (iv) failure to comply could result in referrals by the courts or the U.S. Attorney's Office to the Office of Professional Responsibility.
- vi. timing of disclosure (discussed more fully below);
- a. exculpatory information must be disclosed reasonably promptly after it is discovered;
 - (i) exculpatory information that includes classified or otherwise sensitive national security material may require certain protective measures that may delay or restrict disclosure.
 - b. impeachment information typically disclosed at a reasonable time before trial;
 - (i) sometimes need to balance the goal of early disclosure against other significant interest

such as witness security and national security;

(ii) in such cases, disclose at a time and manner consistent with statutory requirement.

vii. exculpatory and impeachment information that casts doubt upon proof of an aggravating factor at sentencing, but not related to proof of guilt, must be disclosed no later than the initial presentence investigation report.

viii. if classified information, need supervisory approval to not disclose impeachment information before trial or exculpatory information reasonably promptly; and upon such approval, notice must be provided to the defendant as to the time and manner by which disclosure of the exculpatory or impeachment information will be made. USAM 9-5.001C.4.

H. PRACTICE TIP: Because a determination of what is Brady depends on the defense being offered, it can be helpful to state on the record in court that in order to fully comply with its Brady obligations, the government needs to know the defense.

I. Consequences of Nondisclosure

i. reversal of convictions, *Kyles v. Whitley*, 514 U.S. 419 (1995);

ii. dismissal of Indictment, *United States v. Chapman*, 524 F.3d 1073 (9th Cir. 2008);

- iii. referral to Office of Professional Responsibility, USAM 1-4.100; *United States v. Shaygan*, 661 F.Supp 2d 1289, 1325 (S.D. Fla. 2009);
 - iv. bar disciplinary proceedings, *in re Attorney C*, 47 P.3d 1167 (Colo. 2002);
 - v. publication of AUSA's name in Federal Reporters, *United States v. Jones*, 609 F.Supp 2d 113, 114 (D.Mass. 2009);
 - vi. award of attorney's fees, *Shaygan*, 661 F.Supp 2d at 1325;
 - vii. civil suit against investigators and prosecutors.
- J. For further guidance on implementation of the *Brady/Giglio* policies of the District of Kansas, please see the memorandum pertaining to the approved procedures. (Attached)

This 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).

Implementation Plan for Potential Impeachment (*GIGLIO*) Information Regarding Law Enforcement Agency Witnesses

A. Introduction

Supreme Court decisions mandate the disclosure of potential impeachment information which is material to the defense. Impeachment material subject to disclosure includes, but is not limited to: (1) specific incidents of conduct of a witness for the purpose of attacking the witness' credibility or character for truthfulness; (2) evidence in the form of opinion or reputation as to a witness' character for truthfulness; (3) prior inconsistent statements; and (4) information that may be used to suggest that a witness is biased.

Law enforcement agency employees, prior to providing a sworn statement or testimony in any federal investigation or case, are under an obligation to inform the prosecuting attorney of such potential impeachment information. Nothing in this implementation plan diminishes this obligation, and it is expected that prosecuting attorneys will receive potential impeachment information directly from the law enforcement agency witness during the normal course of investigations and/or in preparation for court proceedings.

B. Definitions

For the purposes of this plan, the following terms shall have the meanings as follow:

Agency Official: The individual designated by the law enforcement agency to receive, coordinate and respond to all potential impeachment information requests from the United States Attorney's Office.

Prosecutor: The particular Assistant United States Attorney(s)

assigned to a criminal investigation or case, who is designated by the United States Attorney's Office for the District of Kansas to request potential impeachment information from law enforcement agencies and to receive such information in connection with the specific request.

C. United States Attorney's Office Internal Procedure

Before any officer or agent testifies or serves as an affiant for a Complaint, Search Warrant, or Seizure Warrant, the prosecutor must inquire of the officer or agent if any potential impeachment exists.⁷ Similarly, before any officer or agent testifies as a witness in a court proceeding, the prosecutor must make a formal request in writing, to the Agency Official at the law enforcement agency employing that officer or agent, requesting any potential impeachment material concerning that officer or agent.⁸ If the prosecutor has worked on a regular basis with the officer or agent and knows that an impeachment request was returned in the previous twelve months with no such material, then another official request in writing is not necessary.

D. Review By Agency

Upon receipt of a request for potential impeachment information, the Agency Official shall make a timely review of agency records in accordance with the agency's implementation plan. The Agency Official shall also contact the appropriate Office of Inspector General [O.I.G.] and/or Office of Professional Responsibility [O.P.R.] to determine the existence of potential impeachment information. If applicable, the Agency Official shall advise

⁷ To aid in remembering this requirement, it is suggested that a reminder to ask the affiant whether any potential impeachment material exists be added to the prosecutor's forms utilized for complaints and warrants.

⁸ To assist in complying with this requirement, it is suggested that prosecutors request a list of all potential law enforcement witnesses from the case agent, which may be provided to the prosecutor's legal assistant to issue the formal request in writing to the respective Agency Official.

the Prosecutor, in writing, of the following:

1. any finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during an administrative inquiry;
2. any past or pending criminal charge brought against the employee; and
3. any credible allegation of misconduct that reflects upon the truthfulness or possible bias of the employee that is the subject of a pending investigation.

E. Unsubstantiated Allegations, Allegations Lacking Credibility, and Allegations Resulting in Exoneration

When a request for potential impeachment information is received by the Agency Official, allegations against the agency employee that are unsubstantiated, not credible, or have resulted in exoneration will be provided to the Prosecutor only under the following circumstances:

1. the Prosecutor has advised the Agency Official that such information is required by a court decision;
2. when, on or after the effective date of this plan,
 - a. the allegation was made by a federal prosecutor, magistrate or judge; or
 - b. the allegation received publicity;
3. when the Prosecutor and the Agency Official, based upon exceptional circumstances involving the nature of the case or the role of the agency witness in the case, agree that disclosure is appropriate; or
4. when disclosure is otherwise deemed appropriate by the agency.

The Agency Official is responsible for advising the Prosecutor whenever the files of the agency, O.I.G. or O.P.R. reveal an allegation that is unsubstantiated, not credible or resulted in the employee's exoneration.

F. Procedure Regarding Handling of Potential Impeachment Information

1. Documents Not Considered Subject To Disclosure To Court And Counsel:

All documents concerning allegations disclosed pursuant to Section E of this plan shall be kept by the Prosecutor in a secure location in a sealed envelope. The secure location shall be in a locked compartment within a room that is accessible only by the Prosecutor, the Criminal Coordinator [Branch Offices], and/or the United States Attorney.* At the conclusion of the case, including any appeal or post-sentencing motions, the Prosecutor shall expeditiously return the documents, and all copies thereof, to the Agency Official.

Nothing herein prohibits the Prosecutor from keeping materials such as motions, responses, legal memoranda, court orders, and internal office memoranda and correspondence in the relevant criminal case file.

2. Documents Considered Subject To Disclosure To Court And Counsel:

Whenever impeachment material relating to an agency witness/affiant is disclosed by the Agency Official to the Prosecutor, the prosecutor shall:

- a. discuss with the agency witness/affiant and his/her Agency Official the impeachment material and the Prosecutor's understanding of both the relevant law and the practice of the court applicable to the facts of the investigation/case and the impeachment information;
- b. seek an *ex parte, in camera* review and decision by the

court concerning whether the potential impeachment information must be disclosed to defense counsel when such action is consistent with the practice of the particular court and is deemed appropriate by the Prosecutor;

c. seek a protective order limiting the use and further dissemination of the potential impeachment information by defense counsel if such an action is consistent with the practice of the particular court and is deemed appropriate by the Prosecutor; and

d. confer with, and consider the views of, both the agency witness/affiant and Agency Official concerning disclosure of the impeachment information to the court or defense counsel and the advisability of seeking an *ex parte, in camera* review by the court and a protective order.

3. Record Keeping

a. The United States Attorney's Office shall not retain records of potential impeachment information concerning law enforcement agency witnesses in any system of records by the name of the agency witness/affiant, provided however, the records may be retained in a record system accessible by witness identity when the information has been disclosed to the court and defense counsel.* In that event, the judicial rulings, related pleadings, correspondence and memoranda shall be retained with the disclosed information.

4. Copies To Agency Official

Whenever potential impeachment information received from the Agency Official has been disclosed to a court or defense counsel, the Prosecutor shall provide the Agency Official copies of the information disclosed and all related pleadings and judicial rulings for retention by the Agency Official.

5. Updating Records and Continuing Duty to Disclose

Prior to use or reliance upon potential impeachment information previously disclosed by the Agency Official and retained in the files of the USAO, the Prosecutor shall notify the Requesting Official of such proposed use or reliance. The Prosecutor shall contact the Agency Official to determine the status of the potential impeachment information and whether any additional information exists.

The Agency Official, O.I.G. and O.P.R. (through the Agency Official) have a continuing obligation during the pendency of the investigation/case to provide any new, additional, or newly discovered impeachment information regarding the agency employee to the Prosecutor.

In any case/investigation wherein a request was made under this plan and information was received from the agency, the Prosecutor has an obligation to promptly notify the Agency Official when the criminal case or investigation has resulted in a judgment or declination.

6. Transfer, Reassignment or Retirement of AgeDCY Witness/Affiant

When the Prosecutor is notified in writing by the Agency Official that an employee has retired, been transferred or reassigned to a position in which the employee will neither be a witness nor an affiant, the Criminal Chief shall remove from the USAO system any records concerning impeachment relating to that employee that can be accessed by the identity of the employee. Prior to removal, however, the Criminal Chief must determine that there are no pending investigations or litigation in which the employee could be a witness or affiant.

G. Dismissal of Prosecution

When factors lead a prosecutor to conclude that *Giglio* information disclosed by an agency would jeopardize the successful prosecution of a

matter the prosecutor shall notify the Criminal Coordinator and Criminal Chief. The Criminal Coordinator or Criminal Chief shall advise the United States Attorney of the prosecutor's assessment and the United States Attorney, after reviewing the information, will decide whether to discontinue the prosecution or investigation of the matter.

H. Other

This Plan does not create additional rights for anyone should actions occur outside of, or inconsistent with, the provisions herein, and further, this Plan may be modified at any time without public notification.

This 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).