UNITED STATES ATTORNEY'S OFFICE
WESTERN DISTRICT OF KENTUCKY

DISCOVERY POLICY

OCTOBER 15, 2010

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INTRODUCTION[1]

This document sets forth discovery/disclosure policy for all AUSAs, SAUSAs, and DOJ trial counsel who prosecute criminal cases in this district. This policy is not intended to, does not, and may not be relied upon, to create any substantive or procedural rights enforceable at law by any person in any administrative, civil, or criminal matter or case. Nor are any limitations hereby placed on the otherwise lawful litigative prerogatives of the U.S. Department of Justice. See United States Attorneys' Manual (USAM) § 1-1.100; United States v. Caceres, 440 U.S. 741 (1979).

All prosecutors in this district are expected to be familiar with and comply with all federal law, court rules and DOJ and office policies concerning criminal discovery. This includes Fed.R.Crim.P 16; the *Brady, Giglio* and *Presser* line of cases; USAM 9-5.001 (Disclosure of Exculpatory and Impeachment Information); USAM 9-5.100 (Potential Impeachment Information on Law Enforcement Witnesses); the Jencks Act (18 U.S.C. § 3500) and Fed. R. Crim. P. 26.2; and the discovery orders entered by District Judges and Magistrates. These statutes, rules, judicial opinions, and orders set forth the minimum standards for disclosure in a criminal case. Specific case-related considerations may warrant a departure from the policy set forth in this document. Prosecutors must consult with supervisory AUSAs for authorization for such policy departures.

I. Rule 16

A. Scope of Discovery

AUSAs are encouraged to review the January 4, 2010, memorandum from Deputy Attorney General David Ogden captioned "Guidance for Prosecutors Regarding Criminal Discovery" (the DAG Guidance memo), for guidance on locating and reviewing information subject to discovery. Prosecutors shall provide all discovery required by Rule 16(a), and have an an obligation to provide continuing discovery pursuant to Fed.R.Crim.P. 16(c) (hereafter Rule 16(c).

AUSAs should, however, remain mindful of the limited scope of discovery required by Rule 16, which specifically exempts from discovery "reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case." Rule 16(a)(2).

[1]This Document is adapted from the excellent research effort by the Western District of Michigan US Attorneys Office, with permission of the US Attorney Don Davis.

THIS OFFICE DOES NOT HAVE AN "OPEN FILE" POLICY. The Deputy Attorney General has directed that:

> Prosecutors should never describe the discovery being provided as "open file." Even if the prosecutor intends to provide expansive discovery, it is always possible that something will be inadvertently omitted from production and the prosecutor will then have unintentionally misrepresented the scope of materials provided. Furthermore, because the concept of the "file" is imprecise, such a representation exposes the prosecutor to broader disclosure requirements than intended or to sanction for failure to disclose documents, *e.g.*. agent notes or internal memos, that the court may deem to have been part of the "file."

See also United States v. Atisha, 804 F.2d 920, (6th Cir. 1986) ("If the government agrees to maintain an 'open file' policy, ... the government is obligated to adhere to that agreement"). No AUSA is authorized to implement, agree to, or imply or represent that the office or any prosecutor in this district has an "open file" policy. Prosecutors should thoughtfully and carefully consider what information to provide in the course of discovery, and "open file" discovery is inconsistent with that considered decision-making. Open file discovery creates the risk that departmental policy, office policy, internal deliberations, confidential information or decisions, or work product could be disclosed, inadvertently, and risks waiver of privileges and confidentiality. Any request for this type of internal office information shall be brought to the attention of a supervisor.

B. Timing of Rule 16 Disclosure

Initial pre-trial discovery shall be provided by as required by any applicable pretrial order. Although Rule 16 and some judge's pretrial orders require a defense "request" to trigger discovery obligation, it is this office's practice and policy that all prosecutors will produce discoverable Rule 16 materials even if no request is made. Additional discovery shall be provided "promptly" or "immediately" after it comes to the attention of the AUSA in accordance with Rule 16(c). AUSAs are encouraged to disclose all appropriate discovery materials consistent with the following interests:

1. Discoverable materials should be disclosed in a time and manner to ensure a fair trial;
2. Discoverable materials should be disclosed with sufficient lead time to avoid inconveniencing the trial court and jury;
3. Discoverable 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. Discoverable materials should be disclosed in a time and manner that will facilitate "reciprocal discovery" from defense counsel; and
5. Discoverable materials should be disclosed in a time and manner that will facilitate the plea negotiation process.

C. Record of Disclosures

A written record of all discovery provided to the defense shall be made and kept in the case file. Where practical, copies of all discovery materials provided to the defense shall also be made and kept in the case file. Bates stamping of extensive discovery material is encouraged.

D. Exceptions

Exceptions to the general provisions of this policy may be authorized, on a case-by-case basis, by a criminal supervisory AUSA. This includes any request for protective orders pursuant to Fed.R.Crim.P. 16(d)(1).

II. Disclosures Under the Jencks Act and Rule 26.2

Title 18, United States Code, Section 3500, (hereafter the "Jencks Act"), expressly states that in a criminal prosecution, "no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness shall be the subject of. . . discovery . . .until said witness has testified on direct examination in the trial of the case. The Jencks Act provides that after the direct trial testimony of a government witness, the defense may request and obtain any prior "statement" of that witness "which relates to the subject matter" of the witness' testimony for use in cross-examination. Fed.R.Crim.P. 26.2 (hereafter Rule 26.2) establishes a similar rule for both government *and* defense witnesses (other than the defendant), and applies not only to trials, but also to detention hearings, preliminary hearings, sentencing hearings, probation or supervised release violation hearings, and § 2255 hearings. Rule 26.2(g). The Sixth Circuit interprets the provisions of the Jencks Act and Rule 26.2 similarly. United States v. Musick, 291 Fed. Appx. 706, 727 (6th Cir. 2008).

A. What are Jencks Act "Statements"?

The Jencks Act and Rule 26.2 define a witness "statement" to mean a) a written statement made by the witness and signed or otherwise adopted or approved by the witness, b) a contemporaneous recording or other "substantially verbatim recital" of an oral statement made by the witness, or c) a statement, however taken or recorded, made by the witness to a grand jury.

The "grand jury" and "substantially-verbatim-recital" provisions of the Jencks Act are fairly straightforward. But issues often arise at trial concerning reports of witness interviews, such as FBI 302s or DEA-6s. Typically, under 6th Circuit law, such reports of interview do not meet the above definition of a "statement" of the interviewed witness and so the witness' testimony does not trigger disclosure under the Jencks Act or Rule 26.2 . See United States v. Dorman, 108 Fed. Appx. 228, 244-45 (6th Cir. 2004); United States v. Nathan, 816 F.2d 230, 236-37 (6th Cir. 1987); United States v. Pope, 2007 WL 4395533 (W.D. Mich. 2007). However, if during trial preparation a witness reviews his or her own report of interview, and "adopts" or "approves" the report, then that act may render the report Jencks Act material. Likewise, agent notes of witness interviews do not constitute "statements" of the witness unless the notes were shown or read back to the witness and "adopted or approved" by the witness or constitute a "substantially verbatim recital" of the interview. See 18 U.S.C. § 3500(e)(1) and (2); Goldberg v. United States, 425 U.S. 94 (1976). Agent notes may, however, constitute written "statements" of the agent if the agent testifies about the interview. See Clancy v. United States, 365 U.S. 312 (1961).

Prosecutors should thoughtfully and carefully consider whether a report of interview or part thereof should be considered a Jencks Act statement, and make appropriate disclosures if so. If a report of interview does not constitute Jencks Act material, and does not memorialize information that could be deemed discoverable under *Brady, Giglio, Kyles* or DOJ policy, discussed below, each prosecutor retains the discretion to decide whether to disclose it or not. Tactical and strategic reasons may inform that decision. For instance, disclosure may enhance efforts to resolve a case, or may result in stipulations that would make trial proceed more smoothly. On the other hand, denying a testifying defendant a chance to "customize" his story to fit with other witnesses' anticipated testimony at trial may warrant non-disclosure.

It has been long recognized that the actual investigative file, in its entirety, is not Jencks material. United States v. Nickell, 552 F. Ed 684, 688-89 (6th Cir. 1977)(rejecting argument that Jencks required disclosure to defense or court all reports made by testifying agent, because purpose of Jencks Act is to restrict general defense exploration of government's files.) At most, only those parts of the investigative report amounting to a written statement concerning facts to which the agent testifies at trial are subject to production under the Jencks Act. Such portions may be statements that "relate to the subject matter as to which the witness has testified," and thus may be relevant and material to the agent's trial testimony. Id. at 689. While "routine judicial screening" of such reports for such relevance and materiality may be burdensome, it is prudent for prosecutors to submit an investigative report for court inspection to determine what portions do not relate to the subject matter of the agent's testimony, or which may constitute non-discoverable evaluative or tactical notations. Id. (McCree, J. dissenting).

B. Timing of Disclosure

The Jencks Act and Rule 26.2 do not require production of witness "statements" until after the direct examination of the witness has concluded. Our District Judges encourage prosecutors to disclose Jencks Act material prior to trial, but do not and cannot require pre-trial disclosure. If it is not certain that a particular witness will testify, or if an AUSA has concerns about witness safety, misuse of witness statements by the defense, or if other legitimate concerns outweigh early disclosure, the AUSA may stand on the literal timing guidance of the Jencks Act or Rule 26.2. The AUSA should probably advise the defense if some or all of the Jencks material will be held until after a witness testifies. It could be unfair "gamesmanship" to disclose some Jencks material before trial, and then surprise the defense with additional Jencks material for additional witnesses during the trial itself.

The time frame of 18 U.S.C. §3500 notwithstanding, AUSAs are discouraged from practices that routinely create trial delays, or would adversely affect other AUSAs or set an adverse precedent for the office. Prosecutors who always adhere to the literal timing requirements of the Jencks Act run the risk that unnecessary trial delays will displease the Judge. Indeed, the Sixth Circuit and other courts have encouraged earlier production of Jencks Act statements in order to prevent delay at trial and "so that defense counsel may have an adequate opportunity to examine that which is not in dispute and the court may examine the rest in camera...." United States v. Minsky, 963 F.2d 870, 876 (6th Cir. 1992). It is the general practice of this office to provide Jencks Act material at the same time as other impeachment information, usually a few days before trial begins (for example, on the Friday before a Monday trial). However, in particularly complex cases or capital cases, the AUSA should provide such materials even earlier. See, e.g., 18 U.S.C. § 3432 (list of witnesses in capital cases must be provided at least three days before trial begins).

III. Brady and Giglio

A. The Rules

In Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court announced:

> We now hold that the suppression by the prosecution of ***evidence favorable to an accused*** . . . violates due process where the evidence is ***material either to guilt or to punishment***, irrespective of the good faith or bad faith of the prosecution.

Id. at 87.[2]

Nine years later, in Giglio v. United States, 405 U.S. 150 (1972), the Supreme Court held that Brady material includes material that might be used to impeach key government witnesses, stating:

> When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of ***evidence affecting [the witness's] credibility*** falls within th[e] general rule [of Brady].

Id. at 154.[3]

The Supreme Court has explained that Brady material and Giglio material are not two distinct kinds of evidence under the Constitution, but rather, Giglio material is merely one form of Brady material:

> In Brady . . ., the prosecutor failed to disclose exculpatory evidence. In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest. See *Giglio*[]. Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule. Such evidence is "evidence favorable to an accused," so that, if disclosed and used effectively, it may make the difference between conviction and acquittal.

United States v. Bagley, 473 U.S. 667, 676 (1985).

Still, it is often useful to keep Brady and Giglio analytically distinct. First, Brady and

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[2] In Brady, John Leo Brady was convicted by a jury of first-degree (felony) murder in connection with a robbery/strangulation, and he was later sentenced to death. Before Brady was sentenced, the state prosecutor failed to disclose to Brady a confession of Charles Boblit, Brady's codefendant, in which Boblit admitted that it was he (Boblit) who did the actual killing, which was Brady's contention. (Boblit, too, was convicted of first-degree (felony) murder and sentenced to death.) Because of the state's failure to disclose Boblit's confession, which Brady could have used to support his argument for a sentence of life imprisonment instead of death, the Maryland Court of Appeals vacated Brady's death sentence and remanded the case to the trial court for resentencing. That decision was affirmed by the U.S. Supreme Court in Brady v. Maryland, 373 U.S. 83 (1963).

[3] In the Giglio case, John Giglio was prosecuted federally for negotiating forged money orders. Robert Taliento, a bank teller, helped Giglio commit the crime. Taliento was named as an unindicted coconspirator and testified at trial as a government witness. Neither Giglio nor the trial AUSA knew until after the trial that a different AUSA, the one who had handled the grand jury proceedings, had given Taliento full immunity in exchange for his testimony. In Giglio v. United States, 405 U.S. 150 (1972), the U.S. Supreme Court decided that the government's failure to disclose the immunity agreement violated due process and overturned Giglio's conviction.

Giglio are, at a more specific level, conceptually different kinds of evidence, and they are commonly referred to separately, as different kinds of evidence: "Giglio material" being the label for *impeachment evidence*, and "Brady material" being the label for every other kind of evidence that could be helpful to the defendant's efforts to create a reasonable doubt (*exculpatory evidence*) or receive a lower sentence (*mitigating circumstances*). Second, the AUSAs' duties under Giglio, at least with respect to *law enforcement* witnesses, which are discussed below, are somewhat different and more complicated than their duties under Brady. Thus, for purposes of this memorandum, the term "**Brady material**" refers to evidence or information — other than Giglio material — that could be used by a defendant to make his conviction less likely or a lower sentence more likely, and the term "**Giglio material**" refers to evidence or information that could be used by a defendant to impeach a key government witness.

DOJs policy on the disclosure of exculpatory and impeaching information and evidence is broader than what is constitutionally required. While ordinarily evidence that would not be admissible at trial need not be disclosed, this policy encourages prosecutors to err on the side of disclosure if admissibility is a close question.

B. The "Prosecution Team" Concept

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).[4] 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 she actually knows about the evidence. That is,

[4] In the Kyles case, Curtis Lee Kyles was convicted of first-degree murder and sentenced to death for attempting to rob and then shooting to death a woman walking from a grocery store to her car in the store's parking lot. Shortly thereafter, one "Beanie" contacted the police and pointed them in the direction of Kyles and away from the somewhat incriminating fact that he (Beanie) was driving the car of the murdered woman mere hours after the murder. Beanie was also the roommate of Johnny Burns, the brother of Kyles's girlfriend, Pinky Burns. Over the course of his cooperation with the police, Beanie's story changed several times, a fact the police either failed to recognize or simply ignored. The police did not disclose to the prosecutor Beanie's inconsistent statements or extensive participation in the investigation, all of which might have supported the theory that Beanie was the murderer and had succeeded in misdirecting the police investigation by framing Kyles (Brady material), and that the police were incompetent (Brady/Giglio material). The police also failed to disclose to the prosecutor the prior inconsistent statements of several eyewitnesses to the murder (Giglio material). In Kyles v. Whitley, 514 U.S. 419 (1995), the Supreme Court reversed Kyles's conviction because of the prosecution's failure to disclose this evidence to Kyles, notwithstanding the fact that during the trial the prosecutor himself was not aware of the evidence. (After three more attempts to convict Kyles, all resulting in hung juries, DA Harry Connick dismissed the charges against Kyles. In a related development, Johnny Burns was convicted of manslaughter in connection with the shooting death of Beanie; Burns was sentenced to 25 years' hard labor.)

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***. In any given case, therefore, the federal prosecution team might include, in addition to federal agents, local sheriffs and police officers, or State Police or investigative agencies. [5]

It is unclear whether and how far the prosecution-team concept will be expanded by the lower federal courts. One issue that will likely arise more often is whether the federal prosecution team includes government personnel who are not directly involved in the federal criminal investigation or prosecution but are directly involved in a federal *civil* or *administrative* investigation or proceeding relating to the same events, such as a civil lawsuit brought by DOJ for the forfeiture of assets purchased with drug-trafficking proceeds, an administrative ATF license-revocation proceeding, or a civil lawsuit brought by the SEC against dishonest brokers.[6]

C. The AUSA's Responsibilities Under *Brady*

1. 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***

[5] The prosecution-team concept for Brady and Giglio disclosures to the defendant roughly corresponds to the grand jury rule that authorizes the automatic disclosure of federal grand jury materials to "such government personnel (including personnel of a state or subdivision of a state) to assist an attorney for the government [i.e., an AUSA] in the performance of such attorney's duty to enforce federal criminal law." Fed. R. Crim. P. 6(e)(3)(A)(ii).

[6] Compare United States v. Morris, 80 F.3d 1151, 1169-70 (7th Cir. 1996) ("Because [the OTS, SEC, and IRS] were [not] part of the team that investigated this case or participated in its prosecution," materials in their possession were not subject to *Brady*. "*Kyles* . . . can[not] be read as imposing a duty on the prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue."), with United States v. Wood, 57 F.3d 733, 737 (9th Cir. 1995) (defendant convicted of obstructing lawful function of FDA; "[f]or *Brady* purposes, the FDA and the prosecutor were one. We need not decide how far the unity of the government extends under the *Brady* rule. We hold only that under *Brady* the agency charged with administration of the statute, which has consulted with the prosecutor in the steps leading to prosecution, is to be considered as part of the prosecution in determining what information must be made available to the defendant charged with violation of the statute.").

could be used by the defendant to make his conviction less likely.[7] 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 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 of which the AUSA is aware.

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.

Accordingly, the AUSA ***must*** ask the case agent if he ***or any other member of the prosecution team*** knows of any Brady material. The AUSA must document the AUSA's fulfillment of her "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.[8] Under Kyles, the AUSA is ***required*** to make these inquiries. A letter, roughly equivalent to the Brady/Giglio agent letter

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[7] Brady also requires the prosecution to disclose evidence favorable to the defendant concerning punishment. But, in contrast to Brady material relating to the question of guilt, Brady material relating to sentencing issues is the subject of significantly fewer disputes and defense challenges.

[8] 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.

Brady does *not* apply to *ex parte* proceedings: It does not apply to the search warrant application process. See Mays v. City of Dayton, 134 F.3d 809, 815-16 (6th Cir. 1998) (rejecting district court's effort to "interweave the *Brady* due process rationale into warrant application proceedings and to require that all potentially exculpatory evidence be included in an affidavit"). (However, if the affiant omits "critical information from the affidavit" "with an intention to mislead," there might be a Franks violation. See Mays, 134 F.3d at 816.) Likewise, Brady does not apply to grand jury proceedings. See United States v. Williams, 504 U.S. 36 (1992). (However, the U.S. Attorneys' Manual provides "that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person." USAM § 9-11.233.)

available in the CRIMFORMS (Form 16) directory, should be sent in every case to the case agent.

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.[9] To allow sufficient time for the case agent to make inquiries for Brady material, the letter must be sent to the case agent well in advance of trial. The request for information covered by the Brady rule should be repeated orally before any suppression hearing, trial or sentencing hearing. An oral request for Brady material is particularly important for suppression hearings that may occur before the form letter has been sent to the case agent.

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.[10] Second, potential Brady material that *is* disclosed to the defendant will not necessarily be admissible at trial.[11] The AUSA should make sure that the case agent understands both of these principles.

2. Examples of *Brady* Material

As discussed above, Brady material is defined generally as ***any evidence favorable to an***

[9] This responsibility is similar to the case agent's responsibility to inform all federal, state, and local government employees to whom grand jury materials are disclosed of the rule of grand jury secrecy. See Fed. R. Crim. P. 6(e)(3)(A)(ii), (B).

[10] For example, the AUSA may conclude that the evidence in question is simply not exculpatory. Or, even if the evidence is arguably exculpatory, the AUSA may choose not to disclose it because she is absolutely, positively certain that the evidence is inadmissible and will not lead directly to admissible Brady material. Cf. Wood v. Bartholomew, 516 U.S. 1, 6 (1995) (per curiam) (because law of state in question barred use of polygraph evidence to impeach witnesses, state was not required by *Giglio* to disclose to defendant polygraph evidence concerning key prosecution witness).

[11] For example, the evidence might be excluded because it is irrelevant, see Fed. R. Evid. 402, because its probative force is outweighed by the risk of unfair prejudice or other negative factors, see Fed. R. Evid. 403, or because it is hearsay, see Fed. R. Evid. 802. Therefore, when the AUSA does disclose Brady material to the defendant, she should consider whether grounds exist for filing a motion *in limine* to exclude or limit the evidence. (Keep in mind, though, that "the judge may always change his mind [about an *in limine* ruling] during the course of a trial." Ohler v. United States, 120 S. Ct. 1851, 1854 n.3 (2000).)

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.
- 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).[12]
- 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. USAM 9-5.001(C).[13]
- Evidence tending to show the existence of an affirmative defense, such as entrapment or duress.[14]
- 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.

D. The AUSA's Responsibilities Under *Giglio*

1. 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

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

[13] See note 12 above.

[14] See note 12 above.

States, 405 U.S. 150, 154 (1972). This duty exists with respect to key government witnesses at suppression hearings, trials, and sentencing hearings.[15]

As with Brady material, an AUSA is constitutionally required to disclose all Giglio material that she ***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 ***or any other member of the prosecution team*** knows of any Giglio material on any government witness. The Brady/Giglio form letter referred to in Section III.C.1 of this Policy seeks Giglio material from the case agent in addition to Brady material, and this letter should be sent to the case agent well in advance of trial to permit timely disclosure of any Giglio information. The AUSA should repeat this inquiry, orally, before all suppression hearings, trials, and sentencing hearings.[16] An oral request for Giglio material is particularly important for suppression hearings that may occur before the form letter has been sent to the case agent. 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, which in turn means that the case agent must make sure that *every* member of the prosecution team knows the Giglio rule.

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 agency policies, the most significant of which is the Attorney General's Giglio Policy issued on October 19, 2006.

The case agent should be advised that if he is unsure whether any evidence or information is covered by Giglio, he should let the AUSA know about it.

[15] See supra note 8.

[16] See supra note 8.

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.[17] Second, evidence that *is* disclosed to the defendant will not

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[17] The AUSA may conclude that the evidence in question simply has no bearing on the witness's credibility. Or the AUSA may choose not to disclose the evidence, even if relevant to credibility, because she is absolutely, positively certain that the evidence is inadmissible for purposes of impeachment and will not lead directly to admissible Giglio material. See Wood v. Bartholomew, 516 U.S. 1, 6 (1995) (per curiam) (because law of state in question barred use of polygraph evidence to impeach witnesses, state was not required by *Giglio* to disclose to defendant polygraph evidence concerning key prosecution witness).

In addition, the AUSA may choose not to disclose the evidence in reliance on the fact that the holding of Giglio applies to only those government witnesses whose "reliability . . . may well be determinative of guilt or innocence." Giglio v. United States, 405 U.S. 150, 154 (1972). Thus, evidence that impeaches an unimportant government witness can be withheld without jeopardizing the defendant's conviction. As one court explained,

> [u]ndisclosed "[*Brady* or *Giglio*] evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome" of the case; hence, the undisclosed evidence will be deemed material only if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."
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> In general, impeachment evidence has been found to be material where the witness at issue "supplied the only evidence linking the defendant(s) to the crime," or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case. In contrast, a new trial is generally not required when the testimony of the witness is "corroborated by other testimony" or when the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable.

United States v. Payne, 63 F.3d 1200, 1209-10 (2d Cir. 1996) (citations omitted).

The problem for the AUSA who wants to play it close to the vest and disclose only as much impeachment evidence as she must to avoid reversible error is that the decision to disclose impeachment evidence (and exculpatory evidence for that matter) is one that must be made *before* the trial begins (or, at the latest, during the trial), but the question of what evidence is material can only be made *after* the trial, when the evidence's relationship to the verdict can first be assessed. As the Kyles Court observed, "the prosecution, which alone can know what is undisclosed, must be assigned the . . . responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached." Kyles v. Whitley, 514 U.S. 419, 437 (1995).

Of course, the AUSA can avoid this guessing game by erring on the side of caution, i.e., disclosing to the defendant every known piece of impeachment evidence on any government witness.

necessarily be admissible at trial.[18] The AUSA should make sure that the case agent understands both of these facts.

2. 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.

a. *Bias*

A witness can be impeached with evidence (including extrinsic evidence) that he 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

[18] For example, *extrinsic* evidence of specific instances of misconduct involving dishonesty is inadmissible. See Fed. R. Evid. 608(b). In addition, impeachment evidence, though relevant, may be excluded as being too remote, speculative, or confusing or too much of a distraction from the main event (i.e., the defendant's guilt). See Fed. R. Evid. 403. Impeachment evidence might also be inadmissible as hearsay. See Fed. R. Evid. 802. Therefore, when the AUSA does disclose Giglio material to the defendant, she should consider whether grounds exist for filing a motion *in limine* to exclude or limit the evidence. (Keep in mind, though, that "the judge may always change his mind [about an *in limine* ruling] during the course of a trial." Ohler v. United States, 120 S. Ct. 1851, 1854 n.3 (2000).)

jailhouse privileges.[19]

- 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 fears unfavorable treatment in a related or unrelated proceeding pending before another government agency or court, or because he 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.

b. *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.[20]

c. *Criminal Conviction*

[19] The most notorious examples of favorable treatment given to incarcerated government witnesses are the favors that were provided to some of the government witnesses in the federal El Rukns gang prosecutions in Chicago. The witnesses were El Rukns who had pleaded guilty and were incarcerated at the Metropolitan Correctional Center. The prosecution team allowed the witnesses to receive and use drugs and have sex with others in the offices of the U.S. Attorney and ATF. It also allowed the witnesses to have unlimited telephone privileges. See United States v. Boyd, 55 F.3d 239, 242-46 (7th Cir. 1995). The government's failure to disclose these favors before or during the four-month trial of seven gang members resulted in the reversal of the convictions of all seven defendants, five of whom had been sentenced to life imprisonment and two of whom had been sentenced to 50 years' imprisonment. See id. at 246.

[20] A witness who flunks a polygraph examination has (assuming the accuracy of the examiner's findings) committed a specific act of misconduct involving dishonesty. However, in a case arising from a state prosecution, the U.S. Supreme Court decided that because the law of the state in question barred the use of such polygraph evidence for impeachment purposes, the state was not required by Giglio to disclose that evidence to the defendant. See Wood v. Bartholomew, 516 U.S. 1, 6 (1995) (per curiam). In the Sixth Circuit, the admission of polygraph results is strongly disfavored because of their "inherent unreliability," but their admission is not absolutely barred. See King v. Trippett, 192 F.3d 517, 520-23 (6th Cir. 1999); United States v. Thomas, 167 F.3d 299, 307-09 (6th Cir. 1999); United States v. Scarborough, 43 F.3d 1021, 1025-26 (6th Cir. 1994).

A witness can be impeached with evidence (including extrinsic evidence) of a prior felony conviction. See generally Fed. R. Evid. 609(a)(1). He 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).

d. *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.)

e. *Untruthful Character*

A witness can be impeached by the testimony of a second witness that he 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).

f. *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 testifies at a hearing or trial. See generally 1 McCormick on Evidence § 44 (John William Strong ed., 4th ed. 1992). 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.

g. *Contradiction*

A witness can be impeached with evidence (including extrinsic evidence in most situations) of facts that contradict the witness's testimony. See generally 1 McCormick on Evidence § 45 (John William Strong ed., 4th ed. 1992).

3. Looking For *Brady* and *Giglio* Material

The government is required only to disclose the Brady and Giglio material that the "prosecution team" knows about.[21] ***The prosecution team is not required to look for unknown Brady and Giglio material which is in the possession of or known to others outside the prosecution team.*** (However, it is wise and prudent for the prosecution team to seek out Giglio material on key civilian government witnesses. In fact, the Third, Fifth, and Ninth Circuits have held that "a duty to search may be imposed [] in cases where a search for readily available background information is routinely performed, such as routine criminal background checks of witnesses." Odle v. Calderon, 65 F. Supp. 2d 1065, 1071 (N.D. Cal. 1999). And the defense may have discovered information that could just have easily been found by the prosecution team. It is always better for the government to expose a government witness's dirt (if he has any) on direct examination. It is always bad for the government to learn about such dirt for the first time during the witness's cross-examination, a situation that not only discredits the witness but often makes jurors suspect that the AUSA's incomplete direct examination was an effort to deceive them.)

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. 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:

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

b. ***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.

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[21] There is a special rule for the disclosure of presentence reports on government witnesses. In April 1996 the Criminal Division of DOJ issued a memorandum effectively overruling United States v. Sherlin, 67 F.3d 1208, 1218 (6th Cir. 1995) (holding that district court need not give "copy of a presentence report concerning a government witness, prepared for the court, to the defense upon request" or "review such a report *in camera* for potential *Brady* [*Giglio*] material" because "*Brady* [*Giglio*] expressly applies to material evidence withheld from the defense *by the prosecution*," not the court). The 1996 DOJ memorandum advised that "when the PSR is in the hands of the prosecution and a defendant makes a threshold showing of a compelling need for disclosure," the district court should review the PSR *in camera* and disclose to the defense any portion that the district court concludes is covered by Giglio.

c. 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.

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

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

f. 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.

PRACTICE TIP: Anytime the government has reason to question a witness's credibility, the government has a duty to inquire. United States v. Osorio, 929 F.2d 753 (1st Cir. 1991) Also, remember that when a declarant's hearsay statements are admitted into evidence, the credibility of the declarant may be attacked, and if attacked may be supported, as if the declarant testified as a witness. Fed. R. Evid. 806.

g. **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.

4. Confidential Informant/Witness Testifying Under Plea or Immunity Agreement

You should investigate a confidential informant, or a witness who has agreed to cooperate pursuant to a plea or immunity agreement, very thoroughly. Among other things, you should investigate and disclose any information obtained in the following areas when you are going to have a confidential informant or cooperating witness testify at trial or a hearing:

- the witness's relationship with the defendant

- the witness's motivation for cooperating/testifying
- drug and alcohol problems

- all benefits the witness is receiving, including:

  i. Monetary payments–how are they calculated?
  ii. Expenses, costs and housing--is anyone paying?
  iii. Immigration status for the witness and/or family members
  iv. Arrests--intervention by law enforcement
  v. Taxes--has the witness paid taxes on informant payments?

- any notes, diaries, journals, e-mails, letters, or other writings by the witness

- prison files, tape recordings of telephone calls, and e-mails, if the informant is in custody

- criminal history

***PRACTICE TIP**: You should request that the law enforcement agency on the case check not only the federal database, but also the database of the states and municipalities where the witness is known to have lived. Why? Some states and municipalities may not have entered relevant information into national databases. Consequently, the federal database may not contain relevant charges, including misdemeanor charges that are related to credibility, like bad check charges, or currently pending arrest warrants.*

You should also review the criminal history with the potential witness to ensure completeness.

5. *Giglio* Material on Law Enforcement Witnesses

a. *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 she has such actual knowledge) means that the AUSA will be held legally responsible for disclosing all Giglio material on law enforcement witnesses, even if she 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.[22] 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.

b. *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. (The Amended Policy is attached.) 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.[23]

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 herself 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 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[]

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[22] See supra note 8.

[23] The AG's Giglio Policy directs each DOJ law enforcement agency to "develop a plan to effectuate this policy" within 120 days. The Giglio Policy was hammered out during months of consultation among representatives of the Criminal Division of Main Justice, U.S. Attorneys, and federal law enforcement agencies.

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.

c. *This Office's Implementation of the AG's Giglio Policy*

The Criminal Chief is the clearing house/gatekeeper in the District 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 District. Thus, he 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 she became aware of it, to the Criminal Chief.***[24]

Second, the Criminal Chief is the "Requesting Official" of the AG's Giglio Policy, which means that he 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 lead 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.***[25]

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[24] Also, a Civil Division AUSA ***must*** inform the Criminal Chief about any information or evidence that she learns of in the course of a civil case that might be used to impeach a law enforcement witness. She must also notify the Criminal Chief whenever any personnel file or similar material concerning an employee of a law enforcement agency is disclosed to another party or to the court.

[25] If a law enforcement witness or his agency does not want to disclose potential Giglio material to the case AUSA for any reason, such as personal embarrassment, the witness or his agency may disclose the material directly to the Criminal Chief. If the Criminal Chief determines that the material is not covered by Giglio, he will return the

Indeed, if any law enforcement employee will be or could be a significant witness in the government's case-in-chief, the AUSA should determine whether any Giglio material exists 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 simply forbid him from, among other things, interviewing a target by himself, being the sole witness of any other potentially significant event, being an affiant, or acting in an undercover capacity.

Throughout this process, of course, AUSAs should appreciate the fact that the disclosure of Giglio material on a law enforcement witness may adversely affect his privacy interests and reputation.[26]

d. *Defense Motions to Compel the Production of Law Enforcement Personnel Files*

On occasion, in his effort to obtain all existing Giglio material on law enforcement witnesses, the defendant will choose not to rely solely on the government's good faith; he will also try to invoke the power of the district court to force the government to turn over the personnel files of the law enforcement witnesses. Fortunately, in the Sixth Circuit the defendant must make some affirmative showing that the personnel file requested may actually contain Giglio material. "Mere speculation that a government file may contain *Brady* [i.e., *Giglio*] material is not sufficient . . . . A due process standard which is satisfied by mere speculation would convert *Brady* into a discovery device and impose an undue burden upon the district court." United States v. Driscoll, 970 F.2d 1472, 1482 (6th Cir. 1992).[27]

E. The AUSA's Responsibilities Concerning the Disclosure of *Brady* and *Giglio* Material to the Defendant

material directly to the witness or his agency. If the Criminal Chief determines that the material should be disclosed to the defendant or at least submitted to the court *in camera*, he will disclose the material to the case AUSA. The AUSA should make sure that the case agent is aware of this bypass option.

[26] The AG's Giglio Policy explains that its "purpose . . . is to insure that prosecutors receive sufficient information to meet their obligations under Giglio v. United States, 405 U.S. 150 (1972), while protecting the legitimate privacy rights of Government employees."

[27] The law of the Ninth Circuit is different. There, the government (in practice, this usually means the AUSA) must obtain and review the personnel file of a law enforcement witness upon the mere request of the defendant for the file. See United States v. Henthorn, 931 F.2d 29, 30-31 (9th Cir. 1991). That is, the defendant is *not* required to make any affirmative showing that the agent's personnel file may contain Giglio material to trigger the government's obligation to obtain and review the file. See id.

There is no specific time by which the government must disclose Brady and Giglio material to the defendant. The Sixth Circuit has ruled that "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.***" United States v. Farley, 2 F.3d 645, 654 (6th Cir. 1993). 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). United States v. Presser, 844 F.2d 1275, 1283 (6th Cir. 1988). **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,"[28] 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 after it is discovered because of its classified or sensitive 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) punt, that is, let the district judge decide whether Brady or Giglio applies by submitting the evidence to the court *in camera*, see United States v. Minsky, 963 F.2d 870, 874 (6th Cir. 1992) ("[A]n *in camera* review by the court was not only proper, but probably required."); see also United States v. Stotts, 176 F.3d 880, 887 (6th Cir. 1999). As to the punting 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

[28]Kentucky's Rules of Professional Conduct requires that prosecutors "make timely disclosure to the defense of all evidence that tends to negate the guilt of the accused or mitigates the offense," and for sentencing, to disclose to the defense and to the court unprivileged mitigating information.

will agree. **Remember, DOJ Policy encourages AUSAs to err on the side of disclosure.**

F. Maintenance of Giglio Records

1. Prosecuting Office Records

The USAO 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.

2. 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.

3. 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, together with any related correspondence or memoranda, in a system of records that can accessed by the identity of the employee.

4. 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.

5. 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.

IV. Preservation of Electronic Communications/ESI (electronically stored information)

This policy is intended as guidance to AUSAs for the Western District of Kentucky and relates to electronic communications including, but not limited to emails, text messages, instant messaging, and voice mails. A failure to comply with the guidance and recommendations contained herein may result in delay, expense, and other consequences prejudicial to a prosecution, but does not necessarily mean that a violation of any disclosure obligation has occurred.

A. Recommendations for Using E-communications

1. Do not use e-communications for substantive communications [29] regarding an investigation or trial unless exceptional circumstances exist.
2. Do not use e-communications when a telephonic or face-to-face conversation would be a better way of ensuring accurate communications or in clarifying a matter.
3. Assume your e-communications will be made public and communicated to the jury or displayed on the front page of a newspaper.
4. Substantive e-communications with witnesses (including victims) should be avoided whenever possible.
5. Members of the prosecution team (law enforcement and other government employees) should be informed that e-communications are a preserved record that might be disclosed to the defendant and used for impeachment in court.
6. It is permissible to use e-communications for logistical matters, for example to schedule meetings with agents, witnesses or other members of the prosecution team or to assign tasks.
7. It is also permissible to use e-communications for "privileged

[29] "Substantive Communications" include factual information about investigative activity; factual information obtained during interviews with witnesses; discussions related to the merits of evidence and opinions regarding potential witnesses, either lay or expert.

communications."[30]

B. Preservation of E-communications

1. AUSAs should preserve e-communications containing substantive communications, communications with lay witnesses, and potentially privileged communications.

2. Logistical communications, e.g., those which have to do with scheduling meetings with members of the prosecution team or the assignment of tasks, generally do not need to be preserved and are not discoverable, unless something unusual in their context suggests they should be disclosed under *Brady, Giglio*, Jencks or Rule 16.

3. E-communications should be preserved as soon as possible after they are sent or received and preserved in their native electronic format or printed out and preserved.

V. Witness Interviews and Note Taking

A. AUSA participation in witness interviews[31]

It is the policy of the U.S. Department of Justice[32] and of the Office of the U.S. Attorney for the Western District of Kentucky that prosecutor notes and original recordings of witness interviews should be preserved. When a prosecutor participates in an interview with an investigative agent, the prosecutor and agent should discuss note-taking responsibilities and memorialization before the interview begins (unless the prosecutor and the agent have established an understanding through prior course of dealing). Whenever possible, prosecutors should not conduct an interview without an agent present to avoid the risk of making themselves a witness to a statement and being disqualified from handling the case if the statement becomes an issue. If exigent circumstances make it impossible to secure the presence of an agent during an interview, prosecutors should try to have another office employee present.

B. Prosecutor's Notes as Jencks Material (see 18 U.S.C.§3500)

A writing prepared by a Government lawyer relating to the subject matter of the

[30]Privileged Communications" include communications between prosecutors or other agency counsel on matters which require supervisory approval, or constitute legal advice, or trial strategy. They include attorney-client privileged communications and work product and thus are generally not discoverable.

[31]"Interview" as used herein refers to a formal question and answer session with a potential witness conducted for the purpose of obtaining information pertinent to a matter or case. It does not include conversations with a potential witness for the purpose of scheduling or attending to other ministerial functions.

[32] Memorandum for Department Prosecutors, "Guidance for Prosecutors Regarding Criminal Discovery," David W. Ogden, Deputy Attorney General, January 4, 2010, p. 7.

testimony of a Government witness that has been "signed or otherwise adopted or approved" by the Government witness (or is a "substantially verbatim" recital of an oral statement made by said witness, or has been taken or recorded, or is a transcription thereof) is not rendered non producible because a Government lawyer interviews the witness and writes the "statement." Goldberg v. United States, 425 U.S. 94, 98 (1976).

C. Prosecutor's Work Product[33]

In general, a prosecutor's opinions and mental impressions of the case are not automatically discoverable. An exception to this rule is *Brady* material which must be produced. Mincey v. Head, 206 F.3d 1106, 1133 (11th Cir. 2000). It is the policy of the United States Attorney for the Western District of Kentucky that Work Product be placed in the case file.

VI. Conducting the Discovery Review

Having gathered items of potential discovery (See Sections I, II and III of this Policy), the AUSA must ensure that the material is reviewed to identify discoverable information. It would be preferable if AUSAs could review the information themselves in every case, but such review is not always feasible or necessary. The AUSA is ultimately responsible for compliance with discovery obligations. Accordingly, the AUSA should develop a process for review of pertinent information to ensure that discoverable information is identified. Because the responsibility for compliance with discovery obligations rests with the AUSA, the AUSA's decision about how to conduct this review is controlling. This process may involve agents, paralegals, agency counsel, and computerized searches. Although AUSAs may delegate the process and set forth criteria for identifying *potentially* discoverable information, AUSAs should not delegate the disclosure determination itself. In cases involving voluminous evidence obtained from third parties, AUSAs should consider providing defense access to the voluminous documents to avoid the possibility

that a well-intentioned review process nonetheless fails to identify material which constitutes discoverable evidence.

VII. Managing the Discovery Process - How to Produce and Track Discovery Provided

A. Considerations with regard to the scope of discovery

Even if AUSAs intend to provide expansive discovery, the discovery should never be described as "open file." It is always possible that something will be inadvertently omitted from

[33]Material prepared by an attorney in anticipation of litigation, including mental impressions, legal memoranda and material involving strategy. Not included, for the purpose of this definition, are statements of witnesses, which are covered in sub-section B.

production and the AUSA will then have unintentionally misrepresented the scope of the materials provided. Furthermore, because the concept of the "file" is imprecise, such a representation exposes the AUSA to broader disclosure requirements than intended or to sanction for failure to disclose documents, *e.g.* agent notes or internal memos, that the court may deem to have been part of the "file."

When considering providing discovery beyond that required by the discovery obligations or providing discovery sooner than required, AUSAs should consider:

1. Protecting victims and witnesses from harassment or intimidation;
2. Protecting the privacy interests of witnesses;
3. Protecting privileged information;
4. Protecting the integrity of ongoing investigations;
5. Protecting the trial from efforts at obstruction;
6. Investigative agency concerns;
7. Enhancing the likelihood of receiving reciprocal discovery by defendants;
8. Any applicable legal or evidentiary privileges; and,
9. Any other strategic considerations which enhance the likelihood of achieving a just result in a particular case.

B. Production of discovery (form of disclosure)

1. If the AUSA possesses original paper documents, a choice should be made on whether to provide the defense with electronic copies, paper copies or access to original documents.

2. If the AUSA possesses documents in electronic form, it is preferable to provide electronic copies on DVD.

3. For electronic evidence seized by warrant, if is preferable to have a tech agent pull the evidence (spreadsheets, databases, emails and other substantive files) off the drives and provide the data on discs.

4. For an entire computer imaged pursuant to a warrant, AUSAs should, when possible, consider making a forensic image available to the defense by allowing the defense to supply a blank hard drive onto which the tech agent would copy the forensic image.

5. Some member of the Prosecution Team (the AUSA, Paralegal assigned the case or Legal Assistant) MUST LISTEN to any and all undercover tapes prior to their being provided to the defense as discovery. This is to insure the quality of the recordings, and the integrity of the format in which they

are provided.

6. AUSAs should be prepared to assist the defense in insuring access to any electronically stored information("ESI"). This is especially the case if the defense lacks financial resources.

C. Tracking of Discovery Provided to the Defense

It is EXTREMELY IMPORTANT for AUSAs to make a record of how information is disclosed or otherwise made available to the defense. This will ordinarily take the form of a letter accompanying the discovery package, addressed to defense counsel, detailing items provided. In appropriate circumstances, it can also take the form of an itemized receipt for items received by counsel or their representative. In every case the letter or form should detail the items provided. In instances where items of discovery are discovered at a later date, a follow up letter, describing the items should accompany the package.

1. In Subsection B.1 and 2 (above), production of either paper or electronic documents, AUSAs should consider Bates stamping discovery in voluminous document cases.

2. If Bates stamping is used, a detailed document log and description of documents can be extremely time consuming to produce and should be avoided if at all possible.

VIII. National Security Discovery Guidance

A. National Security Matters

Cases involving national security, including terrorism, espionage, counterintelligence, and export enforcement, can present unique and difficult criminal discovery issues with far reaching implications for national security and the nation's intelligence community. The Department of Justice has developed special guidance for these 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, their supervisors, and the National Security Division of the Department of Justice for guidance on criminal discovery in these cases. Prosecutors should note that 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 drug cases, human trafficking cases, money laundering cases, and organized crime cases.

B. Applicability of Department Policy Presumptions Favoring Disclosure in

Discovery

Due to the risks associated with the disclosure of national security information, prosecutors often will not be able to follow the policy presumptions that the Department has adopted in other contexts in favor of disclosing more information than the law requires or disclosing it earlier than the law requires. Prosecutors in all cases, of course, disclose in discovery information to which the defense is entitled by law, but national security interests will often militate against disclosing more than the law requires or disclosing it earlier than the law requires in national security cases. The Classified Information Procedures Act, 18 U.S.C. Appendix 3 (CIPA) sets forth procedures for protecting national security information, and prosecutors who handle national security cases should be fully familiar with CIPA. Moreover, disclosure of classified information, by definition, poses a risk to national security. Disclosure of unclassified information relating to a national security investigation may also pose a risk to national security, if, for instance, the information reveals investigative steps taken, investigative techniques or tradecraft used, or the identities of witnesses interviewed during a national security investigation.

C. Duty to Search and Disclose in National Security Cases

As a result of the potential involvement of both the intelligence community (IC) and law enforcement agencies in national security cases, prosecutors must undertake a careful analysis to determine whether the government has a duty to search and, if it does, the scope of such a search.

D. Prudential Searches

A "prudential search" is a search of the files of an IC agency, usually prior to indictment, undertaken because the prosecution team has a specific reason to believe that the agency's files may contain classified information that could affect the government's charging decisions. This type of search will assist the prosecution team in identifying and managing potential classified information concerns before indictment and trial. Prosecutors must coordinate prudential search requests through the National Security Division.

E. Foreign Intelligence Surveillance Act (FISA) Material

Potentially discoverable information obtained pursuant to FISA must be reviewed and disclosed in accordance with applicable law and Department policies. Like CIPA, FISA provides specific procedures designed to facilitate the use of intelligence information in criminal proceedings while at the same time protecting sources and methods of intelligence collection. Prosecutors must obtain advance authorization before using FISA information in criminal proceedings. The granting of FISA use authority is a related, but distinct, question from discovery and declassification questions. Use, discovery, and declassification determinations are

time consuming, so early coordination with NSD is a must whenever a case involves FISA materials.

F. Points of Contact

Prosecutors submitting search requests or making other inquiries regarding their discovery obligations should call the relevant component of NSD at the following: Counterterrorism Section (202-514-0849) or Counterespionage Section (202-514-1187).