DISCOVERY POLICY[1]

This is a guide to Discovery in the Eastern District of Louisiana. It does not cover every issue an AUSA will be faced with in making discovery decisions but it is meant to give you a framework. The supervisors in the office, particularly the Discovery Coordinator, are available to assist in properly meeting discovery obligations.

The Government's disclosure obligations are generally set forth in Fed. R. Crim. P., R. 16 and R.26.2, 18 U.S.C. § 3500 (*Jencks* Act), *Brady*[2] and *Giglio*[3] (collectively referred to as "discovery obligations.") AUSAs should be aware that USAM Section 9-5.001 details DOJ policy regarding disclosure of exculpatory and impeachment information and provides for broader and more comprehensive disclosure than required by *Brady* and *Giglio*.

A. Examples of *Brady* Material:

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

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

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

3. 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).

4. 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)).

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[1]This policy is not intended to have the force of law or to create or confer any rights, privileges, or benefits to defendants. *United States v. Caceres*, 440 U.S. 741 (1979).

[2]*Brady v. Maryland*, 373 U.S. 83 (1963) followed by *U.S. v. Bagley*, 473 U.S. 667, 682 (1985) and *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (prosecutors have a duty to learn of any favorable evidence known to others acting on the Government's behalf in the case), explain the Government's duty to disclose evidence favorable to an accused and material to guilt or punishment.

[3]*Giglio v. United States*, 405 U.S. 150 (1972).

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

6. 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.

B. Examples of *Giglio* Material:

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

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

b. 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' potential sentence, an agreement not to seek forfeiture of his property, a decision to place him in the witness security program or a decision to grant him full transactional immunity. Another form of favorable treatment that could lead to pro-government bias in a government witness is the government's giving him money, gifts, or any other thing of value. With respect to an incarcerated government witness, such favorable treatment may also include his transfer to a more comfortable facility or his receipt of special jailhouse privileges.

c. A witness may have a pro-government bias resulting from the government's favorable treatment of a relative or friend who has criminal exposure.

d. 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.

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

2. Specific Instances of Misconduct Involving Dishonesty

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

3. Criminal Conviction

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

4. Prior Inconsistent Statements

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

5. Untruthful Character

A witness can be impeached by the testimony of a second witness that he 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' dealings with and observations of the witness, the witness is generally untruthful. *See generally*, Fed. R. Evid. 608(a).

6. Incapacity

A witness can be impeached with evidence (including extrinsic evidence in most situations) of defects in his physical or mental capacities at the time of the offense or when he 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' use or abuse of controlled substances at the time of trial, and a witness' mental disease or defect.

7. Contradiction

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

C. Timing of Disclosures

1. Discovery – Immediately following indictment, the AUSA should begin making discovery material available without waiting to get a formal request from the defense. A letter can be sent to the defense acknowledging our obligation under Rule 16 and setting forth a timetable for disclosure. In order to accomplish this, you must begin addressing discovery prior to indictment.

    a. Exculpatory information (including information which the defense may assert is exculpatory) must be disclosed promptly. *Brady* requires disclosure of fact-based impeachment materials or material witness inconsistencies. **Note:** *Brady* is a rule of disclosure not admissibility.

    b. Impeachment information contemplated by the *Giglio* rule will typically be disclosed at a reasonable time prior to trial depending on the prosecutor's decision on who will be called as witnesses which generally is not known until right before trial. (See USAM § 9-5.001).

Prosecutors should always consider security concerns of victims/witnesses when making discovery timing decisions as well as protecting ongoing investigations, preventing obstruction of justice, investigative agency concerns and other strategic considerations that improve our chances of reaching a just result in our cases.

D. Disclosure of Reports of Interview for Testifying/Non-Testifying Witnesses

Reports of interview (ROI's) such as FBI 302's and DEA 6's are not considered *Jencks* material unless the ROI contains a verbatim statement of the witness or the witness has adopted it. Therefore, the general policy is that ROI's are not turned over to the defense in discovery. *United States v. Flores*, 63 F.3d 1342, 1365 (5th Cir. 1995).

Exceptions may apply where an ROI contains impeachment or exculpatory information. In that situation, consideration should be given whether to provide the ROI itself or instead compose a letter to the defense containing the impeachment/exculpatory information.

An agent's ROI is *Jencks* if the agent is going to testify about the subject matter contained in the ROI. Therefore, you must disclose the ROI as the *Jencks* material of the testifying agent.

E. Providing Disclosure Beyond the Requirements of R. 16, R. 26.2, *Brady*, *Giglio* and *Jencks*

In many cases, AUSAs should consider giving broader and earlier discovery than that which is required because it promotes our truth-seeking mission and helps us achieve speedier case resolutions when the defense realizes the overwhelming nature of our evidence. This practice also provides AUSAs with a margin of error where, in good faith, we may have erroneously overlooked something discoverable.

For example, in cases where there is documentary evidence too voluminous to review completely, an AUSA should consider providing the defense access to all of it lest there be a later inadvertent discovery by the AUSA of something that could arguably be material, or impeachment/exculpatory and it was not disclosed.

AUSAs should discontinue the practice of calling this expansive disclosure "open file" discovery to protect against the defense complaining that a misrepresentation was made about the scope of discovery if an inadvertent omission occurs or if an AUSA's definition of "file" is different from the defense attorney's.

Note: This District has long employed the philosophy . . . if you have to ask, disclose it!

F. Scope of Team

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

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

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

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

3. State/local agencies – a police officer is a part of the "prosecution team" if the investigation is a multi-agency task force and the AUSA is directing the officer's

actions in any way; or if the officer/trooper participated in the investigation or gathered evidence which ultimately led to the charges.

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

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

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

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

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

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

AUSAs should take an expansive view in deciding who should be considered part of the "prosecution team" and therefore from whom we should seek possible discovery or disclosure information.

G. What to Review Once It Is Determined Who Is Part of the Prosecution Team and Therefore Which Material Is In the Custody or Control of the AUSA

1. The investigative agency's file – the AUSA should consider personally reviewing the agent's file to include all the ROI's, e-mails, etc.

2. Confidential Informant (Witness) file – the entire file not just the part relating to the current case should be reviewed.

3. Confidential Informant (Non-Testifying) – if circumstances warrant, the AUSA should request access to these files.

4. Evidence – an AUSA should review all evidence obtained including information obtained as the result of search warrants and subpoenas.

5. Regulatory Agency/DOJ Civil attorney files – the AUSA should request all information relating to the case.

H. Case-related Communications Through Electronic Medium Such as Email

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

I. Obtaining *Giglio* Information from Local Law Enforcement Agencies

Giglio Policy (Law Enforcement Witnesses)

1. Overview

It is expected that an AUSA will be familiar with the District's Giglio plan and obtain all potential impeachment information directly from agency witnesses. To formalize this process, the office has a designated Requesting Official concerning *Giglio/Brady* material. In this capacity, the Requesting Official coordinates all formal requests from the U.S. Attorney's Office to covered law enforcement agencies, to search for impeachment information on potential witnesses. Local law enforcement agencies are included in this policy.

2. Requesting the Information

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

3. Submission of Request to Agency

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

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

b. Any past/pending criminal charge; and

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

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

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

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

c. The allegation received publicity;

d. Disclosure is otherwise deemed appropriate.

4. If Potential Impeachment Exists

The requesting official will immediately provide any negative information to the AUSA. The information must be treated as sensitive for purposes of storage and access. The AUSA handling the case will be responsible for determining the extent to which disclosure to the court and defense counsel is warranted. Where appropriate, the AUSA should seek an ex parte in camera review by the court regarding whether the information must be disclosed. Protective orders should be sought where possible.

J. Disclosure Questions Relating to Trial Preparation Witness Interviews

All AUSAs have a duty to interview all trial witnesses prior to calling them to testify. This duty includes, but is not limited to, reviewing all previous statements rendered by the witness either made under oath or during an interview with investigators. Moreover, trial witnesses should be shown the trial exhibits they will sponsor, authenticate, or introduce during their testimony.

If, however, during the pre-trial interview, the AUSA learns that any part of the pre-trial interview is ***materially*** different from prior statement rendered by the witness, regardless of how or when made, the AUSA must disclose the information. When considering disclosure, AUSAs should first consider going to the court and seeking an in camera review of the differences and or discrepancies and have the court determine if the differences and or discrepancies are, indeed, material, in view of *Kyles v. Whitley*, and *Bagley*.

K. Disclosure of Agent's Notes

It is the current law of this circuit that the interview notes of agents are not deemed to be the agent's Jencks material or discoverable pursuant to Rule 16 of the Federal Rules of Criminal

Procedure. See, *United States v. Brown*, 303 F.3d. 582 (2002) cert. denied, 537 U.S.1173 (2003). If the agent's notes are a faithful representation of what is contained in their formal report (ROI), AUSAs have no duty to disclose the interview notes. Conversely, however, if the notes depart materially from what is contained in the formal report, disclosure should be considered after consultation with an AUSA's supervisor and the Discovery Coordinator. When deciding whether to charge a 18 U.S.C. § 1001 false statement to an agent as a count in an indictment, an AUSA should consider reviewing the agent's notes to determine whether they are consistent with the formal ROI.

L. Maintaining Records of Disclosure

Faithful adherence to the discovery and disclosure duties imposed on AUSAs should be accompanied by evidence of the discharge of those duties. Accordingly, AUSAs should draft receipts inventorying any and all documents, statements, reports, or exhibits given to defense counsel and said receipt should be signed by the AUSA and defense counsel.

Consideration should also be given to retaining an exact copy of the discovery given to the defense for later reference.

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).

M. Cases Involving National Security

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.