

MIDDLE DISTRICT OF LOUISIANA

DISCOVERY POLICY IN CRIMINAL CASES

OCTOBER 21, 2010

This policy is intended to provide uniformity in the manner in which prosecutors in the Middle District of Louisiana approach and handle the various issues which are addressed herein.<sup>1</sup> This policy is intended to govern those cases which do not present issues of protecting the integrity of ongoing investigations, witness security, and classified information. Cases involving these concerns often raise unique disclosure issues which are more appropriately resolved on a case-by-case basis. When these issues arise, and actions which are contrary to this policy are contemplated, prosecutors must obtain supervisory approval prior to proceeding.

This policy provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any substantive or procedural rights enforceable by law by any person in any administrative, civil, or criminal matter or case. This policy does not in any way limit the lawful litigative prerogatives of the U.S. Department of Justice.

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<sup>1</sup>In light of the purpose of this policy, many legal citations are omitted.

## Obligations and Guidance

This policy provides guidance on gathering, tracking, reviewing and producing information to criminal defendants in accordance with statutory or procedural law and case law, the Constitution, DOJ policy and local rules. These duties are defined in the Federal Rules of Criminal Procedure Rules 12 and 16; the Jencks Act and Federal Rule of Criminal Procedure 26.2; Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972), and their progeny; USAM 9-5.001 (Disclosure of Exculpatory and Impeachment Information) and 9-5.100 (Potential Impeachment Information on Law Enforcement Witnesses); and the local rules and standing orders of the district and magistrate court. In some respects, this policy requires broader production than the law and local rules. It counsels AUSAs to provide broad and early discovery of information and materials to the extent that broad and early discovery promotes the just resolution of a case and does not jeopardize witness safety, national security, or an ongoing criminal investigation.

On January 4, 2010, Deputy Attorney General Ogden issued a memorandum entitled “Guidance for Prosecutors Regarding Criminal Discovery” (“Ogden Memorandum”). See Attachment A. The Ogden Memorandum provides prosecutors with valuable guidance in meeting their discovery obligations.

## Timing of Disclosure

Exculpatory information<sup>2</sup> shall be disclosed reasonably promptly after its discovery.

Impeachment information shall be disclosed at a reasonable time before trial to allow the trial to proceed efficiently. Disclosure should be made at least 5 days before trial. However, earlier disclosure should be considered depending upon the type and volume of information to be disclosed.

USAM 9-11.233 requires AUSAs to disclose to the grand jury “substantial evidence that directly negates the guilt of a subject of an investigation.”

Brady requires the disclosure of favorable evidence material to punishment. Regarding the timing of such disclosure, USAM 9-5.001D3 requires that such material be disclosed “no later than the court’s initial presentence investigation.”

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<sup>2</sup>The words “information,” “material,” and “evidence” are used synonymously herein.

Disclosure of Exculpatory and Impeachment Information Beyond That  
Which is Constitutionally and Legally Required

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

AUSAs must disclose information that either casts a substantial doubt upon the accuracy of any evidence - including but not limited to witness testimony - the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence. This information must be disclosed regardless of whether it is likely to make the difference between conviction and acquittal of the defendant for a charged crime.

## The Prosecution Team

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

Attorneys should consult the Ogden Memorandum for guidance in determining who is considered to be part of the prosecution team.

## Potential Sources of Discoverable Information

AUSAs should seek out discoverable information from the prosecution team. The process should include a review of the following potential sources of information:

- investigative agency's files;
- CI/CW/CHS files;
- victim-witness coordinator files;
- evidence gathered during investigation;
- documents and evidence gathered by civil attorneys and/or regulatory agencies in parallel proceedings;
- communications (e.g. emails) with agents and others;
- personnel and disciplinary files of law enforcement witnesses;
- agent notes; and
- presentence reports.

The Ogden Memorandum provides extensive guidance on how to conduct the review process.

## The AUSA's Responsibilities Under Brady

### A. Communicating with the Case Agent

Brady requires the prosecution to disclose to the defendant all "evidence favorable to [him] ... where the evidence is material ... to guilt," that is, all evidence that could be used by the defendant to make his conviction less likely.

The AUSA must ask the case agent and each member of the prosecution team if they know of any Brady material. The AUSA should repeat this inquiry before all suppression hearings, trial, and sentencing hearings. Under Kyles, 514 U.S. at 437, the AUSA is required to make these inquiries.

The primary responsibility for getting Brady material to the AUSA lies with the case agent, which in turn means that the case agent must make sure that every member of the prosecution team knows the Brady rule. **The case agent can accomplish this task after a thorough briefing by the AUSA who may consider copying this portion of the policy and disseminating it to the prosecution team.**

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

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

#### B. Examples of Brady Material

Brady material is defined generally as any evidence favorable to an accused that is material to the question of either guilt or punishment. 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).
- 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.

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

### C. Looking for Brady Material

The government is required only to disclose the Brady material that the prosecution team knows about. The prosecution team is not required to look for unknown Brady material.

### The AUSA's Responsibilities Under Giglio

#### A. Communicating with the Case Agent

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

As with Brady material, an AUSA is constitutionally required to disclose all Giglio material known to the AUSA or any other member of the prosecution team. 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 AUSA should repeat this inquiry, orally, before all suppression hearings, trial, and sentencing hearings. Under Kyles, the AUSA is required to make these inquiries.

The primary responsibility for getting Giglio material to the AUSA on **civilian witnesses** - i.e., government witnesses other than law enforcement witnesses - lies with the case agent, which in turn means that the case agent and the AUSA must make sure that every member of the prosecution team knows the Giglio rule.

## B. Examples of Giglio Material

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

### 1. Bias

A witness can be impeached with evidence 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 jailhouse privileges.
- A witness may have a pro-government bias resulting from the government's favorable treatment of a relative or friend who has criminal exposure.
- A witness may have a pro-government bias because he 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.

## 2. Specific Instances of Misconduct Involving Dishonesty

A witness can be impeached with 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 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 of prior inconsistent statements. See generally Fed. R. Evid. 613.

## 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's dealings with and observations of the witness, the witness is generally untruthful. See generally Fed. R. Evid. 608(a).

## 6. Incapacity

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

## 7. Contradiction

A witness can be impeached with evidence of facts that contradict the witness's testimony.

## Giglio Material on Law Enforcement Witnesses

### 1. Generally

A law enforcement agent who is called as a witness knows whether there is anything that exists that could be used to impeach him. That simple fact taken together with the irrebuttable presumption established in Kyles v. Whitley, that the AUSA knows everything that any member of the prosecution team knows (whether or not the AUSA has such actual knowledge) means that the AUSA is responsible for disclosing all Giglio material on law enforcement witnesses, even if the AUSA and the case agent have no idea that such material exists. The AUSA must find out 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.

### 2. The Attorney General's Giglio Policy

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 (The 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. By its own terms, the Giglio Policy governs only the DOJ law enforcement agencies (FBI, USMS, DEA, INS). But the Secretary of the Treasury has adopted the Giglio Policy for the Treasury agencies as well. See United States Attorneys' Manual 9-5.001. Although the Giglio policy is not applicable to state and local law enforcement agencies, this office has always treated state and local law enforcement as being covered by the Giglio Policy and those agencies have voluntarily complied with the terms of the Giglio Policy.

### 3. Gathering Giglio Information and Implementing the Giglio Policy

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

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

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

Second, the AUSA can ask the Criminal Chief whether he knows of any Giglio material on the witness.

Third, per office policy, the AUSA shall request potential impeachment information from the investigative agency. 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.

Prior to using a member of law enforcement as **an affiant** and prior to the commencement of **any suppression hearing, trial or sentencing hearing** in which law enforcement witnesses are expected to testify, AUSAs must personally question each law enforcement witness to determine whether Giglio information exist and to make appropriate disclosures, if necessary.

The Criminal Chief 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. 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 to the Criminal Chief.

The Criminal Chief is the "Requesting Official" of the Giglio Policy, which means that he is the person authorized to request potential Giglio material on a law enforcement witness directly from the witness's agency.

Finally, the Criminal Chief is the arbiter of disputes between the case AUSA and the agency as to whether any particular material is covered by Giglio or whether any particular material is close enough to the sweep of Giglio to warrant its submission to the court *in camera* for the court's determination. **It is the policy of this office that no potential Giglio material on a law enforcement witness will be disclosed to the court in camera or to the defendant unless (1) the law enforcement witness's agency has been given the opportunity to consult with the Criminal Chief and (2) the Criminal Chief approves of the disclosure.**

**As a general rule, the AUSA must initially seek Giglio material on a law enforcement witness by asking the witness. The AUSA's obligation to ask the law enforcement witness directly about evidence that might be used to impeach him may not be delegated to the case agent.**

**Prior to all trials, AUSAs are required to ask the Criminal Chief to make a formal request to the witness's agency for Giglio material. AUSAs must initiate their Giglio request at least two weeks before trial begins and as soon as possible before a suppression or sentencing hearings begins. When local law enforcement officers are**

**essential witnesses to the trial of a case, Giglio requests shall be made and responses received prior to indictment.**

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

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

Disclosure of Statements/Jencks/Reports of Interview (ROI) for  
Testifying Witnesses and Non-Testifying Individuals

Testifying Witnesses

Disclosure shall be made sufficiently in advance of trial to permit the defendant to make effective use of the information. Disclosure should be made at least 3 days before trial. However, earlier disclosure should be considered depending upon the volume of information disclosed.

Non-Testifying Individuals

**AUSAs shall review all statements and ROIs produced during the investigation of the case to determine whether disclosure is appropriate.**

Disclosure should not be made when the information therein is irrelevant or not significantly probative of the issues before the court. In making this determination, AUSAs should take a broad view of materiality and err on the side of disclosure if admissibility is a close question.

When disclosure is appropriate, the timing of disclosure is the same as for testifying witnesses.

### Progressive Truth-Telling Witness

A witness's statement may vary during the course of an interview or investigation. For example, they may initially deny involvement in criminal activity, and the information they provide may evolve, broaden, and change considerably over the course of time, especially if there are a series of debriefings which occur over several days or weeks.

Material variances over the course of a witness's statement must be disclosed, even if the variances occur within the same interview.

## AUSA and Agent Notes

Whenever possible, AUSAs should not conduct an interview without an agent present to avoid the risk of making themselves the sole witness to a statement containing discoverable Brady or Giglio material and being disqualified from handling the case if the statement becomes an issue.

AUSAs should preserve their notes of interviews and/or debriefings during the course of an investigation and review them for Brady/Giglio information.

Agents' notes of interviews should be reviewed if there is a reason to believe that: (1) the notes are materially different from the memorandum, (2) if a written memorandum of the interview was not prepared, (3) if the precise words used by the witness are particularly important, or (4) if the witness disputes the agent's account of the interview.

## E-mail Use

AUSAs are discouraged from using e-mail<sup>3</sup> to communicate substantive case-related information. This method of communication should be limited to non-substantive matters such as scheduling of interviews or notification of dates and times of hearing. AUSAs should inform agents of this policy and encourage their compliance.

If e-mail is used, all substantive communication from agents, witnesses and/or victims should be preserved and reviewed for potentially discoverable material.

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<sup>3</sup>In this policy, the term “email” includes any form of electronic messaging using devices such as computers, telephones, and blackberries, including, but not limited to, emails, text messaging, instant messages, tweets, and voice mail messages that are automatically converted to text (e.g., Google voice, Spinvox, etc.).

## Use of Brady Letters

Maintaining records of witnesses interviews is one of the most important aspects of any criminal case.

If any Brady or Giglio information is not memorialized in an interview memorandum or other report, AUSAs should disclose it to the defendant in a letter.

When crafting a Brady letter, AUSAs should take great care to describe the full scope of the discoverable information as accurately and completely as possible.

## Documenting Disclosure

AUSAs shall make and maintain a record of when and how information is disclosed or otherwise made available to defendants.

## National Security Information

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.