

**CRIMINAL DISCOVERY POLICY
DISTRICT OF MARYLAND
OCTOBER 2010**

**NOT FOR DISSEMINATION OUTSIDE THE DEPARTMENT OF
JUSTICE
PRIVILEGED ATTORNEY WORK PRODUCT**

This policy is not intended to and does not create any substantive or procedural rights enforceable at law by any person in any administrative, civil or criminal matter or case, nor does this policy place any limitations on otherwise lawful litigative prerogatives of the United States. See United States Attorney's Manual (USAM) § 1-1.100; *United States v. Caceres*, 440 U.S. 741 (1979).

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I. INTRODUCTION

As a result of a comprehensive nationwide review of the Department's and United States Attorneys' discovery policies, the Deputy Attorney General issued a memorandum on January 4, 2010 entitled *Guidance for Prosecutors Regarding Criminal Discovery* and an accompanying memorandum requiring each United States Attorney's Office to promulgate a discovery policy that implements the Deputy Attorney General's directives.

This policy, together with the District of Maryland Best Practices Memo of December 2009, provides guidance to AUSAs¹ on gathering, maintaining, reviewing and producing information to criminal defendants in accordance with the Constitution, statutes, rules, case law, DOJ policy and local rules and practice. While it does not undertake to address every issue an AUSA will confront when making discovery decisions, it is designed to familiarize attorneys with their disclosure obligations, provide guidance, and identify potential issues. Supervisors are available to assist in satisfying discovery obligations.

This guide is also intended to help fulfill the special responsibility of the United States Attorney as famously articulated by the Supreme Court in 1935:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and definite sense the servant of the law, the twofold aim of which is that guilty shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed he ought to do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935).

Our duties are set forth in the Federal Rules of Criminal Procedure Rules 12 and 16; Federal Rules of Evidence 404(b) and 413-414, the *Jencks Act*, 18 U.S.C. § 3500, and Federal Rule of Criminal Procedure 26.2; *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S.

¹ "AUSAs" includes Special AUSAs and any DOJ attorneys practicing in the District of Maryland.

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, as well as rules governing professional conduct². Additionally, the Department will soon be issuing a “blue book” monograph on discovery which should be consulted. All AUSAs should be familiar with the rules, statutes, and USAMs cited above, and should read, in addition to *Brady* and *Giglio*, *Kyles v. Whitley*, 514 U.S. 419 (1995) and *Strickler v. Greene*, 527 U.S. 263 (1999).

This policy, and that of the Department of Justice, encourages AUSAs to provide liberal 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. In some respects, this policy requires broader production than the law and local rules. It is not intended, however, to confer any substantive or procedural rights or benefits on any defendant, party or witness, and is not to be cited or disseminated outside the Office. *See generally, United States v. Caceres*, 440 U.S. 741 (1979).

Kyles v. Whitley, 514 U.S. 419 (1995) places the responsibility to produce all discoverable information in a criminal case squarely with the AUSA(s) assigned to the case. To fulfill this responsibility, AUSAs should consider the following:

- **What & When:** What are the policies, rules, statutes and case law that define what must be produced and when must it be produced?
- **Who** is part of the prosecution team: AUSAs are obligated to produce information that is within the possession of “the prosecution team;” thus, defining the scope of the prosecution team is critical.
- **Where to look:** Once the scope of the prosecution team has been identified, AUSAs must ensure that *all* discoverable information in whatever format is located, reviewed and produced as required, potentially including agency investigative and administrative files, notes, CI files, e-mails, PSRs, law enforcement *Giglio*, etc.
- **How** to produce and track: AUSAs must decide in what form to produce the discovery (*Bates* numbered, hard copy, e-copy, available for inspection, redacted, etc), and must keep a detailed record of all discovery produced. A sloppy or imperfect record of what discovery is produced won’t be any use to a colleague trying to defend a conviction years later. AUSAs should never characterize their production as “open file.”

² AUSAs are subject to the rules of professional conduct promulgated by the states in which they are admitted. 28 U.S.C. § 530B.

II.
What and When?
What?
Summary of Laws, Rules and Policies
Governing Disclosure and Timing of Discovery

The government's obligation to provide discovery derives from four general sources: **federal rules**, specifically Federal Rules of Criminal Procedure 16, 26.2, and 12(b)(4) and Federal Rules of Evidence 404(b), 413 and 414, **statute**, specifically the *Jencks* Act, 18 U.S.C. § 3500, the **Constitution**, as explicated through **case law** and directives contained in the United States Attorney's Manual (**USAM**), specifically USAM 9-5.001 and 9-5.100. Additionally, local (state bar) rules of professional conduct may apply under 18 U.S.C. § 530B (the "McDade" Act)

A. Federal Rules of Criminal Procedure Rule 12 and 16

In accordance with the terms of the Office's standard discovery agreement, upon the defendant's request and the signing of a discovery agreement at or before arraignment,³ AUSAs should generally make available for inspection beginning **within 14 days of the later of the arraignment or the return of the signed discovery letter all materials and items required to be produced or identified by Federal Rules of Criminal Procedure Rules 12(b)(4) and 16**, including but not limited to

-Defendant's written or recorded statements. These may be voluminous, particularly if there are wiretap conversations, text or email messages or jail calls. Transcripts of recorded communications do not need to be provided at this time, so long as the conversations themselves are provided, but the AUSA should give defense counsel some indication of when transcripts are expected to be ready. AUSAs should ask all agents and police officers who have had any contact with the defendant to report all statements, verbal or non-verbal, the defendant may have made. If a defendant made a statement to law enforcement that is not memorialized in a report, the substance of the statement must be disclosed to the defense.

-Statements attributable to an organizational defendant.

³ To trigger the government's reciprocal discovery rights defined in Federal Rules of Criminal Procedure Rule 16 (b), the defendant must "request" discovery. As is apparent from the Office's standard discovery letter, this Office deems all proper requests to have been made, and we will not quibble over whether a defendant has made a discovery request.

-Defendant's prior record

-Documents or objects obtained from the defendant, for use in the government's case-in-chief or which are material to the preparation of the defense (can start with an inventory of items seized from the defendant by law enforcement officials)

-Reports of physical, mental or scientific examinations and tests. This includes drug analysis, handwriting analysis, DNA, blood-alcohol, fingerprint, ballistics and toolmark examination, etc.

-Expert witness summaries and qualifications. AUSAs should remember that under Rule 702, agents and police officers can supply "expert" testimony as to gangs, the drug trade, street terms, etc. Accordingly, they are covered by Rule 16, and their qualifications (CVs) and a summary of their testimony must be provided with the Rule 16 discovery.

-Rule 12(b)(4) requires the government to provide notice of evidence it intends to use in order to allow the defense the opportunity to move to suppress that evidence before trial. Examples include statements to law enforcement or evidence seized during a search. It is wise to provide such evidence well in advance of trial in order for the suppression to be fully litigated before trial. If you provide the defense with this evidence pretrial and they fail to file a motion to suppress it, the defendant is deemed to have waived the suppression issue. Fed. R. Crim. P. 12(b)(3) & (e). In the event the government loses on a pretrial suppression motion that relates to material evidence, we may seek an interlocutory appeal. If, however, the government fails to turn over the evidence in a timely manner and the court allows the defense to raise a suppression motion at trial, we have no appellate remedy because jeopardy will have attached by that point. If a suppression issue is pending, an AUSA should press the court to rule on it before jury selection to preserve the government's right to appeal. Under Rule 12(d), a court cannot defer ruling on a pretrial motion if doing so adversely affects a party's appellate rights.

Practice Tip: Start making a Rule 16 folder when you begin the investigation. As you go along, and before indictment, put into it copies of defendants' statements, rap sheets, documents seized from or belonging to the defendant, CVs of expert witnesses, etc. This way you will be prepared to provide substantial Rule 16 discovery at arraignment. Being well-organized and able to produce voluminous discovery promptly conveys confidence in one's case and fosters a reputation for candor and preparedness which serves an AUSA well.

Occasionally, in fast-moving reactive cases and in drug or violent crime cases involving multiple defendants, even after making the agents aware of their discovery obligations, it may not be possible to gather and produce *all* Rule 16 discovery within 14 days of the arraignment or the

return of the signed discovery letter. However, AUSAs should consider this an important goal, and should, by planning for discovery well before indictment, be able to meet a substantial part of their Rule 16 obligations within this time frame. It is consistent with this policy for an AUSA to provide, within the specified time frame, partial discovery of as much Rule 16 as reasonably possible in good faith, noting for opposing counsel that there is material that has *not* been produced, and to complete production as soon as reasonably practicable, recognizing that discovery imposes a continuing obligation. **It is *not* consistent with this policy to withhold discovery after indictment purely to secure a tactical advantage, and AUSAs should not take this paragraph as license to delay Rule 16 discovery just because it is inconvenient. Where an AUSA is unable to provide all Rule 16 discovery within 14 days of arraignment or the return of the signed discovery letter, s/he should document the reasons for his or her supervisor and should have a plan for when the remaining Rule 16 materials will be produced.**

Practice Tip: Rule 16 contains its own provision for a protective order. Fed. R. Crim. P. 16(d)(1). If there is Rule 16 discovery that could put any person at risk or that might impair an ongoing investigation, the AUSA may wish to submit it for *in camera* review and to ask the court to “deny, restrict, or defer” Rule 16 discovery for that reason.

Note that Rule 16(a)(1)(E) requires disclosure of documents and objects in the government’s control which are (i) material to preparing the defense; (ii) intended for use in the government’s case-in-chief; or (iii) obtained from or belong to the defendant. There may occasionally be documents or objects which an AUSA intends to use *only* in rebuttal, to counter an anticipated defense. So long as these were not obtained from the defendant, and are not material to the preparation of the defense, it is acceptable to keep such documents or objects back for rebuttal use. The AUSA must be extremely careful in doing so, however, and should keep in mind that if the document becomes one that s/he needs or wants to use in the case-in-chief, it must be disclosed. It is not the policy of this Office that the term “material to preparing the defense” includes documents that will help the defense to avoid embarrassment by being able to tailor the defense around rebuttal evidence. However, AUSAs should always bear in mind the truth-seeking mission of the Department and this Office, and should not “sandbag” the defense where providing early and liberal discovery could promote prompt and just resolution of a case.

It was the former practice of this Office in multi-defendant cases to appoint one defense attorney to serve as “discovery counsel” for all defendants. We no longer do so. Even voluminous discovery can now generally be produced cheaply and conveniently in disc form, and providing discovery to all counsel avoids the problem of discovery counsel forgetting his obligations to his co-defendants once his client pleads.

Occasionally a defense attorney will decline to sign the standard discovery agreement. If this occurs, the AUSA should consult with his or her supervisor to determine how to handle discovery

for such an attorney.

B. Fed. Rules of Criminal Procedure 12.1, 12.2 and 12.3

Each of these rules allows the government to seek disclosure of specified information from the defense, and each triggers a reciprocal disclosure requirement from the government. For example, Rule 12.1 allows us to seek alibi information from the defense, but in order to make the request, we have to specify the time, date and place of the offense in writing. AUSAs handling cases where an alibi defense (or a defense asserting insanity under Rule 12.2 or public authority under Rule 12.3) is possible, should make the demand at arraignment.

Once the government has made the request, the defendant is obliged to respond within 14 days, stating where he claims to have been and giving names and contact information for every witness he will call to establish the alibi. The government is then obligated to supply names and contact information for each witness who will place the defendant at the scene, and each rebuttal witness. There are special considerations for victim witnesses, so the AUSA should read the rule carefully and should consult with the victim witness unit to be sure that the victims' rights are being observed. The AUSA may choose not to file an alibi notice at all, simply to avoid triggering the reciprocal obligation.

Rule 12.2 governs mutual disclosures where the defendant offers an insanity defense, and Rule 12.3 applies where the defendant claims to have committed the crime because he was authorized to do so by law enforcement or the intelligence community. (This has happened: in this office we have prosecuted a defendant who claimed to be working for the CIA, and asserted, naturally, that they would disavow him, and one who was actually flying planes for DEA - when he wasn't flying planes for the Colombian drug lords).

C. Fed. Rules of Evidence 404(b), 413 and 414 - Similar Act Evidence

Rule 404(b) contains its own discovery provision: "upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial."

Our discovery agreement deems 404(b)⁴ evidence to have been "requested," thus triggering our obligation to provide "reasonable notice." As a rule, where possible, providing early 404(b) evidence to the defense will help to resolve a case quickly. In any event, the Office's standard discovery agreement provides that

⁴ Evidence under Rules 413 and 414, applicable to sexual assault and molestation cases, is treated the same as 404(b) evidence.

at the same time that [the government] provides Rule 16 material [*i.e.* **within two weeks of arraignment** or the return of the signed discovery letter], it will provide notice of the existence of alleged other crimes, wrongs or acts committed by your client pursuant to Rule 404(b) of the Federal Rules of Evidence, along with copies of all physical and documentary evidence believed by the government to fall within the ambit of Rule 404(b) which the government intends to introduce at trial in its case-in-chief. The government acknowledges its continuing duty to disclose Rule 404(b) evidence as it is recognized as such after the time period in which the government has provided Rule 16 material.

The universal exception to the undertaking to provide early 404(b) is, of course, where providing early Rule 404(b) will endanger any person or compromise national security or an ongoing criminal investigation. The AUSA should always consider whether it is possible to enter into a protective order or to craft a 404(b) disclosure in such a way as to avoid exposing any potential witnesses. In any case, absent a court order to the contrary, 404(b) evidence should be produced no later than the time when *Jencks* and *Giglio* are provided.

Practice Tip: If an AUSA wishes to delay production of Rule 404(b) evidence, the AUSA should first consult his or her supervisor before seeking a determination from the court that there is “good cause” to delay disclosure. No AUSA should unilaterally decide to withhold disclosure of Rule 404(b) evidence without notifying opposing counsel of its existence, since to do so could give a misleading impression and result in the court excluding the evidence.

Practice Tip: One vehicle to disclose the existence of Rule 404(b) material is to file a Motion *in Limine* outlining the evidence and explaining its relevance and admissibility.

D. *Brady* information

The constitutional guarantee of a fair trial, as interpreted by *Brady v. Maryland* and its progeny, requires AUSAs to disclose to the defense any **evidence that is material to guilt or punishment**. *Brady*, 373 U.S. at 87; *Giglio*, 405 U.S. at 154. *Brady* and *Giglio* information must be disclosed to the defense regardless whether the defense makes a request for such information. On October 19, 2006, the Department of Justice issued an amendment to the U.S. Attorney’s Manual that “requires AUSAs to go beyond the minimum obligations required by the Constitution and establishes broader standards for disclosure of exculpatory and impeachment information.” The details of the requirements are set forth in USAM § 9-5.001. In short, the policy requires disclosure

of “information beyond that which is ‘material’ to guilt as articulated in *Kyles v. Whitley*, 514 U.S. 419 (1995),” and encourages AUSAs to “err on the side of disclosure.” This policy requires the prosecution team to produce “information,” not just “evidence,” and counsels that the AUSA must consider the cumulative impact of items of information. This means that an AUSA must not try to assess whether the *Brady* information is admissible or would, standing alone, yield a different outcome, but should turn the information over, regardless. Again, if the “exculpatory” information would put any person at risk, the AUSA should first consult with his or her supervisor, and may wish to seek the guidance of the Court.

The fundamental rule is this: **All exculpatory information known to or in the possession of the prosecution team, regardless of whether or how the information is memorialized, should be disclosed to the defendant reasonably promptly after its discovery.** Technically, *Brady* (and *Giglio*) are not “discovery” obligations, but proscriptions against the government concealing potentially exculpatory information. As such, the cases do not prescribe any timetable other than that disclosure must be made in time for the defense “to reasonably and effectively use it at trial.” *United States v. Jeffers*, 570 F. 3d 557, 573 (4th Cir. 2009). The better practice, and the practice in the District of Maryland as stated in our standard discovery agreement, is to disclose *Brady* information as soon as the prosecutor identifies it. And in accordance with the directives of USAM 9-5.001, AUSAs are encouraged to go beyond the Constitutional requirements and take a broad view of materiality when determining what must be disclosed:

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

USAM 9-5.001. This includes exculpatory information contained in whatever form, whether in interview memoranda of persons expected to be called as witnesses, information contained in interview memoranda of persons not expected to be called (sometimes confusingly referred to as “non-testifying witnesses”) and in internal emails, memos, and other reports. There is no requirement that the exculpatory information be provided in its original form; nor is there any requirement that the government flag it as ‘exculpatory.’ The requirement is simply that the government not *conceal* it.

Practice Tip: The AUSA may wish to send a letter to defense counsel simply identifying a person who has exculpatory information, or spelling out the exculpatory information in lieu of providing a copy of the original source document. We do not meet our discovery obligations, however, if we bury the exculpatory document in a warehouse full of other items.

E. The *Jencks* Act and Rule 26.2

As a rule, as provided in this office's standard discovery agreement, we agree to provide *Jencks* materials either one week or two weeks in advance of trial. We provide *Giglio* (impeachment) materials at the same time.

The *Jencks* Act, 18 U.S.C. § 3500, defines "witness statements" as ... "(1) a written statement made by [a] witness and signed or otherwise adopted or approved by him; (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by [the] witness and recorded contemporaneously with the making of such oral statement; or (3) a statement, however taken or recorded, or a transcription thereof, if any, made by [a] witness to a grand jury." Title 18 U.S.C. § 3500 (e). *Jencks* Act materials on witnesses thus may include not only grand jury transcripts, but also wiretaps, undercover conversations, recorded jail calls, e-mails or documents signed by the witness, if they "relat[e] to the subject matter as to which the witness [is expected to testify]."

Practice Tip: In cases where there is a danger to witnesses, the AUSA may wish to shorten the time provided for in the discovery agreement to three days before trial, or even, in extreme cases, the night before a witness is expected to be called. Where the discovery agreement provided for *Jencks* a week or two before trial, but circumstances develop that suggest that a particular witness may be endangered by early disclosure, the AUSA should seek a protective order for good cause. In such a case, the court may approve providing *Jencks* as late as the evening before the witness is to testify, but will not, in all likelihood, be willing to let you withhold *Jencks* until after the witness has testified, because that will cause a delay in the trial.

It is well established in the Fourth Circuit that interview reports such as 302s, DEA 6s, ROIs or MOIs (hereafter "302s") are not *Jencks* materials unless either they contain a *verbatim* recitation of the witness's words or the witness has adopted the statements made therein. *United States v. Roseboro*, 87 F. 3d 642, 645-646 (4th Cir. 1996). Similarly, an agent's rough notes, if incorporated into a formal report, need not be maintained for *Jencks* production. *United States v. Hinton*, 719 F. 2d 711 (4th Cir. 1983).⁵ Nevertheless, AUSAs are encouraged to review all 302s and agent notes

⁵ Exceptions to this general rule include instances where there are inconsistencies between the notes and the final report or where there is no other means available to satisfy the government's discovery obligations. Agents should be directed to review their rough notes to determine whether any inaccuracies or omissions exist within their written reports. The AUSA should personally review the rough notes if there is reason to believe there are inconsistencies, a written memorandum was never prepared, the precise words a witness used are important (as in a false statement case), or the witness disputes the agent's account of the interview. If it turns out that

thoroughly, first to see if they contain *Brady*, and ultimately to determine whether, absent threats to witness safety, national security, or an ongoing criminal investigation, turning over the 302s will promote the just and expeditious resolution of the case.

Do not give it up for free, however. Defense attorneys rely heavily on the *Jencks* materials, and may be willing to enter into stipulations or make other concessions in order to get *Jencks* early or to get 302s which are not technically *Jencks*. Any AUSA who elects to provide 302s should stipulate that although the material is not *Jencks* and not discoverable, s/he is providing it as a courtesy in the expectation of a prompt resolution. The AUSA should always redact the witness's contact information and any personal identifiers, should consider obtaining a protective order or agreement from defense counsel that the 302s will not be disseminated further, and should take pains to collect all copies of the 302s after the resolution of the case. AUSAs should recognize that, in the context of violent crime, "paper," such as a 302, is evidence that can be used to pose a serious threat to the witness.

Practice tip: Consider *showing* 302s to counsel (with appropriate redactions), rather than providing them. Or extract from counsel a written agreement that, in exchange for disclosure of the 302s, the attorney agrees that the 302 is not *Jencks* of any witness (except the author) and s/he will not attempt to use it to cross-examine any witness. Similarly, you may wish to obtain a protective order or Rule 6(e) order to govern discovery and to prohibit further downstream dissemination of grand jury transcripts or other documents provided as *Jencks*.

Practice Tip: AUSAs should be aware of the many ways in which "Jencks" can be created, and should take steps to avoid creation of unnecessary, inconsistent or inaccurate *Jencks* material. For example, you may want to put inexperienced Agent A in the grand jury in order to give him the experience of testifying before a grand jury and summarizing an investigation, but to call experienced Agent B at trial. If you will not be calling A at trial, you will not need to produce his grand jury testimony as *Jencks*. There is no obligation under the rules or this policy to provide the defense a roadmap of the government's case.

Practice Tip: AUSAs, agents and witnesses should be reminded not to engage in substantive email, text, tweet or other electronic communications about the case, since such communications would have to be disclosed under the *Jencks* Act.

there are inconsistencies between the notes and the final report, the government will have to produce the notes.

F. *Giglio* (impeachment) material

1. In General: *Giglio v. United States*, 405 U.S. 150 (1972), and its progeny, require the government to turn over to the defendant any information known to the government that tends to impeach government witnesses in a material way. Again, USAM 9-5.001 goes beyond *Giglio*'s requirements and requires AUSAs to disclose anything that is material to the witness's credibility, or "that casts a substantial doubt upon the accuracy of any evidence ... the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence." USAM 9-5.001. The information should be disclosed "regardless of whether the information ... would itself constitute admissible evidence." USAM 9-5.001.

Examples of *Giglio* that must be disclosed include

- promises of leniency or immunity made to a witness, plea agreements,
- financial benefits provided or promised to a witness or his family, including relocation expenses, being put up in a hotel for safety purposes, purchase of "court" clothing,
- payments to an informant who becomes a witness
- offers or expectations of immigration consideration,
- consideration extended to family members, such as a decision not to charge a witness's wife, parent, child, etc.,
- favorable treatment of an incarcerated witness, such as transfer to a more comfortable facility or even buying an inmate lunch during a prep session,
- any benefit of whatever kind afforded to the witness by a government agent (free phone use, alcohol, unsupervised "conjugal" visits),
- local unrelated arrests made to "disappear" by law enforcement,
- evidence of addiction, alcoholism or mental problems that may affect the witness's ability to observe and report or that may disclose bias,
- materially inconsistent statements,
- any information that reflects negatively on a witness's credibility, such as the witness's rap sheet, or other known prior material bad acts of misconduct of a witness.
- In the case of a law enforcement officer, evidence of sustained disciplinary findings which cast the officer's integrity or impartiality into doubt

Practice tip: AUSAs are not obliged to investigate the entire life of a civilian witness in order to uncover potential *Giglio* information (*i.e.* no need for a victim bank teller to disclose getting caught stealing candy at age 10). If that were the case, no one would willingly testify. But the AUSA should take special care to uncover *Giglio* material on criminal witnesses as well as law enforcement agents. AUSAs should remember to obtain jail calls, letters and emails of incarcerated

cooperator witnesses, since these may contain statements or observations about the case or the witness's expectations.

Practice Tip: It is helpful to ask cooperating witnesses if there is anything that the *defendant* knows about them that could be used to embarrass or impeach them. Undoubtedly the defendant knows more about his confederates than we do, and if we know about bad information beforehand, we can file a Motion *in Limine* to keep it out.

2. *Giglio* Impeachment Information Relating to Law Enforcement Witnesses

On occasion, *Giglio* issues arise with respect to law enforcement witnesses who are either affiants or witnesses at a hearing or trial. For example, an agent or police officer may have been found to have committed misconduct, or may be the subject of a pending internal or criminal investigation. USAM 9-5.100 sets forth the Department's policy on obtaining and disclosing *Giglio* information relating to law enforcement witnesses. This procedure was developed in conjunction with the law enforcement agencies, and must be followed. The FAUSA is the *Giglio* officer for this district, and in his absence, the Criminal Chief.

All potential impeachment information obtained from a law enforcement witness or the witness's agency should be carefully protected and only disclosed to those with a need to know.

The USAO does not maintain a "do-not-call" list or any similar sort of blackball for law enforcement witnesses, but rather relies on the good faith of law enforcement witnesses and their agencies to respond to *Giglio* requests. There are three steps in ascertaining whether to disclose impeachment information on law enforcement witnesses: the questionnaire, the request to the agency, and the disclosure to court and/or counsel.

Step 1. *Giglio* Questionnaire for Law Enforcement Witnesses.

In every case, the AUSA should ask each potential law enforcement affiant/witness the questions on the *Giglio* checklist, sufficiently in advance of a hearing or trial so that if there is reason to make a formal *Giglio* request to the agency, the agency will have adequate time to respond. The Baltimore City Police will respond within a day or two; in the case of a federal agency, or a local or county police department, more time will be needed.

The questionnaire itself is designed to be an *internal* checklist, not a statement of a witness, and should be completed by the AUSA and maintained in the case file. It should not be given to the law enforcement witness to complete, shown to the law enforcement witness, or produced in discovery.

If the *Giglio* questionnaire raises no concerns, it should simply be put in the case file. A “yes” answer to any of the questions necessitates further inquiry, and the AUSA should alert the *Giglio* officer (the FAUSA), who will, in consultation with the AUSA, decide what action should be taken. The original questionnaire should be kept with the case file in a marked and sealed envelope.

Step 2. Requesting and Reviewing Personnel and Disciplinary Files.

When the *Giglio* checklist suggests that further inquiry is called for, or when the defense has made a request for *Giglio* information on a particular officer, or when the case is before Judge Bennett, the AUSA should notify the *Giglio* officer promptly, and provide him with any relevant pleadings. When so notified by an AUSA, the *Giglio* officer will make a formal request for all *Giglio* information from the law enforcement witness’s agency. If it is a federal agency, the cognizant agency official will conduct a review of the agent’s personnel and disciplinary files and disclose any impeaching information from the file to the requesting *Giglio* officer. If it is a state or local agency, the agency will likely be asked to produce the complete records to the *Giglio* officer for review.

Note: Judge Bennett requires a review of the IAD files of all testifying Baltimore City police officers, whether or not there are adverse findings.

Practice Tip: Because gathering and reviewing *Giglio* records takes time, AUSAs should consult with the *Giglio* officer sufficiently in advance of the witness’s anticipated testimony to allow the process to be completed before the witness testifies. If a *Giglio* request has been made but not responded to before trial begins, the AUSA should so advise the court.

Step 3. Disclosure of Potential Impeachment Information to the Court or Defense Counsel.

Once the agency discloses any impeachment information to the *Giglio* officer, the *Giglio* officer, in consultation with the prosecuting AUSA, will review the material to determine whether it should be disclosed to the court for an *ex parte, in camera* review or to defense counsel. The FAUSA will discuss the matter fully before the AUSA makes any disclosures either to the court *ex parte, in camera*, or to defense counsel. If the *Giglio* officer and the AUSA determine that the matter must be disclosed, they will notify the officer/agent and the agency, in order to afford them an opportunity to be heard.⁶

⁶ In some cases, an agent may be unaware that s/he is the subject of a pending investigation. In such cases, the *Giglio* officer and the AUSA should be careful to discuss the matter only with the agency, and not with the agent.

If an AUSA asks the court to conduct an *ex parte, in camera* review of potential *Giglio* information, or if, in the case of Judge Bennett, the court elects to conduct the review *sua sponte*, the AUSA should ensure that the AUSA's submission and the information reviewed by the court are made part of the record, under seal, so that the judge's decision can be reviewed by an appellate court if necessary. The AUSA should provide the *Giglio* officer with any pleadings or documents that are filed with the court regarding a law enforcement witness's potential impeachment information, as well as with any court rulings on potential impeachment information so that the *Giglio* officer can handle the information in a consistent fashion in future cases.

All potential impeachment information received from an agency pursuant to a *Giglio* request must be securely maintained and should not be shared with any person who does not have a need to know. The FAUSA will determine whether, how and where such information should be maintained. AUSAs should seek protective orders of sensitive potential impeachment information in appropriate cases to prohibit further disclosures by defense counsel or the defendant.

When? Timing of Disclosure

A. Before charges are brought.

(1) Grand Jury:

Exculpatory Information. Although the Supreme Court has held that there is no constitutional requirement that the government disclose exculpatory evidence to the grand jury, see *United States v. Williams*, 504 U.S. 36, 52-54 (1992), USAM 9-11.233 requires AUSAs to disclose to the grand jury "substantial evidence that directly negates the guilt of a subject of the investigation." This only makes sense, as the AUSA has the opportunity in the grand jury to explore the supposedly exculpatory evidence and to decide whether or not to press for an indictment in light thereof.

Impeachment Information: Again, there is no legal duty to seek out impeachment information or to present impeachment information to a grand jury, but if an AUSA is aware of significant impeachment information relating to a witness testifying before the grand jury, the AUSA should consider disclosing it to the grand jury, taking into account the witness's role in the case and nature of the impeachment information.

(2) Affidavits:

Exculpatory Information. If an AUSA is aware of substantial exculpatory information at the time he or she is preparing or reviewing an affidavit in support of a search warrant, complaint, seizure warrant, or T. III, the AUSA should discuss the matter in detail with his or her supervisor and the Criminal Chief. See *United States v. Kelly*, 35 F. 3d 929 (4th Cir. 1994). AUSA should probably

disclose the exculpatory information in the affidavit unless the AUSA obtains express supervisory approval not to do so. *See generally, Franks v. Delaware*, 438 U.S. 154 (1978).

Impeachment Information. If at the time an AUSA is preparing or reviewing an affidavit in support of a search warrant, complaint, seizure warrant or T.III, the AUSA is aware of impeachment information relating to the affiant or other person relied upon in the affidavit such as a confidential informant, and that impeachment information is sufficient to undermine the court's confidence in the probable cause contained in the affidavit, the AUSA should disclose the information in the affidavit unless the AUSA obtains supervisory approval not to do so. A prior judicial finding of a lack of credibility of an affiant or person relied upon in the affidavit should always be disclosed in the affidavit. An AUSA who is in any doubt as to whether there exists such a finding with respect to a law enforcement agent should consult the FAUSA.

B. Post-Indictment Disclosures:

(1) Exculpatory Information: After a defendant is charged, exculpatory information should be disclosed reasonably promptly upon its discovery so that the defense can make use of it. USAM 9-5.001 D 1; *United States v. Jeffers*, 570 F. 3d 557, 573 (4th Cir. 2009). If an AUSA discovers exculpatory information after conviction, sentencing and appeal, the AUSA should discuss the proper way to handle the matter with the Criminal Chief or Appellate Chief.

(2) Impeachment information should be disclosed as follows:

(a) Pre-Trial Hearings: Impeachment information relating to government witnesses who will testify at a detention hearing, motions hearing, or other pre-trial hearing should be disclosed sufficiently in advance of the hearing to allow the hearing to proceed efficiently.

(b) Guilty Pleas: The Supreme Court has held that there is no constitutional requirement that the government disclose impeachment information prior to a guilty plea. *United States v. Ruiz*, 536 U.S. 622 (2002). Nonetheless, if the AUSA is aware of impeachment information so significant that it undermines the AUSA's confidence in the defendant's guilt, the AUSA should consult his or her supervisor, and should disclose the information, unless the AUSA obtains express supervisory approval not to do so.

AUSAs should bear in mind that the ABA has issued a formal opinion interpreting ABA Model Rule 3.8(d), Formal Opinion 9-454 (2009) which maintains that, *inter alia*, a prosecutor has a duty to disclose exculpatory and impeachment information *prior* to entering a guilty plea. That is not the policy of the Department of Justice or of the USAO for the District of Maryland, and any AUSA confronting an argument relying on Model Rule 3.8(d) and the opinion interpreting it should not only consult with her supervisor in formulating a response, but should also consult the Professional Responsibility Officers and the Department of Justice Professional Responsibility Advisory Office (PRAO), which can be reached at 202-514-0458.

(c) Trial: Impeachment information should be disclosed “at a reasonable time before trial to allow the trial to proceed efficiently.” USAM 9-5.001 D 2; *United States v. Jeffers*, 570 F.3d 557, 573 (4th Cir. 2009). It is the local practice of the United States Attorney’s Office for the District of Maryland to provide impeachment material (*Giglio*) at the same time *Jencks* is provided, by agreement, usually one or two weeks in advance of trial. AUSAs should resist requests to provide *Giglio* earlier, since to do so conclusively identifies cooperators, exposing them to danger whether or not the case eventually goes to trial.

(d) Sentencing: USAM 9-5.001 D 3 requires: “Exculpatory and impeachment information that casts doubt upon proof of an aggravating factor at sentencing, but that does not relate to proof of guilt, should be disclosed no later than the court’s initial presentence investigation.” Thus, AUSAs should generally disclose such information to the defense and to the United States Probation Officer conducting the PSR investigation. If additional favorable information becomes apparent after the initial PSR is issued, it should be disclosed promptly.

(e) Post-conviction evidentiary hearings: (probation/supervised release revocations, *habeas* actions) The United States District Court for the District of Maryland seldom conducts evidentiary hearings in post-conviction matters. In the event of such a hearing, however, impeachment information should be disclosed at a reasonable time before the hearing to allow the hearing to proceed without interruption.

III. Who?

Who is Part of the Prosecution Team: Gathering and Reviewing Potentially Discoverable Information

A. Prosecution Team

In *Kyles v. Whitley*, 514 U.S. 419 (1995), the Supreme Court held that prosecutors are charged with knowledge of, or possession of, any evidence held by their investigators even where the prosecutor himself was unaware of the existence of that evidence. In *Kyles*, Louisiana argued that the state prosecutor was unaware of some of the exculpatory evidence: namely, significant inconsistencies in the story that a key cooperating witness told the police. The Court held that the government had suppressed *Brady* information and held that “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. The Court concluded that a *Brady* violation can occur even if undisclosed evidence is “known only to police investigators and not the prosecutor.” *Id.* at 438.

Four years later, the Supreme Court invoked *Kyles* in a case involving a state prosecutor who was unaware of his state detective’s exculpatory notes. *Strickler v. Greene*, 527 U.S. 263 (1999).

While the state of Virginia argued that the prosecutor had an “open file” policy and thought he had fulfilled his *Brady* obligation, the Court reiterated that the prosecution has a duty to uncover and disclose to the defense *any* exculpatory evidence known to a police investigator, whether or not known or available to the prosecutor. *Id.* at 280-81 (citing *Kyles*, 514 U.S. at 438); *see also Youngblood v. West Virginia*, 547 U.S. 867, 869 (2006) (citing *Kyles* and *Strickler* with approval).

In light of *Kyles* and *Strickler*, the Department issued policy guidance, which states:

It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant.

USAM § 9-5.001. This duty to search the files of the entire prosecution team also extends to information prosecutors are required to disclose under Federal Rules of Criminal Procedure 16 and 26.2 and the *Jencks* Act.

In most cases, “the prosecution team” will include all the agents and law enforcement officers within the relevant district working on the case. Many cases arise out of investigations conducted by multi-agency task forces or otherwise involving state law enforcement agencies. In such cases, prosecutors should consider (1) whether state or local agents are working on behalf of the prosecutor or are under the prosecutor’s control (or that of a federal agency, such as DEA); (2) the extent to which state and federal governments are part of a team, are participating in a joint investigation, or are sharing resources; and (3) whether the prosecutor has ready access to the evidence. Courts will generally evaluate the role of a state or local law enforcement agency on a case-by-case basis, and statements such as Office press releases thanking all participants could be conclusive in determining whether a given entity was part of the “prosecution team” for discovery purposes.

In multi-district investigations, investigations that include both Assistant United States Attorneys and prosecutors from a Department litigating component or other United States Attorney’s Office, and parallel criminal and civil proceedings, this definition will necessarily need to be adjusted to fit the circumstances. In addition, in complex cases that involve parallel proceedings with regulatory agencies (such as the Environmental Protection Agency (EPA), Food and Drug Administration (FDA) or Securities and Exchange Commission (SEC)), or other non-criminal investigative or intelligence agencies, the prosecutor must consider whether the relationship with the other agency is close enough to make it part of the prosecution team for discovery purposes.

Practice Tip: The AUSA should be aware of public statements made by the United States Attorney or his spokespersons concerning partnerships with

other law enforcement agencies in determining who should be considered part of the prosecution team. For example, was ICE or the Coast Guard present for a press conference or part of a press release at the inception of the case? If so, it is highly likely that the court would hold us responsible for anything in those agencies' files.

Factors To Consider in Determining the Scope of the Prosecution Team

- Whether the prosecutor and the agency conducted a joint investigation or shared resources related to investigating the case;
- Whether the agency played an active role in the prosecution, including conducting arrests or searches, interviewing witnesses, developing prosecutorial strategy, participating in targeting discussions, or otherwise acting as part of the prosecution team;
- Whether the prosecutor knows of and has access to discoverable information held by the agency;
- Whether the prosecutor has obtained other information and/or evidence from the agency;
- The degree to which information gathered by the prosecutor has been shared with the agency;
- Whether a member of an agency has been made a Special Assistant United States Attorney;
- The degree to which decisions have been made jointly regarding civil, criminal, or administrative charges; and
- The degree to which the interests of the parties in parallel proceedings diverge such that information gathered by one party is not relevant to the other party.

Having identified the scope of the prosecution team, the AUSA should collect from the members of the team all information that is required to be produced under this Policy and by Federal Rules of Criminal Procedure Rules 12 and 16; the *Jencks Act* and Federal Rule of Criminal Procedure 26.2; FRE 404(b) and 413-14; and *Brady* and *Giglio*.

B. AUSA's Obligation to Review Potentially Discoverable Information

When practical, AUSAs should make every effort to *personally* review all discoverable information before it is produced, even if the information is gathered and organized by others working on the case, including legal assistants, paralegals, agents, analysts, or other law enforcement personnel. In cases involving voluminous documents or computerized information, personal review by the AUSA may be impossible. In such instances, the AUSA is advised to meet with those who will be assisting in gathering discovery to develop a discovery plan and should thereafter closely oversee the gathering and production of discovery to ensure that all discoverable information is identified and produced, or made available to the defense for inspection and copying. The AUSA should always remember that ultimate responsibility for the production of all discoverable information lies with the AUSA, and that it is our license that is on the line.

IV. Where to Look Potential Sources of Discoverable Information

The discovery-gathering process should include a review of at least the following potential sources of discoverable information:

A. Evidence and Information Gathered During the Investigation. It would seem to go without saying, but AUSAs should review all evidence and information gathered during the course of the investigation, including, but not limited to, information and evidence gathered via search warrant, subpoena (grand jury, administrative, Inspector General, etc), Title III wiretaps, consensual /monitorings, jail calls, surveillance, and witness interviews. If the volume of evidence makes it impractical for the AUSA to review all the evidence, this obligation may be satisfied by making the evidence available to the defense for inspection and copying, and carefully documenting the times and means by which the evidence was made available.

B. Investigative Agency's Files, including police files. All substantive case-related information in the possession of an agent who is part of the investigative team should be reviewed by the AUSA to determine whether it should be disclosed as part of discovery. The search for information should not be limited to formal investigative reports such as FBI 302s, DEA-6s, IRS MOIs, etc. The investigative agency may also have substantive case-related information in other formats or locations that an agent may not consider to be part of the "investigative" file, such as electronic communications (ECs), searchable electronic databases, inserts, emails, or other forms of electronic communications. It may not be necessary to disclose the information in its original format, but AUSAs should review the information in its original format, whenever possible.

Practice Tip: AUSAs should be mindful that, at least in the case of the Baltimore City Police, different divisions have differing practices concerning retention of files. For example, Homicide detectives maintain their own files, so a

query to the district may not unearth a relevant homicide file. It may be necessary to query more than one officer or supervisor to obtain the entire relevant file.

C. Agent Notes. Although it is not necessary to turn over an agent's handwritten notes that have been incorporated into a 302 as part of Rule 16 discovery or the *Jencks* Act, *see, e.g. United States v. Hall*, 93 F. 3d 126, 131 (4th Cir. 1996), it is necessary to preserve them in the event that the accuracy of the related formal report become an issue. AUSAs should review the agent's notes of critical interviews, particularly interviews of the defendant, where the exact wording may be significant. If the notes contain favorable information that is not memorialized in a formal report or any information that is materially inconsistent with the formal report, the notes or the information should be produced.

Practice Tip: Remember that agent notes are not maintained in the "case file, but, in the case of the FBI, for example, are kept separately in "1-A" envelopes. If you want to examine the agent's notes, you will have to require the agent to produce the 1-As to you.

D. Confidential Informant (CI)/Witness (CW)/Human Source (CHS) Files. If a person who has been enrolled as a CI or CHS is going to be required to testify, these files will likely contain *Giglio* information, such as witness payments and criminal conduct which should be disclosed to the defense or to the court for a ruling on whether it should be disclosed to the defense. AUSAs should make arrangements with the investigative agency to review the file(s) personally. This will usually involve the AUSA going to the agency to review the files on site, as they will not generally be copied or released outside the office. The Criminal Chief is the Confidential Human Source (CHS) coordinator for the FBI, and is given notice of any arrests involving CHSs, so the AUSA may wish to check with her first.

E. Interview Reports of Testifying Witnesses. It is not always possible to identify *Brady* and *Giglio* particularly when the theory of the defense is not readily apparent. Furthermore, sometimes it is only the cumulative effect that renders the information relevant in the context of *Brady* or *Giglio*. AUSAs should always review witness interviews for potential *Brady* or *Giglio*. A witness interview may contain *Brady/Giglio* information if it discloses that the witness expects a benefit from cooperating, or indicates that the witness has given materially conflicting information or information that materially conflicts with another witness's statement, or failed to tell the whole truth from the beginning, or failed to advise the interviewing agent of certain key facts during an interview.

AUSAs should be particularly sensitive to the potential for inconsistent statements if the same witness has been interviewed repeatedly (progressive truth-telling). Some cooperating witnesses may not tell all they know the first time they are interviewed. If a witness initially denies or minimizes his knowledge of or involvement in criminal activity, and thereafter provides information that is materially broader or different, the fact that the witness provided materially different information should be memorialized, even if the variance occurs within the same interview, and should be provided to the defense as *Giglio* information.

The duty to disclose to the defendant the substance of what a witness has said during interviews, debriefings, or informal discussions cannot be avoided by failing to memorialize these events. If any such events occur that are not memorialized in an interview report, the AUSA should determine what the witness said during the session and disclose the content of the witness's statements to the defense. AUSAs should emphasize to agents the importance of memorializing all impeaching information.

F. *Brady/Giglio* Information in the Form of Material Inconsistencies Developed During Pretrial Witness Interviews. AUSAs should disclose information learned during pre-trial witness preparation that is materially inconsistent with information provided by the same or a different government witness. This does not mean that every time a witness supplies greater detail about an event that the new information is necessarily impeaching, but if it differs materially from what the witness has said on other occasions, it should be disclosed through a report of the interview prepared by the agent, or through a letter from the AUSA to the defense. Regardless, the AUSA and the agent should reach a clear understanding on who will memorialize any impeaching or inconsistent information, and the AUSA should ensure that the inconsistency is disclosed to the defense in a timely manner.

Practice Tip: In the *Stevens* prosecution, which was dismissed on the motion of Attorney General Holder because of multiple discovery lapses, one such lapse occurred where an important government witness recalled a significant event while testifying that he had failed to recall an event in an early debriefing session. The government did not disclose the inconsistency. When prepping your witnesses, be sure to note and explore with the witness any material changes from their grand jury or early statements, and disclose the difference to the defense.

G. Interviews of Non-Testifying Individuals. Sometimes during the course of an investigation, an agency will conduct literally hundreds of interviews, very few of which turn out to be relevant to the ultimate case. (Example: *McVeigh*) Because the very fact that the agency identified a different suspect, or failed to identify the defendant as a suspect could be *Brady*, the AUSA should at least review all 302s of non-testifying individuals. In general, AUSAs are not required to produce 302s of non-testifying individuals unless the reports contain exculpatory information or information inconsistent with or otherwise impeaching of a testifying witness or the government's theory of the case.

H. Prosecutor's Notes. A prosecutor's notes of witness prep are most likely going to be protected from discovery by privilege rules and Federal Rule of Criminal Procedure 16(a)(2). AUSAs should be mindful, however, that notes that contain substantially verbatim quotes of what a witness said during an interview (*Jencks*), or favorable information (*Brady/Giglio*), might have to be turned over. AUSAs preparing for trial should always review their own notes to see if they disclose any inconsistencies on the part of witnesses or other discoverable information. If the discoverable information in the AUSA's notes is contained in materials otherwise provided to the defense (e.g., 302s, agent's notes, letter to defense), that should suffice. It is possible, however, that if the exact nature of the information contained in the notes becomes an issue in the case, the court

may review the notes *in camera*.⁷ AUSAs should always avoid having substantive interaction with witnesses without an agent or other person present who can serve as a witness to the exchange. If an issue arises in a case regarding the contents or discoverability of a prosecutor's notes, the AUSA must consult with a supervisor.

I. Documents or Evidence Gathered by Civil Attorneys and/or Regulatory Agencies in Parallel Civil Investigations. If civil attorneys and/or regulatory agencies involved in parallel civil investigations are deemed to be part of the prosecution team, AUSAs must also gather and review any and all information and evidence from them that could be discoverable using the criteria set forth in the factors set forth above and in the DAG's Criminal Discovery guidance memo.

J. Case-Related Communications (emails, tweets, text messages, memoranda, notes). Because email communications from or between agents, or between agents and witnesses, may not be as complete or drafted with the same degree of focus and care as formal investigative reports, and may have the unintended effect of circumventing the investigative agency's established procedures for writing and reviewing reports, AUSAs should remind investigative agents that, unless circumstances dictate otherwise, they should communicate substantive information in the form of a formal investigative report, rather than an email.

However, recognizing that email is ubiquitous, the AUSA should review all substantive case-related communications, whether e-mails, text messages, voice messages or the like, and should determine whether disclosure in accordance with the rules and this policy is required.

Practice Tip: AUSAs should develop the habit of reminding agents and witnesses not to communicate about cases via email, voice messages, IMs, tweets, texts or other forms of electronic communication. It is perfectly fine to use email for scheduling, but you do not want to find yourself in the position of the AUSA whose agent, during a proffer, texted another agent a colorful message casting aspersions on the profferor (and eventual government witness).

K. Personnel and Disciplinary Files that May Contain Potential *Brady* or *Giglio* Information Relating to Law Enforcement Witnesses. Law Enforcement *Giglio* issues are discussed in detail above at 12. AUSAs must complete a *Giglio* checklist for each testifying officer in every case, and should determine whether each potential law enforcement witness has on- or off-duty instances of misconduct, including pending investigations, that may qualify as potential impeachment or exculpatory information. Additionally, it is wise to inquire of agents and other law

7. See *United States v. Jones*, 620 F. Supp.2d 113 (D. Mass. 2009); *United States v. Jones*, 2010 WL 565478 (D. Mass. February 19, 2010); *United States v. Livingstone*, 576 F.3d 881 (8th Cir. 2009); *United States v. Reid*, 300 Fed.Appx. 50 (2d Cir. 2008); *United States v. Campos*, 20 F.3d 1171 (5th Cir. 1994) (unpublished).

enforcement witnesses whether they have Facebook or MySpace pages or personal websites which may contain information that has to be disclosed.

Practice Tip: There have been instances where officers or agents have made racist or biased remarks on personal Facebook pages, or where they have made statements about an investigation on such social networking media. We need to uncover and disclose these.

Practice Tip: As stated above in footnote 6, there may be instances where an officer is under investigation but does not know it. For this reason, it is wise to run the names of any officers past the *Giglio* officer, just to be sure that there is not something covert, and to consider how such information might be handled.

L. Presentence Reports. AUSAs should be mindful that if a witness is or was a defendant in federal court, there will be a Presentence Report (PSR) relating to that witness. The PSR may contain *Jencks*, *Brady*, or *Giglio*. The court has not required disclosure as a general rule, since the PSR is deemed to be in the possession of the court, not the prosecution, but it is still a wise practice for the AUSA to review carefully the PSR of any witness, and to seek the court's guidance *in camera* and that of the United States Probation Office, if the AUSA believes that the PSR may contain discoverable information that is not available from any other source.

M. Databases. As government attorneys, we have access to a number of databases which may contain discoverable exculpatory or impeachment information. There are many databases to which we have access, including NCIC, FINCEN, CATS, SARs, ACS, MAGCLOLEN, MCAC and state databases, and if there is a law-enforcement reason to query all or some of these databases, the court could find that we have an obligation to search for *Brady* or *Giglio* material.

Practice Tip: AUSAs should be aware that the defense bar and the courts sometimes assume that there is a global government database where, with a couple of clicks, the government can find out everything about anybody. That isn't so, of course, and it is not legally required for an AUSA to consult every known database in a hunt for *Giglio*. To date, we have not been required to run tax histories, for example, on government witnesses. We currently have neither the resources nor the expertise to conduct comprehensive database searches for discovery purposes on every witness in every case, but AUSAs should be aware that this is an issue that may come up. If you have reason to believe that there may be database files on a witness that could contain *Brady* or *Giglio*, you should talk to your supervisor and take steps to conduct a tailored search. The United States District Court for the Northern District of Illinois recently granted a new trial in a case where a search of an FBI database *to which AUSAs do not have access* would have disclosed that the government's key witness was actively dealing drugs in a neighboring district. *United States v. Sanchez*, 2009 WL 5166230 (N.D. IL 2009) No. 07-CR 0149.

V.
How
Manner of Production and Record-Keeping

It is essential that AUSAs carefully document *everything* they provide in discovery, because, as important as it is to ensure that the defendant has everything he needs to obtain a fair trial, it is equally important for us to be able to demonstrate that we have complied with the law. Sometimes discovery challenges are raised years after conviction, when without a good record, it is nearly impossible to reconstruct, let alone defend, what the AUSA did or did not disclose.

Under no circumstances should an AUSA represent that s/he has provided “open file” discovery. Rather, the AUSA should make a meticulous record of every item turned over.

A. Manner of Production

1. Documents: AUSAs should maintain a record of all documents, photographs, transcripts, etc. provided to the defense, whether by *Bates* numbering the pages, making an exact duplicate of the materials turned over, or, by scanning discoverable documents and producing them electronically in a format that allows the documents to be searched by a word or name. If providing discovery on discs, the AUSA should make a read-only copy that cannot be over-written as evidence of what s/he provided to the defense. Disks containing electronic data should be well-labeled so that they can readily be identified.

If the discoverable documents in a case are too voluminous to be scanned, the documents should be made available to the defense for inspection and copying, and a record should be made of when the documents were made available and when and for how long the defense reviewed the documents. The investigative agent should not, however, note or make any record of what exact documents the defense attorney reviewed or copied. It is helpful to have the material organized so that a defense attorney does not needlessly waste time going through it. Boxes can be labeled, for example, “Search of 123 Main Street,” “Search of ABC Bank Offices,” “Phone Records,” etc.

a. Transcripts: If transcripts of wiretap or consensual conversations are provided in discovery, the AUSA should obtain a stipulation that the transcripts are in DRAFT FORM, and being provided as courtesy to counsel only, and that counsel will not cross-examine or make any motions based on any discrepancies between the draft transcript and the ones used at trial. This is because transcripts always evolve with multiple hearings, and as the transcripts are not evidence, it is only a courtesy to provide them to the defense.

2. Non-documentary evidence, such as objects, clothing, drug packaging, or photographs should be made available to the defense for inspection and photographing, and the AUSA and agent should meticulously document the times and places when the defense reviewed the evidence.

a. Hard Drives: For an entire computer imaged pursuant to warrant, AUSAs should 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. It is an open question as to what portions of imaged computers to disclose to the defense if the warrant authorized the government to review only limited files.

3. **Video and Audio Recordings.** 18 U.S.C. § 2517 governs the disclosure of the contents of wire oral or electronic intercepts. Disclosure can be made only upon court order. Assuming that the wire has been shut down and sealed, and an appropriate order entered, AUSAs should make copies of all recordings for the defense. See above for how to handle transcripts.

Practice Tip: The criminal paralegals are experienced and knowledgeable about producing discovery in electronic form. AUSAs should feel free to consult with them in developing a discovery plan, and should take advantage of their expertise in training the agents.

B. Record-Keeping

AUSAs should keep a written record in the criminal case file of all discovery produced to the defense and all evidence made available for inspection and copying. The AUSA should use a discovery production letter to memorialize in detail the discovery that was provided or the items or material that was made available for inspection or copying. All production letters should be maintained in the criminal case file.

C. Privacy Protection: Redacting Documents

All personal identifiers should be redacted from discovery, including, but not limited to, names of minors, dates of birth, social security numbers, taxpayer identification numbers, home street addresses, telephone numbers, Medicare or Medicaid ID numbers, financial account numbers, or any other identifier which may improperly disclose private or sensitive information. Federal Rule of Criminal Procedure 49.1, which contains direction for redacting documents filed with the court, should be used as a starting point for the redaction of documents that will be produced in discovery.

If the volume of discovery is so great that the redaction process will take so long that the production of discovery will be delayed, AUSAs may wish to consider seeking an agreed protective order at the discovery stage.

D. Handling Discovery in Child Pornography Cases

Title 18 U.S.C. § 3509(m) requires that media containing child pornography remain in government custody at all times, and provides that a court should deny any defense request for the copying or reproduction of material containing child pornography, so long as the government provides a reasonable opportunity for the defense to inspect the evidence. Accordingly, in a child pornography case, discovery will be made by having the defense attorney (and defendant, if he is not

detained) go to a place designated by the government to meet with the agent and be shown the images. AUSAs should not handle or maintain child pornography evidence in their files or in the USAO. Again, the AUSA should document carefully the dates and times on which the evidence was produced for review.

VI. Special Considerations

A. National Security Matters / Classified materials

Although all criminal cases present the same Constitutional obligations, 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 could 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.

B. Capital Cases

Capital cases present additional discovery considerations. First, under 18 U.S.C. § 3432, the government is obliged to provide a witness list to the defense at least three days before trial that includes the names and “place of abode” of the witnesses to be produced to “prove the indictment.” The court may allow for an exception if the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person. It is strongly recommended that any AUSA complying with this provision both (1) coordinate closely with the Victim Witness unit, so that the witnesses can be alerted that their names and addresses have been disclosed to the defense, and (2) obtain a protective order so that the list goes to counsel only, and cannot be disseminated further.

Second, in a death penalty prosecution, the notion of what constitutes *Brady* material is considerably expanded to encompass materials that may mitigate in the sentencing phase. Any mitigating information should be disclosed promptly and comprehensively. Statutory mitigating factors are set forth in 18 U.S.C. § 3592(a) and any evidence that tends to prove any of these mitigating factors constitutes *Brady* material in this context. Equally important, any evidence that would support a *non*-statutory mitigating factor would also constitute *Brady* material. This might include evidence of an abusive childhood, borderline IQ, organic brain damage or mental health issues not rising to the level of impaired capacity to appreciate the wrongfulness of the defendant’s actions.