



U.S. Department of Justice

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MEMORANDUM
Subject: Criminal Discovery
Date: October 2010
To: Attorneys and Support Staff
From: Donald A. Davis

This policy is intended to set forth a uniform discovery policy for all AUSAs in this district. It supersedes all previous policies on criminal discovery, including Brady and Giglio disclosures. This policy is not intended to, does not, and may not be relied upon to create any substantive or procedural rights enforceable at law by any person in any administrative, civil, or criminal matter or case. Nor are any limitations hereby placed on the otherwise lawful litigative prerogatives of the U.S. Department of Justice. See United States Attorneys' Manual (USAM) § 1-1.100; United States v. Caceres, 440 U.S. 741 (1979).

All Assistant United States Attorneys (AUSAs) in this district are expected to be familiar with and comply with all federal law, court rules and DOJ and office policies concerning criminal discovery. This includes Fed.R.Crim.P 16; the Brady, Giglio and Presser line of cases; USAM 9-5.001 (Disclosure of Exculpatory and Impeachment Information), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm#9-5.001; 9-5.100 (Potential Impeachment Information on Law Enforcement Witnesses), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm#9-5.100, the Jencks Act (18 U.S.C. § 3500) and Fed. R. Crim. P. 26.2; the District Court's Standing Discovery Order in Criminal Cases, Admin. Order 06-085 (hereafter the Standing Discovery Order), http://www.miwd.uscourts.gov/RULES%20OPINIONS/Administrative%20Order%2006-085.pdf; and any other pretrial discovery order. These statutes, rules and judicial opinions set forth the minimum standards for disclosure in a criminal case.

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I. Rule 16

A. Scope of Discovery

AUSAs are encouraged to review the January 4, 2010, memorandum from Deputy Attorney General David Ogden captioned “Guidance for Prosecutors Regarding Criminal Discovery” (the DAG Guidance memo), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00165.htm, for guidance on locating and reviewing information subject to discovery. AUSAs shall provide all discovery required by Rule 16(a) and the District Court's Standing Discovery Order. This includes an obligation to provide continuing discovery pursuant to Fed.R.Crim.P. 16(c) (hereafter Rule 16(c)) and paragraph M of the Standing Discovery Order. Although an AUSA may, with supervisory approval (see section D, *infra*), provide discovery beyond the scope of Rule 16(a) and the Standing Discovery Order, **this office does not have an "open file" policy**. The Deputy Attorney General has directed that:

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

See also United States v. Atisha, 804 F.2d 920, (6th Cir. 1986) (“If the government agrees to maintain an ‘open file’ policy, ... the government is obligated to adhere to that agreement”). No AUSA is authorized to implement, agree to, or imply or represent an "open file" policy. Discovery materials do not normally include information concerning Departmental policy, Office policy, internal committee decisions, or work product. Any request for this type of information shall be brought to the attention of a supervisor.

B. Timing of Disclosure

Initial pre-trial discovery shall be provided by the time of the initial pretrial conference or as required by the District Court’s Standing Discovery Order or other order of the court. Additional discovery shall be provided "promptly" or "immediately" after it comes to the attention of the AUSA in accordance with Rule 16(c) and paragraph M of the Standing Discovery Order. AUSAs are encouraged to disclose all appropriate

discovery materials consistent with the following interests:

1. Discovery materials should be disclosed in a time and manner to ensure a fair trial;
2. Discovery materials should be disclosed with sufficient lead time to avoid inconveniencing the trial court and jury;
3. Discovery materials should be disclosed in a time and manner that will minimize the risk of harm, embarrassment, and harassment to witnesses and potential witnesses;
4. Discovery materials should be disclosed in a time and manner that will facilitate “reciprocal discovery” from defense counsel; and
5. Discovery materials should be disclosed in a time and manner that will facilitate the plea negotiation process.

C. Record of Disclosures

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

D. Exceptions

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

II. Jencks Act and Rule 26.2

The Jencks Act, 18 U.S.C. § 3500 (hereafter “Jencks Act”), provides that after the direct trial testimony of a government witness, the defense may request and obtain any prior “statement” of that witness “which relates to the subject matter” of the witness’ testimony for use in cross-examination. Fed.R.Crim.P. 26.2 (hereafter Rule 26.2) establishes a similar rule for both government *and* defense witnesses (other than the defendant), and applies not only to trials, but also to detention hearings, preliminary hearings, sentencing hearings, probation or supervised release violation hearings, and § 2255 hearings. Rule 26.2(g). The Sixth Circuit interprets the provisions of the Jencks

Act and Rule 26.2 similarly. United States v. Musick, 291 Fed. Appx. 706, 727 (6th Cir. 2008).

A. “Statements”

The Jencks Act and Rule 26.2 define a witness “statement” to mean a) a written statement made by the witness and signed or otherwise adopted or approved by the witness, b) a contemporaneous recording or other “substantially verbatim recital” of an oral statement made by the witness, or c) a statement, however taken or recorded, made by the witness to a grand jury. Reports of witness interviews, such as FBI 302s or DEA-6s, which do not meet the above definition of a “statement,” are not required to be disclosed pursuant to the Jencks Act or Rule 26.2. See United States v. Dorman, 108 Fed. Appx. 228, 244-45 (6th Cir. 2004); United States v. Nathan, 816 F.2d 230, 236-37 (6th Cir. 1987); United States v. Pope, 2007 WL 4395533 (W.D. Mich. 2007). However, it is the general practice of this office to disclose such reports (at least to the extent they relate to the subject matter of the witness’ testimony) in case they contain any Brady or Giglio information. If an AUSA has concerns about witness safety, misuse of interview reports by the defense, or other legitimate concerns, the AUSA may, with supervisory approval, stand on literal compliance with the terms of the Jencks Act or Rule 26.2.

B. Interview Notes

Notes of witness interviews do not constitute “statements” of the witness unless the notes were shown or read back to the witness and “adopted or approved” by the witness or constitute a “substantially verbatim recital” of the interview. See 18 U.S.C. § 3500(e)(1) and (2); Goldberg v. United States, 425 U.S. 94 (1976). They may, however, constitute written “statements” of the agent if the agent testifies about the interview. See Clancy v. United States, 365 U.S. 312 (1961). Even though the notes may not be producible under the Jencks Act or Rule 26.2, the District Court’s Standing Discovery Order requires the government to “advise its agents and officers involved in this case to preserve all rough notes.”

C. Timing of Disclosure

The Jencks Act and Rule 26.2 do not require production of witness “statements” until after the direct examination of the witness has concluded. However, the Sixth Circuit and other courts have encouraged earlier production of Jencks Act statements in order to prevent delay at trial and “so that defense counsel may have an adequate opportunity to examine that which is not in dispute and the court may examine the rest in camera....” United States v. Minsky, 963 F.2d 870, 876 (6th Cir. 1992). It is the general practice of this office to provide Jencks Act material at the same time as other

impeachment information, usually several days before trial begins (for example, on the Friday before trial). However, in particularly complex cases or capital cases, the AUSA may want or be required to provide such materials even earlier. See, e.g., 18 U.S.C. § 3432 (list of witnesses in capital cases must be provided at least three days before trial begins). If an AUSA has concerns about witness safety, misuse of interview reports by the defense, or other legitimate concerns that outweigh early disclosure, the AUSA may, with supervisory approval, stand on literal compliance with the terms of the Jencks Act or Rule 26.2. AUSAs are discouraged from practices that would adversely affect other AUSAs or set an adverse precedent for the office.

III. Brady and Giglio

A. The Rules

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

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

Id. at 87.¹

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

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

¹ In Brady, John Leo Brady was convicted by a jury of first-degree (felony) murder in connection with a robbery/strangulation, and he was later sentenced to death. Before Brady was sentenced, the state prosecutor failed to disclose to Brady a confession of Charles Boblit, Brady’s codefendant, in which Boblit admitted that it was he (Boblit) who did the actual killing, which was Brady’s contention. (Boblit, too, was convicted of first-degree (felony) murder and sentenced to death.) Because of the state’s failure to disclose Boblit’s confession, which Brady could have used to support his argument for a sentence of life imprisonment instead of death, the Maryland Court of Appeals vacated Brady’s death sentence and remanded the case to the trial court for resentencing. That decision was affirmed by the U.S. Supreme Court in Brady v. Maryland, 373 U.S. 83 (1963).

Id. at 154.²

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

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

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

Still, it is often useful to keep Brady and Giglio analytically distinct. First, Brady and Giglio are, at a more specific level, conceptually different kinds of evidence, and they are commonly referred to separately, as different kinds of evidence: “Giglio material” being the label for *impeachment evidence*, and “Brady material” being the label for every other kind of evidence that could be helpful to the defendant’s efforts to create a reasonable doubt (*exculpatory evidence*) or receive a lower sentence (*mitigating circumstances*). Second, the AUSA’s duties under Giglio, at least with respect to *law enforcement* witnesses, which are discussed below, are somewhat different and more complicated than her duties under Brady. Thus, for purposes of this memorandum,

the term “**Brady material**” refers to evidence or information — other than Giglio material — that could be used by a defendant to make his conviction less likely or a lower sentence more likely, and

the term “**Giglio material**” refers to evidence or information that could be

² In the Giglio case, John Giglio was prosecuted federally for negotiating forged money orders. Robert Taliento, a bank teller, helped Giglio commit the crime. Taliento was named as an unindicted coconspirator and testified at trial as a government witness. Neither Giglio nor the trial AUSA knew until after the trial that a different AUSA, the one who had handled the grand jury proceedings, had given Taliento full immunity in exchange for his testimony. In Giglio v. United States, 405 U.S. 150 (1972), the U.S. Supreme Court decided that the government’s failure to disclose the immunity agreement violated due process and overturned Giglio’s conviction.

used by a defendant to impeach a key government witness.

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

B. The “Prosecution Team” Concept

In some cases, there may be Brady or Giglio material that an agent knows about but the AUSA does not. In 1995, the U.S. Supreme Court made clear that a defendant is entitled to the disclosure of *all* Brady and Giglio material known to *any member of the prosecution team*. See Kyles v. Whitley, 514 U.S. 419, 437-38 (1995).³ Thus, if any member of the prosecution team knows of any Brady or Giglio material, the AUSA will be held legally responsible for disclosing that evidence to the defendant, whether or not she actually knows about the evidence. That is, *the AUSA’s ignorance of such evidence will not prevent a court from penalizing the government* by suppressing evidence, vacating a sentence, reversing a conviction, or recommending that the AUSA be professionally sanctioned.

The prosecution team includes all “others acting on the government’s behalf in

³ In the Kyles case, Curtis Lee Kyles was convicted of first-degree murder and sentenced to death for attempting to rob and then shooting to death a woman walking from a grocery store to her car in the store’s parking lot. Shortly thereafter, one “Beanie” contacted the police and pointed them in the direction of Kyles and away from the somewhat incriminating fact that he (Beanie) was driving the car of the murdered woman mere hours after the murder. Beanie was also the roommate of Johnny Burns, the brother of Kyles’s girlfriend, Pinky Burns. Over the course of his cooperation with the police, Beanie’s story changed several times, a fact the police either failed to recognize or simply ignored. The police did not disclose to the prosecutor Beanie’s inconsistent statements or extensive participation in the investigation, all of which might have supported the theory that Beanie was the murderer and had succeeded in misdirecting the police investigation by framing Kyles (Brady material), and that the police were incompetent (Brady/Giglio material). The police also failed to disclose to the prosecutor the prior inconsistent statements of several eyewitnesses to the murder (Giglio material). In Kyles v. Whitley, 514 U.S. 419 (1995), the Supreme Court reversed Kyles’s conviction because of the prosecution’s failure to disclose this evidence to Kyles, notwithstanding the fact that during the trial the prosecutor himself was not aware of the evidence. (After three more attempts to convict Kyles, all resulting in hung juries, DA Harry Connick dismissed the charges against Kyles. In a related development, Johnny Burns was convicted of manslaughter in connection with the shooting death of Beanie; Burns was sentenced to 25 years’ hard labor.)

the case.” Kyles, 514 U.S. at 437. At a minimum, this includes *all federal, state, and local law enforcement personnel directly involved in the investigation or prosecution of the federal criminal case*. In any given case, therefore, the federal prosecution team might include, in addition to federal agents, Kent County deputy sheriffs, City of Grand Rapids police officers, or Michigan State Police forensic document examiners.⁴

It is unclear whether and how far the prosecution-team concept will be expanded by the lower federal courts. One issue that will likely arise more often is whether the federal prosecution team includes government personnel who are not directly involved in the federal criminal investigation or prosecution but are directly involved in a federal *civil* or *administrative* investigation or proceeding relating to the same events, such as a civil lawsuit brought by DOJ for the forfeiture of assets purchased with drug-trafficking proceeds, an administrative ATF license-revocation proceeding, or a civil lawsuit brought by the SEC against dishonest brokers.⁵

C. The AUSA’s Responsibilities Under *Brady*

1. Communicating with the Case Agent

As noted above, Brady requires the prosecution to disclose to the defendant all “*evidence favorable to [him] . . . where the evidence is material . . . to guilt,*” that

⁴ The prosecution-team concept for Brady and Giglio disclosures to the defendant roughly corresponds to the grand jury rule that authorizes the automatic disclosure of federal grand jury materials to “such government personnel (including personnel of a state or subdivision of a state) to assist an attorney for the government [i.e., an AUSA] in the performance of such attorney's duty to enforce federal criminal law.” Fed. R. Crim. P. 6(e)(3)(A)(ii).

⁵ Compare United States v. Morris, 80 F.3d 1151, 1169-70 (7th Cir. 1996) (“Because [the OTS, SEC, and IRS] were [not] part of the team that investigated this case or participated in its prosecution,” materials in their possession were not subject to *Brady*. “*Kyles* . . . can[not] be read as imposing a duty on the prosecutor’s office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue.”), with United States v. Wood, 57 F.3d 733, 737 (9th Cir. 1995) (defendant convicted of obstructing lawful function of FDA; “[f]or *Brady* purposes, the FDA and the prosecutor were one. We need not decide how far the unity of the government extends under the *Brady* rule. We hold only that under *Brady* the agency charged with administration of the statute, which has consulted with the prosecutor in the steps leading to prosecution, is to be considered as part of the prosecution in determining what information must be made available to the defendant charged with violation of the statute.”).

*is, all evidence that could be used by the defendant to make his conviction less likely.*⁶ Although many criminal investigations do not uncover any Brady material, many do.

Ultimately, in any given case, it is the AUSA who decides, based on her professional judgment, what evidence is covered by Brady and must, therefore, be disclosed to the defendant. Plainly, the AUSA is responsible for disclosing any Brady material that she is aware of.

But, as noted above, the Supreme Court has made clear that a defendant is entitled to the disclosure of all Brady material known to the government, *even Brady material “known only to police investigators and not to the prosecutor.”* Kyles v. Whitley, 514 U.S. 419, 438 (1995). Thus,

the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.

Id. at 437.

Accordingly, the AUSA *must* ask the case agent if he *or any other member of the prosecution team* knows of any Brady material. The office’s new Brady/Giglio form letter to case agents does this. The AUSA *must* send this letter to the case agent when the criminal file is opened; the letter will help to document the AUSA’s fulfillment of her “duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case.” Kyles, 514 U.S. at 437. The AUSA should repeat this inquiry, orally, before all suppression hearings, trials, and sentencing hearings.⁷ Under Kyles, the AUSA

⁶ Brady also requires the prosecution to disclose evidence favorable to the defendant concerning punishment. But, in contrast to Brady material relating to the question of guilt, Brady material relating to sentencing issues is the subject of significantly fewer disputes and defense challenges.

⁷ In the absence of case law to the contrary, it is the policy of this office that the government’s Brady and Giglio obligations extend to only the following three adversarial proceedings: (1) suppression hearings, (2) trials, and (3) sentencing hearings. There is no controlling legal authority holding that Brady and Giglio apply to other adversarial proceedings.

Brady does *not* apply to *ex parte* proceedings: It does not apply to the search warrant application process. See Mays v. City of Dayton, 134 F.3d 809, 815-16 (6th Cir. 1998) (rejecting district court’s effort to “interweave the *Brady* due process rationale into warrant application proceedings and to require that all potentially exculpatory evidence be included in an affidavit”).

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.⁸ The case agent can accomplish this task by giving every member of the prosecution team a copy of the new office form letter.

This office has instructed federal law enforcement agencies in this district that if the case agent is unsure whether any evidence or information is covered by Brady, he should let the AUSA know about it.

Finally, two things should be kept in mind about potential Brady material that comes to the AUSA's attention: First, the decision to disclose or not disclose potentially exculpatory evidence ultimately rests with the AUSA, and so evidence that is identified as Brady material by the case agent and provided to the AUSA will not necessarily be disclosed to the court or the defendant.⁹ Second, potential Brady material that *is* disclosed to the defendant will not necessarily be admissible at trial.¹⁰ The AUSA should make

(However, if the affiant omits "critical information from the affidavit" "with an intention to mislead," there might be a Franks violation. See Mays, 134 F.3d at 816.) Likewise, Brady does not apply to grand jury proceedings. See United States v. Williams, 504 U.S. 36 (1992). (However, the U.S. Attorneys' Manual provides "that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person." USAM § 9-11.233.)

⁸ This responsibility is similar to the case agent's responsibility to inform all federal, state, and local government employees to whom grand jury materials are disclosed of the rule of grand jury secrecy. See Fed. R. Crim. P. 6(e)(3)(A)(ii), (B).

⁹ For example, the AUSA may conclude that the evidence in question is simply not exculpatory. Or, even if the evidence is arguably exculpatory, the AUSA may choose not to disclose it because she is absolutely, positively certain that the evidence is inadmissible and will not lead directly to admissible Brady material. Cf. Wood v. Bartholomew, 516 U.S. 1, 6 (1995) (per curiam) (because law of state in question barred use of polygraph evidence to impeach witnesses, state was not required by Giglio to disclose to defendant polygraph evidence concerning key prosecution witness).

¹⁰ For example, the evidence might be excluded because it is irrelevant, see Fed. R. Evid. 402, because its probative force is outweighed by the risk of unfair prejudice or other negative factors, see Fed. R. Evid. 403, or because it is hearsay, see Fed. R. Evid. 802. Therefore, when the AUSA does disclose Brady material to the defendant, she should consider whether grounds

sure that the case agent understands both of these facts.

2. Examples of *Brady* Material

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

- 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).¹¹
- Evidence that either casts a substantive doubt upon the accuracy of evidence including but not limited to witness testimony the AUSA intends to rely on to prove an element of any crime charged, or which may have a significant bearing on the admissibility of prosecution's evidence. USAM 9-5.001(C).¹²
- Evidence tending to show the existence of an affirmative defense, such as entrapment or duress.¹³

exist for filing a motion *in limine* to exclude or limit the evidence. (Keep in mind, though, that "the judge may always change his mind [about an *in limine* ruling] during the course of a trial." Ohler v. United States, 120 S. Ct. 1851, 1854 n.3 (2000).)

¹¹ The AUSA must disclose this information even if he does not believe such information will make the difference between conviction and acquittal for a charged crime. USAM § 9-5.001(C).

¹² See note 12 above.

¹³ See note 12 above.

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

D. The AUSA’s Responsibilities Under *Giglio*

1. Communicating with the Case Agent

The government’s constitutional duty to disclose evidence favorable to the defendant includes “*evidence affecting [the] credibility*” of key government witnesses. *Giglio v. United States*, 405 U.S. 150, 154 (1972). This duty exists with respect to key government witnesses at suppression hearings, trials, and sentencing hearings.¹⁴

As with Brady material, an AUSA is constitutionally required to disclose all Giglio material that she *or any other member of the prosecution team* is aware of. The AUSA, consequently, “has a duty to learn of any [Giglio material] known to the others acting on the government’s behalf in the case, including the police.” *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

Accordingly, the AUSA *must* ask the case agent if he *or any other member of the prosecution team* knows of any Giglio material on any government witness. The office’s new mandatory Brady/Giglio form letter to case agents does this. The AUSA should repeat this inquiry, orally, before all suppression hearings, trials, and sentencing hearings.¹⁵ Under Kyles, the AUSA is *required* to make these inquiries.

The primary responsibility for getting Giglio material to the AUSA on civilian witnesses — i.e., government witnesses other than law enforcement witnesses — lies with the case agent, which in turn means that the case agent must make sure that *every* member of the prosecution team knows the Giglio rule. The case agent can accomplish this task by giving every member of the prosecution team a copy of the new office form letter.

¹⁴ See supra note 8.

¹⁵ See supra note 8.

NOTE: The separate subject of Giglio material on **law enforcement** witnesses is discussed below. The acquisition by federal prosecutors of evidence that could be used to impeach law enforcement witnesses (particularly evidence of prior agent misconduct) and the disclosure of such evidence to defendants are sensitive matters that are governed by specific agency policies, the most significant of which is the Attorney General's Giglio Policy issued on October 19, 2006.

This office has instructed federal law enforcement agencies in this district that if the case agent is unsure whether any evidence or information is covered by Giglio, he should let the AUSA know about it.

Finally, two things should be kept in mind about potential Giglio material that comes to the AUSA's attention: First, the decision to disclose or not disclose impeachment evidence on a *civilian* government witness ultimately rests with the AUSA, and so evidence that is identified as Giglio material by the case agent and provided to the AUSA will not necessarily be disclosed to the court or the defendant.¹⁶ Second, evidence

¹⁶ The AUSA may conclude that the evidence in question simply has no bearing on the witness's credibility. Or the AUSA may choose not to disclose the evidence, even if relevant to credibility, because she is absolutely, positively certain that the evidence is inadmissible for purposes of impeachment and will not lead directly to admissible Giglio material. See Wood v. Bartholomew, 516 U.S. 1, 6 (1995) (per curiam) (because law of state in question barred use of polygraph evidence to impeach witnesses, state was not required by *Giglio* to disclose to defendant polygraph evidence concerning key prosecution witness).

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

[u]ndisclosed "[*Brady* or *Giglio*] evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome" of the case; hence, the undisclosed evidence will be deemed material only if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."

* * *

that *is* disclosed to the defendant will not necessarily be admissible at trial.¹⁷ The AUSA should make sure that the case agent understands both of these facts.

2. Examples of *Giglio* Material

To decide what evidence is covered by Giglio, one needs to know the ways in which a witness can be impeached. AUSAs should be especially alert to the existence of

In general, impeachment evidence has been found to be material where the witness at issue “supplied the only evidence linking the defendant(s) to the crime,” or where the likely impact on the witness’s credibility would have undermined a critical element of the prosecution’s case. In contrast, a new trial is generally not required when the testimony of the witness is “corroborated by other testimony” or when the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable.

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

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

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

¹⁷ For example, *extrinsic* evidence of specific instances of misconduct involving dishonesty is inadmissible. See Fed. R. Evid. 608(b). In addition, impeachment evidence, though relevant, may be excluded as being too remote, speculative, or confusing or too much of a distraction from the main event (i.e., the defendant’s guilt). See Fed. R. Evid. 403. Impeachment evidence might also be inadmissible as hearsay. See Fed. R. Evid. 802. Therefore, when the AUSA does disclose Giglio material to the defendant, she should consider whether grounds exist for filing a motion *in limine* to exclude or limit the evidence. (Keep in mind, though, that “the judge may always change his mind [about an *in limine* ruling] during the course of a trial.” Ohler v. United States, 120 S. Ct. 1851, 1854 n.3 (2000).)

evidence relating to the first two forms of impeachment described below, namely, a witness's bias and a witness's prior misconduct involving dishonesty.

a. *Bias*

A witness can be impeached with evidence (including extrinsic evidence) that he has a bias against the defendant or in favor of the government. See generally United States v. Abel, 469 U.S. 45 (1984). The sources of such bias are too numerous and varied to catalogue, but here are a few illustrations:

- A witness might dislike the defendant because of some unrelated previous encounter between the two or because of the defendant's race.
- A witness who has some actual or potential exposure to criminal penalties arising from the subject matter of the prosecution may have a pro-government bias resulting from his getting some form of leniency from the government, which may take many forms, such as a plea agreement reducing the witness's potential sentence, an agreement not to seek forfeiture of his property, a decision to place him in the witness security program, or a decision to grant him full transactional immunity. Another form of favorable treatment that could lead to pro-government bias in a government witness is the government's giving him money, gifts, or any other thing of value. With respect to an incarcerated government witness, such favorable treatment may also include his transfer to a more comfortable facility or his receipt of special jailhouse privileges.¹⁸
- 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

¹⁸ The most notorious examples of favorable treatment given to incarcerated government witnesses are the favors that were provided to some of the government witnesses in the federal El Rukns gang prosecutions in Chicago. The witnesses were El Rukns who had pleaded guilty and were incarcerated at the Metropolitan Correctional Center. The prosecution team allowed the witnesses to receive and use drugs and have sex with others in the offices of the U.S. Attorney and ATF. It also allowed the witnesses to have unlimited telephone privileges. See United States v. Boyd, 55 F.3d 239, 242-46 (7th Cir. 1995). The government's failure to disclose these favors before or during the four-month trial of seven gang members resulted in the reversal of the convictions of all seven defendants, five of whom had been sentenced to life imprisonment and two of whom had been sentenced to 50 years' imprisonment. See id. at 246.

treatment in a related or unrelated proceeding pending before another government agency or court, or because he fears that such a proceeding will be instituted.

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

b. Specific Instances of Misconduct Involving Dishonesty

A witness can be impeached with evidence (but *not* extrinsic evidence) of a prior act of misconduct involving dishonesty, even if it has not resulted in a criminal charge or conviction. See generally Fed. R. Evid. 608(b). Examples of such prior misconduct include lying (or failing to disclose material facts) on a job application, tax return, or search warrant affidavit; lying to criminal investigators or in a court proceeding; stealing or otherwise misappropriating property (in certain circumstances); and using an alias.¹⁹

c. Criminal Conviction

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

d. Prior Inconsistent Statements

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

¹⁹ A witness who flunks a polygraph examination has (assuming the accuracy of the examiner's findings) committed a specific act of misconduct involving dishonesty. However, in a case arising from a state prosecution, the U.S. Supreme Court decided that because the law of the state in question barred the use of such polygraph evidence for impeachment purposes, the state was not required by Giglio to disclose that evidence to the defendant. See Wood v. Bartholomew, 516 U.S. 1, 6 (1995) (per curiam). In the Sixth Circuit, the admission of polygraph results is strongly disfavored because of their "inherent unreliability," but their admission is not absolutely barred. See King v. Trippett, 192 F.3d 517, 520-23 (6th Cir. 1999); United States v. Thomas, 167 F.3d 299, 307-09 (6th Cir. 1999); United States v. Scarborough, 43 F.3d 1021, 1025-26 (6th Cir. 1994).

e. *Untruthful Character*

A witness can be impeached by the testimony of a second witness that he has a reputation in the community for being untruthful. Similarly, a witness can be impeached by the testimony of a second witness that in the opinion of the second witness, based on the second witness's dealings with and observations of the witness, the witness is generally untruthful. See generally Fed. R. Evid. 608(a).

f. *Incapacity*

A witness can be impeached with evidence (including extrinsic evidence in most situations) of defects in his physical or mental capacities at the time of the offense or when he testifies at a hearing or trial. See generally 1 McCormick on Evidence § 44 (John William Strong ed., 4th ed. 1992). An example of a physical incapacity is the myopia of an eyewitness to a bank robbery. Examples of mental incapacity are the drunken fog through which an inebriated eyewitness to a bank robbery observed the crime, the sluggishness caused by a witness's use or abuse of controlled substances at the time of trial, and a witness's mental disease or defect.

g. *Contradiction*

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

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

The government is required only to disclose the Brady and Giglio material that the prosecution team knows about.²⁰ ***The prosecution team is not required to look for***

²⁰ There is a special rule for the disclosure of presentence reports on government witnesses. In an April 1996 memorandum effectively overruling United States v. Sherlin, 67 F.3d 1208, 1218 (6th Cir. 1995) (holding that district court need not give "copy of a presentence report concerning a government witness, prepared for the court, to the defense upon request" or "review such a report *in camera* for potential *Brady* [*Giglio*] material" because "*Brady* [*Giglio*] expressly applies to material evidence withheld from the defense *by the prosecution*," not the court), the Criminal Division of Main Justice informed USAOs in the Sixth Circuit that "when the PSR is in the hands of the prosecution [which it now always is] and a defendant makes a threshold showing of a compelling need for disclosure," the district court should review the PSR *in camera* and turn over to the defendant any portion of the PSR that the district court concludes is covered by Giglio.

*unknown Brady and Giglio material*²¹ — with the notable exception discussed in footnote 21.

All evidence and other potentially discoverable material gathered during the investigation, whether in our custody or the custody or control of the other members of the prosecution team, should be reviewed. Special care should be given to gathering exculpatory/impeachment information and witnesses' statements. Specifically, you should review, or cause to be reviewed by someone intimately familiar with the law and DOJ policy on the disclosure of exculpatory and impeachment information, the following:

- a. *All* of the agency's investigative files.
- b. *All* of the CI/CW/CHS/CS files, by whatever name the agency labels these. Agencies who make use of confidential informants and cooperating individuals have their own established procedures for retaining information about those witnesses. The agencies may keep multiple files containing different types of records or information. Thus, inquiries to agencies about informants should include a review of every kind of file that might contain information about the individual.
- c. Evidence/information obtained via subpoena, search warrants, or other legal process. With respect to electronically-stored evidence, including e-mails, sufficient time must be allotted for a search of hard drives, disks and other storage hardware. These searches may take a long time, so they should be undertaken well before indictment.

- d. Evidence/information gathered by civil or regulatory agencies in parallel investigations.
- e. Substantive communications/correspondence **including e-mails, text messages, and letters, between and among prosecutors, agents, witnesses, victims, victim-witness coordinators, etc.**
- f. Potential *Giglio* information about non-law enforcement witnesses (including declarants whose hearsay statements the government might seek to introduce at trial). Ask the case agent to run a criminal history report on all non-law enforcement witnesses.

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

- g. **When preparing a witness for a hearing or trial, be very aware of our continuing obligation to disclose information that might be exculpatory or have impeachment value.** Thus, if a witness provides information that conflicts in material ways with information the witness has previously provided, or conflicts with material information provided by other witnesses, we should disclose that conflict to the defendant.

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

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

- the witness's relationship with the defendant

- the witness's motivation for cooperating/testifying
- drug and alcohol problems
- all benefits the witness is receiving, including:
 - i. Monetary payments--how are they calculated?
 - ii. Expenses, costs and housing--is anyone paying?
 - iii. Immigration status for the witness and/or family members
 - iv. Arrests--intervention by law enforcement
 - v. Taxes--has the witness paid taxes on informant payments?
- any notes, diaries, journals, e-mails, letters, or other writings by the witness
- prison files, tape recordings of telephone calls, and e-mails, if the informant is in custody
- criminal history

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

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

Also see the "The Use of a Criminal as a Witness," by Senior United States Circuit Judge Stephen S. Trott, for an extensive discussion of the issues associated with using confidential informants and other cooperators (<http://10.173.2.12/usao/eosua/ole/usabook/homi/07homi.htm>).

5. Giglio Material on Law Enforcement Witnesses

a. Generally

A law enforcement agent who is called as a witness knows (or certainly should

know) whether there is anything that exists that could be used to impeach him. That simple fact taken together with the irrebuttable presumption, established in Kyles v. Whitley, that the AUSA knows everything that any member of the prosecution team knows (whether or not she has such actual knowledge) means that the AUSA will be held legally responsible for disclosing all Giglio material on law enforcement witnesses, even if she and the case agent have no idea that such material exists. Hence the AUSA absolutely must find out, one way or another, if there is any Giglio material on any employee of a law enforcement agency — whether federal, *state, or local* — who will or might be a witness at any suppression hearing, trial, or sentencing hearing.²² The two forms of impeachment that will come into play most often with law enforcement witnesses are bias and specific instances of misconduct involving dishonesty, which are discussed above.

b. *The Attorney General's Giglio Policy*

In recognition of the tension that may arise between AUSAs and agents because of Giglio, the Attorney General issued a directive, dated December 9, 1996, entitled “*Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses* (‘[AG’s] Giglio Policy’).” This policy was amended on October 19, 2006, to conform to the Department’s new policy regarding disclosure of exculpatory and impeachment evidence. (The Amended Policy is attached.) By its own terms, the AG’s Giglio Policy governs only the DOJ law enforcement agencies (FBI, USMS, DEA, INS). But the Secretary of the Treasury has adopted the AG’s Giglio Policy for the Treasury agencies as well. See United States Attorneys’ Manual § 9-5.001.²³

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

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

It is expected that a prosecutor generally will be able to obtain all potential impeachment information directly from potential agency witnesses and/or

²² See supra note 8.

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

affiants. Each investigative agency employee **is obligated to inform** prosecutors with whom they work of potential impeachment information as early as possible prior to providing a sworn statement or testimony in any criminal investigation or case.

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

Third, the AG's Giglio Policy states that the USAO "may *also* decide to request potential impeachment information from the investigative agency." The Policy then goes on to "set[] forth procedures for those cases in which a prosecutor decides to make such a request." As described below, the AUSA initiates this procedure by simply asking the Criminal Chief to ask the law enforcement witness's agency to look for and identify any potential Giglio material on the witness.

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

Where the AUSA is concerned that there maybe a potential Giglio issue, *the AUSA must contact the Criminal Chief* prior to the commencement of *any* suppression hearing, trial, or sentencing hearing²⁴ in which a law enforcement witness (i.e., a member of the "prosecution team") is, or law enforcement witnesses are, expected to testify and give him the name(s) of the law enforcement witness(es). *The AUSA must make this contact at least two weeks before a trial begins and as soon as reasonably practicable before a suppression or sentencing hearing begins. (In fact, as explained below, contact with the Criminal Chief even sooner than than this is advisable to protect the integrity of the investigation.)* The AUSA's contact with the Criminal Chief is essential because the Criminal Chief is the clearing house/gatekeeper in the Western District of Michigan for all Giglio material on law enforcement witnesses.

In that capacity, the Criminal Chief has three functions: First, the Criminal Chief is the repository of all Giglio materials on law enforcement witnesses in the Western District of Michigan. Thus, he should be asked about, and may already know about, the existence of Giglio material on one or more of the AUSA's law enforcement witnesses. And because the Criminal Chief is the Giglio repository, *any AUSA who becomes aware of Giglio material on a law enforcement witness, especially an explicit or implicit finding by a judicial officer that a law enforcement witness has made false or misleading statements in an affidavit or while testifying, must provide that information,*

²⁴ See *supra* note 8.

*however she became aware of it, to the Criminal Chief.*²⁵

Second, the Criminal Chief is the “Requesting Official” of the AG’s Giglio Policy, which means that he is the only person authorized to request potential Giglio material on a law enforcement witness directly from the witness’s agency (through his counterpart at the agency, referred to in the AG’s Giglio Policy as the “Agency Official”). The Criminal Chief may also direct the request for Giglio material to DOJ’s Office of Inspector General and Office of Professional Responsibility.

Finally, the Criminal Chief is the arbiter of any dispute between the 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.***²⁶

As a general rule, the AUSA ***must*** initially seek Giglio material on a law enforcement witness by asking the witness directly. Moreover, ***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.*** The AUSA must also ask the Criminal Chief whether he knows of any Giglio material on that witness.

The AUSA has the additional option of asking the Criminal Chief to make a formal request to the witness’s agency for Giglio material. This option should be exercised only in certain situations. A formal request to an agency may be appropriate,

²⁵ Also, a Civil Division AUSA ***must*** inform the Criminal Chief about any information or evidence that she learns of in the course of a civil case that might be used to impeach a law enforcement witness. She must also notify the Criminal Chief whenever any personnel file or similar material concerning an employee of a law enforcement agency is disclosed to another party or to the court.

²⁶ If a law enforcement witness or his agency does not want to disclose potential Giglio material to the case AUSA for any reason, such as personal embarrassment, the witness or his agency may disclose the material directly to the Criminal Chief. If the Criminal Chief determines that the material is not covered by Giglio, he will return the material directly to the witness or his agency. If the Criminal Chief determines that the material should be disclosed to the defendant or at least submitted to the court *in camera*, he will disclose the material to the case AUSA. The AUSA should make sure that the case agent is aware of this bypass option.

for example, when the law enforcement witness asserts that there is no potential Giglio material on himself but the AUSA has some reason to doubt that assertion (because the AUSA thinks that the witness doesn't fully appreciate the meaning of Giglio or for reasons that are less benign); when the law enforcement witness asserts that there *is* potential Giglio material on him and describes it (because then it is necessary to confirm the Giglio event and fully explore the circumstances surrounding that event); or when the AUSA simply wants to be absolutely, positively certain that there is no Giglio on the witness.

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 search his repository for any Giglio material on the AUSA's law enforcement witness(es). It will also 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 be 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 simply forbid him from, among other things, interviewing a target by himself, being the sole witness of any other potentially significant event, being an affiant, or acting in an undercover capacity.

Throughout this process, of course, AUSAs should appreciate the fact that the disclosure of Giglio material on a law enforcement witness may adversely affect his privacy interests and reputation.²⁷

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

On occasion, in his effort to obtain all existing Giglio material on law enforcement

²⁷ The AG's Giglio Policy explains that its "purpose . . . is to insure that prosecutors receive sufficient information to meet their obligations under Giglio v. United States, 405 U.S. 150 (1972), while protecting the legitimate privacy rights of Government employees."

witnesses, the defendant will choose not to rely solely on the government's good faith; he will also try to invoke the power of the district court to force the government to turn over the personnel files of the law enforcement witnesses. Fortunately, in the Sixth Circuit the defendant must make some affirmative showing that the personnel file requested may actually contain Giglio material. "Mere speculation that a government file may contain *Brady* [i.e., *Giglio*] material is not sufficient A due process standard which is satisfied by mere speculation would convert *Brady* into a discovery device and impose an undue burden upon the district court." United States v. Driscoll, 970 F.2d 1472, 1482 (6th Cir. 1992).²⁸

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

There is no specific time by which the government must disclose Brady and Giglio material to the defendant. The Sixth Circuit has ruled that "due process requires only that disclosure of exculpatory material be made *in sufficient time to permit the defendant to make effective use of that material at trial.*" United States v. Farley, 2 F.3d 645, 654 (6th Cir. 1993). Moreover, if Brady or Giglio material "is within the ambit of the Jencks Act [Fed. R. Crim. P. 26.2], then the express provisions of the Jencks Act control [the timing of] discovery of that kind of evidence" (i.e., disclosure is not required until witness completes his direct examination). United States v. Presser, 844 F.2d 1275, 1283 (6th Cir. 1988). **Under DOJ Policy, Giglio materials must be disclosed whether or not the defendant has made a request for such materials.**

DOJ Policy as set forth under USAM 9-5.001 provides that "the government's disclosure will exceed its constitutional obligations. As such, the USAM provision directs disclosure of exculpatory information "reasonably promptly after it is discovered," and that the disclosure of impeachment information be made before trial. Delaying disclosure per the Jencks Act should be done only where necessary due to witness security or national security concerns. Disclosure of exculpatory or impeachment material having to do with sentencing factors should occur in time to be included in the PSR.

²⁸ The law of the Ninth Circuit is different. There, the government (in practice, this usually means the AUSA) must obtain and review the personnel file of a law enforcement witness upon the mere request of the defendant for the file. See United States v. Henthorn, 931 F.2d 29, 30-31 (9th Cir. 1991). That is, the defendant is *not* required to make any affirmative showing that the agent's personnel file may contain Giglio material to trigger the government's obligation to obtain and review the file. See *id.*

An AUSA must obtain the approval of the Criminal Chief not to disclose impeachment information before trial or not to disclose exculpatory information reasonably promptly because of its classified nature. Upon such approval, notice must be provided to the defendant of the time and manner by which disclosure of the exculpatory or impeachment information will be made.

With respect to any material that lies in a Brady or Giglio gray area and thus may or may not be material that the government must disclose to the defendant, the AUSA has three options: (1) disclose the evidence to the defendant, (2) withhold the evidence from the defendant, or (3) punt, that is, let the district judge decide whether Brady or Giglio applies by submitting the evidence to the court *in camera*, see United States v. Minsky, 963 F.2d 870, 874 (6th Cir. 1992) (“[A]n *in camera* review by the court was not only proper, but probably required.”); see also United States v. Stotts, 176 F.3d 880, 887 (6th Cir. 1999). As to the punting option, the AUSA should probably let the defendant know that the government has made an *in camera* submission to the district judge, without, of course, disclosing the material in question to the defendant. Also, keep in mind that if the district judge decides that the evidence is not covered by Brady or Giglio, and thus need not be disclosed, it does not necessarily follow that the court of appeals will agree. **Remember, DOJ Policy encourages AUSAs to err on the side of disclosure.**

F. Maintenance of Giglio Records

1. Prosecuting Office Records

The USAO will not retain in any system of records that can be accessed by the identity of an employee, potential impeachment information that was provided by an agency, except where the information was disclosed to defense counsel. This policy does not prohibit USAO from keeping motions and Court orders and supporting documents in the relevant criminal case file.

2. Copies to Agencies

When potential impeachment information received from Agency Officials has been disclosed to a Court or defense counsel, the information disclosed, along with any judicial rulings and related pleadings, shall be provided to the Agency Official that provided the information.

3. Record Retention

When potential impeachment information received from Agency Officials has been disclosed to defense counsel, the information disclosed, along with any judicial rulings and related pleadings, will be retained by the USAO, together with any related correspondence or memoranda, in a system of records that can be accessed by the identity of the employee.

4. Updating Records

Before any AUSA uses or relies upon information included in the USAO's system of records, the Criminal Chief shall contact the relevant Agency Official(s) to determine the status of the potential impeachment information and shall add any additional information provided to the USAO's system of records.

5. Removal of Records Upon Transfer, Reassignment, or Retirement of Employee

Upon being notified that an employee has retired, been transferred to an office in another judicial district, or been reassigned to a position in which the employee will neither be an affiant nor witness, and subsequent to the resolution of any litigation pending in the prosecuting office in which the employee could be an affiant or witness, the Criminal Chief shall remove from the USAO's system of records any record that can be accessed by the identity of the employee.

IV. Cases Involving National Security or Classified 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 the DOJ National Security Division (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 the 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 a request through NSD 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.