NORTHERN DISTRICT

OF MISSISSIPPI

CRIMINAL DISCOVERY POLICY

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This is a guide to discovery in criminal cases in the Northern District of Mississippi. It does not cover every issue with which an AUSA will be faced in making discovery decisions, but it is meant to provide a framework. As a part of the mentoring program, training provided by the Office of Legal Education and in-house training, AUSAs have and will continue to receive instruction on our discovery obligations in criminal cases.

The Government's disclosure obligations are generally set forth in Fed. R. Crim. P., R. 16 and R. 26.2, 18 U.S.C. Section 3500 (*Jencks* Act), *Brady*[1] and *Giglio*[2] (collectively referred to as "discovery obligations.") USAM Section 9-5.001, attached hereto as an Appendix, details DOJ policy regarding disclosure of exculpatory and impeachment information which provides for broader and more comprehensive disclosure than required by *Brady* and *Giglio*. Fed. R. Crim.P., R 16(c) imposes a continuing obligation to disclose newly discovered evidence or material before or during trial. In addition, the discovery obligations listed above apply, in whole or in part, in

sentencing hearings and habeas corpus proceedings.

I. Timing of Disclosures

Pursuant to Rule 16(a)(1)(A)-(G), discovery is made "upon a defendant's request." The government's compliance with this request triggers the defendant's obligation to produce

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

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

reciprocal discovery. A uniform discovery letter is available to send to the defense setting forth the material provided or made available to counsel pursuant to Rule 16. In order to accomplish this, the AUSA must begin addressing discovery prior to indictment. At the arraignment, the court will enter a scheduling order setting the deadline by which discovery must be completed. Keep in mind that, pursuant to Rule 16(c), there is a continuing obligation to provide discovery.

II. Discovery by the Government

Upon request by the defendant, items of discovery should be provided or made available within the time period set by the magistrate judge in the Pretrial Order: See Fed. R. Crim P. 16(a)(1)(A)-(G).

A. The substance of any oral statements made by the defendant, before or after arrest, made in response to interrogation by a person known by the defendant to be a government agent;

B. Defendant's written or recorded statement, including the grand jury testimony of the defendant relating to the offenses charged;

C. Statement of representative, employee, director, officer or agent of an organizational defendant who was legally able to bind the defendant;

D. The defendant's prior arrest and conviction records;

E. All documentary or physical evidence the government may use in its case-in-chief or which were obtained from or belonged to the defendant, or are material to preparing the defense, including copies of transcripts to be used at trial, line-ups or photo spreads used in identification of the defendant and latent fingerprints identified as those of the defendant.

F. Reports of physical or mental examinations or scientific tests or experiments;

G. Expert witnesses, including a written summary of any testimony that the government intends to use under Rules 702, 703 or 705 of Federal Rules of Evidence in its case-in-chief at trial, including the opinions of the witness and the bases and reasons for the opinion, as well as the witness' qualifications.

The prosecution should also give notice of any items seized from the defendant or a third party, any search warrants, any Title III evidence or other evidence that the defendant may move to suppress under Rule 12, Fed. R. Crim. P.

In the initial discovery letter and supplement discovery letters, the prosecutor should request reciprocal discovery from the defendant pursuant to Fed. R. Crim. P. 16(b).

Rule 16(a)(2) specifically provides that work product of the government is not subject to disclosure. Nor are statements of witnesses other than defendant except as provided in the Jencks Act. 18 U.S.C. 3500.

III. Rule 404(b), Fed.R.Evid.-Proof of Other Crimes

Rule 404(b) of the Federal Rules of Evidence provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident provided that 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.

Rule 404(b) of the Federal Rules of Evidence requires reasonable pretrial notice of evidence to be offered under that rule. However, AUSAs should consider early disclosure to avoid the evidence being excluded for failure to give the defendant adequate notice to defend against the evidence. For guidance on the admissibility and procedures for admitting 404(b) type evidence see United States v. Beechum, 582 F.2d 898 (5th Cir. 1978).

IV. Impeachment and Exculpatory Evidence and Materials

The Constitution and the case law require disclosure of evidence favorable to the defendant, including misidentification, exculpatory statements and other Brady material.

Every AUSA is encouraged to take pretrial discovery obligations seriously, plan ahead for meeting these obligations, and carefully document all disclosures made, usually by copy of the discovery letter with copies of discovered documents attached.

A. Exculpatory information (including information which the defense may assert is exculpatory) must be disclosed at a time prior to trial to reasonably allow the defense sufficient time to make use of the information. *Brady* requires disclosure of fact-based impeachment materials or material witness inconsistencies. Note: *Brady* is a rule of disclosure, not admissibility.

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

Prosecutors should always consider security concerns of victims/witnesses when making discovery timing decisions as well as protecting ongoing investigations, preventing obstruction of

justice, investigative agency concerns and other strategic considerations that improve the chances of reaching just results.

V. The Jencks Act (18 U.S.C. § 3500 and FRCP 26.2)

The Jencks Act (18 U.S.C. § 3500, requires the government to make “witness statements” available to the defense upon request after the witness testifies on direct examination. (Fed. R.

Crim. P. 26.2 imposes the same requirement on the defense for all witnesses other than the defendant.) "Witness statements" include writings that the witness made, signed or adopted; recordings of the witness; substantially verbatim written recordings by a person interviewing the witness and grand jury transcripts.

As a matter of law, a court cannot order the government to disclose witness statements before the witness has testified at trial. However, in the discretion of the AUSA, Jencks Act statements may be made available to the defense in advance to promote flow and efficiency at trial. The timing of this disclosure is solely within the discretion of the AUSA. In all cases, AUSAs should have defense counsel return the Jencks statements to the government at the end of the hearing or trial.

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

While defense counsel may treat agents' interview reports as witness statements, AUSAs should resist such a characterization. An AUSA may decide to disclose interview reports in a particular case, but as a matter of law, they are not required to be disclosed unless the agent is a witness concerning the substance of the written report or the report contains impeachment or exculpatory information that must be disclosed under *Brady* or *Giglio*. Should an ROI contain exculpatory or impeachment information and is not otherwise to be disclosed, redact all information except the exculpatory or impeachment information or compose a letter containing the impeachment/exculpatory information. If agency reports are disclosed, redact all references to other reports or cases, and all identifying names, numbers, etc. for the agencies' filing

purposes. Further, an AUSA should move *in limine* to prevent a non-agent witness from being impeached by an agency report that he did not adopt.

Prior to making a formal report, agents typically take notes during the investigation of events or of witness interviews. These rough notes are not Jencks Act statements of the witness or the agent. Absent a court order, an AUSA generally should not turn over an agent's rough notes unless there is no other means available to meet the government's obligations. To the extent that they exist, an AUSA should review the notes to ensure that the notes do not record what the witness said verbatim or contain exculpatory or impeachment materials.

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

An agent's ROI is *Jencks* if the agent is going to testify about the subject matter contained in the ROI. In that instance, the ROI must be disclosed as *Jencks* material of the testifying agent.

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

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

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

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

Note: This District has long employed the philosophy . . . if in doubt, disclose.

VII. Scope of Team

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

In determining who should be considered part of the prosecution team, an AUSA must determine whether the relationship is close enough to warrant inclusion for discovery purposes. Examples are:

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

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

C. State/local agencies – a police officer is a part of the "prosecution team" if the investigation is a multi-agency task force and the AUSA is directing the officer's actions in any way; or if the officer/trooper participated in the investigation or gathered evidence which ultimately led to the charges.

Considerations in determining whether an agency or district should be considered part of

the “prosecution team”:

1. Whether the AUSA/case agent conducted a joint investigation or shared resources relating to the investigation with the other district or regulatory agency;
2. Whether the other agency/district played an active role in the AUSA's case;
3. The degree to which decisions have been made jointly regarding the other district's or agency's investigation and yours;
4. Whether the AUSA has ready access to the other entity's evidence; and
5. Whether the AUSA has control over or has directed action by the other entity.

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

VIII. Potential Sources of Discoverable Information

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

A. Investigative Agency’s 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 302's, DEA-6's, IRS MOI’s, 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 (EC's), 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.

B. Confidential Informant (CI)/Witness (CW)/Human Source (CHS) Files. These files will likely contain *Giglio* information 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 possessing the file(s) to review the file(s) personally, whenever possible. If the file is located out of the district, AUSAs may consider asking an AUSA in the district where the file is located for assistance in reviewing the file.

C. Evidence and Information Gathered During the Investigation. 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, 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.

D. 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 should also gather and review any and all information and evidence from them that could be discoverable.

E. Substantive Case-Related Communications (emails, tweets, text messages, memoranda, notes). Substantive case-related communications, regardless of format or means of transmission, should be reviewed and disclosed if discoverable.

F. Personnel and Disciplinary Files that May Contain Potential *Brady or Giglio* Information Relating to Law Enforcement Witnesses. AUSAs 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. *See* also paragraph X below.

G. Handwritten Notes of Agents. AUSAs should review the agent's notes of critical interviews, which would include any interview of a defendant, and the notes relating to any report of interview the accuracy of which the defense has questioned. *See also* paragraph XII below.

H. Presentence Reports

If an AUSA has a witness who is or was a defendant in federal court, in most cases there will be a Presentence Report (PSR) relating to that witness. The PSR may contain Jencks, *Brady*, or *Giglio* that may need to be disclosed at the appropriate time. The AUSA must obtain the court's consent to disclose any relevant information received in a PSR.

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

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

X. Obtaining Giglio Information from Local Law Enforcement Agencies

Giglio Policy (Law Enforcement Witnesses)

A. Overview

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

B. Requesting the Information

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

C. Submission of Request to Agency

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

1. A finding of misconduct or similar adjudication that reflects upon the truthfulness or possible bias of the employee including a finding of lack of candor during an administrative inquiry;
2. Any past/pending criminal charge; and
3. Any credible allegation of misconduct that reflects upon the truthfulness or possible bias of the employee.

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

1. The court issued an order or decision requiring disclosure;
2. The allegation was made by a federal prosecutor or judge.
3. The allegation received publicity;
4. Disclosure is otherwise deemed appropriate.

D. If Potential Impeachment Exists

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

XI. Disclosure Questions Relating to Trial Preparation Witness Interviews

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

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

XII. Disclosure of Agent's Notes

It is the current law of this circuit that the interview notes of agents are not deemed to be the agent's Jencks material or discoverable pursuant to Rule 16 of the Federal Rules of Criminal Procedure. See, *United States v. Brown*, 303 F.3d. 582 (2002) cert. denied, 537 U.S.1173 (2003). If the agent's notes are a faithful representation of what is contained in their formal report (ROI),

AUSAs have no duty to disclose the interview notes. Conversely, however, if the notes depart materially from what is contained in the formal report, disclosure should be considered after consultation with an AUSA's supervisor and the Discovery Coordinator. When deciding whether to charge a 18 U.S.C. Section 1001 false statement to an agent as a count in an indictment, an AUSA should consider reviewing the agent's notes to determine whether they are consistent with the formal ROI.

XIII. Maintaining Records of Disclosure

Faithful adherence to the discovery and disclosure duties imposed on AUSAs should be accompanied by evidence of the discharge of those duties. Accordingly, AUSAs should maintain a file containing any and all correspondence related to discovery which inventories any and all documents, statements, reports, or exhibits given to defense counsel.

An exact copy of all the discovery given to the defense should be made and kept for later reference.

XIV. Electronic Media

In order to reduce costs associated with providing discovery materials on paper, AUSAs are encouraged to produce discovery materials in a digital/electronic format which is readily accessible by the defense, i.e. compact disc or other media. The Automated Litigation Support Specialist, Systems Manager, Information Technology Specialist and legal assistants are available to aid in this process. Please make arrangements with any of the above at the earliest possible time as the process, especially in complex case, may be time consuming.

When producing discovery in a digital/electronic format, AUSAs should make and keep a copy of the digital/electronic media and an inventory or a paper record of contents of the electronic media.

XV. Discovery in Cases of National Security, Terrorism or Involving 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 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 NSD.

Although discovery issues relating to classified information are most likely to arise in national security cases, they may also arise in a variety of other criminal cases, including narcotics cases, human trafficking cases, money laundering cases, and organized crime cases. In particular, it is important to determine whether the prosecutor, or another member of the prosecution team, has specific reason to believe that one or more elements of the IC possess discoverable material in the following kinds of criminal cases:

- Those targeting corrupt or fraudulent practices by middle or upper officials of a foreign government;
- Those involving alleged violations of the Arms Export Control Act or the International Emergency Economic Powers Act;
- Those involving trading with the enemy, international terrorism, or significant international narcotics trafficking, especially if they involve foreign government or military personnel;
- Other significant cases involving international suspects and targets; and
- Cases in which one or more targets are, or have previously been, associated with an intelligence agency.

For these cases, or for any other case in which the prosecutors, case agents, or supervisors making actual decisions on an investigation or case have a specific reason to believe that an element of the IC possesses discoverable material, the prosecutor should consult with NSD regarding whether to make through NSD a request that the pertinent IC element conduct a prudential search. If neither the prosecutor, nor any other member of the prosecution team, has a reason to believe that an element of the IC possesses discoverable material, then a prudential search generally is not necessary.