Memorandum

United States Attorney
Southern District of Mississippi

Subject	Date
Discovery Policy in Criminal Cases	October 15, 2010

To	From
All AUSAs	DONALD R. BURKHALTER United States Attorney

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This memorandum sets forth the office's policy relating to Discovery. The Discovery Policy is intended to make discovery available to defense counsel in order to expedite case resolution. The Discovery Policy is not intended to, does not, and may not be relied upon to create any procedural or substantive 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; *see also United States v. Caceres*, 440 U.S. 741 (1979). The Discovery Policy is for internal use and guidance for AUSAs only. The Discovery Policy is not exhaustive as to every conceivable discovery issue and AUSAs shall be mindful of their statutory, constitutional, and Department of Justice mandated responsibilities to insure that discovery is handled in accordance with the law.

I. DISCOVERY

In almost all cases, within 30 days of a defendant being arraigned, we are obligated to make disclosures to the defense. The requirements in this District, imposed by the Court per the Order Regarding Discovery, go beyond those imposed by the Constitution, federal statute or federal rule. In general, this Office turns material over to the defense unless there is good reason not to (such as endangering the lives of witnesses, informants, etc.). However, in certain cases, an AUSA may need to proceed more cautiously. In this section, we will discuss the source of our legal obligations to make disclosures to the defense, the discovery obligations of the defense, and miscellaneous issues that often arise during discovery. At the arraignment hearing, the AUSA will hand deliver, to defense counsel, the letter found at EXHIBIT 1. If a defendant waives arraignment, then the EXHIBIT 1 letter will be sent to defense counsel on the same day the waiver of arraignment is docketed. When discovery is provided to the defense, the AUSA will use the Standard Defense Counsel Discovery Letter. *See* EXHIBIT 2.

A. Government's Obligations

1. District's Standing Order

The Order Regarding Discovery, *See* EXHIBIT 3, requires the government to disclose – within 30 days of arraignment – all material covered by Federal Rules of Criminal Procedure 16 and all material within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. The Order Regarding Discovery also requires the government to disclose impeachment evidence under *Giglio v. United States*, 405 U.S. 150 (1972), prior bad acts evidence under Federal Rule of Evidence 404(b), a witness list, and all statements of such witnesses as defined in Rule 26.2, Fed.R.Crim.P., and Section 3500(e), Title 18, United States Code five (5) days prior to trial. Prior to providing defense counsel with the items listed above five (5) days prior to trial, an AUSA must send the Witness List/Jencks letter attached as EXHIBIT 4. The items required to be turned over five (5) days prior to trial will be exchanged at the U.S. Attorney's office in either Gulfport or Jackson and will not be turned over to defense counsel unless defense counsel is reciprocating as required by the Order Regarding Discover.

It is not uncommon that additional evidence and additional witnesses come to light after initial discovery disclosures have been made. Our duty to disclose is a continuing one. The discovery letters we send to defense counsel should always note that we are providing evidence known to date, but that additional information may be obtained and additional disclosures may be made. Except in exceptional circumstances, our cases should be ready for discovery when we indict. Discovery disclosures beyond 30 days from arraignment should be the rare exception, not the rule.

2. Federal Rule of Criminal Procedure 16

Rule 16(a) sets forth the government's basic discovery obligations, and much of the Order Regarding Discovery mirrors the rule. Under Rule 16(a), the government is required to disclose:

a. written or recorded statements of the defendant;

b. the substance of any oral statements made by the defendant in response to interrogation by a known government agent;

c. the defendant's criminal history;

d. all documents or other tangible evidence the government plans to introduce in its case-in-chief or which are material to the defense;

e. reports of physical, mental, or scientific examinations (such as handwriting analysis, drug analysis, fingerprint reports, etc.) to be introduced by the government in its case-in-chief or which are material to the defense; and

f. expert witness disclosures and summaries.

Rule 16 explicitly excludes from disclosure witness statements and internal reports written by government agents or attorneys in connection with the investigation or prosecution of the case.

Rule 16 makes the government's discovery obligations contingent upon a defendant's request. In this District, however, the Order Regarding Discovery requires disclosure without a request by the defense, although the Order Regarding Discovery allows a defendant to object to the Order which relieves the government of certain of its obligations under the Order.

3. Informant Disclosure

Roviaro v. United States, 353 U.S. 53 (1957) and its progeny mandate the disclosure of the identity of government informants under a narrow set of circumstances. As a general rule, the government does not have to disclose the identity of an informant unless the informant has relevant information that is helpful to the defense, *i.e.*, he or she was an eyewitness to the charged offense.

Informants who merely act as tipsters should never be disclosed. For example, assume narcotics officers use a confidential informant to make a buy from a drug dealer at the dealers' home, and based upon the buy, the officers obtain a search warrant. They find drugs in the house, and the dealer is arrested and prosecuted on charges pertaining to the drugs discovered during the search. The government is not obligated to disclose the informant who made the buy that provided probable cause for the search. If the dealer is charged for the buy made by the informant, however, the government would have to disclose the informant as he is now an eyewitness to the transaction at issue.

Obviously, disclosure of an informant may very well endanger the safety of that informant and circumvent investigations in which they are involved. For these reasons, we resist disclosure of government informants, only make such disclosures when ordered by a court, and we will seek appropriate protective orders..

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

The definition of "statement" under Rule 26.2 mirrors that provided by the Jencks Act, 18 U.S.C. § 3500. § 3500 requires the Government to produce certain statements of witnesses who testify at trial. The statute defines "statements" to include:

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
> (2) a stenographic ... or other recording ... which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
> (3) a statement ... made by said witness to a grand jury.

18 U.S.C. § 3500(e).

It is the policy of this Office, pursuant to the Order Regarding Discovery, to disclose witness statements at least five (5) days before the start of the trial in the typical case, unless relieved of that obligation as provided in the Order Regarding Discovery, or as otherwise directed by the Court.

If a witness statement contains *Brady* material, it or the *Brady* material contained therein should be disclosed as soon as the AUSA becomes aware of it. However, if early disclosure of *Brady* and/or *Giglio* material would subject a witness to harassment or intimidation or threaten an ongoing investigation, the AUSA should make an *in camera* request of the court for a protective order to withhold disclosure for that reason until some other appropriate time. Obtaining a protective order is a two-part procedure. First, the AUSA must file a motion, seeking permission to submit a sealed *ex parte* affidavit. If the court grants that motion, the sealed *ex parte* affidavit of an agent is filed with a motion for protective order and a proposed order.

The application to the court for a protective order should make clear that the government intends to delay disclosure of exculpatory material that would identify a witness. So informing the court will provide the AUSA with judicial authorization in the event of a later claim of a *Brady* violation and this procedure cannot be undertaken without the prior written approval of the Criminal Chief.

Certain material is not covered by the Jencks Act, and AUSAs should resist disclosing these items unless they contain exculpatory evidence. For example, statements of people who will not be called as witnesses in the government's case in chief are not discoverable unless they fall within the scope of *Brady*. An agent's rough notes made during surveillance or witness interviews are not witness statements. The agents and officers working on a case should be informed to preserve their notes, however, and AUSAs have an obligation to review the notes to determine if they contain *Brady* or *Giglio* material.

Different AUSAs have different practices as to taking their own notes when interviewing witnesses. Such interviews must be done with an agent or officer present so that the AUSA does not become a witness in the case, and some AUSAs prefer that only the agent take notes. Others take their own notes for the purpose of witness preparation. If an AUSA does take notes, he or she should be mindful of the fact that notes reflecting a verbatim statement of a witness are considered to be a statement of the witness which is required to be disclosed under the Jencks Act. Neither should the witness be shown the notes for him or her to adopt. Otherwise, the notes may very well be Jencks material, and the defense may be entitled to them. Further, if an AUSA's notes vary from those taken by the agent, the notes may need to be disclosed as potential impeachment material. *See* EXHIBIT 5 - Witness Interviews and Best Practices Guide.

If multiple law enforcement agents are present during an interview, one agent should be designated to take notes. If more than one agent takes notes and the notes deviate from each other, once again the AUSA may have to disclose the fact of these deviations as potential impeachment material. Agents should be instructed to follow their respective agency's policies on note-taking and report writing.

We often try cases in which consensual or non-consensual electronic surveillance results in the production of a tape-recording. The agent should have the tape recording transcribed for use in the preparation of the case before the case is charged. Before using the transcripts at trial and before disclosing them to the defense, AUSAs should check their accuracy. Rough drafts often are incomplete or inaccurate in some respect and not in an acceptable form for the jury. AUSAs should use caution in disclosing draft transcripts to the defense. If they are different than the final version, the defense may use them in an attempt to preclude use of the more accurate version at trial or to otherwise attack the transcript.

The following should serve as additional guidance regarding the Jencks Act and Rule 26.2:

a. Statements must be substantially verbatim or otherwise adopted by the witness

The burden of establishing that a statement constitutes a Jencks Act statement is on the defendant. *United States v. Merida*, 765 F.2d 1205, 1216 (5th Cir. 1985). A trial court's ruling on whether a statement constitutes a Jencks Act statement will be reversed only if that ruling was clearly erroneous. *United States v. Martinez*, 87 F.3d 731, 734 (5th Cir. 1996).

b. There is no "open-file" discovery obligation on the part of the government

The government is not obligated to provide open-ended discovery in criminal cases. "With regard to matters that are not exculpatory or impeaching, there is no requirement that the government provide open-ended disclosure of its files." *United States v. Martinez*, 151 F.3d 384, 391 (5th Cir. 1998), *citing*, *United States v. Agurs*, 427 U.S. 97, 109 (1976).

Although the government may voluntarily agree to turn over Jencks Act statements before the witness has testified, the district court may not, by agreed discovery order or otherwise, compel the government to do so. *United States v. Welch*, 810 F.2d 485, 489 & n. 2 (5th Cir. 1987).

c. An agent's witness interview report is not a statement of the witness unless adopted by the witness

In *United States v. Martinez*, 87 F.3d 731 (5th Cir. 1996), the Fifth Circuit reviewed an order of a district court requiring the government to turn over a witness statement an agent had taken of a witness. The Court concluded that such statements were clearly not covered by the Jencks Act and reversed the district court's order of disclosure. *Id.* at 739.

In reaching this conclusion, the Fifth Circuit noted that in *Jencks v. United States*, 353 U.S. 657 (1957), the Supreme Court had decided that federal criminal defendants were "entitled, in certain circumstances, to obtain, for impeachment purposes, statements which had been made to government agents by government witnesses." *Id.* at 739, *quoting Palermo v. United States*, 360 U.S. 343, 345 (1959). In response, Congress enacted the Jencks Act. "One of the most important motive forces behind the enactment of [the Act] was the fear that an expansive reading of *Jencks* would compel the undiscriminating production of agent's summaries of interviews regardless of their character or completeness . . . it was felt to be grossly unfair to allow the

defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations, and interpolations." *Palermo,* 360 U.S. at 350. The Fifth Circuit continued: "Therefore, the Supreme Court emphasized in *Palermo* the statutory requirement that 'statements' under 18 U.S.C. 3500(e)(2) must constitute 'a substantially verbatim recital of an oral statement made by said witness to an agent. . . *Palermo,* at 351**.** It is clear from the continuous congressional emphasis on 'substantially verbatim recital' . . . that the legislation was designed to eliminate the danger of distortion and misrepresentation inherent in a report which merely selects portions, albeit accurately, from a lengthy oral recital.'" *Id.* at 739, *citing Palermo,* at 352.

The *Martinez* court called it a "tenet" that "statements that contain an agent's interpretations or impressions are not producible." *Id.* at 738 n. 10, *citing Goldberg v. United States,* 425 U.S. 94, 112 n. 2 (1976) and *United States v. Judson,* 581 F.2d 553, 554-55 (5th Cir. 1978) (unfair to require production of statements that could be said to be the product of the investigator's "selections, interpretations, and interpolations.") (citations omitted).

The Fifth Circuit has consistently ruled that agent's notes of witness interviews are not witness statements of that witness which must be turned over pursuant to the Jencks Act. *See, e.g., Duncan v. Cain,* 278 F.3d 537, 539 (5th Cir. 2002) (officer's report of a witness interview not a statement of the witness unless adopted by the witness); *United States v. Blackburn,* 9 F.3d 353, 358 (5th Cir. 1993) ("The government was not required to tender the FBI interview notes because they are not discoverable"); *United States v. Williams,* 998 F.2d 258, 269 (5th Cir. 1993) (FBI 302s not adopted by a witness are not the Jencks Act statement of that witness).

The agent's interview report is not a Jencks Act statement of the witness even if it contains some direct quotes from the witness. *See United States v. Cole,* 634 F.2d 866, 867 (5th Cir. 1981) ("[A]lthough the notes may have contained phrases or isolated sentences identical to the language used by the witness, they were not a 'substantially verbatim report' of the interview."); *Martinez,* 87 F.3d at 736, 739 (overturning district court's order of production despite the fact that the report contained some direct quotes from the witness).

The general approval of the witness of the notes does not constitute adoption of them. *United States v. Judon,* 567 F.2d 1289, 1292 (5th Cir. 1978). An interviewer's reading back portions of the notes to the witness or discussing the accuracy of the notes does not constitute adoption of the notes by the witness. *Goldberg v. United States,* 425 U.S. 94, 110 n. 19 (1976); *United States v. Newman,* 849 F.2d 156, 160 (5th Cir. 1988); *United States v. Hogan,* 763 F.2d 697, 704 (5th Cir.), *opinion withdrawn in part,* 771 F.2d 82 (5th Cir. 1985), *appeal after remand,* 779 F.2d 296 (5th Cir. 1986).

d. An agent's report is the agent's Jencks Act statement only if it relates to the subject matter of his testimony

An agent's report may become his own statement if it recounts activities he personally engaged in, other than interviewing witnesses. For example, if an agent conducts surveillance and testifies about his observations then his surveillance report becomes his statement and producible under the Jencks Act. *See United States v. Sink,* 586 F.2d 1041, 1050-511 (5th Cir. 1978) (agent's report concerning his investigation of the case is a statement of the agent), *cert.*

denied, 443 U.S. 912 (1979).

Even if it is the agent's own statement, it is not discoverable unless it relates to the subject matter of the agent's testimony. *See United States v. Ramirez*, 145 F.3d 345, 356 (5th Cir. 1998) (testifying agent's interview report of "the organization's pilot" not producible as Jencks Act statement where the agent did not testify about the pilot on direct examination; that is, the statement did not relate to the subject of the agent's testimony); *United States v. Welch*, 810 F.2d 485, 490 (5th Cir. 1987) (remand for the trial court to determine whether the report constituted a statement of the agent about which he had testified).

Thus, even if the trial court determines that a portion of the statement is producible, care should be taken to redact portions of the statement unrelated to the witness's trial or hearing testimony before turning it over to the defense. *United States v. Montgomery*, 210 F.3d 446, 452 (5th Cir. 2000).

Although unlikely to come up in the context of a preliminary hearing, grand jury testimony of an agent which merely summarizes testimony of other witnesses is neither the Jencks Act statement of the agent nor of the witnesses whose statements are summarized. *See United States v. Kamerud*, 326 F.3d 1008, 1015 (8th Cir. 2003).

5. Discovery in Title III Cases

After a case has been charged that involved a wire tap, the government is obligated to disclose certain materials pertaining to the wire tap. First and foremost, we provide defense counsel with a CD rom containing the intercepted conversations. We emphasize, in writing, that the conversations themselves are the evidence rather than any summary, description, or even transcription of the conversations we may provide. We should provide every call that has been intercepted. In the course of plea discussions, an AUSA may want to provide a defendant's attorney with a sampling of the most pertinent, inculpatory calls to facilitate reaching a resolution, but it should be stressed to the defense, in writing, that the calls provided in such instances are a sampling only, and that the government may use other calls in the trial of the case. We also provide the defense with copies of the logs that track each intercepted call.

Often in wire tap cases, some of the defendants are detained pre-trial and the issue has arisen about how to ensure that such defendants can review the intercepted conversations and confer with their counsel about this evidence during their preparation for trial. It is the policy of the Office to obtain a protective order limiting disclosure of Title III material to counsel and to designated personnel at custodial facilities. This practice allows defendants to have access while, at the same time, protecting this sensitive material from widespread dissemination within the prisons.

Final corrected transcripts are disclosed to the defense. While the defense may ask for draft transcripts to aid them in their trial preparation, providing draft transcripts is risky, and is discouraged, especially if the final versions differ in any significant way from the drafts. Every effort should be made to transcribe tapes as soon as possible.

In addition to material that relates directly to the intercepted conversations, we also

provide the defense with copies of the final version of the application, affidavit, and order authorizing electronic surveillance and any and all extensions thereof, of pen register orders and pleadings, of pleadings and orders obtained pursuant to 18 U.S.C. § 2703, of sealing applications and orders, and of notices of inventory. If this material is provided to the defense on CD rom, care should be taken to make certain the version provided is the final one that was actually submitted to the court.

We do not disclose to the defense the progress reports we submit to the court during the wire tap.

Before providing any of the above material to the defense, the AUSA should obtain, either on consent of counsel or otherwise, a protective order that prevents disclosure of wire tap material beyond defense counsel and counsel's affiliates. The order should direct counsel that copies of the Title III discovery provided cannot leave their custody or control, or the control of designated prison personnel who agree to give detained defendants controlled access. Defendants can have access only through their attorneys. Such an order will limit, to the extent possible, dissemination of sensitive Title III material and provide recourse for the Government if such dissemination occurs.

6. Discovery in National Security Cases

Cases involving national security, including terrorism, espionage, counterintelligence, and export enforcement, can present unique and difficult criminal discovery issues. The Department of Justice has developed special guidance for those cases, which is contained in Acting Deputy Attorney General Gary G. Grindler's September 29, 2010, memorandum, "Policy and Procedures Regarding the Government's Duty To Search for Discoverable Information in the Possession of the Intelligence Community or Military in Criminal Investigations." Prosecutors should consult that memorandum and their supervisors regarding discovery obligations relating to classified or other sensitive national security information. As a general rule, in those cases where the prosecutor, after conferring with other members of the prosecution team, has a specific reason to believe that one or more elements of the Intelligence Community (IC) possess discoverable material, he or she should consult NSD regarding whether to request a prudential search of the pertinent IC element(s). All prudential search requests and other discovery requests of the IC must be coordinated through NSD.

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

- Those targeting corrupt or fraudulent practices by middle or upper officials of a foreign government;

- Those involving alleged violations of the Arms Export Control Act or the International Emergency Economic Powers Act;

- Those involving trading with the enemy, international terrorism, or significant international narcotics trafficking, especially if they involve foreign government or military personnel;

- Other significant cases involving international suspects and targets; and

- Cases in which one or more targets are, or have previously been, associated with an intelligence agency.

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

B. Defense Obligations

The defense has discovery obligations as well, although they are much more limited than those imposed on the government. At the time an AUSA has provided discovery to the defense, he or she should request reciprocal discovery. Our form discovery letter makes this request, but it is routinely ignored by defense counsel. If the defense has not provided discovery within the time frame set forth in the Order Regarding Discovery, the AUSA should file a written motion for reciprocal discovery, and press the defense and the court for compliance. The government will then have an argument to preclude the defendant's introduction of evidence that falls within the scope of the Order Regarding Discovery and federal rules that was not disclosed before trial.

1. District's Standing Order

Under the Order Regarding Discovery, the defendant is required to disclose the following within 30 days of the Order Regarding Discovery being entered by the Court: (1) books, papers, tangible evidence in the defendant's possession, custody, or control that the defendant intends to introduce in his or her case-in-chief; (2) results or reports of physical or mental examinations or scientific tests the defendant will introduce in his or her case-in-chief or which were prepared by a defense witness who will testify; and (3) expert witness summaries, qualifications, and opinions.

If the defense calls a witness, other than the defendant, at any hearing in the case, they are required to turn over any statements of the testifying witness that relates to the subject matter of the witness's testimony.

2. Federal Rule of Criminal Procedure 16

Federal Rule of Criminal Procedure 16(b) sets forth the basic discovery obligations imposed on the defendant. The Order Regarding Discovery mirrors this rule. Rule 16 does not

require production of witness statements; any disclosure obligation in this regard is set forth in Rule 26.2.

3. Notice of Certain Defenses

Rules 12.1, 12.2, and 12.3 require the defendant to give notice of certain types of defenses. Each AUSA must read and understand these rules including the time requirements imposed on the government and defendant. If a defendant fails to follow the rules, the AUSA should file an objection for the record.

a. Alibi

Rule 12.1 requires the defendant to give written notice of any intended alibi defense. Before receiving such notice, the **government must request it in writing, stating the time, date, and place of the alleged offense**. The defendant's response is due within 14 days and must state specifically where the defendant was at the time of the offense and provide the names, addresses, and telephone numbers of all alibi witnesses on whom the defendant intends to rely. Once the government receives the alibi notice, within 14 days after the defendant's notice but no later than 14 days before trial, it must disclose the witnesses it will call to rebut the alibi and to establish the defendant's presence at the scene of the crime. The disclosure obligations of the defendant and the government are continuing. The failure to comply with these notice provisions may lead to the exclusion of the non-disclosed witness. However, the court cannot prevent the defendant from testifying about the alibi even if the defense fails to comply.

b. Insanity

Rule 12.2 requires the defendant to provide written notice of his intention to rely on the insanity defense. His failure to provide such notice precludes assertion of this defense. The defendant is also required to provide written notice of his intention to introduce expert evidence relating to mental disease or defect at either the trial or the penalty phase of the case. The rule provides for mental examinations of the defendant, and contains provisions applicable in the prosecution of a capital case. Should an insanity or mental defect/disease defense be raised, the AUSA will need to be thoroughly familiar with the provisions of Rule 12.2.

c. Public Authority

Rule 12.3 pertains to a claim of public authority to engage in the charged criminal conduct, that is, the defendant claims that he was acting on behalf of a law enforcement or intelligence agency. The defendant is required to provide written notice of this defense under seal, and the government must respond in writing, within 14 days after receiving the defendant's notice but no later than 21 days before trial, either admitting or denying that the defendant exercised the public authority identified in his notice. The defendant is required to identify all witnesses in support of his defense, and the government must notify those witnesses it would call to oppose the defense.

4. Defense Jencks Act responsibility

The Order Regarding Discovery and Rule

26.2 imposes the Jencks obligation on the defense, with the exception of statements of the defendant. AUSAs should be mindful that the Order Regarding Discovery only covers Jencks material for trial while Rule 26.2 covers pre-trial hearings. Accordingly, after a defense witness other than the defendant has testified, the defendant is obligated to disclose any statements he or she has of the witness that pertain to the subject matter of the testimony. A failure to produce witness statements within the custody or control of the defense will lead to the witness' testimony being struck. Fed. R. Crim. P. 26.2(e). Rule 26.2 applies not only to trial but to other proceedings as well, including suppression or detention hearings, sentencings and revocation hearings, and habeas proceedings. Particularly in cases where the defendant has retained a private investigator, it is likely that the defense may have witness statements, or at least notes of the investigator to which an AUSA can seek access or ask for an *in camera* review.

II. BRADY and GIGLIO

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court announced "[W]e 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 "[W]hen 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*]. *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,

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[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).

[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.

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 their 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 used by a defendant to impeach a key government witness.

This District and 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.

A. 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]

[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

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 they 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 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, deputy sheriffs, police officers, or investigators, agents, or examiners from a state agency.[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]

B. The AUSA's Responsibilities Under *Brady*

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.)

[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.").

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 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.

In any given case, it is, initially, the AUSA who decides, based on their 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 of which they are aware.

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 *Brady*/*Giglio* form letter to case agents does this. *See* EXHIBIT 6. The AUSA **must** send this letter to the case agent when the criminal case is indicted; the letter will help to document the AUSA's fulfillment of their "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 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

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[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 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.

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 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

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[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 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).)

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).

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

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

3. Looking for *Brady* Material

The government is required only to **disclose** the *Brady* material that the prosecution team knows about. **The prosecution team is <u>not</u> required to <u>look</u> <u>for</u> unknown *Brady* material**. That's the defendant's job. Indeed, in many cases there will be no *Brady* material for anyone to find.

C. 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.

As with *Brady* material, an AUSA is constitutionally required to disclose all *Giglio* material that they **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 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.

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[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).

Under *Kyles*, the AUSA is **required** to make these inquiries.

The primary responsibility for getting *Giglio* material to the AUSA on <u>civilian</u> 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.

<u>NOTE</u>: 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.[12] Second, evidence that *is* disclosed to the defendant will not

[12]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."

necessarily be admissible at trial.[13] 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 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

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> 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 "corrobrated 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.

[13] 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).)

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.[14]

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

- A witness may have a pro-government bias because he fears unfavorable treatment in a related or unrelated proceeding pending before another government agency or court, or because he fears that such a proceeding will be instituted.

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

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

[14]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.

(in certain circumstances); and using an alias.[15]

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.)

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

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[15]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). *But see United States v. Posado*, 57 F.3d 428 (5th Cir. 1995) (results of polygraph exam may admissible for limited purposes).

Evidence § 45 (John William Strong ed., 4th ed. 1992).

3. Looking For *Giglio* Material

The government is required only to **disclose** the *Giglio* material that the prosecution team knows about. **The prosecution team is <u>not</u> required to <u>look</u> <u>for</u> unknown *Giglio* material**[16] — with the notable exception discussed immediately below.

4. *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 they has such actual knowledge) means that the AUSA will be held legally responsible for disclosing all *Giglio* material on law enforcement witnesses, even if they 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. 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. An AUSA must utilize the form attached as EXHIBIT 7 (Oral Request for Giglio Information) when interviewing all state, county, and local law enforcement officers. The Oral Request for Giglio Information form must be completed and signed and maintained in the case file.

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. By its own terms, the AG's Giglio Policy governs only the DOJ law enforcement agencies (FBI, USMS, DEA, ATF). But the Secretary of the Treasury has adopted the AG's Giglio Policy for the Treasury agencies as well. *See* United States Attorneys' Manual

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[16]However, while it is not required to do so, the prosecution team ***should*** look for unknown *Giglio* material on key civilian government witnesses. (In fact, the Third, Fifth, and Ninth Circuits have held that "a duty to search may be imposed [] in cases where a search for readily available background information is routinely performed, such as routine criminal background checks of witnesses." *Odle v. Calderon*, 65 F. Supp. 2d 1065, 1071 (N.D. Cal. 1999).) It is always better for the government to expose a government witness's dirt (if he has any) on direct examination. It is always bad for the government to learn about such dirt for the first time during the witness's cross-examination, a situation that not only discredits the witness but often makes jurors suspect that the AUSA's incomplete direct examination was an effort to deceive them.

§ 9-5.001.

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

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

Second, as noted below, the AUSA can ask the Giglio Requesting Official whether they know 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.

5. This Office's Implementation of the AG's Giglio Policy

It is expected that an AUSA will be able to obtain all potential impeachment information directly from agency witnesses. The agency employees are obligated to inform an AUSA of potential impeachment material. Each agency should ensure this is done. However, in some cases, an AUSA may decide to request this information from the agency. In those cases, the procedures will be as follows:

a. Point of contact/requesting official

Ruth R. Morgan, Supervisory AUSA, Gulfport Office, has been designated as the Giglio Requesting Official concerning potential *Giglio/Brady* material. Ms. Morgan shall coordinate all requests from the office to covered law enforcement agencies to search for impeachment information on potential witnesses. Ms. Morgan will also provide information to the AUSAs and Agency Officials regarding relevant law and practice regarding impeachment material.

b. Scope of plan

The District Plan covers requests for impeachment material concerning personnel of the Department of Justice (DOJ) and the Department of Treasury who will be witnesses in criminal cases.

c. Initiation of request

If an AUSA determines that it is necessary to request potential *Giglio/Brady* information from an agency because one of the agency employees will be a witness in a criminal case, the prosecutor will initiate the request by contacting the Requesting Official. This shall be done in a timely manner in order to permit the agency to comply with the request. This request will be made in writing and will include information describing the nature of the case, the name of the agent witness, the role of the agent witness, and the basis for the request.

d. Submission of request to agency

Where appropriate, the Requesting Official shall submit the request tot he law enforcement agency's Point of Contact. The agency will be given an opportunity to express its views on whether certain information should be disclosed. The Agency Official shall advise the Requesting Official of any information pertaining to:

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

b) Any past or pending criminal charge brought against the employee; and

c) Any credible allegation (a credible allegation of misconduct is any one which would have resulted in an internal investigation) of misconduct that reflects upon the truthfulness or possible bias of the employee that is the subject of a pending investigation.

If the agency determines that allegations about an employee were not substantiated, credible or resulted in exoneration; disclosure to the Requesting Official is unwarranted unless:

a) the Court has issued an order or decision requiring disclosure;

b) The allegation was made by a Federal prosecutor, Magistrate Judge, or Judge on or after December 9, 1996;

c) The allegation received publicity on or after December 9, 1996;

d) The Requesting Official and Agency Official agree such disclosure is appropriate; and

e) Disclosure is otherwise deemed appropriate.

With regard to unsubstantiated allegations, allegations that are not credible, or allegations that have resulted in exoneration, the Requesting Official and AUSA will ensure that special care is taken to protect the confidentiality of such information and the privacy interests and reputations of agency employees.

e. Receipt of information from agency

Any information received by the Requesting Official shall be immediately turned over to the AUSA who generated the request with a copy to be kept by the Requesting Official. The U.S. Attorney's Office shall treat such information as sensitive information for the purposes of storage and access.

Before the AUSA uses or relies on such information, the Requesting Official will contact the relevant agency official to determine the status of the potential impeachment information and, upon receiving such additional information, the Requesting Official will add to the prosecuting office's system of records such additional information.

f. Disclosure

The AUSA handling the case will be responsible for determining the extent to which disclosure to the Court and defense counsel is warranted. No disclosure will be made without allowing the agency a reasonable opportunity to express its views. Where appropriate, the AUSA should seek an *ex parte in camera* review by the Court regarding whether the information must be disclosed to defense counsel. Protective orders should be sought where possible.

g. Where no disclosure occurred

If such information is not disclosed to the Court or defense, all materials received from an investigative agency shall be returned to the investigative agency or destroyed at the close of the case. This does not prohibit the office from maintaining copies of motions, court orders, etc. involving the materials.

h. Where disclosure has occurred

When impeachment information is received from the agencies has been disclosed to a Court or defense counsel, the information disclosed along with any rulings pertaining to it shall be provided to the agency Point of Contact and will be maintained by the Requesting Official but not in a system that can be accessed by the employee's name until Privacy Act restrictions are revised by DOJ.

i. Notification to agency

Regarding the potential for disclosure of *Giglio* impeachment material, the Requesting Official will promptly notify the relevant agency when a criminal case or investigation ends in a judgment or declination.

j. Resolution of litigation and removal of records

After the resolution of any pending litigation in which the employee could be an affiant or witness, and upon being notified that the employee has retired, has been transferred to an office in another judicial district, or has been reassigned to a position in which the employee will neither be an affiant or a witness, the Requesting Official will ensure the removal from the office's system of records any record that can be accessed by the identity of the employee (bearing in mind the need for the revision of the Privacy Act before such records can be

maintained in an identity-indexed system).

6. 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 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. 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). *Accord United States v. Andrus*, 775 F.2d 825, 843 (7th Cir. 1985); *United States v. Navarro*, 737 F.2d 625, 631 (7th Cir. 1984); *United States v. Pitt*, 717 F.2d 1334, 1338-39 (11th Cir. 1983).

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

An AUSA shall disclose *Brady* material as soon as it may be discovered. Subject to the provisions of the Order Regarding Discovery, an AUSA shall disclose *Giglio* as required by the Order or as provided by law. **Under DOJ Policy, *Giglio* materials must be disclosed whether or not the defendant has made a request for such materials.** *See* EXHIBIT 8 - Brady/Giglio Checklist for AUSAs.

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.

An AUSA must obtain the approval, in writing, 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*. As to the punting option, first, the AUSA should 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 and second, this should be done on a very limited basis. In other words, do not make a wholesale dump of every 302, ROI,

DEA 6, etc. to the judge for him to review everything. 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.**

E. 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 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.