



**U.S. Department of Justice**

United States Attorney  
District of New Jersey

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**DISCOVERY GUIDANCE<sup>1</sup>**

The discovery obligations of federal prosecutors in this District are established by the Federal Rules of Criminal Procedure; the Jencks Act, 18 U.S.C. § 3500; *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); other relevant case law; the Department of Justice's policy on the disclosure of exculpatory and impeachment information; the Local Rules of Criminal Procedure; the District Court's standing discovery order; and the rules governing professional conduct.

It is this Office's practice to abide strictly by the dictates of these authorities. In any case in which the Government's obligation to disclose is unclear, AUSAs are encouraged to disclose or, at a minimum, to present the issue to the court. AUSAs should consult with supervisors when making such decisions. While these authorities set the legal requirements, AUSAs are encouraged in appropriate cases to consider broader and earlier discovery than required.

What follows is not a formal policy statement, but rather a practice guide in outline form.

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1. The statements contained on this page, and the outline that follows, are subject to legal precedent, court orders, and local rules. They are not intended for distribution and are for the use of personnel in this Office only. These documents provide prospective guidance only, are not intended to create or confer any rights, privileges, or benefits to past, current, or future defendants, and are not intended to have the force of law. See *United States v. Caceres*, 440 U.S. 741 (1979).

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UNITED STATES ATTORNEY'S OFFICE  
DISTRICT OF NEW JERSEY

DISCOVERY GUIDANCE

I. INTRODUCTION

A. Rules and Resources

1. The obligations of Assistant U.S. Attorneys (AUSAs) to provide discovery and other information to the defense arise from and are memorialized in a number of sources. In the District of New Jersey, those sources include:
  - a. Rules 16 and 26.2 of the Federal Rules of Criminal Procedure;
  - b. The Court's Standing Order for Discovery and Inspection;
  - c. The Jencks Act, 18 U.S.C. § 3500;
  - d. *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and their progeny;
  - e. The U.S. Attorney's Manual (USAM) § 9-5;
  - f. USAO-DNJ Giglio Plan; and
  - g. Deputy Attorney General Ogden's Memorandum dated January 4, 2010 (see Criminal Resource Manual 165).
2. AUSAs should be familiar with the sources cited above and with this discovery guidance outline.
3. Human resources available to assist AUSAs in making decisions about disclosure to the defense include their supervisors, the Office's Ethics Advisor, the Office's Professional Responsibility Officer (PRO), the Office's Discovery Trainer, and DOJ's Professional Responsibility Advisory Office (PRAO). These resources should be consulted whenever an AUSA's discovery obligations are not readily apparent.
  - a. In particular, AUSAs should consult with their supervisors, the Ethics Officer, the PRO, or the Discovery Trainer, as

appropriate, concerning all situations in which:

- b. The AUSA is unclear about the applicable rule;
  - c. Recent changes in the law may have an effect upon the AUSA's obligations;
  - d. Conflicting concerns make the appropriate action unclear; or
  - e. The AUSA has any other concerns regarding discovery.
4. AUSAs should seek supervisory approval before departing from the practices set forth in this outline.
  5. It is the responsibility of the AUSA to ensure compliance with the Government's disclosure obligations. While case agents, paralegal specialists, legal assistants, and other personnel may be asked for assistance, AUSAs cannot delegate the ultimate responsibility.

B. Breadth of Discovery

1. It is the practice of the USAO-DNJ that disclosure be made consistent with the rules and case law identified above in section I(A)(1) and in accordance with this outline.
2. AUSAs should not describe discovery provided, or to be provided, as "open file" discovery.
  - a. "Open file" implies the production of all documents, which could create a misimpression with defense counsel or the court. As discussed in this outline, withholding certain non-discoverable material may be appropriate.
  - b. The concept of a "file" may be defined differently by the defense or the court than it is by AUSAs.
3. Depending upon the circumstances, broader and earlier discovery than is required by law may be well-advised and beneficial.

- a. It may promote the truth-seeking mission of DOJ and the USAO-DNJ.
  - b. It may foster speedy resolution of cases.
4. AUSAs who choose to make broader disclosures than required should advise the defense in writing that, while they are electing to do so, the Office is not *committing* to any obligation beyond what is actually required. AUSAs should consider whether any countervailing considerations counsel against such disclosure, including:
  - a. Protecting victims and witnesses from harassment or intimidation;
  - b. Protecting the privacy interests of victims and witnesses;
  - c. Protecting the integrity of ongoing investigations;
  - d. Protecting the trial from efforts at obstruction;
  - e. Protecting national security interests; and
  - f. Protecting applicable legal or evidentiary privileges.
5. When there are conflicting considerations in favor of and against earlier and broader disclosure, AUSAs should discuss the issues with their supervisors and other appropriate USAO-DNJ personnel.
6. If there are considerations militating against disclosure, and disclosure is even arguably required, AUSAs should consider requesting that the court review the material *in camera* to determine whether disclosure is necessary. See USAM § 9-5.001(E).
7. Where appropriate, AUSAs should consider seeking protective orders delaying or limiting disclosure that might otherwise be required. See USAM § 9-5.001(E). Protective orders are authorized by Fed. R. Crim. P. 16(d) and, where classified or otherwise sensitive national security material is

involved, by the Classified Information Procedures Act (CIPA), 18 U.S.C. app. 3. While elsewhere in this outline AUSAs are encouraged to provide broader discovery than the law requires, AUSAs handling national security cases are often presented with strong countervailing national security concerns that may require stricter adherence to the rules of discovery. Such considerations should be discussed with the Chief of the National Security Unit.<sup>2</sup>

C. Form of Disclosures

1. Regardless of how and when disclosures are made, AUSAs should keep a record of *everything* provided to defense counsel, including what, when, how, and to whom discovery was provided.
  - a. Except in extraordinary circumstances, AUSAs should maintain a complete, identical set of all material disclosed to the defense, whether on paper or in digital form. In order to keep an exact record of what was provided, the set should not be used for any purpose that might result in its alteration.

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2. This outline does not specifically address the handling of classified information. Cases involving classified information can present unique and difficult criminal discovery issues with far reaching implications for national security and the nation's intelligence community. Those concerns can arise in any case involving classified information, and are not unique to national security investigations. The Department of Justice has developed special guidance for those cases, which is contained in: (1) 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;" and (2) Director H. Marshall Jarrett's October 13, 2010 memorandum, "Additional District Discovery Policy Guidance." AUSAs should consult those publications, their supervisors, the Chief of the Office's National Security Unit, and the National Security Division of the Department of Justice for guidance on criminal discovery in any case involving classified information.

- b. If multiple disclosures are made, each disclosure should be segregated to maintain an accurate record of the discovery provided.
  - c. AUSAs should consider generating an index summarizing materials that have been provided or made available to the defense.
2. Disclosure ordinarily should be made under cover of a letter.
- a. If a limited number of items are being disclosed, and those items can be photocopied, copies may be enclosed with the cover letter.
  - b. The cover letter should identify with specificity the items enclosed. This practice protects the AUSA in the event of a dispute concerning what was enclosed, especially if the cover letter becomes separated from the enclosures.
  - c. If the items being disclosed are voluminous, the defense should pay for photocopying them.
  - d. Discovery may be produced via electronic media, and it may be transmitted via email, provided that a record of the disclosure is preserved.
3. Where documents include both discoverable and non-discoverable information, AUSAs should consider redacting the non-discoverable information.
- a. Such non-discoverable information may include:
    - (1) Personal identification information; and
    - (2) Information that might affect witness security or national security
  - b. Ordinarily, non-discoverable material is redacted from the document; where the discoverable portion is brief, however, it may be retyped verbatim and included in the body of the cover letter.
4. In cases involving voluminous material, AUSAs should consider providing the defense with access to the mass of documents and material to avoid the

possibility that a well-intentioned review process nonetheless fails to identify discoverable information. The material may be either reproduced or made available for inspection at our Office or the investigative agency's office.

a. Permitting defense counsel to examine a large quantity of documents may relieve the Government from the obligation of identifying discoverable materials.

b. As the Court of Appeals for the Third Circuit stated in *United States v. Pelullo*, 399 F.3d 197, 212 (3d Cir. 2005):

*Brady* and its progeny permit the Government to make information within its control available for inspection by the defense, and impose no additional duty on the prosecution team members to ferret out any potentially defense-favorable information from materials that are so disclosed.

c. AUSAs should use their best efforts to review all such material prior to making them available to the defense.

d. Defendants are entitled to review the discovery in person. Accordingly, if the defendant is in custody, arrangements must be made for him or her to be produced or to be transported by agents if such a request is made.

e. AUSAs should ensure that a record is kept when material is reviewed by defense counsel and a defendant in person. If appropriate, an index of all files subject to review can be made to keep a record of what was provided for review during discovery. Ideally, both the AUSA and at least one agent should be in a position to represent to the court that the review took place.

## II. BRADY V. MARYLAND

### A. The Government's Obligations Under *Brady v. Maryland*

1. Under *Brady v. Maryland*, the Government is required to make timely disclosure to defendants

of exculpatory material information known to the Government.<sup>3</sup>

2. Exculpatory information must be disclosed to the defense *reasonably promptly after it is discovered*. USAM § 9-5.001(D).
3. This obligation applies to both the guilt and penalty stages of every prosecution, and no request from the defense is necessary to trigger it.
4. AUSAs have a continuing duty to exercise due diligence to discover and disclose *Brady* material.
  - a. AUSAs are required to disclose information known to any member of the prosecution team. [See Section V(E)(2)]
  - b. AUSAs should be aware that they may be considered to have "constructive knowledge" of information in the possession of other agencies. In determining whether such knowledge should be imputed, courts consider:
    - (1) Whether the party with knowledge of the information is acting on the Government's "behalf" or is under its "control";
    - (2) The extent to which state and federal Governments are part of a "team," are participating in a "joint investigation," or are sharing resources; and
    - (3) Whether the entity charged with constructive possession has "ready access" to the evidence.<sup>4</sup>

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3. Under *Giglio v. United States*, 405 U.S. 150 (1972), the Government is required to disclose impeachment information (anything that might affect the credibility of a Government witness) early enough to permit it to be used. *Giglio* obligations are discussed at greater length in section V(C) below.

4. *United States v. Risha*, 445 F.3d 298, 304 (3d Cir. 2006).

- c. Accordingly, AUSAs should determine whether the USAO or the investigative agency has any such relationship with any other agency, and, if so, whether that agency possesses any relevant *Brady* (or *Giglio*) information.

B. AUSAs Are Encouraged to Provide Greater Disclosure Than Required by *Brady v. Maryland*.

1. While not required by *Brady v. Maryland* or its progeny, pursuant to DOJ policy, AUSAs must disclose information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime. USAM 9-5.001(C)(1).
2. Unlike the requirements of *Brady* and its progeny, which focus on evidence, DOJ policy requires the disclosure of information regardless of whether it is admissible evidence. USAM 9-5.001(C)(3).
3. While items of information viewed in isolation may not reasonably be seen as meeting the standard described in paragraph (2) above, several items together can have such an effect. Under DOJ policy, if this is the case, all such items must be disclosed. USAM 9-5.001(C)(4).
4. A trial should not, however, involve the consideration of information that is irrelevant or not significantly probative of the issues before the court and should not involve spurious issues or arguments which serve to divert the trial process from examining the genuine issues. Information that goes only to such matters does not advance the purpose of a trial and thus is not subject to disclosure. USAM 9-5.001(C).

III. PRE-INDICTMENT PROCEDURES

A. Working With the Investigative Team

1. AUSAs should strive to be active participants in investigative teams. AUSAs should advise and consult with agents about investigative strategies and discuss methods of collection, retention, preservation, and production of evidence to

assist, ease, and ensure compliance with discovery rules and obligations.

2. Early in the course of an investigation, AUSAs should devise a plan with the case agents to organize and even digitize voluminous evidence in a readily usable format.
3. In determining the approach that will be followed in a particular case, AUSAs should consider matters such as the costs likely to be incurred to organize the evidence, to duplicate discoverable material, and to convert the materials to electronic form. AUSAs should obtain approvals for U.S. Attorney's Office expenditures in advance.
4. Early in the investigation, AUSAs should advise the agents working on the case to preserve their rough notes of interviews, surveillance, and other case-related matters.
5. Early in the investigation, AUSAs should discuss the use of email and text messages with the members of the investigative team.
  - a. Team members should be discouraged from exchanging substantive, case related e-communications with anyone. They should be further instructed that, if they elect to use emails or text messages to communicate substantive case-related information, they should treat the preparation and retention of those emails and text messages the same way they would a formal report.
  - b. Team members must be instructed to preserve case-related email and text communications for future review.
  - c. The content of most case-related email communications falls within one of three categories:
    - (1) Potentially Privileged Communications. Email may be the most efficient way for an AUSA to communicate with other USAO personnel about case strategy or tasks, to obtain approval, or to provide advice. This kind of content may fall within the work product privilege and therefore be protected from discovery.

- (2) Substantive Communications.  
Substantive, case-related information contained in emails among AUSAs, agents, witnesses, Victim-Witness Coordinators, and others may be discoverable. "Substantive" communications include reports about investigative activity, discussions of the relative merits of evidence, characterizations of the potential testimony, interviews of or interactions with witnesses or victims, and issues relating to witness credibility.
- (3) Purely Logistical Communications. Email may be used for purely logistical matters, which generally will not be discoverable. However, very substantive "to do" lists can become discoverable and may not be privileged.

- 6. Note-taking: An agent must always be present for a proffer or witness interview. AUSAs should discuss note-taking practices with the case agent(s) at the start of the investigation. Proffer sessions and witness interviews should be memorialized by the agent. Agent and AUSA notes should be preserved, and the agent should prepare a formal report. The agent and AUSA should confer to ensure that the agent's report will be sufficiently complete to enable compliance with the Office's discovery obligations.
- 7. AUSAs should consider reviewing a draft of an agent's report before the agent finalizes the report, while ensuring that the final report comports with the agent's recollection.
- 8. In contrast with proffer sessions, there is no requirement that agents take notes during meetings conducted with witnesses in anticipation of their testimony, and no reports memorializing such meetings are ordinarily necessary. As always, however, any exculpatory or impeachment information learned during such meetings must be memorialized and disclosed.

*PRACTICE TIP:* It is not uncommon for a witness's memory (or level of candor) to evolve. Any material variance by the witness must be memorialized and disclosed. Whether a variance is

material should be discussed carefully with the agents present and, when possible, with the AUSA's supervisor.

B. Considering the Evidence Before Charges Are Filed

1. Of course, AUSAs routinely review the evidence and other available material before charges are filed in order to determine the strength of the case. In the course of that review, AUSAs should consider what steps are necessary to meet discovery deadlines.
2. At this stage, AUSAs should begin to consider whether protective orders may be appropriate.
3. During the course of their pre-charging review of the evidence, AUSAs should begin to identify material that should be disclosed under *Brady v. Maryland*.
4. While impeachment material for Government witnesses is usually not produced until shortly before the witness testifies, AUSAs reviewing evidence prior to charging should make reasonable efforts to determine what impeachment materials exist with respect to witnesses likely to testify for the Government.
5. If there is an organizational victim, AUSAs are required to file a disclosure statement pursuant to Rule 12.4. That statement should, if possible, be prepared prior to charging.

C. Pre-Indictment Disclosures

1. If a defendant has been charged by complaint and the Government has knowledge of *Brady* material, that material must be promptly disclosed. Otherwise, pre-indictment disclosures are voluntary.
2. Accordingly, an AUSA who chooses to provide discovery material pre-indictment need not provide the full range of discovery materials that would be required post-indictment.
3. Pre-indictment, AUSAs should not represent or imply that they are meeting, or that they intend to meet, their post-indictment obligations pre-indictment.

4. In appropriate circumstances, selected discovery material may be disclosed before indictment if doing so appears likely to assist in resolving the matter expeditiously.
5. AUSAs are encouraged to discuss such pre-indictment discovery with their supervisors and to seek advice concerning what items to produce. AUSAs who elect to engage in voluntary, pre-indictment discovery should not be one-sided in what they select to produce (e.g., producing only incriminating materials that do not fully reflect the facts).

#### IV. POST-INDICTMENT DISCOVERY

##### A. Rule 16 and the Court's Order for Discovery and Inspection

1. The bulk of the Government's routine disclosure obligations are set forth in Rule 16.
2. Again, AUSAs must consider the files of any member of the "prosecution team" [see Section V(E)(2)] when searching for Rule 16 material.
3. The court enters an Order for Discovery and Inspection during or shortly after arraignment in every indicted case. Under the District Court's Standing Order for Discovery and Inspection, several categories of Rule 16 discovery are ordinarily due 10 days after arraignment. However, AUSAs should consult the order actually entered in each case to determine when Rule 16 discovery is due in that case.
4. Under the District Court's Standing Order for Discovery and Inspection, the defendant is deemed to have requested discovery within the meaning of the various paragraphs of Rule 16.
5. Each time an AUSA prepares an initial Rule 16 post-indictment discovery letter (see USAO-DNJ's form discovery letter), he or she should review Rule 16 and the applicable Order for Discovery and Inspection as guides.
6. Pursuant to the District Court's Standing Order for Discovery and Inspection, AUSAs should meet or confer with defense counsel (ordinarily within 10 days of the arraignment) to seek to resolve any discovery issues prior to the filing of motions.

B. Some Suggestions About Rule 16 Discovery

1. Oral statements made by the defendant to law enforcement, see Fed. R. Crim. P. 16(a)(1)(A), may have been memorialized in agents' reports. If not, statements that meet the parameters set forth in the rule should be fully and accurately memorialized in a letter to counsel.
2. To locate written and recorded statements of the defendant discoverable under Fed. R. Crim. P. 16(a)(1)(B), AUSAs should consider the following possible items:
  - a. Handwritten or recorded statements made to law enforcement authorities;
  - b. Signed waivers of rights;
  - c. Wiretap or consensual recordings or copies of defendant's conversations, emails, faxes, text messages;
  - d. Prior deposition or other testimony given in civil or administrative parallel proceedings, if in the prosecution team's possession;
  - e. Grand jury testimony; and
  - f. For a corporate defendant, employee admissions
3. Through the case agent, AUSAs should obtain the defendant's most recent criminal history shortly before disclosing it as part of 10-day post-indictment discovery, particularly if the case has been in the investigative stage for a long time.
4. To locate documents and objects discoverable under Fed. R. Crim. P. 16(a)(1)(E), AUSAs should consider the following categories:
  - a. Items seized from the defendant or during a search;
  - b. Contraband, including narcotics, illegal weapons, and child pornography;
    - (1) Other than child pornography (because the images themselves are contraband), photocopies or photographs of these

items can be provided to the defense.

(2) Child pornography can be reviewed by defense counsel (and by the defendant, at least if there is a facially valid reason for him or her to do so) only at the U.S. Attorney's Office or the agency's office, and only with controls in place to prevent copies from being removed from the premises.

(3) The defense has a right to have an expert review contraband items and perform appropriate tests, such as chemical analyses, under agency or Government expert supervision.

c. Items obtained through grand jury subpoenas, such as telephone, bank, EZ Pass, hotel, and electronic records;

d. Photographs of: evidence, the scene of the crime or a search location, contraband, instrumentalities of crime, seized items, etc.;

e. Computers and software; and

f. Video and audio recordings.

5. To identify reports of examinations and tests discoverable under Fed. R. Crim. P. 16(a)(1)(F), AUSAs should consider the following possible items, among others:

a. Laboratory reports, such as drug analyses;

b. Fingerprint analyses;

c. Handwriting analyses;

d. Firearm operability tests; and

e. Reports concerning the forensic examination of computers or other electronic media.

6. As to expert witnesses, the following should be provided:

a. A description of the subject matter of the expert's anticipated testimony; and

- b. A curriculum vitae or resume, as well as any supplementary information concerning the witness's qualifications with respect to the subject matter of the anticipated testimony.
- 7. As to expert witnesses expected to testify to their opinions:
  - a. A summary of those opinions; and
  - b. The bases and reasons for those opinions.
- 8. AUSAs should provide notice of any witness who might be considered an expert, because a failure to provide sufficient information may result in exclusion of the testimony.

C. Bruton v. United States

- 1. Under the Court's Standing Discovery and Inspection Order, the Government must disclose to a non-declarant defendant a confession made to law enforcement by a codefendant that names or makes mention of the non-declarant defendant if the Government intends to offer that statement in evidence in its case-in-chief.
- 2. The Government is further required to provide a proposal for redaction to conform with the requirements of *Bruton v. United States*, 391 U.S. 123 (1968), *United States v. Hardwick*, 544 F.3d 565 (3d Cir. 2008) and *Vazquez v. Wilson*, 550 F.3d 270 (3d Cir. 2008).

*PRACTICE TIP:* If one or more defendants made statements subject to *Bruton*, and there are multiple codefendants, it may be impossible to determine 10 days after arraignment in which of many possible ways the statements will have to be *Brutonized*. In that event, AUSAs should discuss the situation with a supervisor and consider whether it would be advisable to seek a modification of the discovery and inspection order.

D. Transcripts

- 1. Rule 16 expressly requires the disclosure of *recordings* of the defendant, not *transcripts* of those recordings. Nevertheless, transcripts

should be provided to the defense as early as possible.

- a. Providing draft transcripts of incriminating conversations before full-fledged trial preparation encourages early guilty pleas.
  - b. The earlier final transcripts are provided, the more likely the parties will avoid last minute disputes and changes.
  - c. Pursuant to the District Court's Standing Discovery and Inspection Order, if transcripts of translated conversations are provided to the defense 30 days prior to trial, "[t]he correctness of any such translation or transcript will be deemed admitted" unless counsel files a notice setting forth specific objections 14 days prior to trial.
2. In many cases, draft transcripts should be provided to the defense before the final trial exhibits are prepared. It is advisable, however, that draft transcripts not be disclosed without first obtaining a stipulation that the draft document will not be used against the Government at trial.

*PRACTICE NOTE:* It is recommended that the AUSA obtain the signature of defense counsel *and* defendant on any stipulation.

E. Items That Could Be the Subject of a Motion to Suppress Evidence

1. In addition to disclosure required by Rule 16, pursuant to Rule 12(b)(4), items that could be the subject of a motion to suppress should be noticed or produced with Rule 16 discovery.
2. Such items may include:
  - a. Search warrants and supporting applications and affidavits (note that an unsealing order may be necessary to permit disclosure);
  - b. Wiretap orders and supporting applications and affidavits (again, an unsealing order may be necessary to permit disclosure);

- c. Search warrant returns and inventory lists;
  - d. Out-of-court identification materials, such as photo arrays; and
  - e. Items seized in a warrantless search from the defendant or from an area in which the defendant arguably had a privacy interest.
3. AUSAs should consider whether a protective order is necessary and appropriate for portions of search warrant and wiretap affidavits.

F. Hearings and Jencks Act Obligations

1. Fed. R. Crim. P. 26.2, which reiterates the Government's Jencks Act obligations, applies to suppression hearings, as well as to preliminary hearings, detention hearings, sentencing, hearings to revoke or modify probation or supervised release, and Section 2255 hearings. Fed. R. Crim. P. 12(g).
2. Pursuant to Rule 26.2(a), the Government's Jencks obligation for witnesses testifying at hearings is triggered by a defense motion. AUSAs may choose to provide Jencks Act material for such witnesses without a request from the defense. If they choose not to do so, they should nevertheless arrive at the hearing prepared to provide Jencks Act material in the event that the defendant makes such a request.
3. At a suppression hearing, pursuant to Fed. R. Crim. P. 12(h), a law enforcement officer is always considered a Government witness. Accordingly, upon request, the Government must produce Jencks Act information for law enforcement witnesses even if they are called by the defense.

G. Copying Costs

1. For most categories of documents and objects discoverable under Rule 16, the Government's obligation is to make the material available for inspection, copying, or photographing, not to provide copies of the documents or photographs of the objects to the defense. (An exception is the defendant's prior record, "a copy" of which the Government must furnish the defendant. Fed. R.

Crim. P. 16(a)(1)(D).)

2. Unless the cost is de minimis, the defense ordinarily should pay for copying or photographing documents and objects discoverable under Rule 16.

H. AUSAs' Discovery Obligations Continue After Initial Rule 16 Discovery Has Been Provided

1. *Brady*. As noted above, exculpatory information must be disclosed to the defense reasonably promptly, regardless of when it is discovered.
2. *Experts*. Additional information about experts will likely be obtained after the initial discovery letter is sent to the defense. That additional information should be provided to the defense as soon as practicable.
3. *Transcripts*. Additional and final transcripts of recorded conversations should be provided as soon as practicable.
4. *Additional Rule 16 Information*. Pursuant to Rule 16©, any additional discoverable information, no matter how or when obtained, should be disclosed to the defense as soon as practicable.

V. TRIAL PREPARATION

A. Trial Exhibits

1. The Court's Standing Discovery Order typically requires the Government to pre-mark all exhibits that will be used during the Government's direct case at least 30 days prior to the scheduled trial date and to make copies of the exhibits available to the defense for inspection and copying.
2. Providing an exhibit list is not required, but it is a courtesy AUSAs often extend to defense counsel.
3. If an exhibit list is not provided to defense counsel, AUSAs should be sure that defense counsel are aware of items that will be offered into evidence that cannot be photocopied.

B. 404(b) Material

1. The District Court's Order for Discovery and

Inspection generally requires that notice of evidence to be offered pursuant to Rule 404(b) be provided not less than 10 calendar days prior to trial.

2. The Court may require earlier notice, and it may be in the Government's interest to provide such notice earlier than required.
3. AUSAs should consider whether it would be advisable to bring an in limine motion seeking a ruling that the proposed Rule 404(b) evidence is admissible.

C. Giglio Material

1. Under *Giglio v. United States*, 405 U.S. 150 (1972), the Government must disclose impeachment information when such information is material to guilt or punishment, regardless of whether a defendant makes a request for such information.
2. DOJ policy requires AUSAs to go beyond constitutional requirements. See USAM 9-5.001.
  - a. Under DOJ policy, the Government must disclose information:
    - (1) That casts a substantial doubt on the accuracy of any evidence (including but not limited to witness testimony) upon which the AUSA intends to rely to establish an element of the offense, or
    - (2) That may have a significant bearing on the admissibility of prosecution evidence,
    - (3) Regardless of whether the prosecutor believes the information is admissible as evidence or will likely make a difference between conviction and acquittal.
  - b. Furthermore, if the cumulative impact of several pieces of information meets the disclosure requirements, AUSAs are required by DOJ policy to disclose all of the information, even if the pieces, considered separately, do not meet constitutional disclosure requirements. See USAM 9-5.001.

3. AUSAs should be aware that *Giglio* material includes:
  - a. Negative information, such as:
    - (1) Charging documents;
    - (2) Transcripts of guilty pleas;
    - (3) Completed Rule 11 forms;
    - (4) Inconsistent or varying statements;
    - (5) False testimony;
    - (6) Prior findings of incredibility;
    - (7) Criminal records;
    - (8) Instances of misconduct that might be used to attack the witness's character for truthfulness;
    - (9) Relevant negative character evidence (opinion or reputation);
    - (10) Misconduct of witnesses while cooperating;
    - (11) Drug or alcohol abuse; and
    - (12) Mental conditions
  - b. Benefits, such as:
    - (1) Plea agreement;
    - (2) Cooperation agreement;
    - (3) Proffer agreement;
    - (4) Waiver of indictment;
    - (5) Immunity;
    - (6) Agreement not to bring other charges;
    - (7) Promise not to prosecute someone else;
    - (8) Agreement that witness is not required to testify against a friend or relative;
    - (9) Agreement not to forfeit property;
    - (10) Intervention in other court proceedings, such as stays of prosecution or preclusion of discovery;
    - (11) Immigration assistance;
    - (12) Letters to parole board or probation office;
    - (13) Leniency in other prosecutions, including state or local prosecutions; and
    - (14) Material benefits, including:
      - (a) Monetary payments or relocation assistance
      - (b) Liquor, food, telephone use, gifts, clothing, cigarettes, conjugal visits.

c. Bias, such as:

- (1) Expressions of anger at the defendant;
- (2) Personal animus;
- (3) Relevant bias based on race, ethnicity, nationality, religion, gender, sexual preference, etc.; and
- (4) Pending investigations and charges against witness, regardless of identity of the investigating or charging authority if the witness is aware of the investigation (because the witness might shade testimony to please investigators).

4. *Giglio* information must be provided in time for the defense to make effective use of it. It is often sufficient to provide *Giglio* information at the same time that Jencks material is provided, but AUSAs should disclose *Giglio* material earlier if:

- a. The defense may need to conduct additional investigation in order to use the information effectively; or
- b. The material is too voluminous for the defense to review in a short period of time.

D. The Jencks Act and Rule 26.2

1. The Jencks Act, 18 U.S.C. § 3500, and Fed. R. Crim. P. 26.2 require disclosure of the prior statements of witnesses that relate to the subject matter of their testimony at trial or a hearing.

2. A "statement" includes:

- a. A written statement that the witness makes and signs or otherwise adopts and approves;
- b. A substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in any recording or transcription of a recording; and
- c. The witness's grand jury testimony.

3. Under the terms of the Jencks Act, Jencks material need not be disclosed until after the Government witness testifies on direct. However, AUSAs should provide Jencks Act material sufficiently in advance of the witness's testimony to enable the orderly progression of the trial.

E. The Scope of the Government's Obligations Under *Brady*, *Giglio*, and Jencks

1. AUSAs are obligated to disclose *Brady* and *Giglio* materials "known to" the Government and Jencks materials "in the possession of" the Government.
2. "The Government" includes all members of the "prosecution team."<sup>5</sup> Accordingly, AUSAs are responsible for disclosing all *Brady* and *Giglio* material known to any member of the prosecution team and all Jencks material in the possession of any member of the prosecution team.
3. The prosecution team includes:
  - a. Prosecutors working on the case;
  - b. Federal agents and task force officers working on the case;
  - c. Expert witnesses, if they are federal employees or the prosecutor has substantial control over them; and
  - d. If working in concert with federal law enforcement on the case:
    - (1) State, local, or foreign law enforcement officers; and
    - (2) Regulatory agencies in parallel proceedings
4. In determining whether an agency is part of the prosecution team, AUSAs should consider:

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5. The "prosecution team" is a concept frequently employed in analyzing the scope of the Government's obligations under *Brady* and *Giglio*. Most courts analyzing the Government's Jencks obligations do not use the same term, but the phrase "in the possession of the United States" is nevertheless interpreted as having a similar scope.

- a. Whether there was a joint investigation or parallel proceeding with the other agency;
  - b. Whether resources were shared;
  - c. Whether members of the agency played an active role in the investigation, including searches, interviews, and arrests; and
  - d. Whether investigative or charging decisions were made jointly.
5. See Deputy Attorney General Ogden's Memorandum of January 4, 2010 for further guidance regarding the concept of the "prosecution team."
  6. "Known to" the Government includes a duty to learn information in the possession of all members of the prosecution team. All team members must take reasonable steps to conduct a diligent search for discoverable information. Courts have found that AUSAs constructively possessed information (that they failed to produced) because the AUSAs *should have* known the information, and therefore, their failure to obtain and produce the information amounted to a discovery violation. A diligent search beyond the team's files includes, but is not limited to, a witness's state arrest record<sup>6</sup> and information favorable to the defense contained in files of third parties to which the AUSA has access.

F. Locating Discoverable Material: Where to Look

1. *USAO Files*. The paper and electronic case files maintained by all AUSAs who have worked on the case must be reviewed. In addition to copies of material received from the investigative agencies, USAO files may contain, for example:
  - a. Transcripts of grand jury testimony given by a defendant or witness;
  - b. AUSA notes, which may include such discoverable items as:

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6. *United States v. Perdomo*, 929 F.2d 967, 970-71 (3d Cir. 1991).

- (1) Substantially verbatim, contemporaneously recorded recitals of witnesses' oral statements;
  - (2) Descriptions of witness statements that materially vary from each other or from statements memorialized in agents' reports;
  - (3) *Brady* material, such as exculpatory statements made by people who will not be called to testify; and
  - (4) *Giglio* material, such as admissions by witnesses of wrongdoing or bias.
- c. Court records, such as transcripts of witness's guilty pleas.
2. *Agency Case Files.* The case files maintained by the members of the prosecution team must be reviewed. AUSAs should visit the lead investigative agencies and examine their case files first-hand to ensure that no agent reports, internal memoranda, chain of custody records, rough notes, or other potentially discoverable items have been overlooked. Components of the case file may include:
- a. *Cooperating Witness Files.* For testifying informants, AUSAs should personally review the informant files at the relevant agency or agencies. Typically, the AUSA must make arrangements to review such files at the agency's office and await internal agency approval for the release of any records or information the AUSA requests. AUSAs should conduct this review sufficiently in advance of trial.
  - b. *Agency Reports.* All case-related reports, including those that concern interviews of non-witnesses, must be reviewed.
  - c. *Rough Notes.* Agent notes must be preserved.

Exemption 5 - Attorney Work Product



3. *Case-Related Communications.* All substantive case-related communications, including emails and text messages, between and among witnesses and all members of the prosecution team, including the trial AUSAs, other AUSAs who have worked on the case, and agents past and present, should be reviewed. AUSAs should search their own emails and ask the investigating agents to provide theirs.
  
4. *Potential Giglio Information Relating to Law Enforcement Witnesses.* [See USAM 9-5.100 and Crimbank folders: Trial/Giglio/DNJGiglioPlan]. As early as possible in an investigation, AUSAs should discuss with the federal, state, and local law enforcement agents with whom they work regarding any potential *Giglio* issues. In addition, through the USAO-DNJ's *Giglio* Requesting Official, AUSAs should send letters requesting impeachment information ("*Giglio* letters") to the agencies employing all law enforcement witnesses

who are expected to testify.

5. *Expert Witness Statements and Files.* AUSAs should take steps to obtain and review any prior statements, such as work papers, of expert witnesses that have not already been provided.
6. *Witness's Prior Statements.* AUSAs should ask each witness to provide any documents the witness wrote, or reviewed and approved, concerning the subject matter of that witness's testimony.
7. *Criminal History Records.* It is advisable to obtain an updated Criminal History report for all civilian witnesses, including cooperators and informants.

G. Information Obtained During Witness Preparation

1. In general, meetings with witnesses to prepare for trial need not be memorialized. In addition, the Government does not ordinarily have an obligation to disclose newly discovered information that incriminates the defendant (unless the information falls within 2(c) below).
2. If trial preparation sessions reveal any of the following kinds of information, however, the AUSA should memorialize and disclose it:
  - a. New information that is exculpatory, and therefore must be disclosed pursuant to *Brady*.
  - b. New information that could be used to impeach the witness (or another witness) and therefore must be disclosed pursuant to *Giglio*. AUSAs should be particularly alert for witness statements that are inconsistent with the witness's prior statements.
  - c. New, previously undisclosed information that, in light of all the circumstances, the witness would likely have provided earlier if it were true.
3. If the AUSA concludes that memorialization and disclosure are appropriate, he or she should either:
  - a. Arrange for an agent to generate a

supplemental report and disclose that report;  
or

- b. Disclose the information in a letter to defense counsel. (Such letters should avoid any suggestion that the AUSA is a necessary witness.)

H. Disclosing Giglio and Jencks Materials

1. Agency reports

- a. AUSAs should turn over reports that were written or signed off on by the witness if they relate to the subject matter of the witness's testimony.
- b. Although more than the Jencks Act requires, AUSAs should turn over reports that describe an interview of a witness if the report relates to the subject matter of the witness's testimony, even though not formally adopted by the witness.
- c. Agency reports should ordinarily be redacted by deleting the indexing section, witness's addresses, phone numbers, social security numbers, etc., and any other unnecessary data.

2. *Giglio* information concerning law enforcement witnesses

- a. Before turning over such material to defense counsel or the Court, AUSAs should give the affected agency an opportunity to express its views.
- b. Wherever practicable and appropriate, AUSAs should seek judicial in camera, ex parte review of impeachment material in order to determine whether it must be turned over to defense counsel.
- c. Where material must be disclosed to defense counsel, AUSAs should, if practicable and appropriate, seek a protective order to limit the use and further dissemination of the material.
- d. Where material must be disclosed to the

defense or the court, AUSAs should furnish a copy of the disclosed material and any related court papers to the agency.

- e. With respect to unsubstantiated allegations, less-than-credible allegations, and allegations that have resulted in exoneration, AUSAs should take steps to protect the confidentiality and privacy interests and reputation of agency employees, and, at the conclusion of the case, should return such material to the agency.
3. *Giglio* & privacy issues for all witnesses
- a. Some arguably *Giglio* information can be unnecessarily embarrassing to a witness, such as mental health records that do not appear to affect the witness's ability to perceive and recall events.
  - b. In such instances, AUSAs should consider the privacy interests of the witness and, if appropriate, should seek judicial in camera, ex parte review before disclosing material to defense counsel and seek an appropriate protective order.
4. Timing of disclosure: AUSAs should disclose pre-marked Jencks Act and *Giglio* material (typically both marked with exhibit numbers beginning with "J") "sufficiently in advance of the witness's testimony to avoid delay in the trial."
5. AUSAs must obtain supervisory approval:
- a. Not to disclose impeachment information before trial.
  - b. Upon such approval, notice must be provided to the defendant of the time and manner by which disclosure of the information will be made. See USAM § 9-5.001(D)(4).

## VI. SENTENCING AND POST-CONVICTION OBLIGATIONS

- A. Jencks Act. The requirements of the Jencks Act apply to sentencing hearings, hearings to revoke or modify probation or supervised release, and section 2255 hearings. See Fed. R. Crim. P. 12(h) & 26.2.

- B. The Government's Brady and Giglio Obligations. The Government's *Brady* and *Giglio* obligations apply to sentencing proceedings.
- C. Brady/Giglio Violations Discovered After Trial. If, post-conviction, an AUSA becomes aware that at any time *prior* to trial or sentencing (whichever is relevant), the Government knew or should have known of information that should have been disclosed pursuant to *Brady* or *Giglio*, that information, and the surrounding circumstances, should promptly be disclosed to the Court and defense counsel.
- D. Newly Discovered Evidence
1. If, post-conviction, new information comes to light that is both material and actually exculpatory, that information must be promptly disclosed. AUSAs should also consider, and discuss with their supervisors, whether additional action is appropriate.
  2. If, post-conviction, new information comes to light that is not both material and actually exculpatory, but which the Government would have disclosed if it had known of its existence prior to trial or sentencing (whichever is relevant), the AUSA should promptly bring the circumstances to the attention of his or her supervisor (and, as appropriate, the Discovery Training Officer and the Professional Responsibility Officer) so that an informed decision can be made concerning how to proceed.