Memorandum

Subject	Date
Office Discovery Policy in Criminal Matters	December 22, 2014
To	**From**
Andrew Goldsmith, National Criminal Discovery Coordinator; All EDOK AUSA's	Douglas A. Horn FAUSA, EDOK

THIS MEMO SETS FORTH THE UNITED STATES ATTORNEY'S OFFICE FOR THE EASTERN DISTRICT OF OKLAHOMA'S (EDOK) DISCOVERY POLICY, IN ADDITION TO THE CRIMINAL PROCEDURE MANUAL AMENDMENTS AND YEARLY IN HOUSE TRAINING CONCERNING THIS TOPIC. IN PARTICULAR, IT IS AN EFFORT TO COMPLY WITH THE DEPARTMENT OF JUSTICE'S DISCOVERY POLICY FOR ALL UNITED STATES ATTORNEY OFFICE'S (USAO). THIS MEMO IS DIVIDED INTO THREE DISTINCT AREAS WHICH AFFECT AUSA'S: (1), STATUTORY REQUIREMENTS, (2) PRECEDENT AND POLICY,[1] AND (3) HOW THIS AFFECTS THE AUSA'S DUTIES.

PART ONE
AUSA'S DUTIES PURSUANT TO STATUTE

I. Rule 16

One of the primary guides concerning discovery is Rule 16 of the Federal Rules of Criminal Procedure. It is an obligation that, upon request, requires AUSA's to provide defense counsel with certain material. The practice in the EDOK is to provide the following within the time period set forth at arraignment by the U.S. Magistrate in his or her pretrial order:

Defendant's Oral Statement Rule 16(a)(1)(A)

Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation

[1] This memorandum provides only internal Department of Justice Guidance. It is not intended to, does not, and may not be relied upon to create any substantive or procedural rights enforceable at law by any person in any administrative, civil, or criminal matter or case. Nor are any limitations hereby placed on the otherwise lawful litigative prerogatives of the U.S. Department of Justice. See United States' Attorneys' Manual (USAM) § 1-1.100; See also *United States v. Caceres,* 440 U.S. 741 (1979).

by a person the defendant knew was a government agent if the government intends to use the statement at trial.[2]

Defendant's Written or Recorded Statement Rule 16(a)(1)(B)

Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:

(i) any relevant written or recorded statement by the defendant if:

- the statement is within the government's possession, custody, or control; and
- the attorney for the government knows—or through due diligence could know—that the statement exists;

(ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and

(iii) the defendant's recorded testimony before a grand jury relating to the charged offense.

Organizational Defendant Rule 16(a)(1)(C)

Upon a defendant's request, if the defendant is an organization, the government must disclose to the defendant any statement described in Rule 16(a)(1)(A) and (B) if the government contends that the person making the statement:

(i) was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee, or agent; or

(ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent.

Defendant's Prior Record Rule 16(a)(1)(D)

Upon a defendant's request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows — or through due diligence could know — that the record exists.

Documents and Objects Rule 16(a)(1)(E)

Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:

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[2] The practice in the EDOK is to disclose the information even if the AUSA does not intend to use it. As regularly discussed, if the information is irrelevant/ immaterial to your case then there can be no harm in disclosing it.

(i) the item is material to preparing the defense;

(ii) the government intends to use the item in its case-in-chief at trial; or

(iii) the item was obtained from or belongs to the defendant.

Reports of Examinations and Tests Rule 16(a)(1)(F)

Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the government's possession, custody, or control;

(ii) the attorney for the government knows—or through due diligence could know—that the item exists; and

(iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.

Expert Witnesses Rule 16(a)(1)(G)

At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, give to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

Information Not Subject to Disclosure Rule 16(a)(2)

Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C.A. § 3500. (Also known as the *Jenks Rule* which will be discussed more in depth below).

Grand Jury Transcripts Rule 16(a)(3)

This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rules 6, 12(h), 16(a)(1), and 26.2.

Defendant's Disclosure Rule 16(b)

Information Subject to Disclosure Rule 16(b)(1)

Documents and Objects Rule 16(b)(1)(A)

If a defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial.

Reports of Examinations and Tests Rule 16(b)(1)(B)

If a defendant requests disclosure under Rule 16(a)(1)(F) and the government complies, the defendant must permit the government, upon request, to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.

Expert Witnesses[3] Rule 16(b)(1)(C)

The defendant must, at the government's request, give to the government a written summary of any testimony the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial, if—

(i) the defendant requests disclosure under subdivision (a)(1)(G) and the government complies; or

(ii) the defendant has given notice under Rule 12.2(b) of an intent to present the expert testimony on the defendant's mental condition. This summary must describe the witness's opinions, the bases and reasons for these opinions, and the witness's qualifications.

Information Not Subject to Disclosure Rule 16(b)(2)

Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:

(A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or

(B) a statement made to the defendant, or the defendant's attorney or agent, by:

(i) the defendant;

(ii) a government or defense witness; or

(iii) a prospective government or defense witness.

Continuing Duty to Disclose Rule 16(c)

A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court if:

(1) the evidence or material is subject to discovery or inspection under this rule; and

[3] For a breakdown of how to determine payment of expert witness fees, see the EDOK 2014 Criminal Procedure Manual p. 39.

(2) the other party previously requested, or the court ordered, its production[4].

Regulating Discovery Rule 16(d)

Protective and Modifying Orders Rule 16(d)(1)

At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.

Failure to Comply Rule 16(d)(2)

If a party fails to comply with this rule, the court may:

(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;

(B) grant a continuance;

(C) prohibit that party from introducing the undisclosed evidence; or

(D) enter any other order that is just under the circumstances.

II. RULE 12

Rule 12 of the Federal Rules of Criminal Procedure deals with pleadings and pretrial motions. Specific sub-parts trigger components of the discovery process that are relevant to trial practice in the EDOK. In particular:

NOTICE OF ALIBI Rule 12.1

(a) Government's Request for Notice and Defendant's Response.

(1) ***Government's Request***

An attorney for the government may request in writing that the defendant notify an attorney for the government of any intended alibi defense. The request must state the time, date, and place of the alleged offense.

(2) ***Defendant's Response***

Within 10 days after the request, or at some other time the court sets, the defendant must serve written notice on an attorney for the government of any intended alibi defense. The defendant's notice must state:

(A) each specific place where the defendant claims to have been at the time of the alleged offense; and

(B) the name, address, and telephone number of each alibi witness on whom the defendant intends to rely.[5]

[4] The practice of the EDOK is to disclose this information even if not requested by defense counsel.

[5] It is standard practice in the EDOK for the court to allow 10 days for defense to respond.

(b) Disclosing Government Witnesses

(1) ***Disclosure***

If the defendant serves a Rule 12.1(a)(2) notice, an attorney for the government must disclose in writing to the defendant or the defendant's attorney:

(A) the name, address, and telephone number of each witness the government intends to rely on to establish the defendant's presence at the scene of the alleged offense; and

(B) each government rebuttal witness to the defendant's alibi defense.

(2) ***Time to Disclose***

Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within 10 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 10 days before trial.

(c) Continuing Duty to Disclose

Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name, address, and telephone number of each additional witness if:

(1) the disclosing party learns of the witness before or during trial; and

(2) the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had known of the witness earlier.

(d) Exceptions

For good cause, the court may grant an exception to any requirement of Rule 12.1(a) to (c).

(e) Failure to Comply

If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the defendant's alibi. This rule does not limit the defendant's right to testify.

(f) Inadmissibility of Withdrawn Intention

Evidence of an intention to rely on an alibi defense, later withdrawn, or of a statement made in connection with that intention, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

NOTICE OF DEFENSE BASED UPON MENTAL CONDITION Rule 12.2

(a) Notice of an Insanity Defense

A defendant who intends to assert a defense of insanity at the time of the alleged offense must so notify an attorney for the government in writing within the time provided for filing a pretrial motion, or at any later time the court sets, and file a copy of the notice with the clerk. A defendant who fails to do so cannot rely on an insanity

defense. The court may, for good cause, allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.

(b) Notice of Expert Evidence of a Mental Condition

If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case, the defendant must—within the time provided for filing a pretrial motion or at any later time the court sets—notify an attorney for the government in writing of this intention and file a copy of the notice with the clerk. The court may, for good cause, allow the defendant to file the notice late, grant the parties additional trial-preparation time, or make other appropriate orders.

(c) Mental Examination

(1) ***Authority to Order an Examination; Procedures***

(A) The court may order the defendant to submit to a competency examination under 18 U.S.C. § 4241.

(B) If the defendant provides notice under Rule 12.2(a), the court must, upon the government's motion, order the defendant to be examined under 18 U.S.C. § 4242. If the defendant provides notice under Rule 12.2(b) the court may, upon the government's motion, order the defendant to be examined under procedures ordered by the court.

(2) ***Disclosing Results and Reports of Capital Sentencing Examination***

The results and reports of any examination conducted solely under Rule 12.2(c)(1) after notice under Rule 12.2(b)(2) must be sealed and must not be disclosed to any attorney for the government or the defendant unless the defendant is found guilty of one or more capital crimes and the defendant confirms an intent to offer during sentencing proceedings expert evidence on mental condition.

(3) ***Disclosing Results and Reports of the Defendant's Expert Examination***

After disclosure under Rule 12.2(c)(2) of the results and reports of the government's examination, the defendant must disclose to the government the results and reports of any examination on mental condition conducted by the defendant's expert about which the defendant intends to introduce expert evidence.

(4) ***Inadmissibility of a Defendant's Statements***

No statement made by a defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant's consent), no testimony by the expert based on the statement, and no other fruits of the statement may be admitted into evidence against the defendant in any criminal proceeding except on an issue regarding mental condition on which the defendant:

(A) has introduced evidence of incompetency or evidence requiring notice under Rule 12.2(a) or (b)(1), or

(B) has introduced expert evidence in a capital sentencing proceeding requiring notice under Rule 12.2(b)(2).

(d) Failure to Comply

(1) *Failure to Give Notice or to Submit to Examination*

The court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt or the issue of punishment in a capital case if the defendant fails to:

(A) give notice under Rule 12.2(b); or

(B) submit to an examination when ordered under Rule 12.2(c).

(2) *Failure to Disclose*

The court may exclude any expert evidence for which the defendant has failed to comply with the disclosure requirement of Rule 12.2(c)(3).

(e) Inadmissibility of Withdrawn Intention

Evidence of an intention as to which notice was given under Rule 12.2(a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

PART TWO
THE AUSA'S DUTIES PURSUANT TO PRECEDENT AND POLICY

I. *Brady* and *Giglio*

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

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

Id. at 87.[6]

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

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

Id. at 154.[7]

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[6] In *Brady*, a jury convicted John Leo Brady of first-degree (felony) murder and he was later sentenced to death. Prior to sentencing, the state prosecutor failed to disclose 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).

[7] 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 Supreme Court's progeny cases since *Brady* and *Giglio* have further distinguished the expectations. For starters, *Brady* and *Giglio* materials are not necessarily separate, but rather *Giglio* is merely a form of *Brady* material:

> In *Brady* . . ., the prosecutor failed to disclose exculpatory evidence. In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest 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).

AUSA's should be aware that although the two are commonly referred to as the same, they are distinctly different in concept. In practice, AUSA's in the EDOK can view *Giglio* material as impeachment evidence while *Brady* material can be seen as evidence that could be helpful to the defendant's ability to create a reasonable doubt (exculpatory evidence) or receive some relief at sentencing (mitigating circumstances). Thus, *Brady* and *Giglio* require AUSA's to look at evidence and ascertain:

1.) Whether the evidence is favorable to the defense (exculpatory or impeaching);

2.) Whether the government somehow suppressed the evidence (i.e. evidence known to the government, but unknown to the defense);

3.) Whether the evidence was "material."[8]

In practice, AUSA's in the EDOK should be mindful that *Brady* material therefore includes both exculpatory and impeachment material. Therefore, when dealing with exculpatory material (*Brady*), AUSA's should disclose that information promptly; if the material is for impeachment (*Giglio*) although there is no statutory or Constitutional obligation to disclose that information before trial, AUSA's in the EDOK are encouraged to disclose the information as soon as possible when disclosure would not jeopardize the safety of a witness or national security. If there is ever a question, AUSA's are directed to seek out the assistance of a supervisor.

[8] The AUSA should ask whether there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

II. USAM 9-5.001

USAM 9-5.001 not only reiterates this precedent, but goes even further. The USAM requires that all exculpatory and impeachment evidence be disclosed regardless of whether defendant even makes a request.[9] In this section, the Department reminds AUSA's that they require disclosure beyond what is constitutionally required. USAM 9-5.001dispenses with the materiality requirement and requires disclosure beyond information that is material to guilt. Thus, prosecutors must disclose information inconsistent with any element of any crime charged against the defendant, any that establishes an affirmative defense, or any information that either casts a substantial doubt on the upon the accuracy of any evidence - including, but not limited to witness testimony - the prosecutor intends to rely on in court.[10]

The USAM deals with disclosure of exculpatory evidence to Grand Jury's as well. USAM 9-11.233 requires that:

1.) If the prosecutor conducting the Grand Jury investigation is personally aware of substantial evidence that directly negates the guilt of a subject of an investigation;

2.) The prosecutor MUST present or otherwise disclose such evidence to the Grand Jury before seeking an indictment against that person;

3.) Failure to comply with this policy should not result in a dismissal of the indictment, BUT failure to comply could result in a referral to the Office of Professional Responsibility.

So, if information falls within the above definitions, when should AUSA's disclose it? Again, the USAM comments that exculpatory (*Brady*) material must be disclosed promptly after discovery. If a witness's safety or national security may be at risk please refer that in formation to your supervisor. Impeachment (*Giglio)* material is generally disclosed at a reasonable time before trial. If either impeachment or exculpatory material casts doubt upon proof of an aggravating

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[9] In *Kyles v. Whitley,* 514 U.S. 419, 432-33 (1995), the defendant was convicted of first degree murder and sentenced to death for killing a woman after an attempted robbery. Shortly after the crime, an individual contacted law enforcement and pointed them in the direction of Kyles and away from the fact that the reporting witness was driving the victim's car a short time after the homicide. Over the course of the case, the cooperating witness' story changed several times, a fact that police either ignored or failed to recognize. The police did not notify the prosecution team and the Supreme Court reversed the conviction because of the prosecution's failure to reveal the inconsistencies.

[10] Because a determination of what is *Brady* can depend on what defense is being offered, it is suggested that it could be helpful and sound trial strategy for AUSA's in the EDOK to state on the record that in order to fully comply with *Brady* obligations the government needs to know the defense.

factor at sentencing, but it is irrelevant to the proof of guilt it is standard EDOK practice to disclose information before the initial presentence investigation report - if not sooner.

As discussed in EDOK training's and other intra-office communications, it is the practice of the EDOK to disclose the information immediately. If it is relevant to the prosecution's case, it is material, and if it is not, then it is largely irrelevant and harmless to the government's theory of the case - either scenario therefore, favors disclosure. Again, if there are safety concerns, seek out the advice of a supervisor to ascertain if any alternatives exist such as an in camera review by the court, a redacted version of the information, or a protective order. In short, when in doubt - disclose. Consequences such as a reversal of a conviction, a dismissal, a referral to the Office of Professional Responsibility, bar disciplinary proceedings, or a civil suit against the prosecutor are possible outcomes.

III. THE JENCKS ACT

In *Jencks v. United States.*, 353 U.S. 657 (1957), the Supreme Court held that at the time of cross examination the defense was entitled to any relevant statements made by government witnesses to government agents without showing any inconsistency and without prior inspection by the trial court to determine whether an inconsistency in fact existed. That decision led to the enactment of legislation 18 U.S.C. § 3500,[11] and the Federal Rule of Criminal Procedure 26.2[12] which applies to both the government and the defense.

AUSA's in the EDOK are reminded that *Jencks* material includes any statements or reports in the possession of the prosecutorial arm of the federal government, *United States v. Merlino*, 349 F.3d 144 (3rd Cir. 2003); *United States v. Yousef*, 327 F.3d 56 (2nd Cir. 2003). This includes any written statements made by a witness and signed or otherwise approved by him. Specifically, a stenographic, mechanical, electrical, or other recording, or a transcript thereof, which is a substantial verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of the such oral statement or a statement, however taken or recorded, or a transcript thereof, if any, made by said witness to a Grand Jury.

Therefore, pursuant to Department of Justice policy and in compliance with *Jencks* and its progeny, AUSA's in the EDOK should know that the following are classified as *Jencks* material:

1.) Prior testimony (Grand Jury or trial);

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[11] For the complete code please refer to: http://www4.law.cornell.edu/uscode/html/uscode18/usc_sec_18_00003500----000-.html

[12] For the complete rule please refer to: http://www.law.cornell.edu/rules/frcrmp/Rule26_2.htm

2.) Reports (there is a distinction between the agent who wrote the report and the witness whose statement was memorialized, unless the witness formally adopted the statement).

3.) Recordings (including jail tapes);

4.) Statements;

5.) Letters, e-mails, and text messages;

6.) Miranda waivers and consent forms;

7.) Plea and cooperation agreements;

8.) 5k letters (actually this information can be viewed as *Giglio*);

9.) Notes taken by a government agent when interviewing a witness must be produced after the witness testifies if it appears that the notes were adopted or approved by the witness or that they were a substantially verbatim recital of oral statements made by the witness[13];

10.) Notes taken by prosecutors have been said to fall under *Jencks* only if the notes have been signed by the witness, are substantially verbatim, or otherwise adopted or approved by the witness.[14]

In conjunction with this rule, AUSA's are reminded that Rule 49.1 requires that, unless otherwise ordered by the court, certain categories of information are to be redacted if the information is to be filed with the court or made a part of the record. For example, AUSA's in the EDOK should be aware of the following: social security numbers - use only the last four digits; taxpayer identification numbers - use only the last four digits; birth dates - use only the year; names of individuals known to be minors - use only initials; financial account numbers - use only the last four digits; home addresses of individuals - use city and state only. Thus, in order to comply, AUSA's in the EDOK should have two sets of documents: a redacted version to offer into evidence for public record, and the original.

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[13] *Campbell v. United States*, 373 U.S. 487 (1963)

[14] *Goldberg v. United States*, 425 U.S. 94 (1976). See also Rule 16(a)(2) which provides that, "except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or any other government agent in connection with investigation or prosecuting a case."

PART THREE
THE CULMINATION

The effect of the afore-mentioned codes, laws, policy and precedent rests in the hands of the prosecutor. The AUSA is tasked with the responsibility to gauge the likely effect of all evidence and to make disclosure of exculpatory and impeachment evidence. *Kyles v. Whitley*, 115 S.Ct. 1555(1995).[15] In fact, courts have found that prosecutors are responsible for any actual and imputed knowledge of any impeaching information, both before and during trial. *United States v. Burnside*, 824 F. Supp. 1215, 1266 (N.D. Ill. 1993). This obligation extends to all of the prosecutors in the office, *Giglio v. United States*, 450 U.S. 150, 154 (1972), as well as **any member of the prosecution team,** *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995). Thus, if any member of the prosecution team knows of any *Brady or Giglio* material the AUSA will be held legally accountable for disclosing that evidence to the defendant, whether or not he knows about the evidence. In other words, the AUSA's ignorance of such evidence **will not** prevent a court from penalizing the government by suppressing the evidence, vacating a sentence, reversing a conviction, or recommending the AUSA to the Office of Professional Responsibility.

The court in *Kyles* commented that the prosecution team can consist of all "others acting on the government's behalf in the case." *Kyles* 514 U.S. at 437. Generally the "prosecution team" includes federal agents, state and local law enforcement officers, and other government officials participating in the investigation. Courts generally err on the side of expansive rather than limiting when determining who falls under that category. " 'The Government' is not a congery of independent hermetically sealed compartments; and the prosecutor in the courtroom, the USAO in which he works, and the FBI are not separate sovereignties. The prosecution of criminal activity is a joint enterprise among all these aspects of 'the government'...[I]t would be no adequate response for trial counsel to suggest negligence on the part of the case agent or the relevant investigative agency. Trial counsel is the member of the government team who is an officer of the court. In this sense, it may be a form of insubordination if the investigative agency working on the case for trial counsel are not forthcoming in satisfying the government's disclosure obligations. But the prosecutor is duty bound to demand compliance with disclosure responsibilities by all relevant dimensions of the government. Ultimately, regardless of whether the prosecutor is able to frame and enforce directives to the investigative agencies to respond candidly and fully to disclosure orders, responsibility for failure to meet the disclosure obligations will be assessed by

[15] See *United States v. Endicott*, 869 F.2d 452, 455 (9th Cir. 1989)(any non-disclosure of evidence may have been the fault, not of the prosecutor, but of other agents and whether the non-disclosure is a result of negligence or design, it is the responsibility of the prosecutor; the prosecutor's office is an entity and as such it is the spokesman for the government, (quoting *Giglio*, 405 U.S. at 154).

the courts against the prosecutor and his office." *United States v. Osorio*, 929 F.2d 753, 760-62 (1st Cir. 1991).[16]

Numerous districts have determined that it is the responsibility of the case agent to bring all of this information to the attention of the AUSA. However, due to the size of this USAO and its history for working so closely with law enforcement it is the practice of this office that the term prosecution team extends outside of the courtroom as well. In addition to agents, paralegals, support staff, investigative agency counsel, SAUSA's, and others are all tasked with assisting the AUSA in reviewing the files.

The review process should cover the following areas:

- The Investigative Agency File: Obviously, the substantive case file and any other file that would give the AUSA reason to believe that discoverable information related to the matter being prosecuted should be reviewed. In many cases in the EDOK AUSA's should give broader and earlier discovery than what is necessarily required. It assists in quicker resolutions, and helps to affect the goal of the Department. Furthermore, this practice also provides AUSA's a margin for error if something was innocently overlooked.[17]

- Confidential Informant (CI), Confidential Witness (CW), Confidential Human Source (CHS), or Confidential Source (CS) Files: Since the credibility of these witnesses is usually challenged at trial AUSA's should review their file - including all proffers, immunity agreements, and payment information. If it rises to the level that the AUSA feels he needs to personally review the agency file, the AUSA should follow the agency's procedure in order to minimize any risk to the confidential source and/ any other unrelated, on-going investigations.

- Documents or Evidence Gathered by Civil Attorney's and/or Regulatory Agencies in Parallel Civil Proceedings: If an AUSA determines that a member of a regulatory agency such as the SEC is a member of the "prosecution team," their files should be reviewed. Even if the agency is not a part of the criminal proceedings, but is conducting an administrative or parallel civil action the files still should be reviewed.

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[16] See *Smith v. Secretary Department of Corrections*, 50 F.3d 801, 832 (10th Cir. 1995)(lack of communication and coordination among investigative agencies is not a defense to prosecution failure to disclose *Brady* material to defense. The left hand is responsible to determine what the right hand is doing. *Brady* evidence, known to law enforcement personnel involved in the investigation of relevant criminality, is imputed to the prosecutor).

[17] For example, in voluminous corruption or white collar cases, where there is too much documentary evidence to review, it is advised that AUSA's establish a "discovery room" and allow defense access to all of the material, thereby avoiding a situation such as an inadvertent discovery by the AUSA of something that should have been turned over.

- Substantive Case Related Communications: This type of material is most likely to occur (1) among AUSA's and/or agents; (2) between prosecutors and/or agents and witnesses and/or victims, and (3) between victim witness coordinators and witnesses or victims. These "substantive" communications include factual reports about investigative activity, factual discussions of the relevant merits of the evidence, factual information obtained during interviews or interactions with witnesses or victims, and factual issues relating to credibility.

AUSA's should bear in mind that the format for this type of information generally does not determine if it is discoverable. Material exculpatory information that an AUSA receives during a conversation with an agent or witness is generally as discoverable as if that same information were contained in an e-mail, letter, or report. Depending on the circumstances, information received orally should be provided to defense by way of a letter from the AUSA or a report prepared by the agent or victim witness coordinator memorializing the information.

E-mail,[18] although a valuable and efficient tool in the work place, can become a discovery issue if used to communicate substantive case-related information. E-mails are, in essence, memorialized conversations that are not private property, and can be monitored, stored, and recorded. Thus, keep in mind an AUSA should not include anything in an e-mail that he would not want to see on the evening news or hear repeated in court at a later date.

It has been suggested that there are three general categories within which almost every case-related e-mail can be classified:

> 1.) Purely logistical communications are e-mails that simply contain travel information, or dates and times of hearings, meetings, or court appearances and are not discoverable.
>
> 2.) Work product communications are classified as "potentially privileged," and are generally immune from discovery. Examples include:
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> > - e-mails between AUSA's on matters that require supervisory approval or legal advice (i.e. plea routing slips);
> >
> > - e-mails between AUSA's and other USAO staff regarding case-related matters such as organization, tasks that need to be accomplished, research, and analysis;
> >
> > - e-mails between AUSA's and agency counsel on legal issues relating to criminal matters such as a *Giglio* request;

[18] Consistent with DOJ policy the term "e-mail" includes any form of written electronic messaging, using devices such as computers, telephones, and blackberries, including, but not limited to, e-mails, text messaging, instant messaging, tweets, and voice mail messages that can be automatically converted to text.

- e-mails between AUSA's and agents concerning legal advice, or requesting investigation of potential matters or upcoming issues;

3.) Substantive e-mails are the third type of case-related e-mail communications. They are usually from an agent, witness or other USAO employee and can cause the most legal issues. They include reports about investigative activity, discussions of the relative merits of the case, characterizations or criticisms of potential testimony, interviews of or interactions with victims or witnesses, and issues relating to credibility. This form of communicating substantive information should be avoided whenever possible. These communications are hardly ever as complete as investigative reports and may have the unintended effect to generate *Giglio* material on the part of the agent or witness by exposing some type of bias, prior inconsistent statement, or a contradiction.

If substantive e-mails have to be sent, that e-mail should be printed and maintained in the file and considered *Jencks* material and also maintained for *Brady and Giglio* purposes. AUSA's in the EDOK should ask that they be included in any e-mails between agents, between agents and witnesses or victims, or between agents and any USAO personnel. This practice would allow the AUSA the ability to review any case-related e-mail communications and ascertain if the communications are substantive and therefore need to be made available for discovery.

- Potential *Giglio* for Law Enforcement Witnesses: The EDOK currently has a formal procedure to request from participating law enforcement agencies any potential *Giglio* material. AUSA's should have a candid conversation with each potential law enforcement witness and/or affiant with whom they work regarding any on-duty or off-duty potential impeachment information. The results of this candid conversation should be memorialized on the "Eastern District of Oklahoma Law Enforcement Witness Brady/Giglio Interview Questions" form. The AUSA should ask the witness and/or affiant agent the questions on the form and circle the responses. The AUSA should sign and date the form and seal it in an envelope to be maintained in the case file. It is understood that with cases the USAO has adopted, these questions have to come after the prosecution process has begun.

- Potential *Giglio* for Non-Law Enforcement Witnesses: All potential *Giglio* information known by or in the possession of the prosecution team relating to non-law enforcement witnesses should be gathered and reviewed. Criminal Resource Manual 165: Guidance for Prosecutors Regarding Criminal Discovery states that information includes, but is not limited to:

Prior inconsistent statements;

Statements or reports reflecting witness statement variations;

Benefits provided to a witness including:

Dropped or reduced charges;

Immunity;

Expectations of downward departures or motions for reductions of sentences;

Assistance in a state or local criminal proceeding;

Considerations regarding forfeiture of assets;

Stays of deportation or other immigration status;

Monetary benefits;
Non-prosecution agreements;

Letters to other law enforcement officials (i.e. state prosecutors, professional boards) setting forth the extent of a witness's assistance or making substantive recommendations on a witness's behalf;

Relocation assistance; and

Consideration of benefits to culpable or at risk parties.

Other known conditions that could affect the witness's bias:

Animosity towards the defendant;

Animosity towards a group of individuals which the defendant is a member or which the defendant is affiliated;

Relationship with the defendant;

Known but uncharged criminal conduct (that may provide an incentive to curry favor with a prosecutor);

Prior acts under Federal Rules of Evidence 608;

Prior convictions under Federal Rules of Evidence 609; and

Known substance abuse or mental health issues or other issues that could affect a witness's ability to perceive and recall events;

- Information Obtained in Witness Interviews: Whenever feasible AUSAs should not conduct an interview without an agent present to avoid the risk of making themselves a witness to a

statement and therefore being disqualified from handling the entire case, if the statement becomes an issue. If circumstances arise where an agent is not available, AUSAs should attempt to have another office employee present.

Some witness statements will vary during the course of an interview or an investigation. For example, witnesses may initially deny any involvement in criminal activity, but as the case continues the witness information may broaden or change considerably. Material variances in a witness' statement should be memorialized even if they are within the same interview and be provided to defense counsel as *Giglio* information.

That being said, trial preparation meetings with witnesses generally don't need to be memorialized. New information that is exculpatory or can be impeachment material however, should be disclosed. If the new information rises to the level that it represents a variance from the witnesses prior statements, AUSAs should consider whether the statement should be memorialized and produced as noted above. Finally, any agent notes should be reviewed, **if** there is reason to believe that the notes are materially different from the report of the interview, if a report was not prepared at all, if the precise words of the witness are significant, or if the witness disputes the agent's account of the interview.

CONDUCTING THE REVIEW

Clearly the AUSA is ultimately responsible and accountable for compliance with discovery obligations and therefore it is preferable for an AUSA to review personally, the foregoing materials. It has been suggested that whenever that is impractical the AUSA should develop a process for reviewing the material, including identifying who should participate in the review that is previously stated. The ultimate determination should rest with the AUSA and should not be delegated. In cases involving voluminous evidence it is the practice of the EDOK to allow defense access to all of the documents.

MAKING THE DISCLOSURE

This Memo has provided AUSA's with the Department's disclosure obligations set forth in Federal Criminal Procedure Rules 16, 12 and 26.2, 18 U.S.C. § 3500 or the *Jencks* Act, *Brady* and *Giglio* and its progeny in addition to the USAM 9-5.001.[19] As previously mentioned, AUSAs are

[19] 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

encouraged to provide discovery disclosures even broader than those required, because providing wide ranging and early discovery helps foster the truth seeking mission of the Department and helps for a speedy resolution.

Since it is sometimes difficult to assess the materiality of evidence before trial, AUSAs should err on the side of disclosing any impeachment or exculpatory information. Remember

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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:
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> > 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.

USAM 9-5.001 requires production of information beyond that which is simply material. For reiteration, AUSAs should disclose any information that is inconsistent with any element of any crime, or information that establishes a recognized affirmative defense. Moreover, the AUSAs must disclose information that either casts substantial doubt on the accuracy of any witness or might have a significant bearing on the admissibility of the AUSA's evidence. All this information must be disclosed regardless of its admissibility and even if the AUSA does not believe the information will make the difference between conviction and acquittal of a defendant.

It is the practice of the EDOK that AUSA's should not describe the discovery being produced as simply an "open file" since it is always possible that something will be inadvertently omitted from production and portions of the file, such as attorney work product which will not be turned over. Additionally, such a practice could expose the AUSA to broader disclosure requirements then ever intended.

Finally, AUSA's should make a record of when and how discovery was disclosed or otherwise made available. The practice of the EDOK is to paginate the material, then to provide a letter to defense counsel which memorializes exactly what is being produced in the case, and then require defense counsel's signature. In those cases where discovery is a voluminous amount of material, AUSA's in the EDOK should continue to provide a letter to defense counsel informing them where the material is, how to facilitate access to it, and create a sign in sheet listing the defendant's representative's date of inspection and time that they spent reviewing the material.

CONCLUSION

No policy training or guidance can ever take into account every eventuality or set of circumstances. Thus the fact that an AUSA has not made discovery available according to this policy will never mean that an AUSA has acted in bad faith. However, AUSA's should realize all the afore-mentioned tools available to them in evaluating their obligations in addition to supervisors, discovery coordinators, other AUSA's, the Professional Responsibility Advisory Office and online resources on the Department of Justice Intranet website.[20]

[20] The Eastern District of Oklahoma's discovery policy and all the listed supporting laws, memos, cases, policy and procedure does not create a general right of discovery in criminal cases. As noted above, it does not provide defendants with any additional rights or remedies. It is simply another effort by the members of the Department of Justice to provide a group of the most ethical, professional and experiences litigators in the United States additional guidance in the Department of Justice's ultimate goal to seek the truth.