DISTRICT OF RHODE ISLAND

DISCOVERY GUIDELINES
OCTOBER 15, 2010

DISCLAIMER

The guidance set forth below is intended to ensure that AUSAs within this District are aware of and comply with their discovery obligations. There is to be no public release of this document. All members of the USAO are reminded to treat it confidentially, and nothing contained herein is to be disseminated without the prior express approval of the Criminal Chief. The discovery guidelines set forth below do not have the force of law nor do they create any rights, privileges, or benefits. See *United States v. Caceres*, 440 U.S. 741 (1979).

I. SUMMARY AND BACKGROUND

This policy provides guidance on gathering, tracking, reviewing and producing information to criminal defendants in accordance with the Constitution of the United States, statutory and procedural law, case law, DOJ policy, and local rules. These duties are defined in the Federal Rules of Criminal Procedure Rules 12, 12.1, 12.2, 12.3, 16 and 26.2; the *Jencks* Act; *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and their progeny; USAM 9-5.001 (Disclosure of Exculpatory and Impeachment Information) and 9-5.100 (Potential Impeachment Information on Law Enforcement Witnesses); the local rules; and the court's Arraignment and Pretrial Discovery Order ("Discovery Order"). In some respects, this policy requires broader production than the law and local rules. It counsels AUSAs to provide broad and early discovery of information and materials to the extent that broad and early discovery promotes the just resolution of a case and does not jeopardize witness safety, national security, or an ongoing criminal investigation.

The responsibility to produce all discoverable information in a criminal case lies with the AUSA(s) assigned to the case. To fulfill this responsibility, AUSAs should consider several matters:

• **What & when**: What are the policies, rules, statutes and case law that define what must be produced and when it must be produced? (*See II. What Must Be Produced and When*)

• **Who is part of the prosecution team**: AUSAs are obligated to produce information that is within the possession of the prosecution team; thus, defining the scope of the prosecution team is critical. (*See III.A. Gathering and Reviewing Discoverable Information: The Prosecution Team*)

• **Where to look**: Once the prosecution team has been identified, AUSAs must ensure that all discoverable information is located, reviewed, and produced as required, including agency, investigative, and administrative files, CI files, emails, PSRs, law enforcement *Giglio*, etc. (*See III.B. Gathering and Reviewing Discoverable Information: What to Review/Request*)

• **How to produce and track**: AUSAs must decide in what form to produce the discoverable information (bates numbered, hard copy, e-copy, available for inspection, redacted, etc.), and must keep a detailed record of all discoverable information produced.

II. WHAT MUST BE PRODUCED AND WHEN

A. Federal Rule of Criminal Procedure 16

1. Government's Obligations

Rule 16(a) and the court's Discovery Order set forth the government's basic discovery obligations. The Discovery Order provides that within five days of arraignment, the parties shall meet and provide each other with written requests for discovery, unless within five days the party entitled to disclosure files a waiver of discovery. Rule 16 makes the government's discovery obligations contingent upon a defendant's request.

The Order also imposes a five day period within which the government must comply with the defendant's Rule 16 requests, and a five day period following the government's compliance with Rule 16 within which the defendant must meet his Rule 16 obligations. The defendant's disclosure obligations are triggered only if the defendant requests disclosure from the government.

Under Rule 16(a), the government is required to

disclose written and recorded statements of the defendant; the substance of any oral statements made by the defendant in response to interrogation by a known government agent; the defendant's criminal history; all documents and other tangible evidence the government plans to introduce in its case-in-chief, which are material to the defense, or which were obtained from or belong to the defendant; reports of physical, mental, or scientific examinations (such as handwriting analysis, drug analysis, fingerprint reports, etc.) to be introduced by the government in its case-in-chief or which are material to the defense; and expert witness disclosures and summaries. Rule 16 explicitly excludes from disclosure witness statements (except as may be required under the *Jencks* Act) and internal reports written by government agents or attorneys in connection with the investigation or prosecution of the case.

The government's initial discovery disclosure should be accompanied by the Office's standard discovery letter which tracks the provisions of the court's Discovery Order. AUSAs should maintain a record of everything provided to the defense. This can be done in a variety of ways, including but not limited to: identifying with specificity in the discovery letter the materials provided; through a bates stamp system; by maintaining a duplicate disk of materials furnished to the defense in an electronic format.

The Office's standard discovery letter contains the requisite notice language that triggers the defendant's discovery obligations under Rules 16 and 12.1-12.3.

2. <u>Defense Obligations</u>

The defense has discovery obligations as well, although they are more limited than those imposed on the government. Once an AUSA has provided discovery to the defense, he or she should request reciprocal discovery. The Office form discovery letter makes this request.

Section I(B) of the court's Discovery Order discusses the defendant's discovery obligations. In sum, the defendant is required to disclose the following within five days of the government's discovery disclosures: (1) documents and tangible objects pursuant to Rule 16(b)(1)(A); (2) any reports of examination and tests that would be subject to disclosure pursuant to Rule 16(b)(1)(B); and (3) summaries of expert testimony that would be subject to disclosure pursuant to Rule 16(b)(1)(C). Discovery of alibi witnesses is governed by Fed. R. Crim. P. 12.1. (<u>See</u> Section IV below). Discovery of expert

testimony regarding the defendant's mental condition is governed by Fed. R. Crim. P. 12.2(b). (See Section IV below). If the defense calls a witness, other than the defendant, at any hearing in the case, they are required to turn over any witness statements they have that relate to the subject matter of the testimony. (See Section IV below).

B. *Brady* and *Giglio*

Brady v. Maryland and its progeny preclude the government from concealing exculpatory evidence, i.e., evidence that is "favorable to the accused," when such evidence is "material to guilt or punishment." *Giglio v. United States* and its progeny extend *Brady* to all material information that might be used to impeach a government witness, such as a plea agreement between the witness and the government, the witness's criminal record, payments to an informant who will testify, or a witness's prior inconsistent statements. *Giglio* material might include other things such as disciplinary records of a law enforcement witness. Few things cause as much trouble for a prosecutor as failing to disclose exculpatory information. There is no "good faith" exception for a *Brady* violation.

The United States Supreme Court has held that the prosecutor bears a personal obligation to ensure that the investigative files of all law enforcement agencies that participated in the investigation are reviewed for *Brady* and *Giglio* material. *Kyles v. Whitley*, 514 U.S. 419 (1995). The prosecutor will be deemed to have knowledge of material in the agencies' files. Thus, AUSAs must review the agencies' files (or ensure that the files are reviewed) before indictment. In addition, within a reasonable period of time prior to trial or an evidentiary hearing (such as a motion to suppress), the AUSA must provide the *Giglio* Coordinator with a draft *Giglio* letter containing a list of all potential law enforcement witnesses so that any *Giglio* material may be obtained from investigative agencies. (This issue is discussed in greater detail below.) Ordinarily, the AUSA should allow for a three-week period to receive a *Giglio* response from a law enforcement agency.

It is often unclear whether evidence is exculpatory. In this District, *Brady* and *Giglio* are interpreted broadly. If an AUSA has any doubt about whether a piece of evidence is exculpatory, the evidence should be disclosed. Similarly, non-exculpatory neutral evidence, such as the absence of fingerprints on a gun, should be disclosed as well. AUSAs are encouraged to seek counsel on these issues from their supervisor, the Professional Responsibility Officer, or the *Giglio* Policy

Coordinator. Currently, the Professional Responsibility Officer and *Giglio* Policy Coordinator is AUSA Terrence Donnelly.

Although a guilty plea will normally bar later claims that *Brady* was violated, see *Tollett v. Henderson*, 411 U.S. 258, 267 (1973), the AUSA is advised that in *Ferrara v. United States*, 456 F.3d 278 (1st Cir. 2006), the First Circuit held that the government's failure to disclose a witness's recantation of his statement constituted impermissible prosecutorial misconduct, and, because absent the prosecutorial misconduct there was a reasonable probability that the petitioner would not have pleaded guilty but, rather, would have rejected the proffered plea agreement and opted for a trial, a new trial was granted. Thus, if the AUSA becomes aware of *Brady* or *Giglio* material prior to a change of plea, the material should be provided to the defense.

1. Law Enforcement Witnesses

Under Supreme Court and other precedent, see *Kyles v. Whitley*, 514 U.S. 419 (1995), prosecutors are deemed to have knowledge of all material in the files of the agencies and police departments that have participated in the investigation: "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Id. at 437. Such material includes the disciplinary files of the agents and police officers who are prospective government witnesses. In order to comply with our *Brady/Giglio* obligations in this regard, as well as to comply with USAM 9-5.100 (Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("*Giglio* Policy")), this Office instituted a policy that seeks the review of personnel and other law enforcement files that may bear upon the credibility of law enforcement witnesses.

Once an AUSA identifies law enforcement witnesses in a particular case, the AUSA must draft *Giglio* information request letters for their prospective witnesses and forward those letters to the Office's *Giglio* Coordinator within a reasonable period of time prior to trial or an evidentiary hearing (such as a motion to suppress). The *Giglio* Coordinator will then send a written request to the agencies or departments that employ the prospective witnesses, asking the law enforcement agency to review the witnesses' personnel files. If the files contain information that may bear upon the credibility of the prospective law enforcement witness, that information will be forwarded to the *Giglio* Coordinator.

If the witness is expected to testify and the disclosed file material may bear on the witness's credibility, the *Giglio* Coordinator will disclose it to the AUSA on the case.

If the AUSA is advised by the *Giglio* Coordinator that potential *Giglio* material exists, or if the AUSA learns of potential *Giglio* material from another source, the AUSA must consult with the *Giglio* Coordinator and a supervisor on procedures for handling and/or disclosing such materials.

If the impeachment value of the file material is clear, the AUSA will disclose it to the defense, with prior notice made to the law enforcement witness. The material should be disclosed in sufficient time for its effective use by the defense at trial or hearing.

If the impeachment value is unclear, the AUSA will make an ex parte disclosure, under seal, to the presiding judge seeking the court's determination whether the personnel file material must be disclosed to the defense. A copy of any ex parte submissions made to the court and the ruling of the court regarding disclosure should be forwarded to the *Giglio* Coordinator.

2. <u>Informants</u>

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

> "[i]t is well-established that the government has a 'privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law.' *Roviaro v. United States*, 353 U.S. 53, 59, 77 S.Ct. 623, 1 L.Ed. 2d 639 (1957). This privilege is not absolute. 'Where the disclosure of an informant's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair

> determination of a cause, the privilege must give way.' *Id.* At 60-61, 77 S.Ct. 623"

United States v. Cartagena, 593 F.3d 104, 112-113 (1st Cir. 2010).

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

Obviously, disclosure of an informant may very well endanger the safety of that informant and adversely affect other investigations in which the informant is involved. For these reasons, where *Roviaro* does not mandate disclosure of the informant's identity, AUSAs must refuse to disclose the identity of the government informant unless ordered by the court to make such disclosure.

Prior to disclosing the identity of an informant, the AUSA must consult with both the agency involved and with the Criminal Chief or other supervisor.

3. Non-Law Enforcement Witnesses - Civilians

For purposes of this section, a non-law enforcement witness is one who is the victim of a criminal offense (e.g. a bank teller); a person who witnesses the commission of a criminal act, but is not a participant in that act or a co-conspirator (e.g. a bystander or passerby); and other persons to whom no promises, rewards, or inducements have been made.

Prior to any hearing or trial in which an identified non-law enforcement witness is expected to present testimony, the AUSA must request the case agent to conduct a criminal history check for each such person. If the intended non-law enforcement witness has a criminal history, the AUSA must disclose it to the defense within a reasonable period of time prior to trial or an evidentiary hearing and in sufficient time for its effective use by the defense at trial.

4. Cooperating Witnesses

For purposes of this section, a cooperating witness is one who is a co-defendant; a co-conspirator; a participant in the criminal activity who was not charged; a "jailhouse" witness; an informant who has been advised that their identity may not be kept confidential and that they may be called to testify; and other persons to whom promises, rewards, or inducements have been made.

Prior to any hearing or trial in which a cooperating witness is expected to present testimony, the AUSA must request the case agent to conduct a criminal history check for each such person. If the cooperating witness has a criminal history, the AUSA must disclose it, along with all other impeachment material, to the defense within a reasonable period of time prior to trial or an evidentiary hearing and in sufficient time for its effective use by the defense at trial.

C. The *Jencks* Act

The *Jencks* Act, 18 U.S.C. § 3500, requires the government to make "witness statements" available to the defense after the witness testifies on direct examination at trial. Rule 26.2 extends this requirement to suppression hearings, sentencings, supervised release hearings, detention hearings, and probable cause hearings. Rule 26.2 imposes the same requirement on the defense for all witnesses other than the defendant. "Witness statements" include writings that the witness made, signed, or adopted; recordings of the witness; substantially verbatim writings or recordings by a person interviewing the witness; and grand jury transcripts.

Though not required by law, local custom and the policy of this Office is to disclose witness statements before the start of evidence in the typical case and certainly before a witness testifies. The timing of the disclosure is left to the discretion of the AUSA. However, the disclosure should be made sufficiently in advance of the testimony to allow effective use by the defense at trial.

AUSAs should be cognizant that an agency report of an interview of a witness typically is not a "witness statement" – it is usually not substantially verbatim and has not been adopted by the witness.

If a witness statement contains *Brady* material, it should be disclosed sufficiently in advance of trial to allow the defense to make use of it. Our obligations under *Brady* prevail

over the timing provisions of the *Jencks* Act.

Certain material is not covered by the *Jencks* Act, and AUSAs may choose not to disclose such items unless, of course, the material contains exculpatory evidence.

AUSAs should familiarize themselves with the Discovery Order of the court. In particular, paragraph IV (*Jencks* Act Discovery) of that Order specifically addresses the government's agreement to provide pretrial discovery of witness statements and imposes a mandatory reciprocal provision for defense lawyers who accept *Jencks* Act material from the government.

D. Discovery in Title III Cases

In cases where there has been a Title III electronic intercept of communications, we are obligated to disclose certain materials pertaining to the wiretap as identified below.

1. Final copies of all Applications, Affidavits, Orders, Orders to Communication Providers, in support of the electronic surveillance, and extensions thereof;

2. Final copies of all Applications, Orders, and Orders to Communications Providers in support of pen register and trap and trace device orders and orders issued pursuant to 18 U.S.C. § 2703 and Fed. R. Crim. P. 41;

3. A CD rom containing all communications (audio, video, and any other electronic communications) intercepted pursuant to the order(s) of the court;

4. Transcripts of conversations we intend to present at trial. The timing of such disclosure is governed by the court's Discovery Order.

E. Similar Act Evidence, FED. R. EVID. 404(B)

Because early production of 404(b) evidence may facilitate the early resolution of a case, AUSAs should consider whether providing early 404(b) evidence to the defense will help resolve the case. In accordance with Fed. R. Evid. 404(b), AUSAs shall provide 404(b) evidence notice sufficiently before trial so as to provide the defense with an opportunity to object.

F. Expert Notice

The court's Discovery Order and Rule 16 govern disclosure of expert testimony. Often, AUSAs are unable to make immediate full disclosure of expert testimony because the investigative agency has not completed its analysis of the submitted evidence. AUSAs should supplement their expert notice disclosure in sufficient time prior to trial.

III. GATHERING AND REVIEWING DISCOVERABLE INFORMATION

A. Where To Look - The Prosecution Team

Department of Justice policy states:

> It is the obligation of federal prosecutors in preparing for trial, to seek all exculpatory and impeachment information from all members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant.

USAM §9-5.00. This duty to search for exculpatory and impeachment information extends to information prosecutors are required to disclose under Federal Rules of Criminal Procedure 16 and 26.2 and the *Jencks* Act.

In most cases, "the prosecution team" will include the agents and law enforcement officers within the District of Rhode Island who are working on the case. In multi-district investigations, investigations that include both AUSAs and prosecutors from a DOJ litigating component or another United States Attorney's Office, parallel criminal and civil proceedings, or proceedings that are jointly prosecuted with State authorities, this definition must necessarily be adjusted to fit the circumstances. In addition, in complex cases that involve parallel proceedings with regulatory agencies (SEC, FDIC, EPA, etc.), or other non-criminal investigative or intelligence agencies, the AUSA should consider whether the relationship with the other agency is close enough to include it in the prosecution team for discovery purposes.

AUSAs are encouraged to err on the side of inclusiveness when identifying members of the prosecution team for discovery purposes.

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

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

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

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

B. <u>What to Review/Request</u>

All evidence and other potentially discoverable material gathered during the investigation, whether in the custody of AUSAs of this Office or the custody or control of the other members of the prosecution team, should be reviewed. Special care should be given to gathering exculpatory/impeachment information and witnesses' statements. Specifically, AUSAs should review the following:

1. The agency's investigative files;

2. In cases where a CI/CW/CS identity must be disclosed pursuant to <u>Roviaro</u> and its progeny, or where a CI/CW/CS is expected to testify, the AUSA must review the CI/CW/CS files. Agencies who make use of confidential informants and cooperating individuals have their own established procedures for retaining information about those witnesses;

3. Evidence/information obtained via subpoena, search warrant, or other legal process. With respect to electronically-stored evidence, including e-mails, sufficient time must be allotted for a search of hard drives, disks, and other storage hardware;

4. Evidence/information gathered by civil or regulatory agencies in parallel investigations;

5. <u>Substantive</u> communications/correspondence about the case, including e-mails, which must be both preserved and reviewed;

6. Potential *Giglio* information about non-law enforcement witnesses (including declarants whose hearsay statements the government might seek to introduce at trial).

IV. MISCELLANEOUS DISCOVERY CONSIDERATIONS

A. Federal Rule of Criminal Procedure 26.2

Rule 26.2 imposes the *Jencks* Act obligation on the defense, with the exception of statements of the defendant. Accordingly, after a defense witness other than the defendant has testified, the defendant is obligated to disclose any statements he or she has of the witness that pertain to the subject matter of the testimony. A failure to produce witness statements within the custody or control of the defense may lead to the witness's testimony being struck. Fed. R. Crim. P. 26.2(e). Rule 26.2 applies not only to trial, but to other proceedings as well, including suppression or detention hearings, sentencings and revocation hearings, and habeas proceedings.

B. Federal Rule of Criminal Procedure 12(b)(4)

Rule 12(b)(4) provides that the government may notify the defendant at arraignment or soon thereafter of its intention to use specific evidence at trial to afford the defendant the opportunity to move to suppress this evidence before trial. It is in the government's interest to turn over such evidence well in advance of trial so that a suppression motion can be litigated before trial. If the government provides the defense with this evidence pre-trial, and the defense fails to file a motion to suppress the evidence, the defendant is deemed to have waived the suppression issue. Fed. R. Crim. P. 12(b)(3) & (e). If a motion to suppress is granted pretrial, the government can file an interlocutory appeal. But, if the court allows a defendant to raise a suppression motion during trial, perhaps because the government failed to turn over the evidence in a timely fashion, the government has no appellate remedy as jeopardy has attached.

Whenever a suppression issue is pending, the AUSA should ask the court to decide it prior to jury selection so as preserve the government's right to appeal. Under Rule 12(d), a court cannot defer ruling on a pre-trial motion if doing so adversely affects a party's appellate rights.

C. Federal Rules of Criminal Procedure 12.1, 12.2 & 12.3

Rules 12.1, 12.2, and 12.3 require the defendant to give notice of certain types of defenses.

Rule 12.1 requires the defendant to give written notice of any intended alibi defense. Before receiving such notice, the government must make a written request, stating the time, date, and place of the alleged offense. The defendant's response is

due within ten days and must state specifically where the defendant was at the time of the offense and provide the names, addresses, and telephone numbers of all alibi witnesses. Once the government receives the alibi notice, the government must disclose the witnesses it will call to rebut the alibi and to establish the defendant's presence at the scene of the crime. The disclosure obligations of the defendant and the government are continuing. The failure to comply with these notice provisions may lead to the exclusion of the non-disclosed witness. However, the court cannot prevent the defendant from testifying about the alibi even if the defense fails to comply.

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

Rule 12.3 pertains to a claim of public authority to engage in the charged criminal conduct, that is, the defendant claims that he was acting on behalf of a law enforcement or intelligence agency. The defendant is required to provide written notice of this defense under seal, and the government must respond in writing, either admitting or denying that the defendant exercised the public authority identified in his notice. The defendant is required to identify all witnesses in support of his defense, and the government must identify those witnesses it would call to oppose the defense.