

MIDDLE DISTRICT OF TENNESSEE DISCOVERY POLICY

This is a guide to Discovery in criminal cases in the Middle District of Tennessee. It does not cover every issue an AUSA will face in making discovery decisions, but it is meant to provide framework and guidance. The guidance is subject to legal precedent, court orders, and local rules. It provides prospective guidance only and is not intended to have the force of law or to create or confer any rights, privileges, or benefits. *See United States v. Caceres*, 440 U.S. 741 (1979). This discovery policy does not govern disclosure in cases involving terrorism and national security. Policy concerning these cases will be dependent on guidance currently being developed by the Department. The supervisors in the office and particularly the Discovery Coordinator are available to assist in properly meeting discovery obligations.

The Government's disclosure obligations are generally set forth in FED. R. CRIM. P., Rules 16 and 26.2, Local Criminal Rule (LcrR) 16.01(a), 18 U.S.C. § 3500 (Jencks Act), *Brady*¹ and *Giglio*² (collectively referred to as "discovery obligations"). AUSAs should be aware that USAM Section 9-5.001 details DOJ policy regarding disclosure of exculpatory and impeachment information and provides for broader, more comprehensive, and earlier disclosure than required by *Brady* and *Giglio*. This policy is not intended to broaden, expand, or add requirements to the DOJ policy

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

¹ *Brady v. Maryland*, 373 U.S. 83 (1963) followed by *U.S. v. Bagley*, 473 U.S. 667, 682 (1985) and *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (prosecutors have a duty to learn of any favorable evidence known to others acting on the Government's behalf in the case), explain the Government's duty to disclose evidence favorable to an accused and material to guilt or punishment.

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

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.

A. Timing of Disclosures

Discovery - Immediately following indictment but no later than fourteen days (14) after arraignment, the AUSA should begin making discovery material available without waiting to get a formal request from the defense.

- a. Exculpatory information must be disclosed promptly after discovery. While the information should be disclosed at that time, if the underlying document or material is covered by the Jencks Act, and the government intends to call the witness to testify, the disclosure of the underlying document is covered by the

Jencks Act. *United States v. Davis*, 306 F.3d 398 (6th Cir. 2002); *United States v. Bencs*, 28 F.3d 555, 561 (6th Cir. 1994). **Note:** *Brady* is a rule of disclosure not admissibility.

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

Prosecutors should always consider security concerns of victims/witnesses when making discovery timing decisions as well as protecting ongoing investigations, preventing obstruction of justice, investigative agency concerns and other strategic considerations that improve our chances of reaching a just result in our cases.

B. Disclosure of Reports of Interview for Testifying/Non-Testifying Witnesses

Reports of interview (ROIs) such as FBI 302's and DEA 6's are not considered Jencks material unless the ROI contains a verbatim statement of the witness or the witness has adopted it. Therefore, the general policy is that ROIs are not turned over to the defense in discovery. *United States v. Farley*, 2 F.3d 645, 654-55 (6th Cir. 1993). If the material is adopted by the witness, the material should be provided as Jencks shortly before trial, after considering security issues and in line with the department's policy at USAM Section 9-5.001.

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

An agent's ROI is Jencks if the agent is going to testify about the subject matter contained in the ROI. Therefore, you must disclose the ROI as the Jencks material of the testifying agent.

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

In many cases, AUSAs should consider giving broader and earlier discovery than that which is required because it promotes our truth-seeking mission and helps us achieve speedier case resolutions when the defense realizes the nature of our evidence.

For example, in cases where there is documentary evidence too voluminous to review completely, an AUSA should consider providing the defense access to all of it. This procedure could potentially avoid discovery issues. See paragraph J below regarding documentation of what was provided in discovery.

AUSAs should not describe the discovery being provided as "open file" discovery.

When an AUSA becomes aware of evidence that directly negates the guilt of a defendant (*i.e.* *Brady* material), the AUSA must promptly notify a supervisor and disclose that evidence to the defendant and/or defense counsel. It is the policy of this Office that, if it is unclear whether known evidence is exculpatory, or whether it is substantial, AUSAs are encouraged to err on the side of disclosure.

If the prosecutor becomes aware of possible *Brady* evidence in the context of an ongoing Grand Jury investigation, the prosecutor must notify her/his supervisor to determine whether disclosure to the Grand Jury is necessary and appropriate.

D. Scope of Team

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

In determining who should be considered part of the “prosecution team,” an AUSA must determine whether the nature of the investigation or the relationship is close enough to warrant inclusion for discovery purposes. When in doubt, consult with your supervisors and/or the Discovery Coordinator. Some examples are:

1. Multi-district investigations - the “prosecution team” could include the AUSAs and agents from the other district(s).
2. Regulatory agencies - the “prosecution team” could consist of employees from agencies such as SEC, FDIC, U.S. Trustee, etc., which are non-criminal investigative agencies.
3. State/local agencies - a police officer is a part of the “prosecution team” - if the investigation is a multi-agency task force and the AUSA is directing the officer’s actions in any way; or if the officer/trooper participated in the investigation or gathered evidence which ultimately led to the charges.

Considerations in determining whether an agency or district should be considered part of the “prosecution team”:

- a. Whether the AUSA/case agent conducted a joint investigation or shared resources relating to the investigation with the other district or regulatory agency;
- b. Whether the other agency/district played an active role in the AUSA’s case;
- c. The degree to which decisions have been made jointly regarding the other district’s or agency’s investigation and yours;

- d. Whether the AUSA has ready access to the other entity's evidence; and
- e. Whether the AUSA has control over or has directed action by the other entity.

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

E. What to Review Once It Is Determined Who Is Part of the Prosecution Team and Therefore Which Material Is In the Custody or Control of the AUSA

1. The investigative agency's file - the AUSA should consider personally reviewing the agent's file to include all the ROI's, e-mails, etc.
2. Confidential Informant (Testifying Witness) file – the entire file, not just the part relating to the current case should be reviewed.
3. Confidential Informant (Non-Testifying) - if circumstances warrant, the AUSA should request access to these files.
4. Evidence - an AUSA should review all evidence obtained including information obtained as the result of search warrants and subpoenas.
5. Regulatory Agency/DOJ Civil attorney files - the AUSA should request all information relating to the case.

F. Case-Related Communications Through Electronic Medium Such as Email

Because of the duty imposed upon AUSAs to disclose material, documents and information falling within the ambit of the Rules 16, 26.2 of the Federal Rules of Criminal Procedure, Title 18, United States Code, Section 3500, *Giglio*, *Brady*, *Kyles v. Whitley*, and *Bagley*, AUSAs should refrain from communicating with other AUSAs, agents or witnesses through any electronic means, including but not limited to email and text messages, especially where those communications involve trial or investigative strategy, witness statements, witness credibility or trial exhibits. Because email communications from agents may not be as complete as investigative reports, and may have the unintended effect of circumventing the investigative agency's established procedures for writing and reviewing reports, AUSAs should advise investigative agents that, unless circumstances dictate otherwise, substantive written communications from agents about cases should be in the form of a formal investigative report, rather than an email. Any AUSA who does communicate through these mediums should be mindful that those communications may be discoverable and disclosable to the defense and the

courts. Such mediums should only be used when the AUSA has no other means of communication available and immediate communication is essential. Keep in mind that electronic records of substantive matters must be printed and stored in the agent/AUSA file just as any other written records would need to be preserved. For further discussion of and guidance regarding electronic communications use, preservation and disclosure, see the Department of Justice Memo dated March 30, 2011, attached to this policy.

G. Obtaining *Giglio* Information from Local Law Enforcement Agencies
Giglio Policy (Law Enforcement Witnesses)

1. Overview

AUSAs must promptly notify the Office's *Giglio* Coordinator (Requesting Official) whenever a law enforcement official (federal, state or local) has become the subject or target of an investigation or a defendant in a criminal case. There are two reasons for this requirement: first, the *Giglio* Coordinator needs complete information in order to accurately advise AUSAs regarding issues with prospective law enforcement witnesses; and second, the integrity and success of a covert investigation could be jeopardized through disclosure related to a law enforcement official.

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

AUSAs should read and be familiar with DOJ's policy, articulated in a December 1996 memo from the Attorney General, regarding *Giglio* issues related to DOJ employees. That policy is included in the USAM at 9-5.100. To implement the DOJ policy, this Office has adopted the following internal policies, which apply to DOJ employees and other federal, state, and local law enforcement personnel:

- For all law enforcement personnel who are to be affiants and/or witnesses, the AUSA should have a face-to-face discussion with the individual regarding possible *Giglio* information. This discussion should occur as early in the investigation/prosecution as possible. In some instances (*e.g.* an undercover investigation), this discussion should occur at the very beginning of the investigation.
- When a law enforcement witness reports a credibility issue in her/his background, or when a defendant files a motion

requesting agency records, the AUSA must notify the Office's *Giglio* coordinator and request a search of agency records concerning the agent.

- All requests to the agencies for information regarding agency employees are to be made through the *Giglio* coordinator only, who will make such requests consistent with established DOJ procedures.
- Because *Giglio* information may implicate the personal and professional reputation of the agency employee, the AUSA must treat the information carefully and professionally and confer with the AUSA's supervisor and the *Giglio* coordinator regarding how best to proceed. (Depending on the information in question, there are a number of legal positions that the AUSA may take, e.g.: an *ex parte* submission for determination whether the information should be disclosed; disclosure to defense counsel with a protective order; or a motion *in limine* to exclude or limit the use of the information. Decisions regarding these and other such options must be made in coordination with the AUSA's supervisor and the *Giglio* coordinator.)

If an AUSA makes disclosure to the court or defense, this Office is required to provide a copy of the disclosed materials to the agency. If no disclosure is made, the Office must return the materials to the producing agency.

2. Requesting the Information

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

3. Submission of Request to Agency

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

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

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

- a. The court issued an order or decision requiring disclosure;
- b. The allegation was made by a federal prosecutor or judge.
- c. The allegation received publicity;
- d. Disclosure is otherwise deemed appropriate.

4. If Potential Impeachment Exists

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

H. Disclosure Questions Relating to Trial Preparation Witness Interviews

If, during a pre-trial interview, the AUSA learns that any part of the pre-trial interview is exculpatory or *materially* inconsistent with a prior statement rendered by the witness, regardless of how or when made, the AUSA must disclose that information in accordance with *Brady*, *Giglio*, and *Jencks*. When considering disclosure, AUSAs should first consider whether to go to the court and seek an *in camera* review of the differences and or discrepancies and have the court determine if the differences and/or discrepancies are, indeed, material, in view of *Kyles v. Whitley*, and *Bagley*.

I. Disclosure of Agent's Notes

It is the current law of this circuit that the interview notes of agents are not deemed to be the agent's *Jencks* material or discoverable pursuant to Rule 16 of the Federal Rules of Criminal Procedure. See *United States v. Farley*, 2 F.3d 645 (6th Cir. 1993); *United States v. Nathan*, 816

F.2d 230, 237 (6th Cir. 1987). If the agent's notes are a faithful representation of what is contained in their formal report (ROI), AUSAs have no duty to disclose the interview notes, unless the notes are from an interview of the defendant and the defendant requests the notes. *United States v. Clark*, 385 F.3d 609, 619 (6th Cir. 2004). Conversely, however, if the notes depart materially from what is contained in the formal report, disclosure should be considered after consultation with an AUSA's supervisor and the Discovery Coordinator.

J. Maintaining Records of Disclosure

Faithful adherence to the discovery and disclosure duties imposed on AUSAs should be accompanied by evidence of the discharge of those duties. Accordingly, AUSAs should draft receipts indicating what material, including documents, statements, reports, or exhibits are given to defense counsel and the receipt should be signed by the AUSA and defense counsel.

Consideration should also be given to retaining an exact copy of the discovery given to the defense for later reference.