DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

MAR 12 2003

MEMORANDUM FOR CHIEF, CRIMINAL INVESTIGATION

FROM: Barry J. Finkelstein
Acting Division Counsel/Associate Chief Counsel (Criminal Tax)

SUBJECT: Giglio/Henthorn Advice [redacted]

This responds to your request for advice regarding Giglio/Henthorn issues concerning Special Agent [redacted] As discussed below, it is our opinion that information contained in Agent [redacted] file must be disclosed to any prosecutor handling cases in which Agent [redacted] is likely to testify, and the prosecutor will be obligated to further disclose such information to the defense counsel, who will most likely be able to use the material in cross examination of Agent [redacted]

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Facts

[redacted]

[redacted]

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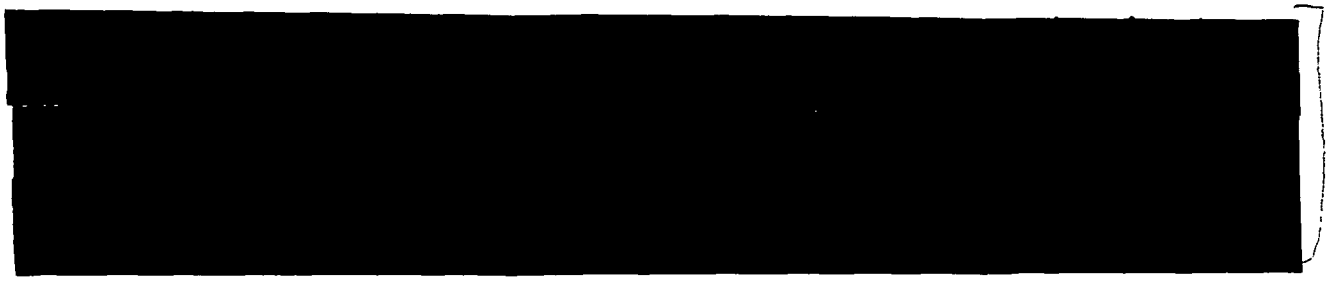

Law

In 1963, the Supreme Court confirmed that in criminal cases the government is under a general obligation to produce to the defense, upon request, evidence that is material to either guilt or punishment of the defendant. United States v. Brady, 373 U.S. 83 (1963). In 1972, the Supreme Court extended the obligation to evidence which affects the credibility of government witnesses. Giglio v. United States, 405 U.S. 105 (1972). In 1991, the Ninth Circuit expanded the government obligation to locate such impeachment material, to a search of employee personnel files. United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991). Since Brady and Giglio have their underpinnings in Constitutional concepts, they trump rules of privacy and non-disclosure. See United States v. Robertson, 634 F. Supp. 1020, 1028 n. 10 (E.D. Cal. 1986).

The linchpin to the government's Giglio/Henthorn obligation is Rule 608(b) of the Federal Rules of Evidence. Under Rule 608(b), court's in their discretion may admit evidence concerning specific instances of conduct that concern the witness's character for truthfulness/untruthfulness. Under this rule, prior false statements (particularly those under oath) are admissible. See e.g., United States v. Reid, 634 F.2d 469 (9th Cir. 1980) (false identification contained in letter to government agency); United States v. Jones, 900 F.2d 512 (2d Cir. 1990) (false statement contained in driver's license, loan and other applications); United States v. Terry, 702 F.2d 299 (2d Cir. 1983) (previous false statement made under oath). Similarly, Rule 608(b) allows cross examination of a government agent on the contents of his personnel file which contained a finding that in unrelated prior testimony he was absolutely incredible. United States v. Calise, 996 F.2d 1019 (9th Cir. 1993). Although Rule 608(b) has no limitations on how removed in time the acts can be and defers instead to a weighing of probative value, Rule 609, which concerns criminal convictions, sets an outer limit of 10 years.

By contrast, appellate courts have upheld trial court decisions to preclude evidence of prior acts where the witness had been exonerated. See, United States v. Phibbs, 999 F.2d 1053 (6th Cir. 1993); Sabir v. Jowett, 143 F.Supp. 217 (D. Conn. 2001) (publication withdrawn at request of court); United States v. Hill, 550 F.Supp 983 (E.D. Pa. 1982), aff'd, 716 F.2d 893 (3d Cir. 1984).

Policy

To reinforce the obligation to disclose impeachment material, the Departments of Justice and Treasury have each issued Giglio/Henthorn guidelines. In those Guidelines, agencies are obligated to turn over to prosecutors all "potential" impeachment material, including those concerning allegations "which are unsubstantiated, not credible or have resulted in exoneration." The prosecutor is then responsible for determining whether to further disclose the material to the defendant, and how to handle the matter at trial.

Conclusion

In the instant matter, it is abundantly clear that in any case for which Agent [redacted] is a potential witness, the Service will have to disclose to the prosecutor the information concerning [redacted]

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