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to: Nancy J. Jardini
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from: Edward F. Cronin 
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subject: Joint Terrorism Task Force (JTTF) Polygraphs

Issue:

If a CI special agent fails a JTTF polygraph and is consequently rejected from the JTTF assignment, and later that agent were to be a potential witness in a trial, should the failed test be disclosed to the prosecutor for *Giglio* and *Henthorn* consideration.

Answer:

Yes.

Background:

As you know, your agents are often asked to join with the FBI and other federal law enforcement agencies on FBI Joint Terrorism Task Force (JTTF) investigations. Related to those assignments, the FBI has raised the possibility of CI special agents submitting to a counter-intelligence polygraph examination.^[1]

Treasury, DOJ, and IRS Policies Concerning *Giglio* and *Henthorn*

Treasury Order 105-13

Treasury Order 105-13, dated February 19, 1997,^[2] addresses the disclosure of potential impeachment information to the United States Attorneys' Office and Department of Justice litigating sections with authority to prosecute criminal cases. The purpose of the

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policy is to ensure prosecutors receive sufficient information from Treasury and its bureaus to meet their obligations under *Giglio*.

- While the exact parameters of potential impeachment information are not easily determined, they have generally been defined to include: (a) specific instances of conduct of a witness for the purpose of attacking the witness' credibility or character for truthfulness; (b) evidence in the form of opinion or reputation as to a witness' character for truthfulness; (c) prior inconsistent statements; and (d) information that may be used to suggest that a witness is biased.
- It is expected that a prosecutor generally will be able to obtain all impeachment information directly from potential agency witnesses and/or affiants. Agency employees are obligated to inform prosecutors with whom they work of potential impeachment information as early as possible prior to providing a sworn statement or testimony in any criminal investigation or case. Each employing agency should ensure that its employees fulfill this obligation. Nevertheless, in some cases, a prosecutor may also decide to request potential impeachment information directly from the employing agency.
- Upon request, allegations that reflect upon the truthfulness or bias of the employee (even those that cannot be substantiated, are not credible, or have resulted in exoneration of an employee), to the extent maintained by the agency, will be provided to the prosecuting office when 1) required by a court decision; 2) the allegation was made by a federal prosecutor, magistrate judge, or judge; 3) the allegation received publicity; 4) disclosure is deemed appropriate based on exceptional circumstances in the case; or 5) disclosure is otherwise deemed appropriate by the agency.

Internal Revenue Manual 9.6.3.7.1.1

Internal Revenue Manual ("IRM") 9.6.3.7.1.1, *Henthorn* Requests, also addresses the government's obligation to disclose impeachment material under *Giglio* and *Henthorn*.

- The *Giglio* decision imposes an affirmative duty on Assistant U.S. Attorneys to disclose readily obtainable exculpatory information, including impeachment information, regardless of whether a defense motion has been filed. *Henthorn* extends the *Giglio* principle to discovery. *Henthorn* searches of personnel records are made in response to a defense motion for discovery.
- Impeachment material is generally that which calls into question a witness' honesty, integrity, or impartiality but it can extend to anything which affects the credibility and veracity of the testimony offered. Depending on the nature of the testimony, impeachment material may include material that calls into question the witness' competence, ability, thoroughness, attention to detail, visual or auditory acuity, sobriety, or reputation in the community, etc.

- If impeachment material is serious enough, it could result in the attorney for the government refusing to allow a special agent to testify.

The IRM references Treasury Order 105-13 which obligates each employee witness or affiant to inform the attorney for the government of such impeachment information.⁽³⁾

Consistent with the above policies, we believe CI should notify prosecutors of any JTTF polygraph failures, so that the prosecutor may make an independent assessment as to whether disclosure of the failure is required under the circumstances of the particular case. Certainly, there may be some practical considerations and alternative approaches, such as utilizing a different witness to sidestep the issue.

Brady, Giglio, and Henthorn

United States v. Brady

The *Brady* decision provided that in all criminal cases, the government is under a constitutional obligation to disclose, upon a defendant's request, evidence that is material either to guilt or punishment (i.e., exculpatory evidence). *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Giglio v. United States

The *Giglio* decision extended *Brady* to impose an affirmative duty on the government to disclose readily obtainable exculpatory information, including impeachment information, regardless of whether a defense motion was filed where the evidence could be used to impeach a government witness. *Giglio v. United States*, 405 U.S. 105, 154 (1972).

United States v. Henthorn

Henthorn extended the principle from *Brady/Giglio* to discovery, obligating the government, upon a defendant's request, to examine the personnel files of government employees it intends to call as witnesses in a criminal trial in order to determine if any portions of the files ought to be made available to the defense for impeachment purposes once the defense has made a demand for their production. *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991).

Case Law Interpretation of *Brady/Giglio/Henthorn* in the Context of Polygraphs

The determination of a JTTF polygraph failure as impeachment material ultimately lies with the prosecutor and is dependent on the facts of each case. The following are factors the prosecutors may consider in making these determinations.

The Supreme Court has held that a prosecutor has no constitutional duty to disclose to a criminal defendant the fact that a witness has "failed" a polygraph test. *Wood v. Bartholomew*, 516 U.S. 1, 5-6 (1995). While the Fourteenth Amendment due process right prohibits "a knowing and deliberate use by a state of perjured evidence in order to obtain a conviction," *Mooney v. Holohan*, 294 U.S. 103 (1935), the Supreme Court has not ruled that polygraph evidence is an inherently reliable indicator of deception, so a defendant cannot show that the prosecution knowingly used or failed to correct perjured testimony simply because the witness has failed a polygraph. *King v. Trippett*, 192 F.3d 517, 522-23 (6th Cir. 1999).

Other courts, however, have found that impeachment evidence does include the results of a polygraph test. *United States v. Lindell*, 881 F.2d 1313, 1326 (5th Cir. 1989)(citing *Carter v. Rafferty*, 826 F.2d 1299, 1305 (3rd Cir. 1987)). Thus, the law seems somewhat unsettled on this point.

In order to establish a *Giglio* violation, the defendant bears the burden of establishing (1) that the prosecution suppressed the evidence, (2) that the evidence was favorable to the accused, and (3) that the evidence was material. *United States v. McCullah*, 136 Fed.Appx. 189, 199-200 (10th Cir. 2005)(emphasis added)(citing *United States v. Gonzalez-Montoya*, 161 F.3d 643, 649 (1998)).^[4]

The materiality test is only met if "[t]here is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *United States v. Lindell*, 881 F.2d 1313, 1326 (5th Cir. 1989)(citing *United States v. Bagley*, 473 U.S. 667, 682 (1985)).^[5] In *Lindell*, while the court found that polygraph results constitute impeachment material, the court did not find that the results in that case were material. The defendant was unable to point to specific trial testimony that could have been impeached by the polygraph results nor was the defendant able to show that the trial would have been different had the defendant been given the polygraph results before the conclusion of the trial. In *Carter*, the court reached an opposite conclusion, finding the polygraph results were material and should have been disclosed under *Brady* because the witness' testimony was critical to the prosecution's case. The witness' eyewitness identification testimony was the only direct evidence placing the habeas corpus petitioner at the scene of the crime. *Carter*, 826 F.2d at 1299.

Since the law remains unsettled on whether polygraph examinations qualify as impeachment material and whether a JTTF-type polygraph is "material" to a particular case, we believe the decision must be left to prosecutors to determine on a case by case basis whether a JTTF polygraph failure is subject to disclosure under *Giglio* and *Henthorn*.

On a separate note, it would also seem that a deceptive response may lead to additional investigation from CI management irrespective of the scenario raised by

Giglio and *Henthorn*. Accordingly, there may be various ramifications for the agent for a failed polygraph.



^[1] It is our understanding the polygraph examination is designed to be narrow and specifically focuses on counter-intelligence issues such as unauthorized contacts and disclosures of classified information. The examination does not cover lifestyle questions, although baseline questions are asked in order to evaluate and compare physiological reactions with pertinent counter-intelligence questions.

^[2] This same language has been adopted by the Justice Department in United States Attorneys' Manual Title 9-5.100, *Giglio* Policy.

^[3] The IRM also addresses internal procedures for notifying the attorney for the government of potential impeachment material.

^[4] See also *Maharaj v. Sec. for Dept. of Corrections*, 432 F.3d 1292, 1312 (11th Cir. 2005); *Tompkins v. Moore*, 193 F.3d 1327, 1339 (11th Cir. 1999).

^[5] See also *Kyles v. Whitley*, 514 U.S. 419, 435 (1995); *United States v. Acosta*, 357 F.Supp.2d 1228, 1242 (D.Nev. 2005).