DEPARTMENT OF JUSTICE

OFFICE OF PROFESSIONAL RESPONSIBILITY

REPORT

Investigation of allegations of prosecutorial misconduct in *United States v. Theodore F. Stevens, Crim. No. 08-231 (D.D.C. 2009) (EGS)*

August 15, 2011

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INTRODUCTION AND SUMMARY

The following constitutes the final report of the Office of Professional Responsibility (OPR) based on its investigation of allegations of prosecutorial misconduct in the case of *United States v. Theodore F. Stevens*, Criminal No. 08 231 (D.D.C. 2009) (EGS).[1]

On July 29, 2008, a District of Columbia grand jury returned an indictment charging then United States Senator Theodore F. Stevens with violations of 18 U.S.C. §§ 1001(a)(1), (a)(2), (c)(1) and (2), for failing to report gifts and liabilities as required on his U.S. Senate Public Financial Disclosure Form. Count One charged Senator Stevens under 18 U.S.C. § 1001(a)(1) with engaging in a scheme, from May 1999 to August 2007, to conceal "his continuing receipt of hundreds of thousands of dollars' worth of things of value" from VECO Corporation and its chief executive officer, Bill Allen, by failing to report the items on his yearly Financial Disclosure Forms. The things of value included: major home improvements to Senator Stevens's Girdwood, Alaska residence; a new Land Rover Discovery vehicle in exchange for a used Ford Mustang automobile; household goods, including a Viking gas grill, a multi drawer tool cabinet with new tools, a massage chair; and a sled dog.

Count One alleged further that, as part of the scheme, Senator Stevens took various steps to conceal his receipt of things of value from VECO and Allen, by filing Financial Disclosure Forms for the years 1999 to 2006 without reporting anything he received from VECO and Allen as either a gift or a liability, and by making false representations to his friends, his staff, and the media about the improvements made to his Girdwood, Alaska residence and his receipt of things of value from VECO and Allen.

In addition, Count One alleged that, at the same time Senator Stevens was concealing his receipt of valuable things from VECO and Allen, he received and accepted solicitations for official actions from Allen and other VECO employees, and used his official position and his Senate office for VECO's benefit. Specifically, the indictment alleged that Senator Stevens used his official position to accept solicitations from Allen in exchange for official action regarding funding for VECO projects and partnerships (including Pakistani and Russian projects); requests for federal grant projects to benefit VECO; and federal and state assistance regarding construction of a natural gas pipeline from Alaska's North Slope Region. The indictment alleged further that Senator Stevens concealed gifts

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[1] On November 8, 2010, OPR submitted its draft report of investigation to the subjects and their attorneys for comment. OPR also invited comment from certain Department and FBI officials. We reviewed all such comments and amended the draft report to the extent we considered appropriate. The comments are attached hereto in Appendix II at Tabs A-J.

from Allen and VECO so he could conduct officials acts on VECO's behalf without arousing suspicion.[2]

Counts Two through Seven of the indictment charged Senator Stevens, under 18 U.S.C. § 1001 (a)(2), with knowingly and willfully making false statements in the Financial Disclosure Forms he filed with the Secretary of the Senate for each of calendar years 2001 through 2006. With respect to each year, the indictment alleged that Senator Stevens failed to report his receipt of things of value (exceeding the nominal threshold reporting amount) from VECO and Allen, while knowing that such things of value were required to be reported as either gifts or liabilities on his annual Financial Disclosure Forms for the years 2001 through 2006.[3]

I. ARRAIGNMENT AND TRIAL DATE SELECTION

United States District Judge Emmet G. Sullivan arraigned Senator Stevens on July 31, 2008 in Washington, D.C. At the arraignment, Senator Stevens's counsel requested all *Brady*[4] material "immediately," "expedited" discovery, and a speedy trial prior to the impending November 2008 election (Stevens was running for re election to the U.S. Senate). Brenda Morris, Principal Deputy Chief of the Department of Justice's Public Integrity Section (PIN), volunteered that the government could provide the bulk of the discovery material (consisting of audio tapes, video tapes from Title III recordings, and consensually monitored recordings) within one week if the defense provided a 500 gigabyte hard drive.[5] Judge Sullivan asked if the government was prepared to produce "everything" that

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[2] The indictment did not specifically allege that Stevens received gifts as a *quid pro quo* for official acts favoring VECO.

[3] Senator Stevens was required to report gifts exceeding $260 for 1999 through 2002. The threshold amount for gifts rose to $285 for 2003, and to $305 for 2004 through 2006. He was also required to report liabilities exceeding $10,000 for all applicable years.

[4] *Brady v. Maryland,* 373 U.S. 83 (1963).

[5] Morris joined a trial team consisting of PIN attorneys Nicholas Marsh and Edward Sullivan; Alaska Assistant U.S. Attorneys (AUSAs) Joseph Bottini and James Goeke; and FBI Special Agents (SAs) Mary Beth Kepner and Chad Joy. PIN Chief William Welch oversaw the trial team. The late addition of Morris drew criticism from members of the trial team, who felt slighted, resulting in an antagonistic work environment that continued throughout the trial. The subjects told OPR that there was no clear leader on the trial team to assign tasks to the various attorneys and ensure that tasks were completed. Lack of leadership also contributed to poor record keeping practices and general disorganization regarding document management, including production of *Brady* and *Giglio* material to the defense.

the government believed was discoverable.[6] Morris responded that the government would produce the "bulk" of discovery within one week, but there would be "some other matters that we just don't have available to give at this point just because of the technical issues."[7]

In response to the defense request for a speedy trial, Judge Sullivan determined that the trial date for the case was October 9, 2008. Morris suggested September 22, 2008, and advised the court that, in suggesting that date, the government had "taken into consideration providing discovery in this matter."[8] Ultimately, Judge Sullivan scheduled the trial for September 24, 2008. At an August 20, 2008 hearing, Morris confirmed the government's ability to meet the September trial date: "We were the ones who suggested September 22nd, so whatever you tell us to do we're going to be here, so we're ready."[9]

II. THE MAIN GOVERNMENT WITNESSES

Between the arraignment and trial, the *Stevens* prosecution team conducted preparation sessions with various witnesses, including Bill Allen, Robert "Rocky" Williams, and Dave Anderson.

Bill Allen is the former Chief Operating Officer of VECO corporation, a large Alaska oil field services corporation, and a longtime friend of Senator Stevens. Allen began cooperating with the government in August 2006, after being confronted with evidence of his involvement in a scheme to bribe state and federal officials in return for favorable legislation regarding an oil industry tax. Allen recorded conversations for the government with various investigation targets, including Senator Stevens. Prior to the *Stevens* trial, Allen testified for the government in the bribery trials of former Alaska House Speaker Peter Kott and former Alaska State Representative Victor Kohring; both were convicted.

Allen was the main witness in the government's case against Senator Stevens, providing testimony at trial about VECO's involvement in renovations to Senator Stevens's Girdwood residence; Allen's exchange of a new Land Rover Discovery for Stevens's used 1964½ Ford Mustang, plus a $5,000 check; and his providing other things of value to Stevens. At the time of the *Stevens* trial, the prosecution team was aware that Allen had some difficulty communicating due

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[6] *United States v. Stevens*, Tr. July 31, 2008 (pm) at 20.

[7] *United States v. Stevens*, Tr. July 31, 2008 (pm) at 20.

[8] *United States v. Stevens*, Tr. July 31, 2008 (pm) at 11-12.

[9] *United States v. Stevens*, Tr. Aug. 20, 2008 (am) at 60.

to head injuries he had sustained in a motorcycle accident in 2001. The prosecution team was also aware of allegations that Allen had sex with underage females, that he had been investigated by the Anchorage Police Department (APD) regarding such allegations (and was currently under investigation by the APD and later the Department of Justice's Child Exploitation and Obscenity Section (CEOS)), and that one of the underage females, Bambi Tyree, once gave a false statement under oath concerning her sexual relationship with Allen.

Rocky Williams had been a VECO employee, and he provided information about renovations to Senator Stevens's Girdwood residence by Williams and other VECO employees. Williams also provided other information, such as the extent to which Senator Stevens and his wife were aware that work was being done by VECO employees. Williams supervised the Girdwood renovations and suggested a contractor, Christensen Builders, to perform the bulk of the carpentry work. Williams received and reviewed the Christensen Builders invoices and forwarded them to Bill Allen, who forwarded all but one of the bills to Senator Stevens. Stevens paid all the invoices he received from Christensen Builders, but Stevens never received any invoices from VECO for its work on the renovations. VECO records attributed hours worked by Williams and other VECO employees to an account associated with the Girdwood project.

Prior to the *Stevens* trial, Williams developed serious health issues. He ultimately did not testify at trial, and died of liver failure on December 30, 2008, two months after trial.

Dave Anderson is Bill Allen's estranged nephew who worked as a welder for VECO and, while on the VECO payroll, worked with Rocky Williams overseeing the renovations to Girdwood. VECO records attributed his hours to the Girdwood account.[10] Like Bill Allen, Anderson was a confidential source for the government. In August 2008, shortly before the trial began, the government became aware that Anderson had signed a false affidavit at the request of [redacted]. The affidavit stated that Anderson had been promised full immunity for himself and 13 friends and family members, including [redacted] in exchange for his cooperation in the investigation of Senator Stevens.

[10] After the renovations, Anderson became romantically involved with Bill Allen's former girlfriend, causing tension between Allen and Anderson. Allen fired Anderson from VECO and had Anderson's home demolished. Anderson then attempted to obtain a "severance package" from VECO, threatening Allen with his knowledge that VECO paid for the renovation to Senator Stevens's Girdwood residence and Allen's other questionable activities. Allen eventually paid Anderson $30,000, and Anderson agreed to leave Alaska.

III. PRETRIAL DISCLOSURES

Prior to trial, in addition to witness preparation, the prosecutors worked to respond to defense requests for discovery, opposed and argued a motion for a change of venue to Alaska, and filed a motion to limit the examination of Allen regarding the APD's active investigation of Allen for alleged sex crimes.[11] On August 7, 2008, the government provided the defense with approximately 500 gigabytes' worth of material, including 66,000 pages of documents, 2,024 pictures and images, and more than 2,800 intercepted telephone conversations. During this period, the prosecutors decided to produce *Brady* and *Giglio*[12] material in summary letters rather than producing FBI 302 reports of interviews, grand jury transcripts, and/or other documents from which the information was taken. In addition, the prosecution team became concerned with Rocky Williams's deteriorating health.

On August 25, 2008, the government provided a *Giglio* letter to the defense, followed by a *Brady* letter on September 9, 2008. The letters purported to address the government's obligations under *Giglio* and *Brady* to disclose impeachment and exculpatory information.

AUSA Bottini drafted the August 25, 2008 *Giglio* letter based on information he had collected to draft the government's motion to limit cross examination of Bill Allen. PIN attorneys Sullivan and Marsh drafted the September 9, 2008 *Brady* letter, based primarily on spreadsheets listing *Brady* information prepared by FBI and IRS agents tasked with reviewing FBI 302s, IRS MOIs, and transcripts of Alaska grand jury testimony. Some agents tasked with the *Brady* review had no working knowledge of *Brady* principles. Prosecution team attorneys did not provide any guidance to the agents, did not themselves review the materials for *Brady* and *Giglio* information, and did not compare the information on the spreadsheets with the documents from which the information was taken. Both Marsh and Bottini stated that they reviewed FBI 302s of each witness they personally planned to present at trial, but neither could point to any *Brady* information they identified for disclosure. In addition, PIN Principal Deputy Chief Morris arranged for PIN attorneys not on the prosecution team to review District of Columbia grand jury transcripts for *Brady* and *Giglio* material.[13] She later acknowledged that such a task would have been difficult to accomplish because

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[11] The motion also addressed examination of other government witnesses regarding such topics as prior convictions and alcohol use.

[12] *Giglio v. United States*, 405 U.S. 150 (1972).

[13] The prosecution team utilized grand juries in both Alaska and the District of Columbia.

the attorneys were not provided with 302s or other witness statements to compare with the grand jury testimony.

In response to the *Giglio* and *Brady* letters, the defense filed motions on September 2, 12, and 15, 2008, requesting that the court order the government to produce all FBI 302s, interview memoranda, and grand jury testimony forming the basis for information included in the letters. Although Judge Sullivan did not require the government to produce the documents, he ordered the government to comply with its ongoing disclosure obligations under *Brady* and related cases, specifically mentioning *United States v. Safavian*.[14] On September 16, 2008, in response to a second defense motion concerning *Brady* material, Judge Sullivan ordered the government to produce all 302s in redacted form by the following day. Again, agents rather than attorneys redacted the documents, and the attorneys did not review the agents' work. The government then provided the 302s, as well as some grand jury transcripts, in redacted form.[15]

IV. THE TRIAL

A. Opening Statements

On September 25, 2008, the prosecution and defense gave their opening statements. In her opening statement, PIN Principal Deputy Chief Brenda Morris described the prosecution as a "simple case about a public official who took hundreds and thousands of dollars worth of free financial benefits and then took away the public's right to know that information." Morris stated that Stevens received renovations to his Girdwood residence, beginning in 2000, that "doubled the size of the house," and that Stevens "never paid his benefactor for the renovations[,] which took years to complete."[16]

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[14] *See United States v. Safavian*, 233 F.R.D. 12 (D.D.C. 2005) (Friedman, J.). In *Safavian*, the U.S. District Court for the District of Columbia interpreted *Brady* to require the government to produce potentially exculpatory or favorable evidence without regard to "materiality" (as to how withholding such evidence might affect the outcome at trial). The court in *Safavian* stated that "[t]he only question before (and even during) trial is whether the evidence at issue may be 'favorable to the accused'; if so, it must be disclosed without regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial." *Id. at 16.* We found that the district court in *Stevens* did not issue an explicit, unambiguous order directing the government to apply the standard imposed by the district court in *Safavian,* and, therefore, we made no findings that the prosecutors violated any *Safavian* type order from the court.

[15] SA Kepner redacted the 302s pertaining to Bill Allen. She completed the task by comparing the language in the 302s to the information provided in the September 9, 2008 *Brady* letter and redacting information in the 302s not included in the letter. No attorney reviewed Kepner's work prior to providing the redacted material to the defense.

[16] *United States v. Stevens,* Tr. Sept. 25, 2008 (am) at 27-28, 32.

Morris stated that Stevens's friend, Bill Allen, admitted providing things of value to Stevens, including "hundreds of thousands of dollars worth of home renovations to that chalet." Morris said that VECO, Allen's company, provided plans for the renovations, workers, subcontractors, and materials. Allen put Stevens in contact with VECO employee John Hess, who created $3,000 worth of architectural plans for the renovations. Stevens wrote Hess a letter asking him for a bill, and Hess returned the letter to Stevens stating that Stevens should contact VECO to get the bill, because Hess was working for VECO when he created the plans. Morris stated that Stevens did hire Christensen Builders, a contractor, to raise his home one level during the summer of 2000, and that, although Stevens paid the contractor $138,000, he never paid VECO for its work on the renovations, which included providing electricians to wire the new structure, steel workers to fabricate and install an outside deck with stairs, and plumbers to install the water system and steam heating system. Morris stated that VECO's costs totaled more than $188,000. She added that although VECO "kept track of costs down to the penny," the figure "could possibly be a little high because VECO built oil wells, not houses," and that the figure could also be "a little low" because it did not capture all of VECO's expenses. Morris added: "[A]t the end of the day, whether it's $188,000, or whether it's $240,000 or whether it's $120,000, the defendant still got it for nothing."

In addition to the renovations, Morris stated that Bill Allen gave Stevens a new $44,000 Land Rover Discovery in a "sweetheart trade" for $5,000 and a Mustang that Stevens admitted was worth less than $39,000. Morris stated that from September to December 2002, after Christensen Builders completed its work and was no longer on site, Stevens received $55,000 worth of renovations from VECO for construction and installation of a first floor deck, decorative rope lighting, and a heat tape system to remove ice from the roof of the residence (the $55,000 was not part of the $188,000 renovation figure Morris mentioned earlier in the opening). Morris stated that Stevens's knowledge of the gifts would be demonstrated through Stevens's correspondence with Bob Persons, a friend of Stevens who was reporting to Stevens about the renovations, showing that Stevens was aware of the work on Girdwood as well as his receipt of other, smaller items, such as a new tool cabinet full of new tools from VECO; a new professional Viking gas grill (placed on his deck and attached to his natural gas pipeline) from VECO; a hand crafted stained glass window from Stevens's friend Bob Penney; and a $2,700 massage chair delivered to Stevens in Washington, D.C., from Bob Persons. Morris concluded that Stevens failed to disclose any of the gifts on his Senate report forms in 2001, 2002, 2003, 2004, 2005, and 2006 because "he made the choice to repeatedly violate the law."

Defense counsel's opening statement centered on Stevens's intent to pay for everything he received, and his lack of intent to file false forms or "conceal anything." Defense counsel stated that Stevens terminated a $50,000 trust to

open a bank account just to pay for renovation bills, secured a $100,000 mortgage, and paid the bills he received. Defense counsel pointed out that Stevens only spent six days in Alaska in 2000, and only nineteen days at Girdwood in 2001. Stevens needed friends such as Bob Persons and Bill Allen to oversee the on site renovations, and his wife Catherine Stevens managed the bills. Defense counsel said Stevens paid a total of $160,000 for the project, of which $140,000 was paid to Christensen Builders. Stevens received the Christensen Builders bills from Bill Allen, who reviewed each bill before passing it on. Defense counsel asserted that Bill Allen did not give Stevens a sixth, unpaid Christensen Builders bill for $19,000, and that, unknown to Stevens, Allen told Augie Paone, the owner of Christensen Builders, to "just eat the bill."[17]

Stevens's counsel stated that the Senator was never made aware of the $188,000 billed to VECO, and that Bill Allen purposefully kept such information from Stevens by not sending him any invoices for the work. Defense counsel asserted that Allen had the heat tape installed at his own cost to repair defective work done on Girdwood, and that Bill Allen installed expensive decorative rope lighting at the residence against Stevens's wishes; Stevens had merely asked Allen to "get someone to put up my Christmas lights."

The defense theory that Stevens intended to pay for everything featured two handwritten notes from Stevens to Allen in October and November 2002, in which Stevens thanked Allen for his help and requested a bill. The October 6, 2002 note included a line noting that "[f]riendship is one thing. Compliance with these ethics rules entirely different," and cautioning Allen to "remember Torricelli." The so called "Torricelli Note" referred to former New Jersey Senator Robert Torricelli, who had been admonished recently by the Senate Ethics Committee for accepting gifts from a campaign contributor.

Defense counsel then described the gifts received by Stevens as things he did not want or did not request, and asserted that Stevens believed the Land Rover/Mustang trade with Allen was fair.

B. Witness Testimony

The government began its case in chief with six current and former VECO workers who testified to completing various tasks associated with the renovation of Stevens's Girdwood residence, including drawing the plans for the renovation, installing a generator and switch, electrical work, and carpentry work. Each worker who testified gave an estimate of the hours he or she worked and the billing rate for those services. Following the workers, former VECO accountant

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[17] Allen later paid off the debt to Paone.

Cheryl Boomershine testified regarding VECO's billing records, which the government introduced into evidence. The government presented the costs in a spreadsheet format, showing the figure of $188,928.82 as VECO's total cost for the renovations. The government also introduced the VECO records on which the spreadsheet was based.

On September 28, 2008, the defense moved the court to dismiss the indictment or for a mistrial after discovering that Rocky Williams had returned to Alaska a few days earlier, on September 25, 2008. Williams had not testified in the trial, but had been subpoenaed by both the government and the defense.[18] On September 28, defense counsel interviewed Williams in Alaska by telephone, and learned that Williams only worked at Girdwood on a part time basis. This information conflicted with VECO records the government introduced into evidence showing Williams working full time, plus substantial overtime, at Girdwood. The defense argued that the government had failed to disclose that information, had "sent" Williams back to Alaska to keep the defense from discovering it, and had intentionally introduced misleading evidence at trial. The government argued against dismissal, stating that Williams was very sick and the government had allowed him to return to Alaska for medical treatment. The prosecution stated that they instructed Williams to contact defense counsel after he returned to Alaska.[19]

After a September 29, 2008 hearing on the issue, Judge Sullivan gave the defense an opportunity to depose Williams under Federal Rule of Criminal Procedure 15. The defense did not depose Williams; rather, the defense elected to "monitor" the situation because Williams was still under a defense subpoena to appear on October 6. The defense accepted the court's offer to recall Boomershine for additional cross examination based on the new information. Judge Sullivan stated that he was concerned over the appearance of impropriety by the government in allowing Williams to return to Alaska, stating that the government had an "obligation to at least inform the court of this problem."

On September 29, VECO accountant Cheryl Boomershine was recalled for additional cross examination. She testified that Williams's time was part of the $188,000 figure of VECO's costs for the Girdwood renovations, but that she had no first hand knowledge whether Williams actually worked on the project.

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[18] The defense subpoena for Williams required his appearance on October 6, 2008.

[19] The government's filings included affidavits from PIN Chief William Welch and FBI Special Agent (SA) Chad Joy describing Williams's poor health as the reason for his return to Alaska.

Following Boomershine's testimony, the government continued its case with current and former VECO employees who testified that they were paid by VECO to work on Girdwood. The government also presented witnesses who testified to the value of other items Stevens received.

C. Bill Allen's Testimony

On September 30, 2008, Bill Allen began his testimony for the government. Judge Sullivan ruled on the government's pending motion to limit cross examination of Allen, ruling that the defense could inquire regarding the fact that there was a pending Alaska Police Department investigation of Allen, but the defense could not inquire as to the underlying facts of the investigation.

Allen began his testimony with background information regarding the history of VECO, his brain injury, and his relationship with Senator Stevens since they met in 1982. Allen then discussed the Land Rover/Mustang trade, testifying that he agreed to the favorable deal for Stevens because he liked the Senator. Allen testified that he later traded Stevens's Mustang back to the Senator in exchange for some rifles and shotguns, but he was not able to recall the value of the firearms.

On October 1, 2008, Allen continued his testimony, giving an overview of VECO's work on Stevens's Girdwood home, discussing the lifting of the chalet, electrical work, generator installation, boiler installation, steel piping installation on the deck, installation of steel stairs, installation of heat tape, and installation of rope lights. He described the project as being overseen by Rocky Williams and Dave Anderson. Allen then testified that he did not think Stevens asked him for a bill in 2002. The government then introduced Exhibit 495, the Torricelli Note. The Torricelli Note is an October 6, 2002 handwritten note from Senator Stevens to Bill Allen that read (in part):

> Thanks for all the work on the chalet. You owe me a bill remember Torricelli, my friend. Friendship is one thing. Compliance with these ethics rules entirely different. I asked Bob P[ersons] to talk to you about this so don't get P.O'd at him it's [sic] just has to be done right.

The government presented the note to Bill Allen, who testified, over defense objection, that when he spoke to "Bob P" (Bob Persons) about the Senator's note requesting a bill, Persons told Allen: "Don't worry about getting a bill. Ted's just

covering his ass."[20] This testimony undermined the defense theory, described in its opening statement, that Stevens intended to pay for the renovations. The prosecution also introduced a November 8, 2002 note from Stevens to Allen requesting a bill, and Allen testified that he did not want to send Stevens a bill because he "wanted to help Ted."

During the evening of October 1, 2008, while the court was in recess but Allen had not yet completed his testimony, the prosecutors sent defense counsel a letter attaching an unredacted FBI 302 of an interview of Bill Allen, which had previously been disclosed in redacted form, as well as an IRS Memorandum of Interview (MOI)[21] of Bill Allen that had not previously been produced.[22] On October 2, 2008, PIN Principal Deputy Chief Morris conceded to the court that the government's failure to produce the information that had been redacted violated the court's September 16, 2008 order to produce exculpatory information contained in the FBI 302s.[23] Morris stated that the redactions of the 302s were

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[20] Unknown to the defense at the time of Allen's testimony, prosecutors had shown Allen the Torricelli Note on April 15, 2008, and he did not then recall speaking with Persons. However, when shown the same note in witness preparation with the prosecution in September 2008, Allen recounted that Persons made the "covering his ass" statement. The prosecution team never produced information regarding either interview to the defense. The prosecution team members (with the exception of Brenda Morris) all denied remembering the April 2008 Allen interview until confronted, post verdict, with attorney notes from the interview. SA Kepner did not write a 302 for either interview, although FBI policy required creation of such a document, and she misplaced her notes for the April 15, 2008 interview. OPR later located the notes in a box of files removed from the Polar Pen "war room" in the FBI Anchorage Office and stored in a closet in the FBI's Anchorage office. OPR's review of SA Kepner's 302 practices resulted in Kepner's admission to OPR that she backdated some *Stevens*-related 302s in violation of FBI policy.

[21] In addition to the FBI agents, two IRS agents worked on the *Stevens* investigation because there were potential tax charges. Although no tax charges were brought, the IRS agents remained a part of the prosecution team throughout trial. IRS SA Bateman OPR Tr. May 21, 2010 at 5, 11-12.

[22] The trial team discovered that information had been improperly redacted from the 302 when reviewing *Jencks* material related to the testimony of summary witness FBI SA Michelle Pluta. Generally, *Jencks* material consists of prior statements by a witness, and does not need to be disclosed to the defense until after the witness testifies on direct examination at trial. Following discovery of the redacted 302, the team held an "all hands" meeting to discuss whether to provide the unredacted document to the defense. PIN Chief Welch concluded the meeting by directing the team to disclose the document. Welch told OPR that following the meeting, he lost confidence in the trial team's judgment with respect to *Brady* due to some of the arguments presented by team members recommending against disclosure of the document. Welch then conducted his own personal *Brady* review of the 302s in the prosecution team's possession.

[23] The exculpatory statement previously redacted from the 302 was Bill Allen's statement that Allen believed that Stevens would have paid architect John Hess's bill.

"mistake[s]" that reflected "bad judgment."[24] The defense argued that the government's September 9, 2008 *Brady* letter also did not include exculpatory information regarding Rocky Williams's work hours on the Girdwood residence. Judge Sullivan stated that he was "persuaded there [wa]s a *Brady* violation" and ordered the government to immediately turn over unredacted FBI 302s, interview memoranda, and grand jury transcripts for every witness in the case.

Following the October 2, 2008 hearing, PIN Chief William Welch reported the alleged *Brady* violation to OPR by email. On October 6, 2008, then Criminal Division Acting Assistant Attorney General (AAG) Matthew Friedrich wrote a letter to OPR formally reporting the allegation. Following its standard policy for cases in active litigation, OPR opened an investigation, but did not interfere with or become involved in the trial court litigation of the underlying case. At the time of the referral, OPR limited its investigative efforts to gathering documents and ensuring that relevant materials were preserved; witnesses were not interviewed, and the investigation was not activated, until after that and other issues had been litigated in the trial court. This enabled OPR to work with a fully developed record, and to have the benefit of the court's views on the issues.

Over the next two days, the prosecution team provided four packets of grand jury transcripts to the defense. On October 4, 2008, defense counsel notified the prosecution that the contents of SA Kepner's May 9, 2007 grand jury transcript indicated that there was an earlier Kepner grand jury transcript that had not been disclosed. The next day, the prosecution located and provided the transcript of SA Kepner's testimony to the grand jury on April 25, 2007. The defense also filed a motion to dismiss the case for repeated, intentional governmental misconduct. The government filed its response the same day, stating that there had been no attempt to withhold evidence, and that the *Brady* material in the redacted 302s was "cumulative and consistent" with material already provided and was redacted through "simple error and nothing else."

Allen continued his trial testimony on October 6, 2008. Among other things, Allen testified that he gave Stevens old furniture from his apartment and a new bed, a Viking gas grill, tools, a punching bag, and some water heaters. He also testified that VECO paid for school for Stevens's grandson and hired Stevens's son. Allen again testified regarding the Torricelli Note, explaining that in order to give Stevens a bill Allen would have had to fight with Roger Chan in VECO accounting, because Roger would not have wanted to create a bill.

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[24] SA Kepner redacted the 302 by comparing the government's September 9, 2008 *Brady* letter to the Allen 302s and removing all material from the 302s not listed in the *Brady* letter. PIN Principal Deputy Chief Morris assumed that PIN attorney Sullivan would review Kepner's work, but she never communicated this request to Sullivan, who did not review Kepner's work.

The prosecution ended the direct examination of Allen by playing tapes of conversations between Allen and Stevens. In an August 31, 2006 conversation, Allen told Stevens that the FBI asked Allen about what work he did on Girdwood. In an October 18, 2006 recorded conversation, Stevens stated that he and Allen did nothing wrong and that he believed the government may even be listening in on their conversation. Stevens speculated that the worst case scenario would require them to pay some fines and spend some time in jail.

The defense cross examination of Allen focused on Allen's understanding of whether Stevens wanted to pay for the renovations. The defense introduced an email from Stevens to Allen in which Stevens mentioned that he had taken out a mortgage in order to "pay the freight" for the renovations. The defense confronted Allen regarding the only Christensen Builders bill that Stevens did not pay. Allen denied that he told Augie Paone of Christensen Builders to "eat the bill." The defense attempted to get Allen to admit that he hid the bill from Stevens and that he later paid Paone for the bill as part of renovations later completed by Paone's company on Allen's house. However, when confronted with the invoice, Allen testified that Rocky Williams showed him the invoice and stated that "Augie is not going to pay this," to which Allen responded, "[j]ust put it on my bill."

The defense also confronted Allen regarding his statement that Persons told him that Stevens was "covering his ass" with the Torricelli Note. The defense questioned Allen vigorously about his disclosure of the "covering his ass" statement to the government, intimating that Allen recently fabricated the statement. Allen denied that he had only recently told the prosecutors about the statement.[25]

Finally, the defense questioned Allen about the tools, furniture, and other things Allen had given Stevens, suggesting that Stevens did not ask Allen for these items. The defense also questioned Allen about the Land Rover/Mustang car exchange with Stevens. The defense pointed out that Allen had no records to show that the value of the Land Rover was $44,000, as he had testified on direct, and that the dealer invoice was only $37,515.[26]

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[25] No member of the prosecution team corrected any potential mistake or misunderstanding regarding Allen's testimony concerning when Allen first told the government about the "covering his ass" statement.

[26] During Allen's cross-examination, Judge Sullivan stated that Allen's attorney, Robert Bundy, was signaling Allen from where Bundy was seated behind the bar in the courtroom. [redacted] The "Bundy Signaling" issue is addressed in detail in Chapter Eleven, *infra*.

On October 7, 2008, the prosecution conducted a redirect examination of Allen and introduced into evidence a check from Allen to Land Rover of Anchorage reflecting the $44,000 purchase of the Land Rover. The government then presented four witnesses: a plumber who installed Stevens's boiler; a Legislative Specialist with the National Science Foundation who received a letter from Stevens requesting that the Foundation give VECO a contract that was currently open for bidding; an FBI agent who introduced numerous recorded conversations between Allen and Stevens regarding construction at the Girdwood residence, the massage chair, and the sled dog; and an FBI agent who authenticated Stevens's United States Senate financial disclosure forms.

On October 8, 2008, the defense filed a motion to dismiss for failure to comply with Federal Rule of Criminal Procedure 16(a)(1)(E), because the prosecution introduced the Land Rover check into evidence without previously producing it to the defense in discovery. At a hearing the same day, Judge Sullivan accused the prosecutors of offering false VECO records regarding Williams's and Anderson's work hours, stating that "all along the government knew it was a lie." PIN attorney Marsh argued that, in its opening statement, the government stated that the figures were "ballpark." During a second hearing later that afternoon, AUSA Bottini explained how the government located the Land Rover check, and Judge Sullivan stated that the record was clear that the government found the check before the defense finished cross examining Allen. Judge Sullivan then struck the check from evidence, noting that earlier in the trial he had ordered the government to comply with "more than *Safavian*." PIN Principal Deputy Chief Morris blamed the disclosure mistakes on the "accelerated pace of trial," but Judge Sullivan noted that the government agreed to the trial date. Judge Sullivan also struck the portions of the VECO records regarding the hours of labor attributed to Williams and Anderson.

On October 9, 2008, the government presented Dave Anderson as a witness. Anderson testified that in 2000, he and Williams worked at the Girdwood residence every day except for the period of October to December 2000, when Anderson was in Oregon.[27] The defense did not cross examine Anderson. Following Anderson's testimony, the government rested and the defense moved for a judgment of acquittal, which the court denied.

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[27] VECO records offered by the government earlier in the trial contained billings for Anderson's work on the Girdwood renovations during the time he was away from the project in Oregon.

D. The Defense Case

The defense began its case on October 9, 2008. The defense case included several character witnesses (United States Senator Daniel Inouye; former Secretary of State Colin Powell; United States Senator Orrin Hatch), as well as witnesses who testified about various items (*e.g.,* stained glass window; sled dog; fish sculpture) received by Senator Stevens. The defense also called a real estate appraiser who estimated the value of the Girdwood improvements at $202,857; witnesses who testified that Catherine Stevens paid their company for work on Girdwood; and a real estate developer and a local assessor who both testified that the Girdwood upgrades only increased the value of the property $106,000.

On October 13, 2008, the defense filed a motion requesting that the court strike the VECO records under Federal Rules of Evidence 802 and 803(6). On October 14, 2008, the prosecution filed an opposition, arguing that the court had already taken appropriate action regarding the records of Williams's and Anderson's hours.

The defense continued its case, presenting, among other witnesses, a person who testified that her son worked at VECO and VECO paid for his academic program; Pauline Jean Penney, who testified that she bought the stained glass window as a housewarming gift for Catherine Stevens, and that Senator Stevens knew nothing about it; and Augie Paone of Christensen Builders, who testified that Catherine Stevens paid all invoices by check, that Anderson and Williams both smelled of alcohol when at the work site, and that Anderson told him that one invoice was "under review." Paone also testified that Allen told him to "eat" the final Girdwood bill, and that VECO eventually paid the bill as part of work done by Paone's company on Bill Allen's house.

On October 15, 2008, the defense presented Senator Stevens's friend, Bob Persons, as a witness. Persons testified that he never told Bill Allen that Stevens was "covering his ass" with the Torricelli Note. Persons stated that the government interviewed him and he testified before the grand jury, but he was never asked about the note or the "covering his ass" statement. Finally, Persons testified that he bought Stevens the massage chair but Stevens told him that he could not accept it. Persons also testified that he received bills from Augie Paone of Christensen Builders and sent them to Catherine Stevens for payment.

On October 16, 2008, the defense called Catherine Stevens to the stand. She testified that she paid all the bills she received and did not approve of the metal steps, the gas grill, Bill Allen's furniture, or the sled dog. She thought Rocky Williams was paid by Christensen Builders, and said that Williams signed all the Christensen Builders invoices. She assumed that VECO engineer Hess's

pay was part of the Christensen Builders contract. Lastly, Catherine Stevens testified that the stained glass window was a gift to her and not to her husband.

On October 16, 2008, the prosecution provided the defense with the entire Bill Allen APD investigation file, with a cover letter from PIN Chief Welch stating that allegations contained in the file had been summarized in the September 9, 2008 *Brady* letter.

On October 16 and 17, 2008, Senator Stevens testified. He stated that Allen volunteered to help him find people to renovate the Girdwood residence; that he liquidated a trust and opened an account to pay for the renovations; that Augie Paone was to be the general contractor for the renovations; that he sent Allen the Torricelli Note because he wanted to make sure Allen "understood that [Stevens] wanted bills for this work that was going on at the chalet"; and that he paid for the bills he received. Stevens also denied requesting or asking for many of the items he received from Allen and others, including some of the renovations.

PIN Principal Deputy Chief Morris conducted the cross examination of Senator Stevens. Morris confronted Stevens about various items he had received from Bill Allen and Bob Persons that Stevens claimed were not gifts. Morris asked why Stevens, the "Lion of the Senate," could not prevent Allen from "putting big ticket" items in the residence. Stevens responded that he and Allen were still friends and he trusted Allen, and that Allen was using the residence more than Stevens.

Morris also emphasized that Stevens received a massage chair from Bob Persons. Stevens stated that the chair was not a gift and that he could not use it because of his back problems. Morris confronted Stevens with emails he wrote discussing how much he enjoyed the chair, and Stevens admitted that the chair was still in his house and stated that "[w]e have lots of things in our house that don't belong to us, ma'am." Morris asked Stevens, "So, if you say it's not a gift, it's not a gift?" Stevens stated that, "I refused it as a gift, and I let him put it in our basement at his request."

Stevens reiterated that "VECO is not Bill Allen to me. And B.[J]. Allen is not VECO. Bill Allen is my friend. And you're the one that's bringing VECO in here. I never had a bill from VECO. I never employed VECO. I did nothing with VECO. I did it with Bill Allen."

Morris asked Stevens about a bill for parts regarding installation of a boiler he received from Chugach Sewer & Drain in 2006, noting that labor was paid by Bill Allen. Stevens admitted that he did not pay the labor cost and that, rather than contacting Chugach to determine the amount due for the labor, Stevens

contacted Allen regarding the bill. Stevens admitted that he could have contacted Chugach directly and paid the bill, but he did not.

Morris asked Stevens if he was "covering his bottom" with the Torricelli Note. Stevens denied the allegation that he sent emails to Bob Persons in an attempt to cover his bottom, asserting "my bottom wasn't bare."

On redirect examination, the defense recounted all the bills that Stevens did pay and ended by having Senator Stevens read the Torricelli Note.

E. Closing Arguments

On October 21, 2008, AUSA Bottini presented the government's closing argument, referring to the Torricelli Note twice and stating that the issue regarding VECO's work on the Girdwood residence was not whether the value was accounted for at $188,000, $250,000, $100,000 or $50,000, but rather, whether Stevens thought it was worth more than $260.00 or $305.00 in any given year. Bottini then listed 19 VECO workers who were involved with the Girdwood project and the work they completed.

In its closing argument, the defense focused on the Torricelli Note, arguing that Allen's testimony about Persons's "covering his ass" statement was a recent fabrication, and that the VECO records were "trash." PIN Principal Deputy Chief Morris presented the government's rebuttal, noting that Stevens sent Allen the Torricelli Note just five days after Torricelli was censured, that Allen had a separate VECO billing code for Girdwood, and that the case was "not about the final number." On October 27, 2008, the jury found Senator Stevens guilty on all counts.[28]

V. POST-TRIAL CLAIMS OF PROSECUTORIAL MISCONDUCT

On October 28, 2008, defense counsel raised numerous allegations of prosecutorial misconduct in a letter to Attorney General Michael B. Mukasey.[29] On November 15, 2008, Dave Anderson sent a letter to the court, alleging

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[28] Although the jury returned a guilty verdict against Senator Stevens, Judge Sullivan dismissed the case on April 7, 2009, having never formally entered the verdict.

[29] Defense counsel sent additional letters alleging prosecutorial misconduct to Attorney General Mukasey on November 19, 2008 and December 30, 2008. Defense counsel sent a letter with additional allegations to Attorney General Eric H. Holder, Jr. on April 28, 2009.

prosecutorial misconduct in relation to his trial testimony.[30] On December 1, 2008, the Office of Inspector General (OIG) provided OPR an undated memorandum written by FBI Special Agent (SA) Chad Joy, who had worked on the *Stevens* trial team, alleging misconduct by the *Stevens* trial team, including an alleged plan to prevent defense access to Rocky Williams by sending him back to Alaska, concealment of *Brady* information, and additional misconduct by SA Mary Beth Kepner unrelated to the *Stevens* case.[31]

On December 2, 2008, OIG and OPR disclosed the "Joy Complaint" to DOJ's Criminal Division so it could investigate the allegations to prepare for potential evidentiary hearings. The prosecution team sent FBI agents to Alaska to interview FBI agents who worked on the *Stevens* case about the allegations in the Joy Complaint. The prosecutors also prepared Declarations regarding their individual responses to the allegations contained in the Joy Complaint.[32]

On December 19, 2008, the court ordered the government to provide the defense with an unredacted version of the Joy Complaint, and to provide the court with internal Department communications about whether Joy attained whistleblower status by virtue of his Complaint. On January 21, 2009, Judge Sullivan issued an Order for PIN to provide all its communications with OPR regarding the Joy Complaint. On February 13, 2009, Judge Sullivan held PIN Chief Welch, PIN Principal Deputy Chief Morris, Criminal Appellate Chief Patricia Stemler, and PIN attorney Kevin Driscoll in contempt of court for failing to comply with the Court's February 3, 2009 Order to provide the defense with documents concerning non privileged internal DOJ communications regarding the Joy Complaint by January 30, 2009. On February 14, 2009, the Court withdrew its contempt finding as to Kevin Driscoll. On October 12, 2010, Judge Sullivan denied a motion to vacate the contempt finding, filed by Stemler, and dismissed the civil contempt matter against Welch, Morris, and Stemler, finding that the

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[30] OPR also reviewed a second letter by Anderson, dated December 15, 2008, elaborating on the claims raised in his November 15, 2008 letter.

[31] On December 30, 2008, the FBI Inspections Division provided OPR with a two-page addendum to SA Joy's original Complaint.

[32] On December 2, 2008, defense counsel sent the prosecution team a letter stating that it believed that it had not received one grand jury transcript of SA Kepner's testimony. The prosecution determined that the transcript was from Kepner's April 27, 2007 grand jury appearance. Because the transcript was not in the prosecutors' possession, the prosecution team ordered a new transcript and PIN attorney Sullivan drove to Annapolis, Maryland, to retrieve the transcript. The prosecution provided the defense with Kepner's April 27, 2007 grand jury transcript on December 3, 2008.

government's later compliance with the January 21, 2009 order purged the contumacious conduct.[33]

VI. THE GOVERNMENT MOVES TO DISMISS THE CASE

On February 19, 2009, Criminal Division attorneys Paul M. O'Brien, William J. Stuckwisch, and David L. Jaffe entered appearances for the government in the *Stevens* case. O'Brien led an investigation of SA Joy's allegations, separate from the prior PIN investigation. O'Brien produced to the court and the defense FBI 302s of witness interviews, witness affidavits, and witness interview outlines belonging to the trial team. In addition, he also provided affidavits, FBI 302s, and FBI agent notes generated during PIN's investigation of the Joy Complaint. During his investigation, O'Brien discovered attorneys' notes from an April 15, 2008 interview during which prosecutors showed the Torricelli Note to Allen, who stated the he did not recall discussing the note with Persons. These notes contradicted Allen's trial testimony that he spoke to Persons about the note and Persons told him that Stevens was just "covering his ass" with the note.

On April 1, 2009, the government filed a Motion to Set Aside the Verdict and Dismiss the Indictment With Prejudice after discovering additional *Brady* material not disclosed during the trial, and stating that the existence of such material rendered statements regarding interviews of Bill Allen in a prior government court filing "inaccurate." In his April 7, 2009 ruling dismissing the charges against Senator Stevens, Judge Sullivan cataloged instances of alleged governmental misconduct that occurred during and after the trial. Judge Sullivan also appointed Henry F. Schuelke, III, to "investigate and prosecute such criminal contempt proceedings as may be appropriate against William M. Welch, II, Brenda K. Morris, Nicholas A. Marsh, Edward P. Sullivan, Joseph W. Bottini, and James A. Goeke."[34]

During its investigation, OPR worked cooperatively with Mr. Schuelke, sharing information and agreeing to delay OPR's interviews of the subject attorneys until those individuals had been interviewed by Mr. Schuelke.

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[33] OPR opened a separate inquiry on the court's contempt finding against Welch, Morris, and Stemler. After reviewing the court's October 12, 2010 order lifting the contempt finding, and after considering the written responses of the three Department attorneys, OPR closed its inquiry, finding no evidence that the attorneys wilfully disobeyed the court's order.

[34] Court Order Pursuant to Federal Rule of Criminal Procedure 42 (D.D.C., filed Apr. 8, 2009). Neither the court order appointing Mr. Schuelke nor any court documents referring to him designate a specific title for Mr. Schuelke's appointed position. We also note that the court order regarding potential contempt proceedings did not include Criminal Appellate Chief Patricia Stemler.

VII. OVERVIEW OF OPR'S INVESTIGATION

A. Allegations Investigated

OPR's investigation addressed allegations that government prosecutors and agents: (1) failed to comply with their obligations to provide the defense evidence that was materially favorable to the accused under *Brady v. Maryland,* 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), with the U.S. Attorneys' Manual § 9 5.001, and with court orders concerning disclosures; (2) presented false evidence in the form of the VECO spreadsheet and VECO records; (3) falsified evidence concerning Bill Allen's "covering his ass" testimony; (4) improperly allowed Rocky Williams to return to Alaska; (5) presented false testimony concerning the alleged immunity promise to Dave Anderson, and improperly coached the testimony of Dave Anderson; and (6) violated disclosure rules with respect to the Land Rover check. The allegations focused on the conduct of PIN Chief Welch; PIN Principal Deputy Chief Morris; PIN attorneys Marsh[35] and Sullivan; and AUSAs Bottini and Goeke.[36]

OPR's investigation also addressed allegations raised by FBI Special Agent (SA) Chad Joy against SA Mary Beth Kepner, the principal FBI agent assigned to the *Stevens* case, including mishandling cooperating witnesses, and failing to enter evidence into FBI evidence control systems.

B. Evidence Gathered

During the course of OPR's investigation, OPR reviewed all relevant pleadings, trial transcripts, court orders, and discovery. In addition, OPR reviewed more than 100 boxes of documents gathered from various sources, including the Criminal Division, the Executive Office for United States Attorneys (EOUSA), and the Federal Bureau of Investigation. We also reviewed computer records, including hard drives. We conducted more than 50 interviews, including interviews of the trial team members, the Criminal Division Front Office, FBI agents, IRS agents, defense counsel, and private citizens, such as Bill Allen and Dave Anderson.[37]

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[35] PIN attorney Marsh died on September 26, 2010, prior to the conclusion of our investigation.

[36] In November 2010, after the issuance of the draft report, OPR Acting Counsel Mary Patrice Brown was named Deputy Assistant Attorney General of the Criminal Division. Robin C. Ashton, who was appointed as OPR Counsel in January 2011, is recused from this matter.

[37] OPR interviewed subject attorneys on a voluntary basis in order to avoid interfering with the ongoing criminal contempt investigation ordered by Judge Sullivan. AUSA Goeke elected not to consent to a voluntary OPR interview. OPR drew no adverse inferences or conclusions based

C. OPR's Draft Report

OPR undertook the investigation of the misconduct allegations raised in the *Stevens* case to determine whether any Department attorneys committed professional misconduct or exercised poor judgment in the prosecution of the late Senator. That was the extent, and also the limit, of our undertaking. We declined to critique the performance of Department officials or trial attorneys, beyond determining whether their conduct deviated from applicable standards of professional conduct, and we have refrained from offering recommendations on how future cases ought to be handled based on the lessons learned from the *Stevens* prosecution and its aftermath. On this score, the facts speak for themselves, and we have set them out fully so that others better suited to the task can determine the Department's course in the wake of *Stevens.*

In reaching our conclusions in this matter, we considered the comments of the subjects and their attorneys on our draft report. In November 2010, we shared the draft report with the subjects and their attorneys, inviting them to offer their views not only on the facts we found but on the conclusions we tentatively reached.[38] This was not an empty gesture. Based on our review of the comments received, we reconsidered, and retracted or modified, several of the adverse findings from the draft report.[39]

We have also endeavored to include in this report the salient comments from the subjects even if we disagreed with them. Two themes that permeated the attorneys' comments warrant attention. First, several contended that OPR's

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on AUSA Goeke's decision not to consent to the voluntary interview. Following distribution of our draft report, Goeke's attorney asserted that OPR attempted to "bully" Goeke into waiving his constitutional rights and that OPR drew negative inferences against Goeke because he refused to submit to a voluntary interview. Feb. 7, 2011 letter from Bonnie J. Brownell to OPR, at 12. These contentions are groundless.

[38] OPR provided its draft report to the seven subjects and their attorneys, as well as designated officials in the affected Department components, for their comments on the factual accuracy and legal conclusions of the draft report. The pertinent comments are attached in Appendix II.

[39] [redacted] We also withdrew the poor judgment findings against AUSAs Bottini and Goeke with respect to the introduction of the VECO accounting records (Chapter 7), and we reduced the misconduct finding against Bottini to poor judgment and withdrew the misconduct finding against Goeke for their failure to correct the misrepresentations contained in the September 9, 2008 *Brady* letter (Chapter 5). After reviewing the comments of the subjects, we determined that these findings, which were close questions to begin with, should be resolved in the subjects' favor.

draft report overlooked the overwhelming burdens confronted by the prosecutors in the *Stevens* case: less than two months to prepare for a high profile trial against a sitting United States Senator represented by aggressive and experienced defense counsel. We appreciate that the attorneys and law enforcement agents involved in the investigation and trial of Senator Stevens worked long hours under intense pressure from both internal and external forces. We believe the factual sections of the report reflect our understanding and appreciation of the difficult conditions under which the attorneys and agents operated. We do not believe, however, that those conditions relieved or excused the attorneys or agents from fulfilling their professional obligations. Indeed, neither the prosecutors nor SA Kepner complained during the *Stevens* prosecution, or during our investigation, that they were unable to meet their obligations because of litigation demands.

A second theme of the comments was that OPR held the line attorneys accountable while ignoring the conduct of Criminal Division management and PIN supervisors. Several argued vigorously that the Criminal Division Front Office, headed by AAG Matthew Friedrich and PDAAG Rita Glavin, micro managed the *Stevens* prosecution and made tactical and personnel decisions that exacerbated the problems the prosecution team faced with the defense's speedy trial demand. Again, we believe that the factual sections of this report fairly and fully describe the effect that the Front Office decisions had on the trial team by, among other things: (1) reconstituting the trial team to add Brenda Morris as lead counsel, relegating Marsh to a secondary role at trial, and removing Goeke and Sullivan altogether from active roles in the courtroom; (2) directing the team not to oppose the defense request for a speedy trial; (3) dictating who would make important arguments (*e.g.*, opening and closing), and handle the examination of important witnesses (*e.g.*, the cross examination of Senator Stevens); and (4) insisting on reviewing all significant pleadings and requiring attorneys, specifically Bottini and Morris, to prepare and submit for their review drafts of the opening statement and closing argument before the start of trial. We found, however, that, as cumbersome as the Front Office demands were, they were within the legitimate prerogatives of management. More importantly, none of the management decisions was itself misconduct or led inexorably to the misconduct committed in this case. Again, none of the *Stevens* prosecutors complained at the time, or during OPR's investigation, that the allegedly overbearing management of the Front Office caused them to fail to abide by their professional obligations. And we would not accept such an argument if it were made.[40] None of the misconduct

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[40] In holding that recurring constitutional violations are not the obvious consequence of a district attorney's office's failure to provide formal in-house training, the Supreme Court recently stated: "Prosecutors are not only equipped but are also ethically bound to know what *Brady* entails and to perform legal research when they are uncertain. A district attorney is entitled to rely on prosecutors' professional training and ethical obligations" in the absence of a pattern of violations. *Connick v. Thompson*, 131 S.Ct. 1350, 1363 (2011).

findings we made was attributable, directly or indirectly, to the conduct of the Criminal Division Front Office or PIN supervisors.[41] The three issues on which we found misconduct or poor judgment the failure to disclose Bill Allen's prior inconsistent statements (Chapter 4), the misrepresentations in the *Brady* letter regarding Allen's role with respect to Bambi Tyree's false sworn statement (Chapter 5), and the failure to disclose Rocky Williams's exculpatory statements (Chapter 6) were the province of the prosecutors. No one in management directed the trial team to withhold any of the information. The conduct that led to these findings were the acts and omissions of the individual prosecutors on whom the disclosure duty fell.[42]

This is not to say, however, that the management of the *Stevens* case was praiseworthy. As the subjects argued in their comments on our draft report, and as we discuss in various sections of this report, the reorganization of the trial team resulted not only in resentment among trial team members, but produced a fractured leadership structure, in which PIN Chief Bill Welch admittedly deferred to the Front Office and Principal Deputy Chief Brenda Morris, and Morris deferred to the team members. The void in leadership resulted in team members lacking clear assignments for certain tasks or accountability for the proper completion of such tasks.[43] Nowhere was this more evident than in the *Brady* review process

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[41] For example, in his letter commenting on our draft report, Bottini's attorney argued that Criminal Division management interfered with Bottini's trial preparation of Bill Allen by having Bottini pursue a fruitless theory of official acts and by ordering him to prepare a draft closing argument well before trial. Despite these demands, Bottini was able to conduct numerous pretrial preparation sessions with Allen and to review all of the 302s related to Allen in order to prepare for trial. Bottini stated that during his pretrial review of the 302s he would have identified any exculpatory material, had he noticed any; however, Bottini failed to identify any such material. Bottini also did not review the *Brady* spreadsheets related to Bill Allen that the FBI assembled. In his interviews, Bottini did not contend that he would have conducted a more thorough review of the 302s, his notes, and the *Brady* spreadsheets but for the added demands placed on his workload by Criminal Division management.

[42] In his letter commenting on the draft report, counsel for the late Nicholas Marsh argued that the "vacuum of leadership" was the "principal reason the April 15, 2008 statements by Allen were not disclosed to the defense." Feb. 7, 2011 letter from Robert D. Luskin to OPR at 6. We disagree. All four prosecutors assigned to the case at the time interviewed Allen on April 15, 2008, three months before the Criminal Division front office took on an active role in the case and reconstituted the trial team. Nothing that management did had any effect on the failure of the prosecutors who attended the April 15 meeting to disclose Allen's statements to the defense. Bottini, for example, attended the April 15 meeting and was responsible for handling Allen at trial. Neither he nor anyone else contended that the failure to disclose Allen's April 15 statements was caused by management's decisions on the handling of the case.

[43] This was the case with respect to the VECO accounting records. The change in the trial team's composition resulted in several different attorneys bearing responsibility at different times for handling the evidence and witnesses surrounding the costs VECO allegedly incurred on

for FBI and IRS interview reports. No member of the team claimed responsibility for the decision to assign the *Brady* review of such statements to the agents and we were unable to determine who authorized it. Although we found that PIN Principal Deputy Chief Morris exercised poor judgment with respect to the agents' *Brady* review, we also concluded that the agents' *Brady* review neither relieved the prosecutors of their disclosure obligations nor caused them to fail to fulfill those obligations.

While the agents' *Brady* review was unique to the *Stevens* case, the use of the *Brady* letter another criticism voiced by the subjects was not. We were unable to determine who authorized the use of the "*Brady* letter" as the means by which *Brady* material was disclosed to the defense, but its use was not peculiar to the *Stevens* case. In three Polar Pen cases tried before *Stevens* *Anderson, Kott,* and *Kohring* the core group of Marsh, Sullivan, Bottini, and Goeke tried each case without intense Criminal Division management oversight, a reconstituted trial team, or an expedited trial date. Nevertheless, in each of those cases, the attorneys provided *Brady* information by letter, just as they did in *Stevens*.[44] We found that the use of the *Brady* letter was standard practice in Polar Pen cases, and that no one on the trial team complained of, or objected to, its use in the *Stevens* case. We found, further, that its use neither relieved the prosecutors of their *Brady* obligations nor caused them to fail to fulfill those obligations.

VIII. OPR'S CONCLUSIONS

At various points in this report, we refer to the attorneys, collectively, as "the trial team," "the prosecution team," "the government," and the "prosecutors." Our use of such phrases is not intended to suggest that each subject possessed the same degree of information regarding the events in question, nor that each subject bears the same level (if any) of culpability for the specific conduct in question. We address individual accountability for each disclosure violation below. We made no findings as to the late PIN attorney Nicholas Marsh, but we

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the Girdwood renovations. We withdrew our poor judgment finding against Bottini and Goeke in part because of the lack of centralized supervision and control over the presentation and handling of this evidence.

[44] In March 2011, the U.S. Court of Appeals for the Ninth Circuit remanded both the *Kott* and *Kohring* cases for new trials after finding that the prosecutors had failed to disclose exculpatory material (including some of the same material not disclosed in the *Stevens* trial). While the Ninth Circuit findings in *Kott* and *Kohring* are irrelevant to our conclusions regarding the *Stevens* matter, we raise the issue to illustrate that the comments we received regarding the culpability for Criminal Division management in this matter must be examined within the proper context.

address his conduct insofar as it had a bearing on the decisions we reached in this matter.

A. The Torricelli Note (Chapter Four)

Based on the results of our investigation, we concluded that the government violated its obligations, under constitutional *Brady* and *Giglio* principles and Department of Justice policy (USAM § 9 5.001) by failing to disclose Allen's April 15, 2008 statements that he did not recall discussing the Torricelli Note with Persons, and that the value of VECO's work on Girdwood was $80,000 $100,000. Neither statement by Allen was disclosed to the defense before or during the *Stevens* trial. We concluded further that the government violated its disclosure obligations with respect to information contained in an FBI 302 of a February 28, 2007 interview of Bill Allen (the "Pluta 302") and an IRS MOI of an Allen interview on December 11 12, 2006.

We concluded that the disclosure violations were not intentional. However, we concluded that AUSA Bottini engaged in professional misconduct by acting in reckless disregard of his disclosure obligations with respect to the Torricelli Note, the Pluta 302, and the IRS MOI for December 11 12, 2006.

We concluded that PIN Principal Deputy Chief Brenda Morris exercised poor judgment by failing to supervise the *Brady* review, delegating the redaction of interview reports to SA Kepner, and failing to ensure that the prosecution team attorneys reviewed Kepner's redactions.

We concluded that PIN Chief Welch, PIN attorney Sullivan, and AUSA Goeke did not commit professional misconduct or exercise poor judgment with respect to the disclosure violations.

B. Information Related to Bambi Tyree (Chapter Five)

We concluded that statements made in the government's September 9, 2008 *Brady* letter were clear misrepresentations of the facts, in violation of an attorney's duty of truthfulness in statements to others under D.C. Rule of Professional Conduct 4.1(a). The statements related to information about Bill Allen's involvement in procuring a false sworn statement from Bambi Tyree, in which she denied having a sexual relationship with Allen when she was a minor. We also concluded that the government violated its disclosure obligations under *Brady* and *Giglio* and Department of Justice policy (USAM § 9 5.001) by failing to disclose to the defense information concerning Bill Allen's role in Bambi Tyree's false sworn statement.

With respect to the misrepresentations and the disclosure violations, we concluded that, although AUSA Bottini and AUSA Goeke were aware of the Tyree *Brady* material, they did not commit professional misconduct because neither knowingly made or endorsed the misrepresentations in the *Brady* letter or made the decision to not disclose the Bambi Tyree information. Nevertheless, we concluded that AUSA Bottini, as the trial attorney responsible for Bill Allen, exercised poor judgment by failing to inform his supervisors that certain representations in the *Brady* letter were inaccurate. We further concluded that PIN Chief Welch, PIN Principal Deputy Chief Morris, PIN attorney Sullivan and AUSA Goeke did not commit professional misconduct or exercise poor judgment in connection with the misrepresentations or disclosure violations.

C. Allegations Relating to Rocky Williams (Chapter Six)

We concluded that the prosecution team did not violate any obligation to the court or the defense in allowing Rocky Williams to return to Alaska. The prosecution team was motivated by Williams's need for medical treatment, not by a desire to prevent the defense from learning any information from Williams. We noted, however, that the better practice would have been to alert the court and the defense before Williams's departure, thus enabling the defense to make an informed decision whether to seek a Rule 15 deposition. In addition, we found no evidence to support SA Joy's allegation that Williams's return to Alaska was the fruit of a "scheme" by PIN attorney Marsh. To the contrary, the decision was motivated by Williams's need for medical treatment, not by a desire to prevent the defense from learning any information from Williams.

We also concluded, however, that the prosecution team violated its disclosure obligations under the *Brady* doctrine and Department of Justice policy (USAM § 9 5.001), by failing to disclose information provided by Rocky Williams relating to his work on the Girdwood renovations. We concluded that the information that Senator Stevens said he wanted to pay for all the Girdwood renovations, that he wanted a contractor he could pay, that Williams reviewed the Christensen Builders invoices and passed them along to Bill Allen (or a VECO employee), and that Williams thought his and Dave Anderson's hours, and possibly all VECO costs, were added into the Christensen Builders bills, was material and favorable to the defense, and thus the failure to disclose it violated the government's constitutional *Brady* obligations. We determined that the violations were not intentional, but that AUSAs Bottini and Goeke engaged in professional misconduct by acting in reckless disregard of their disclosure obligations. We concluded further that PIN Chief Welch, PIN Principal Deputy Chief Morris, and PIN attorney Sullivan did not engage in professional misconduct or exercise poor judgment in this respect.

D. The VECO Spreadsheet and Records (Chapter Seven)

We concluded that the government presented false or inaccurate evidence at trial in the form of the VECO spreadsheet and the underlying records reflecting costs for hours of labor attributed to Rocky Williams and Dave Anderson that exceeded the amount they told prosecutors they had performed. In addition, we concluded that the prosecution team violated its disclosure obligations under *Brady* and *Giglio* and Department of Justice policy (USAM § 9 5.001), by failing to disclose information that contradicted the evidence presented in the VECO spreadsheet and underlying documents.

We found, however, that the prosecution team did not realize that the VECO spreadsheet and records were inaccurate when they were introduced at trial. The evidence supported the prosecutors' assertions that no member of the prosecution team ever compared the VECO records with the various statements of Williams and Anderson, and thus the discrepancies went undiscovered. We found, further, that the accelerated pace of the trial, the lack of centralized supervision, and the dispersal of responsibility created a situation in which no member of the prosecution team was assigned, or independently undertook, to compare the VECO records to the anticipated testimony of Anderson and Williams. Therefore, we concluded that the prosecutors did not knowingly introduce false evidence or act in reckless disregard of their disclosure obligations. We concluded that the errors were inadvertent, and that no member of the prosecution team acted improperly, committed professional misconduct, or exercised poor judgment.

E. Allegations Relating to Dave Anderson (Chapter Eight)

We concluded that Dave Anderson's allegation that the government promised him and 13 friends and family members immunity was not supported by the evidence. Anderson has changed his story several times, but at the end he acknowledged to OPR that he was not promised immunity, and that his claim was based on his own feeling that he and his family and friends *should* have been promised immunity. In addition, we found that the evidence did not support Anderson's claims that government attorneys and agents acted improperly in the course of preparing him for his trial testimony.

F. The Land Rover Check (Chapter Nine)

We found that AUSA Bottini's failure to timely disclose the Land Rover check to the defense violated Federal Rule of Criminal Procedure 16, but, under the circumstances, constituted a mistake rather than professional misconduct or poor judgment. We concluded that PIN Chief Welch, PIN Principal Deputy Chief Morris, AUSA Goeke, and PIN attorney Sullivan bore no responsibility for the disclosure violation.

G. The Missing Grand Jury Transcripts (Chapter Ten)

We concluded that the prosecution team's failure to timely disclose the April 25 and April 27, 2007 grand jury testimony of SA Kepner was, as the government asserted, inadvertent. The court reporting service, pursuant to its custom, had sent the transcripts to a local Assistant U.S. Attorney, who had briefly been assigned to attend the grand jury proceedings but who had long since left both the case and the Department of Justice. When the prosecution team learned of the additional transcripts, it took prompt steps to procure and disclose them. Although the April 25, 2007 transcript appears to have contained *Brady* information, we found no evidence that any member of the prosecution team (other than SA Kepner) knew of the transcript. Therefore, we found that the failure to timely produce the transcripts was simple inadvertence, and no member of the prosecution team acted improperly, committed professional misconduct, or exercised poor judgment.

H. The Alleged Signaling to Allen by Attorney Bundy (Chapter Eleven)

We concluded that the evidence did not establish that Robert Bundy signaled Bill Allen in an attempt to influence his trial testimony. Further, we concluded that, to the extent the evidence suggested that such signaling may have occurred, we found no evidence implicating any government actor prosecutors or agents in the alleged signaling.

I. Analysis of FBI 302 Issues (Chapter Twelve)

[redacted]

J. Analysis of SA Chad Joy's Allegations (Chapter Thirteen)

[redacted]

CHAPTER ONE
THE ALLEGATIONS AND INVESTIGATION

I. SOURCES OF ALLEGATIONS INVESTIGATED

A. Judicial Criticism

1. *Brady* Issues

On September 16, 2008, U.S. District Judge Sullivan ordered the government to provide "the redacted 302s" by September 17, 2008.[45] In response to the court's Order, the prosecution provided a number of documents, including a redacted version of a February 28, 2007 FBI 302 of an interview with government witness Bill Allen. The trial began on September 25, 2008, and Bill Allen testified on September 30, and October 1, 6, and 7, 2008. On October 1, 2008, the prosecution provided the defense with an unredacted version of that 302 and a previously undisclosed December 11 12, 2006 IRS MOI regarding Bill Allen. On October 2, 2008, after reviewing the newly provided material, Judge Sullivan stated that he was "persuaded that there is a *Brady* violation"[46] as a result of the government's late production of both documents.

During the oral arguments referring to the redacted February 28, 2007 FBI 302, Judge Sullivan criticized the government's actions: "If it wasn't intentional, it was gross negligence on the part of the government"; and "[i]t's difficult for the Court to believe that the government overlooked this exculpatory information."[47] Judge Sullivan asserted that the government intentionally redacted the *Brady* information in the February 28, 2007 FBI 302:

> Someone made a conscious effort to shade that information and keep defense counsel from learning of it, and I just reject the answer that that was done because that person believed that the favorable information had already been disclosed to the defendant.[48]

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[45] Judge Sullivan's use of the term "302s" refers to law enforcement reports generated as a result of witness interviews. Specifically, Judge Sullivan ordered the disclosure of FBI 302 reports of interviews and IRS Memoranda of Interviews (MOIs).

[46] *United States v. Stevens*, Tr. Oct. 2, 2008 (pm) at 51.

[47] *United States v. Stevens*, Tr. Oct. 2, 2008 (am) at 6.

[48] *United States v. Stevens*, Tr. Oct. 2, 2008 (pm) at 28.

PIN Principal Deputy Chief Morris acknowledged that the government had violated the court's September 16, 2008 order.[49]

2. Knowingly Presenting False Evidence

On October 8, 2008, the court struck from the record VECO documents that had been entered into evidence. The VECO documents purported to show that the company incurred $188,928.82 in labor and material costs for renovations to Senator Stevens's Girdwood residence, and included billing for work done by VECO employees Rocky Williams and Dave Anderson. At the time the government introduced the documents, the government had reports of interviews [redacted] indicating that Williams had only worked part time on the Girdwood project, rather than the average of 60 to 70 hours per week represented in the VECO records. The government also had [redacted] Judge Sullivan imposed the sanction after ruling that the government "utilize[d] records that the government knows were false."[50]

3. Failure to Provide Material Evidence to the Defense

On October 8, 2008, Judge Sullivan also struck from the record a check for $44,339.50, from Bill Allen to Land Rover of Anchorage showing payment for a Land Rover Discovery that the government entered into evidence during the redirect examination of Allen. In its opening statement, the government said that Senator Stevens received a "sweetheart deal" from Bill Allen though an exchange of Allen's 1999 Land Rover Discovery worth $44,000 for Senator Stevens's 1964½ Ford Mustang and $5,000. On direct examination, Bill Allen testified regarding the $44,000 value of the Land Rover. Defense counsel cross examined Allen with the dealer invoice price, which Allen agreed was $37,515. On redirect examination, the prosecution introduced a $44,339.50 check from Allen to the Land Rover dealer, undercutting defense counsel's cross examination. The government failed to provide the check to the defense prior to offering it into evidence, and the Court found that the evidence was material and "should have been produced to the defendant."[51]

In the Government's Opposition to Defendant's Motion for a New Trial, the government admitted that its failure to produce to the defense the $44,339.51

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[49] *United States v. Stevens*, Tr. Oct. 2, 2008 (am) at 16.

[50] *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 89.

[51] *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 90.

check to Land Rover of Anchorage prior to introducing the check in evidence was "error" under Federal Rule of Criminal Procedure 16(a)(1)(E)(I).[52]

4. Williams's Return to Alaska

On September 29, 2008, Judge Sullivan criticized the government for allowing Rocky Williams, who worked on the Girdwood renovations, to return to Alaska, although the defense had subpoenaed him to appear in court on October 6, 2008. Williams returned to Alaska on September 25, 2008, the day of opening statements in the *Stevens* case, during which the prosecution asserted that VECO documents showed that the company spent $188,000 on the Girdwood renovations. Defense counsel argued that Williams's testimony could have undermined the portions of the $188,000 figure attributed to Williams's hours of work on the project, and that the prosecution sent Williams back to Alaska to conceal such information. The prosecution asserted that Williams was gravely ill and returned home to seek medical attention. The Court queried, "Who gives the Unites States authority to do that?"[53]

5. Additional Court Criticisms

On April 1, 2009, the government filed a Motion to Set Aside the Verdict and Dismiss the Indictment with Prejudice, after locating prosecutors' notes containing information inconsistent with Bill Allen's trial testimony about an October 6, 2002 handwritten note from Senator Stevens to Bill Allen (the Torricelli Note).[54] The prosecutors' notes also contained information that Bill Allen valued VECO's work on the Girdwood renovations at $80,000, significantly less than the $188,000 figure asserted by the prosecution at trial.[55] In its motion, the United States moved to dismiss the case against Senator Stevens, submitting that the "information could have been used by the defendant to cross examine Bill Allen and in arguments to the jury."[56] The government also acknowledged that the newly discovered *Brady* material concerning Bill Allen that led to the dismissal

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[52] Government's Opposition to Defendant's Motion for a New Trial at 40 - 41 (D.D.C., filed Jan. 16, 2009).

[53] *United States v. Stevens*, Tr. Sept. 29, 2008 (am) at 36.

[54] Motion of the United States to Set Aside the Verdict and Dismiss the Indictment with Prejudice at 2 (D.D.C., filed Apr. 1, 2009).

[55] Motion of the United States to Set Aside the Verdict and Dismiss the Indictment with Prejudice at 2 (D.D.C., filed Apr. 1, 2009).

[56] Motion of the United States to Set Aside the Verdict and Dismiss the Indictment with Prejudice at 2 (D.D.C., filed Apr. 1, 2009).

request also affected a prior government filing in the matter.[57] The government "acknowledge[d] that the Government's Opposition to Defendant's Motion for a New Trial provided an account of the [g]overnment's interviews of Bill Allen that is inaccurate."[58] The government's motion represented that Allen was first questioned about the Torricelli Note "shortly before trial." However, attorneys' notes reflected that the trial team reviewed the Torricelli Note with Allen in April 2008, five months prior to trial, and that Allen said at that time he did not recall speaking with Bob Persons about the note.

In his April 7, 2009 ruling dismissing the charges against Senator Stevens, Judge Sullivan stated that "both during and after the trial in this case, the [g]overnment was caught making false representations and not meeting its discovery obligations"[59] and that when such actions came to light, the government claimed "that it had simply made a good faith mistake, that there was no ill intent and/or that the Court had already taken steps to address the problem and therefore there was no need for court action."[60] Judge Sullivan then referenced a number of incidents occurring during and after trial in which the government:

- failed to produce Rocky Williams's exculpatory grand jury testimony and claimed that the testimony was immaterial;[61]
- sent Rocky Williams back to Alaska without advising the court or defense counsel and claimed to be acting in "good faith";[62]
- "affirmatively redacted exculpatory statements" from FBI 302s and claimed the action was "just a mistake";[63]

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[57] Motion of the United States to Set Aside the Verdict and Dismiss the Indictment with Prejudice at 2 (D.D.C., filed Apr. 1, 2009).

[58] Motion of the United States to Set Aside the Verdict and Dismiss the Indictment with Prejudice at 2 (D.D.C., filed Apr. 1, 2009).

[59] *United States v. Stevens,* Tr. Apr. 7, 2009 (am) at 4.

[60] *United States v. Stevens*, Tr. Apr. 7, 2009 (am) at 4.

[61] *United States v. Stevens*, Tr. Apr. 7, 2009 (am) at 4.

[62] *United States v. Stevens*, Tr. Apr. 7, 2009 (am) at 4.

[63] *United States v. Stevens*, Tr. Apr. 7, 2009 (am) at 4.

- falsely told the court that Bill Allen had not been reinterviewed the day before a hearing on its *Brady* disclosures and later claimed the incident was the result of a "mistaken understanding";[64]

- failed to disclose exculpatory statements from Dave Anderson and claimed that the statements were "immaterial";[65]

- failed to disclose a critical grand jury transcript (SA Kepner's April 25, 2007 testimony) containing exculpatory information and claimed the omission was "inadvertent";[66]

- used business records the government "undeniably knew were false" and claimed such use was "unintentional";[67]

- failed to produce bank records of Bill Allen and claimed that a check included in the bank records "was immaterial to the [d]efense";[68]

- sought to keep FBI SA Joy's Complaint alleging misconduct by the prosecutors a secret and claimed that the allegations had nothing to do with the verdict and no relevance to the defense, the allegations could be addressed by OPR, and any misconduct had already been addressed during the trial;[69]

- claimed that its response to defendant's post trial motions would resolve the need for further

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[64] *United States v. Stevens*, Tr. Apr. 7, 2009 (am) at 5.

[65] *United States v. Stevens*, Tr. Apr. 7, 2009 (am) at 5.

[66] *United States v. Stevens*, Tr. Apr. 7, 2009 (am) at 5.

[67] *United States v. Stevens*, Tr. Apr. 7, 2009 (am) at 5.

[68] *United States v. Stevens*, Tr. Apr. 7, 2009 (am) at 5.

[69] *United States v. Stevens*, Tr. Apr. 7, 2009 (am) at 5.

discovery regarding SA Joy's allegations as they related to the defendant;[70]

- failed to comply with a post trial court order to produce documents, resulting in contempt; and[71]

- committed "what may well be the most shocking and serious" *Brady* violation by failing to tell the defense of a pre trial interview with Bill Allen in which he did not recall a conversation with Bob Persons about sending Stevens a bill, and in which he estimated the VECO billing to be $80,000 ("far less than the hundreds of thousands of dollars the [g]overnment had alleged at trial").[72] The defense could have used the information to discredit Allen's damaging trial testimony that Persons did talk to him, stating that Senator Stevens was "just covering his ass" by sending the note.

B. Allegations by Defense Counsel

Following Senator Stevens's conviction on October 27, 2008, defense counsel sent the Attorney General a series of four letters detailing allegations of misconduct by the *Stevens* prosecution team. The letters were dated October 28, 2008, November 19, 2008, December 30, 2008, and April 28, 2009. The defense included similar allegations of misconduct in its December 5, 2008 Motion for a New Trial.

Two defense claims of prosecutorial misconduct listed in defense counsel's series of letters were not addressed by Judge Sullivan on April 7, 2009: (1) prosecutors fabricated Bill Allen's testimony that "Ted's just covering his ass" regarding the Torricelli Note and (2) prosecutors concealed information regarding sex offenses by Bill Allen.[73]

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[70] *United States v. Stevens*, Tr. Apr. 7, 2009 (am) at 6.

[71] *United States v. Stevens*, Tr. Apr. 7, 2009 (am) at 6.

[72] *United States v. Stevens*, Tr. Apr. 7, 2009 (am) at 6.

[73] Oct. 28, 2008 letter from defense counsel to Attorney General Michael B. Mukasey; Apr. 28, 2009 letter from defense counsel to Attorney General Eric H. Holder, Jr.

Following the dismissal of the case, the defense sent Attorney General Holder an April 28, 2009 letter detailing additional areas of alleged misconduct including: (1) FBI SA Kepner violated FBI regulations in not documenting an April 15, 2008 interview of Bill Allen; (2) the government could not have accurately represented that it collected all constitutionally required exculpatory information; (3) prosecutors purposely avoided asking witness Bob Persons questions that could have elicited exculpatory information; (4) PIN attorney Marsh intentionally hid exculpatory information (Allen's statement that Stevens would have paid bills if he had received them) that should have been included in the government's September 9, 2008 *Brady* letter; (5) the government concealed exculpatory information that Bill Allen once asked a woman, Bambi Tyree, to perjure herself in connection with an investigation regarding criminal sex charges against Allen; (6) AUSA Bottini and SA Kepner purposely secured a contradictory statement from Tyree; and (7) FBI agents (working for PIN) investigating the Joy Complaint selectively omitted material from FBI 302s that would have been helpful to the defense.[74]

C. Allegations by Dave Anderson

On November 21, 2008, OPR became aware of a November 15, 2008 letter from Dave Anderson, filed with the court, alleging prosecutorial misconduct in relation to his trial testimony.[75] Anderson was one of the workers who renovated the Girdwood residence. Anderson claimed that the prosecutors knowingly introduced false evidence at trial regarding VECO billing for the Girdwood renovations, and that the prosecution's September 9, 2008 *Brady* disclosure letter to the defense contained false information regarding Anderson's false affidavit claiming immunity. He also claimed that prosecutors promised him immunity, but encouraged him to testify that the government had not provided him immunity. Anderson also claimed that prosecutors had committed misconduct in preparing him for his trial testimony.[76]

D. Allegations by FBI Special Agent Chad Joy

On December 1, 2008, OPR received an undated memorandum written by SA Chad Joy alleging misconduct by the *Stevens* trial team, and additional misconduct by SA Mary Beth Kepner unrelated to the *Stevens* case. On December 30, 2008, the FBI Inspection Division provided OPR with a two page addendum

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[74] Apr. 28, 2009 letter from defense counsel to Attorney General Eric H. Holder, Jr.

[75] Anderson also sent the Court a December 15, 2008 letter elaborating on his November 15, 2008 claims.

[76] Nov. 15, 2008 letter from David Anderson to the Honorable Emmet G. Sullivan.

to SA Joy's original Complaint. SA Joy alleged that SA Kepner: (1) mishandled a number of FBI sources; (2) improperly redacted an FBI 302, thus violating *Brady*; (3) failed to enter evidence in the FBI systems; (4) failed to disclose searches in a Title III affidavit; (5) provided her husband with sensitive information and the use of her covert cell phone; (6) had an inappropriate relationship with the media; and (7) that FBI management was aware of Kepner's inappropriate behavior and did nothing.[77] SA Joy also claimed that PIN attorneys introduced evidence at trial that had not been turned over to the defense; prevented defense access to Rocky Williams, who could have testified favorably for the defense; attempted to conceal *Brady* information; and failed to follow FBI protocols for handing evidence.[78]

II. METHODOLOGY OF THE INVESTIGATION

A. Document Review

During the course of our investigation, OPR reviewed all relevant pleadings, trial transcripts, grand jury transcripts, court orders, and discovery for *United States v. Stevens*. OPR also identified and obtained relevant material from the additional sources identified below.

1. Criminal Division Records and Alaska U.S. Attorney's Office Records[79]

The Department's Criminal Division, in conjunction with the Alaska U.S. Attorney's Office, provided OPR with material for all *Stevens* prosecution team members including: Outlook data; computer hard drives (H: drive, C: drive, and S: drive); handwritten notes; boxes of information collected from the subjects and supervisory personnel containing handwritten notes and drafts of case documents; internal and external correspondence regarding the *Stevens* case; *Stevens* related FBI 302s and IRS MOIs; related search warrants and corresponding affidavits; trial transcripts; grand jury transcripts; and court orders. The Criminal Division also provided OPR with access to hundreds of boxes of trial exhibits, materials received from defense counsel, Polar Pen related material collected from the subject attorneys' offices, and material collected in anticipation of litigation. The Criminal Division obtained such material from PIN, the United States Attorney's Office in Alaska, the FBI, and the Appellate Section

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[77] Undated memorandum by FBI SA Chad Joy.

[78] Undated memorandum by FBI SA Chad Joy.

[79] Feb 16, 2010 memorandum from Former Senior Counsel to the AAG Kimberly Harris to OPR.

of the Criminal Division. In total, the Criminal Division provided OPR with access to 201 boxes of investigatory material relating to Operation Polar Pen, the public corruption investigation in Alaska, from which the *Stevens* prosecution developed.

Due to the general record keeping disorganization of the *Stevens* case and the Polar Pen cases, the Criminal Division could not respond to OPR's document request with a single production. Rather, it provided OPR with newly discovered boxes of documents throughout the pendency of our investigation, locating some additional boxes of relevant information more than one year after our original request for documents. For example, as late as May 6, 2010, the Criminal Division reported locating 11 boxes of VECO payroll records in the possession of the Anchorage FBI.[80] Also, OPR located SA Kepner's missing notes of the April 15, 2008 interview of Bill Allen regarding the Torricelli Note among 89 boxes of documents that had been removed from the FBI Anchorage Division Polar Pen "war room" and stored in a closet in the FBI's Anchorage office. The FBI did not produce these documents to the Criminal Division until January 2010.[81]

2. Executive Office for U.S. Attorneys' (EOUSA) Records

EOUSA provided OPR with access to Outlook data for all relevant individuals from the U.S. Attorney's Office in Alaska. This information included all inbox, outbox, sent emails, and saved emails dating back to 2007 for AUSAs Bottini and Goeke.

3. Federal Bureau of Investigation Records

OPR worked with FBI agents from the FBI's Inspection Division to obtain relevant FBI documents. The agents obtained FBI 302s related to the *Stevens* prosecution concerning Bill Allen, as well as related FBI source files and relevant internal email and computer hard drive information for FBI agents involved in the investigation.

Specifically, the FBI searched its Automated Case Support (ACS) system, identifying over 7000 serials (numerically identified hard copies of items included

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[80] OPR determined that the FBI located the VECO records in February 2010, but did not alert OPR or the Criminal Division of the existence of the records until May 6, 2010. Additionally, these 11 boxes of VECO payroll records from 2001, 2002, and 2003 were never entered into FBI evidence.

[81] As late as May 18, 2010, the FBI conducted a search of its Division space resulting in the location of 26 boxes of Polar Pen documents from the Anchorage Division and two boxes from the Juneau Resident Agency, located within the Anchorage Division, that had not been previously sent to OPR for review.

in an investigative case file) in the Polar Pen investigation. The FBI also produced a large binder of documents with references to Bambi Tyree, the woman who created a false statement, allegedly at Bill Allen's request, concerning their sexual relations when Tyree was a minor. In addition, the FBI discovered that some reports pertaining to Bill Allen were not in the ACS. The FBI also located 997 calls between telephone numbers associated with Allen and Tyree captured during court authorized telephone surveillance.

[redacted]

FBI seized, forensically analyzed, and reviewed 21 hard drives, three laptops, and storage media used by SA Kepner and other FBI employees during the Polar Pen investigation. The FBI obtained all the files for any Confidential Human Source that ever reported on the Polar Pen investigation. The FBI obtained over 125,000 records of user activity for the email accounts of the subjects and other FBI employees, 25,000 records of user activity for the Law Enforcement Online (LEO) accounts (online controlled access communications and information sharing data repository) of SA Kepner and other FBI employees, including records from the Special Interest Group, a secure section of the LEO used during the Polar Pen investigation. The FBI examined ACS user activity and examined more than 5,000 records regarding ACS queries pertaining to Bambi Tyree. The FBI recovered more than 300,000 lines of Blackberry text concerning SA Kepner and other related FBI employees. Finally, the FBI obtained training records for SA Kepner and SA Joy.

4. Professional Responsibility Advisory Office (PRAO) Records

OPR located and reviewed all PRAO records related to the *Stevens* trial and related Polar Pen matters. PRAO provides advice to government attorneys and the leadership at the Department on issues relating to professional responsibility. In the *Stevens* case, the prosecution team contacted PRAO to obtain guidance on a number of professional responsibility issues. In particular, subject attorneys claimed that they relied on PRAO's advice when deciding whether to disclose information regarding Bill Allen's relationship with Bambi Tyree and whether he asked her to make a false statement under oath.

B. Interviews

During the course of our investigation, OPR interviewed PIN Chief William M. Welch II, PIN Principal Deputy Chief Brenda K. Morris, PIN attorneys Nicholas A. Marsh and Edward P. Sullivan; and AUSA Joseph W. Bottini.[82] We interviewed former Deputy Attorney General Mark Filip, current and former Criminal Division Front Office personnel, including former Assistant Attorney General (AAG) Alice S. Fisher; former AAG Matthew W. Friedrich; former Deputy AAG Barry M. Sabin; former Principal Deputy Assistant Attorney General (PDAAG) Rita M. Glavin; and Deputy AAG John C. (Jack) Keeney. We also interviewed PIN Deputy Chief Raymond Hulser and current and former PIN attorneys, including Eileen Gleason, Daniel Petalas, and Daniel Schwager. We interviewed Alaska AUSA Frank Russo, Criminal Division Appellate Attorney Liza Collery, PRAO Attorney Patricia Weiss, and former PRAO Attorney Ruth Plagenhoef. We also interviewed numerous current and former agents in the FBI Alaska office, including former Anchorage SAC Toni Fogle, current Anchorage SAC Kevin Fryslie, ASAC David Heller, CDC Eric Gonzalez, SA John Eckstein, SA Mary Beth Kepner, SA Michelle Pluta, SSA Colton Seale, and SA Chad Joy. In addition, we interviewed litigation support staff in the Alaska U.S. Attorney's Office and the PIN office in Washington, D.C., and Senator Stevens's defense attorneys and other private citizens with relevant information, including Bill Allen, Rick Smith, Dave Anderson, and [redacted].[83]

C. Cooperation with Henry F. Schuelke, III

1. Coordination of Investigations

On April 8, 2009, Judge Sullivan issued an Order appointing Henry F. Schuelke, III to investigate potential contempt charges against DOJ attorneys William M. Welch II, Brenda K. Morris, Nicholas A. Marsh, Edward P. Sullivan, Joseph W. Bottini, and James A. Goeke. OPR conducted its investigation contemporaneously with Mr. Schuelke's investigation, working in a transparent

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[82] Because OPR and the Department of Justice were cooperating with Mr. Schuelke's criminal investigation, OPR interviewed subject attorneys on a voluntary basis to avoid constitutional issues that can arise from compelled interviews. AUSA Goeke elected not to consent to a voluntary OPR interview. OPR drew no adverse inferences or conclusions based on AUSA Goeke's decision not to consent to the voluntary interview.

[83] In total, we interviewed the subjects of the investigation (with the exception of AUSA Goeke) as well as 24 current and former DOJ employees, 22 current and former FBI and IRS personnel, and 15 private citizens.

and cooperative manner.[84] OPR provided Mr. Schuelke with access to documents collected by OPR, transcripts of OPR interviews for all subjects and unofficial OPR transcripts for witnesses, and, through the Criminal Division's designated representative, access to any previously undisclosed documents located in the course of OPR's investigation. OPR agreed to delay interviewing the subject attorneys and critical witnesses until Mr. Schuelke had completed his interviews of those individuals.[85] These steps ensured that the OPR investigation would not interfere with the court ordered criminal contempt investigation.

Pursuant to Mr. Schuelke's document requests, the Criminal Division provided Mr. Schuelke with:[86] (1) emails and attachments from January 1, 2008 through April 7, 2009, that contained at least one member of the prosecution team in at least two fields (to, from, cc, or bcc); (2) emails and attachments relating to the *Stevens* investigation from January 1, 2008 though April 7, 2009, between at least one subject attorney and a member of the Criminal Division Front Office; (3) emails from June 2008 through April 2009, sent from the Alaska USAO for the email accounts for AUSAs Bottini and Goeke; (4) documents flagged by Mr. Schuelke's team during their review of boxes of *Stevens* related material collected from PIN and the Alaska USAO; (5) copies of electronic files selected by Mr. Schuelke's team during their review of hard drives and network drives belonging to subject attorneys; (6) copies of relevant emails and text messages from FBI accounts of agents related to the *Stevens* matter; (7) copies of Bill Allen 302s, 1023s, and corresponding notes obtained from the FBI; (8) copies of PRAO documents relating to Bambi Tyree; (9) relevant court pleadings, trial transcripts, and grand jury transcripts; (10) copies of documents provided to the government by defense counsel; and (11) relevant pleadings in *United States v. Ring* and *United States v. Kott*.

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[84] In addition to working with Mr. Schuelke, OPR also coordinated its investigation with PIN and the Criminal Division Child Exploitation and Obscenity Section (CEOS), pursuant to confidentiality agreements, in regard to necessary reviews concerning ongoing litigation related to Polar Pen cases. Both PIN and CEOS needed to fulfill discovery and *Brady* obligations in pending cases. OPR provided PIN and CEOS access to OPR interview transcripts, coordinated its inspection of boxes of documents located by the Anchorage FBI to allow PIN and CEOS necessary access to potentially relevant material, made available transcripts OPR obtained from Mr. Schuelke's investigation, provided the results of the FBI's Computer Analysis Response Team (CART) analysis requested by OPR, and provided access to text message files the FBI obtained at OPR's direction.

[85] Mr. Schuelke provided OPR transcripts of his interviews with the subjects.

[86] Feb 4, 2010 letter from Former Senior Counsel to the AAG Kimberly Harris to Henry F. Schuelke, III.

2. Scope of OPR's Investigation

During OPR's investigation, we held in abeyance any investigation of potential misconduct regarding the Joy Complaint occurring after December 2, 2008, the date that OPR and the Office of Inspector General provided SA Joy's Complaint to the DOJ's Criminal Division. Following receipt of the Joy Complaint, PIN attorneys became involved in litigation regarding whether the Joy Complaint could be made public, and SA Joy's status as a whistleblower. During this period, PIN attorneys discussed SA Joy's status with OPR and made representations to the court as a result. Judge Sullivan became concerned about possible misrepresentations by the prosecution concerning Joy's whistleblower status, and on January 14, 2009, he ordered the Attorney General to file a Declaration indicating who in DOJ knew about the Joy whistleblower determination. The judge later vacated his order, in part, to allow for a designee of the Attorney General to sign the Declaration. On January 21, 2009, Judge Sullivan also ordered the government to provide all communications regarding Joy's whistleblower status. In response to the order, the government provided numerous email documents to the court on January 20, 2009, including emails from OPR, while withholding some emails based on privilege. On February 3, 2009, the court ordered the government to provide a privilege log for the withheld documents.

On February 13, 2009, Judge Sullivan addressed the PIN attorneys regarding the government's privilege log, noting that the government's log reflected that for 33 of the previously withheld documents the government did not claim privilege. Judge Sullivan then asked the attorneys why they had not provided the non privileged documents. On behalf of the government, PIN attorney Kevin Driscoll indicated that the government wanted to confirm that its interpretation of the court's prior Order was correct. The court confirmed it was, and then asked again why the documents had not been produced. Driscoll said there was "no reason," and that the documents would be produced forthwith. Following this statement, Judge Sullivan held Driscoll, PIN Chief Welch, PIN Principal Deputy Chief Morris, and Criminal Appellate Chief Patricia Stemler in contempt of court for failing to comply with the Court's February 3, 2009 Order to provide the defense with documents concerning non privileged internal DOJ communications regarding the Joy Complaint.[87] Some of the documents relating to the contempt findings included communications between PIN attorneys and OPR. The court rescinded the finding against Driscoll the following day.

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[87] On October 12, 2010, Judge Sullivan lifted the contempt finding, noting that the government had purged the contumacious conduct by disclosing the documents. The court, however, expressly declined to vacate the contempt finding.

As noted above, OPR held in abeyance any investigation of potential misconduct regarding FBI SA Joy's Complaint occurring after December 2, 2008.[88] Consequently, OPR was able to investigate pretrial and trial misconduct allegations without addressing potential misconduct regarding PIN attorneys' representations to the court that could have related to PIN's communications with OPR or whistleblower issues involving SA Joy.

[88] OPR removed such attorneys from the investigation.

CHAPTER TWO
THE FACTUAL BACKGROUND OF THE *STEVENS* PROSECUTION

I. OPERATION POLAR PEN

A. The Scope of the Investigation

Operation Polar Pen (Polar Pen) was a public corruption investigation centered in Alaska that included the 2008 prosecution of Senator Stevens. The United States Attorney's Office (USAO) for the District of Alaska initiated the Polar Pen investigation as a public corruption matter in July 2003 after the FBI developed information that an Alaska private prison company and a lobbyist were corruptly influencing state legislators. In June 2004, the Department of Justice Criminal Division, Public Integrity Section, began assisting in the investigation.

The private prison facet of Polar Pen focused on a private prison company (Cornell Companies) and its lobbyist corruptly influencing state senators to approve legislation that would allow construction and operation of a private prison in Alaska. In June 2004, the lobbyist, [redacted] became a confidential informant for the government.

[redacted] involvement helped expand Polar Pen, targeting [redacted] and businessman William (Bill) Weimar. Using Title III electronic surveillance, the government uncovered evidence that Weimar was illegally funding [redacted] campaign in return for legislative support regarding the private prison initiative.

[redacted] the government focused the Polar Pen investigation on Alaska State Representative Tom Anderson and municipal lobbyist William Bobrick. Anderson accepted $26,000 from Bobrick in return for using his legislative position to advance the interests of the private prison project and its lobbyist, [redacted]. [redacted] Anderson [redacted] and was later convicted on bribery, extortion, money laundering, and conspiracy charges on July 9, 2007.

[redacted] the government focused on efforts by VECO to obtain legislative approval of a natural gas pipeline supported by oil producers. VECO had contracts with the major oil producers to provide oil field services. Through electronic surveillance, the government

uncovered evidence that Bill Allen, VECO's Chief Executive Officer, and Richard (Rick) Smith, VECO's Vice President of Community and Government Affairs, promised and provided benefits to Alaska federal and state legislators in exchange for official acts. In October 2005, the government intercepted a phone call between Smith and Allen in which the two discussed whether additional construction costs on VECO's books related to work done on Allen's home or the house of Alaska State Representative [redacted].[89] During the call, Allen mentioned that Rocky Williams had worked on Senator Stevens's Girdwood residence and that Dave Anderson did not do anything on the project. Allen told Smith that he did not believe that Anderson would have left a "paper trail," intimating that such documentation would tie Allen to the Girdwood renovations.[90]

In October 2005, the government obtained information that Senator Stevens received significant benefits from VECO in the form of renovations to his Girdwood residence in 2000 and 2001, and had not reported such gifts on his United States Senate Public Financial Disclosure Reports for the corresponding years. On August 30, 2006, Bill Allen began cooperating with the government after FBI agents confronted Allen with evidence of his illegal activities.[91] Information provided by Allen, as well as information obtained from Title III recordings and other sources, led to the investigation and prosecution of Senator Stevens.[92] In the *Stevens* case, the government sought to prove that from 1999 to 2006, Senator Stevens knowingly and intentionally concealed his receipt of gifts by either falsely reporting them or omitting them from his United States Senate Public Financial Disclosure Reports.

With the exception of the *Stevens* trial, all Polar Pen related trials and court proceedings occurred in Alaska. In September 2004, Associate Deputy Attorney General (ADAG) David Margolis approved a recusal[93] for the Alaska USAO regarding the Cornell Companies investigation, walling off United States Attorney (USA) Burgess, and other members of the USAO with the exception of FAUSA

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[89] Transcript of Oct. 19, 2005 phone call between Bill Allen and Rick Smith (Exhibit 665).

[90] Bottini OPR Tr. Mar. 10, 2010 at 46; Oct. 19, 2005 13:29:55 phone call between Bill Allen and Rick Smith.

[91] Allen became a Confidential Human Source on October 6, 2006.

[92] Allen also testified for the government at the bribery trials of former Alaska House Speaker Peter Kott and former Alaska State representative Victor Kohring.

[93] [redacted]

Deborah Smith, Criminal Chief Tomas Bradley, AUSA Joseph Bottini, and AUSA JoAnn Farrington, who would "monitor, manage and direct the day to day operation of all matters related to the investigation."[94] ADAG Margolis also designated the Public Integrity Section (PIN) to "assume overall responsibility" for the investigation, including "investigative and prosecutorial decisions."[95] In November 2005, the USAO requested, and ADAG Margolis approved, an office wide recusal from "the investigation and prosecution of Cornell Companies, Inc. and from all corollary investigations and prosecutions of other subjects."[96] The USAO requested such recusal "[g]iven the high degree of sensitivity of such an investigation and the controversy likely to be engendered by investigating such individuals in the close knit Alaskan community."[97] Thereafter, PIN assumed full responsibility for the Polar Pen matters, with assistance from Alaska AUSAs Bottini and James Goeke.

On June 26, 2009, ADAG Margolis rescinded the recusal order, finding that "the appearance problems that necessitated the recusal no longer exist," thus allowing the entire USAO back into the investigation.[98] By that time, all charges against Senator Stevens had been dismissed.

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[94] Sept. 8, 2004 10:49am email from Assistant General Counsel John Kelly (EOUSA) to FAUSA Deborah Smith, Criminal Chief Karen Loeffler, United States Attorney Timothy Burgess, EOUSA Deputy General Counsel Jay Macklin, EOUSA General Counsel Steven Mullins, and PIN Chief Noel Hillman.

[95] Sept. 8, 2004 10:49am email from Assistant General Counsel John Kelly (EOUSA) to FAUSA Deborah Smith, Criminal Chief Karen Loeffler, United States Attorney Timothy Burgess, James Macklin, EOUSA General Counsel Steven Mullins, and PIN Chief Noel Hillman.

[96] Nov. 7, 2005 1:57pm email from EOUSA Assistant General Counsel Pragna Soni to PIN Chief Noel Hillman, FAUSA Deborah Smith, Deputy General Counsel Lisa Cooper, Senior Legal Counsel David Dalton, Assistant General Counsel John Kelly, James Macklin, and General Counsel Scott Schools.

[97] Nov. 3, 2005 6:32pm email from EOUSA Assistant General Counsel Pragna Soni, AAG EOUSA General Counsel's Office to Deputy Attorney General David Margolis.

[98] June 16, 2009 9:13am email from Assistant General Counsel Stuart Melnick to Interim United States Attorney Karen Loeffler, Criminal Chief Kevin Feldis, Principal Deputy Assistant Attorney General Mythili Raman, William Welch, Deputy Attorney General David Margolis, General Counsel Scott Schools, Principal Associate Deputy Attorney General Kathryn Ruemmler, EOUSA General Counsel James Macklin, Deputy General Counsel Michelle Tapken, Deputy General Counsel Andrew Niedrick, and Principal Deputy Director and Chief of Staff Terry Derden.

B. The Prosecution Team

Four attorneys handled the Polar Pen cases: PIN attorneys Nicholas A. Marsh and Edward P. Sullivan, and District of Alaska AUSAs Joseph W. Bottini and James A. Goeke.

Nicholas Marsh graduated from law school in 1998, and was a member of the New York Bar. From 1998 to 1999, he clerked for the Honorable Andrew J. Kleinfeld, U.S. Court of Appeals for the Ninth Circuit. From 1999 to 2001, Marsh was an associate at Sullivan & Cromwell in New York City, and from 2001 to 2003, he was an associate, and then a junior partner, at Hale and Dorr LLP in New York City. In 2003, Marsh joined the Department, was assigned to PIN, and completed a six month detail to the United States Attorney's Office in the District of Columbia. Upon completion of the detail, Marsh was assigned to assist in the Polar Pen investigation. Marsh died on September 26, 2010 prior to the completion of our investigation.

Edward Sullivan graduated from law school in 1995, and clerked for the Honorable John A. Terry of the D.C. Court of Appeals from 1995 to 1996. He was an associate with Wilmer, Cutler and Pickering from 1996 to 1999, when he joined the Justice Department's Civil Division as a trial attorney in the Commercial Litigation Section. In 2006, Sullivan joined PIN and was immediately assigned to the Polar Pen cases. Sullivan is a member of the New York and District of Columbia Bars.[99]

Joseph Bottini graduated from law school in 1984, and has worked as an AUSA in the Alaska United States Attorney's Office since then. He served as Interim U.S. Attorney from 1993 to 1994, First Assistant U.S. Attorney from 1990 to 1992, and Criminal Division Chief from 1990 to 1992 and 2002 to 2003. AUSA Bottini is a member of the Alaska Bar.

James Goeke graduated from law school in 1997. Goeke clerked for U.S. District Judge William Fremming Nielsen in the Eastern District of Washington, and worked in private practice from 1999 to 2003 in Washington, litigating environmental and election law issues. While employed in private practice, Goeke worked pro bono for two months as an Assistant District Attorney in Washington. Goeke joined the Alaska USAO as an AUSA in 2003. AUSA Goeke is a member of the Washington Bar.

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[99] Sullivan joined the District of Columbia Bar for a brief period in order to argue an appellate case. His membership is currently inactive; however, he was an active member at the time of the *Stevens* trial.

Brenda Morris graduated from law school in 1986 and began her prosecutorial career that year as an Assistant District Attorney in the New York County District Attorney's Office. In 1991, Morris joined PIN, and in 2003 she was promoted to PIN Deputy Chief for Litigation. In 2006, Morris became PIN's Principal Deputy Chief. In that position, Morris supervised 31 attorneys and 11 support staff. Morris was an adjunct faculty member at Georgetown University Law Center. Morris is a member of the New York Bar.

William Welch II graduated from law school in 1989, and is a member of the Illinois Bar. Welch entered DOJ through the honors program as a trial attorney with the Tax Division from 1989 to 1991. From 1991 to 1994, Welch worked as an AUSA in the U.S. Attorney's Office for the District of Nevada. From 1995 to 2006, Welch was an AUSA in the U.S. Attorney's Office for the District of Massachusetts. Welch joined PIN in 2006 as a Deputy Chief. Welch became the Chief of PIN in 2007.

The primary FBI agent for the Polar Pen investigation was SA Mary Beth Kepner, working out of the Anchorage FBI field office. Kepner was supervised by Supervisory Special Agent (SSA) Colton Seale and Chief Division Counsel (CDC) Eric Gonzalez,[100] who reported to Assistant Special Agent in Charge (ASAC) David Heller and Special Agent in Charge (SAC) Kevin Fryslie.[101]

Kepner began her FBI career in 1991 in the Philadelphia Field Office, where she investigated complex white collar and organized crime matters. In February 2000, Kepner transferred to the FBI's Anchorage Alaska Office, working out of a sub office in Juneau staffed by only two agents. In August 2006, Kepner moved to the Anchorage, Alaska FBI Office because of the expansion of the Polar Pen investigation (which Kepner started in Juneau). Kepner had experience working with confidential sources and cooperating witnesses.

SA Chad Joy was assigned to work with Kepner on the *Stevens* case. Joy joined the FBI in December 2003, and was assigned to the Polar Pen investigation shortly thereafter. Prior to his employment with the FBI, Joy worked for the United States Air Force as a Budget Analyst and spent two years at the

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[100] Gonzalez only supervised SA Kepner for 30 days from August 2006 to September 2006; at this time SSA Seale was on detail in Pakistan.

[101] Fryslie became SAC in December 2007. Prior to Fryslie, Toni Fogle was SAC from October 2005 to November 2007, and Thomas McClenaughan held the position from January 2003 to September 2005. David Heller is the current ASAC in Anchorage, holding the position since January 2007. Robert Burnham preceded Heller as ASAC from July 2000 to June 2006. Colton Seale worked as Kepner's SSA from December 2005 to July 2009. Ronald Bates also worked as Kepner's SSA from August 1999 to February 2007.

Department of Housing and Urban Development, Office of Inspector General, Office of Audit in Oklahoma City.

C. Results of Operation Polar Pen

To date, Polar Pen has resulted in eleven criminal convictions (not including the *Stevens* case) of Alaska officials and prominent citizens for bribery, extortion, and conspiracy charges including: former Alaska House Speaker Peter Kott (convicted after trial); former Alaska State Representative Victor Kohring (convicted after trial); former Alaska State Representative Tom Anderson (convicted after trial); former VECO Chief Executive Officer Bill J. Allen (pled guilty); former VECO Vice President Richard (Rick) Smith (pled guilty); lawyer and lobbyist (and former Chief of Staff to former Alaska Governor Frank Murkowski) James Clark (pled guilty);[102] private prison advocate Bill Weimar (pled guilty); lobbyist William Bobrick (pled guilty); former Alaska State Senator John Cowdery (pled guilty); former Alaska State Representative Bruce Weyhrauch (pled guilty);[103] and former Alaska State Representative Beverly Masek (pled guilty).[104]

II. CONFIDENTIAL HUMAN SOURCE BILL ALLEN

To build the various criminal prosecutions, SA Kepner developed a number of sources of information with contacts within Alaska's political structure.[105]

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[102] On October 8, 2010, the Alaska USAO elected not to oppose Clark's motion to dismiss his conviction based on the United States Supreme Court's ruling in *Skilling v. United States*, 130 S.Ct. 2896 (2010), concerning the interpretation of honest services fraud under 18 U.S.C. § 1346.

[103] Weyhrauch pled guilty in Juneau District Court on March 14, 2011. Weyhrauch offered his plea to a misdemeanor charge of knowingly working with unregistered lobbyists in exchange for dismissal of four federal felony charges against him.

[104] In June 2009, the government moved to remand the *Kott* and *Kohring* cases to the district court to address potential *Brady* violations involving *Stevens* team members and Bill Allen's testimony. Both Peter Kott and Victor Kohring were released from incarceration pending resolution of the issues. The Criminal Division reviewed thousands of pages of attorney notes, communications, and other relevant documents and provided many such documents to the defense. In March 2011, the U.S. Court of Appeals for the Ninth Circuit vacated the *Kott* and *Kohring* convictions, finding that the prosecutors violated their *Brady* obligations. OPR has opened a separate investigation into the prosecutorial misconduct allegations arising in the *Kott* and *Kohring* cases.

[105] The Attorney General Guidelines define a "Confidential Human Source" as "any individual who is believed to be providing useful and credible information to the FBI for any authorized information collection activity, and from whom the FBI expects or intends to obtain additional useful and credible information in the future, and whose identity, information, or relationship with the FBI warrants confidential handling." Attorney General Guidelines Regarding

Notably, she developed Confidential Human Source relationships, and she utilized the sources to record conversations with potential Polar Pen investigation targets, and she met with the sources to debrief them on numerous occasions. At all times, Kepner's interactions with her sources were subject to the rules and provisions of the FBI's Manual of Administrative Procedure (MAOP), the FBI's Manual of Investigative Guidelines (MIOG), the Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources, and the FBI's Confidential Human Source Manual. Kepner's sources included individuals such as [redacted] and [redacted] Perhaps the most important source, however, was former VECO CEO Bill Allen.

Bill Allen was the CEO and part owner of VECO Corporation, an Alaska company that provided oil pipeline and construction services. Allen was active in Alaska politics and played a central role in the Polar Pen prosecutions. On May 7, 2007, he pled guilty to conspiracy to commit extortion and bribery, and to mail and wire fraud charges regarding dealings with four Alaska legislators (State Representatives Peter Kott, Bruce Weyhrauch, and Victor Kohring, and Alaska State Senator Benjamin Stevens) related to a proposed oil industry tax.[106]

Allen began cooperating with the government on August 30, 2006, and he testified at the *Kott* and *Kohring* trials in September and October 2007, respectively. Allen was a central witness in the government's case against Senator Stevens, giving testimony at trial regarding VECO's involvement in renovations of Senator Stevens's Girdwood home, Allen's exchange of a new Land Rover Discovery for Senator Stevens's used 1964½ Ford Mustang and $5,000, a multi drawer tool cabinet with new tools left at Stevens's Girdwood home, a Viking gas grill Allen had installed in Stevens's Girdwood home, and VECO's employment of Stevens's son and payment for schooling of Stevens's grandson.[107]

Throughout Allen's tenure as a Confidential Human Source, he was interviewed and debriefed by the government on many occasions. SA Kepner was Allen's handler, took part in all the government's interviews of Allen, and documented many of the sessions in FBI 302s. However, SA Kepner failed to

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the Use of FBI Confidential Human Sources at 4 (I.B.7).

[106] On October 28, 2009, Allen was sentenced to 36 months' incarceration and a $750,000 fine.

[107] Prior to the start of Allen's cooperation, the government was aware of allegations that Allen had sex with underage females, and allegations that one of the underage females gave a false statement under oath at Allen's request. The government also became aware of investigations by the Anchorage Police Department (APD) concerning the allegations against Allen.

create FBI 302s for a number of interviews with Allen, which contributed to the disclosure problems that ultimately led to the dismissal of the case.[108]

III. THE POLAR PEN INVESTIGATION SHIFTS TO SENATOR STEVENS

In October 2005, the FBI intercepted a call between VECO Chief Executive Officer Bill Allen and VECO Vice President Rick Smith in which they discussed benefits VECO provided to Senator Stevens in the form of renovations to Stevens's Girdwood residence.[109] Thereafter, the government obtained additional information about the Girdwood renovations, noting that Stevens had not reported the benefits on his United States Senate Public Financial Disclosure Reports for the corresponding years. On August 30, 2006, Allen began cooperating with the government.[110] The following day, the Polar Pen investigation became public when the FBI executed search warrants at offices belonging to various Alaska politicians.[111] Over time, Bill Allen participated in numerous Title III intercepts of telephone calls with Senator Stevens during which Stevens noted that his relationship with Allen could appear to be improper. They also discussed the possibility that both men could be charged criminally and the likely result of such charges.[112] Allen also provided information leading to a July 30, 2007 FBI search of Senator Stevens's Girdwood residence for documentation regarding such things as: blueprints or sketches created by VECO and/or VECO engineer John Hess; correspondence; invoices; and evidence of work performed during the renovation.[113]

From November 2006 through November 2007, the prosecution team presented testimony to grand juries in Alaska and Washington, D.C., regarding Senator Stevens. Also, during 2007, the prosecution team tried and convicted Polar Pen defendants Tom Anderson (in July), Peter Kott (in September), and Victor Kohring (in October). In May 2007, the prosecution team sent Senator

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[108] See Chapter Twelve of this Report for a detailed discussion of this issue.

[109] Mar. 3, 2009 FBI 302 of SA Mary Beth Kepner at 4.

[110] Soon thereafter, Rick Smith also became a cooperating witness (providing solely background information regarding Stevens). Mar. 3, 2009 FBI 302 of SA Mary Beth Kepner at 4.

[111] The FBI searched offices belonging to: State Senators Benjamin Stevens, John Cowdery, and Donald Olson; and state Representatives Peter Kott (former House speaker), Victor Kohring (chairman of the House Special Committee on Oil and Gas), and Bruce Weyhrauch.

[112] *See* May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) at 60.

[113] Search Warrant No. 3:07-mj-00-140-JWR (search of residence located at 138 Northland Road, Girdwood, Alaska).

Stevens a request to preserve documents, and Senator Stevens executed a tolling agreement regarding the statute of limitations for certain potential charges.[114] Over the next year, the prosecution team and Senator Stevens's attorneys corresponded regarding the voluntary production of documents, and Senator Stevens signed an additional agreement tolling the statute of limitations until March 31, 2008.

The prosecution team met with the *Stevens* defense team on February 28, 2008, detailed its case against Senator Stevens, and offered a felony plea to 18 U.S.C. § 1001 (false statements) with no jail time. PIN attorney Marsh and SA Kepner gave a PowerPoint presentation. The defense team later rejected the offer.

The prosecution team continued to present testimony to grand juries in Alaska and Washington, D.C., from January 2008 though June 2008. On March 14, 2008, the prosecution team provided PIN Chief Welch with a memorandum recommending prosecution of Senator Stevens and a draft indictment. On March 19, 2008, the PIN Indictment Review Committee reviewed and approved the draft indictment.[115] On March 20, 2008, the prosecution team made a PowerPoint presentation regarding the case against Stevens to Criminal Division Assistant Attorney General (AAG) Alice Fisher, Principal Deputy AAG Barry Sabin, and Deputy AAG John Keeney.[116] During the presentation, AAG Fisher learned that the *Stevens* defense team planned to produce boxes of documents to the government. AAG Fisher informed the *Stevens* prosecution team that she would not authorize sending the indictment to the Deputy Attorney General until the prosecution team had reviewed the material provided by the defense.[117]

On March 21, 2008, AAG Fisher, Principal Deputy AAG Sabin, and Deputy AAG Keeney met with Stevens's defense counsel; counsel did not present any evidence, giving only a short argument that AAG Fisher should use her

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[114] May 15, 2007 3:50pm email from PIN Principal Deputy Chief Morris to PIN Chief Welch.

[115] Mar. 18, 2008 8:19pm email from PIN attorney Marsh to AUSA Bottini and PIN attorney Sullivan. The indictment review process at PIN, at the time of the *Stevens* indictment, required the submission of a prosecution memorandum and proposed indictment. Certain senior members of the PIN staff served on the review committee depending on their availability. Following a meeting of the review committee, the Principal Deputy would summarize the committee's findings and make recommendations to the Chief.

[116] Fisher OPR Tr. July 29, 2009 at 26-27. Mar. 18, 2008 8:19pm email from PIN attorney Marsh to AUSA Bottini and PIN attorney Sullivan.

[117] Fisher OPR Tr. July 29, 2009 at 62-63. Apr. 10, 2008 12:59pm email from PIN attorney Marsh to AUSA Bottini, AUSA Goeke, and PIN attorney Sullivan.

prosecutorial discretion not to indict Stevens in light of his history of public service and the alleged weakness of the government's case.[118] As an alternative, defense counsel urged Fisher to refer the inquiry to the Senate Ethics Committee.

On March 25, 2008, PIN attorney Marsh told PIN Chief Welch and Deputy Chief Morris that the trial team would need additional time to obtain and review the defense team documents and give the defense team an opportunity to make a presentation to the Deputy Attorney General.[119] On March 27, 2008, Senator Stevens signed an additional tolling agreement (regarding potential tax charges) until April 30, 2008. On April 4, 2008, the defense team provided numerous emails from Senator Stevens's Senate account requested by the prosecution team, and on April 8, 2008, they provided the first installment in a series of document productions. The defense team provided 14 additional boxes on April 11, 2008, 15 additional boxes on April 18, 2008, 8 additional boxes on April 25, 2008, and 250 documents and 100 emails on May 2, 2008. At the request of the government, Senator Stevens signed two more extensions of the tolling agreement (on April 17, 2009 and June 19, 2008), extending the statute of limitations to July 31, 2008.

On April 8, 2008, Principal Deputy AAG Sabin requested that the prosecution team provide a memorandum outlining the strengths and weaknesses in the government's case. On April 11, 2008, the prosecution team provided the memorandum to PIN management.[120] On May 21, 2008, after completing the review of documents provided by the defense, the prosecution team submitted to PIN management a revised prosecution memorandum recommending indictment of Senator Stevens. The revised memorandum did not contain any tax charges, removed charges involving firearms, and included a discussion of the Torricelli Note in the section titled "Potential Defenses."[121]

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[118] Fisher OPR Tr. July 29, 2009 at 32-34.

[119] Mar. 25, 2008 8:37am email from PIN attorney Marsh to PIN Chief Welch, PIN Principal Deputy Chief Morris, and PIN attorney Sullivan.

[120] Apr. 11, 2008 3:56pm email from PIN attorney Marsh to PIN Chief Welch, PIN Principal Deputy Chief Morris, PIN attorney Sullivan, AUSA Bottini, and AUSA Goeke.

[121] The memorandum originally included potential charges against Senator Stevens for accepting a yearly gift of a firearm from the Kenai River Classic from 2002 to 2006, and the potential receipt of a $20,000 shotgun from the Kenai River Classic at some point. However, the government subsequently discovered that Stevens reported the gifts in his 2007 disclosure form and that April 2006 emails from the Senator showed that he had alerted his staff to the firearms, asking whether he needed to report the gift. *See* May 5, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) (Redline) at 72-73.

IV. CRIMINAL DIVISION FRONT OFFICE EVALUATION OF THE PROSPECTIVE TRIAL TEAM

In May 2008, Alice Fisher left the Department and Matthew Friedrich became the Acting AAG for the Criminal Division.[122] In June 2008, Friedrich appointed Rita Glavin as Acting Principal Deputy AAG, tasking her to focus on the *Stevens* matter and to "keep an eye on our briefs" by reviewing the pleadings before filing.[123] Glavin was to oversee the case along with Deputy AAG Keeney, to review pleadings before filing, and to meet with the team as necessary.[124] Keeney told OPR that as the Polar Pen investigation focus shifted to Senator Stevens, Keeney met more frequently with the trial team, and PIN Chief Welch and the trial team gave more detailed briefings to the Front Office.[125]

As the *Stevens* matter neared indictment, Criminal Division management became concerned about the composition of the *Stevens* prosecution team. The group, consisting of PIN attorneys Marsh and Sullivan, and AUSAs Bottini and Goeke, had worked as a team on all prior Polar Pen trials (*Anderson*, *Kott*, and *Kohring*), dividing up the responsibilities among the members.

During the week of July 14, 2008, AAG Friedrich summoned the entire trial team to Washington, D.C., for a meeting; Bottini and Goeke flew in from Alaska on an overnight flight specifically to attend.[126] Friedrich and Glavin had not yet met Bottini or Goeke.[127] The trial team gave Criminal Division management a PowerPoint presentation regarding the *Stevens* prosecution. PIN attorney Marsh conducted the presentation. Morris stated that during the meeting, the "whole team was pretty lackluster," noting that the team was "jet lagged" and "fatigued," and that Friedrich and Glavin were not impressed with the trial team.[128] Welch told OPR that Marsh was "very casual, [and] a little bit flippant" during the presentation, and that Bottini and Goeke "just sat there like very angry

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[122] Friedrich OPR Tr. Aug. 3, 2009 at 3.

[123] Glavin OPR Tr. July 17, 2009 (am) at 8.

[124] Friedrich OPR Tr. Aug. 3, 2009 at 42-44.

[125] Keeney OPR Tr. Dec. 14, 2009 at 5-6.

[126] Morris (Schuelke) Tr. Jan. 15, 2010 at 42.

[127] Sullivan OPR Tr. Feb. 19, 2010 at 140.

[128] Morris (Schuelke) Tr. Jan. 15, 2010 at 43; Morris OPR Tr. Mar. 19, 2010 at 96.

individuals."[129] Glavin told OPR that during the presentation, the trial team had difficulty responding to her questions, and she did not see any member of the team exhibit the leadership characteristics necessary for such a significant case.[130] Bottini recalled that during the meeting Friedrich asked the team if the case was "ready to go," and "the answer was, we are ready to go."[131]

PIN Chief Welch stated that, following the meeting with Friedrich and Glavin on July 14, 2008, he met with Morris, Marsh, Sullivan, Bottini, and Goeke to discuss the status of discovery in the *Stevens* matter and determine if the team was "ready for a speedy trial."[132] Welch stated that "it was pretty clear that if we were going to indict the case, it was going to happen by the end of July; otherwise, we were pushing up too close, at least in our estimation, to the election period."[133] Welch stated that Marsh told him the team had made copies of the relevant Title III material, had created an electronic database of Rule 16 information, and had either reviewed or was reviewing the 302s for *Brady/Giglio*.[134] To test the team's preparedness, Welch requested that Marsh provide him with all the Bill Allen 302s.[135] Welch told OPR that he received a compact disc from Marsh within an hour of the request, purporting to include all the Bill Allen 302s.[136] Because the team was able to respond so quickly to his request, Welch believed that the team had the *Stevens* discovery material organized in anticipation of upcoming trial

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[129] Welch OPR Tr. Mar. 2, 2010 at 83. Welch stated that Marsh's casual approach was a deviation from prior presentations Marsh had made to Criminal Division management and defense counsel and was not representative of his ability to handle a significant role on the trial team. Welch stated that Morris told him that she had counseled Marsh to make such a casual presentation. Sensing that the Criminal Division management was not pleased with the presentation, Welch asked Morris to speak with Glavin to explain that the causal approach to the meeting originated with Morris rather than Marsh. Welch OPR Tr. Mar. 2, 2010 at 83-85.

[130] Glavin OPR Tr. July 17, 2009 (am) at 10-11.

[131] Bottini OPR Tr. Mar. 10, 2010 at 84-85.

[132] Welch (Schuelke) Tr. Jan. 13, 2010 at 108-109. Welch OPR Tr. Mar. 2, 2010 at 72.

[133] Welch OPR Tr. Mar. 2, 2010 at 72. Senator Stevens was running for reelection.

[134] Welch (Schuelke) Tr. Jan. 13, 2010 at 108-109. Welch OPR Tr. Mar. 2, 2010 at 73-74.

[135] Welch (Schuelke) Tr. Feb. 5, 2010 at 288. Welch OPR Tr. Mar. 2, 2010 at 76. Marsh stated that Welch asked for Allen 302s on more than one occasion and inquired as to whether SA Kepner was up to date on her 302s. Marsh stated that he had more than one conversation with SA Kepner urging her to complete her 302s. Marsh OPR Tr. Mar. 25, 2010 at 273.

[136] Welch OPR Tr. Mar. 2, 2010 at 76.

productions. Sullivan told OPR: "I was under the impression that a lot of this was loaded and ready to go in this sense: It's the same material we've already used for *Kott* and *Kohring*, and apart from some additional recordings involving just Stevens, that stuff is already loaded."[137]

On July 22, 2008, defense counsel met with Deputy Attorney General Mark Filip, Acting AAG Matthew Friedrich, and PIN Chief Welch.[138] Filip recalled that prior to the meeting, he received a short oral briefing on the case and he reviewed the prosecution memorandum.[139] As in his prior meeting with AAG Fisher, defense counsel requested that the United States not indict Senator Stevens,[140] but provided no facts and presented no documents, arguing that there was no corruption allegation and the case should be handled by the Senate.[141] Defense counsel also argued that Senator Stevens would be a sympathetic defendant because of his years of service to the country.[142] DAG Filip listened to the presentation and responded that the Criminal Division would get in touch with him.[143] Following the meeting, Filip apprised Attorney General Mukasey of defense counsel's arguments.[144] Mukasey told Filip to "make sure that we're playing it straight down the middle under the Department's policies" in order to avoid allegations that the Department was acting politically.[145] Filip then met with AAG Friedrich and asked him to "look [at a possible plea] hard", and stated that if Stevens was to be indicted "the timing on it has to be in a principled way."[146]

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[137] Sullivan OPR Tr. Feb. 19, 2010 at 159.

[138] Friedrich OPR Tr. Aug. 3, 2009 at 33. July 22, 2008 2:00pm email from PIN attorney Marsh to AUSA Goeke, AUSA Bottini, and PIN attorney Sullivan states "meeting is at 4:00pm. Bill Welch WILL be attending."

[139] Filip OPR Tr. Feb. 26, 2010 at 7.

[140] Friedrich OPR Tr. Aug. 3, 2009 at 33-34.

[141] Welch OPR Tr. Mar. 2, 2010 at 302.

[142] Filip OPR Tr. Feb. 26, 2010 at 10-11.

[143] Filip OPR Tr. Feb. 26, 2010 at 18.

[144] Filip OPR Tr. Feb. 26, 2010 at 18.

[145] Filip OPR Tr. Feb. 26, 2010 at 19.

[146] Filip OPR Tr. Feb. 26, 2010 at 19-20.

V. THE DECISION TO INDICT SENATOR STEVENS

As the July 31, 2008 expiration of Senator Stevens's tolling agreement approached, AAG Friedrich elected not to request additional tolling agreements from the defense because he did not want the defense to continue extending the date up until the November 2, 2008 election date.[147] PDAAG Glavin told OPR that both AAG Friedrich and DAAG Keeney were concerned about the timing of the indictment and did not want it to appear that the Criminal Division was attempting to influence the upcoming elections by indicting Stevens right before the November 2008 elections.[148] Friedrich told OPR: "[I]f we were going to move on this . . . we shouldn't be doing this on say November 1st[.]"[149] Glavin stated that the Criminal Division ultimately followed Attorney General Mukasey's directive that "you bring cases when they are ready to go, regardless."[150] DAAG Keeney told OPR that in deciding whether the timing of the indictment was appropriate, Criminal Division management made a "judgment call" after applying a two part test: (1) was the indictment ready; and (2) what was the likelihood that the indictment would affect the election.

Marsh told OPR that he did not recall any discussion within the team regarding the possibility that the defense would request a speedy trial.[151] Marsh stated that he thought that the defense would "drag it out as long as they could" to allow the Senator to get through the election, and that the case would contain a number of Speech or Debate Clause issues and progress very slowly, similar to

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[147] Friedrich OPR Tr. Aug. 3, 2009 at 25.

[148] Glavin OPR Tr. July 17, 2009 (am) at 43-44. Morris told OPR that the *Stevens* prosecution team originally approached then AAG Alice Fisher requesting to try Stevens as the first Polar Pen case in order to avoid election issues, but Fisher was not comfortable with such an approach and wanted to build momentum through other trials. Morris OPR Tr. Mar. 19, 2010 at 78-79.

[149] Friedrich OPR Tr. Aug. 3, 2009 at 6.

[150] Glavin OPR Tr. July 17, 2009 (am) at 43-44. In preparation for the post-indictment press conference, the prosecution team prepared a memorandum of questions and answers that was forwarded to Glavin. The section regarding the timing of the indictment reads: "As you know, earlier this year the [Attorney General] issued a reminder with respect to election year sensitivities in charging decisions. And I am paraphrasing the text of that reminder, but what it says is that - that politics must play no role in the charging decisions we make; that prosecutors may never select the timing of investigation steps or criminal charges for the purpose of affecting any election. That policy has been followed, to the letter, here." July 28, 2008 2:58pm email from PIN Chief Welch to PDAAG Glavin (attachment) (emphasis in original).

[151] Marsh OPR Tr. Mar. 25, 2010 at 178-179. Sullivan also did not recall any such discussion. Sullivan OPR Tr. Feb. 19, 2010 at 158.

the *Jefferson* case.[152] Bottini recalled being "completely surprised" on hearing that the defense requested a speedy trial.[153] PIN Chief Welch also told OPR that prior to indictment, the team thought that the speech or debate issues in the *Stevens* case would "tend to grind [the case] to a halt."[154] Nevertheless, Welch stated, "We were prepared to have a speedy trial."[155] DAG Filip stated that he and Attorney General Mukasey were aware of, and supported, the indictment.[156]

As the Criminal Division finalized the preparations to indict Senator Stevens, the Criminal Division management concluded that the prosecution team needed a more experienced leader.[157] AAG Friedrich expressed reservations about Marsh following the PowerPoint presentation, noting that he had also reviewed Marsh's work on prior Polar Pen search warrant drafts and that review caused him to question Marsh's experience.[158] DAAG Keeney told OPR that he did not believe the Polar Pen trial team had the experience necessary to try such an important case.[159] PIN Chief Welch justified Marsh's experience level in an email to AAG Friedrich:

> I don't know where you may have got the idea that Nick was a 5 year lawyer. He came to [PIN] in 2003, but before that [he] had clerked for a year on the 9th Circuit after law school, and then was in private practice (Sullivan C[ro]mwell) for 4, coming over here as a junior partner. So he's been a lawyer for 10. By way of comparison, I believe that puts him on approximately

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[152] Marsh OPR Tr. Mar. 25, 2010 at 179. The Speech or Debate Clause of the Constitution states that congressmen "shall not be questioned in any other Place" for speech or debate associated with their legislative work. Jefferson was a Louisiana congressman tried on bribery charges. He was indicted in 2007 and did not go to trial until 2009 because of interlocutory appeals associated with his argument that the speech or debate clause required dismissal of the indictment against him because it contained testimony from his staffers.

[153] Bottini OPR. Tr. Mar 10, 2010 at 61-62.

[154] Welch OPR Tr. Mar. 2, 2010 at 170-171.

[155] Welch OPR Tr. Mar. 2, 2010 at 170-171.

[156] Filip OPR Tr. Feb. 26, 2010 at 23-24.

[157] Friedrich OPR Tr. Aug. 3, 2009 at 11; Glavin OPR Tr. July 17, 2009 (am) at 10, 17-18.

[158] Friedrich OPR Tr. Aug. 3, 2009 at 16-23.

[159] Keeney OPR Tr. Dec. 14, 2009 at 15.

> equal footing with your Principal Deputy [Rita Glavin] and I think he may have comparable trial experience.[160]

Three days later, Welch sent Friedrich and Glavin an email containing biographies of Marsh, Sullivan, Bottini, and Goeke.[161]

Friedrich discussed his concerns with Glavin, Keeney, and PIN Chief Welch, stating that he wanted PIN Deputy Chief Brenda Morris to assume leadership of the *Stevens* trial team. Friedrich told OPR that he made the best decision on behalf of the Criminal Division.[162] Keeney expressed reservations about Morris, stating that she was not a "detail person."[163] Glavin stated that PIN did not have a "mid level bench" because most of its attorneys were either very junior or very senior.[164] Friedrich said that he also asked Welch to join the trial team, but Welch declined.[165] Welch did not agree with the decision to add Morris but was overruled by Friedrich.[166] Morris stated that she did not want to join the trial team and only agreed to do so upon Friedrich's insistence.[167]

On July 28, 2008, one day prior to the *Stevens* indictment, PIN Chief Welch informed the trial team that Morris would assume responsibilities as lead counsel for the *Stevens* matter, with AUSA Bottini as second chair. This decision upset the existing Polar Pen trial team and angered Marsh, who was relegated to third chair; Sullivan and Goeke were not even to appear in court. Marsh's emails to Morris following the decision stated: "frankly I'm so upset right now that nothing

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[160] July 25, 2008 8:17am email from PIN Chief Welch to AAG Friedrich. Welch told OPR that he was told by former PIN Chief Andrew Lourie that Marsh and Sullivan were "a couple of superstars in the section." Welch OPR Tr. Mar. 2, 2010 at 86-87.

[161] July 28, 2008 3:35pm email from PIN Chief Welch to Laura Sweeney, PDAAG Glavin, and AAG Friedrich.

[162] Friedrich OPR Tr. Aug. 3, 2009 at 30. Glavin stated that Morris was a former Manhattan Assistant District Attorney who would have "no fear walking into that courtroom." Glavin OPR Tr. July 17, 2009 (am) at 20.

[163] Glavin OPR Tr. July 17, 2009 (am) at 26. DAAG Keeney told OPR that he recommended a different attorney (who ultimately was not available) to lead the team. Keeney OPR Tr. Dec. 14, 2009 at 16.

[164] Glavin OPR Tr. July 17, 2009 (am) at 23.

[165] Friedrich OPR Tr. Aug. 3, 2009 at 29; Welch OPR Tr. Mar. 2, 2010 at 95.

[166] Glavin OPR Tr. July 17, 2009 (am) at 18-19.

[167] Morris (Schuelke) Tr. Jan. 15, 2010 at 45-46. Glavin OPR Tr. July 17, 2009 (am) at 24. Morris OPR Tr. Mar. 19, 2010 at 110-112.

good will come of additional discussion" and "I'm not taking it very well. The section will lose people because of this."[168] AUSA Bottini emailed a USAO paralegal:

> Tumultuous day internally here. Front Office has mandated the trial team to be Brenda Morris, me and Nick. Everyone unhappy including me. Nick pissed as he considers addition of Brenda (now *de facto* lead attorney) to be slap in the face to him. He is considering quitting over this. Jim [Goeke] and I are exhausted.[169]

Sullivan felt that the decision to stay or leave the team was up to him. Despite the "anger and frustration" Sullivan felt regarding the staffing decision, he elected to stay and help the team "out of loyalty" because he "recognized that they were severely understaffed."[170] Sullivan told OPR that Goeke also stayed involved with the case, concentrating primarily on trial preparation of the laborers who worked on the Girdwood residence.[171]

VI. CRIMINAL DIVISION FRONT OFFICE OVERSIGHT OF THE TRIAL TEAM

PIN Principal Deputy Chief Morris stated that the "Front Office" was "definitely in the weeds on everything," requiring the team to provide letters and motions for review prior to filing.[172] She noted, however, that the Front Office had no role in supervising discovery disclosures.[173] In addition to adding Morris to the trial team, the Front Office also provided the trial team with directives as to which

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[168] July 28, 2008 12:59pm email from PIN attorney Marsh to PIN Principal Deputy Chief Morris; July 28, 2008 12:36pm email from PIN attorney Marsh to PIN Principal Deputy Chief Morris.

[169] July 28, 2008 6:34pm email from AUSA Bottini [redacted]. Bottini told OPR that he thought that the decision to place Morris on the team as lead counsel was "brilliant" and that he was "happy with that [decision]." Bottini OPR Tr. Mar. 10, 2010 at 182. Bottini also sent Morris an email welcoming her to the team, stating that he was "look[ing] forward to trial with [Morris]." Aug. 7, 2008 8:39pm email from AUSA Bottini to PIN Principal Deputy Chief Morris.

[170] Sullivan OPR Tr. Feb. 19, 2010 at 176-177.

[171] Sullivan OPR Tr. Feb. 19, 2010 at 182.

[172] Morris OPR Tr. Mar. 19, 2010 at 151, 154.

[173] Morris (Schuelke) Tr. Jan. 15, 2010 at 232.

personnel could be present at counsel table, which attorneys would give the opening and closing, and which attorneys would examine key witnesses.[174]

PIN attorney Sullivan stated that either prior to or following the arraignment, Morris met with Marsh and Sullivan, asked them how soon they could be ready for trial, and told them that the Front Office had directed the team not to object to any defense request for a speedy or expedited trial.[175] Morris told OPR that she recalled the directive coming from Friedrich or Glavin, and she did not object because she believed that "everything was ready to roll."[176] Morris stated that when she informed the team about the speedy trial directive, she received "blank stares from everyone," but Morris elected not to raise the issue with Friedrich or Glavin because she asked the team to give her a date by which they could be ready.[177]

Marsh stated in an email that "Brenda has 'caucused with management' and will be telling us later today what arguments we're going to have, how cross will be broken up, etc. Given the demeanor of her conversation, I have a pretty good idea of what that means," (implying that Morris would receive the prime witness and argument assignments).[178] These decisions caused further tension within the trial team as Marsh related in an email to PIN attorney Sullivan: "If all of this is true, it means that the front office isn't just trying to put together a trial team, they're actively trying to marginalize people for no justifiable reason whatsoever. It is unbelievably wrong."[179] Marsh also communicated the disharmony in the team in an email to Morris: "I cannot overstate how much of a negative impact these front office decisions are having on the rest of the trial team."[180]

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[174] Glavin OPR Tr. July 17, 2009 (am) 19, 54-56.

[175] Sullivan (Schuelke) Tr. Jan. 6, 2010 at 37; Sullivan OPR Tr. Feb. 19, 2010 at 149. Welch told OPR that he was not aware of any such direction from the Front Office. Welch OPR Tr. Mar. 2, 2010 at 196. Morris OPR Tr. Mar. 19, 2010 at 438-440.

[176] Morris OPR Tr. Mar. 19, 2010 at 438-440.

[177] Morris OPR Tr. Mar. 19, 2010 at 438-440.

[178] Aug. 7, 2008 12:49pm email from PIN attorney Marsh to AUSA Bottini, AUSA Goeke, and PIN attorney Sullivan.

[179] Aug. 6, 2008 7:37pm email from PIN attorney Marsh to PIN attorney Sullivan.

[180] Aug. 6, 2008 12:19pm email from PIN attorney Marsh to PIN Principal Deputy Chief Morris.

Glavin told OPR that Friedrich instructed her to review all pleadings before they were filed.[181] Her review of draft pleadings also caused resentment within the trial team. Glavin recalled reviewing a 404(b) motion (concerning evidence of other crimes by Stevens the prosecution sought to introduce at trial for the purpose of proving intent) and all the government responses to defense pleadings.[182] Glavin stated that she did not review all the defense pleadings or the *Giglio* or *Brady* letters.[183] Regarding the Front Office edits to a venue motion, PIN attorney Marsh wrote, "[t]hey cut 70% of the paragraph and made us take out the actual argument. But that's OK."[184] In a similar manner, AUSA Bottini queried whether Friedrich and Glavin would "let us file [a 404(b) motion] as is."[185]

Glavin told OPR that Criminal Division management did not play a part in reviewing discovery production to the defense, or in the initial decision not to offer "open file" discovery.[186] Marsh partially confirmed Glavin's statement in an email to AUSA Goeke: "It's a shame the folks in the front office didn't decide to micromanage our Rule 16 productions. Because if they had, they would have realized how indispensable you are to our team."[187] However, PIN Chief Welch contradicted Glavin in a post trial email, stating "a week after indictment, Friedrich and Glavin endorsed the idea of non open file discovery (not allowing the defense access to the government's files for discovery purposes). I was surprised when it got raised, and pushed Brenda to be as open as possible."[188] During a conversation regarding not producing FBI 302s as *Jencks* material, Morris stated

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[181] Glavin OPR Tr. Jul 17, 2009 at 52-54.

[182] Glavin OPR Tr. Jul 17, 2009 at 52-54.

[183] Glavin OPR Tr. Jul 17, 2009 at 52-54.

[184] Aug. 11, 2008 3:45pm email from PIN attorney Marsh to AUSA Bottini.

[185] Aug. 12, 2008 10:22pm email from AUSA Bottini to [redacted] Marsh stated that the Front Office was "very involved," reviewing and line editing all briefs before they went out. Marsh OPR Tr. Mar. 25, 2010 at 225.

[186] Glavin OPR Rec. July 17, 2009(am) at 76-78. Morris told OPR that the Front Office directed its resources toward trial issues, such as witness assignments and editing correspondence and motions, rather than discovery. Morris OPR Tr. Mar. 19, 2010 at 136, 151.

[187] Aug. 18, 2008 12:38pm email from PIN attorney Marsh to AUSA Bottini, AUSA Goeke, and PIN attorney Sullivan.

[188] Apr. 2, 2009 7:48am email from PIN Chief Welch to Mark Welch. Welch's email assertions do not appear to take into account that the prosecution team did not use "open file" discovery in any of the Polar Pen trials preceding *Stevens* (*Anderson*, *Kott*, and *Kohring*). Morris did not recall a conversation where Welch "pushed her" to be "as open as possible" on discovery. Jan. 23, 2011 letter from Brenda Morris to OPR at 2.

that Friedrich was "very much in favor of us being hardball" and "playing close to the vest."[189] Morris told Mr. Schuelke, however, that she did not recall ever hearing Friedrich or Glavin say to play disclosure issues "close to the vest."[190] Friedrich told OPR that he did not recall being involved in "line item type decisions" on discovery, and that he did not remember any prohibition against "open file" discovery, but "Rita would know the answer to that."[191] Glavin told OPR that Criminal Division management did not play a part in reviewing discovery production to the defense, or in the decision not to offer open file discovery.[192]

Glavin told OPR that Criminal Division management gave Welch the opportunity to assign witness examinations and arguments and, as a result, Morris was assigned a smaller role in motion arguments and examinations of witnesses than the other attorneys on the team.[193] However, the Criminal Division management sometimes overruled Welch on such issues. For example, Welch wanted Marsh to cross examine Senator Stevens and to present the closing argument. Glavin stated that Criminal Division management overruled Welch (who later agreed with the decision) and reassigned the cross examination of Senator Stevens to Brenda Morris.[194] Glavin reassigned the rebuttal argument to Morris as well.[195] Welch appealed to Glavin to allow Marsh a larger role in witness examination in order to free up Morris and Bottini for other trial work, stating "Brenda and Joe do not like the idea of cutting Nick out. You are putting too much on them at the last minute."[196] Morris emailed AAG Friedrich echoing Welch's request:

> My concern was that we really need to have Nick cross more witnesses. He can do a good job with some of those mopes, but Bill and I are in agreement that he shouldn't do the big one. That will be me. I know Rita [Glavin] told you what a good job Nick did on Friday

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189 Morris OPR Tr. Mar. 19, 2010 at 121-122.

190 Morris (Schuelke) Tr. Jan. 15, 2010 at 232.

191 Friedrich OPR Tr. Aug. 3, 2009 at 53.

192 Glavin OPR Rec. July 17, 2009 (am) at 76-77.

193 Glavin OPR Rec. July 17, 2009 (am) at 82-83

194 Glavin OPR Rec. July 17, 2009 (pm) at 33-39.

195 Glavin OPR Tr. July 17, 2009 (pm) at 26, 37-40.

196 Oct. 9, 2008 6:39pm email from PIN Chief Welch to PDAAG Glavin.

> morning. I just don't want to limit him to five. There are some witnesses he has particular knowledge of that would be helpful if he crossed and Bill will continue to work with him to get the crosses in shape.[197]

Friedrich agreed with Morris's suggestion.[198]

VII. LEADERSHIP AND ORGANIZATION ISSUES WITHIN THE TEAM

Morris had served as a supervisor for the entire Polar Pen investigation, but had not played a role in any of the prior trials. According to Morris, upon joining the trial team, she sought to make herself as "small as possible" and would "try not to even give an opinion" during meetings.[199] Morris stated that she "wasn't really [taking] a supervisory role" in the case and "was trying [her] best to get up to speed to be a . . . trial team member."[200] Morris stated that she saw herself "as a mouthpiece for the team," as the person speaking in court, but "there was no way I was going to dictate to these guys."[201] Morris stated that she felt that the trial team "had been kicked in the teeth enough," and they "knew the evidence [and] . . . the case."[202]

Sullivan stated that he told Welch there was a void of leadership on the team, and that Morris was working on other cases at the same time as *Stevens* .[203] Welch told OPR that once Morris was added to the trial team, his focus shifted to empower her in her role as lead and he afforded her more deference and discretion than he ordinarily would have given someone on the team.[204] Welch told OPR that the addition of Morris to the trial team caused a "bizarre chain of command" because Morris would often skip over Welch and report directly to Friedrich and

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[197] Oct. 11, 2008 3:10pm email from PIN Principal Deputy Chief Morris to AAG Friedrich.

[198] Oct. 11, 2008 3:37pm email from AAG Friedrich to PIN Principal Deputy Chief Morris.

[199] Morris OPR Tr. Mar. 19, 2010 at 142-143.

[200] Morris (Schuelke) Tr. Jan. 15, 2010 at 51.

[201] Morris OPR Tr. Mar. 19, 2010 at 143.

[202] Morris OPR Tr. Mar. 19, 2010 at 143.

[203] Sullivan OPR Tr. Feb. 19, 2010 at 171-172.

[204] Welch OPR Tr. Mar. 2, 2010 at 101.

Glavin.[205] Welch stated that the addition of Morris caused him to take a step back in the management role because Morris had "a direct reporting relationship to the principal deputy and the Assistant Attorney General."[206] Welch stated that Morris would forget to tell him things because she had "too many chains of command" going on.[207] Welch also stated that because Morris was the leader of the trial team, Welch took over Morris's other duties and responsibilities.[208] AUSA Bottini stated that, throughout the investigation, he did not "pick up the phone and call Brenda Morris or William Welch," and as a "practical matter" Marsh was his supervisor.[209] Morris agreed that there was a vacuum of leadership, stating that decisions and task assignments fell to different team members based on "kind of a routine," and that she should have "stepped up" and provided more supervision.[210] Morris stated that she never assigned the team members specific tasks because team members fell into specific "roles," giving the example that "*Brady* stuff always kind of fell under Ed [Sullivan]."[211]

Morris stated that she did not directly supervise the prosecution team's *Brady* review, but she knew that "Nick and Ed on occasion would go to Bill [Welch]" for supervision.[212] She stated that "when there were real decisions to be

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[205] Welch OPR Tr. Mar. 2, 2010 at 107. Morris disagreed with Welch's statement regarding the chain of command and noted that she did nothing to impede Welch's supervision of the trial team. Jan. 23, 2011 letter from Brenda Morris to OPR at 5.

[206] Welch (Schuelke) Tr. Feb. 5, 2010 at 280.

[207] Welch OPR Tr. Mar. 2, 2010 at 108. Welch told OPR that he did not raise with AAG Friedrich the chain-of-command issue of Morris reporting directly to Glavin because Friedrich had told Welch that Glavin was to be the Front Office contact for the trial team and, in a related matter, Friedrich made it clear to Welch that his orders "will be followed." Welch OPR Tr. Mar. 2, 2010 at 108-111.

[208] Welch (Schuelke) Tr. Feb. 5, 2010 at 280.

[209] Bottini OPR Tr. Mar. 10, 2010 at 57.

[210] Morris OPR Tr. Mar. 19, 2010 at 166-169, 154.

[211] Morris OPR Tr. Mar. 19, 2010 at 166-169. In his response to our draft report, Sullivan disputed Morris's characterization of his role regarding *Brady* information, arguing that he did not independently review material or revise others' work regarding the *Brady* review. Concerning the *Brady* letter, Sullivan stated that he was merely "a scrivener" compiling information relayed to him by others. Jan. 31, 2011 letter from Brian M. Heberlig to OPR at 7, 10, and 12.

[212] Morris (Schuelke) Tr. Jan. 15, 2010 at 56. Apparently, the team had experienced prior chain of command issues. For example, on August 31, 2008, Welch sent Marsh an email asking why Marsh sent a draft Federal Rule of Evidence 404(b) response motion directly to Glavin rather than through Welch. Aug. 31, 2008 4:15pm email from PIN Chief Welch to PIN attorney Marsh. Welch told OPR that AAG Friedrich had tasked him to review all motions before sending

made, I was trying my best to get [Welch] into it."[213] On September 8, 2008, Morris sent Marsh and Sullivan an email directing them to "make sure that Bill [Welch] is cc'd on all of the *Brady* issues."[214] Marsh stated that when Morris was added to the team, Marsh had been going to Welch for supervision "as much if not more than Brenda." Marsh continued to go to Welch for supervision throughout the case because, according to Marsh, "[Welch] generally had a better grasp of the facts and the relevant issues."[215] Marsh also stated that in August 2008, Morris told him to "step back" and that he was "bottlenecking some things" because he wanted to be involved in the review of too many of the documents and wanted to be too involved.[216]

Glavin told OPR that, over time, the trial team "froze out" Brenda Morris and that team dynamics degenerated to such a point that Glavin was forced to meet with the team to discuss the issue.[217] Marsh told OPR that, "while I may not have liked Brenda being in there, while I may have had some initial resentment to being changed, I just wanted it to work. And at some point . . . a few days into it, I tried to be as supportive as I could."[218] Morris stated that Marsh continually would "data dump" her by giving her boxes of documents to review to prepare for witness examinations rather than identifying the critical documents.[219] Welch told OPR that he met privately with Marsh to encourage him to "be a team player" and to "make this work," and that Marsh responded that he would do whatever was needed to make the case a success.[220]

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them to Glavin. Welch OPR Tr. Mar. 2, 2010 at 207.

[213] Morris OPR Tr. Mar. 19, 2010 at 147.

[214] Sept. 8, 2008 9:15am email from PIN Principal Deputy Chief Morris to PIN attorney Marsh and PIN attorney Sullivan. Morris stated that when she joined the team, she believed that "there had already been . . . a big *Brady* review" relative to the other Polar Pen trials and that the large portion of *Brady* review "had been done." Morris (Schuelke) Tr. Jan. 15, 2010 at 52-53.

[215] Marsh OPR Tr. Mar. 25, 2010 at 217, 263.

[216] Marsh OPR Tr. Mar. 24, 2010 at 219, 253.

[217] Glavin OPR Tr. July 17, 2009 (am) at 57.

[218] Marsh OPR Tr. Mar. 24, 2010 at 221.

[219] Morris (Schuelke) Tr. Jan. 15, 2010 at 51. Morris OPR Tr. Mar. 19, 2010 at 141-142.

[220] Welch OPR Tr. Mar. 2, 2010 at 106-107.

VIII. DISCLOSURES TO THE DEFENSE IN THE *STEVENS* CASE

A. Disorganization Within the Trial Team

The overall disorganization among the trial team resulted in poor file keeping and affected the team's ability to fulfill its disclosure obligations. As Marsh observed, "I don't think there was any single person in charge of discovery"; it was handled on an "*ad hoc* basis." Marsh added, "it was difficult for any of the line guys to be absolutely 100 percent in the know as to what everyone else was doing."[221] Marsh and Bottini told OPR they reviewed only the 302s and grand jury transcripts relative to witnesses they presented at trial. Sullivan and Goeke did not present witnesses at trial, and thus did not conduct similar reviews (responsibilities for some witnesses were transferred from Sullivan and Goeke to Marsh and Bottini following the addition of Morris to the trial team).

AUSA Bottini stated that, in retrospect, the prosecution team had "no focal point for information" and needed someone to fill a "project manager type role."[222] Bottini told OPR that the USAO in Alaska did not keep track of discovery production as it usually would have because all the information was being sent to PIN for disclosure; he also recalled that PIN attorney Sullivan told him that PIN was keeping track of the disclosures.[223]

OPR was unable to locate many files that one would expect to find. We found no correspondence file, no pleadings file, and no file documenting discovery production (*Brady* files, etc.). PIN Supervisory Administrative Specialist [redacted] told OPR that [redacted] would usually perform such tasks in PIN cases, but in the *Stevens* case the attorneys kept material on their own computers and there was never a chain of custody set up so that [redacted] could receive and file copies of final documents or discovery that was produced to the defense.[224]

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[221] Marsh (Schuelke) Tr. Feb. 2, 2010 at 39, 42, 44.

[222] Bottini (Schuelke) Tr. Dec. 17, 2009 at 812.

[223] Bottini OPR Tr. Mar. 10, 2010 at 114-115. In his response to the draft repot, Sullivan stated that he did not recall making such a statement, noting that he was not assigned such a task. Jan. 31, 2011 letter from Brian M. Heberlig to OPR at 9.

[224] [redacted] OPR Tr. Apr. 13, 2009 at 8-9.

On July 31, 2008, two days after the indictment, SA Kepner sent the prosecution team "the discovery plan we discussed last month."[225] The two page plan listed various types of evidence (electronic surveillance; search warrant evidence; financial records; grand jury material; non financial subpoenaed documents; affidavits; FBI reports; VECO documents; and other documents), noting in bold who was responsible for each item.[226] Some documents also contained a notation that review was "done" and listed the person who completed the review.[227] According to the two page plan, grand jury exhibits and testimony were to be reviewed by "USAO/PI[N]."[228] The section of the plan addressing FBI reports divided the reports into four categories: Bill Allen; Rick Smith; Dave Anderson; and other witness reports.[229] The plan noted that the FBI was responsible for reviewing the material for each category of FBI reports.[230]

B. The Decision to Use a *Brady* Letter

At the arraignment on July 31, 2008, the defense requested that the government provide *Brady* material "as immediately as possible."[231] The following day, the defense sent the government its "First Request For Discovery," requesting that the government agree to an "open file" approach to discovery or, in the alternative, that the government provide the materials itemized in the letter, including: statements of the defendant; documents and tangible objects; *Brady*

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[225] July 31, 2008 9:53am email from SA Kepner to AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, PIN attorney Marsh, litigation support manager [redacted], PIN Principal Deputy Chief Morris, and paralega [redacted].

[226] July 31, 2008 9:55am email from SA Kepner to AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, PIN attorney Marsh, litigation support manager [redacted], PIN Principal Deputy Chief Morris, and paralega [redacted].

[227] July 31, 2008 9:55am email from SA Kepner to AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, PIN attorney Marsh, litigation support manager [redacted], PIN Principal Deputy Chief Morris, and paralegal [redacted].

[228] July 31, 2008 9:55am email from SA Kepner to AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, PIN attorney Marsh, litigation support manager [redacted], PIN Principal Deputy Chief Morris, and paralega [redacted].

[229] July 31, 2008 9:55am email from SA Kepner to AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, PIN attorney Marsh, litigation support manager [redacted], PIN Principal Deputy Chief Morris, and paralegal [redacted].

[230] July 31, 2008 9:55am email from SA Kepner to AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, PIN attorney Marsh, litigation support manager [redacted], PIN Principal Deputy Chief Morris, and paralegal [redacted]

[231] *United States v. Stevens*, Tr. July 31, 2008 at 4-5.

and *Giglio* material; other crimes evidence; information regarding suppression issues; and any charts and summaries the government planned to use at trial.

On August 7, 2008, the government provided the defense with "roughly 500 gigabytes' worth of documents, recordings, and other media" including:

> Approximately 66,000 pages of documents pursuant to Rule 16, including the affidavits, application, and orders for the court ordered electronic surveillance in this case and the search warrant affidavit, application, and order relating to the search of defendant's residence;
>
> Approximately 2,846 intercepted telephone conversations, including a substantial early production of *Jencks* material for potential government witnesses Bill Allen and Rick Smith;
>
> Approximately 261 audio/video recordings; again, including a substantial early production of *Jencks* material; and
>
> Approximately 2,024 pictures and spherical photography from the government's search of defendant's residence in Girdwood, Alaska; and
>
> A production log listing all of the material on the computer hard drive, including Memorandum in Opposition to Defendant's Motion to Compel Discovery.[232]

On August 12, 2008, the government and the defense agreed that "to the extent *Brady* material was contained within *Jencks* material, the government would provide that *Brady* information in the due course of discovery (as opposed to within 24 hours of the witness's testimony), even if it chooses not to provide the transcript itself."[233] Additionally, on August 15 and 18, 2008, the government provided 35,753 pages of documents consisting primarily of VECO documents

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[232] Government's Memorandum in Opposition to Defendant's Motion to Compel Discovery at 2-3 (D.D.C., filed Sept. 5, 2008) (sealed).

[233] Aug. 12, 2008 1:45pm email from defense counsel to PIN Principal Deputy Chief Morris, PIN attorneys Marsh and Sullivan, and AUSAs Bottini and Goeke.

along with logs and indices for the material provided.[234] The government also responded to defense requests by providing all prior sworn testimony for Bill Allen and Rick Smith, "additional logs not required by Rule 16," and *"Brady* related material."[235]

However, instead of producing the FBI 302 reports, grand jury transcripts, and other documents to the defense, the prosecution elected to disclose *Brady* and *Giglio* information via summary letter. A U.S. District Court for the District of Columbia had held, in a case involving grand jury transcripts, that the government may satisfy its *Brady* obligation by informing the defendant of the substance of the *Brady* evidence by means of a summary. In *United States v. Blackley*, 986 F. Supp. 600 (D.D.C. 1997), the court held that the government can meet its *Brady* obligations by disclosing the essential facts and nature of the exculpatory evidence as long as the defense had the opportunity and ability to develop the evidence for trial. *Blackley*, 986 F. Supp. at 604 05 (citing *United States v. Grossman*, 843 F.2d 78 (2nd Cir. 1988)). However, the methods used for the review and disclosure of such material in the *Stevens* case would ultimately lead to numerous allegations of prosecutorial misconduct.

The prosecution team had used *Brady* disclosure letters in all of the prior Polar Pen trials (*Anderson*, *Kott*, and *Kohring*). At the time of the *Stevens* trial, the policy of PIN regarding discovery was to "adapt to whatever is the practice in that local jurisdiction."[236] AUSA Bottini told OPR that he had used summary *Brady* letters in "more than a few" cases in the past in Alaska.[237] Marsh stated that he believed such letters were customary practice in Alaska.[238] Marsh also stated that the *Brady* letter was "never viewed to be the sum total" of the *Brady* and *Giglio* material that was produced in the *Stevens* case.[239] No one OPR interviewed recalled anyone making a decision to provide *Brady* disclosures via summary letters. An August 14, 2008 email from Marsh to Sullivan, Bottini, and Goeke stated "we need to get cranking on our omnibus *Brady/Giglio* letter to defense

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[234] Government's Memorandum in Opposition to Defendant's Motion to Compel Discovery at 2-3 (D. DC, Filed Sept. 5, 2008) (sealed).

[235] Government's Memorandum in Opposition to Defendant's Motion to Compel Discovery at 2-3 (D.D.C., filed Sept. 5, 2008) (sealed).

[236] Morris (Schuelke) Tr. Jan. 15, 2010 at 160.

[237] Bottini OPR Tr. Mar. 10, 2010 at 109, 111.

[238] Marsh (Schuelke) Tr. Feb. 2, 2010 at 46.

[239] Marsh (Schuelke) Tr. Feb. 2, 2010 at 46.

counsel."[240] Brenda Morris stated that she believed the trial team made the decision to use a *Brady* letter because such letters were the practice in Alaska and the team had used a similar approach in prior cases; Morris stated further that she "wouldn't have bucked their practice of doing this."[241] Morris also stated that "it was always a given that a *Brady* letter was going to be done."[242] PIN Chief Welch told OPR that he was not aware of the team's use of *Brady* letters until a September 8, 2008 meeting with the team just before they issued the letter.[243] Welch told OPR that he was not comfortable with the *Brady* letter format, and upon learning of the proposed letter, Welch spoke to PIN Deputy Chief Raymond Hulser, who informed Welch that, although the section was moving away from use of such letters, some of the senior people in PIN had used *Brady* letters .[244] Marsh claimed that he and Sullivan approached Morris about "doing open file" discovery in the *Stevens* case; however she "was not supportive of it" and "[w]e didn't push it very hard."[245] Morris did not recall such a conversation.[246] Sullivan stated that there "was probably a discussion about how to handle some of the 302 issues. The problem is no one communicates it to me until September 6, it looks like."[247] Sullivan stated that he was not aware of anyone using open file discovery in PIN cases.[248]

C. The Motion to Limit Cross-Examination

On August 14, 2008, the prosecutors filed a motion *in limine* under seal to exclude "inflammatory, impermissible cross examination" pursuant to Federal

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[240] Aug. 14, 2008 1:49pm email from PIN attorney Marsh to PIN attorney Sullivan, AUSA Bottini, and AUSA Goeke.

[241] Morris (Schuelke) Tr. Jan. 15, 2010 at 159-161; Morris OPR Tr. Mar. 19, 2010 at 69.

[242] Morris OPR Tr. Mar. 29, 2010 at 179.

[243] Welch OPR Tr. Mar. 2, 2010 at 180-181.

[244] Welch OPR Tr. Mar. 2, 2010 at 183-184.

[245] Marsh (Schuelke) Tr. Feb. 2, 2010 at 48. Sullivan told OPR that he was not aware of other PIN cases where "open file" discovery was used. Sullivan OPR Tr. Feb. 19, 2010 at 216.

[246] Morris OPR Tr. Mar. 19, 2010 at 187-188.

[247] Sullivan OPR Tr. 2010 at 272.

[248] Sullivan OPR Tr. 2010 at 216.

Rules of Evidence 401, 403, 608(b), and 611(a)(3).[249] AUSA Bottini drafted the motion, which attempted to limit examination of potential government witnesses Bill Allen, Dave Anderson, and Rocky Williams regarding "rumored personal vices such as excessive alcohol consumption, substance abuse, or allegations of sexual misconduct."[250] Bottini was to present all three witnesses at trial.[251]

The motion did not contain any details of the allegations of excessive alcohol consumption or substance abuse by Allen, Anderson, or Williams.[252] The motion stated that Bill Allen had been the subject of an Anchorage Police Department (APD) investigation concerning allegations that he "engaged in a sexual relationship with a juvenile female approximately ten years ago," that Allen had not been charged with a criminal offense regarding the investigation, that the investigation was reopened earlier in the year and then closed or suspended, and that any "rumor" that the USAO played a role in suspending the investigation because of Allen's status as a cooperator was "completely baseless and untrue."[253]

At the time prosecutors filed the motion, they were in possession of a 2004 FBI 302 (the SeaTac 302) stating that, at Allen's request, a female prostitute named Bambi Tyree had made a false statement under oath denying her prior sexual relations with Allen when she was a minor. They were also in possession of three government pleadings filed in an unrelated case which stated that Tyree lied at Allen's direction.[254] Both Bottini and Goeke argued for some kind of

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[249] Government's Motion in Limine to Exclude Inflammatory, Impermissible Cross-Examination at 2 (D.D.C., filed Aug. 14, 2008) (sealed).

[250] Government's Motion in Limine to Exclude Inflammatory, Impermissible Cross-Examination at 2 (D.D.C., filed Aug. 14, 2008) (sealed).

[251] Initially, Marsh was to present Williams at trial. But in an August 21, 2008 email from Bottini to Morris, Bottini stated that Williams was his witness, with the caveat that Marsh would have to take responsibility for Williams if Anderson became a viable witness. Aug. 21, 2008 2:05pm email from AUSA Bottini to PIN Principal Deputy Chief Morris, SA Kepner, AUSA Goeke, PIN attorney Marsh, PIN attorney Sullivan, and SA Joy. Bottini conducted his first trial preparation meeting with Williams on August 15, 2008 in Alaska, and conducted additional meetings with Williams on August 20, 22, and 31, and September 20 and 21, 2008.

[252] PIN attorney Sullivan added the information regarding substance abuse, but stated, "it is unclear whether Dave/Rocky abused any substances beyond alcohol." Aug. 13, 2008 11:35pm email from PIN attorney Sullivan to AUSA Bottini, AUSA Goeke, PIN attorney Marsh, PIN Principal Deputy Chief Morris, and PIN Chief Welch.

[253] Government's Motion in Limine to Exclude Inflammatory, Impermissible Cross-Examination at 2-3 (D.D.C., filed Aug. 14, 2008) (sealed).

[254] A detailed factual chronology of issues involving the Bambi Tyree false statement appears in Chapter Five of this report.

disclosure of the Tyree false statement in the motion to limit cross examination, but Marsh argued against such inclusion, and the prosecution filed the motion without reference to the false statement.

D. The August 25, 2008 *Giglio* Letter

Following the motion to limit cross examination, the prosecutors became aware of new allegations that the APD was pursuing concerning Allen having sex with underage females.[255] The prosecutors also received an August 21, 2008 letter from defense counsel offering to not move to introduce evidence or examine Allen regarding the APD investigation without first providing the government with advance notice and giving the court time to rule on the issue. In return, the defense requested that the government "immediately provide all information regarding the APD investigation under *Brady* and *Giglio*" and that the government withdraw its sealed motion to limit cross examination and file it on the public record.[256] The government responded later the same day stating that it would not discuss sealed pleadings in a letter and inviting the defense to raise the issue before the court if it determined such action was necessary.[257]

Bottini again raised the Tyree false statement issue as he drafted what ultimately became the prosecution's August 25, 2008 *Giglio* letter.[258] On August 18, 2008, Bottini sent the prosecution team a draft letter which contained a paragraph stating:

> [THIS IS WHAT WE HAVE TO DECIDE IN OR OUT?]
> "In connection with the investigation involving allegations of sexual misconduct, the government is also aware that Allen is alleged to have had some involvement in a witness creating a false statement. Those

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[255] Aug. 21, 2008 2:47pm email from SA Kepner to PIN attorney Sullivan, PIN Principal Deputy Chief Morris, PIN attorney Marsh, AUSA Bottini, PIN attorney Sullivan, SA Joy, SSA Seale, and CDC Gonzalez.

[256] Aug. 21, 2008 letter from defense counsel to PIN Principal Deputy Chief Morris.

[257] Aug. 21, 2008 letter from PIN Principal Deputy Chief Morris to defense counsel.

[258] Prior to drafting the letter, Bottini sent Morris, Marsh, Goeke, and Sullivan an email stating, "[h]ere is a sample of what we have done in the past," attaching a similar letter the team sent in the *Anderson* case. Aug. 18, 2008 7:47pm email from AUSA Bottini to PIN Principal Deputy Chief Morris, PIN attorney Sullivan, PIN attorney Marsh, and AUSA Goeke.

> allegations have been investigated by the government and have been proven false."[259]

Three days later AUSA Bottini sent to the prosecution team another draft of the letter including the language:

> "The government is also aware that the female subject of the earlier investigation has stated that she made a false statement regarding the nature of her relationship with Allen. The subject of the earlier investigation is emphatic that she made the false statement on her own initiative and Allen denies that he caused her to make the statement."[260]

Bottini included the paragraph in bolded font, indicating that the team would need to discuss it. The following day, PIN attorney Sullivan emailed a new version of the letter to Morris and Marsh, retaining the paragraph bolded by Bottini, stating he had "cleaned up" AUSA Bottini's draft.[261] AUSA Goeke then recommended that statement be described as a "sworn false statement."[262]

On August 25, 2008, the prosecutors provided the defense with a *Giglio* letter identifying, among other things, potential impeachment material regarding the Allen sex cases, stating: Allen had previously been the subject of a criminal investigation conducted by the APD "regarding allegations that he engaged in a sexual relationship with a juvenile female more than ten years ago"; Allen "has not been charged with any criminal offense stemming from this investigation"; the investigation had been "briefly reopened this year" and was "recently closed or suspended." In addition, the letter stated that "[o]n August 20, 2008" the government learned of a pending investigation of Allen regarding a sexual relationship with a different juvenile female "in the late 1990's"; that the "rumor" that the Alaska USAO played a role in suspending the earlier Allen investigation was "completely baseless and untrue"; that Allen "provided financial benefits" to

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[259] Aug. 18, 2008 10:27pm email from AUSA Bottini to PIN Principal Deputy Chief Morris, PIN Attorney Marsh, PIN attorney Sullivan, AUSA Goeke, and SA Kepner.

[260] Aug. 21, 2008 10:44pm email from AUSA Bottini to PIN attorney Marsh, PIN attorney Sullivan, AUSA Goeke, SA Kepner, SA Joy, and IRS Agent Bateman.

[261] Aug. 22, 2008 1:11pm email from PIN attorney Sullivan to PIN Principal Deputy Chief Morris, and PIN attorney Marsh.

[262] Aug. 22, 2008 11:35am email from AUSA Goeke to AUSA Bottini, PIN attorney Marsh, PIN attorney Sullivan, SA Kepner, SA Joy, and IRS Agent Bateman.

the first juvenile female; and that the government was aware of allegations that Allen provided financial benefits to the second juvenile female.[263]

The letter did not raise Allen's possible involvement in soliciting Tyree's false statement. During the drafting process, PIN attorney Marsh argued "strongly" to delete the Tyree false statement paragraph, noting:

> [w]e have nothing to turn over, we have neither evidence nor an allegation that Allen directed her to lie, we have investigated this til the end of time, and we have been blessed by PRAO twice. There is simply no reason to revisit it.[264]

Marsh sent this recommendation to PIN Principal Deputy Chief Morris, who agreed with not including the disclosure.[265]

The August 25, 2008 *Giglio* letter also contained criminal history information for Bill Allen, Rick Smith, Dave Anderson, and Robert (Rocky) Williams.[266] The letter stated that the government was "aware of rumors concerning excessive alcohol use by Anderson,"[267] and "aware of rumors concerning excessive alcohol use by Williams" and that it was "possible that Williams may have an alcohol dependency issue."[268] Bottini stated that he described Williams's alcohol issues as a "rumor" because although witnesses told

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[263] Aug. 25, 2008 letter from PIN Principal Deputy Chief Morris to defense counsel at 2. Bottini stated that he and Goeke may have drafted the initial language regarding the Alaska investigation. Bottini (Schuelke) Tr. Dec. 17, 2009 at 714. Goeke acknowledged that he "played a role" in drafting the paragraphs involving allegations of sexual misconduct. Goeke (Schuelke) Tr. Jan. 8, 2010 at 177-178. Morris stated that she reviewed the letter and "assumed what was in it was accurate and true." Morris (Schuelke) Tr. Jan. 15, 2010 at 82-83.

[264] Aug. 22, 2008 1:40pm email from PIN attorney Marsh to PIN Principal Deputy Chief Morris and PIN attorney Sullivan. PIN attorney Sullivan responded with an email stating, "I agree." Aug. 22, 2008 1:41pm email from PIN attorney Sullivan to PIN Principal Deputy Chief Morris and PIN attorney Marsh.

[265] Aug. 22, 2008 1:41pm email from PIN Principal Deputy Chief Morris to PIN attorney Marsh and PIN attorney Sullivan.

[266] The letter incorrectly listed Williams's first name as Richard.

[267] In an earlier draft of the letter, Sullivan included a reference that Anderson "may have been medically treated in the past for an alcohol dependency issue." Aug. 22, 2008 1:11pm email from PIN attorney Sullivan to PIN Principal Deputy Chief Morris, and PIN attorney Marsh.

[268] Aug. 25, 2008 letter from PIN Principal Deputy Chief Morris to defense counsel at 4-5.

the prosecutors that Williams was often drunk, "nobody ever said, 'This guy is an alcoholic'"[269] Morris stated that she reviewed the August 25, 2008 letter, and that Anderson's and Williams's drinking was "widely known," but the government did not label them alcoholics because the prosecution did not have a medical diagnosis for either individual.[270] However, Morris also stated that Anderson was prepared to admit to being an alcoholic if asked about it on cross examination.[271]

Finally, the letter contained a list of financial benefits provided to Anderson by the government, a reference to Anderson's March 25, 2008 false affidavit claiming the government promised him and his family immunity, and a list of witnesses who were granted "use immunity."[272]

E. The Defense Motion to Compel Discovery

Following receipt of the government's August 25, 2008 *Giglio* letter, the defense sent an August 27, 2008 letter requesting that the government "certify" that it had produced all *Brady* and *Giglio* material in its possession. In particular, the defense requested: FBI 302s of witness interviews; notes of witness interviews taken by the FBI or others; plea agreements for Dave Anderson; Anderson's March 25, 2008 affidavit; and any plea agreement regarding Rocky Williams.[273]

On September 2, 2008, the defense filed, under seal, its Motion to Compel Discovery Pursuant to *Brady v. Maryland* and Fed. R. Crim. P. 16.[274] Noting that trial was only three weeks away, the defense stated that the government had withheld:

> (1) copies of all exculpatory grand jury testimony, FBI Form 302 witness interview memoranda, and all

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[269] Bottini (Schuelke) Tr. Dec. 16, 2009 at 51. Sullivan stated that he was aware that Williams had an "alcohol issue" including "conviction for a manslaughter, DWI charge" but he could not explain why Bottini used the term "rumor" in the letter. Sullivan (Schuelke) Tr. Jan. 6, 2010 at 120-121, 126.

[270] Morris (Schuelke) Tr. Jan. 15, 2010 at 89-91.

[271] Morris (Schuelke) Tr. Jan. 15, 2010 at 89-91.

[272] A grant of use immunity prevents the government from using the witness's compelled testimony against him in a future criminal proceeding. The witnesses who received use immunity included Bill Allen, [redacted].

[273] Aug. 27, 2008 letter from defense counsel to PIN Principal Deputy Chief Morris.

[274] Motion to Compel Discovery Pursuant to *Brady v. Maryland* and Fed. R. Crim. P. 16 (filed Sept. 2, 2008) (filed under seal).

> contemporaneous notes of witness interviews, including notes or memoranda reflecting false statements by the witnesses; (2) the allegedly false affidavit signed by government witness David Anderson, in which he claimed that the government had provided him and his friends and family with a broad grant of immunity for past crimes, and any written agreement between Anderson and Bill Allen to conceal information; (3) plea agreements for government witnesses David Anderson and Rocky Williams; (4) all information relating to Alaska state investigations into government witness Bill Allen; (5) medical records for Bill Allen, including those relating to any cognitive impairment resulting from Mr. Allen's severe head injury; and (6) all information, including medical records and arrest records, relating to the possible drug and alcohol abuse of government witnesses.

The defense argued that despite its August 1, 2008 and August 27, 2008 letters to the government requesting production of *Brady* material, "the government has yet to produce a *single* memorandum, note, or witness statement taken in the course of its multi year investigation."[275]

On September 5, 2008, the defense sent the government a letter responding to the government's August 25, 2008 *Giglio* letter. In the letter, the defense requested, pursuant to *Brady* and *Giglio,* the nature of any and all financial benefits Allen provided to the individuals involved in the prior and current investigations of Allen referenced in the August 25, 2008 letter. The defense also requested details of the benefits, including the dates and amount of payment and the names and contact information for family members who received such benefits.[276] The government sent the defense two letters on September 5, 2008. The first letter included attachments that had been inadvertently left off the August 25, 2008 *Giglio* letter, and included a paragraph stating:

> Please also note that the government is in the process of reviewing agents' interview notes and formal memoranda and grand jury testimony to determine if this material contains any *Brady* or *Giglio* related information. To the extent we locate such information, we will produce it to

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[275] Motion to Compel Discovery Pursuant to *Brady v. Maryland* and Fed. R. Crim. P. 16 at 5 (filed Sept. 2, 2008) (filed under seal).

[276] Sept. 5, 2008 letter from defense counsel to PIN Principal Deputy Chief Morris.

> you immediately in a manner consistent with our prior agreement.[277]

The government's second letter was written in response to the defense September 5, 2008 letter, and stated that:

> The government is fully aware of our continuing duty to disclose information to the defense pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). We will continue to abide by that duty and provide the defendant with information in our possession that is material to your client's defense.[278]

Also on September 5, 2008, the government filed its motion in opposition to the defendant's September 2, 2008 motion to compel discovery, arguing that the defense was not entitled to additional information regarding the APD investigation other than the information the government previously provided in its August 25, 2008 *Giglio* letter, and in its motions and reply briefs concerning the Motion in Limine to Exclude Inflammatory, Impermissible Cross Examination.[279] In the section of the motion entitled "FBI Interview Notes and Memoranda," the government stated:

> With these parameters in mind, the government advises the Court (as it advised defendant) that it is in the process of re reviewing all agent rough notes and formal interview memoranda to determine if there is any *Brady* related material in them.[280]

PIN attorney Sullivan later stated the term "re reviewing" was not in his original draft of the motion.[281] On September 4, 2008, Sullivan had emailed

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[277] Sept. 5, 2008 letter from PIN Chief Welch (signed by PIN attorney Sullivan) to defense counsel.

[278] Sept. 5, 2008 letter from PIN Principal Deputy Chief Morris to defense counsel.

[279] Government's Memorandum in Opposition to Defendant's Motion to Compel Discovery at 7-8 (D.D.C., filed Sept. 5, 2008) (sealed).

[280] Government's Memorandum in Opposition to Defendant's Motion to Compel Discovery at 10-11 (D.D.C., filed Sept. 5, 2008) (sealed).

[281] Sullivan (Schuelke) Tr. Jan. 6, 2010 at 429-431.

Marsh a draft of the motion stating, "feel free to tinker and edit."[282] The version Sullivan sent stated that the government was "in the process of reviewing all agent rough notes and formal interview memoranda to determine if there is any *Brady* related material in them."[283] OPR concluded that Marsh added the term "re reviewing."

IX. THE GOVERNMENT'S *BRADY* REVIEW

To fulfill its obligations under *Brady*, the prosecution team conducted various reviews of relevant items in its possession, such as FBI 302s, IRS MOIs, agent notes, and grand jury transcripts. Marsh stated that the review was conducted in a "piecemeal" fashion, with no one "specifically designated to be in charge."[284] These reviews were conducted largely by agents with little or no knowledge of *Brady* doctrine. During OPR's interviews with the subjects, no attorney took responsibility for orchestrating the review effort or assigning review tasks. Emails OPR reviewed showed that PIN attorney Sullivan became a *de facto* organizer of the task because he appeared to be the agents' focal point for questions and he received the agents' end product spreadsheets for use in drafting the government's September 9, 2008 *Brady* letter. Sullivan, however, was "adamant that [he] was not the person in charge" and that "[n]o one person was in charge of *Brady/Giglio*."[285] PIN Principal Deputy Chief Morris stated that she did not play a role in supervising either the *Brady* review or the drafting of the *Brady* letters.[286] Morris told OPR that she was aware that the agents were doing a *Brady/Giglio* review, but she was unaware that no attorneys reviewed the agents' work product.[287] Welch told OPR that he did not become aware of the agents' *Brady* review and corresponding spreadsheet until December 2008 and January 2009.[288] Sullivan stated that in August 2008, as a result of the U.S. Court of Appeals for the District of Columbia Circuit decision in *United States v. Andrews*, 532 F.3d 900 (D.C. Cir. 2008), the prosecution team met with FBI

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[282] Sept. 4, 2008 10:48pm email from PIN attorney Sullivan to PIN attorney Marsh.

[283] Sept. 4, 2008 10:48pm email from PIN attorney Sullivan to PIN attorney Marsh.

[284] Marsh (Schuelke) Tr. Feb. 2, 2010 at 93.

[285] Sullivan OPR Tr. Feb 19, 2010 at 229.

[286] Morris (Schuelke) Tr. Jan. 15, 2010 at 53.

[287] Morris OPR Tr. Mar. 19, 2010 at 173-174.

[288] Welch OPR Tr. March 2, 2010 at 154. Welch stated that he was "livid" when he found out about the agent *Brady* review and that, "[i]f I had known that agents were doing the *Brady/Giglio* review, I would have lost it." *Id.* at 155.

agents in Alaska to direct them to review their own notes for inconsistencies with the corresponding 302s.[289] Marsh told OPR that he recalled instructing the agents to review their notes for inconsistencies with the 302s.[290] Sullivan told OPR that the agent *Brady/Giglio* review of 302s may have been a "natural evolution of the fact they were reviewing" their notes to comply with *Andrews*.[291] The attorneys did not, however, review their own notes from witness interviews or trial preparation sessions for *Brady* information.

A. IRS Agents' Review of MOIs and Agent Notes

On September 3, 2008, IRS SA Larry Bateman sent an email to FBI SA Kepner and PIN attorney Sullivan to clarify the task of reviewing MOIs. Bateman stated that he understood he was supposed to review the notes of witness interviews to look for "specifically inculpatory/exculpatory statements re TS or impeachment material on the witness. We are also reviewing the notes versus the MOI to determine if there are any material differences between the two."[292] Bateman told OPR that he had never conducted such a *Brady* review before and he believed that *Brady* is "an attorney's job," rather than a task for IRS agents.[293]

On September 4, 2008, SA Bateman emailed a spreadsheet to PIN attorney Sullivan and SA Kepner.[294] The spreadsheet purported to list all of the IRS MOIs regarding the *Stevens* investigation for the purpose of noting whether at least in SA Bateman's view the reports contained any *Brady* or *Giglio* information. Along with the chart, SA Bateman emailed Sullivan, IRS SA Dennis Roberts, and SA Kepner stating "my thought is to be very liberal in interpretation subject to final cuts by the attorneys. I've included one example on the spreadsheet. Let me

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[289] Sullivan (Schuelke) Tr. Jan. 8, 2010 at 155-156.

[290] Marsh OPR Tr. Mar. 25, 2010 at 228.

[291] Sullivan OPR Tr. Feb. 19, 2010 at 251.

[292] Sept. 2, 2008 7:02pm email from SA Bateman to PIN attorney Sullivan, SA Roberts and SA Kepner. Bateman told OPR that he did not compare the MOIs to grand jury testimony. Bateman OPR Tr. May 21, 2010 at 57.

[293] Bateman OPR Tr. May 21, 2010 at 39.

[294] Bateman told OPR that he was not instructed to create a spreadsheet; he created the spreadsheet on his own initiative as "an easy way" to deliver the requested information. Bateman OPR Tr. May 21, 2010 at 50.

know if this is what you had in mind."[295] Our review of the emails revealed that there was no email response to SA Bateman.

Later that day, SA Bateman sent an updated spreadsheet that included IRS SA Roberts's notes from interviews.[296] After receiving the spreadsheets, PIN attorney Sullivan forwarded them to the rest of the prosecution team.[297] After reviewing the spreadsheets, Sullivan requested the underlying notes for interviews of Rocky Williams. In addition, Sullivan requested another MOI referenced in the spreadsheet as "possible Giglio #10 Hess."[298] Sullivan ended his email by reminding the agents: "[W]e should err on the side of caution and, to the extent information it (sic) is potentially *Giglio* or *Brady*, we should produce it."[299] The following day, Sullivan sent the trial team (including FBI and IRS agents) the "three reports from the IRS that, in their view, arguably have *Brady/Giglio*."[300]

SA Bateman emailed the *Stevens* prosecution team a finalized spreadsheet listing all of the IRS MOIs and notes, identifying whether they contained *Brady* or *Giglio* information or material differences between the notes and reports.[301] Bateman told OPR that he identified only one MOI in his spreadsheet that he

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[295] Sept. 3, 2008 4:24pm email from SA Bateman to PIN attorney Sullivan, SA Roberts and SA Kepner. Bateman recalled that Sullivan had asked him and Kepner to begin the review of the agent reports. Bateman told OPR that he and IRS SA Roberts divided the MOIs between them and reviewed all the documents. Bateman stated that he later emailed Sullivan for clarification regarding *Brady* because "Ed was on point" for the task. OPR Bateman Tr. May 21, 2010 at 37, 38, 43.

[296] Sept. 4, 2008 11:31am email from SA Bateman to PIN attorney Sullivan, SA Kepner and SA Roberts.

[297] Sept. 4, 2008 12:15pm email from PIN attorney Sullivan to PIN attorney Marsh, AUSA Goeke, AUSA Bottini, and Principal Deputy Morris.

[298] Sept. 4, 2008 12:41am email from PIN attorney Sullivan to SA Bateman, SA Kepner, SA Roberts, SA Joy, AUSA Bottini, AUSA Goeke, PIN attorney Marsh, and Principal Deputy Morris.

[299] Sept. 4, 2008 12:41am email from PIN attorney Sullivan to SA Bateman, SA Kepner, SA Roberts, SA Joy, AUSA Bottini, AUSA Goeke, PIN attorney Marsh, and Principal Deputy Morris.

[300] Sept. 5, 2008 4:44pm email from PIN attorney Sullivan to SA Bateman, AUSA Bottini, litigation support manager [redacted], AUSA Goeke, SA Joy, SA Kepner, PIN attorney Marsh, PIN Principal Deputy Chief Morris, SA Roberts, and paralegal Walker. Sullivan attached three MOI reports to the email: Dec. 14, 2006 MOI [redacted]; Sept. 1, 2006 MOI of Rocky Williams; Aug. 31, 2006 MOI [redacted].

[301] Sept. 4, 2008 6:19pm email from SA Bateman to PIN attorney Sullivan, Principal Deputy Morris, PIN attorney Marsh, AUSA Goeke, AUSA Bottini, SA Kepner, SA Joy, and SA Roberts.

believed that prosecutors "should look at": a September 1, 2006 MOI of Rocky Williams.[302] In the spreadsheet, Bateman included the notation:

> Williams stated 99% of the work was done by C[hristensen] B[uilders] (#12). Possible *Giglio* #10 Williams stated there was no formal plan for the remodel. He drafted sketch personally.[303]

This notation was the only *Brady/Giglio* information flagged for the attorneys in the spreadsheet. SA Bateman told OPR that he discussed the identified Rocky Williams MOI with PIN attorney Sullivan and other members of the trial team, noting that Williams's statements conflicted with prior statements he had given on the amount of work completed by Christensen Builders and the completion of plans for the renovations.[304] According to SAs Bateman and Roberts, none of the other IRS interviews contained *Brady* or *Giglio* information.[305]

After receiving the finalized *Brady/Giglio* spreadsheet, PIN attorney Sullivan sent it to all the agents and the PIN attorneys along with the three MOIs that the IRS agents assessed as containing *Brady*. PIN attorney Sullivan's email stated that after the FBI agents completed their review of the 302s, everyone should "review all of this as a team for production purposes."[306] OPR found no evidence that the prosecution team ever met to conduct such a review.[307]

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[302] Bateman OPR Tr. May 21, 2010 at 51-52.

[303] Sept. 4, 2008 6:19pm email from SA Bateman to PIN attorney Sullivan, Principal Deputy Morris, PIN attorney Marsh, AUSA Goeke, AUSA Bottini, SA Kepner, SA Joy, and SA Roberts.

[304] Bateman OPR Tr. May 21, 2010 at 54-56.

[305] The government later discovered that SA Roberts did not identify *Brady* material in an IRS MOI from a December 11, 2006 interview of Bill Allen. The IRS agents' spreadsheet contained a notation indicating they reviewed the MOI, but it did not identify *Brady* material contained therein. Bateman OPR Tr. May 21, 2010 at 74.

[306] Sept. 5, 2008 4:44pm email from PIN attorney Sullivan to SA Bateman, AUSA Bottini, litigation support manager [redacted], AUSA Goeke, SA Joy, SA Kepner, AUSA Marsh, Principal Deputy Morris, SA Roberts, and paralegal [redacted].

[307] Bottini told OPR that he did not review the spreadsheets for accuracy prior to execution of the September 9, 2008 *Brady* letter. Bottini OPR Tr. Mar. 10, 2010 at 161-163. Goeke acknowledged the same. Goeke (Schuelke) Tr. Jan. 8, 2010 at 444-446.

B. FBI Agents' Review of 302s and Agent Notes

In late August or early September 2008, FBI agents conducted a *Brady* review during which they compared FBI 302s and 1023s to the corresponding agent notes. Like the IRS agents, the FBI agents had little or no experience reviewing such material for *Brady* information.[308] SA Herrett stated that she went "on the internet" and "looked up *Brady* and looked up *Giglio*" to get a "general overview" of what type of information she should identify.[309] Similarly, SA Joy, who also participated in the review, told OPR that he "didn't think [he] had the experience or tools, the knowledge to be able to appropriately identify exactly what what we needed according to the rules."[310] Ultimately, the FBI agents produced a spreadsheet combining their review work with that of the IRS agents.

SA Kepner, the lead agent on the *Stevens* case, stated that she could not specifically remember who instructed her to begin the review, but she believed it was either PIN attorney Marsh or AUSA Bottini, and that Marsh made the decision that the FBI should conduct the review rather than the attorneys.[311] PIN Principal Deputy Chief Morris told OPR that she was aware of the review but believed that attorneys "were going to review the final product of whatever the FBI turned over."[312] Morris also stated that she was unaware that the FBI agent *Brady* review was not reviewed by attorneys, and did not discover that until "stuff blew up in court."[313] Marsh stated that he "knew there was a *Brady* review," but he thought "there were other people doing it."[314] In a September 4, 2008 email to SA Kepner, PIN attorney Sullivan told Kepner to focus the FBI agents on reviewing the FBI

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[308] Bottini acknowledged that the responsibility for *Brady* and *Giglio* should "always" fall on the prosecutor. Bottini OPR. Tr. Mar, 10, 2010 at 128-129.

[309] Herrett OPR Tr. June 23, 2009 at 107. Herrett told OPR that SSA Seale assigned her and SA Cusak to aid in the *Brady* review. Herrett OPR Tr. June 23, 2009 at 74.

[310] Joy OPR Tr. Sept. 15, 2009 at 102.

[311] Kepner (Schuelke) Tr. Aug. 24, 2009 at 24, 45-46.

[312] Morris OPR Tr. Mar. 19, 2010 at 194.

[313] Morris OPR Tr. Mar. 19, 2010 at 174. Morris acknowledged that it is the attorney's responsibility to review information in the government's possession to determine whether it constitutes *Brady* or *Giglio*. Morris OPR Tr. Mar. 19, 2010 at 174-175.

[314] Marsh (Schuelke) Tr. Feb. 2, 2010 at 87. Marsh did not identify who he believed conducted the review.

302s and notes.[315] In a September 6, 2008 email PIN attorney Sullivan sent to the trial team, Sullivan specifically asked Kepner when the *Brady* review would be complete, noting that "the quicker we get it to [the defense], the better for us."[316] Sullivan told OPR that he did not recall any discussions with agents where he provided instructions or directions on how to conduct the review.[317] Goeke also stated that he provided no guidance to the agents regarding the review, and he acknowledged that at least one non agent (an intelligence analyst) was involved in the review.[318] At the time she conducted the review, Kepner said she had received no training relative to *Brady,* and had never read either the *Brady* or *Giglio* decisions.[319] Kepner later stated that, looking back, she was not qualified to conduct the *Brady* review.[320] Kepner reviewed the material relating to Bill Allen and Rick Smith, SA Chad Joy reviewed the Dave Anderson material, and other agents reviewed the remaining material.[321] Kepner stated that she reviewed FBI 302s, 1023s, and accompanying agent notes for "material in the reports that would be helpful to the *Stevens* defense team," and she was told to look for inconsistencies between the final reports and the accompanying notes.[322] Kepner did not look for inconsistences between grand jury testimony and the reports, inconsistencies between information provided by different witnesses, or inconsistencies within the witness's own statements.[323] Kepner stated that she "came up with a spreadsheet approach" to document the results of the agent

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[315] Sept. 4, 2008 10:08pm email from PIN attorney Sullivan to SA Kepner.

[316] Sept. 6, 2008 12:37pm email from PIN attorney Sullivan to SA Bateman, AUSA Bottini, litigation support manager [redacted], AUSA Goeke, SA Joy, SA Kepner, PIN attorney Marsh, PIN Principal Deputy Chief Morris, SA Roberts, PIN attorney Sullivan, and paralegal [redacted]. Sullivan's email also states that the team needs to decide "if we are producing the 302s/notes/transcripts in either: (1) full form; (2) redacted form; or (3) summary letter form." This appears contrary to Marsh's understanding as of August 14, 2008, when he sent an email to Sullivan, Bottini and Goeke saying "we need to get cranking on our omnibus *Brady/Giglio* letter to defense counsel." Aug. 14, 2008 1:49pm email from PIN attorney Marsh to PIN attorney Sullivan, AUSA Bottini, and AUSA Goeke.

[317] Sullivan OPR Tr. Feb. 19. 2010 at 274-275.

[318] Goeke (Schuelke) Tr. Jan. 8. 2010 at 444-445.

[319] Kepner (Schuelke) Tr. Aug. 24, 2009 at 16, 46.

[320] Kepner (Schuelke) Tr. Aug. 24, 2009 at 62.

[321] Kepner (Schuelke) Tr. Aug. 24, 2009 at 34; Joy OPR Tr. Sept. 15, 2009 at 112.

[322] Kepner (Schuelke) Tr. Aug. 24, 2009 at 29.

[323] Kepner (Schuelke) Tr. Aug. 24, 2009 at 42, 56.

review.[324] Kepner created a spreadsheet documenting her review of Bill Allen interview reports and Rick Smith interviews.

Ultimately, SA Steve Forrest combined the FBI agents' and IRS agents' review work into a single spreadsheet and sent it to the trial team on September 9, 2008.[325] The final spreadsheet contained columns to indicate whether a particular interview was documented by notes, a 302, or a corresponding IRS MOI, and if there was *Brady/Giglio* material and/or material differences between the notes and the report. In addition, the chart contained a column with notations detailing potential *Brady/Giglio* information. Several entries in the chart were highlighted in yellow with a notation to the attorneys to "review notes/302."[326] Although Forrest's spreadsheet combined the FBI review and IRS review, it did not include any of the entries from the speadsheet Kepner created to document review of the Bill Allen and Rick Smith reports.

C. FBI Agents' Review of Grand Jury Transcripts

Although not requested to do so by the attorneys, on September 4, 2008, SA Kepner asked SSA Seale to assign agents in Alaska to perform the *Brady/Giglio* review of the Alaska grand jury transcripts.[327] Seale then assigned SA Herrett, SA Sparks, and SA Howland to review the transcripts.[328] Later that night, Kepner informed PIN attorney Sullivan that agents were reviewing the grand jury transcripts.[329] Sullivan told Kepner to have agents focus on reviewing the FBI 302s and notes because he was arranging for PIN attorneys to review the grand

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[324] Kepner (Schuelke) Tr. Aug. 24, 2009 at 48-49.

[325] Sept. 9, 2008 5:55pm email from SA Forrest to PIN attorney Sullivan, PIN attorney Marsh, AUSA Goeke, AUSA Bottini, SA Kepner, SA Joy, and paralegal [redacted]

[326] [redacted]

[327] Sept. 4, 2008 1:10pm email from SA Kepner to SSA Seale and SA Joy. PIN Principal Deputy Chief Morris told OPR that she was aware of the FBI review of grand jury testimony. Morris OPR Tr. Mar. 19, 2010 at 195.

[328] Sept. 4, 2008 3:11pm email from SSA Seale to SA Herrett, SA Sparks, and SA Howland. Herrett, Sparks, and Howland had been working on the Polar Pen investigation.

[329] Sept. 4, 2008 10:05pm email from SA Kepner to PIN attorney Sullivan.

jury transcripts.[330] However, Kepner sent an email claiming that agents would be upset because they had already started the process, and to stop at that point would mean that their time had been wasted.[331]

On September 6, 2008, SA Joy emailed the trial team a spreadsheet documenting the *Brady/Giglio* review of the Alaska grand jury transcripts, which contained detailed notes with transcript cites to potential *Brady/Giglio* material.[332] According to Kepner, the agents did not compare grand jury testimony of witnesses to the witnesses' 302s to determine if there were inconsistencies.[333]

D. PIN Attorneys' Review of Grand Jury Transcripts

As the agents reviewed FBI 302s and IRS MOIs in Alaska, PIN Principal Deputy Chief Morris arranged for PIN attorneys not involved in the *Stevens* case to assist in reviewing the transcripts from the grand jury proceedings in the District of Columbia for *Brady* information.[334] Morris stated that she enlisted PIN attorneys Daniel Petalas, Eileen Gleason, and Daniel Schwager to conduct the review, but she did not provide the attorneys with any documents to compare to the grand jury testimony in order to identify inconsistencies.[335] Gleason told OPR that after she was assigned the review task, she spoke to Marsh who told her "a little bit about the defenses and what sort of information would be considered exculpatory." However, [redacted], Gleason did not actually participate in the review task.[336] Petalas told OPR that he had no recollection of conducting the review.[337] Schwager told OPR that PIN Deputy Chief Peter Ainsworth gave him a four to five inch high stack of *Stevens* grand jury testimony to review, and Schwager reported to PIN Principal Deputy Chief Morris for

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[330] Sept. 4, 2008 10:08pm email from PIN attorney Sullivan to SA Kepner.

[331] Sept. 4, 2008 10:17pm email from SA Kepner to PIN attorney Sullivan.

[332] Sept. 6, 2008 10:10pm email from SA Joy to PIN attorney Sullivan, SA Kepner, PIN Principal Deputy Chief Morris, AUSA Goeke, AUSA Bottini, and PIN attorney Marsh.

[333] Kepner (Schuelke) Tr. Aug. 24, 2009 at 42.

[334] Morris OPR Tr. Mar. 19, 2010 at 218-220. PIN Chief Welch told OPR that he was aware of the review, but that Morris told him that Marsh and Sullivan did not believe there was *Brady* information in the transcripts but they wanted "a second set of eyes to look for any sort of straggling statements." Welch OPR Tr. Mar. 2, 2010 at 192.

[335] Morris OPR Tr. Mar. 19, 2010 at 218-220.

[336] Gleason OPR Tr. Mar. 24, 2010 at 3-6.

[337] Petalas OPR Tr. Apr. 8, 2010 at 12-13.

direction.[338] Schwager recalled that Morris told him the "the types of things . . . the defense might consider" to be exculpatory, but he could not remember any specific direction.[339] Schwager sent an email to Morris, Marsh, and Sullivan on September 7, 2008 asking for direction on how to review the grand jury testimony for [redacted], stating "because he's not a construction worker I don't have any instructions on what to look out for."[340] Marsh replied:

> [redacted] who (a) heard TS mention on at least one occasion that Bill Allen/VECO were involved in the home renovations and (b) was involved in some of the official act requests that VECO sent to TS' office. [redacted] also has some *Giglio* issues in that [redacted] If you need any more info, just holler.[341]

Schwager believed that he was given a copy of the indictment as a reference document.[342] Schwager told OPR that he did not locate any potential *Brady* material in his review, although he flagged "a couple of things I wanted to ask a question about."[343] However, when Schwager returned the material to Morris, she told him that the *Brady* review of the material had already been completed and his work was not needed.[344]

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[338] Schwager OPR Tr. at Apr. 12, 2010 at 5.

[339] Schwager OPR Tr. at Apr. 12, 2010 at 5.

[340] Sept. 7, 2008 12:45am email from PIN attorney Schwager to PIN Principal Deputy Chief Morris, PIN attorney Sullivan, and PIN attorney Marsh.

[341] Sept. 7, 2008 10:25am email from PIN attorney Marsh to PIN attorney Schwager, PIN Principal Deputy Chief Morris, and PIN attorney Sullivan.

[342] Schwager OPR Tr. at Apr. 12, 2010 at 5-6.

[343] Schwager OPR Tr. at Apr. 12, 2010 at 8, 15.

[344] Schwager OPR Tr. at Apr. 12, 2010 at 8-10. Bottini stated that he reviewed the grand jury transcript for [redacted] for *Brady* because he presented [redacted] to the Alaska grand jury. Bottini (Schuelke) Dec. 17, 2009 at 786-787.

E. The Trial Team's *Brady* Review

Bottini stated that *Stevens* was the only case he ever worked "where the attorneys weren't doing the entirety of the *Brady* review."[345] Bottini stated that when preparing draft outlines for trial preparation sessions for witnesses assigned to him, he would review his notes, grand jury testimony of the witness, 302s of the witness, and other source material in order to create an outline. Bottini was responsible for presenting Allen, Williams, and Anderson at trial.[346] Bottini stated that when preparing such outlines, he would look at the material with an "eye" for potentially exculpatory information.[347] However, Bottini did not conduct a separate review of the material specifically concentrating on potential *Brady* material.[348] Nor did he review his notes from trial preparation sessions.[349] Bottini also did not review the 302s flagged by the FBI during its review.[350] Bottini told OPR that he felt that his review of FBI 302s and other source material satisfied his obligations under *Brady.*[351] However, Bottini stated that he was aware of his *Brady* obligations as he reviewed the material to prepare Allen for trial, but he did not recall that anything "leaped out" at him. He told OPR that he did not identify any *Brady* material in his review.[352]

Sullivan stated he did not review his notes prior to trial or when gathering *Brady* material, and that he was not asked to review his own notes from witness interviews.[353] Goeke stated that he never reviewed his notes for *Brady* material because he "wasn't asked to," and he "didn't believe that [he] had participated in any substantive pretrial preparation interview of a witness that didn't have a 302

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[345] Bottini (Schuelke) Tr. Dec. 16, 2009 at 74-75.

[346] Bottini (Schuelke) Tr. Dec. 16, 2009 at 63.

[347] Bottini (Schuelke) Tr. Dec. 16, 2009 at 66.

[348] Bottini (Schuelke) Tr. Dec. 16, 2009 at 67.

[349] Bottini (Schuelke) Tr. Dec. 16, 2009 at 26.

[350] Bottini OPR Tr. Mar. 10, 2010 at 149.

[351] Bottini OPR Tr. Mar. 10, 2010 at 162-163.

[352] Bottini OPR Tr. Mar. 10, 2010 at 162-163.

[353] Sullivan (Schuelke) Tr. Jan. 6, 2010 at 157.

or an MOI that would go along with it."[354] Goeke stated that he reviewed grand jury material and 302s for some witnesses (without specifying which witnesses), but that he did not review such material relative to Rocky Williams because he was not asked to do so.[355] In addition, Goeke did not review his own notes from trial preparation sessions.[356]

On September 3, 2008, Sullivan emailed the prosecution team stating that:

> In light of defendant's motion to compel, we'll need to make double time of the redactions for Augie [Paone] and Persons' GJ testimony. Are there any other grand jury transcripts that might have *Brady/Giglio* material in them?[357]

Although OPR recovered no direct responses to Sullivan's email, Goeke's emails indicate that he reviewed grand jury transcripts for witnesses Bob Persons and Augie Paone and sent his findings to the prosecution team for inclusion in the September 9, 2008 *Brady* letter.[358] Marsh stated that he "reviewed 302s and grand jury transcripts" for his witnesses as part of the *Brady* review.[359] Marsh also stated that he had a "general memory of reviewing some of [his] notes," but he did not go through all his notes.[360] Marsh stated that he believed that he identified potential *Brady* material relative only to witness [redacted] during his

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[354] Goeke (Schuelke) Tr. Jan. 8, 2010 at 19-20. Goeke stated that, in his other cases, he would usually review his own notes for *Brady* purposes, but he did not do so in *Stevens* because "I didn't think to review my handwritten notes. I didn't believe there . . . would be any variances between my handwritten notes and agent 302s." *Id.* at 449.

[355] Goeke (Schuelke) Tr. Jan. 8, 2010 at 63-64.

[356] Goeke (Schuelke) Tr. Jan. 8, 2010 at 23, 33, 28.

[357] Sept. 3, 2008 8:35pm email from PIN attorney Sullivan to PIN attorney Marsh, AUSA Goeke, AUSA Bottini, and PIN Principal Deputy Chief Morris.

[358] Sept. 8, 2008 11:01am email from AUSA Goeke to PIN attorney Sullivan, PIN attorney Marsh, SA Kepner, SA Joy, AUSA Bottini, and PIN Principal Deputy Chief Morris; Sept. 9, 2008 email from AUSA Goeke to PIN attorney Sullivan, PIN attorney Marsh, AUSA Bottini, PIN Principal Deputy Chief Morris, and PIN Chief Welch. Sept. 9, 2008 3:34am email from AUSA Goeke to PIN attorney Marsh, AUSA Bottini, PIN attorney Sullivan, PIN Principal Deputy Chief Morris, and PIN Chief Welch.

[359] Marsh (Schuelke) Tr. Feb. 2, 2010 at 103.

[360] Marsh (Schuelke) Tr. Feb. 2, 2010 at 115.

review of that witness's grand jury transcript.[361] Marsh said he did not know who was responsible for reviewing documents relating to any person interviewed by the government who the government did not plan to present as a witness.[362] Brenda Morris stated that she did not ask any of the prosecutors to review their notes for *Brady* material and such an action would never have crossed her mind (she did not review her own notes).[363]

X. THE SEPTEMBER 9, 2008 *BRADY* LETTER

The government sent its *Brady* letter to the defense on September 9, 2008. PIN attorney Sullivan drafted the majority of the letter by assembling information from the FBI and IRS *Brady* spreadsheets, and from information provided to him by members of the trial team. No attorneys compared the spreadsheets to the underlying 302s, 1023s, MOIs, or agent notes. Sullivan drafted the early versions of the letter and Marsh completed the document. Sullivan's first draft contained language identifying the sources of the information contained therein (grand jury transcripts, FBI 302s, etc.); however, the letter was later revised to remove all such references, leaving just the factual information without context or references to the document(s) containing the information. Marsh later added to the *Brady* letter information he received from SA Kepner as a result of a telephone interview she conducted with Bill Allen on the same day Marsh completed the letter (Kepner recorded the contact in an FBI 302 seven days later). During the drafting process for the letter, the trial team again debated whether or not to include information concerning whether Bambi Tyree made a false statement at Bill Allen's direction.

The final September 9, 2008 *Brady* letter contained three sections which, when examined in context with the information available to the government at the time, are problematic: (1) Paragraph 15 addressing Rocky Williams's statements about Christensen Builders' involvement in the renovations (the IRS SAs identified these statements in the *Brady* spreadsheet);[364] (2) Paragraph 17(c) addressing Allen's statements about whether Stevens would have paid a bill if Allen sent one; and (3) page 5 of the letter stating that the government had thoroughly investigated the "suggestion" that Allen had asked a woman (Bambi Tyree) to

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[361] Marsh OPR Tr. Mar. 25, 2010 at 232-233.

[362] Marsh OPR Tr. Mar. 25, 2010 at 70, 233-236.

[363] Morris (Schuelke) Tr. Jan. 15, 2010 at 54, 62.

[364] See Chapter Six of this report for a detailed discussion of the Rocky Williams issue.

make a false statement, and the government found no evidence to support the "suggestion."[365] These issues are discussed in more detail below.

A. The Creation of the September 9, 2008 *Brady* Letter

On September 4, 2008, PIN attorney Sullivan circulated a draft letter to defense counsel stating that the government was in the process of reviewing agent notes, memoranda, and grand jury testimony for *Brady* information, and that the letter would include an attachment of an "FBI Form 302 memoranda relating to certain interviews of Bill Allen and David Anderson."[366] The final letter, sent the following day, did not contain the reference to the supplemental production of Allen and Anderson interviews.[367] On September 5, 2008, the defense sent the government a request for additional information regarding the Allen APD investigation mentioned in the government's August 25, 2008 *Giglio* letter. On September 6, 2008, Sullivan sent the trial team an email asking when the FBI agents would complete the *Brady* review and asking the group as a whole:

> [C]ollectively, the team needs to decide if we are producing the 302s/notes/transcripts in either: (1) full form; (2) redacted form; or (3) summary letter form.[368]

Sullivan did not receive any email responses to his questions regarding the form of disclosure. The following day, the team began discussing, over email, the wording for disclosures relating to Bill Allen's APD investigations. Sullivan later stated that "around September 7th or 8th" either "Brenda Morris or Nick Marsh" asked him to assemble the *Brady* information received from the agents into a letter format.[369] Sullivan then created the first draft of the *Brady* letter, viewing himself as a "scrivener" incorporating information and edits provided by others.[370]

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[365] See Chapter Five of this report for a detailed discussion of the Bambi Tyree issue.

[366] Sept. 4, 2008 1:04pm email from PIN attorney Sullivan to AUSA Bottini, AUSA Goeke, PIN attorney Marsh, and PIN Principal Deputy Chief Morris.

[367] Sept. 5, 2008 letter from PIN Chief Welch (signed by PIN attorney Sullivan) to defense counsel.

[368] Sept. 6, 2008 12:37pm email from PIN attorney Sullivan to SA Bateman, AUSA Bottini, litigation support manager [redacted], AUSA Goeke, SA Joy, SA Kepner, PIN attorney Marsh, PIN Principal Deputy Chief Morris, SA Roberts, and paralegal [redacted]. Only SA Kepner responded to the email stating that the grand jury review was complete and the 302 review would be completed the following Monday.

[369] Sullivan (Schuelke) Tr. Jan. 6, 2010 at 170.

[370] Sullivan (Schuelke) Tr. Jan. 6, 2010 at 194.

We examine the various drafts of the letter below, focusing on the evolution of Paragraph 15 (Williams's statements) and Paragraph 17(c) (Bill Allen's statements), and page 6 of the letter addressing the APD investigations of Allen.

B. The September 7, 2008 Draft by PIN Attorney Sullivan

PIN attorney Sullivan created the first draft of the *Brady* letter on September 7, 2008. At that time, the prosecution team was in possession of information that Bill Allen had sex with an underage prostitute named Bambi Tyree and that, at Allen's direction, Tyree had gone to Allen's attorney and made a false statement denying the sexual affair. The prosecutors had such information in government pleadings filed in an unrelated case (the *Boehm* case handled by AUSAs Frank Russo and James Goeke) and an FBI 302 (the SeaTac 302) with the accompanying agent notes. The prosecution had not provided such information to the defense in either the *Kott* or *Kohring* cases in which Allen was a witness for the government. Disclosure of the false statement was a contested issue among the trial team, which Marsh attempted to resolve in 2007 by speaking with the Department's Professional Responsibility Advisory Office (PRAO) and obtaining two separate opinions favoring no disclosure of the information.[371] Because AUSA Goeke had been involved in the *Boehm* case (where the allegations arose), he suggested repeatedly that despite the PRAO opinions, the prosecution team should disclose the false statement issue in some form.

Sullivan sent an email to the trial team containing a draft paragraph about the APD investigation of Bill Allen. In the email, Sullivan asked AUSA Bottini, AUSA Goeke, and SA Kepner to review the paragraph, in view of their September 7, 2008 interview with Allen, to determine what should be in the *Brady* letter.[372] Kepner, Bottini, and Goeke had recently interviewed Allen, who stated that Tyree asked to speak with his lawyer, [redacted], to help Allen resolve a blackmail issue concerning their alleged sexual relationship. Allen asserted that he did not ask Tyree to make a false statement.

Sullivan's initial paragraph addressed allegations by former prostitute [redacted] who claimed that she had had an affair with Allen; that Allen provided her gifts (a car, a condominium, and money); that she introduced Allen to Bambi Tyree (then age 15), with whom Allen had a sexual relationship when she was underage; that in exchange for $5,000, Allen and his attorney wanted [redacted] to sign a

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[371] However, in his discussions with PRAO, Marsh failed to disclose important facts about whether Tyree created a false statement at Allen's behest. See Chapter Five of this report for a detailed discussion of this issue.

[372] Sept. 7, 2008 4:03pm email from PIN attorney Sullivan to AUSA Goeke, AUSA Bottini, PIN attorney Marsh, PIN Principal Deputy Chief Morris, and SA Kepner.

statement saying that she did not have sex with Allen; that Allen gave money and gifts to Tyree's family; and that Allen flew [redacted] and her family out of town to evade the APD investigation.[373]

Goeke responded to Sullivan's email by adding an additional paragraph concerning the government's September 7, 2008 interview with Allen.[374] Goeke's paragraph included Allen's response to [redacted] allegations, noting that [redacted] was a prostitute who tried to extort Allen regarding his relationship with Tyree, and added the following language:

> Allen refused to pay any money and considered [redacted] threats to be blackmail and/or extortion. Allen hired a lawyer to address his belief that he was blackmailed. Allen stated that at some point, he told [Bambi Tyree] about the blackmail/extortion attempts and that she then asked to speak to Allen's lawyer. Allen stated that he did not ask [Tyree] to speak to his lawyer and he is not aware of what [Tyree] told his lawyer. Allen advised that his friendship with [Tyree] and her family is longstanding. Allen denied ever offering to pay anyone money to make a false statement.[375]

Twenty minutes after Goeke sent his additions for the draft *Brady* letter, Marsh responded with an email "streamlining" the Allen disclosure.[376] Marsh did not include Goeke's addition regarding the Tyree statement and edited Sullivan's paragraph as follows:

> Allen refused to pay any money and considered [redacted]] threats to be blackmail and/or extortion. Allen hired a lawyer to address his belief that he was being

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[373] Sept. 7, 2008 4:03pm email from PIN attorney Sullivan to AUSA Goeke, AUSA Bottini, PIN attorney Marsh, PIN Principal Deputy Chief Morris, and SA Kepner.

[374] Sept. 7, 2008 4:50pm email from AUSA Goeke to PIN attorney Sullivan, AUSA Bottini, PIN attorney Marsh, PIN Principal Deputy Chief Morris, SA Kepner, and PIN Chief Welch.

[375] Sept. 7, 2008 4:50pm email from AUSA Goeke to PIN attorney Sullivan, AUSA Bottini, PIN attorney Marsh, PIN Principal Deputy Chief Morris, SA Kepner, and PIN Chief Welch.

[376] Sept. 7, 2008 5:10pm email from PIN attorney Marsh to AUSA Goeke, AUSA Bottini, PIN attorney Sullivan, PIN Principal Deputy Chief Morris, SA Kepner, SA Joy, and PIN Chief Welch.

> blackmailed. Allen denied ever offering to pay anyone money to make a false statement.[377]

Sullivan's September 7, 2008 *Brady* letter draft incorporated Marsh's version of the Allen disclosure information.[378] In addition, the draft contained a variety of other information under headings indicating the source material for each disclosure (grand jury transcripts, agents' rough notes, agents' formal memoranda). In his email transmitting the letter to the prosecution team, Sullivan noted that "[s]everal of the items are not *Brady* or *Giglio* in my mind and, thus we should go through them one by one to determine which ones get dropped."[379]

In the section regarding potential *Brady/Giglio* material taken from agents' rough notes or formal memoranda, Sullivan included the following paragraph concerning Rocky Williams:

> On September 1, 2006, government agents interviewed Robert Williams. Williams stated that there were no formal plans for the addition at defendant's residence and that Williams sketched the plans for the addition based upon conversations with the defendant. Williams also stated that, although he was the general contractor on the project, he did not deal with the expenses. Williams further stated the majority of the work on the property was completed by Christensen Builders, estimating that 99 percent of the work was done by Christensen Builders and the remaining portion performed by subcontractors.[380]

The information in this paragraph came from the 302 of the September 1, 2006 Williams interview flagged by IRS agents during their *Brady* review. The

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[377] Sept. 7, 2008 5:10pm email from PIN attorney Marsh to AUSA Goeke, AUSA Bottini, PIN attorney Sullivan, PIN Principal Deputy Chief Morris, SA Kepner, SA Joy, and PIN Chief Welch.

[378] Sept. 7, 2008 6:15pm email from PIN attorney Sullivan to AUSA Goeke, AUSA Bottini, PIN attorney Marsh, SA Kepner, SA Joy, and PIN Principal Deputy Chief Morris.

[379] Sept. 7, 2008 6:15pm email from PIN attorney Sullivan to AUSA Goeke, AUSA Bottini, PIN attorney Marsh, SA Kepner, SA Joy, and PIN Principal Deputy Chief Morris. Morris responded to Goeke's email stating: "I'll speak with you in the morning." Sept. 7, 2008 9:40pm email from PIN Principal Deputy Chief Morris to PIN attorney Sullivan.

[380] Sept. 7, 2008 6:15pm email from PIN attorney Sullivan to AUSA Goeke, AUSA Bottini, PIN attorney Marsh, SA Kepner, SA Joy, and PIN Principal Deputy Chief Morris.

information about Williams's claim regarding his creation of the plans for the Girdwood renovations was inconsistent with information the prosecutors had that the plans were drafted by VECO engineer John Hess. The information about Williams's statement that he did not deal with expenses was inconsistent with Williams's [redacted].[381] The information about Williams's statement that Christensen Builders completed 99 percent of the work at Girdwood was consistent with the defense theory that Stevens paid for all the renovations (by paying all the Christensen Builders bills), but it undercut the prosecution's case that VECO had performed more than $188,000 worth of work on Girdwood.

Finally, Sullivan's draft included a placeholder to "[a]dd in [SA Kepner's] review of other 302/interview notes."[382]

C. The September 8, 2008 Draft by PIN Attorney Sullivan

AUSA Goeke responded to Marsh's email regarding the Bill Allen paragraph of the draft *Brady* letter after Sullivan had circulated his first draft including Marsh's edits. Goeke sent two identical emails (one responding to Marsh's edits and one responding to Sullivan's first draft) requesting addition of the language below:

> Allen stated that at some point, he told [Bambi Tyree] about the blackmail/extortion attempts and that she then asked to speak to Allen's lawyer. Allen stated that he did not ask [Tyree] to speak to his lawyer and is not aware of what [Tyree] told his lawyer.[383]

Goeke then sent the team an email detailing his review of the *Boehm* file. Goeke was co counsel in the *Boehm* case, and Tyree was a witness. During a debriefing session in 2004, Tyree told the government that she made a false statement at Allen's request. This information was recorded in the SeaTac 302, in agent's rough notes, and in three pleadings filed in the *Boehm* case. In his email, Goeke wrote that he reviewed the *Boehm* pleadings, noting that Tyree's

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[381] Bottini acknowledged that the defense did not have [redacted], which was necessary to identify the inconsistency, at the time they received the *Brady* letter. Bottini (Schuelke) Tr. Dec. 16, 2009 at 99-100.

[382] Kepner later created a spreadsheet documenting her review of Bill Allen 302s and Rick Smith 302s.

[383] Sept. 7, 2008 6:17pm email from AUSA Goeke to PIN attorney Marsh, AUSA Bottini, PIN attorney Sullivan, PIN Principal Deputy Chief Morris, SA Kepner, SA Joy, and PIN Chief Welch; Sept. 7, 2008 6:26pm email from AUSA Goeke to PIN attorney Sullivan, AUSA Bottini, PIN attorney Marsh, SA Kepner, SA Joy, and PIN Principal Deputy Chief Morris.

statements in the FBI 302 concerning the false statement were not consistent with his memory, and that during a different preparation session, Tyree told him that she made the false statement on her own initiative. Goeke also stated that his co counsel AUSA Frank Russo's notes from the 2004 interview with Tyree (for which Goeke was not present) showed that the idea to make the statement was Tyree's own idea, and that when the prosecution team interviewed Tyree about the 2004 statement, she denied that the false statement was Allen's idea. Goeke also noted that the prosecution team provided information regarding the statement to PRAO in 2007 prior to the *Kohring* case and were told that no disclosure was required. Goeke then requested that the government include additional language in its *Brady* letter noting that because he was involved in the *Boehm* case, and also charged Allen's other accuser in a separate case, he was "keen to make sure our disclosure is as accurate as possible."[384] Goeke requested that the new letter include the following:

> Allen stated that at some point, he told [Bambi Tyree] about the blackmail/extortion attempts and that she then asked to speak to Allen's lawyer. Allen stated that he did not ask [Tyree] to speak to his lawyer, did not ask [Tyree] to lie, and is not aware of what [Tyree] told his lawyer. The government has also interviewed [Tyree] and she stated that she met with the attorney and the content of the document was created solely by her with the help of the attorney.[385]

AUSA Bottini responded to Goeke's email, stating that the prosecution should approach its disclosure obligations with the understanding that the *Stevens* defense team likely had access to the *Boehm* filings (which were made under seal) because *Boehm* was represented in a civil case by [redacted] who was Senator Stevens's [redacted].[386] Following Bottini's email, AUSA Goeke then forwarded the prosecution team an email he had first sent to Sullivan and Bottini in March of 2007 (Marsh received the same email in October 2007) providing excerpts from

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[384] Sept. 8, 2008 12:16am email from AUSA Goeke to PIN attorney Marsh, AUSA Bottini, PIN attorney Sullivan, PIN Principal Deputy Chief Morris, SA Kepner, SA Joy, and PIN Chief Welch.

[385] Sept. 8, 2008 12:16am email from AUSA Goeke to PIN attorney Marsh, AUSA Bottini, PIN attorney Sullivan, PIN Principal Deputy Chief Morris, SA Kepner, SA Joy, and PIN Chief Welch.

[386] Sept. 8, 2008 9:53am email from AUSA Bottini to AUSA Goeke, PIN attorney Marsh, PIN attorney Sullivan, PIN Principal Deputy Chief Morris, SA Kepner, SA Joy, and PIN Chief Welch.

the pleadings in the *Boehm* case concerning Tyree's false statement.[387] Goeke then provided Morris, Welch, Bottini, Marsh, and Sullivan copies of AUSA Russo's and SA Eckstein's notes from the SeaTac interview.

Shortly after Goeke forwarded his 2007 email regarding the *Boehm* pleadings, PIN attorney Sullivan emailed to the trial team a second draft of the *Brady* letter.[388] This draft added information (provided by AUSA Goeke) regarding Bob Persons's grand jury testimony.[389] Sullivan's second draft did not alter the sections concerning Bill Allen and Rocky Williams. In his email to the trial team, Sullivan requested that IRS SAs Bateman and Roberts obtain "the Rocky notes as soon as possible."[390]

D. The September 8, 2008 Draft by PIN Attorney Marsh "(v.2)"

On the afternoon of September 8, 2008, Welch, Morris, Marsh, and Sullivan met to discuss the Bambi Tyree disclosure issue.[391] The meeting ended with the team's decision to address the issue in the *Brady* letter. Welch told OPR that at this meeting, he first learned that the team planned to disclose *Brady* information in a summary letter, and that he did not see the completed letter until the day after it was sent.[392] Morris's notes from the meeting indicate that only she, Marsh,

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[387] Sept. 8, 2008 12:30pm email from AUSA Goeke to PIN attorney Marsh, PIN Principal Deputy Chief Morris, PIN Chief Welch, and AUSA Bottini.

[388] Sept. 8, 2008 12:37pm email from PIN attorney Sullivan to PIN Chief Welch, SA Kepner, SA Joy, PIN Principal Deputy Chief Morris, AUSA Goeke, AUSA Bottini, PIN attorney Marsh, SA Roberts, and SA Bateman.

[389] Sept. 8, 2008 12:37pm email from PIN attorney Sullivan to PIN Chief Welch, SA Kepner, SA Joy, PIN Principal Deputy Chief Morris, AUSA Goeke, AUSA Bottini, PIN attorney Marsh, SA Roberts, and SA Bateman.

[390] Sept. 8, 2008 12:37pm email from PIN attorney Sullivan to PIN Chief Welch, SA Kepner, SA Joy, PIN Principal Deputy Chief Morris, AUSA Goeke, AUSA Bottini, PIN attorney Marsh, SA Roberts, and SA Bateman.

[391] Morris circulated an email at 12:38pm with the subject line "RE: Tyree" stating that she planned to convene a team meeting with Welch at 4pm EST "to get [Welch] in on the conversation" and that AUSA Bottini would not be able to attend because he was traveling. Sept. 8, 2008 12:38pm email from PIN Principal Deputy Chief Morris to AUSA Goeke, AUSA Bottini, PIN attorney Marsh, PIN attorney Sullivan, and PIN Chief Welch. Although AUSA Goeke responded to the email stating he was available for the meeting and he thought that Bottini could also call in, Morris's notes from the meeting show that neither Bottini nor Goeke were present.

[392] Welch OPR Tr. Mar. 2, 2010 at 147; Welch (Schuelke) Tr. Jan. 10, 2010 at 192-195. Welch told OPR that, prior to this meeting, he believed the prosecution was providing the defense redacted 302s. Welch OPR Tr. Mar. 2, 2010 at 180.

Sullivan, and Welch were present at the meeting and that Welch told the team to "make sure we had it correct" and then provide the information to defense counsel.[393]

Eight hours after Sullivan's second draft of the *Brady* letter, Marsh emailed the prosecution team a new version of the document, stating, "[s]ubsection 3 revised to include the Bambi Tyree stuff we discussed earlier today[.]"[394] Marsh's draft retained the Rocky Williams paragraph from Sullivan's first and second drafts. However, Marsh added the following paragraph in the Bill Allen section:

> Given the foregoing allegation from the adult female, we are also providing you with some additional information that, as described below, is neither *Brady* nor *Giglio*. In 2007, the government became aware of a suggestion that, a number of years ago, Allen asked [Bambi Tyree] to make a sworn, false statement concerning their relationship. After hearing that suggestion, the government conducted a thorough investigation and was unable to find any evidence to support it. The investigation included: (a) an inquiry to [Tyree], who denied the suggestion; (b) an inquiry to Allen, who denied the suggestion; (c) a review of notes taken by a federal law enforcement agent during a 2004 interview of [Tyree]; and (d) a review of notes taken by [AUSA Frank Russo] during a 2004 interview of [Tyree]. Because the government is aware of no evidence whatsoever to support any suggestion that Allen caused [Tyree] to make a false statement under oath, neither *Brady* nor *Giglio* apply.[395]

Marsh later stated that his use of the word "suggestion" in the letter was "inartful."[396] The added paragraph was problematic because the statement that the government had "no evidence whatsoever to support the suggestion" that Allen caused Tyree to lie was inconsistent with the fact that the government had: the

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[393] Morris OPR Tr. Mar. 19, 2010 at 266-267.

[394] Sept. 8, 2008 8:53pm email from PIN attorney Marsh to AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, PIN Principal Deputy Chief Morris, and PIN Chief Welch.

[395] Sept. 8, 2008 8:53pm email from PIN attorney Marsh to AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, PIN Principal Deputy Chief Morris, and PIN Chief Welch. Marsh stated that he drafted this portion of the letter. Marsh (Schuelke) Tr. Feb. 2, 2010 at 157.

[396] Marsh (Schuelke) Tr. Feb. 2, 2010 at 245.

SeaTac 302, three pleadings in the *Boehm* case, and an FBI agent's notes, all of which stated that Tyree had lied at Allen's behest.

E. The September 9, 2008 Draft by PIN Attorney Sullivan "(v.2(3))"

On the morning of September 9, 2008, Sullivan emailed the team a new version of the *Brady* letter. The new version included grand jury information regarding witness Augie Paone (provided by AUSA Goeke) and retained the Rocky Williams paragraph from the first draft of the letter. Sullivan also retained Marsh's new paragraph regarding the Tyree false statement, adding a note that the team should consider including a reference to Bambi Tyree's attorney's statement that Tyree made the false statement on her own.[397]

F. The September 9, 2008 Draft by PIN Attorney Sullivan "(v.4)"[398]

Two hours after Sullivan sent the team a revised version of the *Brady* letter, Sullivan emailed Marsh an updated version of the letter.[399] The new version removed the detailed references to sections of the grand jury testimony of Persons and Paone (prepared by Goeke), indicating instead that the government would provide both witnesses' entire grand jury transcripts to the defense. In addition, the new version removed the headings present in prior versions indicating the source of each statement (grand jury transcript, agents' rough notes, and agents' memoranda of interviews). Moreover, the word "testified" was replaced with the word "stated" for all statements originating from grand jury proceedings, and references to "government agents interview[ing]" witness were removed.[400] Sullivan told OPR that he recalled meeting with the trial team in the conference room to discuss edits to the letter. Sullivan told OPR that the removal of the headings and words identifying the source material likely occurred during the meeting but he could not recall who directed him to remove the notations.[401] Sullivan stated that he later typed up the group's edits and circulated the draft to

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[397] Sept. 9, 2008 10:16am email from PIN attorney Sullivan to AUSA Bottini, AUSA Goeke, PIN attorney Marsh, PIN Principal Deputy Chief Morris, PIN Chief Welch, SA Kepner, SA Joy, SA Roberts, and SA Bateman.

[398] Sullivan told OPR that after he wrote this draft of the *Brady* letter, he stopped working on the letter and "shut my door and just buried myself" in an appellate case he was preparing for argument. Sullivan OPR Tr. Mar. 12, 2010 at 344.

[399] Sept. 9, 2008 12:09pm email from PIN attorney Sullivan to PIN attorney Marsh.

[400] Sept. 9, 2008 12:09pm email from PIN attorney Sullivan to PIN attorney Marsh.

[401] Sullivan OPR Tr. Feb. 18, 2010 at 306-308.

the group.[402] For example, the paragraph regarding Rocky Williams, noted above as beginning with the statement, "On September 1, 2006, government agents interviewed Robert Williams," was edited to read as follows:

> On September 1, 2006 Robert Williams stated that there were no formal plans for the addition at defendant's residence and that Williams sketched the plans for the addition based upon conversations with the defendant. Williams also stated that, although he was the general contractor on the project, he did not deal with the expenses. Williams further stated the majority of the work on the property was completed by Christensen Builders, estimating that 99 percent of the work was done by Christensen Builders and the remaining portion performed by subcontractors.[403]

Finally, the new version of the letter removed Sullivan's question about whether to add information regarding Tyree's attorney to the Bill Allen paragraph.

G. The September 9, 2008 Draft by PIN Attorney Marsh "(v.5)"

Later in the day on September 9, 2008, SA Forrest emailed the trial team "the final spreadsheet containing the *Brady/Giglio* review of 302's."[404] Approximately one hour later, Marsh emailed the team a new version of the *Brady* letter, stating in his email:

> This includes all of the 302 [*Brady/Giglio*] to date, the revised Bambi disclosure. And all [Bill Allen] 302 based *Brady* except for a very limited category of arguable [*Brady/Giglio*] relating exclusively to the 404(b) evidence. Should the court rule in our favor tomorrow on the 404(b), we'd then turn it over to [the defense].[405]

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[402] Sullivan OPR Tr. Feb. 18, 2010 at 306-308.

[403] Sept. 9, 2008 12:09pm email from PIN attorney Sullivan to PIN attorney Marsh.

[404] Sept. 9, 2008 5:55pm email from SA Forrest to SA Joy, PIN attorney Sullivan, SA Kepner, AUSA Bottini, PIN attorney Marsh, AUSA Goeke, and paralegal [redacted].

[405] Sept. 9, 2008 6:50pm email from PIN attorney Marsh to AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, PIN Principal Deputy Chief Morris, and PIN Chief Welch.

Marsh's new draft contained two main revisions, one regarding Rocky Williams and the other regarding Bill Allen.[406] Marsh revised Paragraph 15 of the letter to read (emphasis added to illustrate the revisions):

> On September 1, 2006 Robert Williams stated that there were no formal plans for the addition at defendant's residence and that Williams sketched the plans for the addition based upon conversations with the defendant. Williams also stated that, although he was the general contractor on the project, he did not deal with the expenses <u>and did not recall reviewing Christensen Builders invoices. In a memorandum of interview from the same meeting, a federal law enforcement agent noted that Williams estimated that 99 percent of the work was done by Christensen Builders. In a subsequent interview, Williams stated that he did not recall ever saying that Christensen Builders performed 99 percent of the work, and that such a figure was inconsistent with what he knows to have occurred.</u>[407]

The new version of the Williams paragraph included information that Williams did not deal with Girdwood renovation expenses or review Christensen Builders' invoices. Such information was contrary to Williams's statements in interviews, before the grand jury, and in several trial preparation sessions. However, at the time the defense received the *Brady* letter, the defense did not have [redacted], the interview reports, or the notes that would provide context as to why such information was disclosable under *Brady*.

The "subsequent interview" referred to in the Williams paragraph resulted from the prosecutors' view that Williams was "wrong" if he stated, as reflected in the entry on the *Brady* spreadsheet, that Christensen Builders did 99 percent of the work at Girdwood. Marsh later stated that when he first saw the 99 percent

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[406] Marsh's revisions also contained minor additions such as a mention of Dave Anderson's receipt of a $30,000 "severance package" from VECO and allegations that Bill Allen provided a woman with a trip out of Alaska to avoid testifying. Marsh also included Bill Allen's denial that he ever caused anyone to leave Alaska to avoid "any type of proceeding."

[407] Sept. 9, 2008 6:50pm email from PIN attorney Marsh to AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, PIN Principal Deputy Chief Morris, and PIN Chief Welch. Marsh stated that "it is very possible" he added the revisions noting that [i]t would be consistent with some of the last minute edits that went in." Marsh (Schuelke) Tr. Feb. 2, 2010 at 314-5. Goeke later acknowledged that although Williams told him and Bottini on three separate occasions that he (Williams) reviewed the Christensen Builders invoices, the *Brady* letter that went to the defense stated the complete opposite. Goeke (Schuelke) Tr. Jan. 8, 2010 at 166.

comment, "it seemed crazy," and that he added the second statement regarding the 99 percent comment after "somebody contacted Rocky and asked him if that statement seemed correct."[408] Marsh also stated that the team contacted Williams because the 99 percent quote "wasn't consistent with the facts and also was inconsistent . . . with other things that were in the 302."[409]

The Williams paragraph was also problematic because it did not include potential *Brady* information from memoranda of interviews, and from prosecutors' and agents' notes from trial preparation sessions with Williams on August 20, 22, and 31, 2008, in which Williams stated that he reviewed the Christensen Builders bills and gave them to Bill Allen with the expectation that Allen would add his and Anderson's time to the bills before forwarding them to Senator Stevens. The *Brady* letter also did not contain Williams's prior statements that Stevens wanted to pay for everything, and that Stevens wanted a contractor he could pay.

Marsh also added a Paragraph 17 to the letter addressing Bill Allen's statements concerning the renovations to the Girdwood residence. In prior versions of the letter, this paragraph contained a placeholder notation that the attorneys were awaiting SA Kepner's review of 302s and notes. Paragraph 17 contained seven subparagraphs detailing Bill Allen statements. The majority of the information in the subparagraphs originated from Kepner's spreadsheet detailing her review of Bill Allen 302s.

The information disclosed in Paragraph 17(c) later became a point of contention between the prosecution and the defense. The paragraph stated:

> Allen stated that on at least two occasions defendant asked Allen for invoices for VECO's work at the Girdwood residence. Allen stated that he never sent an invoice to defendant or caused an invoice to be sent to defendant. Allen stated that he believed that defendant would not have paid the actual costs incurred by VECO, even if Allen had sent defendant an invoice, because defendant would not have wanted to pay that high of a bill. Allen stated that defendant probably would have paid a reduced invoice if he had received one from Allen or VECO. Allen did not want to give Stevens a bill partly because he felt that VECO's costs were higher than they

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[408] Marsh (Schuelke) Tr. Feb. 2, 2010 at 110.

[409] Marsh (Schuelke) Tr. Feb. 2, 2010 at 133.

needed to be, and partly because he simply did not want defendant to have to pay.[410]

At some point on September 9, 2008, in order to draft the paragraph above, Marsh asked Kepner questions to clarify statements appearing in the Bill Allen *Brady* spreadsheet she created. Specifically, the spreadsheet entry for February 28, 2007 stated that Allen "believed that T[e]d Stevens would have paid an invoice if he received one."[411] Marsh stated that he, Bottini, and Kepner did not believe the information in the spreadsheet was correct based on their knowledge of the documents.[412] According to Kepner, Allen had never been questioned on this point after the government obtained the $188,000 expense total listed on the VECO spreadsheet.[413]

Kepner stated that she called Allen at Marsh's direction and posed the hypothetical question: "[I]f he had sent a bill for $188,000, did Allen think "Ted would have objected, or would he have paid that invoice?"[414] Marsh stated that he asked Kepner to call Allen specifically to ask about the disputed statement in the spreadsheet, not to ask him to "confirm or deny" the statement, but to ask him "what he thought Stevens would want to do."[415] Kepner went directly to Marsh's office after speaking with Allen and "basically almost dictated" what Allen said for Marsh to write in the letter.[416] Marsh stated that the information Kepner provided from the call was "consistent with what Joe [Bottini] and I remembered," and he "plugged it in[to]" the *Brady* letter.[417] Kepner did not generate a report regarding the interview until September 16, 2008, when she used the September

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[410] Sept. 9, 2008 6:50pm email from PIN attorney Marsh to AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, PIN Principal Deputy Chief Morris, and PIN Chief Welch.

[411] *See* CRM000743.

[412] Marsh (Schuelke) Tr. Feb. 2, 2010 at 123-4.

[413] Kepner (Schuelke) Tr. Aug. 24, 2009 at 92-93.

[414] Kepner (Schuelke) Tr. Aug. 24, 2009 at 93. Allen's attorney, Robert Bundy did not participate in the call. Kepner (Schuelke) Tr. Aug. 24, 2009 at 95; Marsh (Schuelke) Tr. Feb. 2, 2010 at 121.

[415] Marsh (Schuelke) Tr. Feb. 2, 2010 at 126.

[416] Kepner (Schuelke) Tr. Aug. 24, 2009 at 102.

[417] Marsh (Schuelke) Tr. Feb. 2, 2010 at 126.

9, 2008 *Brady* letter to copy the information from paragraph 17(c) into an FBI 302.[418]

According to Marsh, he included Allen's statements made to Kepner during the phone call, and not the statement in the *Brady* spreadsheet summarizing the 302, because the statement in the spreadsheet was "a summary of a source document," and "the source document was represented to me to be inconsistent with this secondary summary."[419] Marsh stated that he did not actually review the February 28, 2007 Allen 302 until "October 1 or 2 in the middle of trial."[420] Marsh acknowledged that:

> [W]hat I should have done was gone back to the 302 and review the 302, and if I had done that, the letter would have read instead of saying [Stevens] probably would have paid a reduced invoice if he had received one, it would have read [Stevens] would have paid an invoice for John Hess' work if he had received on[e].[421]

H. The September 9, 2008 Draft by PIN Attorney Marsh "(v.6)" (final version)

Marsh emailed the prosecution team the final draft of the *Brady* letter at 8:09pm on September 9, 2008.[422] The final version of the letter was identical to the prior version, with two small changes. In Paragraph 17(d), and (e), regarding Bill Allen's statements that he gave Stevens a bed and that Stevens made sure he paid for dinners with Allen and his share of a charter flight he took with Allen, Marsh simply removed the dates that Allen made the statements (April 9, 2007 and August 2, 2007).[423]

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[418] We use the term "302" to identify FBI witness interview reports. By this time, the FBI had started using a form 1023 to memorialize interviews with confidential human sources.

[419] Marsh (Schuelke) Tr. Feb. 2, 2010 at 141.

[420] Marsh (Schuelke) Tr. Feb. 2, 2010 at 144.

[421] Marsh (Schuelke) Tr. Feb. 2, 2010 at 145.

[422] Sept. 9, 2008 8:09pm email from PIN attorney Marsh to AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, PIN Principal Deputy Chief Morris, and PIN Chief Welch.

[423] Sept. 9, 2008 8:09pm email from PIN attorney Marsh to AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, PIN Principal Deputy Chief Morris, and PIN Chief Welch.

Marsh also made one change in the final section of the letter concerning Bill Allen's relationship with Bambi Tyree and the allegations that Tyree made a false statement at Allen's request. Marsh removed the word "whatsoever" and changed the word "caused" to "asked" as shown below (emphasis added):

> Original: Because the government is aware of no evidence whatsoever to support any suggestion that Allen caused [Tyree] to make a false statement under oath, neither *Brady* nor *Giglio* apply.[424]
>
> Revised: Because the government is aware of no evidence to support any suggestion that Allen asked [Tyree] to make a false statement under oath, neither *Brady* nor *Giglio* apply.[425]

Approximately one half hour after Marsh circulated the final version of the letter, Sullivan emailed the letter (signed by Morris) to the defense.[426] Morris stated that she assumed the information in the letter was accurate and she did not look at the supporting documentation.[427] Bottini told OPR that he did not prepare the letter, but he reviewed it during the evening of September 9, 2008, before it was sent to the defense.[428] Goeke stated that he reviewed "drafts" of the letter but could not recall whether or not he reviewed the final letter prior to the completion of the *Stevens* trial.[429]

XI. THE *BRADY* HEARINGS

A. The September 10, 2008 Hearing

On September 10, 2008, the court held a hearing to resolve the pending pretrial motions, including the defense motion to compel disclosure of *Brady*

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[424] Sept. 9, 2008 6:50pm email from PIN attorney Marsh to AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, PIN Principal Deputy Chief Morris, and PIN Chief Welch.

[425] Sept. 9, 2008 8:09pm email from PIN attorney Marsh to AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, PIN Principal Deputy Chief Morris, and PIN Chief Welch.

[426] Sept. 9, 2008 8:37pm email from PIN attorney Sullivan to Brendan Sullivan, defense counsel, PIN Principal Deputy Chief Morris, AUSA Goeke, AUSA Bottini, and PIN Attorney Marsh.

[427] Morris (Schuelke) Tr. Jan. 15, 2010 at 168, 180-181.

[428] Bottini OPR Tr. Mar. 11, 2010 at 448.

[429] Goeke (Schuelke) Tr. Jan. 8, 2010 at 37-38.

material. At the hearing, the government stated that the previous evening it had sent to the defense the September 9, 2008 *Brady* letter.[430] Defense counsel acknowledged that they had received the letter, but objected to the letter providing only summaries of information.

Defense counsel argued that they should receive the documents that reflected the same *Brady* information.[431] Counsel argued further that the government's disclosure method in general prohibited the defense from making effective impeachment use of the information.[432] At the hearing, defense counsel pressed their demand for 302s and reports generally, and specifically as to the APD investigation of Bill Allen.[433]

In response to defense counsel's argument, Judge Sullivan asked:

> With respect to *Brady*, why shouldn't the Court just say everyone knows, everyone has read, and everyone is well versed with respect to opinions from this Circuit and opinions from my colleagues, including Judge Friedman in the *Safavian* case and other district court opinions that address *Brady* obligations and responsibilities. Everyone knows what the law is. Why shouldn't the Court just say to the government you know what the law is, follow the law? . . . And abide by your *Brady* obligations period, because there's no question as to what the law what our Court of Appeals has said about *Brady* and the government's responsibility. It's not just exculpatory evidence; we all know that. So the government says we're aware of our *Brady* obligations, and I say fine, then comply with your *Brady* obligations, and why should I do more than that?[434]

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[430] *United States v. Stevens*, Tr. Sept. 10, 2008 (am) (motions hearing) at 37-39.

[431] *United States v. Stevens*, Tr. Sept. 10, 2008 (am) (motions hearing) at 65.

[432] *United States v. Stevens*, Tr. Sept. 10, 2008 (am) (motions hearing) at 65-66, 70.

[433] *United States v. Stevens*, Tr. Sept. 10, 2008 (am) (motions hearing) at 69-70.

[434] *United States v. Stevens*, Tr. Sept. 10, 2008 (am) (motions hearing) at 60.

Defense counsel answered, "Your Honor, first it would be in fact helpful if you could do precisely that."[435] Judge Sullivan replied, "I just did it. I just did it."[436]

PIN attorney Sullivan told the court that the government understood its continuing obligation under *Brady* and that the September 9, 2008 summary letter was "exceptionally detailed."[437] Sullivan also stated that the government had turned over "a hundred thousand pages" including a "massive amount of documents turned over to Senator Stevens prior to indictment," and that the summary letter was intended to supplement the other productions.[438] Finally, PIN attorney Sullivan cited *United States v. Blackley*, 986 F. Supp. 600, 601 (D.D.C.1997), for the proposition that the government may produce *Brady/Giglio* information in summary format.[439]

In ruling on the motions, Judge Sullivan stated that he was "convinced" that the prosecution team was familiar with the relevant *Brady* case law and understood its obligations.[440] With regard to his ruling on the motion to compel *Brady* material, Judge Sullivan told the parties "if anyone is unclear about that aspect of the motion, you need to let me know now before you leave."[441] None of the attorneys requested clarification.[442]

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[435] *United States v. Stevens*, Tr. Sept. 10, 2008 (am) (motions hearing) at 60.

[436] *United States v. Stevens*, Tr. Sept. 10, 2008 (am) (motions hearing) at 60.

[437] *United States v. Stevens*, Tr. Sept. 10, 2008 (am) (motions hearing) at 75. PIN attorney Sullivan told OPR that he believed that "the trial team, particularly the senior management . . . underst[ood] the obligations" and he thought the team was following the law. Sullivan OPR Tr. Feb. 19, 2010 at 321.

[438] *United States v. Stevens*, Tr. Sept. 10, 2008 (am) (motions hearing) at 75. In its September 5, 2008 court filing, the government asserted that on August 7, 2008, it provided the defense "roughly 500 gigabytes' worth of documents, recordings, and other media." Government's Memorandum in Opposition to Defendant's Motion to Compel Discovery at 2-3 (D.D.C., filed Sept. 5, 2008) (sealed).

[439] *United States v. Stevens*, Tr. Sept. 10, 2008 (am) (motions hearing) at 76.

[440] *United States v. Stevens*, Tr. Sept. 10, 2008 (pm)(motions hearing) at 14-15.

[441] *United States v. Stevens*, Tr. Sept. 10, 2008 (pm)(motions hearing) at 15.

[442] *United States v. Stevens*, Tr. Sept. 10, 2008 (pm)(motions hearing) at 15.

B. The Emergency Motion to Compel and Subsequent Hearings

Following the pretrial hearing, the defense sent a letter to the government asking for immediate production of all *Brady* and *Giglio* material in a useable format "pursuant to Judge Sullivan's oral ruling today."[443] The government responded by stating that it had already provided "*Brady/Giglio* material in a format consistent with our prior agreement and governing law."[444]

The next day, September 11, 2008, the government provided its exhibit list (listing 1,012 exhibits) and proposed witness list as ordered by the court.[445] When the defense asked for a copy of the proposed exhibits, the government responded that defense counsel already possessed the exhibits as a result of the discovery process.[446] To the surprise of the government attorneys, defense counsel were extremely dissatisfied with the government's refusal to provide a copy of the trial exhibits.[447]

The next morning, defense counsel filed a "Motion to Compel Emergency Relief and Discovery" alleging they were unable to readily retrieve the government's proposed trial exhibits from the discovery production, and that the government had failed to comply with the court's *Brady* rulings.[448] In the motion, defense counsel argued that although the government claimed the defense had been provided with the government's exhibits in the course of discovery, "the reality [was] more complex."[449] Specifically, the defense claimed that the government's discovery production suffered from "three critical infirmities" making

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[443] September 10, 2008 Letter from defense counsel to Principal Deputy Chief Morris. *See also* Sept. 10, 2008 4:50pm email from defense counsel to Principal Deputy Chief Morris, PIN attorney Marsh, PIN attorney Sullivan, AUSA Bottini, AUSA Goeke.

[444] September 10, 2008 Letter from Principal Deputy Morris to defense counsel (attached to Defense Emergency Motion to Compel).

[445] *United States v. Stevens*, Tr. Sept. 10, 2008 (motions hearing) at 110.

[446] *See* Sept. 11, 2008 7:43pm email from Principal Deputy Morris to defense counsel.

[447] *See* Sept. 11, 2008 10:54pm email from PIN attorney Sullivan to Principal Deputy Morris, PIN attorney Marsh, AUSA Bottini and AUSA Goeke ("Gang – Alex just called. I gave Brenda all the details. Bottom line – he has come unglued. Oh, and he wants all of our exhibits on a CD with load files for each exhibit and he wants our position on this issue first thing in the morning. . . ."). Sept. 11, 2008 11:54pm email from AUSA Bottini to PIN attorney Sullivan, Principal Deputy Morris, PIN attorney Marsh and AUSA Goeke ("Wow. We owed them a list - not copies of exhibits. How in the world could they legitimately think otherwise? A list means a list.").

[448] Motion to Compel Emergency Relief and Discovery at 2 (D.D.C., filed Sept. 12, 2008).

[449] Motion to Compel Emergency Relief and Discovery at 2 (D.D.C., filed Sept. 12, 2008).

the prospect of locating and retrieving the exhibits overly burdensome.[450] First, because the government produced discovery without "load files,"[451] defense counsel needed to consider every page of the 105,038 page document production in order to find an exhibit. Second, the government scanned and "locked" certain documents, which prevented defense counsel from searching or creating page breaks within those .pdf files.[452] Finally, "many of the documents provided by the government contain bates numbers that do not correspond to the names of electronic files."[453]

the litigation support staff member who was responsible for electronic evidence in the Polar Pen investigations, later told OPR that Marsh instructed to arrange the electronic files in a way that would make it more difficult for the defense to use.[454] initially "structured the evidence that was coming in into directories that were defined by each source."[455] For instance, placed all the evidence obtained from the Kenai Fishing Association into a directory titled "Kenai Fishing Association."[456] When showed PIN attorney Marsh how had organized the electronic discovery for the defense, he instructed to "just put everything in one directory." According to Marsh instructed to do this because he had "dealings with [Stevens defense counsel] in the past" and "didn't want to make it easy for them." As a result, copied all the .tif files and put them in one main directory.[457] Bottini told OPR that he recalled telling him that "wasn't happy" with

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[450] Notice of Supplemental Authority in Support of Motion to Compel Emergency Relief and Discovery at 2-3 (D.D.C., filed Sept. 12, 2008).

[451] Load files are "the electronic equivalent of staples, paper clips and/or folders. Load files allow the recipient to identify each separate document as a separate electronic unit (or to 'unitize' the document)." Motion to Compel Emergency Relief and Discovery at 3 (D.D.C., filed Sept. 12, 2008).

[452] Motion to Compel Emergency Relief and Discovery at 3 (D.D.C., filed Sept. 12, 2008). Defense counsel illustrated the problem as follows: "government's potential trial exhibit number 172 is bates-stamped VECOComputer001609. To find that document, counsel must flip through one thousand, six hundred and eight pages of the 'VECO Computer' production."

[453] Motion to Compel Emergency Relief and Discovery at 3 (D.D.C., filed Sept. 12, 2008).

[454] OPR Tr. Aug. 19, 2009 at 23-24.

[455] OPR Tr. Aug. 19, 2009 at 23-24.

[456] OPR Tr. Aug. 19, 2009 at 23-24.

[457] OPR Tr. Aug. 19, 2009 at 22-26.

Marsh's request regarding production of electronic discovery.[458] Marsh later told OPR that his prior experience with Stevens's defense counsel did not cause him to approach *Brady/Giglio* disclosures differently in the Stevens case than he would normally, stating: "[T]hey were very aggressive, but I mean, *Brady* is *Brady* and *Giglio* is *Giglio*, so . . . ."[459] Marsh told OPR that he did not "remember wanting to make it harder for them," but that he might have made a joke about the matter.[460] PIN Principal Deputy Chief Morris told OPR that Marsh told her that he put the documents in a ".tif file" so they would be more difficult for the defense to manipulate, and Morris stated that Marsh "thought that was cute."[461] Morris stated, "I didn't think that he was being deceptive or that he was not providing everything or giving full disclosure. I thought he was being cute."[462]

With regard to the failure to comply with the court's *Brady* rulings, defense counsel complained that by not providing the underlying documents such as FBI 302s and grand jury testimony, the government could not claim that it had provided impeachment material in a useable format.[463]

C. The September 12, 2008 Hearing

Judge Sullivan granted the defense request for a hearing on the emergency motion and ordered the parties to appear that day. At the hearing, the government explained that the exhibit list contained errors because it was done "with our office in combination with the office in Alaska, and just combining the exhibit list some numbers came off."[464] Morris also told the judge that when some of the documents were scanned by the government's vendor, the documents were given different electronic file names than the names that the government had given the files.[465] Morris claimed that by using the "Bates numbers" and "common sense," the defense could find the documents that were proposed government trial

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[458] Bottini OPR Tr. Mar. 10, 2010 at 117-118.

[459] Marsh OPR Tr. Mar. 25, 2010 at 174.

[460] Marsh OPR Tr. Mar. 25, 2010 at 197-200.

[461] Morris OPR Tr. Mar. 19, 2010 at 200-201.

[462] Morris OPR Tr. Mar. 19, 2010 at 213.

[463] Emergency Motion to Compel Emergency Relief and Discovery at p. 5 (D.D.C., filed Sept. 12, 2008).

[464] *United States v. Stevens,* Tr. Sept. 12, 2008 (pm) at 10.

[465] *United States v. Stevens,* Tr. Sept. 12, 2008 (pm) at 10.

exhibits, although it might be "a little awkward."[466] The government also provided an errata sheet to the exhibit list.[467]

Defense counsel (with the assistance of one of their information technology employees) argued that even with the corrected Bates numbers, it would still be overly burdensome for the defense to find certain documents.[468] The court found that the defense should not have to "hunt and peck" to look for the exhibits and ordered that the government provide hard copies of all exhibits by 10:00 p.m. that evening.[469]

Turning to the *Brady* issue, the defense reiterated their request for all *Brady* material and impeachment material in a "useable format."[470] Defense counsel argued that they needed and were entitled to the FBI 302s or grand jury testimony underlying the *Brady/Giglio* statements that the government had provided in summary form in order to effectively cross examine witnesses.[471]

The government objected, claiming that for some witnesses where the *Brady/Giglio* statements were so intertwined with the rest of the testimony, they had turned over the entire grand jury transcript, and that FBI 302s were not *Jencks* as to the witness interviewed, but rather *Jencks* as to the authoring agent.[472] The government also objected to turning over the FBI 302s because the Federal Rules of Evidence would prohibit the defense from using an FBI 302 to impeach a witness.[473] The defense response, however, was that information in the FBI 302, such as to whom the witness made the statement, and in what context, was significant to the defense.[474] The defense also pointed out that witnesses could be impeached with their prior inconsistent statements made to the grand

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[466] *United States v. Stevens,* Tr. Sept. 12, 2008 (pm) at 11.

[467] *United States v. Stevens,* Tr. Sept. 12, 2008 (pm) at 11.

[468] *United States v. Stevens,* Tr. Sept. 12, 2008 (pm) at 15-20.

[469] *United States v. Stevens,* Tr. Sept. 12, 2008 (pm) at 20.

[470] *United States v. Stevens,* Tr. Sept. 12, 2008 (pm) at 31.

[471] *United States v. Stevens,* Tr. Sept. 12, 2008 (pm) at 31, 33-37, 38-40.

[472] *United States v. Stevens,* Tr. Sept. 12, 2008 (pm) at 32, 40.

[473] *United States v. Stevens,* Tr. Sept. 12, 2008 (pm) at 36.

[474] *United States v. Stevens,* Tr. Sept. 12, 2008 (pm) at 36.

jury.[475] And, according to the defense, if the statement was made in the context of an interview with the FBI, they needed to know who was present at the interview so that the defense would know whom to call as a witness in their own case to impeach the government witness.[476]

Judge Sullivan stated that he was not persuaded that he should order "a *carte blanche* production of Form 302s," but invited defense counsel to submit supplemental authority.[477] At the hearing, PIN Principal Deputy Chief Morris asserted that all of the *Brady/Giglio* in the government's possession had been disclosed to the defense and that if additional material were discovered, it would be turned over.[478]

D. The Supplemental Briefing

On September 15, 2008, the defense filed supplemental authority for its position that the court could, and should, order the government to turn over FBI 302s and notes under the *Brady* doctrine.[479] The government filed an opposition, relying on *United States v. Blackley* for the proposition that the government meets its *Brady* obligations when it provides summaries that disclose the "nature of the exculpatory testimony that each witness might offer."[480] The government pointed out that in *Blackley*, the witnesses's own statements were at issue and yet the court did not require the government to turn over the witnesses's grand jury testimony because it had provided accurate summaries of the testimony to the defense.[481] In the instant case, the government argued, because the reports and

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[475] *United States v. Stevens,* Tr. Sept. 12, 2008 (pm) at 38.

[476] *United States v. Stevens,* Tr. Sept. 12, 2008 (pm) at 38-39.

[477] *United States v. Stevens,* Tr. Sept. 12, 2008 (pm) at 40.

[478] *United States v. Stevens,* Tr. Sept. 12, 2008 (pm) at 41. Morris later defended her statements to the court after reflecting upon the government's *Brady* review process in the *Stevens* case (which involved agents reviewing 302s and notes for *Brady* information), stating that she "thoroughly believed that the members of the team were doing their job," that they "knew most of this evidence," and that, in particular, SA Kepner was "as smart as most lawyers." Morris (Schuelke) Tr. Jan. 15, 2010 at 268.

[479] Notice of Supplemental Authority in Support of Motion to Compel Emergency Relief and Discovery (D.D.C., filed Sept. 15, 2008).

[480] Government's Response to Defendant's Notice of Supplemental Authority at 2 (quoting *Blackley*, 986 F. Supp. at 604-605) (D.D.C., filed Sept. 16, 2008).

[481] Government's Response to Defendant's Notice of Supplemental Authority at 2 (D.D.C., filed Sept. 16, 2008).

notes were not the witnesses's own statements but the statements of the authoring agent, there was no need to turn over the reports.[482] The government distinguished the cases cited by the defense by arguing that in those cases, unlike the *Stevens* case, the statements at issue belonged to testifying FBI agents. Therefore, according to the prosecution, the FBI agent's notes were properly provided for the purpose of impeaching that government agent.[483] Additionally, the government claimed that any information in the reports would be cumulative to the information already provided.[484]

E. The Court Orders the Government to Produce Redacted 302s

On September 16, 2008, Judge Sullivan ordered the parties to appear at 3:30 p.m. for his ruling on the Speech or Debate Clause motion and to discuss the jury questionnaire and objections to the exhibits.[485] The court revisited its September 12, 2008 order that the government produce hard copies of its trial exhibits, and the prosecution explained the rather than provide copies of the exhibits, it came to an agreement with the defense to provide the material electronically with an accompanying table.[486] Defense counsel argued that the log did not adequately identify the documents at issue and again requested hard copies of the documents.[487] At defense counsel's request, Judge Sullivan directed the government to provide the court with hard copies of all the trial exhibits to which the defense were objecting labeled with exhibit numbers corresponding to the exhibit list by 10:00 the next morning.[488]

Although the court had not read the government's reply brief to the supplemental authorities and the *Brady* motion was not on the court's agenda,[489]

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[482] Government's Response to Defendant's Notice of Supplemental Authority at 2 (D.D.C., filed Sept. 16, 2008).

[483] Government's Response to Defendant's Notice of Supplemental Authority at 2-4 (D.D.C., filed Sept. 16, 2008).

[484] Government's Response to Defendant's Notice of Supplemental Authority at 5 (D.D.C., filed Sept. 16, 2008).

[485] *United States v. Stevens*, Tr. Sept. 16, 2008 (pm) at 3.

[486] *United States v. Stevens*, Tr. Sept. 16, 2008 (pm) at 18-19.

[487] *United States v. Stevens*, Tr. Sept. 16, 2008 (pm) at 23.

[488] *United States v. Stevens*, Tr. Sept. 16, 2008 (pm) at 18-20, 23.

[489] *United States v. Stevens*, Tr. Sept. 16, 2008 (pm) at 24-25, 27.

Judge Sullivan invited argument on the matter.[490] In response to the court's questioning, PIN attorney Sullivan conceded that turning over redacted 302s would not prejudice the government, but insisted that doing so would not provide the defense with additional information because the summaries previously provided were adequate.[491] Defense counsel responded that the reports would provide them with something to attempt to refresh the witnesses's recollection, and the knowledge of which agents were present so that, if necessary, they could call that agent in their own case.[492] After the defense suggested that the court conduct an *in camera* review of the 302s, Judge Sullivan asked how many 302s were at issue.[493] "There are hundreds," PIN attorney Sullivan replied.[494] Sullivan went on to say, "Bill Allen has been spoken to many, many times, and, therefore, we have given them a very exhaustive list."[495] PIN attorney Sullivan attempted to convince the court that the defense would be improperly impeaching witnesses if they were given the 302s, because a 302 is the statement of the authoring agent rather than the witness interviewed.[496] Judge Sullivan was unpersuaded and directed the government to produce redacted 302s the next day.[497]

XII. THE PLUTA 302

As a result of Judge Sullivan's orders to produce the trial exhibits and the redacted 302s, starting in the late afternoon on September 16, 2008 (nine days before trial), the government began gathering, labeling, and copying all of its proposed trial exhibits to produce by the next morning. The PIN attorneys and support staff worked primarily on assembling the more than 1,000 government exhibits. Bottini and Goeke worked on redactions of grand jury transcripts (at Morris's request), and Kepner redacted the Bill Allen 302s to include only the *Brady* information contained in the September 9, 2008 letter.[498]

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[490] *United States v. Stevens*, Tr. Sept. 16, 2008 (pm) at 24-25.

[491] *United States v. Stevens*, Tr. Sept. 16, 2008 (pm) at 25-27.

[492] *United States v. Stevens*, Tr. Sept. 16, 2008 (pm) at 28-29.

[493] *United States v. Stevens*, Tr. Sept. 16, 2008 (pm) at 29.

[494] *United States v. Stevens*, Tr. Sept. 16, 2008 (pm) at 29.

[495] *United States v. Stevens*, Tr. Sept. 16, 2008 (pm) at 29.

[496] *United States v. Stevens*, Tr. Sept. 16, 2008 (pm) at 30.

[497] *United States v. Stevens*, Tr. Sept. 16, 2008 (pm) at 30.

[498] Bottini OPR Tr. March 10, 2010 at 201-202.

Morris stated that she initially asked SA Joy to "take the first crack at . . . the *Brady* in the 302s" but he refused, stating he was "not as familiar with the facts" as Kepner.[499] SA Kepner volunteered to go through the FBI reports and redact them to remove all information not included in the September 9, 2008 *Brady* letter.[500] Welch told OPR that he asked Morris why the team was redacting 302s rather than just producing the documents and that Morris replied that the team wanted to do it that way.[501]

Before starting the redaction task, Kepner prepared, at Marsh's direction, an FBI 302 to document her September 9, 2008 telephone conversation with Allen.[502] Kepner created the report using language in paragraph 17(c) of the September 9, 2008 *Brady* letter.[503]

According to Kepner, she did not receive any guidance on how to redact the reports.[504] Morris told OPR that she did not give, but should have given, Kepner guidance on how to redact the 302s.[505] Kepner stated that, while she was doing the review and redaction of the 302s, AUSAs Bottini and Goeke were undertaking the same procedure with regard to the Alaska grand jury transcripts.[506] Kepner took the September 9, 2008 *Brady* letter and went through it point by point, locating the relevant reports that had provided the basis for each statement in the *Brady* letter.[507] Kepner did not use the *Brady* spreadsheet for the review; rather, she gathered all the Allen 302s and reviewed them, looking for those relevant to

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[499] Morris (Schuelke) Tr. Jan. 15, 2010 at 251.

[500] Kepner (Schuelke) Tr. Aug. 24, 2009 at 138; Morris (Schuelke) Tr. Jan. 15, 2010 at 251. Kepner began the task at approximately 10:00pm. Kepner (Schuelke) Tr. Aug. 24, 2009 at 147.

[501] Welch OPR Tr. Mar. 2, 2010 at 31-32.

[502] Kepner (Schuelke) Tr. Aug. 24, 2009 at 97, 163; October 14, 2009 OPR Interview of SA Kepner at 595-596. Although Kepner stated that she prepared a 302 at PIN Attorney Marsh's direction, Marsh did not recall asking her to write a report. Marsh OPR Tr. Mar. 25, 2010 at 294-295, 334-335.

[503] Kepner (Schuelke) Tr. Aug. 24, 2009 at 97, 163; Kepner OPR Tr. Oct. 14, 2009 at 595-596.

[504] Kepner (Schuelke) Tr. Aug. 24, 2009 at 138.

[505] Morris OPR Tr. March 19, 2010 at 298-299.

[506] Kepner (Schuelke) Tr. Aug. 24, 2009 at 140-142.

[507] Kepner (Schuelke) Tr. Aug. 24, 2009 at 144-146.

the *Brady* letter.[508] Once she located the relevant 302, Kepner redacted any statements that had not been referenced in the letter.[509] With respect to the Bill Allen statements contained in the *Brady* letter, Kepner "had the Bill Allen reports in front of me, and would scan through the report to locate the section that was stated in the *Brady* letter."[510] According to Kepner, she did not review the 302s for *Brady* material; rather, she was simply trying to locate the material referenced in the *Brady* letters. However, she left unredacted one particular statement from a 302, which had not been in the September 9, 2008 letter. Specifically, the unredacted statement was "Allen recalled that Ted Stevens wanted to pay for everything he got."[511] When asked why she did not redact that particular statement, SA Kepner stated she had left the statement in "[o]ut of the abundance of caution. You know, I saw it, it looked like something that would be helpful to defense, so I wouldn't have redacted it out intentionally."[512]

One of the 302s that Kepner redacted was a report documenting a February 28, 2007 interview of Bill Allen conducted by SAs Kepner and Pluta ("the Pluta 302"). Kepner was also present at the interview. As discussed below, the Pluta 302 contained an exculpatory statement that Allen believed Stevens would have paid John Hess's bill (Hess was the VECO engineer who drafted plans for the Girdwood renovations) had he been presented with the bill. Kepner redacted the statement likely because it did not match any statements in the September 9, 2008 *Brady* letter. The Pluta 302 was also the underlying document for the entry in Kepner's *Brady* spreadsheet that stated, "Stevens would have paid the invoice if he received one." It was this comment that caused Kepner to contact Allen at Marsh's request on September 9, 2008, and obtain the statement that Stevens "would not have wanted to pay that high of a bill."

Once Kepner completed the redactions, she gave the 302s to PIN attorney Sullivan.[513] PIN attorneys Marsh and Sullivan spent most of the night printing, stickering, and copying the exhibits.[514] A little before 4:00 a.m., Sullivan sent Morris an email stating that "the redacted transcripts and 302s are done. They

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[508] Kepner (Schuelke) Tr. Aug. 24, 2009 at 146-148.

[509] Kepner (Schuelke) Tr. Aug. 24, 2009 at 146.

[510] Kepner (Schuelke) Tr. Aug. 24, 2009 at 146.

[511] Kepner (Schuelke) Tr. Aug. 24, 2009 at 150.

[512] Kepner (Schuelke) Tr. Aug. 24, 2009 at 151.

[513] Kepner (Schuelke) Tr. Aug. 24, 2009 at 147.

[514] Marsh OPR Tr. March 25, 2010 at 296-297.

are on my chair, but we need to proof them before they go out the door to [the defense] tomorrow."[515] However, no attorney ever reviewed the redacted 302s.[516] Morris assumed that PIN attorney Sullivan would review Kepner's work, but she never communicated this request to Sullivan, who did not review Kepner's work.[517] On September 17, 2008, the prosecution provided the defense with the redacted reports.[518]

Two weeks later, on October 1, 2008, while conducting a *Jencks* review relative to summary witness SA Michelle Pluta, the trial team discovered that Kepner redacted *Brady* information from the Pluta 302 that was provided to the defense on September 17, 2008.[519] Morris stated that Marsh "came rushing in and he said . . . I found this. I found this. It looks like we overredacted."[520] The team held an "all hands" meeting to discuss whether to provide the unredacted document to the defense. During the meeting, Marsh initially took the position that the material in the 302 did not have to be provided to the defense because it was cumulative of material already provided in the September 9, 2008 *Brady* letter.[521] Morris told OPR that Marsh "was adamant that we shouldn't turn it over" and argued that "if we don't call Pluta, we don't have to turn it over."[522] Sullivan told OPR that he recalled Marsh "laying on the floor and . . . rolling his

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[515] Sept. 17, 2008 3:48am email from PIN attorney Sullivan to Principal Deputy Morris, Chief Welch, SA Bateman, AUSA Bottini, litigation support manager [redacted], AUSA Goeke, SA Joy, SA Kepner, PIN attorney Marsh, SA Roberts, paralegal [redacted]. On September 18, 2008, the court held a brief hearing to address the defense team's request for *Brady* information concerning government witnesses' personal vices identified in the government's August 25, 2008 *Giglio* letter. PIN attorney Sullivan assured the court that the defense had "received as much information as I believe we currently have," but indicated he would check to ensure there was no new additional information. *United States v. Stevens*, Tr. Sept 18, 2008 (am) at 71.

[516] February 21, 2009 Declaration of Principal Deputy Morris at ¶12 ("I failed to review the redactions. I know the documents, once redacted were copied for the defense, but I am not aware of any of the attorneys having reviewed the redactions.")

[517] Morris stated that she "got caught up in the copying and forgot [to ensure Sullivan knew to do a review]." Morris (Schuelke) Tr. Jan. 15, 2010 at 254.

[518] Files provided to OPR by defense counsel reflect that the government provided a total of 92 reports to defense counsel.

[519] Generally, *Jencks* material consists of prior statements, signed or adopted by a witness, and does not need to be disclosed to the defense until after the witness testifies at trial. *See* The Jencks Act, 18 U.S.C. 5 3500, and Fed. R. Crim. P. 26.2.

[520] Morris OPR Tr. Mar. 19, 2010 at 358.

[521] Marsh (Schuelke) Tr. Feb. 2, 2010 at 353.

[522] Morris OPR Tr. Mar. 19, 2010 at 359, 361.

eyes" and arguing that the information in the Pluta 302 was cumulative.[523] Marsh told OPR that "I probably didn't fully understand that there was no materiality component in *Safavian*."[524] Morris told OPR that she wanted to turn the information over to the defense as *Jencks* for SA Pluta rather than identifying it as *Brady* information.[525] PIN Chief Welch argued that the report contained *Brady* material, and the team ultimately agreed to disclose the document.[526] Morris stated that Welch told the group, "[i]f we've got to discuss it this long, turn it over."[527] Welch later stated that, following the meeting, he was "taken aback" by some of the arguments team members presented recommending not disclosing the document, so he then conducted his own *Brady* review of the unredacted 302s in the prosecution team's possession by reviewing each witness file in the "war room" for *Brady* information.[528]

During the *Brady* review, the trial team also located a December 11, 2006 IRS MOI of Bill Allen that had not been provided to the defense earlier (although the MOI had been listed earlier in the IRS *Brady* spreadsheet). This MOI also contained a statement by Allen that "If Rocky Williams or Dave Anderson had invoiced Ted or Catherine Stevens for VECO's work, Bill Allen believes they would have paid the bill."[529]

During the evening of October 1, 2008, while the court was in recess and Allen had not yet completed his testimony, the prosecutors sent defense counsel a letter attaching a redacted version of the Pluta 302 and a redacted version of the previously undisclosed IRS MOI of Bill Allen. The text of the letter, drafted by Marsh, stated that the government located the documents after conducting a "re review of, among other things, all memoranda of interviews between federal law

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[523] Sullivan OPR Tr. Mar. 12, 2010 at 372.

[524] Marsh OPR Tr. Mar. 25, 2010 at 305.

[525] Morris OPR Tr. Mar. 19, 2010 at 363.

[526] Welch (Schuelke) Tr. Jan. 13, 2010 at 119-124. Welch told OPR that, at the time of the decision, he was not aware that Kepner had redacted the document, as opposed to an attorney. Welch OPR Tr. Mar. 2, 2010 at 360. Marsh stated that he "agreed with" and "supported" the decision to produce the Pluta 302. Marsh (Schuelke) Tr. Feb. 2, 2010 at 353-4.

[527] Morris OPR Tr. Mar. 19, 2010 at 366.

[528] Welch (Schuelke) Tr. Jan. 13, 2010 at 127-128; Welch recalled flagging a 302 regarding [redacted] for production. Welch OPR Tr. Mar. 3, 2010 at 375.

[529] Dec. 11-12, 2006 IRS MOI Re: Bill Allen by SA Dennis Roberts.

enforcement agents and Mr. Allen."[530] Notably, an earlier draft of the letter by Sullivan stated that the government located "cumulative *Brady* material" relating to Allen during a *Jencks* review regarding SA Pluta, rather than during a specific *Brady* review of Allen materials.[531] Marsh stated that he changed the language to "re review" because once the team had located the Pluta 302, it conducted another review of the material and located the IRS MOI which was not related to Pluta.[532] However, Marsh acknowledged to OPR that the letter "probably could have been more specific" and "probably could have included" references to the Pluta *Jencks* review and the subsequent *Brady* review; Marsh noted that he was "exhausted" when he drafted the letter.[533] Morris acknowledged to OPR that the letter was misleading but said her representations to the court were consistent with the discovery of the documents as represented in Sullivan's prior draft.[534]

XIII. REPRESENTATIONS CONCERNING THE *BRADY* LETTER

On October 2, 2008, Morris acknowledged to the court that the government's failure to produce the unredacted information in the Pluta 302 violated the court's September 16, 2008 order to produce exculpatory information contained in the FBI 302s.[535] Morris also explained that the government located the Pluta 302 when reviewing SA Pluta's *Jencks* material and, as a result, it conducted a *Brady* review of the agent reports.[536] The defense argued for dismissal of the case. Judge Sullivan ordered the government to turn over "every

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[530] Oct. 1, 2008 letter from PIN Principal Deputy Chief Morris to defense counsel (attached to Oct. 1, 2008 11:29pm email from PIN Principal Deputy Chief Morris to defense counsel.

[531] Oct. 1, 2008 9:49pm email from PIN attorney Sullivan to AUSA Goeke, AUSA Bottini, PIN attorney Marsh, and PIN Principal Deputy Chief Morris.

[532] Marsh OPR Tr. Mar. 25, 2010 at 323-325.

[533] Marsh OPR Tr. Mar. 25, 2010 at 323-325.

[534] Morris OPR Tr. Mar. 19, 2010 at 372-373.

[535] *United States v. Stevens*, Tr. Oct. 2, 2008 (am) at 16. The exculpatory statement previously redacted from the 302 was Bill Allen's statement that Allen believed that Stevens would have paid engineer John Hess's bill.

[536] *United States v. Stevens*, Tr. Oct. 2, 2008 (am) at 27. We note that Morris's statement to the court regarding the Pluta *Jencks* review reflects the language contained in the Sullivan draft of the October 1, 2008 letter to defense counsel rather than the *Brady* "re-review" language contained in the final version of the letter the government sent to defense counsel.

Memorandum of Interview," stating that the defense would receive the "unredacted version" of "302s and MOIs for every witness in this case."[537]

Judge Sullivan called a recess to give the defense the opportunity to brief its motion to dismiss and give the government a chance to respond; both parties returned to argue later that same afternoon. The defense argued for dismissal, stating that the two documents went to the core of the defense case, representing two occasions where Allen said that Stevens would have paid an invoice if Allen had sent one. The prosecutors argued that the information was cumulative because the government had already produced statements from Allen that Stevens "wanted to pay for everything he got" in an August 30, 2006 interview.[538] Moreover, in its October 2, 2008 memorandum in opposition, the government stated "[t]he Court has previously instructed the parties to consider *United States v. Safavian*, 233 F.R.D. 12 (D.D.C. 2005), for guidance on interpreting the *Brady* doctrine. The government has taken this decision into account when producing its *Brady* related material."[539]

The court had also ordered the government (in a minute order) to file a declaration under oath setting forth the sources for Paragraph 17(c) of the government's September 9, 2008 *Brady* letter. Paragraph 17(c) stated that Bill Allen believed that Stevens would not have paid VECO's actual costs if he was sent a bill, because he "would not have wanted to pay that high of a bill."[540] The information contained in paragraph17(c) originated from SA Kepner's telephone conversation with Allen on September 9, 2008, the date Marsh finalized the *Brady* letter (Kepner later documented the information in an FBI 302 on September 16, 2008). In response to the court order, the government filed a Declaration by PIN Principal Deputy Chief Brenda Morris stating that Paragraph 17(c) of the government's September 9, 2008 *Brady* letter was based on five FBI 302s of Bill Allen.[541] The attachments to the Declaration included FBI reports from August 30,

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[537] *United States v. Stevens*, Tr. Oct. 2, 2008 (am) at 19, 29.

[538] Government's Memorandum in Opposition to Defendant's Motion to Dismiss or For a New Trial at 1 (D.D.C., filed Oct. 2, 2008).

[539] Government's Memorandum in Opposition to Defendant's Motion to Dismiss or For a New Trial at 9 (D.D.C., filed Oct. 2, 2008).

[540] Sept. 9, 2008 letter from PIN Principal Deputy Chief Morris to defense counsel.

[541] Declaration of Brenda K. Morris at 1 (D.D.C., filed Oct. 2, 2008). The attachment was not filed with the court due to privacy-related concerns and concerns regarding on-going investigations. Oct. 2, 2008 4:22pm email from PIN attorney Sullivan to Judge Sullivan, Judge Sullivan's clerk, defense counsel, AUSA Goeke, AUSA Bottini, PIN attorney Marsh, and PIN Principal Deputy Chief Morris.

2006, March 2, 2007, February 28, 2007, April 19, 2007, and August 2, 2007. However, these 302s addressed the substance of paragraphs 17(a), (b), (d), (e), (f) of the *Brady* letter and *not* 17(c).[542] Instead, the government filed Kepner's report of the September 9, 2008 Allen interview relative to paragraph 17(c) of the *Brady* letter as Exhibit B of its memorandum in opposition to the motion to dismiss (filed the same day).[543]

In its memorandum in opposition, the government did not specifically refer to an Exhibit B. It only referred to Exhibit A, an August 30, 2006 debrief of Bill Allen (also attached as an exhibit to Morris's Declaration). The memorandum in opposition also listed a number of *Brady* disclosures the government made regarding Allen. Those disclosures tracked paragraph 17(a) (f) of the *Brady* letter (corresponding to the FBI 302s attached to Morris's Declaration), and included the disclosures relative to paragraph 17(c). However, the opposition brief did not state that the corresponding FBI 302s were attached to the motion.

During her presentation to the court, Morris stated that Bill Allen had not been interviewed by the government on September 9, 2008. At the time, Judge Sullivan had the September 9, 2008 FBI 302 of Bill Allen in his possession (because it was attached to the other government filing), and had asked Morris about the interview. Morris responded that she was not sure of the interview date and that she would "double check" the date.[544] Morris stated that the redactions of the 302s were "mistake[s]" reflecting "bad judgment." The defense argued that the government's September 9, 2008 *Brady* letter omitted exculpatory information regarding Rocky Williams's work hours on the Girdwood residence, which the defense had identified through its telephone interviews with Williams and its review of Williams's grand jury transcript. Judge Sullivan stated that he was "persuaded there [wa]s a *Brady* violation" and ordered the government to

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[542] Morris told OPR that she asked PIN attorney Sullivan to draft the Declaration for her because she was flustered from the morning court session. Morris stated that she did not review the *Brady* letter prior to filing her Declaration or compare the 302s attached to the Declaration to paragraph 17(c) of the letter. Morris OPR Tr. Mar. 19, 2010 at 378-390. Sullivan told OPR that he did not draft or review Morris's declaration and that Morris requested that Sullivan email her a prior declaration by PIN Chief Welch that Morris could use as a formatting template. Sullivan OPR Tr. Mar. 12, 2010 at 442-443; Oct. 2, 2008 3:13pm email from PIN attorney Sullivan to PIN Principal Deputy Chief Morris (attaching Welch affidavit).

[543] Government's Memorandum in Opposition to Defendant's Motion to Dismiss or for a New Trial (D.D.C., filed Oct. 2, 2008).

[544] Morris later stated that at the time she was before the court, she was unaware of the September 9, 2008 FBI 302, believing that the judge was incorrect, until Bottini whispered to her that Allen was interviewed on that date. Morris then told the court she would check on the information. Morris (Schuelke) Tr. Jan. 15, 2010 at 265-266.

immediately turn over all FBI 302s, interview memoranda, and grand jury transcripts.[545]

XIV. KEPNER'S BACKDATED 302s NOT PRODUCED TO THE DEFENSE

SA Kepner told OPR that, as the prosecution team responded to the court's order to produce the 302s, she was responsible for gathering the Bill Allen 302s for production to the defense.[546] After providing the defense with the 302s, the prosecution next produced a log identifying the unnamed source in each 302. Following receipt of the log, the defense team sent the prosecution an email requesting clarification of items in the log. In particular, the defense noted that although the prosecution's log listed a September 6, 2006 302 of Bill Allen, that document was not provided to the defense.[547] OPR could find no email or other prosecution response to the email regarding the missing September 6, 2006 302, and no one OPR interviewed could recall ever resolving the issue. The defense did not raise the issue before the court. Nevertheless, the September 6, 2006 Bill Allen 302 was listed in Kepner's *Brady* spreadsheet and in an October 4, 2008 email from AUSA Bottini to PIN attorney Sullivan describing the 302s recently produced to the defense, indicating that the prosecutors believed that they had produced the 302.[548] In his email, Bottini stated that the September 6, 2006 302 was inconsistent with Allen's trial testimony regarding the Land Rover:

> **BA stated in this interview that Lily Stevens picked up the Land Rover at BA's house.** However, BA testified at trial last week that he thought they picked up the Land Rover **at the dealership.** They will no doubt argue that this is material re: TS knowledge of how much the Land Rover cost BA.[549]

OPR determined that the prosecution never produced the September 6, 2006 Allen 302 to the defense. Kepner told OPR that she thought that the September 6, 2006 Allen 302 was included in the box of 302s she provided to the defense, but she

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[545] *United States v. Stevens*, Tr. Oct. 2, 2008 (pm) at 51-53.

[546] Kepner OPR Tr. Feb. 18, 2010 at 149.

[547] Oct. 4, 2008 10:40am email from defense counsel to PIN attorney Sullivan, PIN Principal Deputy Chief Morris, PIN attorney Marsh, AUSA Bottini, and AUSA Goeke.

[548] Oct. 4, 2008 7:08pm email from AUSA Bottini to PIN attorney Sullivan.

[549] Oct. 4, 2008 7:08pm email from AUSA Bottini to PIN attorney Sullivan (emphasis in original).

concluded that she likely forgot to include the document.[550] Moreover, SA Kepner admitted to OPR that she created multiple versions of the document and backdated the document.[551] Other than Kepner, no member of the prosecution team OPR interviewed was aware of the multiple backdated 302s, and OPR did not locate any evidence indicating that any other members of the team were aware of Kepner's actions.

XV. ADDITIONAL MOTIONS AND HEARINGS ON ALLEGED MISCONDUCT

On October 5, 2008, the defense filed a motion to dismiss the indictment due to "the government's intentional and repeated misconduct."[552] In its motion, the defense argued that the government intentionally withheld the portions of the Pluta 302 and December 11, 2006 IRS MOI containing the statements that Bill Allen believed that Senator Stevens would have paid an invoice if he received one, and instead sought a contradictory statement from Allen that it disclosed in Paragraph 17(c) of its September 9, 2008 *Brady* letter. The defense alleged that the government obtained the contradictory statement on the evening it completed the *Brady* letter and that SA Kepner did not record the September 9, 2008 Allen interview until September 16 in order to fulfill the court ordered September 17, 2008 disclosure deadline. The defense also highlighted PIN Principal Deputy Chief Morris's October 2, 2008 colloquy with Judge Sullivan during which Morris mistakenly denied that the government interviewed Allen on September 9, 2008.

The government filed a brief in opposition on October 6, 2008, arguing that the defense motion was "factually and legally groundless."[553] The government argued that it had previously provided the defense with a February 28, 2007 302 documenting Allen's statement that Stevens told Allen he "needed to pay some" of the invoices, and stated that the government only reached out to Allen on September 9, 2008 to "be as accurate as possible."[554] The government also argued that on August 15, 2008, it had provided the defense with copies of two July 30, 2007 search warrants of the Girdwood residence (and the accompanying affidavit by SA Kepner) citing information from the February 28, 2007 FBI 302, including

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[550] Kepner OPR Tr. Feb. 18, 2010 at 148-149.

[551] See Chapter Twelve of this report for a detailed discussion of this issue.

[552] Senator Stevens's Motion to Dismiss the Indictment Due to the Government's Intentional and Repeated Misconduct (D.D.C., filed Oct. 5, 2008).

[553] Government's Opposition to Defendant's Motion to Dismiss Due to Alleged Misconduct (D.D.C., filed Oct. 6, 2008).

[554] Government's Opposition to Defendant's Motion to Dismiss Due to Alleged Misconduct (D.D.C., filed Oct. 6, 2008) at 12.

Stevens's willingness to pay for some of the expenses. The government acknowledged that it inadvertently redacted Allen's statement from the February 28, 2007 302 that, had VECO sent an invoice for VECO engineer John Hess's work, Stevens would have paid it. The government also refuted the defense argument that the prosecution attempted to conceal its September 9, 2008 interview with Allen during Morris's colloquy with Judge Sullivan at the October 2, 2008 hearing. The government stated that Morris's statements reflected "confusion" and a "mistaken understanding" regarding the 302, because the prosecution had provided the document to the defense and the court prior to the hearing.

On October 7, 2008, the defense filed a reply brief noting that the government's arguments did not focus on *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005) and reiterating that the government intentionally produced only Allen's September 9, 2008 inculpatory statement rather than the other exculpatory statements.[555]

[555] Government's Opposition to Defendant's Motion to Dismiss Due to Alleged Misconduct (D.D.C., filed Oct. 6, 2008) at 12.

CHAPTER THREE
APPLICABLE STANDARDS

I. OPR'S ANALYTICAL FRAMEWORK

OPR finds professional misconduct when an attorney intentionally violates or acts in reckless disregard of a known, unambiguous obligation imposed by law, rule of professional conduct, or Department regulation or policy. In determining whether an attorney has engaged in professional misconduct, OPR uses the preponderance of the evidence standard to make factual findings.

An attorney intentionally violates an obligation or standard when the attorney: (1) engages in conduct with the purpose of obtaining a result that the obligation or standard unambiguously prohibits; or (2) engages in conduct knowing its natural or probable consequence, and that consequence is a result that the obligation or standard unambiguously prohibits.

An attorney acts in reckless disregard of an obligation or standard when: (1) the attorney knows or should know, based on his or her experience and the unambiguous nature of the obligation or standard, of an obligation or standard; (2) the attorney knows or should know, based on his or her experience and the unambiguous applicability of the obligation or standard, that the attorney's conduct involves a substantial likelihood that he or she will violate, or cause a violation of, the obligation or standard; and (3) the attorney nonetheless engages in the conduct, which is objectively unreasonable under all the circumstances. Thus, an attorney's disregard of an obligation is reckless when it represents a gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation.

If OPR determines that an attorney did not engage in professional misconduct, OPR determines whether the attorney exercised poor judgment, made a mistake, or acted appropriately under all the circumstances. An attorney exercises poor judgment when, faced with alternative courses of action, he or she chooses a course of action that is in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take. Poor judgment differs from professional misconduct in that an attorney may act inappropriately and thus exhibit poor judgment even though he or she may not have violated or acted in reckless disregard of a clear obligation or standard. In addition, an attorney may exhibit poor judgment even though an obligation or standard at issue is not sufficiently clear and unambiguous to support a professional misconduct finding. A mistake, on the other hand, results from an excusable human error despite an attorney's exercise of reasonable care under the circumstances.

II. STANDARDS OF CONDUCT

A. The Government's Obligations Under *Brady* and *Giglio*

In federal criminal cases, the Due Process Clause of the Fifth Amendment to the Constitution requires the government to disclose evidence that is both favorable and material to the defense as to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83 (1963). Encompassed within this requirement is "evidence affecting [the] credibility" of a government witness when the "reliability of [the] witness may well be determinative of guilt or innocence." *Giglio v. United States*, 405 U.S. 150, 154 (1972). The government has a duty to disclose the evidence regardless of whether the defendant requests its disclosure. *Kyles v. Whitley*, 514 U.S. 419, 432 33 (1995).

A *Brady* violation occurs when: (1) evidence that is material and favorable to the accused, either because it is exculpatory or because it is impeaching; (2) is suppressed by the government, either willfully or inadvertently; and (3) prejudice ensues. *Strickler v. Greene*, 527 U.S. 263, 281 282 (1999). The good or bad faith of the prosecution is irrelevant. *Brady*, 373 U.S. at 87. In *Strickler*, the Supreme Court elaborated, "strictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler*, 527 U.S. at 281.

Evidence is "material" only if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler*, 527 U.S. at 280. "Reasonable probability" does not require that disclosure of the evidence would have resulted in acquittal, but rather that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. 419, 434. *See also United States v. Bagley*, 473 U.S. 667, 682 (1995) (prosecutor not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial).

The obligation to disclose *Brady* material extends to information in the government's possession that the prosecutor is unaware of, but which he or she could become aware of through due diligence. *Kyles*, 514 U.S. at 438 (citing *Giglio*, 405 U.S. at 154). In preparing for trial, prosecutors have an affirmative duty of inquiry and must learn of evidence favorable to the defense from all the members of the prosecution team, which includes federal, state, and local law enforcement officers and other government officials participating in the investigation and the prosecution of the case. *Kyles*, 514 U.S. at 437; *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992).

Reasoning that FBI 302s could contain mistakes or omissions and that rough notes are the best evidence of witnesses' first impressions, the D.C. Circuit requires that FBI agent rough notes of witness interviews be preserved as material subject to possible disclosure pursuant to *Brady*. *United States v. Harrison*, 524 F.2d 421, 423 (D.C. Cir. 1975). In *United States v. Andrews*, 532 F.3d 900 (D.C. Cir. 2008), the D.C. Circuit cited *Harrison* for the proposition that rough notes from any witness interview "could prove to be *Brady* material." *Id.* at 906. In *Andrews*, prosecutors failed to provide to the defense prior to trial an agent's interview notes that omitted inculpatory statements included in the agent's written report of an interview with the defendant (the prosecution produced the notes during cross examination of the agent). The decision stated that the value of "impeaching a witness" with "discrepancies between the notes and the witness's testimony is not diminished in cases where the notes form the basis of a final report that the prosecution turns over to the defense." *Id.* Furthermore, the prosecutors had "a duty to learn of any favorable evidence known to others acting on the government's behalf in the case," and to provide such evidence to the defense. *Id.*

Although *Brady* does not specifically require the government to take notes during witness interviews, *Brady* and *Giglio* nevertheless require the prosecutor to produce to the defense any material exculpatory and impeaching information. *United States v. Rodriguez*, 496 F.3d 221, 222 (2nd Cir. 2007). In *Rodriquez*, the Second Circuit rejected the defense argument that the government had an obligation to take notes during trial preparation sessions with a cooperating witness. *Id.* at 223. The court explained, however that "[w]hen the Government is in possession of material information that impeaches its witness or exculpates the defendant, it does not avoid the obligation under *Brady/Giglio* to disclose the information by not writing it down." *Id.* at 222. The court noted that, "[t]he obligation to disclose information covered by the *Brady and Giglio* rules exists without regard to whether that information has been recorded in tangible form." *Id.* at 226. Furthermore, the court noted that the government's *Brady* obligations do "not depend on whether the information to be disclosed is admissible as evidence in its present form" and that the prosecution is required to "make the defense aware of material information potentially leading to admissible evidence favorable to the defense." *Id.* at 226 n 4. The court stated that such information must be disclosed "in a manner that gives the defendant a reasonable opportunity either to use the evidence in the trial or to use the information to obtain evidence for use in the trial." *Id.* at 226.

The government does not, however, have an obligation to produce *Brady* material known to the defense or in the possession of the defense. *United States v. Agurs*, 427 U.S. 97, 103 (1976); *United States v. Derr*, 990 F.2d 1330, 1335 (D.C. Cir. 1993). Some circuits have held that the government is not obligated to disclose *Brady* material that is readily available to the diligent defendant. *United*

States v. Rodriguez, 162 F.3d 135, 147 (1st Cir. 1998); *Lugo v. Munoz*, 682 F.2d 7, 9 10 (1st Cir. 1982) (citing *United States v. Soblen*, 301 F.2d 236 (2nd Cir. 1962)). Additionally, the government has no affirmative duty under *Brady* to seek out information that is not in its or its agents' possession. *United States v. Graham*, 484 F.3d 413, 417 (6th Cir. 2007); *United States v. Moore*, 25 F.3d 563, 569 (7th Cir. 1994).

B. The United States Attorneys' Manual[556]

Section 9 5.001, "Issues Related to Trials and Other Court Proceedings," of the United States Attorneys' Manual (USAM) (October 2006) sets forth the Department's policy on the disclosure of exculpatory and impeachment information to the defense in criminal cases. Recognizing that it is often difficult to assess the materiality of evidence before trial, the USAM states: "[P]rosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence." USAM § 9 5.001(B)(1) (citing *Kyles*, 514 U.S. at 439). The manual advises that the policy is designed to ensure "timely disclosure of an appropriate scope of exculpatory and impeachment information" to ensure fair trials and verdicts. USAM § 9 5.001(E).

The USAM provides that it is Department policy for prosecutors to disclose exculpatory and impeachment information beyond that which is constitutionally and legally required. Specifically, the USAM provides that prosecutors are to disclose "information beyond that which is 'material' to guilt as articulated in *Kyles v. Whitley*, 514 U.S. 419 (1995), and *Strickler v. Greene*, 527 U.S. 263, 280 81 (1999)." USAM § 9.5001(C). The USAM notes that a fair trial often includes examination of relevant exculpatory or impeachment information that is probative of the issues before the court, but may not, on its own, make a difference between guilt and innocence. *Id.*[557]

Pursuant to Section 9 5.001(C) (1), a prosecutor must disclose information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes the information will make the difference between conviction and acquittal. Under Section 9 5.001(C)(2), a prosecutor must disclose information that casts substantial doubt upon the accuracy of any evidence,

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[556] The USAM "contains general policies and some procedures relevant to the work of the United States Attorneys' offices and to their relations with the legal divisions, investigative agencies, and other components within the Department of Justice." USAM § 1-1.100.

[557] The USAM notes, however, that the policy does not require the disclosure of information regarding "spurious issues or arguments which serve to divert the trial process from examining the genuine issues." *Id.*

including witness testimony, the prosecutor intends to rely on to prove any element of any crime charged, regardless of whether it is likely to make the difference between conviction and acquittal. Section 9.5.001(C)(3) makes clear that the disclosure requirement of Section 9 5.001(C) applies to "information" regardless of whether that information would constitute admissible evidence.

Section 9.5.001(B)(2) states that, in preparing for trial, federal prosecutors are obligated to "seek all exculpatory and impeachment information from all members of the prosecution team . . . includ[ing] federal, state, and local law enforcement officers and other government officials" participating in the prosecution of the defendant. *Kyles*, 514 U.S. at 437.

C. The Government's Obligations Under Rule 16

Federal Rule of Criminal Procedure 16(a)(1)(E)(I) provides that:

> 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: (i) the item is material to preparing the defense[.]

In *United States v. Marshall*, 132 F.3d 63, 67 68 (D.C. Cir. 1998), the court addressed Rule 16, holding that evidence that is "material" to the preparation of the defendant's defense (and therefore required to be disclosed by the government), includes inculpatory as well as exculpatory evidence.

D. The Government's Obligations Under the Jencks Act And Rule 26.2

The *Jencks* Act, 18 U.S.C. § 3500, and Federal Rule of Criminal Procedure 26.2, require that after a government witness has testified on direct examination, the court shall, on a motion of the defendant, order the government to produce any statement made by the witness, as defined by the Act, in the government's possession, that relates to the witness's testimony. The Jencks Act does not compel the government to produce a statement or report of a government witness until after the witness has testified on direct examination. *United States v. Green*, 151 F.3d 11, 15 16 (8th Cir. 1998). A timely motion for production under the Jencks Act is made after the witness has testified. *Id.* However, at least one court has held that where the government agrees to produce material covered by the Jencks Act before trial, the defendant does not have to move for the material at

the close of each witness's testimony. *United States v. Newman*, 849 F.2d 156, 159 (5th Cir. 1988).

E. The Obligation to Correct False or Misleading Statements

A prosecutor may not knowingly present false evidence or permit the introduction of evidence known to be false. *See, e.g.*, *Giglio v. United States*, 405 U.S. 150, 153 (1972). Nor may the government, "although not soliciting false evidence," knowingly "allow[ ] it to go uncorrected when it appears." *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

F. The Obligation to Follow Court Orders

It is well settled that an attorney is obligated to comply with all court orders. *See, e.g., Young v. United States*, 481 U.S. 787 (1987): *Maness v. Meyers*, 419 U.S. 449, 458 (1975) ("[A]ll orders and judgments of courts must be complied with"); *United States v. United Mine Workers*, 330 U.S. 258, 293 (1947) ("[A]n order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings").

1. Court Orders of September 10, 2008 and September 16, 2008

On September 10, 2008, Judge Sullivan issued an oral order from the bench directing the government to "follow the law" with regard to its *Brady* obligations.[558] Judge Sullivan directed the prosecution to produce all *Brady* material that had not been produced by the following day, September 11, 2009, or to inform the Court why they could not produce it.[559] Although Judge Sullivan considered issuing a written order, he ultimately declined to do so, stating that he was "convinced" that the prosecution team was familiar with the case law of the D.C. District Court and the D.C. Circuit, and therefore understood its obligations.[560] On September 16, 2008, in response to the defense's September 12, 2008 motion to compel the government's production of "all of the *Brady* material within its possession,"[561] and its assertion that the prosecution's summaries of the *Brady* material contained in the FBI 302s did not constitute a "useable format," Judge

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[558] *United States v. Stevens*, Tr. Sept. 10, 2008 (am) (motions hearing) at 60.

[559] *United States v. Stevens*, Tr. Sept. 10, 2008 (am) (motions hearing) at 61.

[560] *United States v. Stevens*, Tr. Sept. 10, 2008 (am) (pretrial conference) at 14-15.

[561] Motion to Compel Emergency Relief and Discovery (Senator Stevens's Pretrial Motion No. 13) at 1(D.D.C., filed Sept. 12, 2008).

Sullivan ordered the government, "to produce the redacted 302s and do it by tomorrow."[562]

a. The September 10, 2008 Order

Judge Sullivan convened a motions hearing on September 10, 2008.[563] Among the motions considered was the September 2, 2008, Defense Motion to Compel Discovery Pursuant to *Brady v. Maryland* and Rule 16. Judge Sullivan queried the parties as to why he should not issue an order directing the government to abide by its *Brady* obligations:

> With respect to *Brady*, why shouldn't the Court just say everyone knows, everyone has read, and everyone is well versed with respect to opinions from this Circuit and opinions from my colleagues, including Judge Friedman in the *Safavian* case and other district court opinions that address *Brady* obligations and responsibilities. Everyone knows what the law is. Why shouldn't the Court just say to the government you know what the law is, follow the law? . . . And abide by your *Brady* obligations period, because there's no question as to what the law what our Court of Appeals has said about *Brady* and the government's responsibility. It's not just exculpatory evidence; we all know that. So the government says we're aware of our *Brady* obligations, and I say fine, then comply with your *Brady* obligations, and why should I do more than that?[564]

In response, defense counsel stated, "Your Honor, first it would be in fact helpful if you could do precisely that."[565] Judge Sullivan replied, "I just did it. I just did it."[566]

In *United States v. Safavian*, 233 F.R.D. 12 (D.D.C. 2005), the court required the government under *Brady* to produce potentially exculpatory or

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[562] *United States v. Stevens*, Tr. Sept. 16, 2008 (pm) at 28, 30.

[563] *United States v. Stevens*, Tr. Sept. 10, 2008 (am) (motions hearing).

[564] *United States v. Stevens*, Tr. Sept. 10, 2008 (am) (motions hearing) at 60.

[565] *United States v. Stevens*, Tr. Sept. 10, 2008 (am) (motions hearing) at 60.

[566] *United States v. Stevens*, Tr. Sept. 10, 2008 (am) (motions hearing) at 60.

favorable evidence without regard to how withholding such evidence might be viewed as affecting the outcome of trial. Specifically, the court in *Safavian* stated:

> Because the definition of 'materiality' discussed in *Strickler* and other appellate cases is a standard articulated in the post conviction context for appellate review, it is not the appropriate one for prosecutors to apply during the pretrial discovery phase. The only question before (and even during) trial is whether the evidence at issue may be 'favorable to the accused'; if so, it must be disclosed without regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial.

Safavian, 233 F.R.D. at 16. The *Safavian* court defined "favorable" as "any information in possession of the government broadly defined to include all Executive Branch agencies that relates to guilt or punishment and that tends to help the defense by either bolstering the defense case or impeaching potential prosecution witnesses." *Id.*[567]

The defense asserted that "the state of production is not in a position where the government can say that they have actually met their *Brady* obligations."[568] Judge Sullivan responded:

> The Court: Then I say produce everything by no later than, and finish that sentence.
>
> Mr. Romain: Tomorrow. Tomorrow.

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[567] Responding to the government's motion for clarification of the discovery and *Brady* requirements set forth in the December 23, 2005 opinion, the *Safavian* court stated further:

> The Court fully understands that its reading of the term "favorable to the accused" under *Brady* and its opinion that the post-trial 'materiality' standard is irrelevant to pretrial and in-trial *Brady* decisions to be made by prosecutors and trial judges are inconsistent with the way some Justice Department lawyers have approached their *Brady* obligations in the past. But there is no need for clarification. There is simply a need for the Justice Department to change the mindset of its trial prosecutors to assure that its approach to *Brady* is broad and open, 'consistent with the special role of the American prosecutor in the search for truth in criminal trials.' The Court's December 23, 2005 Opinion stands as it is.

Safavian, 233 F.R.D. at 206-207 (citations omitted).

[568] *United States v. Stevens*, Tr. Sept. 10, 2008 (am) (motions hearing) at 61.

> The Court: If they can't produce everything that they haven't produced by tomorrow, produce it or let the Court know the reason why they can't produce it.[569]

Judge Sullivan noted that the government had not argued that *Safavian* was "no longer the law in this jurisdiction" in its response to the defense's motion to compel.[570] Nonetheless, Judge Sullivan again asked whether it was necessary that he issue an order:

> Should the Court just issue an order and say everyone recognizes what *Marshall*[571] says, *Safavian* says, *Poindexter*[572] says, and a litany of other cases say, and so the government is directed to immediately to forthwith provide defense counsel any outstanding *Brady* material as defined by those cases and on an ongoing daily basis provide the information as that information becomes in the possession, knowledge, control of the government, should the Court do that?[573]

Government counsel indicated that such an order would not be necessary.[574]

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[569] *United States v. Stevens*, Tr. Sept. 10, 2008 (am) (motions hearing) at 61.

[570] *United States v. Stevens*, Tr. Sept. 10, 2008 (am) (motions hearing) at 63; *see*, *also* Government's Memorandum in Opposition to Defendant's Motion to Compel Discovery (D.D.C., filed Sept. 9, 2008). Although the prosecution cited *Safavian* twice, it did not assert that *Safavian* was not binding law in the *Stevens* case. The prosecution did, however, argue that its *Brady* obligations extended only to evidence that was material. *Id.* at 5, 10.

[571] Cited in *Safavian*, *United States v. Marshall,* 132 F.3d 63, 67-68 (D.C. Cir. 1998) addresses Federal Rule of Criminal Procedure 16 and holds that evidence that is "material" to the preparation of the defendant's defense and therefore required to be disclosed by the government, includes inculpatory as well as exculpatory evidence.

[572] In *United States v. Poindexter*, 727 F. Supp. 1470, 1485 (D.D.C 1989) (Greene, J.), the court held that the government's *Brady* obligations are not modified merely because they happen to arise in the context of witness statements. Therefore, the government has an obligation to produce to the defendant immediately any exculpatory evidence contained in its *Jencks* materials, including exculpatory impeachment material, to the extent the government is aware of such material.

[573] *United States v. Stevens*, Tr. Sept. 10, 2008 (am) (motions hearing) at 73-74.

[574] *United States v. Stevens*, Tr. Sept. 10, 2008 (am) (motions hearing) at 74.

Judge Sullivan concluded the discussion of *Brady* material at the motions hearing by stating: "I'll just issue an order as a general reminder to the government to remind it of its daily ongoing obligation to produce that material."[575] The prosecution stated its understanding of the Judge's order in a later motion in opposition: "The Court has previously instructed the parties to consider *United States v. Safavian*, 233 F.R.D. 12 (D.D.C. 2005), for guidance on interpreting the *Brady* doctrine. The government has taken this decision into account when producing its *Brady* related material."[576]

A few minutes later on September 10, 2008, at a pretrial conference, Judge Sullivan summarized his rulings from the motions hearing and informed the parties that he would not issue a written order concerning the government's *Brady* obligations:

> I think every aspect of the motion to compel has been resolved. You know what, I'm not going to write an order that says 'follow the law.' We all know what the law is. The government I'm convinced that the government in its team of prosecutors is thoroughly familiar with the decisions from our Circuit and from my colleagues on this Court, and that they, in good faith, know that they have an obligation, on an ongoing basis to provide the relevant, appropriate information to defense counsel to

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[575] *United States v. Stevens*, Tr. Sept. 10, 2008 (am) (motions hearing) at 74. We determined that the court did not issue an explicit order directing the government to apply the disclosure standard imposed by the court in *United States v. Safavian,* 233 F.R.D. 12 (D.D.C. 2005) (Friedman, J.), in which the district court ordered the government to produce information "favorable" to the defense without regard to materiality (*i.e.,* whether the evidence would affect the outcome of the case). Rather, in open court on September 10, 2008, Judge Sullivan, in response to a defense request for an order directing the government to produce 302s and other interview reports, expressed his view of the government's *Brady* obligations: "With respect to *Brady*, why shouldn't the Court just say everyone knows, everyone has read, and everyone is well versed with respect to opinions from this Circuit and opinions from my colleagues, including Judge Friedman in the *Safavian* case and other district court opinions that address *Brady* obligations and responsibilities." When the defense asked the court to "do precisely that," the court replied: "I just did it. I just did it." The government never challenged the court's statement of the government's *Brady* obligations or requested clarification of it. To the contrary, when asked if a formal court order was necessary, PIN attorney Sullivan responded that it was not and agreed with the court's characterization that such an order would be "surplus" because the government understood what its obligations were. Nevertheless, we were unable to find that the court issued an unambiguous order that the prosecution specifically follow the *Safavian* case in connection with its *Brady* disclosures. Therefore, we made no findings that any of the prosecutors violated any perceived *Safavian* order.

[576] Government's Memorandum in Opposition to Defendant's Motion to Dismiss or For a New Trial (D.D.C., filed Oct. 2, 2008) at 9.

> be utilized in a usable format as that information becomes known or in the possession of the government, and I accept that. . . . I don't have the time or the interest to draft another order saying, you know, follow *Marshall*, follow *Safavian*, follow *Poindexter*, follow all the opinions that my colleagues have issued.[577]

b. The September 16, 2008 Order

Judge Sullivan addressed the issue of the government's *Brady* obligations on several additional occasions, including on September 12, 2008, and September 16, 2008. On September 12, 2008, at a hearing to discuss the parties' exhibits, Judge Sullivan rejected a request from the defense for production of the FBI 302s.[578] Responding to the defense's argument that the prosecution's summaries of the FBI 302 *Brady* material sent via letter were "not in a format that we can use to cross examine," Judge Sullivan stated, "I don't think I'm persuaded that I should order just a carte blanche production of Form 302s."[579] However, on September 16, 2008, persuaded by the supplemental authority cited by the defense that the format in which the defense received the FBI 302 *Brady* information made the material difficult to use,[580] Judge Sullivan ordered the government to produce the FBI 302s by September 17, 2008.[581] Judge Sullivan stated, "All right. I'm going [] to direct that the government produce the redacted 302s and do it by tomorrow."[582]

2. The October 2, 2008 Orders

On the morning of October 2, 2008, the ninth day of trial, the government admitted that it violated the Court's September 16, 2008 order directing the government to provide redacted FBI 302s to the defense by September 17, 2008.[583] Specifically, on October 1, 2008 at 11:29 p.m., the government sent the defense

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[577] *United States v. Stevens*, Tr. Sept. 10, 2008 (am) (pretrial conference) at 14-15.

[578] *United States v. Stevens,* Tr. Sept. 12, 2008 (pm) at 40.

[579] *United States v. Stevens,* Tr. Sept. 12, 2008 (pm) at 31, 40.

[580] Notice of Supplemental Authority in Support of Motion to Compel Emergency Relief and Discovery (D.D.C., filed Sept. 15, 2008).

[581] *United States v. Stevens*, Tr. Sept. 16, 2008 (pm) at 30.

[582] *United States v. Stevens*, Tr. Sept. 16, 2008 (pm) at 30.

[583] *United States v. Stevens*, Tr. Oct. 2, 2008 (am) at 6, 8, 13.

a cover letter enclosing a redacted FBI 302 and IRS MOI of Bill Allen interviews.[584] At trial the following morning, defense counsel raised to the court that it had just received *Brady* material.[585] Government counsel acknowledged that the information constituted *Brady* material.[586] Government counsel also agreed that it should have been provided to the defense when the court ordered the government to produce the redacted FBI 302s by September 17, 2008.[587] Government counsel asserted that the fact that it was not turned over was not intentional, however, but an error: "[W]e do realize this is a gross error, however, based on the judge's based on the order of the Court to turn over the redacted 302s."[588]

Judge Sullivan then ordered the government to provide the defense with unredacted 302s for each witness in the case as well as the 302s and other documentation providing the basis for Paragraph 17(c) of the government's September 9, 2008 *Brady* letter.

The substance of Judge Sullivan's bench orders concerning the government's *Brady* obligations was revisited during the afternoon session of the trial on October 8, 2008. In addressing the defense assertion that the government had withheld *Brady* material in numerous instances, including as recently as that morning, Judge Sullivan reminded the parties of their prior discussions of *Brady*:

> I've been telling the government what to do from day one. . . . [W]e talked about *Brady* obligations. We talked about the *Marshall* case. We talked about Judge Sentelle, now Chief Judge Sentelle's opinion in *Marshall* and *Safavian* and the other authorities, and there was no question[,] I even asked the question, is anyone unsure of what his or her obligation[s] are in the *Brady* (sic), and the response was, no, and I just assumed and you told me that [the] team went back and reread

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[584] Oct. 1, 2008 letter from PIN Principal Deputy Chief Morris to defense counsel. The letter explained that the 302s had been discovered that evening during a "re-review" of "all memoranda of interviews between federal law enforcement agents and Bill Allen" in connection with Allen's ongoing trial testimony.

[585] *United States v. Stevens*, Tr. Oct. 2, 2008 (am) at 3-4.

[586] *United States v. Stevens*, Tr. Oct. 2, 2008 (am) at 6.

[587] *United States v. Stevens*, Tr. Oct. 2, 2008 (am) at 8.

[588] *United States v. Stevens*, Tr. Oct. 2, 2008 (am) at 10 - 11.

> everything in order to insure it was complying with [its] *Brady* obligations . . . .[589]

Later, during the same discussion, Judge Sullivan indicated that counsel for the parties had represented that they were familiar with the cases that he had cited:

> It was more than just *Safavian.* That was one case that the Court cited, but the Court was focusing on Circuit authority from our circuit, *Marshall*, and other cases, as well, and I went through a whole list of cases one day. . . . And everyone said, oh, yeah, I've read it. I've read it. I know what it says.[590]

G. Timing and Method of Disclosure

Material and favorable information must be disclosed at a time that enables the defendant to make effective use of it at trial. *United States v. Pollack,* 534 F.2d 964, 973 (D.C. Cir. 1976); *United States v. Elmore*, 423 F.2d 775 (4th Cir. 1970) (disclosure to be made at a time when disclosure would be of value to the accused). Some courts hold that the government is required to disclose exculpatory evidence upon discovery. *United States v. Blackley*, 986 F. Supp. 600, 601 (D.D.C.1997) ("The government has an ongoing burden to provide material exculpatory evidence whenever it discovers that it has such information in its possession"). Furthermore, although the Jencks Act, 18 U.S.C. § 3500, requires the government to disclose statements made by a government witness once the witness has testified, the government has an obligation to disclose such statements before trial if the statements also constitute *Brady* material. *United States v. Tarantino*, 846 F.2d 1384, 1414 n.11 (D.C. Cir. 1988).

Section 9 5.001(D) of the USAM provides that, in most cases, disclosure will be made in advance of trial. It provides further that exculpatory information "must be disclosed reasonably promptly after it is discovered," and that impeachment information "will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently." USAM § 9 5.001(D)(1)and (D)(2).

The USAM does not prescribe the method for disclosing *Brady* material. *See generally* USAM § 9 5.001. Although the government commonly discloses the actual documents, the U.S. District Court in *Blackley* ruled that the government

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589 *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 69.

590 *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 72.

may satisfy its *Brady* obligation by informing the defendant of the substance of the *Brady* evidence by means of a summary. *Blackley*, 986 F. Supp. At 605 605.

In *Blackley*, the Independent Counsel provided the defense a letter containing synopses of "favorable testimony" that it expected certain individuals would give. *Id.* at 604. The defense argued that the government was required to produce transcripts of the grand jury testimony, as well as interview notes and memoranda. *Id.* The court held that the government meets its *Brady* obligations by disclosing the essential facts and nature of the exculpatory evidence as long as the defense has the present opportunity and ability to develop the evidence for trial. *Id.* at 604 05 (citing *United States v. Grossman*, 843 F.2d 78 (2nd Cir. 1988)). In reaching its conclusion, the *Blackley* court cited the rationale articulated by the Second Circuit in *Grossman*:

> The rationale underpinning *Brady* is to "'assure that the defendant will not be denied access to exculpatory information *only known to the government.*'" Once the letter was received, the defense at that point "knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence."

Id. (internal citations omitted). However, it is not sufficient simply to inform the defendant that a certain witness may have exculpatory information without disclosing the actual statement when the "defendant probably could not elicit the potentially exculpatory information in an interview." *United States v. Trie*, 21 F. Supp. 2d 7, 26 (D.D.C. 1998) (Friedman, J.).

H. Rules of Professional Conduct

A determination of the rules of professional conduct that apply to the conduct at issue is governed by Department of Justice regulations set forth at 28 C.F.R. Part 77, Ethical Standards for the Government, which implement 28 U.S.C. § 530B. The regulations provide that government attorneys shall, in all cases, conform to the rules of ethical conduct of the court before which a particular case is pending. Because the case at issue was pending before the U.S. District Court for the District of Columbia, we first reviewed that court's Local Rules. Those Rules incorporate the District of Columbia Rules of Professional Conduct, adopted by the District of Columbia Court of Appeals. *See* Rule 83.15(a) of the Local Rules of the District Court for the District of Columbia. The D.C. Rules of Professional Conduct choice of law provision, Rule 8.5(b)(1), states that "[f]or conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise." Based on these authorities, we concluded that the

D.C. Rules of Professional Conduct governed the conduct of the attorneys in the *Stevens* case.

Because the attorneys in this matter were bar members in other jurisdictions (Welch Illinois; Morris, Marsh, and Sullivan New York;[591] Bottini Alaska; Goeke Washington), we examined the bar rules in place at the time of the trial for those jurisdictions as well. Illinois RPC Rule 8.5(b)(1), New York DR Rule1 105(b)(1)), Alaska RPC 8.5(b)(1), and Washington RPC 8.5(b)(1) have language similar to DC RPC Rule 8.5(b)(1) deferring to the rules of the jurisdiction where the alleged misconduct occurred. We note that the Illinois and New York choice of law rules apply the rules of the jurisdiction where the proceeding occurred, if the attorney was admitted to that jurisdiction to practice "generally or for the purposes of that proceeding." The Alaska and Washington choice of law provisions are identical to the DC Rules of Professional Conduct and less specific, only requiring that the conduct at question be "in connection with a matter pending before a tribunal." Therefore, no Illinois, New York, Alaska, or Washington substantive RPC applied in this case.

1. Candor to the Tribunal/General Duty of Candor

a. Rule 3.3(a)(1) (False Statements)

Under District of Columbia Rules of Professional Conduct Rule 3.3(a)(1), "a lawyer shall not knowingly [m]ake a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer, unless correction would require disclosure of information that is prohibited by Rule 1.6."[592] In addition, all Department of Justice attorneys have a general duty of candor to the court. That duty emanates from several sources: case law, judicial expectations, and bar rules. The ethical obligation of a Department attorney to be honest and candid with a court is plain. It includes the obligation to affirmatively correct even innocently created misunderstandings of which an attorney becomes aware. In some circumstances, silence can be tantamount to a misrepresentation. *See generally* 1 G. Hazard & W. Hodes, The Law of Lawyering, § 3.3:101 (2d).

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[591] Because the events in this matter took place prior to an April 2009 revision of the New York Disciplinary Rules (DR), we assess the attorneys' conduct under the DRs in place before the April 2009 revision.

[592] Rule 1.6 provides that, except in certain limited circumstances, a lawyer shall not knowingly reveal client confidences or secrets.

b. Rule 3.3(a)(4) (False Evidence)

Rule 3.3(a)(4) provides, "A lawyer shall not knowingly . . . [o]ffer evidence that the lawyer knows to be false." The only exception is when the evidence that is known to be false is the testimony of the lawyer's client who is the accused in a criminal case. Rule 3.3(a)(4) further provides, "[a] lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false." Even in the case of a testifying criminal defendant, the lawyer may not examine the witness so as to elicit the false testimony and may not argue the probative value of the false testimony.

c. Rule 4.1(a) (Truthfulness in Statements to Others)

Rule 4.1(a) of the District of Columbia Rules of Professional conduct states: "In the course of representing a client, a lawyer shall not knowingly . . . [m]ake a false statement of material fact or law to a third person." The comments to the rule provide that lawyers are required to be truthful when dealing with others on a client's behalf and that partially true but misleading statements or omissions that are the equivalent of affirmative false statements are misrepresentations. The comments define "third person" as any person or entity other than the lawyer's client.

2. Fairness to the Opposing Party

Rule 3.4 of the District of Columbia Rules of Professional Conduct addresses an attorney's duty of fairness to the opposing party and opposing counsel.

a. Rule 3.4(a) (Concealing Evidence)

Rule 3.4(a) provides, in pertinent part:

> A lawyer shall not . . . [o]bstruct another party's access to evidence or alter, destroy, or conceal evidence, or counsel or assist another person to do so, if the lawyer reasonably should know that the evidence is or may be the subject of discovery or subpoena in any pending or imminent proceeding.

b. Rule 3.4(b) (Falsifying Evidence)

Rule 3.4(b) provides, "[a] lawyer shall not . . . [f]alsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law."

c. Rule 3.4(d) (Failure to Make Diligent Efforts to Comply with Legally Proper Discovery Requests)

Rule 3.4 (d) states: "A lawyer shall not . . . [i]n pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party."

d. Rule 3.4(f) (Requesting That a Person Refrain From Giving Information to Another Party)

Additionally, under Rule 3.4(f), "[a] lawyer shall not . . . [r]equest a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) The person is a relative or an employee or other agent of a client; and (2) The lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information."

3. Special Responsibilities of a Prosecutor

The District of Columbia Rules of Professional Conduct include special responsibilities for prosecutors. Rule 3.8(e) provides that the prosecutor in a criminal case shall not:

> Intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense, or in connection with sentencing, intentionally fail to disclose to the defense upon request any unprivileged mitigating information known to the prosecutor and not reasonably available to the defense, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

The comment to Rule 3.8 elaborates: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries

with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[593]

4. Duty to Obey an Order of the Court

a. Rule 3.4(c) (Knowingly Disobeying an Obligation Under Rules of the Tribunal)

Rule 3.4(c) of the District of Columbia Rules of Professional Conduct provides that a lawyer shall not "[k]nowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists."

[593] Courts cite the same principle with respect to prosecutors. *See*, *e.g.*, *Berger v. United States*, 295 U.S. 78, 88 (1935) ("[T]he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all: and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice be done."). *See also United States v. Quesada Bonilla*, 952 F.2d 597, 602 (1st Cir. 1991) (citing *Berger*).

CHAPTER FOUR
THE TORRICELLI NOTE

I. INTRODUCTION AND SUMMARY

The Torricelli Note is an October 6, 2002 handwritten note from Senator Stevens to Bill Allen that was admitted in evidence at the *Stevens* trial (Exhibit 495). Allen's testimony about the Torricelli Note became an important piece of evidence contributing to the ultimate dismissal of the charges against Senator Stevens. The Torricelli Note reads (in part):

> Thanks for all the work on the chalet. You owe me a bill remember Torricelli, my friend. Friendship is one thing. Compliance with these ethics rules entirely different. I asked Bob P[ersons] to talk to you about this so don't get P.O'd at him it's [sic] just has to be done right.

The note referred to former New Jersey Senator Robert Torricelli, who had been admonished by the Senate Ethics Committee for accepting gifts from a wealthy fundraiser. The *Stevens* defense team provided the note (along with 45 boxes of documents) to prosecutors prior to indictment to demonstrate that the Senator intended to pay for the services he received.

At trial, the government presented the note to Bill Allen, who testified that when he spoke to "Bob P" (Bob Persons) about the Senator's note requesting a bill, Persons told Allen, "[D]on't worry about getting a bill . . . Ted is just covering his ass." However, prosecutors' notes uncovered in March 2009, long after the trial, reflected that when prosecutors (Marsh, Sullivan, Bottini, and Goeke, along with SA Kepner) asked Allen about the Torricelli Note on April 15, 2008, Allen said he received the note, but he did not recall a conversation with Bob Persons regarding Senator Stevens's request for a bill. The notes also indicated that Allen estimated that the fair market value of VECO's work on Girdwood was only $80,000, rather than the $188,000 figure claimed at trial by the prosecution based on VECO's accounting records. The prosecutors' failure to disclose the exculpatory notes was a factor contributing to the government's decision to move to dismiss the case in April 2009.

Based on the results of our investigation, we concluded that the government violated its obligations, under constitutional *Brady* and *Giglio* principles and Department of Justice policy (USAM § 9 5.001), by failing to disclose Allen's April 15, 2008 statements that he did not recall discussing the Torricelli Note with Persons, and that the value of VECO's work on Girdwood was $80,000 $100,000.

Neither statement by Allen was disclosed to the defense before or during the *Stevens* trial. We concluded further that the government violated its disclosure obligations with respect to information contained in an FBI 302 of a February 28, 2007 interview of Bill Allen (the "Pluta 302") and an IRS MOI of an Allen interview on December 11 12, 2006.

II. FACTUAL BACKGROUND

On April 8, 2008, the *Stevens* defense team provided five boxes of documents to the government, including two handwritten notes from Senator Stevens to Bill Allen stamped with Bates numbers 34 and 35.[594] The notes read as follows:

> Bates number 35:
>
> 10/6/02
> Dear Bill
> When I think of the many ways in which you make my life easier and more enjoyable I lose count!
> Thanks for all the work on the chalet. You owe me a bill remember Torricelli, my friend. Friendship is one thing. Compliance with these ethics rules entirely different. I asked Bob P[ersons] to talk to you about this so don't get P.O.'d at him it's [sic] just has to be done right.
> Hope to see you soon.
> My best,
> Ted

This became known as the "Torricelli Note."

> Bates number 34:
> 11/8/02
> Dear Bill:
> Many thanks for all you've done to make our lives easier and our home more enjoyable. The Christmas lights top it all our 60 foot tree lighted to the highest point! (Don't forget we need a bill for what's been done out at the chalet). I appreciate your willingness to "keep me company" and have enjoyed our conversations. Above

[594] Over the ensuing weeks, the defense team provided the government with 45 total boxes of documents.

> all, my thanks for all your efforts to help raise funds for our candidates. We got 8 out of 10 not bad at all! And, plans are underway on both the gas pipeline and ANWR. As soon as things settle down I'll call you to brief you on our plans. Hope to see you again soon. You are a great and understanding friend.
> My best
> Ted

At the time, the *Stevens* prosecution team also had in its possession an October 7, 2002 email from Bob Persons to Senator Stevens in which Persons stated that he "[s]poke to Bill about your concerns and all is well."[595] The full text of the email is as follows:

> Dear Ted, went by the house Friday and all is well, the downstairs deck w/cover is in place, has been painted and looks great. They left the lights on and I went to the third floor to discover a new wall fan in your bedroom which creates some circulation plus the windows are being covered with the tinting material that [Catherine Stevens] requested. We have a system for the de icer that can't be mistaken and the sequoi[a] has not broken ground. Those apple trees are behaving the same as last year and I'm concerned about them getting hit with an early snowfall before the leaves fall. I'll ask an expert tomorrow. The front is completely tented while the deck dries. Spoke to Bill about your concerns and all is well. We can't find a likely colt at the [redacted] sale and [redacted] is looking elsewhere. [redacted] is the only person who has not sent his money. [M]y best, [B]ob.[596]

The *Stevens* prosecution team highlighted the phrase "[s]poke to Bill about your concerns and all is well" in its PowerPoint presentation regarding the case against

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[595] Oct. 7, 2002 1:28am email from Bob Persons to Senator Stevens (attached as TS00000066 to Apr. 9, 2008 email from PIN attorney Sullivan to AUSA Goeke, AUSA Bottini, PIN Attorney Marsh, SA Kepner, and Kerry Sparks).

[596] The PowerPoint presentation included the entire email and emphasized five quotes that appear to show that Stevens was kept apprised of the extent of the renovations: (1) "the downstairs deck w/cover is in place, has been painted and looks great"; (2) "I went to the third floor to discover a new wall fan in your bedroom"; (3) "the windows are being covered with the tinting material that CAS requested"; (4) "We have a system for the de-icer that can't be mistaken"; and (5) "the front is completely tented while the deck dries". The presentation also addressed: "Spoke to Bill about your concerns and all is well."

Senator Stevens. The email could be read to show that, just one day after Stevens sent Allen the Torricelli Note, Persons actually spoke to Allen at Stevens's request.

Immediately upon receipt of the documents, the prosecution team identified the two handwritten letters as problematic for the case against Senator Stevens because they provided Stevens with the potential defense that he requested that Bill Allen send Stevens an invoice for the renovations to the Girdwood residence. Prior to discovery of the two letters, the March 3, 2008 version of the prosecution memorandum stated that "on at least one occasion," Stevens made what the prosecutors believed was a pretextual request for an invoice.[597] PIN Chief Welch recalled speaking to Morris, Marsh, Sullivan, and the Criminal Division Front Office about the significance of the notes shortly after they were provided by the defense, telling them that he believed that the notes were harmful to Stevens because "he's essentially admitting that he had liabilities."[598] In an April 8, 2008 email to her supervisor, SSA Colton Seale, SA Kepner stated:

> Bill Welch did not seem to be too upset about the notes that were found related to Stevens asking Bill for invoices. I got ahold of Bob Bundy and Bill Allen. We will debrief Bill on Tuesday regarding the new documents received from Stevens. Too early to tell if this issue will be fatal or not. I'm worried that this may give DOJ an out if they were looking for one.[599]

Later the same day, AUSA Bottini wrote to the prosecution team:

> [SA Kepner] just called in and left a message she heard back from Bundy [Allen's attorney] and he is back in town this coming Sunday night. She did not say how much she gave him in the way of a heads up concerning why we need to talk to Allen now. Bill [Allen] is flying up

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[597] *See* Mar. 3, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) at 58.

[598] Welch (Schuelke) Tr. Jan. 10, 2010 at 42. Welch recalled talking to Principal Deputy AAG Barry Sabin and AAG Alice Fisher in the Front Office. Welch (Schuelke) Tr. Jan. 10, 2010 at 42-43.

[599] Apr. 8, 2008 5:49pm email from SA Kepner to SSA Colton Seale. SA Kepner stated that she believed the note was not "insurmountable," but she feared that the *Stevens* case would be "tanked for political reasons" by DOJ management. Kepner elaborated that she held such a belief due to the "lack of direction that we were getting from higher-level DOJ officials" and that the DOJ management had a working draft of the *Stevens* search warrant affidavit for "almost a year" before giving authorization for the search. Kepner (Schuelke) Tr. Aug. 24, 2009 at 259-261.

> on Monday. Thus we will set up a debrief of Bill regarding the recent revelations (and be able to shove documents in front of him) as of next Tuesday (4/15).[600]

Three days later, on April 11, 2008, PIN attorney Marsh forwarded to PIN Chief Welch and Principal Deputy Chief Morris a memorandum "in response to the questions raised last week by [Principal Deputy AAG] Barry [Sabin] and [Deputy AAG Jack] Keeney."[601]

The April 11, 2008 memorandum attached the Torricelli Note and the November 8, 2002 handwritten note, and addressed each note in a section titled "Additional Correspondence Between STEVENS and Allen from 2000 2002."[602]

> * On October 6, 2002 and November 18, 2002,[603] STEVENS sent Allen two handwritten notes in which STEVENS requested that Allen provide STEVENS with an invoice for the work that was being done at the time by VECO at the Girdwood residence. In the first of these, STEVENS referenced the problems that befell former United States Senator Robert Torricelli, and told Allen that "friendship is one thing compliance with these ethics rules entirely different." We note that in July 2002, Senator Torricelli was publically admonished by the United States Senate for accepting numerous gifts from a wealthy fundraiser, and that on September 30, 2002 one week before STEVENS wrote the note to Allen Senator Torricelli withdrew from his Senate re election

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[600] Apr. 8, 2008 7:46pm email from AUSA Bottini to PIN attorney Marsh, AUSA Goeke, and PIN attorney Sullivan.

[601] Apr. 11, 2008 3:57pm email from PIN attorney Marsh to PIN Chief Welch, PIN Principal Deputy Chief Morris, PIN attorney Sullivan, AUSA Bottini, and AUSA Goeke.

[602] Apr. 11, 2008 memorandum from PIN Chief Welch and PIN Principal Deputy Chief Morris to AAG Fisher, "Additional Information Concerning the Prosecution of Current United States Senator Ted Stevens" at 13.

[603] The "November 18, 2002" date referenced in the memorandum appears to be a typographical error. The correct date of the handwritten letter referenced in the memorandum and attached thereto is November 8, 2002.

> race. Copies of these two notes are annexed hereto at Exhibit B.[604]

The memorandum stated that the notes were "both helpful and harmful" to Senator Stevens.[605] They were harmful because they precluded him from arguing that "he believed the fall 2002 work was incorporated into Christensen Builders' spring 2001 bills" and they "will likely preclude STEVENS from arguing that he simply forgot to pay Allen for the work."[606] The memorandum observed that the notes were helpful to Senator Stevens's argument that "he wanted to pay for the work all along, and the failure to pay for it was the result of a miscommunication between STEVENS and Catherine Stevens" (*i.e.*, Stevens thought his wife was handing all the bills)."[607] Although the prosecution team recognized that the notes could allow Stevens "to portray himself as someone who truly wanted to comply with Senate ethics rules," they also showed that Stevens was "knowledgeable about what he was getting and from whom he was receiving it."

The April 11, 2008 memorandum also identified two issues regarding the authenticity of the Torricelli Note: (1) it did not appear in Stevens's computer correspondence tracking system; and (2) it did not contain a stamp as regularly used for Stevens's letters on personal stationery.[608] Although the prosecution team concluded that it was "somewhat unlikely" that Stevens fabricated the note, they nonetheless scheduled a meeting with Stevens's archivist "to explore the

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[604] Apr. 11, 2008 memorandum from PIN Chief Welch and PIN Principal Deputy Chief Morris to AAG Fisher, "Additional Information Concerning the Prosecution of Current United States Senator Ted Stevens" at 14-15.

[605] Apr. 11, 2008 memorandum from PIN Chief Welch and PIN Principal Deputy Chief Morris to AAG Fisher, "Additional Information Concerning the Prosecution of Current United States Senator Ted Stevens" at 15.

[606] Apr. 11, 2008 memorandum from PIN Chief Welch and PIN Principal Deputy Chief Morris to AAG Fisher, "Additional Information Concerning the Prosecution of Current United States Senator Ted Stevens" at 15.

[607] Apr. 11, 2008 memorandum from PIN Chief Welch and PIN Principal Deputy Chief Morris to AAG Fisher, "Additional Information Concerning the Prosecution of Current United States Senator Ted Stevens" at 15.

[608] Apr. 11, 2008 memorandum from PIN Chief Welch and PIN Principal Deputy Chief Morris to AAG Fisher, "Additional Information Concerning the Prosecution of Current United States Senator Ted Stevens" at 15.

manner in which this document was located and produced."[609] Ultimately, the prosecution team did not question the authenticity of the document at trial.

The prosecution team attached a chart to the April 11, 2008 memorandum to AAG Alice Fisher describing "attacks" and "responses" to the Torricelli Note and November 8, 2002 note as follows:

> Attacks
> TS did not pay because he never received a bill. Here, [the *Stevens* defense team] focuses on the fact that no bills were sent by VECO to TS, and as such he could never repay Allen the amount VECO incurred for the renovation. Supported by fact that in early 2001 TS asked Allen to send TS an invoice for the work. Supported by two fall 2002 notes in which TS asked Allen for an invoice for the fall 2002 work.[610]
>
> Responses
> This will require TS to admit that he knew VECO did the work and that he knew that he never paid VECO for the work done. Absence of invoices irrelevant to financial disclosure forms, because TS could have estimated the value (which TS has done at least once in the past). Also inconsistent with TS' continued use of VECO's services in 2002 and beyond i.e., if TS really wanted an invoice and couldn't get one, why continue to ask the same individuals to do more work?[611]

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[609] Apr. 11, 2008 memorandum from PIN Chief Welch and PIN Principal Deputy Chief Morris to AAG Fisher, "Additional Information Concerning the Prosecution of Current United States Senator Ted Stevens" at 15.

[610] Apr. 11, 2008 memorandum from PIN Chief Welch and PIN Principal Deputy Chief Morris to AAG Fisher, "Additional Information Concerning the Prosecution of Current United States Senator Ted Stevens" attached chart at 1. (Emphasis in original).

[611] Apr. 11, 2008 memorandum from PIN Chief Welch and PIN Principal Deputy Chief Morris to AAG Fisher, "Additional Information Concerning the Prosecution of Current United States Senator Ted Stevens" attached chart at 1. (Emphasis in original).

On April 14, 2008, PIN attorney Marsh emailed the prosecution team "some documents to show B[ill] A[llen]."[612] Along with other documents, Marsh attached the Torricelli Note and the November 8, 2002 handwritten note to the email.[613]

On April 15, 2008, AUSA Bottini, AUSA Goeke, and SA Kepner met with Bill Allen and his attorney, Robert Bundy, in Anchorage, Alaska.[614] PIN attorneys Marsh and Sullivan participated by telephone from Washington, D.C.[615] The interview consisted of the attorneys showing Allen documents provided by Stevens's counsel and discussing the documents with him.[616] Robert Bundy, Allen's attorney, noted the purpose for the meeting as "re: documents from [Stevens]."[617] SA Kepner later stated, "[T]ypically I ran the interview sessions. This was kind of a different situation . . . [because] it was being run by the attorneys."[618] Bottini stated that Marsh was "doing the questioning" and Kepner was showing Allen the documents.[619]

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[612] Apr. 14, 2008 4:25pm email from PIN attorney Marsh to AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, and SA Kepner.

[613] Apr. 14, 2008 4:25pm email from PIN attorney Marsh to AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, and SA Kepner.

[614] AUSA Bottini presented Allen as a witness at trial. Bottini later stated that at the time of the April 15, 2008 meeting, he had no assigned role regarding Allen and was not assigned Allen as a witness until July 29, 2008. *See* Bottini (Schuelke) Tr. Dec. 17, 2009 at 805-806. Bottini stated that he had not had contact with Allen since he had presented Allen as a witness in the *Kohring* trial. Bottini (Schuelke) Tr. Dec. 17, 2009 at 355-356. Bottini acknowledged that Allen was most comfortable with him and he thought that he "was probably going to wind up with Bill Allen" as his witness. Bottini OPR Tr. Mar. 10, 2010 at 286-288.

[615] Apr. 15, 2008 AUSA Bottini notes of interview with Bill Allen CRM013688.

[616] Bottini told OPR that the purpose of the meeting was to "explore with Bill Allen a bunch of that email traffic" regarding potential official acts charges. Bottini OPR Tr. Mar. 10, 2010 at 331-333.

[617] Apr. 15, 2008 notes of Robert Bundy at RB-AWP-OPR 320.

[618] Kepner (Schuelke) Tr. Aug. 24, 2009 at 274.

[619] Bottini (Schuelke) Tr. Dec. 17, 2009 at 483-484. Despite a diligent search, OPR could not locate any notes of the interviews belonging to Marsh. Marsh stated that his note taking was "pretty erratic," he could not recall whether he took notes at the April 15, 2008 interview, and that he looked though all his files and could not locate any notes for the interview. Marsh (Schuelke) Tr. Feb. 2, 2010 at 20, 365. Marsh stated that he did not recall discussing the Torricelli Note with Allen, that "he probably didn't pay as much attention as he should have" during phone interviews, and that he would often "multi-task and do other things" during phone interviews. Marsh (Schuelke) Tr. Feb. 2, 2010 at 361-362. Marsh told OPR that he was likely doing other things during the Allen interview and he did not remember leading the interview. Marsh OPR Tr. Mar. 26, 2010 at 558. Bottini stated that Marsh was conducting the interview because Bottini and

Although SA Kepner was present for, and took notes at, the April 15, 2008 Allen interview, she did not memorialize the interview in an FBI 302. In her interview with Mr. Schuelke, SA Kepner said she could not locate any FBI formal documentation of the interview and was unsure if she ever wrote a report.[620] OPR searched FBI records and recovered no report of the interview. Kepner also stated that at no point did any of the prosecutors advise her not to write a report of the meeting.[621] All the government attorneys interviewed by OPR denied instructing Kepner not to create an FBI 302. SA Kepner could not provide OPR with any reason that she would not have created an FBI 302 of the interview.[622] In her OPR interview on February 18, 2010, Kepner acknowledged that "I should have done a 302, you know, for those," and explained that writing the report "fell through the cracks."[623] On March 23, 2009, after the *Stevens* trial but before the case was dismissed, FBI CDC Eric Gonzalez wrote an FBI 302 regarding SA Kepner's reasoning for not drafting an FBI 302 for the April 15, 2008 interview of Allen:

> At approximately 12:00pm, SA Mary Beth Kepner met with CDC Gonzalez and informed him that her Outlook calendar reflects a meeting with Bill Allen on the date of 4/15/2008. However, she believes that no F[BI] 302 was ever prepared because it was her recollection that the debriefing of Bill Allen did not go well. Specifically, she and AUSA Joseph Bottini were having a difficult time keeping Allen focused on the subject matter of the debriefing.[624]

Goeke would not have had time to review all the interview documents Marsh had just emailed them earlier that same morning. Bottini OPR Tr. Mar. 10, 2010 at 284-285. Bill Allen told OPR that he recalled that Bottini and Kepner asked the questions during the interview. June 12, 2010 FBI 302 of Bill Allen at 5. In his comments on our draft report, Sullivan argued that the Torricelli Note was "not of particular importance to him" as he attended only a portion of the April 15 interview for purposes of the official acts documents, and he did not attend the April 18 follow-up interview. Jan. 31, 2011 letter from Brian M. Heberlig to OPR at 14-15.

[620] Kepner (Schuelke) Tr. Aug. 24, 2009 at 278.

[621] Kepner (Schuelke) Tr. Aug. 24, 2009 at 279, 290.

[622] Kepner OPR Tr. Oct. 14, 2009 at 640-641.

[623] Kepner OPR Tr. Feb. 18, 2010 at 311.

[624] Mar. 23, 2009 FBI 302 of CDC Eric Gonzalez. SA Kepner told OPR she was mistaken in her statement to CDC Gonzalez because she confused the April 15, 2008 Allen interview with an April 18, 2008 interview during which Allen became distracted after discussing Dave Anderson and ended the interview early. Kepner OPR Tr. Oct. 14, 2009 at 640-641.

OPR located SA Kepner's April 15, 2008 notes on January 14, 2010, among 89 boxes of documents provided to OPR by the Anchorage FBI. The contents of the particular box where the records were located had been removed from the Polar Pen "war room" in the FBI Anchorage Division office and placed in a box that was stored in a closet in the FBI's Anchorage office. OPR located SA Kepner's hand written notes of the April 15, 2008 Bill Allen interview in a box of unrelated documents. Prior to OPR's discovery of the notes, SA Kepner stated in a post trial affidavit that Allen was not asked about the Torricelli Note until "two or three weeks prior to his trial testimony."[625]

In a March 2009 FBI interview, AUSA Bottini told investigators that Allen was not asked about the Torricelli Note until "August of 2008," and that he had "no specific recollection about putting the Torricelli note in front of Allen" in a spring meeting to review documents. He added that "if they had the note in their possession at the time he likely would have displayed it and questioned Allen."[626] Bottini later recalled that Allen was shown the note during the April 15, 2008 meeting, and that his prior statement in the 302 was the product of an unrefreshed recollection.[627] Bottini stated that he initially misplaced his notes for the April 15 and 18, 2008 meetings with Allen because he put them in a folder labeled "Documents to show BA on April 15th" rather than labeling the folder as notes of Allen interviews from April 15 and April 18.[628] In a March 2009 FBI interview, PIN attorney Marsh said that he "was unsure if they had shown ALLEN the TORRICELLI note previously."[629]

Contemporaneous notes taken by AUSA Bottini, AUSA Goeke, and PIN attorney Sullivan, SA Kepner, and Allen's attorney Robert Bundy indicated that prosecutors showed Allen the Torricelli Note (Bates number 35) and that Allen said he did not recall Bob Persons talking to him about creating an invoice for Stevens:

> Notes of AUSA Bottini (22 pages of notes, 4 pages re: Torricelli Note)

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[625] Feb. 20, 2009 Affidavit of Mary Beth Kepner at 13.

[626] Mar. 20, 2009 FBI 302 of Joseph Bottini at 1, 3-5.

[627] Bottini (Schuelke) Tr. Dec. 17, 2009 at 350.

[628] Bottini (Schuelke) Tr. Dec. 17, 2009 at 571. Bottini assisted OPR in locating his notes from the April 15 and 18 meetings. Bottini searched for his notes and tracked down five boxes of his and Goeke's trial documents that had been misplaced in the PIN offices in Washington, D.C. PIN sent the boxes to the Alaska USAO, where they were inventoried by FBI SA Ryan Zarfoss. *Id.* at 583-587.

[629] Mar. 18-19, 2009 FBI 302 of Nicholas Marsh at 8.

Document No. 35 10/6/02

Handwritten note from [Stevens] → [Allen]
Sent to home address
Recall Bob P[ersons] talking to you about this?
[Allen]: No
"Remember Torricelli"
Recall getting this?
[Allen]: "Probably did"
Don't recall ever doing up a bill for [Stevens].
Never got any invoices because of Rocky and Dave
They were screwed up, etc.
Don't think that they made up any invoice
→Never gave [Stevens] invoice, etc.
Didn't want [Stevens] to pay for this
Just ignore the note?
Didn't discuss this with [Stevens]!
Only recall talking about the boiler with [Stevens] later when that went out.
If he had pressed me on this
I would have given him an <u>invoice</u>!
Would have been hard, but would have done it.
Would not have dummed something up.
Would have been difficult to figure expenses.
Dave Anderson never did any accounting, etc
Dave & Rocky screwed this up
cost so much $ because of their incompetence, being drunk
not efficient
Even if they had done it right
it would have cost about 80K
cost something like 250K!?
Rocky/Dave
Screw offs not there to direct the VECO employees
[Allen] believes that this added to the cost, etc
<u>Re</u>: John Hess time billing, etc.
Recall [Stevens] asking about that?
Bill for he (Hess') time
Don't recall that. <u>No</u> (Emphasis in original.)

Bottini later stated that he recalled Allen becoming "extremely angry right after looking at" the Torricelli Note, complaining that Dave Anderson and Rocky Williams "screwed everything up" because there was "no paperwork, there were

no invoices." Bottini stated that he stopped taking notes and tried to calm Allen down and "get him back on track." Bottini stated that Allen "hates [Anderson] with a passion" and that "[o]nce you get Bill Allen onto the thread of Dave Anderson, watch out."[630]

> Notes of PIN attorney Sullivan (4 pages of notes, 1 page of notes re: Torricelli Note)
>
> WC35
> 10/6/02 notes from [Stevens] to [Allen]
> [Allen] recalls receiving note from [Stevens]. Doesn't recall talking to [Bob Persons] re: giving bill to [Stevens]
> [Allen] not saying it didn't happen just doesn't recall. Doesn't recall having VECO put a bill together
> [Allen] didn't want [Stevens] to have to pay for it. Doesn't recall talking to [Stevens] re: this note. Doesn't recall [redacted] walking on deck @ this point.
> [Allen] would not have put together a false invoice. To prepare a fair estimate [Allen] would have had to consult w/Dave Anderson
> [Dave Anderson]/[Rocky Williams] always drunk. Screwed the project up; allowed the workers to waste time; sit around;
> inefficient. Didn't supervise well.
> *But, if they had done the work efficiently
> then cost FMV = $80,000 (estimate)
> DS re: whether other employee asked/told [Allen] that [Stevens] wanted a bill. [Allen] would not have wanted any VECO employee to send out an invoice to [Stevens] w/o [Allen] first reviewing it.

Sullivan later stated that he did not review his notes prior to trial or when gathering *Brady* material, and that he was not asked to review his own notes.[631] Sullivan also stated that in August 2008, the prosecution team met with FBI agents in Alaska to direct them to review their own notes for inconsistencies with the corresponding FBI 302s.[632] PIN Principal Deputy Chief Morris stated that she did not ask any of the prosecutors to review their notes for *Brady* material and

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[630] Bottini (Schuelke) Tr. Dec. 17, 2009 at 447, 486.

[631] Sullivan (Schuelke) Tr. Jan. 8, 2010 at 157.

[632] Sullivan (Schuelke) Tr. Jan. 8, 2010 at 155-156.

such an action would never have crossed her mind.[633] Morris also stated that she did not instruct the prosecutors to review agent notes for *Brady* material.[634]

> Notes of AUSA Goeke (5 pages of notes, 1 page re: Torricelli Note)
>
> 000035
> note to Bill from [Stevens]
> references Torricelli and [Stevens] needing a bill for the work
> [Allen] does not recall Bob P[ersons] talking to him about a bill for [Stevens]
> If [Stevens] had pressed would have created an invoice
> Rocky [Williams] and Dave [Anderson] screwed this up b/c always drunk

Goeke stated that he never reviewed his notes for *Brady* material because he "wasn't asked to" and he "didn't believe that [he] had participated in any substantive pretrial preparation interview of a witness that didn't have a 302 or an MOI that would go along with it."[635] Goeke later acknowledged that the substance of his notes should have been disclosed to the defense.[636]

> Notes of SA Kepner (3 pages of notes, 1/4 re: Torricelli Note)
>
> 35 10/6/02 Handwritten note from T[ed] S[tevens] to B[ill] A[llen]. Probably got the note. Doesn't recall B[ob] P[ersons] talking to him about an invoice. BA didn't have any invoices. Never asked anyone to produce. Would have given T[ed] S[tevens] an invoice if he pushed.
>
> John Hess didn't talk to [Allen] about a bill for the work on [Stevens] house.
> Doesn't recall talking to [Dave Anderson] house [John Hess'] work.

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633 Morris (Schuelke) Tr. Jan. 15, 2010 at 54, 62.

634 Morris (Schuelke) Tr. Jan. 15, 2010 at 60-61.

635 Goeke (Schuelke) Tr. Jan. 8, 2010 at 19-20.

636 Goeke (Schuelke) Tr. Jan. 8, 2010 at 407.

34 11/8/02 [Handwritten note from Stevens]
[Allen] would have never given [Stevens] an invoice.
Lights w[ere] a Xmas present
[Stevens] said he would get the [illegible] done in 18 months, if state did its job. [Stevens] working on both projects.

Kepner's notes included an additional relevant entry at the bottom of the page following entries regarding Bates 33, 352, 14, 12, and 11:

> Projects costs minimal for VECO. VECO work $80,000 100,00.[637]

Allen's attorney, Robert Bundy, was also present during the interview. Bundy's notes indicate that prosecutors showed Allen 24 documents during the meeting[638] and his notes corroborate Allen's responses to the documents as noted by the *Stevens* trial team attorneys:

> Notes of Robert Bundy (10 pages of notes, 1.5 pages re: Torricelli Note)
>
> Doc 000035 Note TS BA 10/6/02
>
> Thanks for all the work on chalet you owe me a bill
> remember Torricell[i]
> Asked Bob P to talk to you
> [does not remember] Persons talking to him about getting an invoice.
> could have, but no memory
> BA never asked anyone at VECO to produce a bill for Ted
> Bill never got any invoices because Rock & Dave screwed things up
> MBK: (bottom back) deck A built by [redacted]
> had worked for Augie
> he gave VECO a bill
> BA never discussed note with TS
> Bill wanted to give this to Ted

---

637 Apr. 15, 2008 notes of SA Kepner at 3.

638 Notes from the members of the prosecution team vary regarding the exact number of documents shown to Allen (from a low of 17 to a high of 27 documents).

> If TS pressed, he would have had VECO put together an invoice would have been hard
> BA wouldn't have made false invoice
> BA would have got ahold of Dave A[nderson] and figure out what to do
> BA thought Dave A would have give an invoice to someone in VECO
> BA [does not remember] Ted asking about John Hess' invoice
> BA would have been angry if TS sent invoice by VECO [without] going through BA[639]

Also, Bundy's notes reflect an additional conversation led by Marsh at the conclusion of Allen's review of the documents:

> Nick: Bill, give some thoughts about what your motivations were to do what you did re: not giving invoice
>
> [illegible] trying not to get things such that Ted would have to pay it back
>
> BA Knew had to give Ted some invoices
> but never got invoices
> Bill thought about $80k would have been OK for what VECO did on house
>
> Bill would have thought he would have had some invoices
> If Bill would have got invoices from VECO [illegible] he would have cut back a lot on invoice for Ted if the VECO invoice was $250k or anything like it.[640]

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[639] Apr. 15, 2008 notes of Robert Bundy at RB-AWP-OPR 325-326.

[640] Apr. 15, 2008 notes of Robert Bundy at RB-AWP-OPR 328.

During the Allen interview, PIN attorneys Marsh and Sullivan (who were participating by telephone) and AUSAs Bottini and Goeke sent emails to each other regarding Allen's responses regarding the note:

> Email from Marsh to Bottini, Goeke, and Sullivan
> Subject: am I pushing too hard?[641]
>
> Email from Sullivan to Marsh, Bottini, and Goeke
>
> We may want to talk to [Robert] Bundy immediately afterwards and get him to push [Allen] on this issue and get him to focus. [Allen's] position makes no sense and is directly contradicted by his contemporaneous acts.
>
> I'd also like to push [Allen] re: why [Stevens] is asking for a bill in 10/02 and 11/02. The timing is bothering me. Is it [because] the project is out of control? Only VECO guys are on the site? Neighbors are snooping around? Public is about to find out?[642]
>
> Email from Marsh to Sullivan, Bottini, and Goeke
>
> Re: #2, do you think it's probably that his friend Torricelli withdrew from his reelection campaign a week before the 10/02 note?[643]

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[641] Apr. 15, 2008 12:13pm email from PIN attorney Marsh, to AUSA Bottini, AUSA Goeke, and PIN attorney Sullivan. Marsh said that statement may have referred to Allen lying about [redacted] involvement in a bribe payment. Mar. 18-19, 2009 FBI 302 of Nicholas Marsh. Bottini later stated that he believed that the "pushing too hard" statement referred to Allen becoming angry after viewing the Torricelli Note. Bottini (Schuelke) Tr. Dec. 17, 2009 at 485-486. Marsh stated later that he recalled "really pushing" Allen on his statement that "I wouldn't have even been able to come up with an invoice if I wanted to because I didn't know how," because Marsh thought the statement was "ludicrous." Marsh (Schuelke) Tr. Feb. 2, 2010 at 363. Allen told OPR that he did not recall Marsh pushing him during this meeting. June 12, 2010 FBI 302 of Bill Allen at 5.

[642] Apr. 15, 2008 4:22pm email from PIN attorney Sullivan to PIN attorney Marsh, AUSA Bottini, and AUSA Goeke.

[643] Apr. 15, 2008 4:24pm email from PIN attorney Marsh to PIN attorney Sullivan, AUSA Bottini, and AUSA Goeke.

Email from Sullivan to Marsh, Bottini, and Goeke

> Could be. Could also be that it's a wink and a nod that he knows [Allen] won't send him an invoice, but he can paper the file. Could be a lot of things. I was hoping [Allen] might be able to shed some light on the timing/context.[644]

Email from Marsh to Sullivan, Bottini, and Goeke

> Sorry I thought we all believed it's a wink and a nod, and we're just trying to figure out why [Stevens] was nervous at that particular moment and decided to paper the file with something. Am I wrong?[645]

Bottini recalled that following the interview, the team asked Robert Bundy to speak to Allen about his responses concerning whether or not he had planned to give Stevens a bill.[646] Bill Allen stated later that following the April 15, 2008 meeting, SA Kepner told him that the prosecutors "didn't think [he] had done a very good job" but did not provide specific complaints.[647] Allen told OPR that, following the April 15, 2008 meeting, Allen recalled Kepner "pushing" him to accept a $250,000 figure for the Girdwood renovations rather than the $80,000 figure Allen believed was accurate.[648] Allen stated that no member of the prosecution team ever told him that he would lose his cooperation deal if he did not agree to the $250,000 figure.[649] Bottini stated that following the interview, prosecutors asked Bundy to speak with Allen and clarify what Allen meant when he said that "I didn't want Ted to pay for it, but I knew I had to send him a bill."[650] Allen met again with prosecutors on April 18, 2008, to continue his review of

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[644] Apr. 15, 2008 4:27pm email from PIN attorney Sullivan to PIN attorney Marsh, AUSA Bottini, and AUSA Goeke.

[645] Apr. 15, 2008 4:29pm email from PIN attorney Marsh to PIN attorney Sullivan, AUSA Bottini, and AUSA Goeke.

[646] Bottini OPR Tr. Mar. 10, 2010 at 288-289. Bottini stated that Kepner was present for the conversation with Bundy. Bottini OPR Tr. Mar. 10, 2010 at 298-299.

[647] Allen (Schuelke) Tr. Mar. 6, 2010 at 14.

[648] June 12, 2010 FBI 302 of Bill Allen at 5.

[649] June 12, 2010 FBI 302 of Bill Allen at 6.

[650] Bottini (Schuelke) Tr. Dec. 17, 2009 at 499.

documents provided by defense counsel.[651] Allen stated that, during the April 18 meeting, SA Kepner wanted Allen to adopt $250,000 as VECO's costs for the renovation of Girdwood, and Allen explained that he believed the renovations were "worth $80,000."[652] Bottini stated that when Allen returned on April 18, 2008, he cleared up the issue by stating that when he received the Torricelli Note, "I didn't want to send him a bill. I didn't want Ted to pay for it."[653]

On April 21, 2008, PIN Chief Welch asked Marsh to send him some of the key documents he had found among those produced by the defense, including "the two letters."[654] Bottini, Goeke, Marsh, Sullivan, and Kepner interviewed Stevens's archivist [redacted] on April 24, 2008. The FBI 302 of that interview does not contain any information indicating that the attorneys raised the authenticity of the Torricelli Note with [redacted].[655] On April 25, 2008, PIN attorney Marsh emailed the prosecution team a December 2002 email exchange between Senator Stevens and his aide, [redacted] Senator Stevens's email from December 17, 2002, to [redacted] stated that "there will be bills coming in" and "Bob Persons is riding herd to make certain we get charged for what they have done."[656] Marsh's email stated: "It's difficult to make sense of these" but "taken in the abstract these emails are not good."[657] In response, AUSA Bottini wrote: "It tracks with the October and November handwritten notes to Bill . . . I agree, not good, but obviously not fatal either."[658] Marsh stated that on April 30 or May 1, the prosecution team interviewed [redacted] who confirmed that the Torricelli Note was "consistent with normal practice" and not "created after the fact."[659] OPR recovered handwritten notes by AUSAs Bottini and Goeke indicating

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[651] PIN attorney Sullivan was not present for this meeting.

[652] Allen (Schuelke) Tr. Mar. 6, 2010 at 14-16.

[653] Bottini (Schuelke) Tr. Dec. 17, 2009 at 500; Bottini OPR Tr. Mar. 10, 2010 at 290-291.

[654] Apr. 21, 2008 9:53am email from PIN Chief Welch to PIN attorney Marsh and PIN attorney Sullivan.

[655] Apr. 24, 2008 FBI 302 of [redacted]

[656] Dec. 17, 2002 4:29pm email from Senator Stevens to [redacted].

[657] Apr. 25, 2008 12:41pm email from PIN attorney Marsh to AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, and SA Kepner.

[658] Apr. 25, 2008 5:52 pm email from AUSA Bottini to PIN attorney Marsh, AUSA Goeke, PIN attorney Sullivan, and SA Kepner.

[659] Marsh (Schuelke) Tr. Feb. 2, 2010 at 391. Marsh OPR Tr. Mar. 26, 2010 at 563.

that the team interviewed [redacted] on May 1, 2008, along with [redacted] counsel. Goeke's notes indicate that he, Bottini, Sullivan, Marsh and SA Kepner were present. However, OPR was unable to find evidence that SA Kepner took notes during the interview or created a 302 of the [redacted] interview.[660]

On May 2, 2008, in response to an email from PIN attorney Marsh stating that Stevens had "selected yep, you guessed it one of his Alaska office staff" to manage his personal affairs, SA Kepner wrote, "It looks like [Stevens] was going to great efforts to cover his a** and work on his defense."[661] The phrase used by SA Kepner in the May 2, 2008 email "cover his ass" was similar to the phrase later used by Bill Allen during his trial testimony regarding the Torricelli Note.[662]

On May 8, 2008, PIN attorneys Marsh and Sullivan, along with AUSAs Bottini and Goeke, interviewed Bob Persons. The prosecutors did not ask Persons about the Torricelli Note, or whether Persons talked to Bill Allen regarding invoices for Senator Stevens.[663] AUSA Bottini later stated that "it would not make sense to ask Persons about the Torricelli [N]ote as he was not a friendly witness for the government."[664] Marsh stated that prosecutors "shut [the interview] down" after showing Persons some documents that suggested that he perjured himself at the grand jury because Persons claimed "he could not remember," that he had "Alzheimer's," and he was "unwilling to acknowledge anything relating to those documents."[665]

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[660] Marsh OPR Tr. Mar. 26, 2010 at 564.

[661] May 2, 2008 11:39am email from PIN attorney Marsh to AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, and SA Kepner; May 2, 2008 12:08pm email from SA Kepner to PIN attorney Marsh, AUSA Bottini, AUSA Goeke, and PIN attorney Sullivan.

[662] SA Kepner asserted that her email comment was "a totally separate situation than the 10/6/2002 note" and that to assume the comment related to the note was "unfair." Kepner (Schuelke) Tr. Aug. 24, 2009 at 317.

[663] May 8, 2008 FBI 302 of Bob Persons.

[664] Mar. 20, 2009 FBI 302 of Joseph Bottini. Bottini later clarified that his statement in the 302 was the product of an unrefreshed recollection and that Persons was not asked about the Torricelli Note because the purpose of the interview was "to confront him with his grand jury testimony and the documents that we had recently received." Bottini (Schuelke) Tr. Dec. 17, 2009 at 444; Bottini OPR Tr. Mar. 10, 2010 at 305. Given Persons's ties to Stevens, Bottini stated that he formed the opinion that "it would be a waste of time going back to this guy about anything." Bottini (Schuelke) Tr. Dec. 17, 2009 at 444.

[665] Marsh (Schuelke) Tr. Feb. 2, 2010 at 402-404.

On May 21, 2008, the prosecution team provided PIN Chief Welch and Principal Deputy Chief Morris with an updated Recommendation to Prosecute Senator Stevens.[666] In Section IX, "Potential Defenses," the prosecutors addressed the Torricelli Note and the November 8, 2002[667] handwritten note from Stevens to Allen, arguing that the documents are "both helpful and harmful."[668] They were harmful because they precluded Stevens from arguing that "he believed the fall 2002 work was incorporated into Christensen Builders' spring 2001 bills"; they were helpful because they "will likely also preclude STEVENS from arguing that he simply forgot to pay Allen for the work."[669] The prosecution team concluded that although the notes could allow Stevens "to portray himself as someone who truly wanted to comply with Senate ethics rules," the notes also showed that Stevens was "knowledgeable about what he was getting and from whom he was receiving it."[670] The memorandum contained the phrase: "Should Stevens be successful in introducing evidence of his requests for invoices from ALLEN," suggesting that, as of May 21, 2008, the prosecution team did not intend to introduce the Torricelli Note or the November 2008 handwritten note in its case in chief.[671]

During a post trial interview, Allen stated that as he boarded a plane to fly to Washington, D.C., to testify at trial, Kepner contacted him by telephone and asked him to "figure out or remember what you done [sic] with this Torricelli Note from Ted."[672] Allen stated that no one on the prosecution team gave him the idea

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[666] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001).

[667] The May 21, 2008 Recommendation to Prosecute memorandum contained the identical typographical error as the Additional Information Concerning the Prosecution of Current United States Senator Ted Stevens memorandum, in which, the November 8, 2002 note is referred to by the incorrect date of November 18, 2002. May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) at 71.

[668] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) at 72.

[669] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) at 72.

[670] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) at 72.

[671] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) at 73.

[672] Allen (Schuelke) Tr. Mar. 6, 2010 at 21.

to say, "Ted was just covering his ass."[673] Allen stated he first remembered Persons's statement during his plane trip to Washington, D.C., to testify at the *Stevens* trial.[674] Allen also stated that prior to the phone call from SA Kepner, no one had discussed the Torricelli Note with him since the April 15, 2008 meeting.[675]

On September 14, 2008, during a trial preparation session with Bill Allen, Robert Bundy, AUSA Bottini, and SA Kepner, Bottini again raised the Torricelli Note, now labeled "#495" (the trial exhibit number).[676] Kepner stated that the occasion was the "first time that we dissected [the Torricelli Note], you know, where we went line by line and really, you know, broke it out."[677] Notes taken by SA Kepner indicate:

> 2. 10/6/02 074019 Note [Stevens] to [Allen]
> #495 [Bob Persons] didn't push this
> [Stevens] is covering his ass by the note.
> [Persons] said he was just covering his ass.
> [Allen] recognizes.[678]

SA Kepner did not write an FBI 302 regarding the September 14, 2008 meeting.[679]

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[673] Allen (Schuelke) Tr. Mar. 6, 2010 at 25.

[674] Allen (Schuelke) Tr. Mar. 6, 2010 at 45-46.

[675] Allen (Schuelke) Tr. Mar. 6, 2010 at 41.

[676] Sept. 14, 2008 notes of SA Kepner at 2. OPR reviewed all available notes and reports regarding the prosecution's contacts with Allen between the April 15, 2008 meeting and Allen's trial testimony in September 2008. Only the notes from the September 14, 2008 session addressed the Torricelli Note.

[677] Kepner OPR Tr. Oct. 14, 2009 at 617. SA Kepner also stated that between April 18, 2008 and September 14, 2008, she did not recall meeting with Allen's attorney to discuss preparing Allen to explain the note. Kepner OPR Tr. Oct. 14, 2009 at 622.

[678] Sept. 14, 2008 notes of SA Kepner at 2. Allen stated that his response did not generate any special response from the prosecutors: "[I]t wasn't a big deal for them." Allen (Schuelke) Tr. Mar. 6, 2010 at 57.

[679] In her February 2009 affidavit regarding the September 2008 trial preparation session, SA Kepner noted that "[t]here is no FBI policy that requires an agent to write a report of a meeting with a source and the prosecuting attorney in preparation for their testimony at trial. As a matter of practice, I do not write reports for trial preparation meetings unless specifically requested by a prosecuting attorney and no reports were prepared in this instance." Feb. 20, 2009 Affidavit of Mary Beth Kepner at p. 13.

AUSA Bottini made handwritten notes on his typed and printed draft direct examination outline. Bottini used both a red and blue pen to take notes and he told OPR that there was no particular reason for using one color or the other.[680] Bottini's notes reflect:[681]

> BA seen this!! [red ink][682]
> 10/6/02 [blue ink]
> HW note from TS →BA [blue ink]
> You owe me a bill remember Torricelli? [blue ink]
> You need to send me a bill. [blue ink]
> BA seen this? [red ink]
> Ted is covering his ass here (BA).... [red ink]
> Mentioning Torricelli, etc. [red ink]
> Think that Persons said [blue ink]
> He is just covering his ass, etc. [blue ink]
> Persons never pushed me on this, etc. [red ink]
> Bob never did push me on this [blue ink]
> He didn't want TS to have to put more $$ [blue ink]
>
> 11/8/2002 [blue ink]
> HW note from TS Many Thanks [blue ink]
> Lights top it all off [blue ink]
> Don't forget, we need a bill for [illegible] @ the chalet [blue ink]
> Thanks for raising fund, etc. [blue ink]
> You are great [blue ink]
> BA recalls [illegible], etc. [red ink]

Seven pages further into his outline, Bottini wrote in red ink:

> Knew that I had to get an invoice that was [illegible]
> they were after his ass [red ink]

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680 Bottini OPR Tr. Mar. 10, 2010 at 308.

681 *See* Bill Allen Direct Outline Sept. 12, 2008 at back of p. 33. Bottini told OPR there was "no rhyme or reason" why he wrote on the back of some of the pages of his direct outline. Bottini OPR Tr. Mar. 10, 2010 at 310.

682 When asked whether this quote may represent Bottini's surprise that Allen recognized the handwritten note, Bottini stated, "I think it actually signifies that this is something that he recalls and he can authenticate." Bottini OPR Tr. Mar. 10, 2010 at 321. Bottini also stated that he "probably" would not have made the notations "B.A. seen this?" and "B.A. seen this!!" had he remembered showing Allen the Torricelli Note previously in April 2008. Bottini OPR Tr. Mar. 10, 2010 at 335-336.

> Really didn't want to get him an invoice when stuff comes out later on [blue ink]
> Initially did want it to be a gift [red ink]
> Persons never did press me I think that Persons said TS just covering his ass. [red ink]
> Bundy reads [*Kohring*] transcript to BA→ [red ink]
> You said it wasn't a gift to TS what meant by that, etc [red ink]
> Didn't want it to be a gift when first done, [blue ink]
> But later, when he pressed me, etc [blue ink][683]

Robert Bundy's notes also confirm the comment:

> Note TS→BA 10/6/02
> The many ways you [unintelligible]
> Thx for the work on chalet
> Need bill for chalet
> BA remembers
> thinks TS covering his ass[684]

Allen stated later that "they all were" pushing him on the answer [referring to SA Kepner and AUSA Bottini] although he could not articulate what anyone had done or said to explain his allegation.[685] Allen's attorney, Robert Bundy, stated during the present investigation that no one at the September 2008 meeting (including himself) appeared to recall that Allen had been questioned about the Torricelli Note on April 15, 2008.[686]

PIN Chief Welch stated that he recalled Marsh approaching him in the hallway prior to the trial, after Allen arrived in Washington, D.C., to tell him about

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[683] *See* Bill Allen Direct Outline Sept. 12, 2008 at 40.

[684] Sep. 14, 2008 notes of Robert Bundy at RB-AWP-OPR 377.

[685] Allen (Schuelke) Tr. Mar. 6, 2010 at 42. In his comments on the OPR draft report, Bottini's counsel argued that we gave "casual treatment" to Allen's "pushing" quote, thereby insinuating that Bottini and Kepner "planted" the "covering his ass" statement. Feb. 8, 2011 letter from Kenneth L. Wainstein to OPR at 19. This allegation ignores the rest of the sentence in the draft report, in which OPR pointed out that Allen was unable to provide any details to support his allegation. Furthermore, the factual section of the report details that Allen said he recalled the "covering his ass" statement while on a plane to Washington D.C., free from the influence of any government agent. Bottini's counsel also ignores our analysis in Chapter Three, Sect. III.A.1, in which we state explicitly that we found no support for the allegation that prosecutors fabricated the "covering his ass" testimony. *See infra* note 731.

[686] Bundy (Schuelke) Tr. Nov. 4, 2009 at 95.

Allen's comments regarding the Torricelli Note in the September 14, 2008 preparation session. Welch stated that he was not aware of the April 15, 2008 Allen interview, and did not become aware of it until after trial, in March 2009.[687] Welch also stated that PIN's informal policy regarding 302s was to adhere to the FBI policy that a 302 should be generated in a "post indictment prep session" only if the interview is "covering new subject matter."[688] Welch said that Allen's "covering his ass" statement should have been memorialized in an FBI 302.[689] Furthermore, Welch stated that attorneys should have reviewed their notes as part of a *Brady* review, and that PIN management circulated the *Andrews* opinion prior to the *Stevens* trial putting attorneys on notice to review agent notes.[690] Morris recalled that when Marsh told her about Allen's comment she remembered that Allen had been asked about the Torricelli Note before and "he acknowledged the notes, but I didn't connect up that, well, why didn't he say that earlier."[691] Marsh stated that "it didn't trigger to me that there was now an issue because Allen said something different in the past."[692]

During its pretrial, trial, and post trial *Brady/Giglio* disclosures, the prosecution did not provide the defense with any information regarding the inconsistencies between the April 15, 2008 interview, in which Allen did not remember talking to Persons about the Torricelli Note, and the September 14, 2008 trial preparation session in which Allen stated that Persons told him that Stevens was "just covering his ass." Each of the subject prosecutors (with the exception of Brenda Morris) told OPR that they did not remember Allen's statements at the April 15, 2008 meeting, and that there was no FBI 302 from

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[687] Welch (Schuelke) Tr. Jan. 13, 2010 at 44-50. Welch told OPR that once the "covering his ass" statement became know, the information from the April 15, 2008 interview of Allen, "in whatever form, should have been disclosed." Welch OPR Tr. Mar. 3, 2010 at 390-391.

[688] Welch (Schuelke) Tr. Jan. 13, 2010 at 87.

[689] Welch (Schuelke) Tr. Jan. 13, 2010 at 92.

[690] Welch (Schuelke) Tr. Jan. 13, 2010 at 89-91. Morris recalled that a July 15, 2008 memorandum was sent to PIN staff regarding the *Andrews* opinion and the importance of reviewing agent notes. Morris (Schuelke) Tr. Jan. 15, 2010 at 61. *See United States v. Andrews,* 532 F.3d 900 (D.C. Cir. 2008).

[691] Morris (Schuelke) Tr. Jan. 15, 2010 at 291, 306-307.

[692] Marsh OPR Tr. Mar. 26, 2010 at 570.

Kepner to remind them, though (with the exception of Marsh) they did have their own notes.[693]

Regarding Allen's April 15, 2008 statement that he valued the Girdwood renovations at $80,000, notes from AUSA Bottini and Allen's attorney, Robert Bundy, show that the prosecutors revisited the topic during a September 15, 2008 preparation session. Bundy's notes indicate that he, Allen, Bottini, and Kepner were present and that Allen was asked:

> Brenda Question
> When work started
> re: loan for home why $100k
> Bill told him would take ≈$100k[694]

Similarly, OPR located an undated page of notes by AUSA Bottini stating:

> BA recall that when on plane
> told TS could probably do it for 100k
> Maybe why he got the loan in that amt., etc.[695]

Notes OPR recovered from SA Kepner for September 15, 2008, indicating that Kepner, Bottini, and Bundy were present for a preparation session of Allen, did not reflect a discussion of the $100,000 loan.[696] Kepner did not create an FBI 302 to record Allen's statement that Stevens took out a $100,000 loan to cover the renovations because Allen had told him that $100,000 was the expected cost of the project. The prosecution never provided such information to the defense.

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[693] Morris recalled that Allen had been shown the note prior to the September 2008 preparation session, but that "he wasn't really pinned down." Morris stated that she spoke to Marsh following the April 15, 2008 Allen interview and that Marsh was disappointed that Allen had received the note. Morris stated that she told Marsh he needed to "ask the rest of the questions" about the note such as how did Allen get the note, and where was he when he received the note. Morris stated that none of the attorneys on the prosecution team talked to her about their memory of what happened on April 15. Morris OPR Tr. Mar. 19, 2010 423-426.

[694] Sep. 15, 2008 notes of Robert Bundy at RB-AWP-OPR 382. Although Bundy's notes state the inquiry was a "Brenda Question," Bundy did not list Morris as present for the meeting.

[695] Undated notes of AUSA Bottini. OPR located these notes among Bottini's notes regarding his redirect examination of Allen. In his comments on our draft report, Bottini's counsel argued that because OPR located the note following Bottini's interview and therefore never questioned Bottini about the note, it was also reasonable for Bottini to have missed the note in his trial preparation. Feb. 8, 2011 letter from Kenneth L. Wainstein to OPR at 24-25.

[696] Sept. 15, 2008 notes of SA Kepner.

The *Stevens* trial began on September 25, 2008. In her opening statement, PIN Principal Deputy Chief Morris said that "VECO's cost [for the Girdwood renovations] totaled more than $188,000," noting that the figure "could be possibly a little high" and that "VECO kept track of most of the costs right down to the penny."[697] In her opening statement, Morris did not mention Allen's April 15, 2008 statement to prosecutors that the fair market value of the work was $80,000.[698]

In the defense opening statement, counsel highlighted the Torricelli Note:

> [Stevens] writes to Bill Allen. Bill Allen. Thanks for the work. You owe me a bill. Remember Torricelli, another Congress person who got in trouble. Friendship is one thing, compliance with the ethics rule, entirely different. I asked Bob Persons to talk to you about this, the bill. Don't be angry at him. It just has to be done right. It jumps off the page and grabs you by the throat to show you what the intent of Ted Stevens was. That's in October 2002. A month later he's writing to Bill Allen saying don't forget we need a bill for what's been done at the chalet. He writes to his staff person in his office and he says, there will be bills coming in after the first of the year.[699]

Two days later, on September 27, AUSA Bottini sent an email to the defense stating the prosecution's intent to introduce the Torricelli Note through Bill Allen's testimony:

> Rob,
> I just realized that the government's list of exhibits that we intend to introduce through Bill Allen inadvertently omitted Government Exhibits 495 and 509.
> These are respectively
> the handwritten note from Senator Stevens to Bill Allen dated October 6, 2002 (GX 495) and
> the handwritten note from Senator Stevens to Bill Allen dated November 8, 2002 (GX 509)

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697 *United States v. Stevens*, Tr. Sept. 25, 2008 (am) at 42.

698 Morris, however, was not present when Allen made the April 15, 2008 statement.

699 *United States v. Stevens*, Tr. Sept. 25, 2008 (am) at 73.

> I assume you would have no objection to the introduction of these exhibits.
> Joe Bottini[700]

On October 1, 2008, AUSA Bottini introduced the Torricelli Note. After introducing the note, Bottini told the court he believed that Allen's discussion with Persons was admissible.[701] Judge Sullivan then held a bench conference; Bottini argued that the discussion was admissible because it "goes directly to [Allen's] state of mind and explains why he didn't send the bill."[702] Bottini also argued that the discussion was admissible under Federal Rule of Evidence 801(b)(2) as a joint venture statement.[703] Judge Sullivan allowed the line of questioning over the defense objection.[704] When questioned about the Torricelli Note, Allen provided the following testimony:

> Q. Mr. Allen, do you remember having a conversation with Mr. Persons after you got the note from Senator Stevens?
>
> A. Yes.
>
> Q. What did Mr. Persons tell you?
>
> A. He said oh, Bill, don't worry about getting a bill. He said, Ted is just covering his ass. Maybe I shouldn't say ass, but that's . . .
>
> Q. All right.[705]

Allen's testimony that Stevens was "just covering his ass" with the "Torricelli Note" went to the heart of Stevens's defense theory. As a result, the defense questioned Allen vigorously about his disclosure of the "covering his ass" statement to the government, intimating that Allen fabricated the statement

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[700] Sept. 27, 2008 10:21pm email from AUSA Bottini to defense counsel, AUSA Marsh, PIN Principal Deputy Chief Morris, PIN attorney Sullivan, AUSA Goeke, and AUSA Bottini.

[701] *United States v. Stevens*, Tr. Oct. 1, 2008 (am) at 50-52.

[702] *United States v. Stevens*, Tr. Oct. 1, 2008 (am) (bench conference) at 3.

[703] *United States v. Stevens*, Tr. Oct. 1, 2008 (am) (bench conference) at 3.

[704] *United States v. Stevens*, Tr. Oct. 1, 2008 (am) (bench conference) at 3.

[705] *United States v. Stevens*, Tr. Oct. 1, 2008 (am) at 52-53.

and/or that the government had the statement but did not disclose it in its September 9, 2008 *Brady/Giglio* letter, or in its September 17, 2008 production of redacted exculpatory FBI 302s:

> Q. Well, you came in here the other day on your direct examination, and you said, well, despite the fact that I saw this letter, I heard from Mr. Persons I shouldn't send a bill because this was just Ted covering his ass; do you remember that testimony?
>
> A. That's exactly right.
>
> Q. When did you first tell that story? When did you first say those words? Was it in the last since September 9th? Was it since September 9th?
>
> A. It's been so long that I can't tell you how many days before I talked to him, but I did, and I asked him, hey, I got to get something done. I've got to get some invoices. And he said, hell, don't worry about the invoices. Ted is just covering his ass. That's exactly what he said.
>
> Q. My question to you, sir, is when did you first tell the government that because on September 9th, 2008 you were giving them three other reasons why you didn't send the bill.
>
> A. I don't know.
>
> Q. When did it come to you, sir?
>
> A. What?
>
> Q. When did you first tell the government that Persons tol[d] you Ted was covering his ass and these notes were meaningless? It was just recently, wasn't it?
>
> A. No. No.
>
> Q. On September 9th, you didn't tell them that, did you?
>
> A. Hell, I don't know whatever

> Q. You gave them reasons why you didn't send a bill. You answered you simply wanted to do the work was one of them, and another was part of the reason was that the costs were higher than they needed to be. You didn't tell them then about Persons' conversation with you, did you?
>
> A. You know what, I don't know when I talked to them, but I did talk to him, and it's been quite aback, quite awhile back. Whether you like it or you don't.
>
> Q. When did you first come up with this, sir?
>
> A. When did I come up with it?
>
> Q. When did you first tell somebody?
>
> A. Huh?
>
> Q. When did you first tell a government agent?
>
> A. Hell, I don't know what day it was.[706]

Following Allen's testimony, no member of the prosecution team corrected the record to reflect that Allen first told prosecutors about the "covering his ass" comment on September 14, 2008. AUSA Bottini stated that he "didn't understand that to be a false statement" by Allen and that "[i]t wasn't clear to me that he understood what [defense counsel] was asking him."[707] Bottini stated that he thought the defense was suggesting that Allen recently fabricated the statement and that Allen was confused about the statement, answering instead about when Persons actually made the statement; however, Bottini "didn't think [Allen] answered the question inaccurately."[708] Morris stated that if she had focused on Allen's testimony, she would have had the obligation to correct the record.[709] However, at the time Allen testified, Morris "was exhausted," operating on only

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[706] *United States v. Stevens*, Tr. Oct. 6, 2008 (pm) at 79-81.

[707] Bottini (Schuelke) Tr. Dec. 17, 2009 at 649-650.

[708] Bottini OPR Tr. Mar. 10, 2010 at 341-345.

[709] Morris (Schuelke) Tr. Jan. 15, 2010 at 317-318.

three to fours hours of sleep, and she did not focus on his testimony.[710] Marsh stated that he could not remember if he was present for Allen's cross examination, and at the time he "was so overwhelmed with what I had to do, I probably paid less attention than I would have normally to what was going on in other contexts."[711]

The defense later questioned Bob Persons on whether he ever made the "covering his ass" statement and whether the government ever asked Persons about the statement.

> Q. In May of 2008, sir, were you asked by the government whether Bill Allen, whether you ever said to Bill Allen, quote, don't worry about the bills, Ted is just covering his ass?
>
> A. No.[712]
>
> * * *
>
> Q. Did you say to Bill Allen, "Bill don't worry about getting a bill, Ted is just covering his ass?" Did you say that to Bill Allen?
>
> A. No. Crazy.[713]
>
> * * *
>
> Q. How many times have you been interviewed by the FBI?
>
> A. Three.
>
> Q. On any of those three occasions, were you asked about the comment that you supposedly made to Bill Allen, "Ted is just covering his ass"?

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[710] Morris (Schuelke) Tr. Jan. 15, 2010 at 318-320.

[711] Marsh (Schuelke) Tr. Feb, 2, 2010 at 389.

[712] *United States v. Stevens*, Tr. Oct. 16, 2008 (am) at 38.

[713] *United States v. Stevens*, Tr. Oct. 15, 2008 (pm) at 44.

> A. Absolutely not. Nobody's ever asked me that question before.[714]

Senator Stevens testified in both direct and cross examination about the Torricelli Note to explain his intent in sending Allen the note.

> You know, this is a period after the accident Bill Allen had and he was getting sort of short tempered. It wasn't easy to tell him anything and I didn't want him to get upset about it, but I wanted to make sure he understood that I wanted the bills for this work that was going on at the chalet, so I asked Bob Persons to talk to him and I was telling Bill Allen not to get po'd at Bob because I was the guy that told him to talk to him about it and get me a bill.[715]

In his testimony, Stevens asserted that he was not "covering [his] bottom" and that he never told Bill Allen anything that could lead to the conclusion that "[Stevens] [was] trying to cover [his] ass by this letter."[716] On cross examination, Stevens denied that he sent emails to Bob Persons in an attempt to cover his bottom, asserting "my bottom wasn't bare."[717]

Both AUSA Bottini and PIN Principal Deputy Chief Morris referred to the Torricelli Note in their closing and rebuttal arguments. Bottini cited Allen's testimony that Bob Persons told him the note was Stevens "covering his ass." Morris linked the note to the Torricelli incident referenced within:

> I submit to you ladies and gentlemen, that handwritten note to Bill Allen came seven days after Senator Torricelli had been [censured] by the Senate Select Committee on Ethics. [Stevens] knew full well; he was trying to paper the trail. This is a very smart man.[718]

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[714] *United States v. Stevens*, Tr. Oct. 15, 2008 (pm) at 49.

[715] *United States v. Stevens*, Tr. Oct. 17, 2008 (am) at 61.

[716] *United States v. Stevens*, Tr. Oct. 17, 2008 (am) at 61.

[717] *United States v. Stevens*, Tr. Oct. 17, 2008 (pm) at 87-88.

[718] *United States v. Stevens*, Tr. Oct. 21, 2008 (pm) at 51.

The defense centered its closing argument on the Torricelli Note stating that Exhibit 495 was similar to "route 495" for those who "live here in the District" because you "can't get far without going to route 495" and Exhibit 495 "will take you straight into the mind of Ted Stevens on that day."[719] Defense counsel referred to Exhibit 495 throughout its closing, arguing that the government never asked Bob Persons about the "covering his ass" comment, and alleging that Allen's testimony about the note was a "recent fabrication."[720] Defense counsel also linked the Torricelli Note to Exhibit 497, an October 7, 2002 email (that was highlighted by the prosecution team in its earlier PowerPoint presentation) from Persons to Stevens stating Persons "[s]poke to Bill about [Stevens's] concerns, and all is well."[721]

Following the conviction, defense counsel alleged in an October 28, 2008 letter to Attorney General Mukasey, and in a December 5, 2008 Motion for New Trial, that the prosecution fabricated Bill Allen's "Ted is just covering his ass" testimony.[722] The defense argued that Allen was interviewed by the government on "more than 20 separate occasions" and the government provided the defense with "[m]ore than 50 government memoranda (including FBI Form 302s and IRS Memoranda of Interview) relating to Mr. Allen" and "[n]ot one of these memoranda references this purported comment from Bob Persons, or even hints at the existence of such a conversation."[723]

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[719] *United States v. Stevens*, Tr. Oct. 21, 2008 (am) at 62.

[720] *United States v. Stevens*, Tr. Oct. 21, 2008 (am) at 68-69.

[721] *United States v. Stevens*, Tr. Oct. 21, 2008 (pm) at 5-6. This same Oct. 7, 2002 Bob Persons email was highlighted by the prosecution in its earlier PowerPoint presentation.

[722] Oct. 28, 2008 letter from defense counsel to Attorney General Michael B. Mukasey at 11-15; Memorandum in Support of Senator Stevens's Motion for New Trial at 36-39 (D.D.C., filed Dec. 5, 2008)(emphasis in original). Defense counsel raised two other allegations concerning the government's dealings with Bill Allen. In a letter to OPR on August 30, 2010, defense counsel alleged that, following the declination of criminal charges against Allen, the government had secretly promised not to charge Allen with sex offenses arising out of the Anchorage Police Department (APD) investigation. Aug. 30, 2010 letter from defense counsel to OPR Acting Counsel Mary Patrice Brown. Allen, however, expressly denied receiving any such promise from the government and he did so at a time when it would have served his penal interests to claim otherwise. Second, defense counsel alleged that the government's promises to Allen - specifically, to immunize [redacted], and not to charge his company, VECO Corporation - were improper inducements designed to secure and ensure his favorable testimony for the government. Both promises, however, were expressly acknowledged in the plea agreement, which was disclosed to the defense and available for cross-examination of Allen. Moreover, the defense could have raised the issue with the court during the pendency of the case. We found no basis for either allegation.

[723] Memorandum in Support of Senator Stevens's Motion for New Trial at 37 (D.D.C., filed Dec. 5, 2008).

The prosecution team responded to the defense motion in a January 16, 2009 Opposition:

> In claiming that Allen's testimony was false, defendant relies on the fact that Persons's comment was not recorded in the government's memoranda of its interviews with Allen. This fact proves nothing, however, because the government was not even aware of the October 6, 2002 note until defendant produced it in early 2008, long after most of the memoranda were prepared. Moreover, it was not until shortly before trial that the government questioned Allen about defendant's statement that he had asked Persons to speak to Allen about a bill, and thereby learned about Persons's remark. Allen's recollection on this point was not recorded in an FBI 302 because it was disclosed during a trial preparation session.[724]

The government stated further that it "did not check Allen's recollection against Persons's because it thought it highly unlikely that [Persons] would willingly recall any conversation detrimental to the defense."[725]

In February 2009, then Acting AAG Rita Glavin appointed DOJ Narcotic and Dangerous Drug Section Chief Paul O'Brien, Deputy Chief David Jaffe of the Domestic Security Section, and Senior Trial Attorney William Stuckwisch of the Fraud Section to conduct the post trial litigation in the *Stevens* matter. As a result of O'Brien's investigation, the government moved to set aside the verdict and dismiss the indictment with prejudice on April 1, 2009.[726] The government's motion stated:

> The Government recently discovered that a witness interview of Bill Allen took place on April 15, 2008. While no memorandum of interview or agent notes exist for this interview, notes taken by two prosecutors who participated in the April 15 interview reflect that Bill

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[724] Memorandum in Support of Government's Opposition to Defendant's Motion for New Trial at 42-43 (D.D.C., filed Jan. 16, 2008).

[725] Memorandum in Support of Government's Opposition to Defendant's Motion for New Trial at 44 (D.D.C., filed Jan. 16, 2008).

[726] Motion of the United States to Set Aside the Verdict and Dismiss the Indictment with Prejudice (D.D.C., filed Apr. 1, 2009).

> Allen was asked about a note dated October 6, 2002, that was sent from the defendant to Bill Allen. The note was introduced at trial as Government Exhibit 495 and was referred to as the "Torricelli note." The notes of the April 15 interview indicate that Bill Allen said, among other things, in substance and in part, that he (Bill Allen) did not recall talking to Bob Persons regarding giving a bill to the defendant. This statement by Allen during the April 15 interview was inconsistent with Allen's recollection at trial, where he described a conversation with Persons about the Torricelli note. In addition, the April 15 interview notes indicate that Allen estimated that if his workers had performed efficiently, the fair market value of the work his corporation performed on defendant's Girdwood chalet would have been $80,000.[727]

The government's motion explained that the defense was not informed of Bill Allen's April 15, 2008 statements "prior to or during trial," and that such "information could have been used by the defendant to cross examine Bill Allen and in arguments to the jury."[728]

The government also acknowledged that the "account of the Government's interviews of Bill Allen" in the January 16, 2009 Opposition to the Defendant's Motion for a New Trial was inaccurate.[729] Criminal Division appellate attorney Liza Collery drafted the inaccurate section of the government's brief.[730] Collery told OPR that she relied on information provided by SA Kepner and AUSA Bottini regarding the government's contacts with Bill Allen.[731]

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[727] Motion of the United States to Set Aside the Verdict and Dismiss the Indictment with Prejudice at 1-2 (D.D.C., filed Apr. 1, 2009).

[728] Motion of the United States to Set Aside the Verdict and Dismiss the Indictment with Prejudice at 2 (D.D.C., filed Apr. 1, 2009). In his OPR interview, Welch told OPR that he believed that the information Allen provided on April 15, 2008 concerning the $80,000 to $100,000 cost of the renovations was "another *Brady* violation." Welch OPR Tr. March 2, 2010 at 35-36.

[729] Motion of the United States to Set Aside the Verdict and Dismiss the Indictment with Prejudice at 2 (D.D.C., filed Apr. 1, 2009).

[730] Collery was assigned to assist with the brief post trial. The trial team consulted her briefly during trial in connection with jurors and jury instructions. Collery OPR Tr. July 1, 2009 at 3-4.

[731] Collery OPR Tr. July 1, 2009 at 76-78.

III. ANALYSIS

On April 15, 2008, approximately three months before the indictment, the entire prosecution team, as it was then constituted, interviewed Bill Allen concerning his knowledge of certain documents that Senator Stevens's defense counsel provided to the government a week earlier. AUSAs Bottini and Goeke and SA Kepner were in Anchorage with Allen and his attorney, Robert Bundy, while PIN Attorneys Marsh and Sullivan participated in the interview by telephone from Washington, D.C. During the interview, Allen made two consequential statements. First, when questioned about the Torricelli Note, Allen said he "probably" received the note but had no recollection of talking to Bob Persons about it, even though the note from Stevens said Persons would contact him about producing bills for the work done by VECO on Stevens's Girdwood residence. Second, Allen said the value of the work performed by VECO employees was approximately $80,000 to $100,000, as opposed to the $188,000 figure charged to the Girdwood account on VECO's books. No FBI 302 was prepared regarding Allen's statements at the April 15 interview.

We found that the government had a duty, under constitutional *Brady* and *Giglio* principles as well as under USAM § 9 5.001 to disclose both statements to the defense. Neither statement by Allen, however, was disclosed to the defense before or during the *Stevens* trial.

A. The Allen Statements

1. The Failure to Recall Discussing the Torricelli Note

When Allen told the prosecution team on April 15, 2008, that he did not recall Bob Persons asking him, at the Senator's behest, about submitting a bill for VECO's work on the Girdwood residence, his statement was neither *Brady* nor *Giglio* information at that time. The statement was neutral then; it benefitted neither party. Allen did not deny talking to Persons; he simply had no recollection of doing so. That changed, however, on September 14, 2008, when Allen told Bottini and Kepner during a trial preparation session that he had in fact discussed the note with Persons, who told Allen that Stevens was "just covering his ass."

Allen's statement on September 14, and his subsequent testimony to the same effect at trial, was powerfully incriminating evidence. It cast the Torricelli note as a canard, and worse, it did so through the words of Stevens's close friend and ally, Bob Persons. The prosecution team recognized the significance of the statement, as either Bottini or Kepner promptly shared it with Marsh, who then shared it with both Morris and Welch. The statement by Allen on September 14, however, altered the character of his statement about the Torricelli note on April

15. Allen's statement that Persons said Stevens was "just covering his ass" with the Torricelli note stood in stark contrast with his lack of memory five months earlier of Persons ever discussing the note with him.

The evidence of Allen's failure of recollection on April 15 was clearly "favorable" to the defendant and a basis for potential impeachment of Allen's trial testimony. The Torricelli Note was the centerpiece of the defense. If accepted at face value, the Torricelli Note, together with a similar note one month later, tended to show that the defendant was sincere about wanting to pay for all the renovation work performed at Girdwood and that he had been diligent in seeking bills for services rendered. Allen's trial testimony, which came as a complete surprise to the defense, severely undermined the primary defense theory by portraying the note as a sham. Had the government disclosed that five months earlier Allen had no memory of any statement by Persons on the subject of the Torricelli Note, much less a remark as dramatic and arguably unforgettable as the one to which he testified, defense counsel would undoubtedly have used the contradiction to impeach Allen's trial testimony. The effect of the impeachment would have been enhanced if defense counsel had also known that Kepner pressed Allen, just days before the September 14 meeting, to think about what happened with the Torricelli note.[732] Instead, because the evidence of Allen's April 15 failure of recollection was not disclosed to the defense, counsel's attempt to challenge Allen at trial on when he told the government of Persons's "covering his ass" statement fell flat. Allen denied that he only "recently" told the government about it, and no one at the prosecution table corrected his testimony. The evidence surrounding Allen's failed recollection on April 15 clearly should have been disclosed to the defense.

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[732] The defense alleged in closing argument that Allen's "covering his ass" statement was a "recent fabrication." In his October 28, 2008 letter to the Attorney General, and in a December 5, 2008 Motion for New Trial, defense counsel went farther, alleging that the prosecution "fabricated" Allen's "Ted is just covering his ass" testimony. In both his OPR and Schuelke interviews, Allen denied that the prosecution put the words in his mouth. To the contrary, he stated that he thought about the Torricelli Note while on the plane to Washington, D.C., for the trial and recalled the encounter with Persons. Although he was prompted by Kepner to "think" about what happened with the note, he maintained that at no time did Kepner or the prosecutors tell him what to say, or threaten him with any action (with respect to his cooperation agreement or sentencing) if he did not say what they wanted to hear. We found that Allen did not always capitulate to what the prosecution seemed to want or believe. For example, Allen said Kepner repeatedly pushed him towards a $250,000 valuation of the work performed by VECO, but Allen was steadfast in his $80,000-100,000 valuation and no one threatened to upset his agreement over it. We found the evidence did not support the allegation that the prosecutors or Allen fabricated the "covering his ass" testimony.

2. Allen's Valuation of VECO's Work on Girdwood

Allen's second significant statement at his April 15 interview, in which he estimated the total value of VECO's contribution to the Girdwood renovation as $80,000 100,000, was also favorable to the defendant. That statement, too, was never disclosed to the defense.

The central issue at trial was Senator Stevens's knowledge of whether he had paid for work performed on his house by VECO and, therefore, should have reported it on his annual financial disclosure forms as either a gift or a liability. The Torricelli note cut both ways for the defense. On the one hand, the note requesting a bill from Allen tended to show that the Senator was intent upon meeting his financial and ethical obligations by paying for all the work done on his property. On the other hand, it also tended to show that Stevens knew VECO had performed services for which he had not yet paid. Allen, however, never responded to either the Torricelli Note or the follow up note with a bill. Under these circumstances, the amount and value of the work done by VECO became important: The higher the value placed on VECO's work, the more implausible became the defense that Stevens believed he had paid for everything. Conversely, the lower the value of VECO's contribution to the project, the more plausible became the defense that Stevens's failure to report it was unintentional.

The prosecution pursued the higher valuation for VECO's performance, based primarily on VECO's own accounting records showing expenses attributable to the Girdwood project of more than $188,000. In the government's opening statement, PIN Principal Deputy Chief Brenda Morris asserted that VECO kept expense records "down to the penny," and, even allowing for inefficiencies and mismanagement by VECO, the accounting records established a baseline for assessing VECO's contribution to the project. Moreover, those records did not account for the considerable work that VECO did on the Girdwood residence before the company began tracking expenses or after the account was effectively closed. Morris remarked in opening that, "whether it's $188,000, or whether it's $240,000 or whether it's $120,000, the defendant still got it for nothing."

The defense countered in opening and during trial that: Stevens rarely visited the site; his wife, Catherine, handled the bills for the project; he received no bills from VECO; he was never informed of the amount attributed to the project on VECO's internal accounting records; and, the couple paid approximately $140,000 to Christensen Builders ($160,000 in total) for a project that, according to two experts, increased the value of the property by a little more than $100,000.

In addition to providing his assessment of the value of VECO's work on the project, Allen explained on April 15 why he did not send an invoice to Stevens. According to AUSA Bottini's notes from the interview, Allen explained that he

never sent a bill to Stevens because: (1) Rocky Williams and Dave Anderson "screwed up" the project; (2) the two never prepared an invoice for their and other VECO employees' work; (3) he did not want Stevens to have to pay for the work; (4) project costs were high because Williams and Anderson were incompetent and drunks; and (5) it would have been hard to do an invoice for the work but he would have done so if Stevens had "pressed me on this."

3. The Pluta 302 and the IRS MOI

On the evening of October 1, 2008, PIN attorney Marsh determined, while gathering *Jencks* material for FBI SA Michelle Pluta's anticipated testimony as a summary witness, that Pluta's 302 for the Allen interview of February 28, 2007, contained *Brady* information that had not been provided to the defense. The information was that Allen said Stevens would have paid a bill for VECO engineer John Hess's blueprints for the Girdwood renovations if Stevens had received such a bill. Marsh recognized not only the *Brady* implications of the document, but the likely reaction from the court and defense counsel to the disclosure of a prior statement by Allen so late in the trial (Allen was already on the witness stand at the time). During an "all hands" meeting that evening, the prosecution team, including agents, discussed whether the Pluta 302 was required to be turned over to the defense. The team also considered alternatives to calling Pluta as a witness, thereby avoiding the disclosure of the Pluta 302 as *Jencks* material, or simply including the Pluta 302 along with other *Jencks* material for SA Pluta, without highlighting the *Brady* implications of the 302. In the end, PIN Chief Welch concluded that the Pluta 302 constituted *Brady* material that had to be disclosed, irrespective of whether Pluta was called as a witness.[733]

After deciding that the Pluta 302 had to be disclosed to the defense, the prosecution team proceeded to review all Allen interview reports to determine if additional information needed to be turned over. As a result of that review, the IRS MOI of the Allen interview on December 11 12, 2006, was also identified for disclosure to the defense. That MOI included the statement: "If Rocky Williams or Dave Anderson had invoiced Ted and Catherine Stevens for VECO's work, Bill Allen believes they would have paid the bill."[734] Late on the night of October 1, PIN

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[733] In his November 22, 2008, letter to the FBI Inspections Division, SA Joy alleged that "Marsh attempted to conceal" the Pluta 302 from the defense. Joy Complaint, ¶ 12. We rejected Joy's allegation for several reasons. First, Marsh was the one who recognized the implications of the Pluta 302 and raised the issue with his colleagues. Second, although he initially took the position that the 302 was "cumulative," he eventually agreed with the collective team judgment that the document contained *Brady* material that had to be disclosed. And third, Joy would not have known what Marsh's ultimate opinion was because, by his own admission, he "left the conference room" before the decision to disclose was made. *Id.*

[734] IRS MOI Dec. 11-12, 2006, ¶ 44.

Principal Deputy Chief Morris transmitted both the Pluta 302 and the IRS MOI, in redacted form, to defense counsel.

At a hearing the following morning, October 2, Morris acknowledged that the two redacted documents contained *Brady* material and tacitly conceded that the government had violated the court's September 16 order to produce *Brady* material "in usable format" on September 17. Although the court was "persuaded that there is a *Brady* violation," it denied the defense motion for dismissal or mistrial, and instead directed the government to provide all witness statements, without redaction, to the defense by the next day.

4. An Allen Statement During Pretrial Preparation

During the course of our investigation, we came across another statement made by Allen that was favorable to the defense but was not disclosed at any time. During a trial preparation session on September 15, 2008, the day after Allen revealed Persons's "covering his ass" remark, Allen was asked why Stevens took out a $100,000 loan for the Girdwood renovations. According to Bundy's notes, Allen responded that he told Stevens that the work would cost $100,000. We also found an undated note in AUSA Bottini's files reflecting the same information. We found that Allen's statement on September 15, like his statements on April 15 (as well as on other occasions) concerning the valuation of the project, was favorable and material to the defense. Coupled with Allen's other statements on the valuation subject, Allen's statement that Stevens took out a loan to match Allen's estimate supported the defense theory that Stevens intended to pay for everything he received and that he believed he had done so. The September 15 statement was not disclosed to the defense or elicited from Allen at trial.[735]

B. The *Brady* Letter Representations

The government did not disclose to the defense the statements made by Allen during the April 15, 2008 interview. Instead, the government disclosed, through Paragraph 17(c) of the September 9, 2008 *Brady* letter, what Allen told Kepner during a telephone interview *the same day* the letter was sent:

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[735] The failure to memorialize either Allen's September 14 or September 15 statements is similar to other occasions on which information favorable to the defense was not reduced to writing. Although FBI policy does not mandate the creation of a report for information provided during pretrial interviews, there is an exception for new information adduced during such sessions. We note that the prosecutors followed the practice where the new information was favorable to the government, but we found no evidence that they did so with respect to information favorable to the defense.

> Allen stated that on at least two occasions defendant asked Allen for invoices for VECO's work at the Girdwood residence. Allen stated he never sent an invoice to defendant or caused an invoice to be sent to defendant. *Allen stated that he believed that defendant would not have paid the actual costs incurred by VECO, even if Allen had sent defendant an invoice, because defendant would not have wanted to pay that high of a bill.* Allen stated that defendant probably would have paid a reduced invoice if he had received one from Allen or VECO. Allen did not want to give defendant a bill partly because he felt that VECO's costs were higher than they needed to be, and partly because he simply did not want defendant to have to pay.[736]

Although Paragraph 17(c) purported to set forth *Brady/Giglio* material pertaining to Allen's anticipated testimony, it fell far short of satisfying the prosecution's duty to disclose Allen's exculpatory or inconsistent statements. Rather than providing prior statements of Allen inconsistent with his expected trial testimony, the government divulged in Paragraph 17(c) only Allen's *most recent statement* on the subject. Kepner interviewed Allen by telephone at Marsh's direction on September 9, only two weeks before the start of trial. Immediately after the interview, Kepner told Marsh what Allen said, while Marsh contemporaneously typed the information into Paragraph 17(c) of the letter.[737] Given the timing of the statement

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[736] Sept. 9, 2008 letter from PIN Principal Deputy Chief Morris to defense counsel at 3-4 (emphasis added).

[737] On September 16, Marsh instructed Kepner to prepare a 302 of her September 9 telephonic interview of Allen, so that the government would be able to produce "in useable format," in accordance with the court's order of the same day, the *Brady* and *Giglio* information contained in the September 9 *Brady* letter. Kepner prepared a 302 that tracked the language of Paragraph 17(c) almost verbatim. Morris, however, was not aware of either the Allen interview of September 9 or the subsequent preparation of a 302 covering that interview. As a result, at the October 2 hearing before Judge Sullivan, she disputed that Allen was interviewed on September 9, and no one, including Marsh or Kepner, corrected her. The court directed the government to submit an affidavit providing the support for the representations made in Paragraph 17(c). Before the hearing resumed that afternoon, Morris submitted an affidavit, attaching five 302s of Allen that Morris attested were the basis for paragraph 17(c). None of the reports attached to the affidavit was the 302 prepared on September 16 of Allen's September 9 interview. That 302 was, in fact, the sole support for the representations contained in Paragraph 17(c); it was attached, however, to the government's opposition to the defense motion to dismiss that was filed at the same time as Morris's affidavit. Morris told us she asked Sullivan to draft the affidavit and played no role in collecting the responsive documents. Sullivan told OPR that he did not draft or review Morris's declaration, and that Morris requested that Sullivan email her a prior declaration by PIN Chief Welch that Morris could use as a formatting template. We found that Sullivan did not play a role in drafting the affidavit and that Morris did not know that her affidavit was inaccurate. We

by Allen, this formulation was likely to be consistent, not inconsistent, with his trial testimony. And, second, rather than being favorable to the defense, the statement ascribed to Allen in Paragraph 17(c) of the *Brady* letter, particularly the highlighted sentence, was more favorable *to the government*, at least compared to Allen's statements on the subject during his April 15 interview. Indeed, the statement that Allen "believed that defendant would not have paid the actual costs incurred by VECO, even if Allen had sent defendant an invoice, because defendant would not have wanted to pay that high of a bill" was not made by Allen on April 15, and is found nowhere in any of the more than 50 reports of Allen interviews with government agents and attorneys. To the contrary, the one interview report that touched upon the subject the August 30, 2006 FBI 302 of the Bill Allen flip session reported Allen's statement that "Ted Stevens wanted to pay for everything he got." This information that should have been disclosed to the defense was that Allen had previously stated that Stevens wanted to pay for everything he got, and that Allen had never said before September 9, 2008, that Stevens would not have paid the actual costs incurred by VECO because he would not want to pay that much. Moreover, Allen's statement, as conveyed in Paragraph 17(c), that the costs incurred by VECO were higher than they "needed to be," grossly understated what Allen said on April 15 about the reasons for the high costs that Williams and Anderson were incompetent drunks who "screwed up" the project.

In addition, we found several other statements attributable to Allen that were consistent in substance and tenor with Allen's April 15, 2008 statements and inconsistent with the substance and tenor of the disclosure made in Paragraph 17(c) of the September 9 *Brady* letter. First, Kepner testified before the grand jury that [redacted] Kepner's testimony was not disclosed through the *Brady* letter and only came to light after the court ordered full disclosure of grand jury transcripts and witness statements on October 2, 2008. Second, Kepner's and Bundy's notes of Allen's interview on September 20, 2006, reflect that Allen, when asked about billing Stevens for VECO's work at Girdwood, said there were "screw ups" on the house; that Williams and Anderson were alcoholics; that VECO employees' time was charged to the Girdwood project when they had no other work to do and "probably" did not work at Girdwood; and that

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concluded that it was likely that the attachments for the motion were inadvertently interchanged with the attachments for the affidavit.

[738] [redacted]

the project should have cost $100,000 to $125,000, "if done right." Allen's September 20, 2006 interview, which was attended by AUSA Goeke, was not memorialized in an FBI 302.[739]

Third, Bundy's notes reflect similar statements by Allen during a debriefing on December 11 and 12, 2006. Kepner and two IRS agents were also in attendance, but no prosecutor was present. According to Bundy's notes, Allen was asked about VECO invoices for Williams's and Anderson's hours at Girdwood. Allen reportedly said that he never saw any invoices; that Stevens never paid VECO but would have if he had gotten invoices; that Stevens paid Christensen Builders bills; that Williams and Anderson "weren't worth anything" and were alcoholics; and that if Williams and Anderson had given invoices to Persons, Persons would have given them to Catherine Stevens, who would have paid them. Kepner did not prepare a 302 for this interview, but the IRS agents prepared an MOI that reflected Allen's statement that the Stevenses would have paid invoices from Williams and Anderson if they had received them. The December 11 12 Allen interview MOI was provided to the prosecution team. It was not, however, provided to the defense until October 2, 2008, at the same time that the Pluta 302 was disclosed.

The foregoing Allen statements were both favorable to the defense and inconsistent with statements attributed to Allen on the subject. None, however, was mentioned in Paragraph 17(c) of the September 9 *Brady* letter, and only Kepner's grand jury testimony and the IRS MOI were ever disclosed and then only in the middle of trial, after being ordered by the court.

In assessing the prosecutors' accountability for the failure to disclose this information, we considered the fact that Kepner did not prepare an FBI 302 of the September 20, 2006 interview (although Goeke was present for the interview, it is understandable that he would have forgotten a fact that was not relevant at the time), and that the prosecutors would not have been privy to Bundy's notes. Nevertheless, we also considered the context in which the pertinent representations in Paragraph 17(c) were made. No prosecutor reviewed agents' notes and no one apparently asked Kepner for her interview notes. Moreover, the prosecutors abdicated their responsibility to review interview reports and delegated that duty to the agents. Notwithstanding the agents' performance of that function by preparing spreadsheets reflecting *Brady/Giglio* material gleaned from the various reports, the agents' judgment of what constituted *Brady/Giglio*

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[739] As we discuss in Chapter Twelve of this report, Kepner did not prepare a 302 of this interview and her notes were given to CDC Gonzalez on March 23, 2009, the same day she gave him her notes of the April 18, 2008 Allen interview.

material was not always adopted, and no attorney conducted an independent *Brady* review of the interview reports.

This was particularly true with respect to the Paragraph 17(c) representations. Although the spreadsheets prepared by the agents reflected *Brady/Giglio* information from the "Pluta 302" that Allen said Stevens would have paid an invoice if one had been sent Marsh said he believed the spreadsheet was "not reliable" and recalled that Allen had said at some point that Stevens would not have wanted to pay the full costs because he was "too cheap."[740] The FBI spreadsheet entry in question read: "On February 28, 2007, Bill Allen stated that he believed that T[e]d Stevens would have paid an invoice if he received one." (The actual FBI 302 makes clear that this refers only to a possible invoice for Hess's work on the blueprints, not for all of the VECO work.) The FBI spreadsheet continued: " . . . Ted Stevens said he needed an invoice from Allen regarding the work that VECO performed on the Girdwood residence. Allen said he never provided such an invoice. Allen said [he] did not want to give Stevens a bill because he felt that VECO made mistakes during the construction."[741] This formulation, which Marsh said he viewed as inaccurate, is strikingly similar to what Allen said on April 15, 2008.

Marsh, who said he spent only three to five minutes on the issue and did not review the Pluta 302 or search for a 302 memorializing Allen's alleged "too cheap" remark, instead instructed Kepner to call Allen and ask him the "hypothetical" question of whether he thought Stevens would have paid an invoice for the entire cost incurred by VECO on the Girdwood renovations. The result of the telephone conversation is what appears in Paragraph 17(c) of the *Brady* letter, instead of the information from the FBI spreadsheet, the Pluta 302 or, more importantly, what Allen said in the April 15 interview (not to mention the September 20 and December 11 12, 2006 interviews).

Marsh claimed that he was striving to be "accurate" with respect to the Paragraph 17(c) disclosure, but his obligation was to report information in the government's possession that was favorable to the defense as either exculpatory or impeaching. Rather than report what the government possessed the Pluta 302, the IRS December 11 12 MOI, and the Allen flip session 302 on August 30, 2006 (Stevens said he "wanted to pay for everything he got") or reviewing the 302s himself or searching his notes or the memories of his colleagues and Kepner,

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[740] Marsh (Schuelke) Tr. Feb. 2, 2010 at 123-126.

[741] FBI Spreadsheet, CRM000752-CRM000744.

Marsh commissioned Kepner to obtain Allen's *current* response to the question of why he did not send Stevens a bill.[742]

We found serious deficiencies in the information Marsh provided to the defense through Paragraph 17(c). First, it was a deviation from past practice, not to mention the agreement with Allen's attorney, for Kepner to interview Allen alone, without his counsel and with no prosecutor present, on an issue that went to the heart of the matter.[743] To compound the problem, Kepner spoke with Allen by telephone without the aid of any documents to prompt Allen's memory a difficult undertaking under the best of circumstances with a keenly focused witness, but particularly difficult with a witness like Allen under these circumstances.

Second, in light of Allen's well known cognitive deficiencies, we found it surprising that Allen would have been able to provide as lucid and concrete a response to Kepner's question as Paragraph 17(c) and the subsequently created 302 ascribed to him. For example, the very first line of Paragraph 17(c) stated: "Allen stated that on at least two occasions defendant asked Allen for invoices for VECO's work at the Girdwood residence." When he was interviewed in person on April 15, 2008, Allen had difficulty recalling his receipt of the Torricelli note and had no recollection of Persons discussing the note with him. Yet, on September 9, 2008, Allen is reported to have said over the telephone and without reviewing any documents that Stevens asked him for invoices "on at least two occasions."[744] We note that Kepner's telephone call to Allen on September 9,

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[742] Marsh's handling of Paragraph 17(c) of the *Brady* letter was similar to the way he handled the disclosures of Rocky Williams's statements in Paragraph 15. As we discuss in Chapters Six and Seven, Marsh and Bottini questioned the accuracy of Williams's reported statement, during a 2006 interview, that Christensen Builders performed "99%" of the work at Girdwood. Marsh added a statement to Paragraph 15, obtained contemporaneously from Williams, that Williams "did not recall" making that statement and that the "figure" was wrong. This marked another occasion in which the government took pains to "correct" a prior statement that was favorable to the defense with a current one that was favorable to the government. Certainly, prosecutors are obliged to present what they believe is accurate testimony at trial; thus, confirming a witness's testimony is entirely appropriate. However, all investigative statements obtained in the quest for accuracy must be disclosed to the defense.

[743] The prosecution team knew that Allen's attorney, Robert Bundy, insisted on being present for any substantive interview of Allen. Marsh gave Kepner no instruction to contact Bundy; she bypassed Bundy and called Allen directly.

[744] According to the Pluta 302 of Allen's February 28, 2007 interview, Allen said that, within a month or two of the project's completion, Stevens requested an invoice for work done by John Hess, a VECO architect/engineer, but Allen never complied and Stevens never asked again. This statement, at a minimum, should have been disclosed through the September 9 *Brady* letter, but Marsh did not review it, instead relying on the new statement by Allen. The Pluta 302 was disclosed to the defense on October 2, 2008, in the middle of trial.

2008, coincides with Allen's statement that Kepner called him just days before he flew to Washington, D.C., for the trial and told him he needed to think about what happened with the Torricelli Note.[745]

Our concerns about the representations in Paragraph 17(c) were enhanced by what happened after the letter was sent. Kepner essentially dictated to Marsh what Allen allegedly said to her in their telephone conversation that day; Marsh typed the paragraph as Kepner spoke. One week later, the court ordered the government to provide the documentary support for all the disclosures in the September 9 *Brady* letter. There was none for Paragraph 17(c), so Marsh directed Kepner to prepare an FBI 302 memorializing her September 9 telephone interview of Allen.[746] The ensuing 302 was taken virtually word for word from the *Brady* letter.[747] Thus, the *Brady* letter became the basis for a 302, not vice versa. Moreover, for the second time in a three week period, a prosecutor directed an agent to prepare a 302 when the information redounded to the government's benefit. Yet, when Allen provided information favorable to the defense on April 15, no one said a word to Kepner about writing an interview report; the prosecutors then faulted the lack of a 302 for their failed recollection of the interview. We found these two inconsistent approaches difficult to reconcile.

It is clear that Paragraph 17(c) differs markedly from what Allen said on April 15. In addition to the absence of any mention of Allen's $80 100,000 estimate of the value of VECO's work, the core of the representation is that Allen said Stevens would not have paid VECO's actual costs if Allen had sent him an invoice, "because he would not have wanted to pay that high of a bill." That, however, was not the message Allen conveyed to the prosecution team on April 15. Then, he cited the sloppy and inefficient work of his two key employees on the project as the reason he did not send a bill to Stevens. It was not that Stevens did not want to pay that high of a bill, but that Allen could not *justify* that high of a

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[745] In his Schuelke interview, Allen stated that Kepner called him "a couple of days" before he left Alaska for the trial and said, "[y]ou'd better think about whatever you did with respect to this Torricelli note." Allen (Schuelke) Tr. Mar. 6, 2010 at 22. Allen told OPR essentially the same thing. Allen June 12, 2010 FBI 302 at 6-7. Allen flew to Washington, D.C., on September 12, 2008, three days after the telephone conversation between Kepner and Allen that is described in Paragraph 17(c) of the *Brady* letter. Allen (Schuelke) Tr. Mar. 6 2010 at 24. We drew the reasonable inference that the subject of the Torricelli Note, as described by Allen, came up during the same conversation.

[746] Kepner (Schuelke) Tr. Aug. 24 2009 at 97 ("Q: Why was it that you created the report a week later? A: It was not a priority at that point, until Nick Marsh asked me to make sure I had memorialized that.").

[747] The name "Stevens" was used in the 302 in lieu of "defendant" as used in Paragraph 17(c).

bill and did not want Stevens to have to pay anyway. Thus, the information from Allen on this subject was presented by the prosecution only in a light that was most favorable to the government.

The *Brady* letter also omitted any mention of the Allen statement contained in the "Pluta 302," a report of a February 28, 2007 interview with Allen in which Allen said Stevens would have paid a bill for the renovation blueprints prepared by VECO engineer Hess if Stevens had received a bill. Kepner cited that statement in the FBI *Brady* spreadsheet, but Marsh did not include it in the *Brady* letter.

C. The Prosecutors Breached Their Duty to Disclose Allen's Statements

We concluded that the government had a clear and unambiguous duty, pursuant to the *Brady/Giglio* doctrine or Department of Justice policy (USAM § 5.001), to disclose to the defense Allen's statements from the April 15 interview. As detailed above, the statements were clearly favorable to the defendant. Furthermore, they were material because they implicated the heart of the defense case Senator Stevens's willingness to pay for all the Girdwood renovations, and his belief that he had done so and severely undermined the government's evidence. The impact of the "covering his ass" statement would have been dramatically lessened if the defense had evidence that Allen's recollection of that phrase was, indeed, quite recent. And Allen's valuation of VECO's work at Girdwood as between $80,000 and $100,000 dovetailed with the defense position that Stevens reasonably believed he had paid for the renovations. The evidence showed that Stevens paid more than $160,000 in bills, and other evidence (also not disclosed to the defense)[748] showed that Stevens took out a $100,000 loan to cover the estimate provided by Allen to Stevens of how much the total renovation would cost.

The prosecution team disclosed the Pluta 302 (albeit tardily) because it recognized that it contained *Brady* information. The information in the December 11 12, 2006 IRS MOI was even more exculpatory; it indicated that the Stevenses would have paid not just for Hess's work, but for all of VECO's work. For the same reasons detailed above, this information was material for purposes of a *Brady* analysis.[749] But even if one could argue that the information was not material, it (as well as the April 15 statements) still should have been disclosed

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[748] Handwritten notes by Robert Bundy, Bill Allen's attorney, of statements made by Allen during a September 15, 2008 trial preparation session. An undated note in AUSA Bottini's files reflected the same information.

[749] When this information was disclosed mid-trial, the court stated that it was "persuaded that there is a *Brady* violation." *United States v. Stevens*, Tr. Oct. 2, 2008 (pm) at 51.

pursuant to Department of Justice policy. Section 9 5.001 of the USAM provides that prosecutors must disclose exculpatory and impeachment information beyond that which is constitutionally required. Further, a prosecutor must disclose exculpatory and impeachment information that is "probative of the issues before the court," as well as information that casts substantial doubt upon the accuracy of any evidence, including witness testimony, regardless of whether it is likely to make the difference between conviction and acquittal. USAM § 9 5.001(C), (C)(1) and (C)(2). Bill Allen's statements on April 15, 2008 clearly fit within that policy.

D. Culpability for the Government's Failures

1. The Government's Violations Were Not Intentional

We found circumstantial evidence indicative of intentional misconduct. The April 15, 2008 interview of Bill Allen was clearly a significant event in the investigation. By that time, the investigation was nearly complete and the statute of limitations was about to run. The prosecution team was recommending that charges be brought against Senator Stevens, but the Criminal Division Front Office put the decision on hold until the voluminous materials provided by the defense could be examined and evaluated. Among those materials were the Torricelli Note of October 6, 2002, and its companion note one month later. As the recipient of both notes, Allen held the key to whether the notes were genuine or fabricated. The significance of Allen's interview on April 15 is demonstrated by the participation of all four prosecutors then assigned to the investigation Bottini, Goeke, Marsh, and Sullivan and the lead FBI agent, Kepner. The interview was plainly substantive and pre indictment, thus requiring, as everyone involved acknowledged, that Allen's interview be memorialized in an FBI 302 report. Yet, no such interview report was ever prepared because, as Kepner told CDC Eric Gonzalez on March 23, 2009, the interview "did not go well."[750]

Even though no FBI 302 of this interview was created, at least four of the five prosecution team members Marsh apparently being the lone exception took (and retained) notes of Allen's statements regarding the Torricelli Note and the other documents placed before him. Those interview notes, however, were not found until late March 2009, five months after the verdict was returned.[751] Had

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[750] In her OPR interview on February 18, 2010, Kepner acknowledged that "I should have done a 302, you know, for those," but the writing of the reports "fell through the cracks." Kepner OPR Tr. Feb. 18, 2010 at 307, 311.

[751] In Kepner's case, the discovery came more than a year after the trial. Her notes of the April 15 Allen interview were not found until January of 2010, and then only serendipitously. Her April 15, 2008 notes somehow became separated from her notes of the Allen interview conducted three days later and were found by OPR in a banker's box containing assorted,

it not been for the diligence of the O'Brien team appointed to investigate the post trial misconduct allegations, it seems highly unlikely that the notes would have ever been unearthed. Under these circumstances, it is difficult to accept the proposition that all four prosecutors present for the April 15 Allen interview simply forgot that Allen addressed the Torricelli Note, particularly when Brenda Morris, who was not present for the April 15 interview, recalled, after learning on September 14, 2008 of Allen's "covering his ass" statement, that Allen was interviewed previously about the Torricelli Note.[752]

Notwithstanding our skepticism, we also found substantial circumstantial and direct evidence militating against a finding of intentional misconduct. First, Kepner did not prepare an FBI 302 memorializing the April 15 interview. Kepner's explanation to CDC Gonzalez for the absence of a 302 for the April 15 interview ("it did not go well") raised the possibility that she was instructed by the prosecutors not to memorialize the interview. That inference derives from the fact that it is standard FBI policy and procedure to memorialize pre indictment investigative interviews, and Allen's April 15 interview clearly met the criteria. But, the prosecutors insisted, and Kepner confirmed, no one instructed Kepner not to prepare a report of the April 15 interview. To the contrary, we found that the decision not to do so was hers, and hers alone; she asked no one if she should forgo a report, and she told no one that she did not plan to write one. As we discuss in greater detail in Chapter Twelve of this report, our investigation revealed that Kepner often deviated from FBI policy and practice, particularly with respect to the preparation of witness interview reports. According to Kepner, witness interview reports were not a high priority and she never got around to writing a report of Allen's April 15, 2008 interview. We also found that the prosecutors were not aware of Kepner's capricious report writing practices, and we credited their representations to us that they expected a report to be done for Allen's interview in the normal course. One explanation offered by the prosecutors for their failure to recall the substance of the April 15 interview was the absence of an FBI 302 memorializing that interview. When it came time to prepare for trial, the prosecutors relied on the 302s that existed and it did not occur to any of them that a critical witness interview was not accounted for with a 302.

Second, the Torricelli Note was not the only document presented to Allen on April 15. Among the 30 odd boxes of documents produced by the defense in early April were numerous documents that the prosecutors believed bore on the issue of whether Stevens had taken official actions on behalf of VECO in exchange for VECO's and Allen's generosity. The statements made by Allen concerning the

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unrelated documents. The banker's box was one of 89 boxes of Polar Pen materials delivered to OPR by Anchorage FBI in January 2010.

[752] Morris (Schuelke) Tr. Jan. 15, 2010 at 291-306.

Torricelli Note came toward the end of the interview when, according to several participants, his patience was wearing thin. After authenticating the note as something he believed he received, Allen drew a blank on whether Persons discussed the note with him. Shortly thereafter, Allen launched into a tirade about Rocky Williams and Dave Anderson, subjects that often caused him to lose his composure. Under the circumstances, the important development from the interview, at least insofar as the Torricelli Note was concerned, was that Allen recognized it as something he received from Stevens. His lack of recollection concerning any role played by Persons was not significant at that time. Allen neither admitted nor denied any contact with Persons regarding the note; he simply did not recall any such contact at the time of the interview. Whether Persons did or did not in fact discuss the note with Allen only became significant when Allen later remembered the "covering his ass" remark by Persons.[753] We found it plausible that, in the absence of an FBI 302 memorializing the interview and with the hectic pace of activity on other matters related to the case, the prosecutors could have forgotten Allen's comments regarding Persons in the five month interval between the two interviews.

Third, the prosecutors were not the only attendees at the April 15 Allen interview who said they forgot about Allen's failure of recollection concerning Persons. Robert Bundy, Allen's lawyer and a former U.S. Attorney for Alaska, took copious notes of virtually every meeting he and Allen had with prosecutors or agents. His notes of the April 15 and September 14 interviews correspond in substance to the notes taken by the prosecutors and Kepner. Yet, Bundy said he, too, failed to recall the April 15 interview when Allen made his "covering his ass" statement at the September 14 trial preparation session.

Fourth, three of the four prosecutors who attended the April 15 interview Bottini, Goeke, and Sullivan searched their files and produced, directly or indirectly, their interview notes when the fact of the April 15 interview came to light in March 2009.[754]

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[753] Curiously, Persons was interviewed three weeks after the April 15 Allen interview, but no one asked him whether he discussed the Torricelli Note with Allen. Bottini's explanation – that Persons was "probably going to be a hostile witness to the government" – did not strike us as a sound reason for not asking the question. Bottini OPR Tr. Mar. 10, 2010 at 305. One would still want to know what the witness had to say on the matter. The standard practice with respect to probable defense witnesses is to "lock in" their versions on material issues, so that they can be impeached if their trial testimony differs.

[754] Marsh said he searched for, but could not find, any notes of the April 15, 2008 interview. Although Marsh was described by others as a meticulous note-taker, he told us he participated by telephone and was engaged in other tasks as well, thereby making it unlikely that he took any notes.

Fifth, and perhaps most importantly, we found no direct evidence that any of the prosecutors in fact recalled Bill Allen's failure of recollection on April 15. Each denied recalling Allen's statement, and we found no evidence that any of them mentioned or discussed, after the September 14 trial preparation session, that Allen had previously failed to recall discussing the Torricelli Note with Persons. Bottini's failure to recall, however, was the most important. As the prosecutor responsible for handling Allen's trial preparation, and as the sole prosecutor present at the September 14 trial preparation session, the primary burden for the disclosure of Allen's faulty memory at the April 15 interview fell to Bottini. Bottini acknowledged that, as of April 15, 2008, he was the prosecutor most likely to be charged with responsibility for handling Allen at trial (and, therefore, the one most responsible for *Brady* and *Giglio* disclosures). We found corroboration for Bottini's failed recollection of questioning Allen on the Torricelli Note on April 15 in his exclamatory note from the September 14 trial preparation session: "BA seen this!!" The double exclamation marks signified to Bottini that he did not know (or recall) that Allen had been shown the document previously and recognized it.

We also considered whether the prosecutors intentionally suppressed the *Brady* information from the Pluta 302 and the IRS MOI, and willfully violated the court's order of September 16, 2008. We concluded that they did not.

The fact that the prosecutors (finally) recognized the significance of the Pluta 302 and the IRS MOI and determined that they had to be disclosed, knowing that the late disclosure would be met with the court's displeasure, was commendable. Nevertheless, we found Morris's explanation to the court for the late disclosure wanting. Morris told the court that the redaction of the Pluta 302 was the product of "human error."[755] Although Morris declined to assign blame in court for the redaction, her assertion was premised on her understanding that Kepner had redacted the language in question from the Pluta 302 because she reviewed all of Allen's 302s and redacted everything but what matched the representations in the September 9 *Brady* letter. Because the *Brady* letter did not specifically recite Allen's statement from the Pluta 302 that Allen "believes that Stevens would have paid an invoice if he had received one," Kepner redacted that statement from the Pluta 302. What Morris did not know at the time, however, was that Kepner had identified the Pluta 302 on the *Brady* spreadsheet, with the recommendation for disclosure of information that went beyond the single statement identified above, but that Marsh rejected that disclosure in favor of the statements Allen made to Kepner on the same day, September 9, the *Brady* letter was sent to the defense.

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[755] *United States v. Stevens*, Tr. Oct. 2, 2008 (am) at 11.

Whatever merit Morris's "human error" argument holds as to the Pluta 302, it is unavailing as to the December 11 12 IRS MOI. The focus of the court's attention, and Morris's argument, at the October 2 hearing was the Pluta 302, but we found that the IRS MOI was more significant for *Brady* purposes. The IRS MOI contained even more powerful exculpatory information than the Pluta 302: "If Rocky Williams or Dave Anderson had invoiced Ted and Catherine Stevens for VECO's work, Bill Allen believes they would have paid the bill."[756] This statement, which was indisputably favorable to the defense, was withheld until October 1, not because of inadvertent redaction, but because no attorney reviewed Allen's interview reports for *Brady* material until that night. Rather, the prosecutors delegated that essential attorney function to the FBI and IRS agents.[757] Thus, although we found that the failure to produce the Pluta 302 and IRS MOI information before October 1 was not intentional, we also found that it was not the result of an excusable mistake.

Based on the results of our investigation, we found insufficient evidence to conclude that any of the prosecutors acted with the requisite intent ("intentionally fail to disclose") to establish a violation of D.C. Rule of Professional Conduct 3.8(e), although we found this a close question. Members of the prosecution team knew or should have known that the information tended to negate the guilt of the accused, but we concluded that they did not "intentionally" withhold it.[758] For similar reasons, we also concluded that there was insufficient evidence to support a finding that any prosecutor violated DC RPC 4.1(a) ("knowingly" make a false statement of material fact to a third person) with respect to the disclosures and omissions in Paragraph 17(c) of the September, 2008 *Brady* letter.

2. Misconduct Findings

The prosecutors' delegation of the *Brady* review responsibility to the agents was the crux of the problem not because the agents failed to do their duty, but because they should never have been saddled with the *exclusive* responsibility for conducting the *Brady* review of interview reports in the first place. All the prosecutors acknowledged that *Brady* review is a prosecutor's primary duty and that law enforcement agents are neither trained nor expected to carry out that

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[756] IRS MOI Dec. 11-12, 2006, at ¶ 44.

[757] The IRS spreadsheet, prepared by IRS SA Larry Bateman, did not reflect any *Brady* information from the Dec. 11-12, 2006 MOI. Bateman shared the task of reviewing IRS MOIs with IRS SA Dennis Roberts, who identified no *Brady/Giglio* information in the Dec. 11-12, 2006 MOI.

[758] The bar rule contains a *scienter* element. Proof of intent is necessary to establish a violation of Rule 3.8(e): "[t]he prosecutor in a criminal case shall not [i]ntentionally fail to disclose to the defense . . . any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense . . . ."

function alone.[759] Yet, until the night of October 1 in the midst of trial no prosecutor conducted an independent review of Allen's interview reports to determine if they contained *Brady* material. Moreover, even after the agents made their determinations, the prosecutors further delegated to the agents, specifically SA Kepner, the responsibility for redacting the various reports in which they found *Brady* material. Thus, as we discuss more fully below, we found that the delegation of the *Brady* review, including the redaction of reports, to the case agents constituted an abdication of the prosecutors' duty.

We found, further, that the disclosure of the Pluta 302 and the December 11 12, 2006 MOI did not cure the failure to disclose Allen's statements of April 15. Allen's statements on April 15 were far more comprehensive and favorable to the defense than what Allen was reported to have said on either February 28, 2007 (the Pluta 302) or on December 11 and 12, 2006 (the IRS MOI). We concluded that neither the statements in Paragraph 17(c) of the *Brady* letter, nor the subsequent (but untimely) disclosure of Allen's statements from the August 30, 2006 FBI 302, the Pluta 302, and the December 11 12, 2006 MOI, sufficed as substitutes for the information conveyed by Allen on April 15.

a. The April 15, 2008 Allen Statements

We concluded, first, that neither PIN Chief Welch nor Principal Deputy Chief Morris committed professional misconduct or exercised poor judgment with respect to the failure to disclose Allen's April 15 statements. Neither attended the April 15 interview, and neither knew that Allen had said he did not recall discussing the Torricelli Note with Persons, until the prosecutors' notes surfaced months after trial.[760] We also concluded that neither Goeke nor Sullivan acted in reckless disregard of their professional obligations or exercised poor judgment in this regard. Although both Goeke and Sullivan took notes of the April 15 interview, both were relieved of trial duties after the realignment of the trial team

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[759] We do not intend this to constitute criticism of the agents' performance. As SA Herrett told us, the agents received little guidance for the task, leading her to search the Internet for a "general overview" of the terms "Brady" and "Giglio." We fault Kepner not for failing to discern *Brady* material in the reports she prepared, but for failing to memorialize Allen interviews in which he provided information that was clearly favorable to the defense, specifically Allen's interviews of September 20, 2006, and April 15, 2008.

[760] Upon hearing of Allen's September 14, 2008 statement about the Torricelli Note, Morris recalled that Allen had been asked about the Note at an earlier date and that "he acknowledged the notes[.]" However, we found that Morris did not appreciate the significance of the earlier interview, stating that she "didn't connect up that, well, why didn't he say that earlier." We found this explanation reasonable given Morris's lack of involvement in, or responsibility for, any of the Allen preparation sessions or interviews. More importantly, Morris was not present for the April 15, April 18, and September 14 interviews of Allen.

following the indictment, and neither attended the September 14, 2008 interview. Neither had any duties or responsibilities with respect to Allen's preparation for trial, and no one asked them to review their notes of the April 15 meeting. We did not find it objectively unreasonable for the two members of the prosecution team who were not to represent the government in court to expect the attorneys who were part of the trial team, Bottini and Marsh, to fulfill the disclosure obligations relating to the key government witness that each of them, at varying times, was responsible for handling.

We reached the opposite conclusion as to Bottini.[761] We concluded that Bottini acted in reckless disregard of his disclosure obligations by failing to search his own files for exculpatory and impeachment material relating to Bill Allen. It is settled *Brady* doctrine that "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case . . . ." *Kyles v. Whitley,* 514 U.S. 419, 437 (1995). USAM Section 9.5.001(B)(2) draws on the Court's teachings in *Kyles v. Whitney* by directing, in preparing for trial, federal prosecutors are obligated to "seek all exculpatory and impeachment information from all members of the prosecution team . . . includ[ing] federal, state, and local law enforcement officers and other government officials" participating in the prosecution of the defendant. In July 2008, the D.C. Circuit Court of Appeals found, in a case prosecuted by PIN, that the prosecutor's duty to learn of *Brady* and *Giglio* material extends to notes taken by agents of a witness interview. *United States v. Andrews,* 532 F.2d 900, 906 (D.C. Cir. 2008).[762] We need not go even that far. By necessary implication, the duty to review *others'* interview notes requires a prosecutor to review *his own* notes. Here, Bottini participated in the April 15 Allen interview and took detailed notes of Allen's responses to the questions regarding the Torricelli Note. Bottini was the only trial team attorney present during the September 14, 2008 pretrial preparation session in which Allen made the "covering his ass" statement. We found that Bottini failed to adequately search his own files for his notes of Allen interviews and took no steps to gather any notes taken by Kepner or his fellow prosecutors for any Allen interviews. Accordingly, we concluded that Bottini acted in reckless disregard of his obligation to learn of exculpatory and impeachment evidence in the government's possession regarding Bill Allen.

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[761] As with other issues discussed in this Report, we have refrained from articulating misconduct findings on this issue with regard to Marsh.

[762] In his Schuelke interview, PIN Chief Welch said "from a substantive legal standpoint, I don't see a difference between attorneys' notes and agents' notes" and that they "should have been reviewed." Welch (Schuelke) Tr. Jan 13, 2010 at 91. The *Andrews* opinion was circulated through PIN, and Morris discussed the case with agents when she met with them in Anchorage in August 2008.

In reaching our conclusion, we considered Bottini's excuse that he "initially misplaced his notes" from the April 15 and 18, 2008 interviews of Allen by putting them in a folder labeled "Documents to show BA on April 15th." The documents shown to Allen on April 15 were the same as the ones shown to him during the August and September trial preparation sessions. Bottini met with Allen on multiple occasions leading up to trial and painstakingly covered all the areas of Allen's expected testimony. We found that although Bottini was generally organized and meticulous in trial preparation, his failure to review the file containing the critical documents used during the April 15 and 18 Allen interviews, coupled with his failure to review the agent generated *Brady* spreadsheets and his failure to identify any *Brady* material in the 302s he reviewed for witness preparation purposes, rendered his *Brady* review ineffective. Moreover, a file labeled "Documents to Show Allen on April 15" should have reminded Bottini that Allen was in fact interviewed about the Torricelli Note on that date, and alerted him that there was no FBI 302 memorializing the interview. That file alone should have prompted Bottini to dig deeper, but he did not.

Although we did not find that Bottini intentionally concealed his notes from the April 15, 2008 Allen interview, we concluded that he acted in reckless disregard of his obligation to find and disclose them. The "covering his ass" statement by Allen on September 14, 2008 was unquestionably new information that severely undermined a critical component of the defense. Bottini knew or should have known that a document as significant as the Torricelli Note was not shown to Allen for the first time a mere two weeks before the commencement of trial. Under the circumstances, we found that Bottini's failure to search his memory or his files, as well as the memories and notes of his colleagues and Kepner, pertaining to Allen interviews was objectively unreasonable under the circumstances.[763] Kepner, in particular, was an obvious source of interview notes;

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[763] Bottini told us he reviewed Allen 302s for trial preparation purposes, not specifically for *Brady* purposes; the agents were reviewing the 302s for *Brady* and *Giglio* purposes. Bottini acknowledged that *Brady* review is a fundamental obligation of the attorneys. He also told us that, while reviewing Allen 302s for trial preparation purposes, he had in mind to make note of any *Brady* or *Giglio* material contained in them, but he said, "I don't think anything leaped out at me." Bottini OPR Tr. at 163. Bottini did not identify a single *Brady* or *Giglio* issue that emerged from his review of Allen's multiple 302s. He also did not review the *Brady* spreadsheets prepared by the agents ("I certainly didn't do it before the *Brady* letter went out") and, in fact, only reviewed them "[l]ater on when some of these issues started to pop up" at trial, specifically with respect to Paragraph 17(c) of the *Brady* letter, which arose in court on October 2. Under these circumstances, we found no reason to believe that Bottini paid any more attention to his own interview notes, for *Brady/Giglio* purposes, than he did to Allen's 302s or the agents' *Brady/Giglio* review. In his comments on our draft report, Bottini's counsel argued that OPR failed to consider Bottini's "good-faith efforts to meet his disclosure obligations," citing the 1999 version of OPR's Analytical Framework recognizing a defense to misconduct allegations for attorneys who made good-faith attempts to ascertain and comply with obligations and standards. Feb. 8, 2011 letter from Kenneth L. Wainstein to OPR at 18. In this case, we did not find that Bottini's conduct

she was not only the lead case agent but participated in virtually every interview of Allen from August 30, 2006, through the start of trial in September 2008. Yet, Bottini never asked her for her interview notes.[764]

Additionally, we found that Bottini missed an opportunity at trial to ameliorate his failure to disclose Allen's April 15 statements. During the cross examination of Allen, defense counsel repeatedly asked Allen when he first told the government about Persons's "covering his ass" statement. The obvious objective of the cross examination was to show that Allen had fabricated, or only recently conveyed, that information to the government. Allen had been in the government fold since August 2006, but there was nothing in any interview report indicating a statement by Allen of that magnitude. The September 9 *Brady* letter made no mention of it, leading counsel to infer that Allen had relayed that important piece of evidence some time after September 9. The purpose of the cross examination may have escaped Allen he was clearly confused by the questioning and denied only recently telling the government about Persons's comment but it did not escape Bottini. Bottini knew what the defense did not know and what Allen was confused about that Allen had conveyed Persons's "covering his ass" statement for the first time on September 14, little more than two weeks before Allen took the stand.

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qualified for the good-faith exception. Bottini was responsible for Allen as a witness and he was aware of his obligations under *Brady*, yet he took insufficient steps to ascertain and comply with such obligations relative to Allen. Bottini did not review or comment on the agent-generated *Brady* spreadsheets or comment on the Allen sections of the draft September 9, 2008 *Brady* letter, and his fruitless review of the 302s only concerned *Brady* issues that could have "leaped out" at him. (Notably, none did.) Bottini identified no such *Brady* material in the 302s. Moreover, we found no evidence that Bottini spoke to colleagues to determine who, if not himself, was responsible for reviewing the Allen material for *Brady* information. Moreover, despite Bottini's knowledge of the recency of Allen's September 14, 2008 pretrial preparation statement, Bottini failed to make any attempt to correct Allen's inaccurate and misleading trial testimony concerning the statement. We found these actions inconsistent with objectively reasonable good faith behavior under these circumstances.

[764] In his comments on our draft report, Bottini's attorney argued that the *Brady* review was not assigned to his client; that Bottini nevertheless conducted a *Brady* review while preparing for witness interviews; and that Bottini made a *Brady/Giglio* disclosure list after consulting a *Brady* reference guide. Feb. 8, 2011 letter from Kenneth L. Wainstein to OPR at 20-21. We found that Bottini was responsible for presenting Allen as a witness and therefore was responsible for ensuring that Allen's *Brady* material was provided to the defense. Bottini told us that he identified no *Brady* material in his review conducted during trial preparation and he missed entirely the folder containing the notes of the April 15, 2008 meeting. We reviewed the "disclosure list" referenced by Bottini's counsel and found it to be a one-page list of general topics for impeachment, with entries such as "alcohol use" and "prior inconsistent statements??". While the list shows that Bottini was aware that prior inconsistent statements may qualify as *Brady/Giglio* material, the list offers no evidence that Bottini actually searched for, or identified, any such material related to Allen.

Bottini made the strategic decision not to inform the defense of this new and powerfully incriminating information before trial. Although the government may not have been obligated to disclose Allen's September 14 statement, it was obligated to disclose his April 15 statement.[765] In the absence of disclosing either, Bottini was obligated, at a minimum, to correct Allen's denial that he only recently told the government about Persons's "covering his ass" remark. Although we did not find that Bottini "knowingly" offered evidence that he knew to be false, within the meaning of D.C. RPC 3.3(a)(4), or that he failed to correct perjured testimony, *see Napue v. Illinois*, 360 U.S. 264, 269 (1959), we concluded that Bottini compounded his misconduct in failing to disclose Allen's April 15 statements by failing to correct Allen's inaccurate testimony on cross examination.[766]

The *Brady* obligation is a continuing one. When Allen denied that he only recently told the government about Persons's remark even if he was confused in doing so the fact that he provided the information on September 14 became at that point *Brady* information that Bottini was duty bound to disclose to the defense. Bottini, however, remained silent.[767] Viewed in conjunction with his failure to search his files for Allen impeachment material relating to the Torricelli Note, Bottini's failure to correct Allen's inaccurate testimony, or to provide the

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[765] Allen's September 14 "covering his ass" statement, however, should have been memorialized in a FBI 302. Although post-indictment trial preparation sessions are generally not subject to the FBI policy and practice of memorializing witness interviews, there is a notable exception for new matter. As Welch explained in his OPR interview, new information uncovered in such an interview should be reduced to writing. The prosecutors understood this, as demonstrated by Goeke's direction to SA Joy (in Bottini's presence) to prepare an FBI 302 summarizing Rocky Williams's statement in the August 22, 2008 trial preparation session that he never discussed with Catherine or Ted Stevens his understanding that his and Dave Anderson's time was rolled into Christensen Builders' bills. No similar instruction was given to Kepner with respect to Allen's "covering his ass" statement at the September 14 trial preparation session. Had a 302 been prepared, as it should have been, it would have been subject to disclosure following the court's October 2, 2008 order to the government to produce all witness interview reports.

[766] In his comments on the draft report, Bottini's attorney argued forcefully that Bottini's failure to locate his notes of the April 15 Allen interview was merely a mistake, but he did not address this critical aspect of Bottini's conduct. *See* Feb. 8, 2011 letter from Kenneth L. Wainstein to OPR at 21-23. We found that even if Bottini's prior failure to identify the *Brady* material related to the Torricelli Note were considered to be a mistake, Bottini's failure to correct Allen's trial testimony, standing alone, constituted reckless disregard of his *Brady/Giglio* and USAM obligations.

[767] Morris told us she was not focused on Allen's cross-examination because Allen was Bottini's witness and she was "exhausted" by that point in the trial. She also told us, however, that had she been focused, she would have considered it her obligation to correct the record. Marsh told us he was not sure if he was in the courtroom at the time, but was so "overwhelmed" that he paid less attention to the testimony of witnesses for whom he was not responsible. Because the primary responsibility for Allen at trial fell to Bottini, we found that Morris did not act in reckless disregard of her obligation to inform the defense of the September 14 disclosure date.

truthful information to the defense, provides further evidence that Bottini acted in reckless disregard of his disclosure obligations.[768]

b. The Pluta 302 and the IRS MOI

Based on the results of our investigation, we concluded that none of the prosecutors committed intentional misconduct with respect to the untimely disclosure of the Pluta 302 and the December 11 12 IRS MOI. Nevertheless, for reasons similar to our conclusions regarding the non disclosure of Allen's April 15 statements, we concluded that AUSA Bottini acted in reckless disregard of his duties under *Brady* and *Giglio* principles and the USAM provision. We concluded, further, that PIN Principal Deputy Chief Morris exercised poor judgment by authorizing the delegation of the *Brady* review of witness interview reports to case agents; by delegating the redaction of interview reports to SA Kepner; and by failing to ensure that team attorneys reviewed the agents' *Brady* determinations and report redactions and conducted an independent review for *Brady* information.

We reached our conclusion as to Bottini for largely the same reasons we concluded that he acted in reckless disregard of his *Brady* obligations with respect to Allen's statements regarding the Torricelli Note at the April 15, 2008 interview. Bottini acknowledged that *Brady* review is the prosecutor's non delegable duty, not the agents'.[769] Nevertheless, he defended the delegation of the *Brady* review to the IRS and FBI agents because of the "time compression" of the case. Although we appreciate that the time constraints under which the prosecution

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[768] We declined to make a separate, independent misconduct finding with respect to Bottini's failure to disclose Allen's statement (during the trial preparation session of September 15, 2008) concerning what Allen told Stevens to prompt him to take out a $100,000 loan for the Girdwood renovations. OPR did not notice the significance of the September 15, 2008 Allen interview notes until after the interviews were completed; therefore, Bottini was not asked during his interview to explain the notes and why he did not disclose what Allen said that day. In his comments on OPR's draft report, Bottini's attorney questioned how OPR could hold Bottini accountable for not finding notes that OPR could not find until late in the investigation. Feb. 8, 2011 letter from Kenneth L. Wainstein to OPR at 24. The crucial distinction between OPR and Bottini on this point is that Bottini was present for Allen's interview on September 15, 2008, and heard what Allen had to say at the time. The interview was barely a week before trial, so Bottini should not have had to review and decipher his notes to determine whether the information had to be disclosed; he could have (and should have) made the disclosure promptly after hearing what Allen said. Nevertheless, under the circumstances, we refrained from making a separate finding as to Bottini's failure to disclose the September 15, 2008 Allen statement. Instead, we considered that conduct as evidence bearing on Bottini's general failure to carefully review his own notes, or prod his own memory, for *Brady/Giglio* material.

[769] Bottini OPR Tr. Mar. 10, 2010 at 128-30.

team operated were onerous, we found that excuse unavailing for Bottini's failure to fulfill his *Brady* obligations.

Bottini was responsible for presenting Allen as a witness at trial. During the months of August and September, Bottini spent numerous hours meeting with Allen to prepare his trial testimony. From our review of Bottini's and Bundy's notes, we counted 13 meetings between Bottini and Allen before Allen took the stand at trial.[770] In the course of trial preparation, Bottini painstakingly worked with Allen on every facet of his direct testimony and prepared him for what he was likely to face on cross examination. To prepare Allen effectively, Bottini had to familiarize himself with the multiple interview reports compiled on Allen. Bottini told us, however, that he reviewed Allen's 302s for trial preparation purposes, not specifically focusing on *Brady*. Nevertheless, he also told us that, while reviewing Allen 302s for trial preparation purposes, he had in mind to make note of any *Brady* or *Giglio* material contained in them, but nothing "leaped out" at him.[771] Bottini did not identify a single *Brady* statement from the collection of Allen reports, much less the clear *Brady* information from the Pluta 302 or the December 11 12 IRS MOI.

Although Bottini acknowledged that *Brady* review is "always" the prosecutor's responsibility,[772] he nevertheless essentially deferred to the agents for the determination of what constituted *Brady* material in the Allen interview reports.[773] He provided no guidance to the agents; he did not review the *Brady* spreadsheets prepared by them ("I certainly didn't do it before the *Brady* letter went out"); and he only reviewed the spreadsheets "[l]ater on when some of these issues started to pop up" at trial, specifically with respect to Paragraph 17(c) of the *Brady* letter. We found that Bottini abdicated his responsibility to perform a *Brady* review of materials relating to his witness.

The duty of a federal prosecutor to review materials in the government's possession for *Brady* information is clear and unambiguous. We found that Bottini, in view of his experience and training, knew or should have known that he bore the responsibility for reviewing interview reports relating to Allen to determine if there was *Brady* material contained therein. We found, further, that

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[770] Bottini met with Allen and his attorney to prepare Allen for trial on the following dates: August 21, 27, and 29; September 2, 3, 5, 6, 13, 14, 15, 16, 17, and 24, 2008.

[771] Bottini OPR Tr. Mar. 10, 2010 at 163.

[772] Bottini OPR Tr. Mar. 10, 2010 at 128

[773] In his OPR interview, Bottini stated that, on the night of October 1, 2008, "I remember reading the MOI and going, yeah, this should have been, this should have been flagged during the initial Brady review." Bottini OPR Tr. Mar. 10, 2010 at 213.

his failure to review Allen's interview reports for *Brady* information presented a substantial likelihood that he would violate his obligations. Under all the circumstances, we concluded that Bottini's failure to review Allen's interview reports for *Brady* material was objectively unreasonable. Moreover, we concluded that Bottini's failure to disclose to the defense, during cross examination of Allen, the timing of Allen's "covering his ass" statement (September 14, 2008) constituted an independent, alternative basis for finding that he acted in reckless disregard of his *Brady*, *Giglio*, and USAM disclosure obligations. Accordingly, we concluded that Bottini committed professional misconduct by acting in reckless disregard of his obligations under *Brady* caselaw and the USAM provision.

We reached a different conclusion as to PIN Principal Deputy Chief Morris. We concluded, first, that Morris did not commit professional misconduct with respect to the untimely disclosure of the Pluta 302 and the IRS MOI. Morris came late to the trial team and did not have the breadth of knowledge concerning Bill Allen that Bottini and others had. She had no responsibility for preparing Allen for trial or examining him on the witness stand. That responsibility fell to Bottini, and Morris had the right to rely on Bottini an experienced prosecutor to fulfill his *Brady* responsibilities with respect to his witness. We also found no evidence that Morris knew of the existence or contents of the Pluta 302 or the IRS MOI before the issue was raised on the night of October 1, 2008. We found, further, that her representations to the court concerning the matter were candid and accurate, to the best of her knowledge.

Although we concluded that Morris did not engage in misconduct, we nevertheless concluded that she exercised poor judgment with respect to the manner in which the *Brady* review was conducted. Morris was a late addition to the trial team and her insertion at the head of the team, through no fault of her own, had a reverberating effect: Sullivan and Goeke were relegated to non trial duties, and Marsh's role was diminished. Morris was sensitive to the effect her inclusion on the trial team had on the morale of others and told us she deferred to the existing team members on many matters, including discovery. Morris told us that, upon joining the trial team, she sought to make herself as "small as possible" and would "try not to even give an opinion" during meetings.[774] She stated, further, that she "wasn't really [taking] a supervisory role" in the case and "was trying [her] best to get up to speed to be a . . . trial team member."[775]

At the same time, Morris remained the PIN Principal Deputy Chief and was the leader of the trial team, whether she relished the role or not. In that capacity,

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[774] Morris OPR Tr. Mar. 19, 2010 at 142-143.

[775] Morris (Schuelke) Tr. Jan. 15, 2010 at 51.

she was required to make decisions about matters that would affect the course of the case. Notwithstanding her reluctance to upset the existing order of the trial team, Morris did in fact make decisions and recommendations concerning crucial matters. Within days after joining the trial team, Morris recommended to AAG Friedrich and PDAAG Glavin that witness interview reports not be turned over to the defense as *Jencks* material. That approach, while within the government's prerogative, increased significantly the burden on the prosecution to thoroughly review witness interview reports to ensure that any *Brady* or *Giglio* material would be culled from the interview reports and timely disclosed to the defense. After obtaining the Front Office's approval for her approach, however, Morris deferred to the team attorneys and agents to implement it. Morris told OPR that she was aware of the *Brady* review by agents but believed, without verifying, that attorneys "would review the final product of whatever the FBI turned over."[776] She was unaware that the agents' review for *Brady* was not supervised or reviewed by attorneys until "stuff blew up in court."[777] She was also unaware that the attorneys did not independently review the interview reports or agent notes for their own witnesses, and she did not direct them to review the interview reports or agent notes, or their own interview notes. Moreover, it was Morris's decision to allow Kepner to perform the redactions of 302s to be turned over to the defense pursuant to the court's September 16 order. Morris provided no instruction to Kepner, did not supervise Kepner's work, and failed to direct any of the team attorneys to either supervise Kepner or review the redactions she made to the interview reports. We concluded that Morris's failure, as the leader of the trial team, to supervise the *Brady* review, or to provide clear instruction to attorneys and agents on what was expected of them, stood in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take.

Finally, we concluded that Welch, Sullivan, and Goeke did not commit professional misconduct or exercise poor judgment with respect to the failure to disclose *Brady* material related to Bill Allen. Goeke played no role in the matter, and Sullivan's role, for which he was given no guidance, was to gather the information compiled by the agents and provide that information to the trial attorneys. He bore no responsibility for reviewing Allen's interview reports. Welch, as the Chief of the section, had a right to rely on Morris and the experienced trial attorneys to fulfill their duties with respect to *Brady* disclosures. With Morris inserted on the trial team, and with the Front Office communicating directly with Morris and providing direction and oversight of the case, Welch's direct supervisory role was diminished. Welch told OPR that he did not become

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[776] Morris OPR Tr. Mar. 19, 2010 at 194.

[777] Morris OPR Tr. Mar. 19, 2010 at 174.

aware of the agent's *Brady* review and corresponding spreadsheet until after the trial, in December 2008 and January 2009.[778] However, when the events of October 1 were brought to his attention, Welch stepped in and directed that the Pluta 302 be disclosed. From that point on, Welch became more intimately involved and provided the supervision and direction that had been lacking. We found no basis for a misconduct or poor judgment finding as to Welch.

[778] Welch OPR Tr. March 2, 2010 at 154. Welch stated that he was "livid" when he found out about the agent *Brady* review and that, "[i]f I had known that agents were doing the *Brady/Giglio* review, I would have lost it." *Id.* at 155.

CHAPTER FIVE
INFORMATION RELATING TO BAMBI TYREE

I. INTRODUCTION AND SUMMARY

Prior to the *Stevens* trial, the prosecution team was aware of allegations that their chief witness, Bill Allen, engaged in sex with underage females, and that he asked one of them to give a false sworn statement that he had not had sex with her. Bambi Tyree is alleged to have had sex with Allen when she was a 15 year old prostitute.[779] Tyree had been a government witness in a prior, unrelated case (*Boehm*). During that case, FBI SA John Eckstein created an FBI 302 of a 2004 interview with Tyree at the SeaTac Correction Facility in Seattle (SeaTac 302). The SeaTac 302 related that Tyree said she had sex with Allen while underage and that she signed a false affidavit at Allen's request denying the sexual relationship.

Sealed pleadings in the *Boehm* case included statements that Tyree admitted to having underage sex with Allen, and that Allen asked Tyree to meet with his attorney and give a sworn statement stating that she never had sex with Allen. At the time of the *Boehm* prosecution, the Anchorage Police Department (APD) was investigating Allen regarding allegations that he had sex with other underage females. However, the APD police file contained a statement by Detective Kevin Vandegriff that in March 2004, he was directed by AUSA Frank Russo not to pursue the allegation against Allen because it might "interfere with a federal investigation they were conducting involving ALLEN and JOSEF BOEHM."

On March 5, 2007, as the team prepared a search warrant for Stevens's residence, AUSA Goeke reviewed the briefs in the *Boehm* case raising the issues of Tyree's false statement. On March 10, 2007, SA Kepner and SA Dunphy interviewed Allen, who stated that he had "never made a statement under oath that h[e] knew was false or misleading" and that he never "encouraged others to make a false statement under oath." According to SA Kepner, the agents were instructed by the "trial team" to question Allen in a vague manner and to intentionally avoid asking him if he had sex with Tyree out of concern that Allen might lie.

Prior to Allen's testimony in the *Kott* case, Kott's former codefendant, Bruce Weyhrauch, filed a motion in his case to examine Allen concerning his relationship with Tyree (Weyhrauch's case had been severed from Kott's). During a hearing on the motion before U.S. District Judge Sedwick (who had previously ruled on the

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[779] Documents reviewed by OPR included allegations that Allen may have paid Tyree and her family (with gifts) to keep the relationship secret.

Boehm motions concerning Allen's relationship with Tyree and his involvement in procuring a false statement from Tyree), Judge Sedwick told the defense attorneys that he was aware of the *Boehm* case and there was nothing that "connects that case to this case in any way that has any relevance here."[780]

In October 2007, members of the *Stevens* prosecution team obtained the SeaTac 302 indicating that Tyree had sex with Allen and that, at his request, she gave a false statement about the underage sex. On October 10, 2007, SA Kepner and AUSA Bottini interviewed Tyree. Tyree claimed that providing a statement to Allen's attorney was her own idea, and that Allen did not ask her to lie. Kepner and Bottini did not ask Tyree whether she had sex with Allen when she was a minor.

In preparation for the October 2007 trial of Victor Kohring, in which Allen was a witness, PIN attorney Marsh consulted the Department of Justice Professional Responsibility Advisory Office (PRAO) regarding the government's obligation to disclose AUSA Frank Russo's belief that Allen orchestrated Tyree's false statement. According to PRAO's summary report and notes, Marsh told PRAO that the SeaTac 302 was unclear as to whether Tyree lied at Allen's request, and that Russo's notes indicated that Tyree denied that Allen asked her to lie. Marsh made such representations despite a clear statement in the SeaTac 302 that "TYREE signed [the statement] at ALLEN's request" and identical language in SA Eckstein's handwritten notes.

The PRAO summary statement and attorney notes do not reflect that Marsh provided a copy of the SeaTac 302 to PRAO, or even read it to the PRAO attorney, or that he mentioned SA Eckstein's notes, which were consistent with the SeaTac 302. Further, the PRAO attorney's notes do not reflect that Marsh ever mentioned that Russo had filed three sealed pleadings in *Boehm* stating that Allen orchestrated Tyree's false statement. Rather, the PRAO summary sheet reflects that Marsh told PRAO that the evidence showed that Allen did not ask Tyree to lie. Based on the information provided, PRAO advised Marsh that Russo's memory that Allen asked Tyree to lie did not have to be disclosed. As a result, the government did not provide the *Kohring* defense team with the information that Allen had suborned a false statement from Tyree. Allen testified for the government at the trial, and Kohring was convicted on November 1, 2007.

Following the *Kohring* verdict, PIN attorneys Marsh and Sullivan again consulted PRAO, at the request of the Alaska USAO, because a local newspaper was preparing to publish a story on Allen's ties to the Tyree family, highlighting

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[780] *United States v. Kott*, No. A07-30496, Transcript of Hearing at 50 (Sept. 13, 2007) (sealed).

Allen's financial gifts to the family. The PRAO Summary Sheet indicates that Marsh and Sullivan told the PRAO attorney that the prosecutors "conducted a thorough inquiry into the matter," interviewed Tyree, reviewed attorney and FBI notes of the 2004 interview with Tyree, and "checked with the other attorney assigned to the earlier case [Goeke]." The PRAO Summary Sheet does not reflect that Marsh and Sullivan told PRAO about the *Boehm* pleadings, the SeaTac 302, or Eckstein's present recollection that Tyree said she lied at Allen's direction. PRAO provided an opinion, via email, consistent with its earlier opinion.

On August 14, 2008, the *Stevens* prosecution team filed a motion to limit cross examination of Bill Allen regarding allegations of sex with underage females. In June 2008, the *Anchorage Daily News* had published an article stating that in December 2007, the APD reopened the 2004 Allen sex investigation and then suspended the investigation for a second time in June 2008. APD representatives gave the *Anchorage Daily News* no explanation for the 2007 reopening of the charges and stated only that the investigation was recently suspended because "one or more witnesses who police hoped would resolve the matter couldn't be located." The government also sent the defense an August 25, 2008 *Giglio* letter stating that Allen had not been charged with sex offenses, and that the APD's investigation of Allen was still active. The letter did not disclose the information that Allen had asked Tyree to falsely state that she did not have sex with Allen.

On September 7, 2008, two weeks before the start of the *Stevens* trial, SA Kepner and AUSAs Bottini and Goeke interviewed Allen regarding his relationship with Tyree. Allen stated that Tyree asked to speak with his lawyer, [redacted], to help Allen resolve a blackmail issue concerning their alleged sexual relationship. Allen asserted that he did not ask Tyree to make a false statement. Once again, according to SA Kepner, prosecutors specifically did not ask Allen about his sexual relations with Tyree out of fear that Allen would lie.

On September 9, 2008, the government provided the defense team with a *Brady* disclosure letter. The letter stated that in 2007, the government became aware of "a suggestion" that Allen asked Tyree to make a sworn, false statement concerning their relationship. The letter stated further that the government "conducted a thorough investigation and was unable to find any evidence to support it." The letter did not disclose that prosecutors reviewed the SeaTac 302, which stated that Tyree lied at Allen's request. The letter also made no mention of the three *Boehm* sealed filings in which the government represented that Tyree made a false statement at Allen's request.

On September 30, 2008, Allen began his trial testimony against Senator Stevens. Prior to Allen's testimony, Judge Sullivan ruled that the defense could cross examine Allen regarding the fact that he was under investigation by the

APD. However, the defense could not raise the specifics of the investigation (sex with underage females). The defense chose not to examine Allen on this point.

On October 3, 2008, the APD investigation of Allen was transferred to the U.S. Attorney's Office for the Western District of Washington. On October 7, 2008, Allen's final day of testimony in the *Stevens* trial, the matter was transferred to the Criminal Division's Child Exploitation and Obscenity Section (CEOS). On October 14, CEOS provided the *Stevens* prosecution team with the APD file; the APD file contained the SeaTac 302 indicating that Tyree lied at Allen's request. On October 16, 2008, PIN Chief Welch provided the file to the defense, after reading the SeaTac 302 for the first time and recognizing its *Brady* implications. In an April 28, 2009 letter to Attorney General Eric H. Holder, Jr., the defense team alleged that the *Stevens* prosecutors intentionally concealed information that Allen had asked Tyree to give a false statement.

Based on the results of our investigation, we concluded that the pertinent statements in the *Brady* letter were clear misrepresentations of the facts, in violation of an attorneys' duty of truthfulness in statements to others under Rule 4.1(a) of the D.C. Rule of Professional Conduct. We concluded, further, that the suppression of the information contained in Russo's pleadings and Eckstein's SeaTac 302 violated the attorneys' disclosure obligations under *Brady* and *Giglio,* and Department of Justice policy (USAM § 9 5.001).

II. FACTUAL BACKGROUND

Prior to approaching Bill Allen to gain his cooperation as a Confidential Human Source (source), at SA Kepner's request, [redacted]

The government first became aware of issues involving Allen and underage females during trial preparation for the prosecution of Anchorage businessman Josef F. Boehm on drug and child sex trafficking charges. AUSA Goeke was a member of the *Boehm* prosecution team, along with AUSA Frank Russo.[783] Bambi

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[781] [redacted]

[782] SA Kepner's Apr. 26, 2006 request [redacted]

[783] Mar. 5, 2007 3:34pm email from James Goeke to Edward Sullivan and Joseph Bottini.

Tyree was a potential cooperating witness who admitted providing Boehm with underage females in exchange for illegal drugs.

On July 22, 2004, AUSA Russo and FBI SA John Eckstein traveled from Alaska to Seattle, Washington, to interview Bambi Tyree, along with her attorney, [redacted] at the SeaTac Correctional Facility, where Tyree was incarcerated. Tyree had previously admitted to Russo and Eckstein, during an interview in Anchorage, Alaska, that she had sex with Bill Allen when she was a minor and that she had given a false sworn statement denying the sexual relationship with Allen.[784] Russo planned to file a motion *in limine* regarding the false statement because he knew the defense would "seize upon" it, and he wanted to determine whether Tyree "denied it or agreed with it."[785] During the SeaTac interview, Tyree stated that she had sex with Allen at age 15 (at the time of the *Boehm* prosecution Tyree was 23 years old) and that, at Allen's direction, she made a false sworn statement regarding the relationship. Four days later, on July 26, 2004, the government filed a motion *in limine* in the *Boehm* case to limit impeachment of Bambi Tyree regarding a false statement she allegedly made under oath.[786] The motion stated that during government debriefs, Tyree admitted that she had sex with Bill Allen when she was 15.[787] The motion related that Tyree said that her roommate, [redacted] attempted to blackmail Allen regarding the underage sex, and in response: "Allen asked Tyree to meet with his attorney, [redacted], and give a sworn statement stating that she never had sex with Allen. Tyree did so. The government confirmed the existence of such [a] statement from [redacted]."[788] The statement was made in the form of a deposition. Tyree gave the statement on June 19, 1999, when she was 18 years

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[784] Russo (Schuelke) Tr. Mar. 24, 2010 at 58-62.

[785] Russo (Schuelke) Tr. Mar. 24, 2010 at 58-62.

[786] *United States v. Boehm*, No. A04-003 CR, Government Motion in Limine Regarding Impeachment Evidence Pertaining to Bambi Tyree at 1 (D. Alaska, filed July 26, 2004) (sealed).

[787] *United States v. Boehm*, No. A04-003 CR, Government Motion in Limine Regarding Impeachment Evidence Pertaining to Bambi Tyree at 1 (D. Alaska, filed July 26, 2004) (sealed).

[788] *United States v. Boehm*, No. A04-003 CR, Government Motion in Limine Regarding Impeachment Evidence Pertaining to Bambi Tyree at 1 (D. Alaska, filed July 26, 2004) (sealed). In an October 4, 2004 letter to AUSA Frank Russo, Allen's attorney, [redacted], confirmed that "the recorded statement taken from Bambi Tyree" occurred on June 19, 1999, in [redacted] law office. However, [redacted] refused to disclose the statement to the government, asserting both attorney-client privilege and the work product doctrine. Oct. 4, 2004 letter from [redacted] AUSA Frank Russo.

old.[789] OPR attempted to obtain Tyree's deposition from [redacted], but we were told that the 1999 deposition had been purged under the [redacted] document retention policy. [redacted]

The government filed two additional pleadings in the *Boehm* case relying on Tyree's false statement made at Allen's request.[790] The government's Reply to Defendant's Opposition to Motion Regarding Impeachment Evidence Pertaining to Bambi Tyree, filed August 17, 2004, stated: "Allen convinced Tyree to give a false statement to his attorney to defend against any prospective criminal action. Tyree complied."[791] The government's Opposition to Defendant's Motion to Reconsider Court's Ruling Regarding Impeachment of Bambi Tyree, filed on October 6, 2004, stated:

> Tyree was a juvenile when the alleged sexual relationship with Allen occurred. There was a scheme to blackmail Allen based on his alleged sexual relationship with Tyree. The blackmail scheme caused Allen to hire an attorney, [redacted]. Tyree agreed to give a sworn statement to [redacted] in which she denied having sex with Allen.[792]

U.S. District Judge Sedwick ruled that evidence "that Tyree lied under oath in a written statement" would be admitted, but that "any other evidence touching upon

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[789] *United States v. Boehm*, No. A04-003 CR, United States' Opposition to Defendant's Motion to Reconsider Court's Ruling Regarding Impeachment of Bambi Tyree at 8 (D. Alaska, filed Oct. 6, 2004) (sealed).

[790] *United States v. Boehm*, No. A04-003 CR, United States' Reply to Defendant's Opposition to Motion Regarding Impeachment Evidence Pertaining to Bambi Tyree at 3 (D. Alaska, filed Aug. 17, 2004) (sealed); *United States v. Boehm*, No. A04-003 CR, United States' Opposition to Defendant's Motion to Reconsider Court's Ruling Regarding Impeachment of Bambi Tyree at 8 (D. Alaska, filed Oct. 6, 2004) (sealed).

[791] *United States v. Boehm*, No. A04-003 CR, United States' Reply to Defendant's Opposition to Motion Regarding Impeachment Evidence Pertaining to Bambi Tyree at 3 (D. Alaska, filed Aug. 17, 2004) (sealed).

[792] *United States v. Boehm*, No. A04-003 CR, United States' Opposition to Defendant's Motion to Reconsider Court's Ruling Regarding Impeachment of Bambi Tyree at 8 (D. Alaska, filed Oct. 6, 2004) (sealed).

her relationship with Allen" would be excluded.[793] Boehm pled guilty prior to trial and Tyree testified at Boehm's sentencing hearing.

In October 2004, prior to Boehm's sentencing, SA John Eckstein created an FBI 302 memorializing the July 22, 2004 interview with Bambi Tyree, her attorney [redacted] and AUSA Russo at the SeaTac Correction Facility (SeaTac 302).[794] The SeaTac 302 stated that:

> TYREE had sex with BILL ALLEN when she was 15 years old. TYREE previously signed a sworn affidavit claiming she did not have sex with ALLEN. TYREE was given the affidavit by ALLEN's attorney, and she signed it at ALLEN's request. TYREE provided false information on the affidavit because she cared for ALLEN and did not want him to get in trouble with the law.[795]

The representation that Tyree signed a false affidavit at Allen's request is consistent with SA Eckstein's interview notes, which indicate that Tyree "signed aff[idavit] at BA's request."[796] Alaska AUSA Frank Russo was also present for the July 2004 Tyree interview. AUSA Russo's notes of the interview are less clear, indicating that Tyree signed "at the request of ~~Bill~~ Bambi's idea."[797]

At the time of the *Boehm* prosecution, the Anchorage Police Department (APD) was investigating Allen regarding allegations that he had sex with other underage females. The APD police file contained a statement by Detective Kevin Vandegriff that in March 2004, he was directed by AUSA Frank Russo not to

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[793] *United States v. Boehm*, No. A04-003 CR, Order Under Seal at 6 (D. Alaska, Filed Sept. 14, 2004).

[794] July 22, 2004 FBI 302 of Bambi Tyree. Although SA Eckstein interviewed Tyree on July 22, 2004, he did not record the interview in an FBI 302 until three months later. SA Eckstein could not explain the reason for such delay. Eckstein OPR Tr. June 24, 2009 at 19. We note that the July 26, 2004 motion was filed only four days following the Russo and Eckstein interview with Tyree at SeaTac Correction Facility.

[795] July 22, 2004 FBI 302 of Bambi Tyree.

[796] SA Eckstein notes of July 22, 2004 interview with Bambi Tyree.

[797] AUSA Russo notes of July 22, 2004 interview with Bambi Tyree. Russo told OPR: "My notes aren't very complete notes usually." Russo OPR Tr. June 25, 2009 at 46. Russo also stated that he was "60 percent" certain he made the cross-out in his notes during a later interview session with Tyree when he used his SeaTac interview notes to prepare the witness. Russo (Schuelke) Tr. Mar. 24, 2010 at 69, 75, 76. OPR was not able to locate Russo's original notes to examine whether the pen markings were different.

pursue the allegation against Allen because it might "interfere with a federal investigation they were conducting involving ALLEN and JOSEF BOEHM."[798] In 2007, Vandegriff told the *Anchorage Daily News* that the 2004 suspension of the investigation "had nothing to do with Allen," and that he and the prosecutors were worried that "a detour would detract from the complicated *Boehm* prosecution." Russo told OPR that he never told Vandegriff to stop the investigation and noted that Polar Pen had "nothing to with Boehm."[799] Vandegriff told OPR that in March 2004 he was advised by AUSA Russo not to actively investigate the case because the investigation might interfere with a federal investigation.

On March 5, 2007, as the prosecution team prepared a search warrant for Stevens's Girdwood residence, AUSA Goeke reviewed the *Boehm* pleadings in order to determine what information must be disclosed to the court authorizing the search warrant (Judge Sedwick, the judge from the *Boehm* case, was to review the search warrant). On March 5, 2007, Goeke sent an email to PIN attorney Sullivan and AUSA Bottini providing excerpts from the briefs in the *Boehm* case involving the Tyree false statement.[800] Goeke stated that, in the *Boehm* case, the government had not questioned Allen or Tyree: "(1) concerning Allen's relationship with Tyree; (2) concerning whether Allen asked Tyree to provide a deposition; and (3) concerning whether Allen asked t[hat] Tyree provide specific testimony at a deposition."[801] Sullivan then forwarded the email to PIN Chief Welch requesting guidance on whether to include such information implicating Allen's credibility in a *Stevens* search warrant affidavit based on information provided by Allen.[802] Sullivan stressed that if Judge Sedwick were to review the search warrant affidavit, Sedwick's prior involvement in reviewing the *Boehm* case motions and his prior involvement reviewing *Stevens* Title III applications may cause him to

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[798] Nov. 4, 2004 Anchorage Police Department memorandum re Case #04-7121.

[799] Russo OPR Tr. June 25, 2009 at 28. Russo noted that Vandegriff explained that the report regarding suspension of the investigation was "simply an administrative responsibility that he was complying with" and was not intended to convey that the investigation was suspended at Russo's request. *Id.* at 29.

[800] Mar. 5, 2007 3:34pm email from AUSA James Goeke to PIN attorney Sullivan and AUSA Bottini. AUSA Bottini stated that PIN attorney Marsh was not included on the emails because he may have been out of the country at that time. Bottini (Schuelke) Tr. Dec. 17, 2009 at 689.

[801] Mar. 5, 2007 3:34pm email from AUSA James Goeke to PIN attorney Edward Sullivan and AUSA Bottini.

[802] Mar. 5, 2007 5:00pm email from PIN attorney Sullivan to PIN Chief Welch. Welch stated that the issue was brought to his attention "in March, maybe early April of 2007" when "we were getting ready to put the affidavit together for the Girdwood search warrant." Welch (Schuelke) Tr. Jan. 13, 2010 at 30.

raise credibility issues regarding Allen when assessing the *Stevens* search warrant.[803] The information was ultimately not included in the search warrant affidavit.[804] Welch later told OPR:

> And so, my advice as it related to the search warrant affidavit was we should certainly put in there the fact that he was negotiating or had secured a plea agreement and sort of flesh out the credibility issues as it relates to cooperation, but I didn't think we had to get into every *Giglio* issue for a particular witness we were relying upon.[805]

On March 10, 2007, SA Kepner and SA Steve Dunphy interviewed Allen, who stated that he had "never made a statement under oath that h[e] knew was false or misleading" and that he never "encouraged others to make a false statement under oath."[806] Throughout Allen's tenure as a source, the prosecutors and agents never specifically asked him if he had sex with Tyree when she was underage.[807] Nor did they ever ask Allen if he was aware of the contents of the deposition Tyree provided to his attorney, [redacted]. OPR's review of all FBI 302s, IRS MOIs, attorney notes, and FBI agent notes regarding Bill Allen revealed no such specific questioning. Additionally, SA Kepner told OPR that the "trial team['s]" strategy was specifically not to ask Allen or Tyree about the allegations

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[803] Mar. 5, 2007 5:00pm email from PIN attorney Sullivan to PIN Chief Welch.

[804] Mary Beth Kepner Affidavit in Support of Search Warrant No. 3:07-mj-00-140-JDR (search of residence located at 138 Northland Road, Girdwood, Alaska).

[805] Welch OPR Tr. Mar. 2, 2010 at 232. AUSA Bottini stated that he did not recall any "communication back and forth about this" with Welch. Bottini (Schuelke) Tr. Dec. 17, 2009 at 678.

[806] Mar. 10, 2007 FBI 302 of Bill Allen. Goeke stated that he asked Allen the same question in trial preparation for the *Kott* trial, but he did not ask Allen about having sex with Tyree, stating: "I didn't think I asked him in that kind of detail" and "Bob Bundy's a good lawyer and he would not have let answer -- would not have let him answer that question." Goeke (Schuelke) Tr. Jan. 8, 2010 at 271-274. Goeke stated that it was "[n]ot in my mind" that he was afraid Allen would lie if asked about sex with Tyree. Goeke (Schuelke) Tr. Jan 8, 2010 at 274. Goeke stated that in retrospect he should have asked Allen more specific questions regarding whether he specifically asked Tyree to lie about having sex with him but he couldn't "articulate why [he] didn't." Goeke (Schuelke) Tr. Jan. 8, 2010 at 278.

[807] Kepner OPR Tr. Oct. 14, 2009 at 741, 748, 763, 765, and 766. Bottini stated he believed that Allen's attorney, Robert Bundy, would not have let Allen answer such a question and that whether Allen had sex with a juvenile "wasn't particularly germane to impeachment issues as I saw it." Bottini (Schuelke) Tr. Dec. 17, 2009 at 727.

concerning underage sexual relations because "we were afraid he'd lie about it."[808] Allen's attorney, Robert Bundy, was present for the meeting on March 10, 2007. His notes show that Allen was not specifically asked about having sex with Tyree or any of the specifics relating to claims that Tyree had made a false statement at Allen's request:

> [Mary Beth Kepner]: anything where ever lied under oath?
> [Bill Allen]: No
> [Mary Beth Kepner]: deposed before?
> [Bill Allen]: yes VECO claim
> never been in court
> [Mary Beth Kepner]: ever encouraged anyone else to make false statement
> [Bill Allen]: No.[809]

Prior to Allen's testimony in the *Kott* case, Kott's former codefendant, Bruce Weyhrauch, filed a motion to examine Allen concerning his relationship with Tyree (the *Kott* and *Weyhrauch* cases had been severed at this point). The issue was raised during a pretrial hearing in the *Kott* case before Judge Sedwick, who had previously ruled on the *Boehm* motions concerning Allen's relationship with Tyree and his involvement in procuring a false statement from Tyree. During the sealed hearing, Judge Sedwick told the defense attorneys that he was aware of the *Boehm* case and there was nothing that "connects that case to this case in any way that has any relevance here."[810] Kott's lawyer told the court: "I don't know who Bambi Tyree is," and assured the court that he had no plan to cross examine regarding Bambi Tyree.[811] Goeke stated later that he had planned to raise the false affidavit issue with the court, but he "felt that the court had cut [him] off" and he "left it that way" even though he knew the defense did not have access to the sealed *Boehm* briefing.[812]

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[808] Kepner OPR Tr. Oct. 14, 2009 at 741, 748, 763, 765, and 766. Kepner attributed the decision to the "trial team" as a whole and did not identify any particular decision maker. Each subject attorney denied that the trial team employed such a strategy.

[809] Mar. 10, 2007 notes of Robert Bundy at RB-AWP-OPR 165.

[810] *United States v. Kott*, No. A07-30496, Transcript of Hearing at 50 (Sept. 13, 2007) (sealed).

[811] *United States v. Kott*, No. A07-30496, Transcript of Hearing at 49, 50 (Sept. 13, 2007) (sealed).

[812] Goeke (Schuelke) Tr. Jan. 8, 2010 at 283-284.

In September 2007, Allen testified for the government in the trial of Peter Kott.[813] Consistent with Judge Sedwick's pretrial ruling, the government did not provide the defense with information regarding the Allen/Tyree relationship, nor did the government disclose any information about Allen procuring the alleged false statement.[814] Kott was convicted on September 25, 2007. AUSA Goeke stated that, although he was involved in the *Boehm* prosecution, at the time of the *Kott* trial he was unaware of the SeaTac 302 because he did not participate in the interview and did not know that the interview occurred.[815] Goeke did, however, sign the October 6, 2004 *Boehm* pleading entitled Opposition to Defendant's Motion to Reconsider Court's Ruling Regarding Impeachment of Tyree, that involved Tyree's credibility (Goeke signed in place of AUSA Russo).[816] The pleading contained the quote:

> Tyree was a juvenile when the alleged sexual relationship with Allen occurred. There was a scheme to blackmail Allen based on his alleged sexual relationship with Tyree. The blackmail scheme caused Allen to hire an attorney, [redacted] Tyree agreed to give a sworn statement to [redacted] in which she denied having sex with Allen.[817]

After the *Kott* trial, Goeke spoke to Eckstein to determine if Eckstein had the same recollection of Tyree's statements on the subject and to obtain any notes or documents prepared by Eckstein memorializing any Tyree interviews he attended. Goeke learned later that day from Eckstein that Eckstein wrote a 302 regarding

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[813] AUSA Goeke presented Allen's testimony at the *Kott* trial. Marsh OPR Tr. Mar. 25, 2010 at 168.

[814] Sept. 7, 2007 letter from PIN attorney Marsh and AUSA Bottini to James A. Wendt, defense counsel in *United States v. Peter Kott*, "providing notice" of information concerning witnesses Bill Allen and Rick Smith.

[815] Sept. 8, 2008 12:16am email from AUSA Goeke to PIN attorney Marsh, AUSA Bottini, PIN attorney Sullivan, PIN Principal Deputy Chief Morris, SA Kepner, SA Joy, and PIN Chief Welch.

[816] Sept. 8, 2008 12:16am email from AUSA Goeke to PIN attorney Marsh, AUSA Bottini, PIN attorney Sullivan, PIN Principal Deputy Chief Morris, SA Kepner, SA Joy, and PIN Chief Welch; United States' Opposition to Defendant's Motion to Reconsider Court's Ruling Regarding Impeachment of Bambi Tyree (D. Alaska, filed Oct. 6, 2004) (sealed).

[817] *United States v. Boehm*, No. A04-003 CR, United States' Opposition to Defendant's Motion to Reconsider Court's Ruling Regarding Impeachment of Bambi Tyree at 8 (D. Alaska, filed Oct. 6, 2004) (sealed).

the SeaTac interview.[818] Goeke said he called Eckstein on October 4, 2007, while Goeke was on vacation, and had the following conversation:

> "By the way, what do you remember about Tyree[?] I remember her talking during . . . one of the prep sessions . . . that false statements she made that she had made it of her own volition." He goes, "I kind of remember that, too." "Is that memorialized anywhere? Is there a 302? Is there a record of that anywhere" "I don't know. Let me check."[819]

According to Goeke, Eckstein called him back promptly after finding the 302.[820] Goeke described his exchange with Eckstein regarding the 302 as follows:

> And then [Eckstein] calls me back a couple hours later and says, "I found a 302." "Well, what's it say?" And he read it to me. I go, "Oh," and I go I remember saying to him, "We may have a disclosure obligation in *Kott*. It seems like we we're gonna have to disclose something along those lines because we didn't make a disclosure ahead of time and that is a 302 that conflicts with my recollection."[821]
>
> . . .
>
> Q So you talked to Eckstein sometime in 2007 is your best recollection, right?
>
> A I am quite certain it would have been October 4, 2007.
>
> Q *So he did not tell you that his 302 was wrong?*

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[818] Goeke (Schuelke) Tr. Jan. 8, 2010 at 241.

[819] Goeke (Schuelke) Tr. Jan. 8, 2010 at 236-237.

[820] Goeke (Schuelke) Tr. Jan. 8, 2010 at 241.

[821] Goeke (Schuelke) Tr. Jan. 8, 2010 at 285. Goeke was not present for the 2004 SeaTac interview with Tyree. However, he did participate in a preparation session with Tyree prior to her testimony at Boehm's sentencing hearing. Goeke recalled that, during the witness preparation session, Tyree volunteered, without any prompting from the prosecutors, that the false statement was her idea. "That's when she made a statement. She goes, 'You guys have asked me about this how it came to be that I made this statement, this false statement, and I want you to understand it was my idea. I did that on my own.' Something to that effect." Goeke (Schuelke) Tr. Jan. 8, 2010 at 256.

> *A No, and I'm not saying he did.*
>
> *Q He just said, "It says what it says and I don't even remember."*
>
> *A Yeah, exactly.*[822]

Goeke then had Eckstein fax the 302 to AUSA Bottini.[823] Goeke stated that he called Bottini, who confirmed that he received the fax, and they agreed to fax the 302 to PIN in order to "make a decision about whether we have a disclosure obligation or not," in both the recently tried *Kott* case and the upcoming *Kohring* case.[824]

On October 4, 2007, AUSA Bottini faxed the SeaTac 302 to Marsh. In the comment area of the fax, Bottini wrote:

> Looks like this interview took place on 7/22/04. It says that she signed the affidavit @ Allen's request, but it doesn't say he knew it was false The inference may be made by the way this is written though. Lets talk early tomorrow AM.[825]

On October 6, AUSAs Bottini and Goeke faxed Marsh selected pages from the initial *Boehm* filing regarding Tyree, underlining the sections stating that Tyree gave a false statement at Allen's request.[826] Goeke stated that PIN's immediate response to the new information was to "get more facts" and "talk to PRAO," for

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[822] Goeke (Schuelke) Tr. Jan. 8, 2010 at 237, 243 (emphasis added).

[823] Goeke (Schuelke) Tr. Jan. 8, 2010 at 285-286; fax copy of July 22, 2004 Tyree FBI 302 sent from FBI Anchorage date stamped Oct. 4, 2007 with fax cover sheet by SA Eckstein; Oct. 4, 2007 fax cover sheet from AUSA Bottini to PIN attorney Marsh attaching SeaTac 302.

[824] Goeke (Schuelke) Tr. Jan. 8, 2010 at 288.

[825] Oct. 4, 2007 fax cover sheet from AUSA Bottini to PIN attorney Marsh attaching SeaTac 302. Bottini told OPR that his comments on the cover sheet were meant to convey that "it didn't expressly say in the 302 that Bambi reported during this interview that Allen knew that that statement that she was signing, or whatever it was that she gave, was false." Bottini OPR Tr. Mar. 11, 2010 at 601. Bottini stated that although the 302 does not state that "Allen knew that the statement was false," "it certainly can be inferred by the sequence of events that is recounted in the 302." Bottini OPR Tr. Mar. 11, 2010 at 603.

[826] Oct. 6, 2007 fax from AUSA Bottini and AUSA Goeke to PIN attorney Marsh attaching portions of the *Boehm* pleadings.

advice on whether there was a disclosure obligation under the circumstances.[827] Goeke stated that PIN directed him to search for the notes underlying the 302.[828] Goeke then located a copy of Russo's interview notes in the *Boehm* file in storage in the USAO.[829] Goeke also stated he obtained from SA Eckstein his notes of the SeaTac interview.[830]

On October 8, 2007, AUSA Bottini emailed PIN attorney Marsh stating that he and AUSA Goeke were concerned about the "Bill/Bambi" information, and that they wanted to "run this by PRAO as soon as possible."[831] Specifically, Bottini was concerned:

> That both [AUSA] Russo and [SA] John Eckstein now recall that Bambi told them that Allen asked her to give the sworn statement that she had not had sex w/Allen when she said that actually [she] had had sex w/him. Jim [Goeke] is very concerned because he crosses over in both cases, it will look like he in particular did not disclose something that might have been inquired into on cross of Bill.[832]

Bottini anticipated that PRAO would advise the team to disclose the information *in camera* to Judge Sedwick "both in anticipation of the *Kohring* trial (do we have to turn it over?) and as a 'here it is, what do we do now' issue as to the *Kott* trial."[833] Marsh responded in an October 9, 2007 email:

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[827] Goeke (Schuelke) Tr. Jan. 8, 2010 at 288-289.

[828] Goeke (Schuelke) Tr. Jan. 8, 2010 at 288-289.

[829] Goeke (Schuelke) Tr. Jan. 8, 2010 at 289, 291, 293. OPR was unable to locate Russo's original notes.

[830] Goeke (Schuelke) Tr. Jan. 8, 2010 at 234, 242, and 288-289.

[831] Oct. 8, 2007 4:12pm email from AUSA Bottini to PIN Attorney Marsh.

[832] Oct. 8, 2007 4:12pm email from AUSA Bottini to PIN Attorney Marsh. Bottini told OPR that this email was based on information relayed to him by AUSA Goeke and not from Bottini's direct communication with Russo or Eckstein. Bottini OPR Tr. Mar. 11, 2010 at 594. Goeke stated that the email reflected "[Bottini's] representation of my concern, but my concerns are multi-fold." Goeke said he was concerned that someone "could cast aspersions to me and my motives[.]" Goeke also noted that he saw Bottini's email for the first time when preparing for his post-trial interview in connection with the misconduct allegations. Goeke (Schuelke) Tr. Jan. 8, 2008 at 336.

[833] Oct. 8, 2007 4:12pm email from AUSA Bottini to PIN Attorney Marsh.

> As for the Allen/Bambi stuff, when Jim [Goeke] and I were prepping for [the *Kohring*] trial, Jim's recollection which I believe absolutely was that Bambi stated in debriefs that Allen never asked her to lie/make a false statement. When Jim and I talked to Frank [Russo] about this on Thursday, Frank said that was his memory as well, although he believed one could "infer" something else. [SA] Eckstein told Jim the same thing later Thursday. So I have to confess that, to me, it's strange that Russo and Eckstein are saying something completely different now. That said, if we need to run it by PRAO, we can and should do that. I have a hard time, though, running it up as "should we have disclosed this?", because this Russo/Eckstein version of the Bambi statement is different than what Jim and I knew prior to the *Kott* trial, and also doesn't square with what Russo and Eckstein were saying at the end of last week.[834]

Russo stated later that he initially spoke with Goeke and possibly Marsh in a quick meeting during which they showed him his notes, in which he had edited "at the request of Bill" by striking "Bill" and substituting "Bambi's idea."[835] We determined this meeting likely occurred during the week of October 4, 2007. Russo stated that Goeke and Marsh did not show him the SeaTac 302 or SA Eckstein's notes, and that they may have conveyed to Russo that "Eckstein also remembers that it was Bambi's idea."[836] Russo stated that he was "taken aback" by his notes, but he told the prosecutors, "I obviously wrote that in my notes, it must be correct."[837] Russo may also have told the attorneys that he was mistaken

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[834] Oct. 9, 2007, 10:01am email from PIN attorney Marsh to AUSA Bottini. SA Eckstein told OPR that the only *Stevens* prosecution team member he ever spoke with, regarding Tyree, was AUSA Goeke. Eckstein stated that when he provided Goeke his notes, they spoke briefly and Goeke did not suggest that Eckstein's notes or 302 were incorrect, nor did he challenge Eckstein on the accuracy of the notes or 302. Eckstein stated that he never told Goeke that his 302 was inaccurate. Eckstein OPR Tr. Dec. 3, 2009 at 14, 25, 27, and 55. Goeke stated that Eckstein never said the 302 was inaccurate. Goeke (Schuelke) Tr. Jan. 8, 2010 at 243.

[835] Russo (Schuelke) Tr. Mar. 24, 2010 at 107-108. Goeke stated that he did not recall speaking to Russo, but that he "may have said something in passing." Goeke (Schuelke) Tr. Jan. 8, 2010 at 292.

[836] Russo (Schuelke) Tr. Mar. 24, 2010 at 107-108; Russo OPR Tr. Dec. 3, 2009 at 58.

[837] Russo (Schuelke) Tr. Mar. 24, 2010 at 111.

in his *Boehm* pleadings.[838] Russo stated that he recalled telling Marsh that because the prosecutors had been discussing the situation for "longer than five or ten minutes," the issue should be disclosed to the court.[839] Russo recalled that Marsh "seemed more entrenched" than the other prosecutors against disclosure of the Tyree information.[840] Russo stated that "the whole conversation didn't sit well with me," and that he revisited it with Bottini and possibly Alaska U.S. Attorney Nelson Cohen and Goeke the following Monday, arguing that Allen had to know about the Tyree false statement and that the prosecution team should make an *in camera* disclosure to Judge Sedwick.[841] Bottini stated that he never showed Russo all the Tyree documents.[842] Cohen told OPR that he did not recall seeing the SeaTac 302 or the *Boehm* pleadings; however, he recalled counseling Bottini and Goeke that they should show the Tyree material to the judge because the information was potentially damaging to their witness (Allen).[843]

The following day, October 10, 2007, AUSA Bottini and SA Kepner interviewed Bambi Tyree in Anchorage, Alaska.[844] Marsh stated that Welch directed him to have Tyree interviewed, specifically without Goeke present (because he was a witness to her statements on the subject before the *Boehm* sentencing hearing); Welch however, denied that he requested the interview.[845] According to an FBI 302 of the interview, Tyree stated that:

> [redacted] (last name unknown) was extorting BILL ALLEN regarding an alleged relationship between Bambi Tyree and ALLEN. TYREE came up with an idea to sign a document to prevent further extortions by [redacted]

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[838] Russo (Schuelke) Tr. Mar. 24, 2010 at 121.

[839] Russo (Schuelke) Tr. Mar. 24, 2010 at 123. Russo OPR Tr. Dec. 3, 2009 at 51.

[840] Russo (Schuelke) Tr. Mar. 24, 2010 at 212. Marsh did not recall speaking with Russo or Eckstein regarding the Tyree issues. Marsh (Schuelke) Tr. Feb. 2, 2010 at 186.

[841] Russo (Schuelke) Tr. Mar. 24, 2010 at 207-210.

[842] Bottini OPR Tr. Mar. 11, 2010 at 649.

[843] Cohen OPR. Tr. Dec. 4, 2009 at 37, 41, 42.

[844] Bottini stated that the request to interview Allen came "from somebody at Public Integrity." Bottini (Schuelke) Tr. Dec. 17, 2009 at 691. Bottini also stated that he contacted Tyree's attorney, [redacted], sometime between October 7 and 12, and [redacted] told him that, during the SeaTac interview, Tyree "never said that Bill Allen asked her to do this." Bottini (Schuelke) Tr. Dec. 17, 2009 at 692; Bottini OPR Tr. Mar. 11, 2010 at 637.

[845] Marsh (Schuelke) Tr. Feb. 2, 2010 at 168-169. Welch OPR Tr. Mar. 2, 2010 at 259.

> TYREE met with an attorney in a downtown office building close to [redacted] office. The content of the document was created solely by TYREE with the help of the attorney.[846]

The FBI 302 of the interview does not reflect that prosecutors or agents asked Tyree whether she had sex with Allen while underage, whether the statements in the document she signed were actually true or false, or whether Allen knew what Tyree planned to tell his lawyer.[847] The FBI 302 also does not reflect that prosecutors or agents asked Tyree questions about her father, Mark Tyree, who had been hired to work on Senator Stevens's Girdwood renovations (Stevens's defense counsel later argued that Bill Allen may have had an incentive to overpay Mark Tyree for his work on Girdwood in order to buy his silence regarding Allen's relationship with Bambi Tyree).

On October 12, 2007, two days after the Bottini/Kepner interview of Tyree, PIN attorney Marsh contacted PRAO by phone, in anticipation of Bill Allen's testimony for the government in the *Kohring* trial. Marsh stated later that he made the call with AUSA Goeke.[848] Sullivan stated that he did not attend this call, and that Marsh and Goeke made the call.[849] Goeke stated that he was not involved in the call to PRAO.[850] Marsh acknowledged that he was the lead attorney in both the October and December 2007 contacts with PRAO concerning Tyree.[851] PRAO documents reflect that Marsh was concerned about the government's obligation in the *Kohring* case to disclose information regarding

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[846] Oct. 10, 2007 FBI 302 of Bambi Tyree; Sept. 8, 2008 12:16am email from AUSA Goeke to PIN attorney Marsh, AUSA Bottini, PIN attorney Sullivan, PIN Principal Deputy Chief Morris, SA Kepner, SA Joy, and PIN Chief Welch. Bottini stated that during the interview, he showed Tyree the SeaTac 302 and she "disavow[ed] the part about Bill Allen asking me to do this." Bottini (Schuelke) Tr. Dec. 17, 2009 at 694. Marsh stated that at the time of the 2007 interview, Allen and Tyree still had a relationship which was "not a sexual relationship" but "more possibly, as bizarre as this sounds, a parent/child relationship as opposed to a friend relationship." Marsh (Schuelke) Tr. Feb. 2, 2010 at 215-216.

[847] OPR's review of all FBI 302s, IRS MOIs, attorney notes, and FBI agent notes regarding Bambi Tyree revealed no such specific questioning.

[848] Marsh (Schuelke) Tr. Feb. 2, 2010 at 173.

[849] Sullivan (Schuelke) Tr. Jan 6, 2010 at 73.

[850] Goeke (Schuelke) Tr. Jan. 8, 2010 at 296. The PRAO attorney on the call told OPR that she recalled only one person on the call with her (Plagenhoef OPR Tr. Mar. 12, 2010 at 43) and the related PRAO Inquiry Summary Sheet indicates that Marsh was the caller.

[851] Marsh OPR Tr. Mar. 26, 2010 at 403.

AUSA Russo's belief that Allen orchestrated Tyree's false statement. Marsh stated that he read PRAO the "relevant portions" of "the documents" and that PRAO said "very clearly and very emphatically you have no *Brady* or *Giglio* obligation."[852] At the time of the contact, Marsh had the SeaTac 302, the *Boehm* filings, Russo's notes, and possibly Eckstein's notes.[853] Marsh did not provide those documents to PRAO because "they did not ask for them" and he specifically recalled reading PRAO the "relevant part of Russo's notes and the relevant part of the 302."[854] Marsh also stated that he "remembered describing the filing" to the PRAO attorney but he did "not think that we read it to her."[855] PRAO's October 12, 2007 Inquiry Summary Sheet indicated that Marsh told PRAO:

> Bambi has said that she lied to an attorney by giving a false declaration during the [*Boehm*] litigation. She says the lying was her own idea, to protect [Allen] and that [Allen] never asked her to lie.[856]

According to the PRAO Summary Sheet, Marsh also told PRAO that: (1) the AUSA (Frank Russo) thought that Tyree told him that Allen asked her to lie;[857] (2) the FBI agent (SA Eckstein) and AUSA Goeke believed that Tyree said the false statement was her idea;[858] (3) Tyree "still says it was" her idea to lie and that Allen

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[852] Marsh (Schuelke) Tr. Feb. 2, 2010 at 179-180. Marsh stated that "it wouldn't have been a big deal" if he had to disclose the Tyree material in the *Kott* case and "we certainly would have been able to do it correctly with respect to the *Kohring* case." Marsh (Schuelke) Tr. Feb. 2, 2010 at 201.

[853] Marsh (Schuelke) Tr. Feb. 2, 2010 at 199.

[854] Marsh (Schuelke) Tr. Feb. 2, 2010 at 199.

[855] Marsh (Schuelke) Tr. Feb. 2, 2010 at 225-226. Marsh recalled "referencing [that] there had been representations made under seal in an unrelated case that Allen had directed her to lie, directed Tyree to lie." Marsh (Schuelke) Tr. Feb. 2, 2010 at 230. Marsh stated, "we described [that] we've got this pleading, but I don't remember us reading verbatim the parts of the brief to PRAO." Marsh OPR Tr. Mar. 26, 2010 at 438.

[856] PRAO Inquiry Summary Sheet 7-10-029 (Oct. 12, 2007).

[857] Russo told OPR that he told Goeke, Bottini, and Marsh that he could not remember exactly what Tyree said, but he was confident that Allen "was complicit"; that he encouraged the attorneys to produce the information to the defense; but he "had the impression that Marsh was not inclined to reveal this." Russo OPR Tr. June 25, 2009 at 55-63.

[858] SA Eckstein told OPR that the SeaTac 302 containing Tyree's statement that she signed a false statement at Allen's direction was consistent with his notes and would have been consistent with his memory at the time. Eckstein OPR Rec. June 24, 2009 at 17. Russo told OPR that when Goeke asked him about the notes, he stated, "If I wrote it in my notes, it must be what

never asked her to lie; (4) Tyree's attorney "believes she did it on her own"; (5) the FBI 302 on the matter is "not clear, stating simply that she lied";[859] and (6) AUSA [Russo's] notes say that "Bambi denied that BA asked her to lie."[860] Marsh made such representations despite the statement in the SeaTac 302 that "TYREE signed [the statement] at ALLEN's request" and identical language in SA Eckstein's notes.[861] The PRAO summary statement and attorney notes do not reflect that Marsh ever mentioned that Russo had filed three sealed pleadings in *Boehm* stating that Allen orchestrated Tyree's false statement, although the notes of the PRAO attorney state: "sealed briefing ref whether Bambi lied."

Based on this, PRAO advised Marsh that Russo's memory that Allen asked Tyree to lie did not have to be turned over to the defense under *Brady/Giglio* as no evidence corroborated Russo's memory and all the evidence the trial team found rebutted Russo's information.[862] PRAO's Inquiry Summary Sheet reflected: "[T]hey researched as much as they could independently about whether it was possible that [Allen] did ask [Tyree] to lie, and all the evidence they uncovered points to the other interpretation."[863] During his OPR interview Marsh acknowledged that prior to contacting PRAO, he received Bottini's October 8, 2007 email stating that "[B]oth [AUSA] Russo and [SA] John Eckstein now recall that Bambi told them that Allen asked her to give the sworn statement that she had

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she said." Russo OPR Tr. Dec. 3, 2009 at 11. Russo did not recall anyone ever asking him if the pleadings he filed in *Boehm* were mistaken, although Russo "might have even conceded" to the *Stevens* prosecution team that his pleadings were incorrect. Russo OPR Tr. Dec. 3, 2009 at 28, 76. Russo told OPR that Goeke never showed him the SeaTac 302 or SA Eckstein's notes. Russo OPR Tr. Dec.3, 2009 at 58.

[859] Marsh stated that the SeaTac 302 was "to some degree ambiguous as to whether [Tyree] was specifically directed to make a false statement at Allen's request" and it also did not show that "Allen was aware she was making a false statement and specifically directed her to make the false statement." Marsh (Schuelke) Tr. Feb. 2, 2010 at 175-178. PRAO attorney Ruth Plagenhoef's handwritten notes contain a notation "got agent's 302 = inconclusive." Plagenhoef told OPR that she could not see how she would have written "inconclusive" in her notes if she had been read the rest of the SeaTac 302. Plagenhoef OPR Tr. Mar. 10, 2010 at 51. Marsh stated that "what we were left with here was more of a, at the very maximum, Allen knew somebody lied." Marsh OPR Tr. Mar. 26, 2010 at 514.

[860] PRAO Inquiry Summary Sheet 7-10-029 (Oct. 12, 2007).

[861] Marsh told OPR that he was "not sure" that he had Eckstein's notes at the time he contacted PRAO. Marsh OPR Tr. Mar. 26, 2010 at 472.

[862] PRAO Inquiry Summary Sheet 7-10-029 (Oct. 12, 2007).

[863] PRAO Inquiry Summary Sheet 7-10-029 (Oct. 12, 2007).

not had sex w/Allen when she said that actually [she] had had sex w/him."[864] Marsh could not recall whether there were further conversations with Eckstein and Russo prior to his PRAO contact and he did not recall such information "coming up" during the call; although, he believed that such information would have been something for Goeke to address with PRAO.[865]

On October 12, 2007, Marsh reported in an email to PIN Principal Deputy Chief Morris that "[w]e took [PRAO] through the whole process" and:

> PRAO strongly supported how we handled it and agreed there was no basis for disclosure/nothing to disclose. In fact, the staff attorney (who starts at OPR on Monday) seemed a little surprised that we thought there was enough to even bring it to PRAO.[866]

The prosecutors did not provide the *Kohring* defense team with the Tyree information, and they did not disclose it to the district court *ex parte*. Allen testified for the government at the trial, and Kohring was convicted on November 1, 2007.[867]

On December 20, 2007, at the request of "AUSAs in the Alaska USAO," Marsh asked PRAO to revisit its October 12, 2007 opinion in light of a forthcoming newspaper article regarding Allen's close relationship with Tyree and the fact that Allen gave Tyree and her family "many things of value" over the years.[868] PRAO maintained that its prior opinion, that disclosure was not required under Alaska Rule of Professional Conduct 3.8(d), was unaltered by the potential of a newspaper

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[864] Marsh OPR Tr. Mar. 26, 2010 at 487-492.

[865] Marsh OPR Tr. Mar. 26, 2010 at 491-492.

[866] Oct. 12, 2007 5:07pm email from PIN attorney Marsh to PIN Principal Deputy Chief Morris. The staff attorney who joined OPR was recused from OPR's investigation in June 2009. Morris stated that she did not believe the Tyree issue was a "a severe deal because we had gotten the advice back from PRAO" and she thought the information had been accurately conveyed to PRAO. Morris (Schuelke) Tr. Jan. 15, 2010 at 111. Morris stated that she relied "mostly" on Marsh with respect to the Tyree issues and she based her conclusions on what she was told (that Allen did not ask Tyree to lie). Morris (Schuelke) Tr. Jan. 15, 2010 at 113, 133, 136.

[867] AUSA Bottini presented Allen's direct testimony at the *Kohring* trial.

[868] PRAO Inquiry Summary Sheet 7-12-031 (Dec. 20, 2007). Goeke stated that he could have been on the first phone call with PRAO, "but if it was, it was very brief." Goeke (Schuelke) Tr. Jan. 8, 2010 at 307. Sullivan stated that he attended the second phone call to PRAO but he was not "a very active participant" and he "wasn't aware of anything [Marsh] said that was either incomplete or inaccurate." Sullivan (Schuelke) Tr. Jan. 6, 2010 at 74, 96, 213, 215.

article because Marsh and his team had "concluded that there is no evidence to support" the position that Allen had pressed Tyree to lie and that "[AUSA Russo's] recollection was either mistaken or was based on a hunch for which there was no concrete support."[869] The PRAO summary sheet and resulting opinion do not indicate that Marsh disclosed the existence of the SeaTac 302 to PRAO or the statement included therein that "TYREE signed [the statement] at ALLEN's request."

Marsh and Sullivan received an email from PRAO attorney Patricia Weiss memorializing her advice and the facts she was told.[870] Weiss's email stated that the prosecution team told her that they:

> had conducted a thorough inquiry into the matter, including, among other things, interviewing Bambi, reviewing the notes of the recalling AUSA [Frank Russo], reviewing the FBI contemporaneous notes of the interview with Bambi in the Unrelated [*Boehm*] Case, and checked with another AUSA [Goeke] who had worked on the Unrelated Case with the Recalling AUSA [Russo].

A review of Weiss's email indicates that she was given the following inaccurate facts: (1) SA Eckstein's notes "reflect that at the time of the interview [Bambi] was adamant that the lie was her own idea";[871] (2) that AUSA Russo's notes "do not indicate one way or the other whether [Russo] thought at the time of the interview, that [Allen] had pressed Bambi to lie";[872] and (3) the "absence of any evidence supporting the notion that [Allen] had pressed Bambi to lie in the [*Boehm*] [c]ase.[873] OPR found no indication that either Marsh or Sullivan corrected PRAO's

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[869] PRAO Inquiry Summary Sheet 7-12-031 (Dec. 20, 2007).

[870] Weiss told OPR that she would have looked at the PRAO file from the October 2007 consultation when preparing her advice, but she would not have looked at the prior PRAO attorney's handwritten notes. Weiss also stated that in her review of the prior PRAO file, "there could have been a miscommunication" regarding the background of the case. Weiss OPR Tr. Mar. 4, 2010 at 9, 21, 33.

[871] Weiss told OPR that she would not have used the "adamant" phrase if "it wasn't what I thought I heard." Weiss OPR Tr. Mar. 4, 2010 at 20.

[872] Weiss told OPR that she wrote the phrase regarding Russo's notes "as I heard it." Weiss OPR Tr. Mar. 4, 2010 at 24.

[873] Dec. 21, 2007 12:55pm email from Patricia Weiss to PIN attorney Marsh and PIN attorney Sullivan.

factual inaccuracies.[874] Again, it appears that Marsh did not reference the SeaTac 302, SA Eckstein's notes, or Russo's or Eckstein's present recollection. Marsh forwarded the PRAO email to Bottini and Goeke on January 3, 2008.[875] Sullivan forwarded the PRAO email to PIN Chief Welch on January 3, 2008.[876] Sullivan forwarded the PRAO email to PIN Principal Deputy Chief Morris on September 6, 2008.[877]

In addition to the inaccuracies reflected in Weiss's email, in her concluding paragraph she included a caveat suggesting that Marsh and Sullivan "double check with your DEO [Departmental Ethics Office] about whether applicable Standards of Conduct might require action on your part in this situation."[878] Weiss also recommended that Marsh and Sullivan "double check to ensure that DOJ's recently adopted policy on disclosures in criminal cases does not require a disclosure here, as I understand that the policy requires more in the way of disclosure than is required under applicable case law."[879] Following receipt of the PRAO email, Sullivan emailed Marsh asking if he had "[a]ny thoughts re: the last

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[874] Marsh stated that the PRAO email was "[n]ot incorrect in substance but incorrect in that the identities are flipped" because Marsh believed that "it was the 302 – that we viewed to be ambiguous." Marsh (Schuelke) Tr. Feb 2, 2010 at 219. Marsh stated the errors in the PRAO email were not "material" because PRAO understood that "there were two things. The one set of information from the agent that was ambiguous, or at least we viewed it as ambiguous, that we provided to them orally, and Russo's notes." Marsh (Schuelke) Tr. Feb. 2, 2010 at 220-221. Bottini stated that he "did not look at the email with a fine-toothed comb" when he received it. Bottini (Schuelke) Tr. Dec. 17, 2009 at 708. Goeke stated that he did not read the PRAO email critically, because he was influenced by an email sent by Welch one week prior reminding Goeke and Bottini that they worked for PIN on this matter, thus ending the discussion. Goeke (Schuelke) Tr. Jan. 8, 2010 at 365-366.

[875] Jan. 3, 2008 4:56pm email from PIN attorney Marsh to AUSA Bottini and AUSA Goeke.

[876] Jan. 3, 2008 4:50pm email from PIN attorney Sullivan to PIN Chief Welch and PIN attorney Marsh.

[877] Sept. 6, 2008 2:31pm email from PIN attorney Sullivan to PIN Principal Deputy Chief Morris and PIN attorney Marsh.

[878] Dec. 21, 2007 12:55pm email from Patricia Weiss to PIN attorney Marsh and PIN attorney Sullivan.

[879] Dec. 21, 2007 12:55pm email from Patricia Weiss to PIN attorney Marsh and PIN attorney Sullivan. Marsh stated that generally the DOJ policies recommend that prosecutors take "a broad view" on information that would tend to exculpate the defendant, he was aware of his "general obligation as a prosecutor," but he could not say he was "aware of this particular policy." Marsh OPR Tr. Mar. 26, 2010 at 521-522.

paragraph?"[880] Marsh responded that he had not "checked the DEO standards but will do so. Since we have nothing to turn over/no evidence of any wrongdoing, I'm sure we're fine."[881] OPR did not locate any evidence showing that the attorneys consulted with their DEO or evaluated the issue with respect to the recently adopted DOJ policies, and Marsh told OPR, "I don't remember focusing on it."[882]

Prior to receiving the email containing the PRAO opinion, AUSA Goeke continued to advocate for some disclosure regarding the Allen/Tyree relationship. A December 20, 2007 email from PIN Chief Welch to AUSAs Bottini and Goeke, and PIN attorneys Marsh, Sullivan, and Principal Deputy Morris, asserted that PIN would not disclose the information regardless of the USAO's position. Welch stated that "PRAO has rendered their advice" and "[w]e've done all that we are going to do on the matter."[883] Welch also stated that "nothing will be filed in the matter" and he stated that AUSA Bottini and AUSA Goeke "work for PIN" and "these are your marching orders until I talk to [Alaska U.S. Attorney] Nelson [Cohen]."[884] The entire Alaska USAO, except for AUSAs Bottini and Goeke, was recused from the Polar Pen investigation. As a result, Bottini and Goeke effectively worked under PIN supervision.[885] Cohen told OPR that he and Welch never discussed the matter.[886] However, both Cohen and Russo told OPR that they met with Bottini and Goeke regarding the Tyree matter and encouraged disclosure of the information.[887] The prosecution did not provide the *Kohring*

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[880] Jan. 2, 2008 7:00pm email from PIN attorney Sullivan to PIN attorney Marsh.

[881] Jan. 3, 2008 10:07am email from PIN attorney Marsh to PIN attorney Sullivan.

[882] Marsh OPR Tr. Mar. 26, 2010 at 525. The "recently adopted DOJ policies" referred to the provision in the U.S. Attorneys' Manual, USAM § 9-5.001, favoring broad disclosure of "favorable information" to the defense in criminal cases. The provision was adopted in October 2006.

[883] Dec. 20, 2007 5:19pm email from PIN Chief Welch to PIN attorney Sullivan, AUSA Bottini, PIN attorney Marsh, AUSA Goeke, and PIN Deputy Morris.

[884] Dec. 20, 2007 5:19pm email from PIN Chief Welch to PIN attorney Sullivan, AUSA Bottini, PIN attorney Marsh, and AUSA Goeke, PIN Deputy Morris. Welch stated that he made the decision against a filing until he had the opportunity to speak with Cohen, because he believed that there was no new information regarding the issue. Welch (Schuelke) Tr. Jan. 13, 2010 at 265.

[885] Bottini stated that, throughout the *Stevens* investigation, he did not "pick up the phone and call Brenda Morris or William Welch," and as a "practical matter" Marsh was his supervisor. Bottini OPR Tr. Mar. 10, 2010 at 57.

[886] Cohen OPR Tr. Dec. 4, 2009 at 70.

[887] Russo (Schuelke) Tr. Mar. 24, 2010 at 131.

defense team with information regarding the Allen/Tyree relationship or the alleged false statement.[888]

On April 4, 2008, Barry Sabin, then Principal Deputy AAG for the Criminal Division, requested that the *Stevens* team provide a "brief memo" outlining the "best arguments/weak issues" with "proposed responses included."[889] AUSA Bottini responded to Marsh's draft memorandum, asking the *Stevens* team if they should "say anything more about the Bambi Tyree issue we have discussed ad [nauseam] w/ PRAO and the current 'reopened' APD investigation of Allen."[890] Bottini stated further that such information fell into the "sketchy background" category and "should not be admissible to impeach Bill."[891] Marsh suggested that Welch would want them to "deal with Bambi just with the 'shady background' reference" in a chart attached to the memo.[892] Sullivan stated: "I agree with Nick that we probably don't need to spell out in detail why or how [Allen] has a shady background."[893] On April 11, 2008, the *Stevens* team submitted the memorandum to PIN Chief Welch and Principal Deputy Morris setting forth "what we anticipate will be STEVENS' best arguments at trial, along with our proposed responses to those arguments."[894] The memorandum contained a chart presenting "STEVENS' strongest defenses and our responses to them."[895] The attached chart included "Allen's problems as a witness: Allen has speech issues and a shady personal

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[888] Oct. 12, 2007 letter from PIN Chief Welch (signed by PIN attorney Sullivan) to defense counsel John Henry Brown regarding *Brady/Giglio* and *Jencks* disclosures in *United States v. Kohring* at 2.

[889] Apr. 7, 2008 1:39pm email from PIN attorney Marsh to AUSA Bottini, AUSA Goeke, and PIN attorney Sullivan.

[890] Apr. 7, 2008 6:47pm email from AUSA Bottini to PIN attorney Marsh, AUSA Goeke, and PIN attorney Sullivan.

[891] Apr. 7, 2008 6:47pm email from AUSA Bottini to PIN attorney Marsh, AUSA Goeke, and PIN attorney Sullivan.

[892] Apr.7, 2008 9:09pm email from PIN attorney Marsh to PIN attorney Sullivan, AUSA Bottini, and AUSA Goeke. Welch stated that he did not discuss with Sullivan and Marsh the amount of detail to be provided regarding Allen's "shady background." Welch (Schuelke) Tr. Jan. 10, 2010 at 39.

[893] Apr. 8, 2008 10:24am email from PIN attorney Sullivan to AUSA Bottini, AUSA Goeke, and PIN attorney Marsh.

[894] Apr. 11, 2008 Memorandum to AAG Alice F. Fisher Re: Additional Information Concerning the Prosecution of Senator Ted Stevens.

[895] Apr. 11, 2008 Memorandum to AAG Alice F. Fisher Re: Additional Information Concerning the Prosecution of Senator Ted Stevens.

background."[896] The memorandum provided no details of Allen's "shady personal background."

In June 2008, the *Anchorage Daily News* reported that the Anchorage Police Department suspended their investigation into whether "Bill Allen had sex with an underaged girl more than ten years ago."[897] The article identified Bambi Tyree by name and stated that her involvement in the *Boehm* investigation led to the investigation of Allen.[898] APD representatives gave the *Anchorage Daily News* no explanation for the 2007 reopening of the charges, and stated only that the investigation was recently suspended because "one or more witnesses who police hoped would resolve the matter couldn't be located."[899]

During a July 14, 2008 meeting with the *Stevens* trial team and AAG Friedrich and PDAAG Glavin, Bottini raised both the sex and false statement issues regarding Allen and Bambi Tyree, and said that PRAO had advised that there was no disclosure obligation.[900] Friedrich told OPR that he recalled being satisfied with the trial team's explanation, as it was presented to him, regarding the handling of the Tyree issue.[901]

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[896] Apr. 11, 2008 Memorandum to AAG Alice F. Fisher Re: Additional Information Concerning the Prosecution of Senator Ted Stevens, attached chart at 1 (emphasis in original).

[897] "Police Suspend Allen Sex Inquiry," Richard Mauer, *Anchorage Daily News*, June 3, 2008. APD detective Kevin Vandegriff wrote a report stating that AUSA Frank Russo told him to suspend the investigation. Russo OPR Tr. June 25, 2009 at 25-28. AUSA Russo told OPR that Vandegriff had to write the report to close the investigation administratively and Russo stated that he never told Vandegriff to stop the investigation. Russo OPR Tr. June 25, 2009 at 25-29. Vandegriff told OPR that he first suspended the investigation in March 2004 because Russo advised him the case might interfere with a federal investigation. In the fall of 2007, Vandegriff's supervisor asked him to reopen the investigation and run it to its logical conclusion. Vandegriff suspended the investigation in February 2008 because he could not locate certain documents in the possession of the Alaska USAO regarding one of the complaining witnesses (not Tyree), and his attempts to interview Tyree and Allen were not successful. Vandegriff told OPR that he could reopen the case at any time if new evidence came in (which he did in August 2008).

[898] "Police Suspend Allen Sex Inquiry," Richard Mauer, *Anchorage Daily News,* June 3, 2008.

[899] "Police Suspend Allen Sex Inquiry," Richard Mauer, *Anchorage Daily News*, June 3, 2008.

[900] Bottini OPR Tr. Mar. 10, 2010 at 79-80. Bottini (Schuelke) Tr. Dec. 19, 2009 at 381-382, 706-709. Sullivan also stated that the team raised Allen "sexual allegations" with Friedrich and Glavin. Sullivan (Schuelke) Tr. Jan. 6, 2010 at 78. Bottini told OPR that he was "a little gun shy about pushing back on stuff" at the meeting as a result of Welch's email reminding Bottini that he worked for PIN on this case. Bottini OPR Tr. Mar. 10, 2010 at 176-177.

[901] Friedrich OPR Tr. Aug. 3. 2009 at 65.

In August 2008, the prosecution began work on a motion to limit cross examination of Bill Allen, Rocky Williams, and Dave Anderson. At the time, the prosecution team thought it was possible that the *Stevens* defense team may have been aware of the Tyree issues because the issues arose during the prosecution of Josef Boehm, and Senator Stevens's [redacted], was representing Boehm's victims in civil lawsuits.

On August 14, 2008, the prosecution team filed a motion *in limine* under seal to exclude "inflammatory, impermissible cross examination" pursuant to Federal Rules of Evidence 401, 403, 608(b), and 611(a)(3).[902] The government sought to limit the cross examination of Bill Allen:

> The government is aware that Allen has been the subject of a criminal investigation conducted by the Anchorage Police Department regarding allegations that he engaged in a sexual relationship with a juvenile female approximately ten years ago. Allen has not been charged with any criminal offense stemming from this investigation and the investigation which was briefly reopened this year was again closed or suspended.[903]

In a footnote, the government noted that the issue was raised in a sealed hearing in both the *Kott* and *Kohring* trials and that, when asked by the court whether defense counsel intended to raise this issue during cross examination of Allen, counsel in each case advised the court that they "would not inquire into this particular issue."[904] The government also addressed the suspension of the APD investigation:

> The government is also aware of a rumor that the United States Attorney's Office in the District of Alaska played some role in an earlier investigation of Allen being suspended due to Allen's status as a cooperating witness. Such allegations are completely baseless and untrue. The initial sexual misconduct investigation involving Allen was suspended by the Anchorage Police

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[902] Government's Motion in Limine to Exclude Inflammatory, Impermissible Cross-Examination at 2 (D.D.C., filed Aug. 14, 2008) (sealed).

[903] Government's Motion in Limine to Exclude Inflammatory, Impermissible Cross-Examination at 2 (D.D.C, Filed Aug. 14, 2008) (sealed).

[904] Government's Motion in Limine to Exclude Inflammatory, Impermissible Cross-Examination at 2 (D.D.C., filed Aug. 14, 2008) (sealed).

> Department two years before he was contacted by the government regarding the public corruption investigation.[905]

Just prior to filing the August 14, 2008 motion, AUSA Bottini emailed Welch, Morris, Marsh, Sullivan, and Goeke to advocate for disclosure of the "rumored" Bambi Tyree false statement made at Allen's request:

> This [motion] obviously does not front out the rumored procurement of the false statement from Bambi by Bill. [Defense counsel's] response to this will possibly develop how much they know about that. Do we notice them up in the *Giglio* disclosure letter about this issue?? I worry that if we don't make some mention of it passing mention of it as a rumor which we investigated and disproved they may respond to the [motion in limine] and raise it thus possibly making it look like we potentially tried to hide something. Completely aware of what PRAO says, but do we run that risk? Just don't want to run afoul of [Judge Sullivan] over this.[906]

AUSA Goeke responded in favor of "some disclosure" of the Allen information:

> I also vote to make some disclosure of the rumored procurement of a false statement from Bambi by Bill in our *Giglio* letter along with a denial of the false assertion of federal help with the state's suspended sex investigation of Bill. I think Joe is right, the rumor about an alleged false statement is out there (could be repeated in an APD report from the alleged reopened investigation for instance). We did our due diligence, and both parties deny that Bill procured the statement, therefore previous statements by the govt in the *Boehm* case to the contrary were an erroneous assumption. . . . So, at the end of the day, the false statement issue

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[905] Government's Motion in Limine to Exclude Inflammatory, Impermissible Cross-Examination at 3 (D.D.C., filed Aug. 14, 2008) (sealed).

[906] Aug. 14, 2008 2:24am email from AUSA Bottini to PIN Attorney Sullivan, AUSA Goeke, PIN Attorney Marsh, PIN Deputy Morris, and PIN Chief Welch. Bottini told OPR that his email was meant to convey that the team should disclose the Tyree material, despite the PRAO opinion, in order to prevent allegations that the team suppressed the material. Bottini OPR Tr. Mar. 11, 2010 at 564.

> coupled with the false suggestion that the govt helped Bill on the state investigation as part of his plea makes me vote to get out in front of both issues and make some mention of both the false suggestion of federal help with the state investigation and the rumored false statement procurement in our *Giglio* letter.[907]

Marsh responded in agreement regarding disclosure of the "fed[eral involvement in [the] state investigation of Allen," but disagreeing regarding the disclosure of Allen's alleged subornation of perjury:

> If we had something to turn over re: the alleged subornation of perjury, I would obviously vote yes to doing so. But given that we have nothing to turn over not even an independent allegation, just a mistake in a brief that's inconsistent with the brief writer's notes don't think we have disclosure to make, much less a disclosure obligation.
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> * * *
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> . . . it seems like to me we shouldn't be making any disclosure at all. But I absolutely defer to the collective on this one.[908]

Marsh's response did not refer to the SeaTac 302 or SA Eckstein's accompanying notes, which both reflected that Tyree stated that she gave a false statement at Allen's direction. PIN Chief Welch responded to the group, agreeing with the decision to address federal involvement with Allen's state investigation, but Welch's response did not address the false statement issue.[909]

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[907] Aug. 14, 2008 4:15am email from AUSA Goeke to AUSA Bottini, PIN attorney Sullivan, PIN attorney Marsh, PIN Deputy Marsh, and PIN Chief Welch. Goeke stated that he used the term "erroneous assumption" because he believed that PIN had adopted such an interpretation of the relevant Tyree facts. Goeke stated that his intent in using such language in the email was to convince PIN to disclose the information despite their characterization of the information as an "erroneous assumption." Goeke (Schuelke) Tr. Jan. 8, 2010 at 369-370. Morris stated that Goeke was "very adamant" that information regarding Allen's "attempt to buy Bambi's lie" be disclosed. Morris (Schuelke) Tr. Jan. 15, 2010 at 106.

[908] Aug. 14, 2008 9:31am email from PIN attorney Marsh to AUSA Goeke, AUSA Bottini, PIN attorney Sullivan, PIN Deputy Marsh, and PIN Chief Welch.

[909] Aug. 14, 2008 9:41am email from PIN Chief Welch to PIN attorney Marsh, AUSA Goeke, AUSA Bottini, PIN attorney Sullivan, and PIN Deputy Morris.

An August 18, 2008 email from AUSA Bottini to the prosecution team included a draft of the team's August 25, 2008 *Giglio* letter including a paragraph stating:

> [THIS IS WHAT WE HAVE TO DECIDE IN OR OUT?]
> "In connection with the investigation involving allegations of sexual misconduct, the government is also aware that Allen is alleged to have had some involvement in a witness creating a false statement. Those allegations have been investigated by the government and have been proven false."[910]

Three days later AUSA Bottini sent another draft of the letter including the language:

> "The government is also aware that the female subject of the earlier investigation has stated that she made a false statement regarding the nature of her relationship with Allen. The subject of the earlier investigation is emphatic that she made the false statement on her own initiative and Allen denies that he caused her to make the statement."[911]

AUSA Goeke then recommended that statement be described as a "sworn false statement."[912]

On August 21, 2008, AUSA Bottini and SA Kepner told Allen's attorney, Robert Bundy, that "an APD investigation of Bill is still active."[913] After the *Stevens* trial, in a February 20, 2009 written Declaration, AUSA Bottini stated

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[910] Aug. 18, 2008 10:26pm email from AUSA Bottini to PIN Principal Deputy Chief Morris, PIN Attorney Marsh, PIN attorney Sullivan, AUSA Goeke, and SA Kepner.

[911] Aug. 21, 2008 10:44pm email from AUSA Bottini to PIN attorney Marsh, PIN attorney Sullivan, AUSA Goeke, SA Kepner, SA Joy, and IRS Agent Bateman.

[912] Aug. 22, 2008 11:35am email from AUSA Goeke to AUSA Bottini, PIN attorney Marsh, PIN attorney Sullivan, SA Kepner, SA Joy, and IRS SA Bateman.

[913] Aug. 22, 2008 11:48am email from AUSA Bottini to PIN Attorney Marsh, PIN Principal Deputy Chief Morris, and AUSA Goeke. In the email to the prosecution team, Bottini recounted the disclosure to Bundy. SA Kepner also wrote an August 22, 2008 report stating that Allen called her to inquire about the APD investigation, and Kepner told him "the investigation was active but [she] was not aware of the details nor would she be able to share them even if they were known." Aug. 22, 2008 FBI Report AN-1164-CW-WC.

that, on more than one occasion, Bundy asked if Bottini was at liberty to tell him anything about the new or re opened investigation and that Allen had no idea what the APD investigation involved.[914] Bottini stated: "It was clear to me based on these conversations that agent Kepner had not told Allen or Bundy anything about any re opened or new APD investigation of Allen."[915] Bottini later stated that Bundy was only told of the existence of the investigation but not told "what the investigation involved."[916] Morris stated that she was aware that Bundy was informed of the investigation and she did not contemplate at the time that she should have informed the defense of the conversation.[917]

On August 25, 2008, the prosecutors provided the defense with a *Giglio* letter identifying, among other things, potential impeachment material regarding the Allen sex cases, stating that: Allen had previously been the subject of a criminal investigation conducted by the APD "regarding allegations that he engaged in a sexual relationship with a juvenile female more than ten years ago"; Allen "had not been charged with any criminal offense stemming from this investigation"; the investigation had been "reopened this year" and was "recently closed or suspended"; "[o]n August 20, 2008" the government learned of a pending investigation of Allen regarding a sexual relationship with a different juvenile "in the late 1990's"; the rumors that the Alaska USAO played a role in suspending the earlier Allen investigation were "completely baseless and untrue"; Allen "provided financial benefits" to the subject of the earlier investigation; and Allen provided financial benefits to the subject of the pending investigation.[918]

The letter did not raise Allen's possible involvement in soliciting Tyree's false statement. During the drafting process for the August 25, 2008 letter, PIN attorney Marsh argued "strongly" to delete the Tyree false statement paragraph, noting "[w]e have nothing to turn over, we have neither evidence nor an allegation that Allen directed her to lie, we have investigated this til the end of time, and we

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[914] Feb. 20, 2009 Declaration of AUSA Joseph Bottini at 3.

[915] Feb. 20, 2009 Declaration of AUSA Joseph Bottini at 3.

[916] Bottini (Schuelke) Tr. Dec. 17, 2009 at 669.

[917] Morris (Schuelke) Tr. Jan. 15, 2010 at 345-346.

[918] Aug. 25, 2008 letter from PIN Principal Deputy Chief Morris to defense counsel at 2. Bottini stated that he and Goeke may have drafted the initial cut of the language regarding the Alaska investigation. Bottini (Schuelke) Tr. Dec. 17, 2009 at 714. Goeke acknowledged that he "played a role" in drafting the paragraphs involving allegations of sexual misconduct. Goeke (Schuelke) Tr. Jan. 8, 2010 at 177-178.

have been blessed by PRAO twice. There is simply no reason to revisit it."[919] Marsh sent this recommendation to PIN Principal Deputy Chief Morris, who agreed with not including the disclosure.[920]

In response to the government's motion *in limine*, the *Stevens* defense team argued that the APD case against Allen was relevant and admissible for cross examination, noting that APD suspended its investigation in 2004 reportedly at "the request of the federal prosecutors"; and the investigation was relevant to Allen's motive to testify.[921] The defense also noted that the government had provided "no information about the investigation of Bill Allen for alleged sexual abuse of a minor" in its *Brady* and *Giglio* productions.[922] The defense again argued for additional information concerning the APD investigation in its September 2, 2008 Motion to Compel Discovery, filed under seal.[923]

According to a memorandum to the file written by Alaska Criminal Chief Karen Loeffler, on September 3, 2008, APD Detective Vandegriff met with Alaska U.S. Attorney Cohen, Loeffler, and AUSA Audrey Renschen regarding a possible investigation related to Bill Allen.[924] Prior to the meeting, a civil attorney for another woman who claimed to have had underage sex with Bill Allen contacted Vandegriff. The attorney stated that Allen had asked his client to give a false statement about the sex. The attorney also stated that the complainant gave interviews to the press and that such information would be released before the *Stevens* trial.[925] During the meeting, Loeffler told Vandegriff that any information he provided would be turned over to the *Stevens* prosecution team so they could

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[919] Aug, 22, 2008 1:40pm email from PIN attorney Marsh to PIN Principal Deputy Chief Morris and PIN attorney Sullivan. PIN attorney Sullivan responded with an email stating, "I agree." Aug. 22, 2008 1:41pm email from PIN attorney Sullivan to PIN Principal Deputy Chief Morris and PIN attorney Marsh.

[920] Aug. 22, 2008 1:41pm email from PIN Principal Deputy Chief Morris to PIN attorney Marsh and PIN attorney Sullivan.

[921] Senator Stevens' Opposition to Government's Motion in Limine to Exclude Inflammatory, Impermissible Cross-Examination at 8-9 (D.D.C., filed Aug. 25, 2008) (sealed).

[922] Senator Stevens' Opposition to Government's Motion in Limine to Exclude Inflammatory, Impermissible Cross-Examination at 8-9 (D.D.C., filed Aug. 25, 2008) (sealed).

[923] Motion to Compel Discovery Pursuant to *Brady v. Maryland* and Fed. R. Crim. P. 16 (Senator Stevens's Pretrial Motion No. 11) at 8. (D.D.C., filed Sep. 2, 2008) (sealed).

[924] Sep. 4, 2008 Memorandum Re: "Meeting with Kevin [Vandegriff]" by Criminal Chief Karen Loeffler.

[925] Sep. 4, 2008 Memorandum Re: "Meeting with Kevin [Vandegriff]" by Criminal Chief Karen Loeffler.

turn it over to the defense.[926] Vandegriff stated that he wanted to keep his investigation secret from Allen at the time.[927] The USAO stated that if Vandegriff's concern over the secrecy of the case changed and he believed that a federal crime had been committed, the USAO would review the case and determine whether the USAO or another office would be available to prosecute the matter.[928] Prior to the meeting, Loeffler asked Bottini if he knew "what Vandegriff was doing."[929] Bottini stated that "he was aware of some new allegations that they had already turned over to the defense and emphasized that he did not want to be involved at all in any decision, but if we learned something about Allen he, would of course, turn it over to the defense."[930] At that time, Vandegriff did not refer the case to the USAO.

On September 4, 2008, the prosecution team again considered their disclosure obligations regarding the Allen sex cases as the team prepared what became the September 9, 2008 *Brady* disclosure letter. Regarding the APD investigation files, PIN attorney Marsh stated that after speaking to "our colleagues in Alaska" the "consensus" is: "(a) the APD investigative files are not public and can't be obtained via the state FOIA law; (b) [the *Stevens* defense team] likely does not have the records; and (c) we shouldn't reach out to APD and ask for a copy."[931] Marsh's comment "after speaking to our colleagues in Alaska" appears to refer to information gleaned from the Alaska USAO's meeting with APD Detective Vandegriff the day before. PIN Chief Welch met with AAG Friedrich and PDAAG Glavin on September 5, 2008, and was instructed to not obtain the APD file in order to keep the file out of the "possession, custody, and control" of the government, therefore not requiring the government to disclose such material to

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[926] Sep. 4, 2008 Memorandum Re: "Meeting with Kevin [Vandegriff]" by Criminal Chief Karen Loeffler.

[927] Sep. 4, 2008 Memorandum Re: "Meeting with Kevin [Vandegriff]" by Criminal Chief Karen Loeffler.

[928] Sep. 4, 2008 Memorandum Re: "Meeting with Kevin [Vandegriff]" by Criminal Chief Karen Loeffler.

[929] Sep. 4, 2008 Memorandum Re: "Meeting with Kevin [Vandegriff]" by Criminal Chief Karen Loeffler.

[930] Sep. 4, 2008 Memorandum Re: "Meeting with Kevin [Vandegriff]" by Criminal Chief Karen Loeffler.

[931] Sept. 4, 2008 2:52pm email from PIN attorney Marsh to PIN Chief Welch, PIN Deputy Morris, and PIN attorney Sullivan.

the defense under *Brady/Giglio*.[932] Welch stated that he did not agree with the decision, and that he thought the government should get ahead of the issue because it would likely win a Federal Rule of Evidence 403 balancing test on the issue.[933] On September 5, 2008, the government filed its opposition to the defendant's September 2, 2008 motion to compel discovery, arguing that the defense was not entitled to additional information regarding the APD investigation, other than the information the government previously provided in its August 25, 2008 *Giglio* letter and in its motions and reply briefs concerning the Motion in Limine to Exclude Inflammatory, Impermissible Cross Examination.[934] The government stated that "it presently is not aware of any documents in its possession, custody, or control concerning any state or local investigation concerning Allen."[935]

On September 5, 2008, defense counsel requested that the government provide additional *Brady/Giglio* information, including the names of each family member of each woman (identified in the government's August 25, 2008 letter) to whom Allen provided financial benefits,[936] the dates that Allen provided financial benefits to the women referenced in the government's August 25, 2008 letter, and the nature and amounts of the benefits Allen provided.[937] Defense counsel's request led to a September 5, 2008 telephone status conference with the court, during which PIN attorney Sullivan argued that with regard to the sex allegations against Allen, "we are not of the view we have to go to state authorities to inquire with them about what information they currently have. With that in mind, we are not presently aware of any additional information in our possession."[938] PIN

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[932] Welch (Schuelke) Tr. Jan. 13, 2010 at 222; Welch (Schuelke) Tr. Feb 5, 2010 at 315. Welch OPR Tr. Mar. 2, 2010 at 222.

[933] Welch OPR Tr. Mar. 2, 2010 at 224-225.

[934] Government's Memorandum in Opposition to Defendant's Motion to Compel Discovery at 8 (D.D.C., filed Sept. 5, 2008) (sealed).

[935] Government's Memorandum in Opposition to Defendant's Motion to Compel Discovery at 8 (D.D.C., filed Sept. 5, 2008) (sealed).

[936] Government witness Dave Anderson testified at the *Stevens* trial that plumber Mark Tyree, Bambi's father, was paid by Allen to work on Stevens's Girdwood home. *United States v. Stevens*, Tr. Oct. 9, 2008 (am) at 48. Defense counsel alleged that Allen may have had an incentive to overpay Mark Tyree for his work on Girdwood in order to buy his silence regarding Allen's relationship with Bambi Tyree. April 28, 2009 letter from defense counsel to Attorney General Eric H. Holder, Jr. at 11.

[937] Sept. 5, 2008 letter from defense counsel to PIN Deputy Chief Brenda Morris at 1-2.

[938] *United States v. Stevens*, Tr. Sept. 5, 2008 (pm) (telephone conference) (sealed) at 20.

attorney Marsh added that "we understand that *Brady* is a continuing obligation . . . we will again go back and review what we have, and if there's anything else to turn over, we will of course do so.[939]

On September 6, 2008, SA Kepner sent an email attaching the SeaTac 302 to Morris, Goeke, Bottini, Marsh, Sullivan, and Joy.[940] Along with the SeaTac 302, Kepner included: (1) an August 19, 2008 report concerning FBI communication with APD Detective Vandegriff regarding his investigation of Allen; (2) the 302 of the October 10, 2007 Tyree interview; and (3) the 302 of the March 10, 2007 Allen interview. Approximately two hours later, Sullivan forwarded to Marsh and Morris the December 21, 2007 email from PRAO attorney Weiss concerning the Allen disclosures.[941]

On September 7, 2008, SA Kepner sent an email to CDC Eric Gonzalez asking him to "[h]old off" on having SA Eckstein obtain the APD investigation reports on the Allen sex investigation from Detective Vandegriff.[942] Kepner stated that the attorneys "are changing their minds."[943] Eckstein stated that Vandegriff had told him that the reports would be available if he wanted them.[944]

Also on September 7, 2008, AUSAs Bottini and Goeke and SA Kepner re interviewed Bill Allen, who stated that [redacted] an adult female with whom he had a prior sexual relationship, had attempted to blackmail him regarding their relationship and threatened to expose his relationship with an underage female,

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[939] *United States v. Stevens*, Tr. Sept. 5, 2008 (pm) (telephone conference) (sealed) at 23. During the same telephone conference, the court stated that it would address the scope of examination of Bill Allen "either before direct or after direct." *United States v. Stevens*, Tr. Sept. 5, 2008 (pm) (telephone conference) (sealed) at 6, 11.

[940] Sept. 6, 2008 12:28pm email from SA Kepner to PIN Principal Deputy Chief Morris, SA Joy, AUSA Goeke, AUSA Bottini, PIN attorney Sullivan, and PIN attorney Marsh. This appears to be the first time Sullivan and Morris received the SeaTac 302.

[941] Sept. 6, 2008 2:31pm email from PIN attorney Sullivan to PIN Principal Deputy Chief Morris and PIN attorney Marsh. This appears to be the first time Morris received the email containing the PRAO opinion regarding the Allen disclosures.

[942] Sept. 7, 2008 12:29pm email from SA Kepner to CDC Gonzalez, SA Eckstein, and SSA Seale.

[943] Sept. 7, 2008 12:29pm email from SA Kepner to CDC Gonzalez, SA Eckstein, and Seale. OPR could not locate any further email correspondence on this topic; however we concluded that the prosecution did not obtain the APD file at this time.

[944] Eckstein (Schuelke) Tr. Apr. 15, 2010 at 91.

Bambi Tyree.[945] Allen stated that Tyree told him she would stop [redacted] blackmail attempt and that she requested to speak with Allen's attorney, [redacted][946] Allen denied knowledge of Tyree's discussions with [redacted] and stated that he did not ask Tyree "to make a false statement" or offer "anyone money to make a false statement."[947] The FBI 302 of the interview did not indicate whether Allen was specifically asked if he had sex with Tyree while she was underage, whether he paid [redacted] for the consultation with Tyree, whether he paid for the cost of Tyree's deposition, or whether he ever saw or knew the contents of the deposition.[948]

In preparation for the September 9, 2008 *Brady* letter, on September 8, 2008, AUSA Goeke provided the prosecution team a summary of the files in the *Boehm* case.[949] Goeke sent an email to the team stating:

> I did not draft these motions, but signed a response to a defense motion to reconsider on this topic "for Frank Russo". These motions are under seal in the *Boehm* case. . . . I recall Bambi stating during a prep session before Boehm's sentencing in spring 2005 that the idea to make a statement was hers, that Allen did not ask her to lie, and that the decision to lie was a decision she made when she met with the attorney. As a result, we asked Allen whether he ever asked anyone to lie under oath and similar questions before *Kott* and he denied that he had done so. After the *Kott* trial, we found out about the [SeaTac] 302 that [Kepner] sent around yesterday regarding Bambi from a 7/22/04 interview in Seattle. . . . As a result of learning of the 302 after *Kott*, we interviewed Bambi, found that the AUSA's notes from

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[945] Sept. 7, 2008 FBI 1023 of Bill Allen.

[946] Sept. 7, 2008 FBI 1023 of Bill Allen.

[947] Sept. 7, 2008 FBI 1023 of Bill Allen.

[948] During her October 2009 OPR interview, SA Kepner told OPR that she re-interviewed Allen specifically to ask him whether he asked Tyree to lie, but did not ask him about the allegations concerning underage sexual relations out of fear that Allen would lie. Kepner OPR Tr. Oct. 13-14, 2009 at 747-749. Goeke stated that he did not ask Allen whether he had had sex with Tyree when she was underage because he "understood this to be a subject of an active APD investigation." Goeke (Schuelke) Tr. Jan. 8, 2010 at 210-211.

[949] Sept. 8, 2008 12:16am email from AUSA Goeke to PIN attorney Marsh, AUSA Bottini, PIN attorney Sullivan, PIN Principal Deputy Chief Morris, SA Kepner, SA Joy, and PIN Chief Welch.

> that meeting state "at the request [then with "Bill" crossed out] Bambi's idea", and went to PRAO. Bambi's attorney also told me that [redacted] had recalled Bambi describing the situation as I recall it. PRAO then said we had no disclosure obligation because there was nothing to disclose.[950]

AUSA Goeke stated further that based on his review, "at a minimum" the prosecution should disclose that:

> Allen stated that at some point, he told the "other female" about the blackmail/extortion attempts and that she then asked to speak to Allen's lawyer. Allen stated that he did not ask the "other female" to speak to his lawyer, did not ask the other female to lie, and is not aware of what the other female told his lawyer.[951]

AUSA Goeke also stated: "I note, though, a minor point, that Bambi's 302 on this point says that the idea to meet with the lawyer was hers and Allen's."[952] In a response email, AUSA Bottini stated that the team had to approach the matter as if the defense has access to the *Boehm* filings "which erroneously assert that Allen asked Bambi to make a false statement."[953]

On September 8, 2008, Marsh emailed the team, stating that Welch and Morris had "asked to see (1) the page of Frank's [Russo] brief re: Bambi and Bill [Allen], and (2) a copy of the page of Frank's notes. Could y'all fax them/PDF

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[950] Sept. 8, 2008 12:16am email from AUSA Goeke to PIN attorney Marsh, AUSA Bottini, PIN attorney Sullivan, PIN Principal Deputy Chief Morris, SA Kepner, SA Joy, and PIN Chief Welch.

[951] Sept. 8, 2008 12:16am email from AUSA Goeke to PIN attorney Marsh, AUSA Bottini, PIN attorney Sullivan, PIN Principal Deputy Chief Morris, SA Kepner, SA Joy, and PIN Chief Welch. Goeke's statement that Allen "is not aware of what the other female told his lawyer," appears to have been taken from the September 7, 2008 FBI 302 of Bill Allen, which states Allen "does not know the outcome of [Tyree's] conversation [with Allen's attorney] or what Tyree discussed with his attorney." Sept. 7, 2008 FBI 1023 of Bill Allen.

[952] Sept. 8, 2008 12:16am email from AUSA Goeke to PIN attorney Marsh, AUSA Bottini, PIN attorney Sullivan, PIN Principal Deputy Chief Morris, SA Kepner, SA Joy, and PIN Chief Welch.

[953] Sept. 8, 2008 9:53am email from AUSA Bottini to AUSA Goeke, PIN attorney Marsh, PIN Attorney Sullivan, PIN Principal Deputy Chief Morris, SA Kepner, SA Joy, and PIN Chief Welch.

them to us?"[954] Goeke later stated that he was asked to "gather the source documents again" and went to SA Eckstein's office to retrieve the agent's notes for the SeaTac 302.[955] Goeke stated that he and Eckstein looked at the notes together and Eckstein made the remarks Goeke later recorded in a September 8, 2008 email transmitting the notes to the prosecution team:

> Here are the notes from the 302. They are ambiguous. The agent also just told me that he does not remember asking Bambi if Bill asked her [to] lie and he doesn't think he would have asked that question because the point of the inquiry was simply whether she believed she had made a false sworn statement and Bambi did not want to talk about Allen.[956]

SA Eckstein told OPR that he did not recall anyone from the Polar Pen investigation asking him if the SeaTac 302 was accurate, although he recalled giving AUSA Goeke a copy of his notes and giving SA Kepner a copy of the SeaTac 302.[957] Eckstein stated that he did not specifically ask Tyree "if Bill Allen asked her to lie."[958] Morris stated that following receipt of the email, she asked Marsh about the ambiguity, to which he responded that Eckstein was sloppy and the USAO in Alaska had problems with him before.[959] Bottini stated that he recalled Goeke telling him that Eckstein said he "could have gotten it wrong" in the 302.[960]

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[954] Sept. 8, 2008 11:48am email from PIN attorney Marsh to AUSA Bottini, AUSA Goeke, and PIN attorney Sullivan.

[955] Goeke (Schuelke) Tr. Jan. 8, 2010 at 379-380.

[956] Sept. 8, 2008 5:47pm email from AUSA Goeke to AUSA Bottini, PIN Principal Deputy Chief Morris, PIN Chief Welch, PIN attorney Marsh, and PIN attorney Sullivan. The same day, Goeke also sent the prosecution team Russo's notes of the SeaTac interview. Sept. 8, 2008 12:38pm email from AUSA Goeke to AUSA Bottini, PIN attorney Marsh, PIN attorney Sullivan, PIN Principal Deputy Chief Morris, and PIN Chief Welch. Goeke stated that he characterized Eckstein's notes as "ambiguous" because they were "ambiguous as to the larger question as to how it came about that the false statement was made." Goeke (Schuelke) Tr. Jan. 8, 2010 at 377. Goeke agreed that "the notes themselves are not ambiguous at all." Goeke (Schuelke) Tr. Jan. 8, 2010 at 378.

[957] Eckstein OPR Tr. June 24, 2009 at 59-61.

[958] Eckstein (Schuelke) Tr. Apr. 15, 2010 at 49.

[959] Morris OPR Tr. Mar. 29, 2010 at 245-246.

[960] Bottini OPR Tr. Mar. 11, 2010 at 590.

Goeke's email to the prosecution team did not note that SA Eckstein's handwritten notes (attached to Goeke's email) contained the statement that Tyree "signed aff[idavit] at BA's request".[961] Earlier in the day, AUSA Goeke forwarded the *Stevens* trial team his March 5, 2007 email containing excerpts from the *Boehm* pleadings regarding Tyree, and sent a second email attaching a PDF version of Russo's notes from the SeaTac interview.[962] At this time, Sullivan forwarded to Welch, Morris, and Marsh copies of the December 21, 2007 PRAO opinion, as well as his March 5, 2007 email to Welch requesting guidance on whether to include the Tyree information in a search warrant affidavit.[963]

Welch stated that he met with Marsh, Sullivan, and Morris on September 8, 2008, and told them to turn over the Tyree false statement allegation to defense counsel.[964] Welch stated that he was told that Allen denied the allegation, Tyree denied the allegation, Russo's notes confirmed that the false statement was Tyree's idea, and that Eckstein's notes were ambiguous and "didn't say it one way or the other."[965] Welch stated that the team should err on the side of caution because Judge Sullivan would not have the same context regarding Tyree as Judge Sedwick had during the *Kott* trial.[966] Welch stated that it was during this meeting that he first heard that the prosecution team planned to use a *Brady* letter to disclose information to the defense, and he did not see the completed letter until September 10, after it had gone out.[967] Morris stated that her notes

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[961] SA Eckstein notes of July 22, 2004 interview with Bambi Tyree.

[962] Sept. 8, 2008 12:39pm email from AUSA Goeke to AUSA Bottini, PIN Principal Deputy Chief Morris, PIN Chief Welch, PIN attorney Marsh, and PIN attorney Sullivan; Sept. 8, 2008 12:39pm email from AUSA Goeke to AUSA Bottini, PIN Principal Deputy Chief Morris, PIN Chief Welch, PIN attorney Marsh, and PIN attorney Sullivan. Morris stated that she felt Goeke was "really trying in earnest to get this out there" and that she likely told Goeke "he was covered because he raised the issue." Morris OPR Tr. Mar. 19, 2010 at 286.

[963] Sept. 8, 2008 12:43pm email from PIN attorney Sullivan to PIN Chief Welch, PIN Principal Deputy Chief Morris, and PIN attorney Marsh.

[964] Welch (Schuelke) Tr. Jan. 13, 2010 at 189. During his OPR interview, Welch stated that Morris was present for the meeting, but that Welch did not "have a vision of Sullivan there." Welch OPR Tr. Mar. 2, 2010 at 214. Sullivan stated that he may have been present at the conference for a brief period and then "stepped out." Sullivan (Schuelke) Tr. Jan. 6, 2010 at 235.

[965] Welch OPR Tr. Mar. 2, 2010 at 214-215.

[966] Welch OPR Tr. Mar. 2, 2010 at 215.

[967] Welch (Schuelke) Tr. Jan. 10, 2010 at 192-195; Welch OPR Tr. Mar. 2, 2010 at 147, 213. Welch told OPR that he also did not know that the prosecution team used *Brady* letters in the *Kott* and *Kohring* cases until the September 8, 2008 meeting. Welch OPR Tr. Mar. 2, 2010 at 146.

from the meeting reflect that Welch told the team to review Eckstein's notes and double check the 302 to "make sure we had it correct" and then provide the information in a letter to defense counsel.[968]

Morris's notes indicate that she, Welch, Marsh, and Sullivan were present for the September 8, 2008 meeting and read as follows:

> Bambi Tyree
> [Welch] believes we should dis[close], [because] he doesn't want [the defense] to go forward & front load [with] [Judge] Sullivan
> Put in letter to [the defense]
> Review of FBI/[SA Eckstein] & double check what was said[969]

On September 9, 2008, the prosecution sent the defense team a *Brady* letter.[970] The letter stated that the government had a February 2004 statement from a woman [redacted] provided in an "unrelated, closed government investigation" indicating that: (1) she had sex with Allen while she was an adult; (2) she believed that Allen had a contemporaneous relationship with the 15 year old female (Bambi Tyree) referenced in the government's August 25, 2008 *Giglio* disclosure letter; (3) Allen provided her with things of value during their relationship; (4) after the relationship ended, Allen's attorney contacted her requesting that in exchange for $5000 she sign a nondisclosure agreement stating that she never had sex with Allen; (5) she did not sign the statement requested by Allen "in part because she wanted more money"; and (6) Allen provided her with a trip outside of Alaska in order to avoid "an unspecified proceeding."[971]

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[968] Morris OPR Tr. Mar. 19, 2010 at 266-267.

[969] Sept. 8, 2008 handwritten notes of PIN Principal Deputy Chief Morris. At 12:38pm on September 8, 2008, Morris circulated an email with the subject line "RE: Tyree" stating that she planned to convene a team meeting with Welch at 4pm EST "to get [Welch] in on the conversation" and that AUSA Bottini would not be able to attend because he was traveling. Sept. 8, 2008 12:38pm email from PIN Principal Deputy Chief Morris to AUSA Goeke, AUSA Bottini, PIN attorney Marsh, PIN attorney Sullivan, and PIN Chief Welch. Although AUSA Goeke responded to the email stating he was available for the meeting and he thought that Bottini could also call in, Morris's notes from the meeting show that neither Bottini nor Goeke were present.

[970] Sept. 9, 2008 letter from PIN Principal Deputy Chief Morris to defense counsel. Morris stated that she signed the letter relying on the accuracy of the information provided and that she and Welch did not focus on the underlying supporting documents. Morris (Schuelke) Tr. Jan. 15, 2010 at 155. Morris OPR Tr. Mar. 29, 2010 at 255.

[971] Sept. 9, 2208 letter from PIN Principal Deputy Chief Morris to defense counsel at 4.

The *Brady* letter stated further that Allen was interviewed on September 7, 2008, regarding the adult female's [redacted]) allegations, and he stated that: (1) he had a relationship with the adult female, a prostitute, and paid her rent; (2) the adult female and her mother demanded money from Allen to prevent them from exposing the sexual relationship with the adult female and the underage female to the media; (3) Allen refused to pay the adult female money and considered her threats to be blackmail; and (4) Allen "hired a lawyer to address his belief that he was being blackmailed," and denied "offering to pay anyone money to make a false statement."[972]

In addressing the issue that Allen asked Tyree to make a sworn false statement about their relationship, the *Stevens* team wrote:

> Given the allegation from the adult female [redacted]], we are also providing you with some additional information that, as described below is neither *Brady* or *Giglio*. In 2007, the government became aware of a suggestion that, a number of years ago, Allen asked the "other female" [Bambi Tyree] to make a sworn, false statement concerning their relationship. After hearing that suggestion, the government conducted a thorough investigation and was unable to find any evidence to support it. The investigation included: (a) an inquiry to [Tyree], who denied the suggestion; (b) an inquiry to Allen, who denied the suggestion; (c) a review of notes taken by a federal law enforcement agent [SA Eckstein] during a 2004 interview of the "other female," and (d) a review of notes taken by a federal prosecutor [AUSA Russo] during a 2004 interview of the "other female." Because the government is aware of no evidence to support any suggestion that Allen asked the "other female" to make a false statement under oath, neither *Brady* nor *Giglio* apply.[973]

Marsh drafted this portion of the letter.[974] Marsh stated that the team chose to include the information even though "we had come up with no evidence to

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[972] Sept. 9, 2208 letter from PIN Principal Deputy Chief Morris to defense counsel at 4.

[973] Sept. 9, 2208 letter from PIN Principal Deputy Chief Morris to defense counsel at 5.

[974] Marsh (Schuelke) Tr. Feb. 2, 2010 at 157.

support the fact that Allen encouraged her to lie" because the allegations were similar to those raised by the second woman, [redacted][975] Marsh stated that he wrote the statement that there was "no evidence to support the suggestion" regarding the false statement because "PRAO informed us that this raised neither *Brady* or *Giglio*, by definition, there could be no evidence to support a *Brady* or *Giglio* issue. It's necessarily correct."[976]

Marsh stated that the term "suggestion" was not meant to refer to specific information, but was used to "describe that there's this issue." Marsh stated further that "not only did the rest of the team and my superiors see ambiguity in [the SeaTac 302], but so did PRAO."[977] Marsh told OPR that he was referring to himself, Bottini, Sullivan, and Goeke, but not Morris and Welch.[978] Marsh had no recollection of Welch or Morris specifically reading the 302.[979]

The September 9, 2008 *Brady* disclosure letter stated that after a "thorough investigation" the government was "unable to find any evidence to support" the "suggestion" that Allen asked Tyree to make a sworn false statement.[980] The government made that assertion despite having reviewed SA Eckstein's notes of the SeaTac interview, which state Tyree "signed aff[idavit] at BA's request," and despite Russo's pleadings in *Boehm* to the same effect.[981] The letter also did not reveal that Bambi Tyree used Bill Allen's private attorney, [redacted], to make the statement regarding Allen, and contained no information that the government had filed three briefs under seal, in an unrelated case, stating that Tyree had given a false statement at Allen's request.[982]

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[975] Marsh (Schuelke) Tr. Feb. 2, 2010 at 163; Marsh OPR Tr. Mar. 26, 2010 at 445.

[976] Marsh (Schuelke) Tr. Feb. 2, 2010 at 201-202.

[977] Marsh (Schuelke) Tr. Feb. 2, 2010 at 204.

[978] Marsh OPR Tr. Mar. 26, 2010 at 547.

[979] Marsh OPR Tr. Mar. 26, 2010 at 552.

[980] Sept. 9, 2008 letter from PIN Principal Deputy Chief Morris to defense counsel at 5.

[981] Sept. 9, 2008 letter from PIN Principal Deputy Chief Morris to defense counsel at 5.

[982] Goeke stated that Marsh "repeatedly" argued that the prosecution did not have to disclose the *Boehm* pleadings because the pleadings were "simply the arguments of lawyers which your government has established were on improper facts." Goeke (Schuelke) Tr. Jan. 8, 2010 at 244. Marsh told OPR that he did not specifically remember why that information was not included, but that PRAO might have told him, in passing, that a filing made by a prosecutor is not evidence.

Marsh added the "suggestion" language to the disclosure letter following the September 8, 2008 meeting with Morris, Welch, and Sullivan. Marsh's email to the team conveying the draft letter containing the newly added language stated: "Subsection 3 revised to include the Bambi Tyree stuff we discussed earlier today[.]"[983] Following Marsh's addition of the "suggestion" language, the letter was edited and circulated by Sullivan (who did not change the Tyree paragraph), and then edited and circulated by Marsh twice. Between drafts, no attorneys responded by email with changes to the "suggestion" language, and such language remained in the final version of the letter sent to defense counsel. Morris stated that she assumed the information in the letter was accurate and she did not look at the supporting documentation.[984] Bottini told OPR that he did not prepare the letter, but he reviewed it during the evening of September 9, 2008, before it was sent to the defense.[985] Goeke stated that he reviewed "drafts" of the letter but could not recall whether or not he reviewed the final letter prior to the completion of the *Stevens* trial.[986]

On September 22, 2008, the APD referred to the USAO its investigation of Bill Allen for allegedly transporting a minor across state lines for sex or prostitution.[987] The same day, U.S. Attorney Cohen requested that EOUSA recuse the USAO from the matter because of AUSA Bottini and AUSA Goeke's involvement with Allen in the *Stevens* case.[988] EOUSA granted the request.

On September 30, 2008, Bill Allen began his trial testimony.[989] Prior to Allen's testimony, Judge Sullivan ruled that the defense could cross examine Allen regarding the fact that he was under investigation by the APD. However, the defense could not raise the specifics of the state investigation (sex with underage

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Marsh OPR Tr. Mar. 26, 2010 at 433.

[983] Sept. 8, 2008 8:53pm email from PIN attorney Marsh to AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, PIN Principal Deputy Chief Morris, and PIN Chief Welch.

[984] Morris (Schuelke) Tr. Jan. 15, 2010 at 168, 180-181.

[985] Bottini OPR Tr. Mar. 11, 2010 at 448.

[986] Goeke (Schuelke) Tr. Jan. 8, 2010 at 37-38.

[987] Sept. 22, 2008 12:05pm email from Alaska U.S. Attorney Cohen to Assistant General Counsel Stuart Melnick.

[988] Sept. 22, 2008 12:05pm email from Alaska U.S. Attorney Cohen to Assistant General Counsel Stuart Melnick.

[989] Bill Allen testified at the *Stevens* trial on September 30, October 1, 6, and 7, 2008.

females).[990] Following the trial, Allen told OPR that during a trial preparation mock cross examination session, prosecutors told Allen to expect questions from the defense concerning Bambi Tyree.[991] Allen stated that his attorney Robert Bundy had told the prosecutors that Allen would "take the Fifth" if he was asked questions about Tyree.[992]

On October 2, 2008, an AUSA from the Western District of Washington emailed PIN Principal Deputy Chief Morris, stating that the Alaska USAO had been recused from an investigation of Allen and that the investigation was assigned to the Western District of Washington USAO.[993] On October 3, 2008, the prosecutors notified the *Stevens* defense team that the USAO for the Western District of Washington received a referral concerning the APD investigation of allegations that Bill Allen transported an adult female across state lines for purposes of prostitution.[994] The letter stated that the *Stevens* prosecution team became aware of the referral on October 3, 2008 and that "we do not believe that Mr. Allen is aware of this referral."[995] Bill Allen testified at the *Stevens* trial on September 30, October 1, 6, and 7, 2008. During cross examination, the defense did not address the APD's investigation of Bill Allen, although Judge Sullivan had granted them permission to do so.

On October 7, 2008, Allen's final day of testimony in the *Stevens* trial, EOUSA transferred the Allen investigation from the Western District of Washington USAO to the Criminal Division Child Exploitation and Obscenity

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[990] Judge Sullivan allowed the defense the opportunity to inquire about the fact that there was an investigation of Allen, but the defense could not introduce the specific facts of the investigation. *United States v. Stevens*, Tr. Sept. 29, 2008 (pm) at 118-123; *United States v. Stevens*, Tr. Oct. 15, 2008 (am) (unredacted bench conference) at 7. Prior to the hearing, on September 26, 2008, the prosecutors re-filed on the public docket their August 14, 2008 Motion in Limine to Exclude Inflammatory, Impermissible Cross-Examination (originally filed under seal).

[991] June 12, 2010 FBI 302 of Bill Allen at 8.

[992] June 12, 2010 FBI 302 of Bill Allen at 8. When asked about Allen's claim, Marsh told OPR, "it's possible" and that he had "a general memory of something" but he did not "think it was Bambi" rather, it related to "the new investigation." Marsh OPR Tr. Mar. 26, 2010 at 536.

[993] Oct. 2, 2008 9:20pm email from AUSA Westinghouse to PIN Principal Deputy Chief Morris.

[994] Oct. 3, 2008 letter from PIN Principal Deputy Chief Morris (signed by PIN attorney Sullivan) to defense counsel.

[995] Oct. 3, 2008 letter from PIN Principal Deputy Chief Morris (signed by PIN attorney Sullivan) to defense counsel. Morris's email reflects that AUSA Westinghouse notified her of the recusal at 9:20pm on October 2, 2008, however, we were unable to determine that Morris first read the email on the evening of October 2 rather than the morning of October 3.

Section (CEOS). Defense counsel later acknowledged becoming aware of the transfer of the investigation "[a]t least during [Allen's] testimony."[996]

On October 9, 2008, the USAO for the Western District of Washington sent the reports and materials it received from APD to CEOS.[997] On October 13, 2008, the prosecution informed the *Stevens* defense team that the Allen investigation had been transferred to CEOS and that they did not "believe Mr. Allen is aware of this referral or what office is investigating it."[998] On October 14, 2008, Criminal Division PDAAG Glavin requested that CEOS Chief Andrew Oosterbaan provide the Allen APD material to PIN Deputy Chief Ray Hulser.[999] On October 14, 2008 the United States informed the *Stevens* defense team that CEOS had expanded its investigation to include "a third female" who claimed to have had sex with Allen "in 1994 or 1995" and that she "was underage at the time of the encounter."[1000]

During a bench conference on October 15, 2008, the *Stevens* defense team argued for further disclosure of the expanded investigation with regard to Allen's potential bias; Judge Sullivan noted that the defense "didn't touch this area" during cross examination "although, I told you you could."[1001] Nevertheless, the court ordered the government to file, by the close of business, a declaration "addressing the circumstances under which that matter opened, [and] when the decision was made to reopen it or to open it, and I need that today."[1002] Welch told OPR that he drafted a Declaration after receiving assurances from Morris, Marsh, Sullivan, Goeke, Bottini, Kepner, and Joy that they did not give Allen or his attorney information about the federal investigation.[1003]

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[996] *United States v. Stevens*, Tr. Oct. 15, 2008 (am) (unredacted bench conference) at 6.

[997] Oct. 9, 2008 letter from AUSA Robert Westinghouse to CEOS Chief Andrew Oosterbaan.

[998] Oct. 13, 2008 letter from PIN Principal Deputy Chief Morris to Craig Singer.

[999] Oct. 14, 2008 9:42am email from PDAAG Glavin to CEOS Chief Oosterbaan.

[1000] Oct. 14, 2008 letter from PIN Principal Deputy Chief Brenda Morris to defense counsel.

[1001] *United States v. Stevens*, Tr. Oct. 15, 2008 (unredacted bench conference) at 7.

[1002] *United States v. Stevens*, Tr. Oct. 15, 2008 (pm) at 3.

[1003] Welch OPR Tr. Mar. 2, 2010 at 288, 338. OPR located a draft of the Declaration, but was unable to ascertain if the Declaration was filed in court.

Welch told OPR that he received the APD file from CEOS on October 14 or 15.[1004] Welch stated that he reviewed the file and saw the SeaTac 302 for the first time and that he became upset when he saw the document, questioning how Goeke could have characterized the agent's notes as ambiguous in his prior email.[1005] Welch stated that prior to viewing the 302 he had only seen Russo's notes, and had conversations with Marsh, Bottini, and Goeke during which they told Welch that Russo's *Boehm* pleadings "must have been a mistaken recollection."[1006] Welch showed the SeaTac 302 to Ray Hulser, stating, "How is this fucking ambiguous?"[1007] Welch stated that he decided to turn over the entire file (with the exception of email documents addressing the Alaska USAO recusal) to the defense and had the prosecution team put Bill Allen and Bambi Tyree under subpoena for a potential hearing; Allen and Tyree were not told why they were to return.[1008]

According to the PRAO Inquiry Summary Sheet, on October 15, 2008, PIN Chief Welch contacted PRAO to request advice whether, under *Brady/Giglio*, PIN must disclose notes in the APD file regarding the SeaTac 302:

> Regarding Bambi's false affidavit, the Alaska investigator's notes say "at request of ~~Bill~~ Bambi's idea." In other words, it appeared that the investigator who wrote the notes apparently had first written the word "Bill" (apparently referring to Bill Allen) and had crossed out "Bill" and had written "Bambi's idea."[1009]

PRAO's Inquiry Summary Sheet referenced the two prior PRAO requests concerning AUSA Russo's recollection of the 2004 Tyree interview and the

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[1004] Welch (Schuelke) Tr. Feb 5, 2010 at 316.

[1005] Welch (Schuelke) Tr. Jan. 13, 2010 at 34, 183-185. Welch stated that prior to viewing the SeaTac 302, he believed "there were simply notes and no 302." Welch (Schuelke) Tr. Jan. 13, 2010 at 35, 181. Welch OPR Tr. Mar. 2, 2010 at 265. Marsh stated that it was possible he showed Welch the 302, but he did not specifically recall ever showing Welch the SeaTac 302. Marsh OPR Tr. Mar. 26, 2010 at 421. SA Kepner sent the SeaTac 302 to the prosecution on September 6, 2008, but Welch was not included as one of the recipients. Sept. 6, 2008 12:28pm email from SA Kepner to PIN Principal Deputy Chief Morris, SA Joy, AUSA Goeke, AUSA Bottini, PIN attorney Sullivan, and PIN attorney Marsh.

[1006] Welch (Schuelke) Tr. Jan. 13, 2010 at 191-192.

[1007] Welch (Schuelke) Tr. Feb 5, 2010 at 316. Welch OPR Tr. Mar. 2, 2010 at 265-266.

[1008] Welch (Schuelke) Tr. Feb 5, 2010 at 372, 376. Welch OPR Tr. Mar. 3, 2010 at 324.

[1009] PRAO Inquiry Summary Sheet 8-10-160 (Oct. 15, 2008) at 2.

prosecution team's conclusion that there was no evidence to "support a notion that Allen had asked Bambi to lie in her affidavit."[1010] The Summary Sheet also contained a summary of information relayed by Welch. Many of the facts listed in PRAO attorney Weiss's summary appear to be incorrect:[1011]

- the notes containing the notation "~~Bill~~ Bambi's idea" belonged to "an investigator".[1012]

  The notes actually belonged to AUSA Russo, not an investigator. SA Eckstein's notes mirror the information in the SeaTac 302: that Tyree made the statement at Allen's request;

- "[n]ow, the prosecutors have received from the Anchorage Police Department an investigative file" containing the investigator's notes from the SeaTac 302.[1013]

  The *Stevens* team was already in possession of SA Eckstein's notes regarding the SeaTac 302 prior to the disclosure of the APD file.[1014] AUSA Goeke circulated the notes to the prosecution team on September 8, 2008;[1015]

- the SeaTac 302, in which Tyree stated that she gave a false statement at Allen's request, "had

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[1010] PRAO Inquiry Summary Sheet 8-10-160 (Oct. 15, 2008) at 2.

[1011] As indicated below, some factual errors in the PRAO Summary Sheet may be the result of translations of the PRAO attorney's written notes.

[1012] PRAO Inquiry Summary Sheet 8-10-160 (Oct. 15, 2008) at 2. The handwritten notes of the PRAO attorney who wrote the report correctly indicate that notes containing Allen's name crossed out belong to an AUSA. Notes for PRAO Inquiry Summary Sheet 8-10-160 (Oct. 15, 2008) at 1.

[1013] PRAO Inquiry Summary Sheet 8-10-160 (Oct. 15, 2008) at 2.

[1014] Sept. 8, 2008 5:47pm email from AUSA Goeke to AUSA Bottini, PIN Deputy Chief Morris, PIN Chief Welch, PIN attorney Marsh, and PIN attorney Sullivan.

[1015] Sept. 8, 2008 5:47pm email from AUSA Goeke to AUSA Bottini, PIN Deputy Chief Morris, PIN Chief Welch, PIN attorney Marsh, and PIN attorney Sullivan.

already been turned over to the defense" by the *Stevens* prosecution team.[1016]

As of October 15, 2008, the prosecution had not provided such material to the defense, although some members of the *Stevens* prosecution team had been aware of, and in possession of, the Sea Tac 302, for some time. AUSA Bottini received it on October 4, 2007, and SA Kepner distributed it to the prosecutors (except Welch) on September 6, 2008;[1017]

- the SeaTac 302 of Tyree states that "she had been adamant that the perjury was her own idea and had not been requested by Allen, a recollection that is substantiated by the agent's contemporaneous FBI 302, and that conforms with the AUSA's own contemporaneous notes of the 2004 interview."[1018]

  The SeaTac 302 states the opposite: "TYREE previously signed a sworn affidavit claiming she did not have sex with ALLEN. TYREE was given the affidavit by ALLEN's attorney, and she signed it at ALLEN's request." The SeaTac 302, written three months after the Tyree interview, conforms with SA Eckstein's notes, stating that Tyree "signed aff at BA's request." The 302 differs from AUSA Russo's notes containing the strikeout of the name "Bill."

Welch discussed the errors in the PRAO Summary Sheet when interviewed regarding this investigation. Welch stated that he had decided to produce the APD

[1016] PRAO Inquiry Summary Sheet 8-10-160 (Oct. 15, 2008) at 2.

[1017] Sept. 6, 2008 12:28pm email from SA Kepner to AUSA Goeke to AUSA Bottini, PIN Deputy Chief Morris, PIN attorney Marsh, PIN attorney Sullivan, and SA Joy; fax copy of July 22, 2004 Tyree FBI 302 sent from FBI Anchorage date stamped Oct. 4, 2007.

[1018] PRAO Inquiry Summary Sheet 8-10-160 (Oct. 15, 2008) at 2. The handwritten notes of the PRAO attorney who wrote the report correctly indicate that the 2004 302 includes information that Tyree lied at Allen's request and that the 2007 302 includes information that Allen "never asked her to do it." Notes for PRAO Inquiry Summary Sheet 8-10-160 (Oct. 15, 2008) at 1.

file upon reviewing it.[1019] Welch also stated that he contacted PRAO only to obtain advice regarding his obligation to correct potential misrepresentations in the September 9, 2008 *Brady* letter surrounding the Tyree issue.[1020] Welch told OPR that PRAO did not answer his question regarding the letter, and Welch did not further question PRAO on the matter, opting instead to provide information regarding the discrepancy between the 302 and the September 9, 2008 *Brady* letter to OPR during his eventual in person interview.[1021] PRAO attorney Patricia Weiss told OPR that she recalled the discussion with Welch regarding the letter and her notes reflect such a discussion; she acknowledged it was her mistake that she failed to include that discussion in her summary.[1022] Weiss stated that, when talking to Welch, she was focused on the discussion of the APD file and not the *Brady* letter.[1023] Weiss also stated that she created her summary some weeks after the call with Welch [redacted].[1024] She stated that the errors in her summary could have been due to the drafting delay and the fact that she took some of the background Tyree information from her prior December 2007 summary.[1025]

Despite the factual errors in the PRAO Inquiry Summary Sheet, PRAO examined obligations under *Brady/Giglio* and D.C. Rule 3.8(e), advising that "it would be wise to err on the side of disclosure in this situation, especially given the number of disclosure related problems [that] had already arisen in this case in the course of the trial."[1026] PRAO also advised Welch to contact AUSA Dan Gillogly (a Department expert on *Brady* and *Giglio* matters) for additional advice.[1027] Welch later informed PRAO that he had ordered the trial team to disclose the APD file minus "two documents that prosecutors believed were protected by privileges

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[1019] Welch Schuelke Tr. Feb 5, 2010 at 317.

[1020] Welch Schuelke Tr. Feb 5, 2010 at 320; Welch OPR Tr. Mar. 2, 2010 at 269-273.

[1021] Welch Schuelke Tr. Feb 5, 2010 at 322; Welch OPR Tr. Mar. 2, 2010 at 269-273, 284-285.

[1022] Weiss OPR Tr. Mar. 4, 2010 at 47, 48, 55.

[1023] Weiss OPR Tr. Mar. 4, 2010 at 49.

[1024] Weiss OPR Tr. Mar. 4, 2010 at 76-78.

[1025] Weiss OPR Tr. Mar. 4, 2010 at 63-64, 76.

[1026] PRAO Inquiry Summary Sheet 8-10-160 (Oct. 15, 2008) at 3.

[1027] PRAO Inquiry Summary Sheet 8-10-160 (Oct. 15, 2008) at 3.

the prosecutors offered to provide those to the court for *in camera* inspection if the defense so requested."[1028]

Welch told OPR that the documents he withheld from production were pages of emails involving EOUSA and the Alaska USAO recusal and the transfer of the case to the Western District of Washington.[1029] SA Eckstein's notes and AUSA Russo's notes were not part of the APD file.[1030]

On October 16, 2008, under a protective order, the prosecution provided the *Stevens* defense team with the Allen APD file (including the SeaTac 302) it received from CEOS on October 14, 2008 (with the exception of two pages withheld under "attorney client and work product privileges").[1031] The cover letter, drafted by PIN Chief Welch, stated that "the information contained in the FBI 302 dated October 28, 2004 [the SeaTac 302] and follow up investigation of that allegation was also summarized in the September 9, 2008 letter."[1032] Welch told OPR that his purpose in drafting the letter was to refer the defense to the connection between the September 9, 2008 *Brady* letter and the SeaTac 302 and "point it out to them because I thought that they could draw the same conclusion that I had drawn."[1033] The prosecution's October 16, 2008 production did not include the notes from the SeaTac interview taken by SA Eckstein or AUSA Russo (which were not in the APD file), although the prosecution's September 9, 2008 *Brady* letter stated that the government's review of such notes, in addition to interviews of Tyree and Allen, was part of its investigation into the "suggestion that Allen asked [Bambi Tyree] to make a false statement under oath."[1034]

Following the October 16, 2008 disclosure of the APD file, the *Stevens* defense team stated that documents in the file raised concerns that Allen was made aware, prior to his testimony, of "another investigation that we didn't know about," and that he might have been aware that the investigation had been

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[1028] PRAO Inquiry Summary Sheet 8-10-160 (Oct. 15, 2008) at 3.

[1029] Welch OPR Tr. Mar. 2, 2010 at 47.

[1030] Welch OPR Tr. Mar. 2, 2010 at 48.

[1031] Oct. 16, 2008 letter from PIN Principal Deputy Chief Morris to defense counsel.

[1032] Oct. 16, 2008 letter from PIN Principal Deputy Chief Morris to defense counsel.

[1033] Welch OPR Tr. Mar. 2, 2010 at 272.

[1034] Apr. 28, 2009 letter from defense counsel to Attorney General Eric H. Holder, Jr. at 14; Sept. 9, 2208 letter from PIN Principal Deputy Chief Morris to defense counsel at 5.

referred to federal authorities.[1035] The following day, the court again addressed the Allen CEOS file issue, arguing that because the investigation of Allen involved "federal crimes," he should be "presumed to know" that the case would have been referred for federal prosecution.[1036] Although the prosecution acknowledged that documents in the CEOS file showed that Allen knew about the state investigation, the prosecution argued that there was no evidence showing Allen was aware of the federal transfer. Ultimately, the court did not grant the defense request for a jury instruction concerning Allen's knowledge of the federal transfer.

III. ANALYSIS

In 2004, two federal law enforcement officers stated unequivocally in official documents that Bambi Tyree admitted making a false sworn statement, at Bill Allen's request, denying that she had sex with Allen when she was 15 years old.

Frank Russo, an experienced federal prosecutor, represented in three separate pleadings filed with the U.S. District Court in Alaska in *United States v. Boehm,* that Allen asked Tyree to provide his attorney a false statement denying their sexual relationship. The first of the three pleadings stated categorically: "Allen asked Tyree to meet with his attorney, [redacted] and give a sworn statement stating that she never had sex with Allen. Tyree did so."[1037] The two subsequent pleadings in the *Boehm* case were to the same effect.

Russo's representations in the *Boehm* pleadings were unqualified statements of fact based on what Tyree said to him and SA Eckstein in the interview at FCI SeaTac, where Tyree was incarcerated. SA Eckstein represented in an FBI 302 memorializing the Tyree interview that:

> TYREE had sex with BILL ALLEN when she was 15 years old. TYREE previously signed a sworn affidavit claiming she did not have sex with ALLEN. TYREE was given the affidavit by ALLEN's attorney, and she signed it at ALLEN's request. TYREE provided false information on the affidavit because she cared for ALLEN and did not want him to get in trouble with the law.

[1035] *United States v. Stevens*, Tr. Oct. 17, 2008 (pm) at 120-121 (redacted bench conference).

[1036] *United States v. Stevens*, Tr. Oct. 18, 2008 (pm) at 98-99 (sealed).

[1037] *United States v. Boehm*, No. A04-003 CR, Government Motion in Limine Regarding Impeachment Evidence Pertaining to Bambi Tyree, at 1 (D. Alaska, filed July 26, 2004) (sealed).

Russo's pleadings and Eckstein's 302 were not disclosed to the defense in the *Stevens* case.[1038] Instead, the government represented in its September 9, 2008 *Brady* letter that there was a "suggestion" in the past that Allen asked Tyree to make a sworn, false statement concerning their relationship, but that the government, after conducting "a thorough investigation," found "no evidence" to support it. The *Brady* letter went on to describe the investigation undertaken by the government, including interviews of both Tyree and Allen and a review of Eckstein's and Russo's interview notes, and ended with the representation that the government "is aware of no evidence to support any suggestion" that Allen asked Tyree to make a false statement under oath. Accordingly, the letter concluded, "neither *Brady* nor *Giglio* apply." No mention was made of the existence or contents of either Russo's pleadings or Eckstein's 302.

Based on the results of our investigation, we concluded that the pertinent statements in the *Brady* letter were clear misrepresentations of the facts, in violation of the government attorneys' duty of truthfulness in statements to others under D.C. Rule of Professional Conduct 4.1(a). We concluded further that the suppression of the information contained in Russo's pleadings and Eckstein's 302 violated the attorneys' disclosure obligations under *Brady* and Giglio and Department of Justice policy (USAM § 9 5.001).

A. The Misrepresentations

Bill Allen was a key government witness in the *Stevens* case, and the prosecution team knew he would be subjected to vigorous cross examination at trial. His credibility was very much at issue. Under Rule 608(b) of the Federal Rules of Evidence, the defense could have attacked Allen's "character for truthfulness" by inquiring on cross examination, in the court's discretion, into specific instances of conduct by Allen that bore on his character for truthfulness. One such instance was the false sworn statement that Bambi Tyree gave to Allen's lawyer.

In 1999, [redacted] allegedly blackmailed Allen by threatening to expose his illicit relationships with herself and Bambi Tyree, who was a minor at the time of her relationship with Allen. Allen hired attorney [redacted] to protect his interests. Bambi Tyree provided a sworn statement to [redacted] denying that she had sex with Allen when she was a minor. Tyree was 18 when she gave the sworn statement to Allen's lawyer.

[1038] Neither Russo's pleadings in the *Boehm* case nor a summary of their contents were ever disclosed to the defense. Eckstein's 302 was turned over to the defense near the end of trial, on October 16, 2008, after PIN Chief Welch read it for the first time and personally transmitted it to the defense, along with the other contents of the APD investigative file on Allen.

Tyree admitted that the sworn statement she gave to Allen's lawyer was false. The only questions were whether she acted on her own or at Allen's request, and if the former, whether Allen knew the sworn statement was false and accepted it nonetheless. According to Russo's pleadings and Eckstein's SeaTac 302, Tyree said on July 22, 2004, that she acted at Allen's request. Eckstein's interview notes were consistent with his 302. Russo's notes, however, indicated that it was "Bambi's idea" to provide the false statement to Allen's lawyer, but were silent on whether Allen endorsed the idea.

The information concerning the evidence of Allen's role in soliciting Bambi's false sworn statement was not disclosed to the defense. We found that the pertinent paragraph of the September 9, 2008 *Brady* letter contained at least three misrepresentations concerning the matter.

1. The "Suggestion" of Allen's Role in Tyree's False Statement

The premise for the pertinent paragraph in the *Brady* letter was the "suggestion" that Allen asked Tyree "to make a sworn, false statement concerning their relationship." The representation implied that the "suggestion" was no more than an unsubstantiated rumor. PIN attorney Marsh, who authored the paragraph, told us that the "suggestion" was predicated on the SeaTac 302 and Russo's pleadings, which were not identified anywhere in the letter. No reasonable reading of Russo's pleadings in the *Boehm* case or the SeaTac 302, however, would support the notion that there was a mere "suggestion" that Allen asked Tyree to lie for him.

Marsh asserted in his OPR interview that the SeaTac 302 ("she signed it at ALLEN's request") was "ambiguous." We disagree. There is nothing ambiguous about Eckstein's 302. We concurred with former PIN Chief Welch, who upon reading the Eckstein 302 for the first time in mid October 2008, exclaimed to PIN Deputy Chief Ray Hulser, in graphic terms, his disagreement with Marsh's characterization of Eckstein's 302 and promptly disclosed the document itself to the defense.

Nor were AUSA Russo's representations in the *Boehm* pleadings ambiguous. On this point, Marsh asserted, allegedly based on the advice he received from PRAO, that pleadings are merely arguments of counsel, not evidence. Russo's representations in the *Boehm* pleadings, however, were statements of fact not

argument or supposition that Allen induced Tyree to give his attorney a false sworn statement about their relationship.[1039]

Both Eckstein's SeaTac 302 and Russo's pleadings constituted far more than a mere "suggestion" that Tyree gave a false sworn statement at Allen's request. Yet, neither document was identified in the letter. The *Brady* letter's characterization of a "suggestion" that Allen asked Tyree to lie about their relationship was misleading and false. The failure to identify either Russo's pleadings or the SeaTac 302 was a misrepresentation by omission.

2. "No Evidence" to Support the Suggestion

The *Brady* letter asserted that the government was "unable to find any evidence to support the suggestion" that Allen asked Tyree to make a false statement under oath, and proceeded to identify four specific items of evidence the government implicitly relied upon to reach that conclusion: (1) an interview of Allen; (2) an interview of Tyree; (3) a review of Russo's notes; and (4) a review of Eckstein's notes. The misrepresentation was two fold. First, the statement implied that the four enumerated items were inconsistent with the suggestion. That implication was false. Although the interviews of Tyree and Allen contradicted the "suggestion," and Russo's interview notes were inconsistent with his pleadings in that he edited "at the request of Bill" by striking "Bill" and substituting "Bambi's idea," SA Eckstein's interview notes were entirely consistent with his 302, as well as with the *Boehm* pleadings. The implicit representation that a review of Eckstein's notes supported the proposition that the government was "unable" to find any evidence of Allen's complicity in Tyree's false sworn statement was erroneous and misleading.

Second, and more important, the enumeration of the items of evidence relied upon to support the "no evidence" conclusion excluded both Russo's pleadings and Eckstein's SeaTac 302, which clearly supported the opposite conclusion. There were four documents (or sets of documents) that emanated from the July 22, 2004 Tyree interview at FCI SeaTac. Three of the four Russo's pleadings in *Boehm*, Eckstein's 302, and Eckstein's notes clearly stated that Tyree gave a false sworn statement to Allen's lawyer, at Allen's request, regarding their relationship. Only one Russo's notes indicated that the "idea" of providing a false statement was Tyree's. Yet, the *Brady* letter favorably cited

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[1039] *Cf.* Fed. R. Evid. 801(d)(2)(B) (admissibility of statement "of which the party has manifested an adoption or belief in its truth"); *United States v. Warren,* 42 F.3d 647, 655 (D.C. Cir. 1994) (objection on hearsay grounds not sustainable where government previously manifested belief in trustworthiness of statement in court submission); *Harris v. United States,* 834 A.2d 106, 118 (D.C. 2003) (statements of AUSAs, in certain circumstances, are admissible as admissions of party opponent).

Russo's notes, mischaracterized Eckstein's notes as supporting the "no evidence" conclusion, and ignored altogether Russo's pleadings and Eckstein's 302. We found that the exclusion of Russo's pleading and Eckstein's SeaTac 302 was a misrepresentation by omission.

3. The Government's "Thorough Investigation"

The third misrepresentation involved the *Brady* letter's representation that the government conducted a "thorough investigation" of the "suggestion" that Allen induced Tyree to lie about their relationship. Of the four principal witnesses on the subject Allen, Tyree, Eckstein, and Russo the prosecution team interviewed Tyree and Allen (twice), but inexplicably neglected to interview either Russo or Eckstein after both stated that they stood behind their written accounts of the Tyree SeaTac interview.[1040] Contrary to the representation made in the September 9 *Brady* letter, we found that the investigation undertaken by the prosecutors into what Tyree said during the July 22, 2004 SeaTac interview with Russo and Eckstein was not "thorough." Rather, we found that it was tailored to support the prosecutors' view that their colleagues, AUSA Russo and SA Eckstein, were mistaken in their written accounts of what Tyree said.

The prosecution team became aware of the issue in March 2007, when AUSA Goeke raised it in connection with drafting the search warrant affidavit for Stevens's Girdwood residence. Goeke shared with the prosecution team the pertinent excerpts of Russo's pleadings in the *Boehm* case. The ensuing investigation was limited to an interview of Bill Allen on March 10, 2007, that resulted in a one paragraph 302 essentially reporting that Allen said he had never lied under oath and had never encouraged anyone else to do so, either.

The issue surfaced again during the hiatus between the *Kott* and *Kohring* trials. During the *Kott* trial in September 2007, handled by Marsh and Goeke, the relationship between Allen and Tyree was alluded to but the defense was not aware of the Tyree interview at FCI SeaTac, or of any allegation that Allen may have suborned perjury by Tyree. The government made no disclosure concerning the statements attributed to Tyree in Russo's sealed pleadings in *Boehm,* and the court did not allow the defense to inquire into the sexual relationship between Allen and Tyree.

After the *Kott* trial, Goeke became concerned about whether he should have disclosed to the *Kott* defense Russo's representations in the *Boehm* pleadings. Because the issue was also germane to the impending *Kohring* trial, Goeke delved

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[1040] Tyree was represented by a lawyer, [redacted] who was also present at the SeaTac interview.

further into the matter. The pertinent representations in Russo's pleadings in July 2004 contradicted what Tyree had said to Goeke during witness preparation sessions before the *Boehm* sentencing hearing in May 2005.[1041] Goeke called SA Eckstein to determine if Eckstein's recollection squared with his own, and to obtain any notes or documents prepared by Eckstein memorializing any Tyree interviews he attended. Eckstein informed Goeke that he prepared a 302 of an interview of Tyree at FCI SeaTac in July 2004. Goeke asked Eckstein to fax the 302 to Bottini, who in turn faxed it to Marsh on October 4, 2007.

The existence and contents of Eckstein's SeaTac 302 presented problems for the prosecution team, both prospectively with respect to the upcoming *Kohring* trial (not to mention future Polar Pen cases, like *Stevens*), and retrospectively with respect to the recently concluded *Kott* trial. The evidence reported in the Eckstein 302 constituted disclosable information bearing on Allen's credibility. Although the existence of the 302 was unknown to the prosecution at the time of the *Kott* trial, it was clearly in the government's possession for *Brady* purposes. The prosecution team recognized that the discovery of the Eckstein 302 posed a disclosure issue for the upcoming *Kohring* trial, and potentially jeopardized the *Kott* conviction.

After learning of the existence of Eckstein's SeaTac 302, Goeke said he was instructed to search for Russo's notes in the *Boehm* files.[1042] He found Russo's July 22, 2004 interview notes, which ascribed to Tyree the idea of giving a false sworn statement to Allen's lawyer.

When confronted with his notes by Goeke and Marsh more than three years after the interview, and without the benefit of reviewing his pleadings or Eckstein's

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[1041] Goeke's differing recollection was based on what Tyree said during a witness preparation session for the *Boehm* sentencing hearing, nearly a year after the SeaTac interview conducted by Russo and Eckstein. According to Goeke, Tyree volunteered, without any prompting from the prosecutors, that the false statement was her idea. "That's when she made a statement. She goes, 'You guys have asked me about how it came to be that I made this statement, this false statement, and I want you to understand it was my idea. I did that on my own.' Something to that effect." Goeke (Schuelke) Tr. Jan. 8, 2010 at 256. At the time, the statement did not mean much to Goeke because Allen was not a charged defendant in the case, and Tyree was scheduled to testify only against Boehm. No one apparently questioned whether Tyree, who was obviously close to Allen, may have made the unsolicited statement, contradicting what Russo stated in the *Boehm* pleadings, in order to protect Allen's interests.

[1042] In his interview with the Schuelke investigation, Goeke did not identify who "instructed" him to conduct the search for Russo's notes.

302, Russo conceded that it appeared he made a mistake in his pleadings.[1043] According to Russo, the discussion with Marsh and Goeke was "very quick" they "briefly questioned me about the notes and then left."[1044] The cursory meeting left Russo feeling "a little bit uncomfortable . . . and it didn't sit well with me . . . I continued to stew about it over the weekend, about this whole idea of absolving Bill Allen for any responsibility with respect to this false statement."[1045] Russo thereafter expressed the view to Goeke, Bottini, and Marsh that, although Tyree may have claimed (at some point) that the idea was hers, "[t]here was no doubt in my mind that Bill Allen was complicit in this false swear[ing]."[1046] Russo urged the prosecutors to disclose the information from the sealed *Boehm* pleadings to the *Kott* defense.[1047] Russo expressed similar views in a meeting with Bottini, USA Nelson Cohen, and probably Goeke.[1048] Russo's advice was not followed.

Where the prosecutors' meetings with Russo were brief, their contact with SA Eckstein was fleeting. According to Eckstein, the only *Stevens* prosecutor he ever spoke with regarding Tyree was Goeke. Goeke said he called Eckstein on October 4, 2007, while on leave, and had the following conversation:

> "By the way, what do you remember about Tyree[?] I remember her talking during . . . one of the prep sessions . . . that false statements she made that she had made it of her own volition." He goes, "I kind of remember that, too." "Is that memorialized anywhere? Is there a 302? Is there a record of that anywhere." "I don't know. Let me check."[1049]

[1043] Russo later stated that he was "60 percent" confident that he altered the notes during a subsequent interview with Tyree in 2005 in preparation for Boehm's sentencing. Russo (Schuelke) Tr. Mar. 24, 2010 at 75-76. Goeke found Russo's notes in the *Boehm* file, but said he found only copies, not the original notes. Goeke (Schuelke) Tr. Jan. 8, 2010 at 293. Russo was unable to find his original notes.

[1044] Russo (Schuelke) Tr. Mar. 24, 2010 at 204. Because Bottini faxed the Eckstein 302 to Marsh in Washington, D.C. on October 4, the same day apparently that Russo was shown his notes from the SeaTac interview, it appears that Marsh's participation was by telephone, not in person.

[1045] Russo (Schuelke) Tr. Mar. 24, 2010 at 204.

[1046] Russo OPR Tr. Dec. 3, 2009 at 26.

[1047] Russo OPR Tr. Dec. 3, 2009 at 121.

[1048] Cohen OPR. Tr. Dec. 4, 2009 at 37, 41, 42.

[1049] Goeke (Schuelke) Tr. Jan. 8, 2010 at 236-237.

According to Goeke, Eckstein called him back promptly after finding the SeaTac 302. The ensuing exchange between the two, though brief, illustrates the prosecutors' concerns and was not a repudiation by Eckstein of the SeaTac 302:

> And then he calls me back a couple hours later and says, "I found a 302." "Well, what's it say?" And he read it to me. I go, "Oh," and I go I remember saying to him, "We may have a disclosure obligation in Kott. It seems like we we're gonna have to disclose something along those lines because we didn't make a disclosure ahead of time and that is a 302 that conflicts with my recollection."
>
> . . .
>
> Q So you talked to Eckstein sometime in 2007 is your best recollection, right?
>
> A I am quite certain it would have been October 4, 2007.
>
> Q *So he did not tell you that his 302 was wrong?*
>
> *A No, and I'm not saying he did.*
>
> *Q He just said, "It says what it says and I don't even remember."*
>
> *A Yeah, exactly.*[1050]

Goeke asked Eckstein to fax the 302 to Bottini and immediately called Bottini to tell him to expect a fax from Eckstein with the 302.[1051] After receiving the 302 from Eckstein, Bottini promptly faxed it to Marsh. Neither Marsh nor Bottini, however, ever spoke with Eckstein about the accuracy of his 302.

[1050] Goeke (Schuelke) Tr. Jan, 8, 2010 at 237, 243 (emphasis added).

[1051] Goeke said he was on vacation when he called Eckstein and spoke to him about Tyree. Eckstein called Goeke back after finding the SeaTac 302 and read it to him over the phone. Although he was on leave at the time, Goeke was apparently concerned enough about the news that he went into his office that day to search the *Boehm* files for notes of Tyree's interviews. *See* Goeke email to Marsh, October 1, 2007 (reflecting out-of-office reply that Goeke would be away from the office from October 1 through October 9). Oct. 1, 2007 10:17am email from AUSA Goeke to PIN attorney Marsh. *See also* Oct. 4, 2007 5:15pm email from AUSA Goeke to PIN attorney Marsh (reflecting Goeke's presence in the office on the afternoon of October 4, 2007).

Eckstein told OPR that he stood behind the accuracy of his 302 and his notes and that he never wavered on that point.

The email exchange between Marsh and Bottini on October 8 and 9, 2007, is instructive. On October 8, Bottini informed Marsh that, according to Goeke, both Russo and Eckstein "now recall that Bambi told them that Allen asked her to give the sworn statement that she had not had sex" with Allen.[1052] In reply, Marsh expressed surprise "because this Russo/Eckstein version of the Bambi statement is different than what Jim [Goeke] and I knew prior to the Kott trial, and also doesn't square with what Russo and Eckstein were saying at the end of last week." Yet, rather than interview Russo and Eckstein about their allegedly conflicting versions of the "Bambi statement" in order to clarify what they recalled, neither Marsh nor Bottini made any further inquiry of either Russo or Eckstein on the subject ever. Instead, on October 10, the day after Marsh's reply to Bottini's email, Bottini and SA Kepner interviewed Tyree. The resulting one paragraph 302 recounts Tyree's statement that she "came up with an idea" to sign a "document" in order to prevent "further extortions by [redacted]." According to the 302, Tyree met with "an attorney" and the content of the document was created solely by her with "the help of the attorney." The 302 does not reveal that the attorney who helped her create the false document was Allen's attorney, or that the context for its execution was for Allen's use in defending against [redacted] extortion. Judging from the brevity and content of the 302, it appears that Tyree was not subjected to thorough questioning concerning Allen's knowledge of the matter. Neither Bottini nor Kepner apparently asked Tyree whether she discussed the "idea" with Allen, how she knew what attorney to talk to, or whether she ever discussed the fact of her sworn statement with Allen before or after signing it.

Aside from the Tyree interview on October 10, 2007, the only investigative step taken by the prosecution team was to interview Allen again shortly before the commencement of the *Stevens* trial.[1053] By that time, the alleged blackmailer, [redacted] had alleged that Allen, through his attorney, had offered her $5,000 on the condition that she sign a confidentiality agreement denying their sexual relationship an allegation strikingly similar to the allegation that Tyree signed

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[1052] According to Bottini's email, he and Goeke had received "solicited and unsolicited input" from others in the USAO concerning the disclosure issue presented by the Eckstein SeaTac 302 and Russo's pleadings. Goeke was "very concerned" that it would appear that he had not disclosed in the *Kott* case "something that might have been inquired into on cross" of Allen.

[1053] Marsh also spoke with PRAO twice concerning the matter, but neither conversation constituted an investigative step. Neither of the PRAO attorneys Marsh consulted possessed any first-hand knowledge about the matter.

a false sworn statement denying her sexual relationship with Allen.[1054] However, in his interview with Bottini, Goeke, and Kepner on September 7, 2008, two days before the issuance of the September 9 *Brady* letter, Allen disclaimed any role in soliciting Tyree to provide a false sworn statement about their relationship to his attorney. According to the FBI 302 of the September 7 interview, Allen said Tyree merely asked to speak with his lawyer about the blackmail attempt. Like the interview of Tyree on October 10, 2007, Allen was not asked probing questions about why Tyree wanted to speak to his lawyer or how his attorney could have accepted a sworn statement that Allen would have known was false.

The failure of the prosecutors to critically examine the statements from Allen and Tyree that Allen was ignorant of what his lawyer and former paramour were doing on his behalf belied the representation that they conducted a "thorough investigation" of the "suggestion" that Allen asked Tyree to sign a false statement denying their relationship. Their failure to interview Russo and Eckstein after learning of their contrary recollection of Tyree's account of how the false statement came about rendered the representation indefensible. The last account that the prosecution team had from Russo and Eckstein was the one reported by Bottini to Marsh on October 8, 2007: Both Russo and Eckstein "*now recall that Bambi told them that Allen asked her to give the sworn statement that she had not had sex*" with Allen. (Emphasis added.) Yet, nowhere in the September 9, 2008 *Brady* letter is there any mention of either the documents that each prepared concerning Tyree's SeaTac interview, or what the two federal law enforcement officers recalled about her statement. Putting aside the irony that federal prosecutors would reject what two experienced colleagues told them in favor of the accounts of two people with criminal records and ample reason to lie to protect their own interests, the failure to acknowledge their colleagues' accounts makes their claim to have conducted a "thorough investigation" misleading.[1055]

[1054] According to the representation in the *Brady* letter, [redacted] rejected the offer in part because she wanted more money [redacted] unusual acknowledgment that she was "doing it for the money" lent credence, in our view, to her allegation, but the prosecutors apparently saw no connection between [redacted] allegation and the allegation that Allen and his attorney solicited a sworn statement from Tyree denying a sexual relationship between her and Allen.

[1055] Marsh suggested that Russo may have been trying to protect himself from exposure for making a false statement to the court in *Boehm:* "I remember feeling like it was -- his notes were not consistent with the filing that he made. This may have been one of the things that caused me to think that he was trying to come up with a way to defend the filing." Marsh Interview Tr. (Schuelke), at 262. Marsh's observation about Russo's possible motivation was inconsistent with the fact that Russo's urging Bottini and Goeke to disclose the *Boehm* pleadings would have resulted in the disclosure of his notes as well, thus exposing Russo to the very scrutiny Marsh implied that Russo was trying to avoid. As to Eckstein, Morris said Marsh referred to him as "sloppy" when Morris asked him about the alleged "ambiguity" in Eckstein's notes that Goeke received and transmitted by email on September 8, 2008. Morris OPR Tr. Mar. 29, 2010 at 245-246. Other

The prosecutors were free to form their own opinions as to the truth of the matter, and their interest in ascertaining the truth was appropriate, but they were not entitled to discard evidence contradicting that opinion. The *Brady* letter did not represent that, after weighing the conflicting evidence, the government concluded that the statements in Russo's pleadings and Eckstein's 302 and notes were wrong; rather, it treated those documents, as well as Russo's and Eckstein's ratification of them, as though they did not exist.

We concluded that the failure to account for Russo's and Eckstein's written accounts, and their subsequent oral ratifications of them, was a plain misrepresentation by omission. We concluded further that the undisclosed accounts of Russo and Eckstein belied the representation that there was a "thorough investigation" that found "no evidence" to support the suggestion that Allen asked Tyree to provide the sworn statement falsely denying their relationship.

4. Misconduct Findings

Statements in, and omissions from, the September 9, 2008 *Brady* letter constituted misrepresentations. We next considered the relative responsibility of the *Stevens* prosecutors for the misrepresentations.[1056]

Marsh was the author of the representations in question, and was the prosecutor most conversant with the subject matter. He knew that Russo had made factual representations in the *Boehm* pleadings based on what Tyree had said to him and Eckstein during the SeaTac interview; that Eckstein had written a 302 of the SeaTac interview; that Eckstein's notes were consistent with his 302; and that both Russo and Eckstein stood behind the accuracy of their accounts of the Tyree interview. Marsh was the only prosecutor to participate in both contacts with PRAO on the question of whether there was a disclosure obligation.[1057] On both occasions, Marsh took the lead in outlining the issues for the PRAO attorney whose advice the prosecutors were seeking, and in both instances (as described more fully in Section C, *infra*), he omitted or downplayed the information indicating that Allen suborned perjury from Tyree.

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prosecutors, however, spoke highly of SA Eckstein.

[1056] Although we address Marsh's role in the matter, we have refrained from articulating any findings as to his conduct.

[1057] Marsh said Goeke joined him for the October 11, 2007 call; Goeke denied participating in the call. Sullivan joined Marsh for the December 20, 2007 call.

Marsh knew that the full disclosure of Russo's and Eckstein's accounts posed problems for the prosecution not only in the *Stevens* case, but in the *Kott* and *Kohring* cases that were tried the previous year. In August, 2008, both Bottini and Goeke argued in favor of "fronting" the Tyree issue in the *Stevens* case through the government's motion *in limine*. To be sure, both Goeke and Bottini advocated that position based on strategic considerations to "smoke out" what the defense knew about the matter but, had the government raised the issue in the proposed motion, it is likely that the full scope of the evidence surrounding the Tyree issue would have been placed before the court, where it belonged. Marsh, however, strongly opposed that approach, based on his assertion that there was "nothing to turn over not even an independent allegation, just a mistake in a brief that's inconsistent with the brief writer's notes," and the issue was omitted from the motion *in limine*.

Goeke and Bottini raised the disclosure issue again in connection with the *Giglio* letter scheduled to be sent to the defense on August 25, 2008. Again, Goeke and Bottini urged limited disclosure not because they believed there was a duty to do so but to pre empt an anticipated claim from the defense that the government was withholding information. Marsh once again "strongly" opposed any disclosure at all: "We have nothing to turn over, we have neither evidence nor an allegation that Allen directed her to lie, we have investigated this til the end of time, and we have been blessed by PRAO twice. There is simply no reason to revisit it."[1058] Marsh sent his recommendation to PIN Principal Deputy Chief Morris, who agreed with omitting the proposed disclosure from the August 25 letter.

On September 8, 2008, the issue came to a head in connection with the *Brady* letter that was due to be sent the next day. Goeke, and to a lesser extent Bottini, again argued in favor of getting out in front on the issue by providing some factual recitation that would likely invite further defense inquiry, while Marsh persisted in his view that PRAO's dual opinions settled the matter. On this occasion, PIN Chief Welch joined the discussion and directed the prosecution team to disclose the Tyree issue. Morris's notes of the September 8, 2008 meeting involving Welch, Morris, Marsh, and Sullivan indicate that Welch ordered the team to disclose the information in the *Brady* letter and to "double check what was said" regarding SA Eckstein. At this point, the team could have clarified the issue by interviewing AUSA Russo and SA Eckstein regarding the documents each

[1058] Aug, 22, 2008 1:40pm email from PIN attorney Marsh to PIN Principal Deputy Chief Morris and PIN attorney Sullivan. Sullivan responded with an email stating his agreement.

generated.[1059] Rather, Marsh drafted the language that appeared in the September 9 *Brady* letter.[1060]

Marsh defended his conduct on several grounds, none of which we found persuasive. First, Marsh contended that the use of the term "suggestion" to include the information contained in Eckstein's SeaTac 302 was merely "inartful." Nowhere in the letter, however, is there so much as a hint that the "suggestion" was predicated on a definitive statement by a federal law enforcement officer that Bambi Tyree said she signed a sworn statement at Allen's request, denying their illicit sexual relationship.

Second, Marsh argued that the Eckstein 302 was ambiguous because it did not state definitively that it was Allen's idea for Tyree to give a false sworn statement or that he knew what Tyree's sworn statement said. To the contrary, we found the document to be clear and unambiguous, notwithstanding the fact that it did not categorically state that Allen knew precisely what Tyree's sworn statement said. The lawyer was Allen's; the benefit was Allen's; and the request was Allen's. The idea that an 18 year old prostitute would sign a false document for a powerful businessman like Allen, through his lawyer but without his knowledge, is implausible. But even so, the resolution to any possible ambiguity in the Eckstein 302 lay within the government's reach. All Marsh or the other prosecutors had to do was ask the author, Eckstein, what he meant by the words he used in the document. Here, Marsh knew from Bottini's email that Eckstein said on October 8, 2007 the last time anyone talked to him about his 302 that he recalled that Tyree said Allen asked her to sign an affidavit denying their sexual relationship. Marsh, however, omitted any mention of Eckstein's recollection in the *Brady* letter.

[1059] At this point, Welch and Morris would have at least been aware of the statements in the *Boehm* pleadings from Goeke's initial 2007 emails identifying the problem. However, we found that Marsh's subsequent representations regarding his contacts with PRAO ("PRAO strongly supported how we handled it and agreed there was no basis for disclosure/nothing to disclose"), would have influenced Morris and Welch regarding production of the pleadings. Goeke also stated that Marsh had repeatedly argued that the briefs did not have to be disclosed because they were lawyers' arguments based on incorrect facts, and Marsh told OPR that he believed that PRAO told him, in passing, that a filing made by an attorney is not evidence.

[1060] Welch told us that his direction to disclose the Tyree issue contemplated the actual disclosure of the underlying documentation. When we asked him how the *Brady* letter representations fulfilled his direction, Welch told us that he was satisfied, based on the representations he had heard from the team, that the letter accurately summarized the issue as he understood it. Thus, even though his direction was not literally followed, Welch was confident that the letter was accurate and provided enough information for the defense to evaluate whether to seek further disclosure. His view of the matter, however, changed dramatically upon reading Eckstein's SeaTac 302 on October 14 or 15, 2008, when it was provided to him as part of the APD investigative file.

Curiously, Marsh saw ambiguity in the SeaTac 302, but saw no ambiguity in Russo's notes. We found no ambiguity in the SeaTac 302. Russo's notes, which the prosecutors relied on to discredit both Russo's pleadings and the SeaTac 302, reflect a change *at some point* from "at the request of Bill" to "Bambi's idea." Even assuming that Russo made the change contemporaneously (a dubious assumption, according to Russo), the change relates only to who initiated the plan, not to how the plan unfolded. It does not answer the more important questions of whether Allen endorsed Tyree's idea and knowingly accepted the fruits of it. We see little qualitative difference, for purposes of assessing whether evidence bearing on credibility must be disclosed to the defense, between a witness who generates a plan for another to lie for him and a witness who accepts another's offer to lie for him. Marsh and his colleagues, however, focused only on the former possibility and ignored the latter.[1061] Moreover, no one bothered to ask Russo when he made the change in his notes, or why.

Third, Marsh contended that he stated in the letter that there was "no evidence to support the suggestion" regarding the false statement because "PRAO informed us that this raised neither *Brady* or *Giglio*[;] by definition, there could be no evidence to support a *Brady* or *Giglio* issue."[1062] Marsh's reasoning was circular and his reliance on PRAO's advice was misplaced. The PRAO attorneys whom Marsh consulted had no personal knowledge of the facts and were entirely reliant on Marsh's accurate recitation of them in forming their opinions. As we discuss more fully below, Marsh's description of the pertinent information to PRAO was one sided and selective. Equally important, PRAO's advice went only to the disclosure issue, not to whether or how the underlying facts should be represented to opposing counsel. The PRAO advisors did not instruct Marsh *not* to disclose the information; they only addressed whether the rules of professional conduct *required* disclosure based on the facts presented by Marsh. Indeed, PRAO Attorney Weiss, in her email of December 21, 2007, summarizing the facts as she understood them, counseled Marsh (and Sullivan, who was also on the conference call) to "double check to ensure that DOJ's recently adopted policy on disclosures in criminal cases does not require a disclosure here, as I understand that the

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[1061] No one on the prosecution team probed Allen as to his knowledge of Tyree's false statement. Marsh's OPR interview is illuminating regarding the narrow focus of the prosecutors' "thorough investigation": "Q: All right. And at the same time in looking at the statements that were obtained from Bambi Tyree and Bill Allen, I take it that no one questioned Bill Allen in particular in that kind of depth to find out "[L]ook[,] [b]ased on all the circumstances, Bill, even if the idea may have been the creation of Bambi Tyree, you knew what she was going to do, and your lawyer had to know what she was up to, and you were prepared to accept her false affidavit." Nobody asked that question? A: I don't remember that being something that came up." Marsh added: "I remember focusing almost exclusively on his subornation of perjury standpoint." Marsh OPR Tr. Mar. 26, 2010 at 515-516.

[1062] Marsh (Schuelke) Tr. Feb. 2, 2010 at 201-202.

policy requires more in the way of disclosure than is required under applicable case law."[1063] Marsh did not heed that advice. In any event, a Department attorney cannot use PRAO advice as a shield when the attorney does not make full and accurate disclosure to PRAO in seeking its guidance.

We next considered Bottini's and Goeke's conduct in connection with the *Brady* letter's representations regarding the Tyree issue. Although we found this to be a close question, we concluded that neither committed professional misconduct in connection with the representations in the *Brady* letter on the Tyree issue. On the one hand, both Bottini and Goeke knew, or should have known, that the representations were inaccurate. On the other hand, neither Bottini nor Goeke wrote the paragraph in question; neither attended the meeting at which Welch directed the disclosure; and neither was asked by Welch or Morris if the paragraph was accurate. On the afternoon of September 8, 2008, Marsh, Morris, Sullivan, and Welch met to discuss the disclosure of the Tyree information. At the time of the meeting, Bottini was flying from Alaska to Washington D.C. and Morris's notes do not indicate that Goeke (who was still in Alaska) was present by telephone. At the meeting, Welch directed the team to disclose the Tyree information in its *Brady* letter. However, because neither Bottini nor Goeke were present for the meeting, they would not have been privy to any particulars regarding the manner of disclosure. Following the meeting, Marsh's email accompanying the revised *Brady* letter containing the misrepresentations stated: "Subsection 3 revised to include the Bambi Tyree stuff we discussed earlier today[.]" Although Goeke had offered Marsh suggestions on early drafts of the Tyree related information for the September 9 *Brady* letter, we found no edits from Goeke or Bottini on the draft that included Marsh's addition of the "suggestion", "no evidence", and "thorough investigation" language or on any other subsequent drafts of the letter. Thus, neither Bottini nor Goeke knowingly made the misrepresentations or caused them to be made.

Moreover, both Bottini and Goeke urged some limited disclosure of the Tyree issue in the motion *in limine* and, alternatively, in the *Giglio* and *Brady* letters. Their overtures, however, met with resistance from Marsh, who thereafter met with Welch and Morris and obtained their endorsement for the representations on the Tyree issue. We recognize that, had their views prevailed, the motion *in limine* might well have resulted in the court directing the government to divulge whatever

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[1063] Following receipt of Weiss's email, Sullivan asked Marsh by email for his thoughts on the last paragraph of Weiss's email, which contained the caveat about reviewing DOJ policy. Marsh responded that he hadn't "checked the DEO standards but will do so. Since we have nothing to turn over/no evidence of any wrongdoing, I'm sure we're fine." When we asked Marsh if he took Weiss's advice and evaluated the disclosure issue from the perspective of the recently adopted DOJ policies, Marsh replied, "I don't remember focusing on it."

information it possessed on the issue. Assuming the government's compliance with such a directive, Russo's pleadings and Eckstein's SeaTac 302 would have been disclosed to the defense and the issue would have been properly joined for the court's resolution. Thus, the misrepresentations in the *Brady* letter might have been obviated if Bottini's and Goeke's position had been adopted.

Although we concluded that Bottini did not commit professional misconduct in connection with the misrepresentations, we concluded that he exercised poor judgment by failing to apprise his supervisors, Morris and Welch, of the errors in the Tyree paragraph of the *Brady* letter. Bottini knew what Marsh knew about Russo's pleadings, Eckstein's 302, and most importantly, about Russo and Eckstein ratifying the representations in their respective documents. After arriving in Washington, D.C., Bottini reviewed the letter but said nothing to either Welch of Morris about it. Bottini told us that he was focused on other matters at the time and did not pay close attention to the representations in the Tyree paragraph. As a member of the trial team, and particularly as the prosecutor responsible by that time for issues relating to Bill Allen, Bottini should have should have paid closer attention to an issue so consequential to the trial. Although Bottini told us he viewed Marsh as his de facto supervisor and liaison to PIN management, we nevertheless concluded that he exercised poor judgment by failing to review the *Brady* letter carefully and then failing to inform either Morris or Welch of the errors in the Tyree representations. Bottini may not have dealt directly with Morris and Welch on a regular basis, but he was no mere subordinate. Nor was Bottini a rookie prosecutor. By the time of the *Stevens* trial, Bottini had served as an AUSA for over 20 years, many of those as a supervisor, including a stint as the Acting U.S. Attorney for the District of Alaska. He was also, at a minimum, the second in command to Morris at trial, with responsibility for closing arguments and the direct examination of the key government witness, Bill Allen. Bottini essentially deferred to Marsh and neglected to closely examine the government's representations on a key issue or raise any question about them with his supervisors. Under these circumstances, we concluded that Bottini's action (or inaction) was in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take, particularly in light of his role in the case and his knowledge of the issue.

We found that Goeke stood on a different footing. Although Goeke also knew what Bottini knew, he occupied a different position in the hierarchy of the trial team; he had neither Bottini's stature nor his responsibility at trial. Unlike Bottini, who was one of the three prosecutors to sit at counsel table for the trial, Goeke was removed from the courtroom trial team and relegated to support duties. In addition, Goeke had pressed for disclosure of the Tyree information as early as March 2007 in connection with the search warrant affidavit for the Girdwood residence. At various points thereafter, Goeke raised the issue again,

but his overtures were rebuffed, to the point that Morris finally told him, essentially, to drop it, that he was "covered," and that the issue was closed.[1064] Morris told us that she felt Goeke was "really trying in earnest to get this out there" and that she likely told Goeke "he was covered because he raised the issue."[1065] Goeke had good reason to believe that any further airing of the issue by him might prove counter productive.

Goeke's September 8, 2008 email, attaching Eckstein's notes from the July 22, 2004 SeaTac interview of Tyree, with the unsolicited observation that the notes were "ambiguous," gave us pause, as did his earlier email expressing the view that the *Boehm* pleadings were based on an "erroneous assumption." That Goeke was wrong on both counts does not alter the fundamental fact that Goeke advocated consistently (and persistently) for disclosure of the underlying information.[1066] Accordingly, we did not conclude that AUSA Goeke committed professional misconduct or exercised poor judgment with respect to the misrepresentations in the *Brady* letter about the Bambi Tyree issue.

We concluded, further, that Welch, Morris, and Sullivan did not commit professional misconduct or exercise poor judgment with respect to the *Brady* letter representations on the Tyree issue. None knew that Russo and Eckstein had ratified the representations made in their documents, and each was entitled to rely on the representations made by Marsh concerning PRAO's advice that the information did not need to be disclosed.

Based on the results of our investigation, we concluded that the misrepresentations in the September 9, 2008 *Brady* letter violated the prosecutors' clear and unambiguous duty under D.C. Rule of Professional Conduct 4.1(a) to be truthful in their representations to defense counsel. We declined to make specific findings concerning the late PIN attorney Nicholas Marsh.

[1064] Goeke (Schuelke) Tr. Jan. 8, 2010 at 201.

[1065] Morris OPR Tr. Mar. 19, 2010 at 286.

[1066] Goeke stated that he characterized Eckstein's notes as "ambiguous" because they were "ambiguous as to the larger question as to how it came about that the false statement was made." Goeke (Schuelke) Tr. Jan. 8, 2010 at 377. Goeke agreed that "the notes themselves are not ambiguous at all." Goeke (Schuelke) Tr. Jan. 8, 2010 at 378. Goeke stated that he used the term "erroneous assumption" because he believed that PIN had adopted such an interpretation of the relevant Tyree facts. Goeke stated that his intent in using such language in the email was to convince PIN to disclose the information despite their characterization of the information as an "erroneous assumption." Goeke (Schuelke) Tr. Jan. 8, 2010 at 369-370.

B. The Prosecution Violated its Disclosure Obligations

1. The Disclosure Obligations

Once the prosecutors elected to make representations concerning the Tyree issue, they had an absolute duty to ensure that their representations were accurate and truthful, irrespective of whether there was a *Brady* or *Giglio* obligation to disclose the underlying information in the first instance. We now consider whether the prosecutors had an independent duty, under constitutional *Brady* and *Giglio* principles and Department of Justice policy (USAM § 9 5.001), to disclose the underlying information. We concluded that they did.

The undisputed facts were these: In 1999, Bill Allen claimed that he was being blackmailed by a prostitute, [redacted], who threatened to expose not only Allen's relationship with her but also his illicit sexual relationship with a minor, Bambi Tyree. Allen retained an attorney, [redacted], to represent his interests in connection with possible civil or criminal actions that might arise from the extortion by [redacted]. Bambi Tyree, then 18, met with [redacted] and provided a sworn statement falsely denying that she had sex with Allen when she was 15 years old. Tyree admitted that the sworn statement was false.

These circumstances, standing alone, strongly implicate Allen in suborning perjury or, at a minimum, aiding and abetting it. After all, the attorney was Allen's agent; Tyree derived no (known) benefit from lying under oath and put herself in legal jeopardy by doing so; and the false sworn statement redounded to Allen's benefit alone. The notion that Allen was ignorant of what his attorney and former paramour were doing for his benefit strains credulity.

Without more, the undisputed facts outlined above raised a genuine issue of whether the defense could use them to challenge Allen's credibility on cross examination under Rule 608(b) of the Federal Rules of Evidence. These undisputed facts, however, were not the only evidence bearing on the issue. Two federal law enforcement officers, Russo and Eckstein, stated in official government documents that Tyree implicated Allen in the false sworn statement. This additional evidence, which both Russo and Eckstein subsequently confirmed, removed any question that the sum total of information surrounding the Tyree issue was subject to disclosure under constitutional *Brady* and *Giglio* principles and Department of Justice policy (USAM § 9 5.001). None of it was disclosed.

The government has a duty to disclose evidence that can be used for impeachment under Federal Rule of Evidence 608(b). *See United States v. Cuffie,* 80 F.3d 514 (D.C. Cir. 1996) (government conceded violation of duty to disclose witness's false testimony in unrelated case). Under Rule 608(b), specific instances of a witness's misconduct may be inquired into on cross examination, "in the

discretion of the court," for purposes of attacking the witness's character for truthfulness or untruthfulness. *See United States v. Whitmore,* 359 F.3d 609, 619 (D.C. Cir. 2004) (abuse of discretion for district court to exclude evidence concerning a judge's observation in different proceeding that, "I think [the witness] lied"). The operative language in Rule 608(b), for purposes of our analysis, is that the evidentiary determination lies within the "discretion of the court." By suppressing the evidence surrounding the Tyree false statement, the government attorneys arrogated to themselves the court's function as arbiter of what evidence is allowed to be heard by the jury.

Upon learning of Eckstein's 302 of the SeaTac interview, Goeke correctly observed that the 302 posed a disclosure issue for the recently concluded *Kott* trial, not to mention upcoming Polar Pen prosecutions in which Allen would be a witness. Rather than disclose the 302, along with Russo's notes, the prosecutors took it upon themselves to weigh the merits of the conflicting evidence. They treated Russo's notes as not only trumping his pleadings in *Boehm*, but trumping Eckstein's 302 and notes as well. The fact that both Russo and Eckstein stood behind their documents was given no weight at all, and Tyree's and Allen's denials were treated as dispositive. Apparently, no one considered the possibility that Tyree said one thing when asked by Eckstein and Russo in July 2004, at a time when Tyree's interests were at stake, and another thing when asked at a time when Allen's interests were at stake.

The prosecution misconstrued its role. It was not the prosecutors' prerogative to weigh the evidence or to rule on the admissibility or use of evidence. That was the court's function. By concealing the evidence of the Eckstein 302, Russo's pleadings, and Russo's and Eckstein's ratifications of the pertinent statements in those documents, the prosecutors effectively removed the issue from the court's province.

We found, further, that the prosecutors misconstrued the distinction between information and admissible evidence with respect to their disclosure obligation under *Brady* and *Giglio* and the pertinent USAM provision. Their duty was to disclose *information* favorable to the defense, irrespective of whether that information constituted admissible evidence. That distinction is particularly significant when Rule 608(b) comes into play. Under Rule 608(b), extrinsic evidence is not admissible to challenge a witness's credibility with regard to specific instances of conduct; the Rule only permits cross examination of the witness on such matters. Thus, Russo's pleadings, Eckstein's 302, and their statements ratifying their documents would not be independently admissible to attack Allen's credibility. But, the fact of their existence could be argued as a basis for the court to allow the defense to cross examine Allen about his complicity in the execution of Tyree's admittedly false sworn statement. The

prosecution effectively usurped the court's function by suppressing the information surrounding Tyree's false sworn statement.

Finally, we considered the argument that the disclosure of the Tyree information would have had no practical effect on the trial because the defense would have been bound by Allen's answer under Rule 608(b)'s prohibition against the introduction of extrinsic evidence. This argument presumes several things: that the defense would have been limited to the single question of whether Allen asked Tyree to execute a false sworn statement; that it would have been stuck with his answer; and that his answer would have been, "No." First, the prosecutors could not know with certainty how Allen would respond to the question. Although Allen denied the allegation when confronted by Bottini, Goeke, and Kepner on September 7, 2008, there was no assurance that he would have responded the same way when questioned in court under oath. Allen might have denied the insinuation, but he also might have admitted it or invoked his Fifth Amendment privilege against self incrimination. However Allen might have responded, the defense, at a minimum, was entitled to ask the question. Second, assuming Allen would have denied the allegation, the court likely would have afforded the defense leeway to challenge Allen's denial by permitting cross examination into the circumstances under which Tyree's false sworn statement was executed. *See United States v. Whitmore,* 359 F.3d at 619; *United States v. Mejia,* 597 F.3d 1329, 1339 (D.C. Cir. 2010) (approving district court's reliance on *Whitmore* to permit defendant to ask witness specific questions regarding another court's credibility finding). The Rule prohibits the *admission* of extrinsic evidence, not the use of the *information* to cross examine the witness. Allen's disclaimer of knowledge in the face of questions about a false sworn statement provided by his 18 year old paramour to his own lawyer would have severely compromised his credibility before the jury. Whether, and to what extent, the court would have permitted such inquiry, the defense was at least entitled to make the argument to the court that there was a good faith basis for the inquiry. The suppression of the evidence improperly foreclosed the issue altogether.

2. Misconduct Findings

Based on the results of our investigation, we found that the government concealed the information surrounding Tyree's false sworn statement from the defense. We next considered whether any of the prosecutors on the *Stevens* team committed professional misconduct in so doing.

Our analysis of the prosecutor's conduct with respect to the misrepresentation issue applies as well to the disclosure issue, with one exception. We concluded that their reliance upon PRAO's advice was inapposite to the misrepresentation issue because PRAO offered no advice on what

representations should be made to the defense. PRAO did, however, offer advice on whether there was a disclosure obligation.

It is established OPR policy that a Department attorney may invoke PRAO's advice as a defense to an allegation of professional misconduct. There are, however, two essential prerequisites for the defense: (1) the attorney must have provided accurate and complete information to PRAO; and (2) the attorney must have followed the advice given by PRAO. We found that Marsh did neither.

In both his OPR interview and his interview with the Schuelke investigation, Marsh stressed that he told PRAO "everything." We found otherwise. On each occasion, October 12 and December 20, 2007, Marsh failed to share with the PRAO advisor a critical piece of information that both Eckstein and Russo stood behind the representations made in their respective documents concerning what Tyree said during the SeaTac interview. Without revealing what Eckstein and Russo had to say on the issue as of October 8, only four days before the first call to PRAO, Marsh instead recited "facts" that would lead ineluctably to the conclusion that no disclosure was necessary. Nothing in the summary sheet prepared by the PRAO advisor on October 12 reflects that Russo made explicit representations in court documents, based on his personal knowledge, that Tyree said she executed a false sworn statement at Allen's request.[1067] Instead, the summary reflects merely that another AUSA who worked on the case "expressed the thought" that Tyree told him that Allen asked her to lie. Worse, Eckstein, the FBI agent on "the old case," is reported as "remember[ing] Bambi saying it was her own idea." And, Eckstein's SeaTac 302, "the old 302," is described simply as "not clear, stating simply that she lied." Marsh's description to PRAO of the essential facts bearing on the disclosure issue was deficient. Marsh's admitted failure to advise the PRAO advisor of what he learned about Eckstein's and Russo's recollections on the subject only four days before the call to PRAO belies his insistence that he told PRAO "everything."

Marsh's second call to PRAO, on December 20, 2007, demonstrated that he failed to follow PRAO's advice. First, the PRAO advisor followed up the conference call with an email to Marsh and Sullivan summarizing the essential facts she learned from them and on which she based her advice. The email reveals that her advice was premised on an incomplete and inaccurate summary of the material facts. Like the conference call on October 12, no mention was made of the recollections of Russo and Eckstein as of October 8, 2007. Instead, the email set

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[1067] The PRAO advisor's notes of the conference call reflect that she was informed that a "sealed briefing" referenced "whether Bambi lied," but that the prosecutor's notes made "clear" that it was "Bambi's decision to lie." Marsh acknowledged that he did not read the pertinent statements from the pleadings to the PRAO advisor. The same notes reflect that the agent denied that Bambi said Allen asked her to lie and that his 302 was "inconclusive."

forth a recapitulation of Marsh's representations during the October 12 conference call with PRAO:

> At that time, in seeking PRAO's advice, you recounted that your team had conducted a thorough inquiry into the matter, including, among other things, interviewing Bambi, reviewing the notes of the Recalling AUSA [Russo], reviewing the FBI's contemporaneous notes of the interview with Bambi in the Unrelated Case, and checking with another AUSA [Goeke] who had worked on the Unrelated Case with the Recalling AUSA.

Conspicuous by its absence was any mention of Russo's pleadings, Eckstein's SeaTac 302, and the current recollections of both Russo and Eckstein as to what Tyree said to them during the SeaTac interview. Instead, the email emphasized the denials of Tyree and Allen and characterized the two sets of notes as (1) "adamant that the lie was her own idea" and (2) "not indicat[ing] one way or the other" whether Tyree acted at Allen's request.[1068] The PRAO email proceeded to state that "[b]ased upon your inquiry and the absence of any evidence supporting the notion that [Allen] had pressed Bambi to lie in the Unrelated Case, you and your team concluded that there is no evidence to support the notion that [Allen] had pressed Bambi to lie." Significantly, the summary paragraph of the December 21 email stated: "You and your team therefore concluded that [Allen] did not press Bambi to lie and *that the AUSA's [Russo's] recollection was either mistaken or was based on a hunch for which there was no concrete support*. (Emphasis added.)

The last sentence of the summary paragraph of PRAO's December 21, 2007 email captures the essence of the information conveyed to PRAO on the two occasions. Notably, the email stated that the advice was predicated on the information provided and invited the prosecutors to correct any inaccuracy in the information recited in the email. We found that on both occasions Marsh dismissed or downplayed the evidence that Tyree told Russo and Eckstein that Allen asked her to provide a false sworn statement and treated that evidence as nothing more than a "hunch" or a "mistake." We concluded that Marsh failed to provide full, accurate, and truthful information to PRAO concerning the Tyree issue.

[1068] The December 21 email attributed the "adamant" denial notes to the agent, Eckstein, and the neutral notes to the Recalling AUSA, Russo. It was actually the other way around.

We also concluded that Marsh failed to follow PRAO's advice. The advice given by PRAO was predicated on the requirements of Rule 3.8(d) of the Alaska Rules of Professional Conduct.[1069] The email, however, expressly informed Marsh not only that "the advice is based on the facts presented," but counseled the prosecutors to "double check to ensure that DOJ's recently adopted policy on disclosures in criminal cases does not require a disclosure here, as I understand that the policy requires more in the way of disclosure than is required under applicable case law." Marsh, however, did not "focus" on that part of PRAO's advice, which refers to the USAM provision, § 9 5.001, that went into effect in 2006. For these reasons, we rejected the defense that Marsh relied on PRAO's advice.

We considered the fact that other prosecutors joined Marsh on the calls to PRAO. According to Marsh, Goeke joined him on the phone from Alaska for the October 12 call; Sullivan participated in the December 20 call.[1070] We found that neither Goeke nor Sullivan, however, committed professional misconduct or exercised poor judgment. Goeke, as we have discussed, was persistent if not entirely forthcoming in urging disclosure of the information, notwithstanding PRAO's advice, but he was overruled. Sullivan, on the other hand, was reliant on Marsh for the basic facts surrounding the issue. He, like Morris and Welch, was not privy to the detailed knowledge that Marsh, Bottini, and Goeke possessed, particularly with respect to Russo's and Eckstein's recollections of what Tyree said during the SeaTac interview. Moreover, Sullivan read the December 21 email from the PRAO advisor and asked Marsh about the caveat in the email concerning Department policy imposing a different obligation regarding disclosure. Marsh told Sullivan he would look into it. Sullivan, as the junior attorney on the team, was entitled to rely on the more experienced attorney, Marsh, to do what he said he would do.

We concluded further that neither Morris nor Welch committed professional misconduct or exercised poor judgment with respect to the government's failure to disclose the Tyree information. They relied on the three attorneys intimately familiar with the facts Marsh, Bottini, and Goeke to provide them with the essential information. No one told them what Russo and Eckstein said about their respective documents or their recollections of what Tyree said at SeaTac on July 22, 2004. To the contrary, the emphasis was placed on PRAO's advice and the

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[1069] The advice sought in December 2007 pertained to the *Kohring* case, which was to be tried in the U.S. District Court for the District of Alaska. Accordingly, the Alaska Rules of Professional Conduct applied.

[1070] Goeke denied being involved in the call, and the PRAO attorney on the call did not recall more than one trial attorney on the call. Therefore, we could not conclude by a preponderance of evidence that Goeke participated in the call.

assertion that Russo's pleadings were "mistaken." We concluded that Welch and Morris did not act intentionally or in reckless disregard of their professional obligations.

Finally, we considered Bottini's responsibility for the failure to disclose the Tyree information. On the one hand, Bottini knew what Marsh and Goeke knew about the critical facts. He also knew, or should have known, that *Brady* and Department policy required disclosure under these circumstances. On the other hand, Bottini, like Goeke, argued in favor of some disclosure of the Tyree issue in the motion *in limine*. Had Bottini's position been adopted, it is likely that the full scope of the Tyree information would have emerged. More importantly, Bottini did not participate in either conference call with PRAO and had the right to rely on Marsh and others to provide PRAO with accurate and complete information on the issue. We also concluded that Bottini did not withhold the Tyree information; rather, he deferred to Marsh and PIN supervisors to make that decision. Although we found this to be a close question, we concluded that Bottini did not commit professional misconduct with respect to the failure to disclose the Tyree information to the defense. Our poor judgment finding as to Bottini on the misrepresentation issue encompasses the non disclosure issue. Had Bottini raised with his supervisors what he knew, or should have known, with respect to the misrepresentations in the *Brady* letter, he would have fulfilled his obligations on the disclosure issue as well.

As noted above, we declined to make any specific finding concerning the conduct of PIN attorney Marsh. With respect to the other members of the prosecution team, we determined that the evidence did not show that any of them "intentionally" failed to disclose evidence or information that tended to negate the guilt of the accused. Accordingly, we found they did not violate D.C. Rule of Professional Conduct 3.8(e) or intentionally violate, or act in reckless disregard of, their disclosure obligations under constitutional *Brady* and *Giglio* principles or Department of Justice policy (USAM § 9 5.001).

CHAPTER SIX
ROCKY WILLIAMS'S RETURN TO ALASKA PRIOR TO TRIAL

I. INTRODUCTION AND SUMMARY

Robert "Rocky" Williams, a former VECO employee who served as a foreman during the renovation of Senator Stevens's Girdwood residence, was a prospective government witness in the trial of Senator Stevens. Both the government and the defense served him with a trial subpoena. Prosecutors planned to have Williams testify about renovations and improvements made at Girdwood by Williams and other VECO employees, and to provide other information, such as the extent to which Senator Stevens and his wife were present at the residence and aware of work being done by VECO employees.

By the time Williams arrived in Washington, D.C., for the trial, however, his physical health had deteriorated to the point that he had difficulty participating in trial preparation sessions. Williams looked gravely ill: his stomach was distended, he had a yellowish complexion, and he had difficulty breathing. Prosecutors learned that Williams was likely suffering from liver failure, and that he had missed several medical appointments back in Alaska during his stay in Washington, D.C. The prosecution team decided to allow Williams to return to Alaska for medical care, and he flew back to Alaska on September 25, 2008, the day of opening statements in the *Stevens* trial.

Williams had left voice mail messages at defense counsel's offices while he was in Washington, D.C., but they had not returned his calls. The trial subpoena served on Williams by the defense required that he be present and prepared to testify in court on October 6, 2008. After Williams returned to Alaska, he again called defense counsel and left a voice mail message. Defense counsel returned Williams's call the following weekend and interviewed him by telephone. Defense counsel learned during the interview that Williams worked only part time at the Girdwood residence during renovations, which suggested that VECO records introduced at trial a few days earlier by the government were false or inaccurate because they showed Williams working full time on the Girdwood project. Defense counsel later learned that government prosecutors had known about Williams's part time status since 2006, but had not disclosed that information to the defense.

On September 28, 2008, defense counsel filed a motion to dismiss the indictment, alleging that the prosecutors deliberately sent Williams back to Alaska to ensure that the defense did not learn that the VECO records overstated the total cost of the Girdwood renovations. The court held a hearing the following day and agreed with the defense that the information regarding Williams's hours

should have been disclosed sooner so the defense could have used it to cross examine Cheryl Boomershine, the witness through whom the VECO records were introduced into evidence. Judge Sullivan stated that he was "flabbergasted" that the government would "send" Williams home without notifying the court or defense counsel. The court was especially upset that government counsel had not mentioned Williams's condition or the possibility of allowing him to return to Alaska during a status conference the preceding weekend.

The prosecution team offered to make Boomershine available for additional cross examination; to arrange for the defense to conduct a video deposition of Rocky Williams; and to fly Williams back to Washington, D.C., in time for him to testify as a defense witness, assuming that Williams's medical doctors would permit a return trip. The only offer the defense accepted was to recall Boomershine and ask additional questions. The defense never asked to depose Rocky Williams, and took no steps to have him return to Washington, D.C., to serve as a defense witness. Instead, at the defendant's request, the court agreed to strike VECO records showing Williams's hours and to redact the value of Williams's billed hours from a spreadsheet setting forth the value of goods and services provided by VECO in connection with the Girdwood renovation.

In late November 2008, SA Chad Joy, the FBI agent responsible for staying in contact with Williams and handling logistical details regarding his trial preparation, filed a complaint within the FBI alleging that PIN attorney Marsh "came up with a great plan" to use Williams's health issues as an excuse to send him back to Alaska because he had done so poorly in a mock cross examination during pretrial preparation. Joy alleged that he repeatedly urged Marsh and others to contact the defense and the judge before "executing their plan," but that he was ignored. Williams died of liver failure three months later, on December 30, 2008.

In the course of our investigation, we learned of additional information that Williams provided to the prosecution team during trial preparation sessions in August and September 2008, that was not disclosed to the defense. This information included Williams's statements that Senator Stevens wanted to pay for all of the work that was done. It also included Williams's statement that he reviewed Christensen Builders bills for accuracy, provided them to Bill Allen, and understood that the cost of Williams's and Anderson's hours would be added to the Christensen Builders invoices (which Senator Stevens paid).

This Chapter addresses the prosecution team's decision to allow Williams to return to Alaska, and its failure to disclose exculpatory information learned from Williams.[1071]

Based on the results of our investigation, we concluded that the prosecution team did not violate any obligation to the court or the defense in allowing Williams to return to Alaska. The prosecution team was motivated by Williams's need for medical treatment, not by a desire to prevent the defense from learning any information from Williams. We noted, however, that the better practice would have been to notify the court and the defense before Williams returned to Alaska. We also concluded that the prosecution team violated its disclosure obligations under the *Brady* doctrine and Department of Justice policy (USAM § 9 5.001), by failing to disclose information relating to Williams's work on the Girdwood renovations.

II. FACTUAL BACKGROUND

A. Rocky Williams Becomes a Prospective Witness

1. Interviews with Investigators

Rocky Williams was interviewed on three occasions in 2006 in connection with the investigation of Senator Stevens.[1072] During these interviews, investigators learned that Williams worked for VECO Equipment, a subsidiary of VECO Corporation, as a laborer in a variety of jobs from 1989 until 2004.[1073] In or about 1990, Williams met Bill Allen, and they became friends.[1074] Williams served as a handyman who was regularly called in by Allen to solve a variety of problems, from repairing equipment to handling maintenance or construction issues.[1075] Allen learned that Williams had considerable experience at general

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[1071] The inconsistencies between Williams's statements concerning his part-time status on the Girdwood project and the VECO records introduced through Cheryl Boomershine is addressed in Chapter Seven, *infra*.

[1072] Sept. 1, 2006 IRS MOI of Rocky Williams; Sept. 14, 2006 FBI 302 of Rocky Williams; Sept. 28, 2006, FBI 302 of Rocky Williams.

[1073] Sept. 1, 2006 IRS MOI of Rocky Williams at 1; Sept. 14, 2006 FBI 302 of Rocky Williams at 1.

[1074] Sept. 1, 2006 IRS MOI of Rocky Williams at 2; Sept. 14, 2006 FBI 302 of Rocky Williams at 1.

[1075] Sept. 1, 2006 IRS MOI of Rocky Williams at 2; Sept. 14, 2006 FBI 302 of Rocky Williams at 1.

contracting and remodeling.[1076] Over the years, Allen had Williams work on a number of private residences, including homes owned by Bill Allen's [redacted], Bill Allen's various girlfriends, and Allen's own home.[1077] According to Williams, he became Allen's "go to guy."[1078]

The renovation of Senator Stevens's Girdwood residence began in approximately July 2000.[1079] Williams met with Allen and Senator Stevens on one or more occasions prior to the start of work. Allen asked Williams to act as foreman or general contractor for the project.[1080] According to Williams, the project started out small, but grew into something much more substantial.[1081] Bill Allen and Senator Stevens came up with the idea of elevating the house by "jacking it up" and constructing additional rooms at ground level, beneath the existing house.[1082] Allen wanted VECO to do all of the work, but early in the project, Williams became concerned that VECO employees lacked experience in home construction, and he recommended that they hire an outside general contractor to undertake much of the work.[1083] According to Williams, Stevens also wanted an outside company to be involved because the cost of the project was "over the limit," and Stevens wanted to have a contractor that he could pay.[1084] Williams selected Christensen Builders, a company Williams and VECO had worked with in the past.[1085]

Christensen Builders, owned by Augie Paone, did the framing, windows, panel siding, painting and finish work, and also covered the floor joists and did

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[1076] Sept. 14, 2006 FBI 302 of Rocky Williams at 1.

[1077] Sept. 1, 2006 IRS MOI of Rocky Williams at 2; Sept. 14, 2006 FBI 302 of Rocky Williams at 1.

[1078] Sept. 14, 2006 FBI 302 of Rocky Williams at 1.

[1079] Sept. 28, 2006, FBI 302 of Rocky Williams at 1.

[1080] Sept. 1, 2006 IRS MOI of Rocky Williams at 2.

[1081] Sept. 14, 2006 FBI 302 of Rocky Williams at 1.

[1082] Sept. 14, 2006 FBI 302 of Rocky Williams at 1.

[1083] Sept. 28, 2006 FBI 302 of Rocky Williams at 1.

[1084] Sept. 14, 2006 FBI 302 of Rocky Williams at 1; Sept. 28, 2006 FBI 302 of Rocky Williams at 1.

[1085] Sept. 14, 2006 FBI 302 of Rocky Williams at 1; Sept. 28, 2006 FBI 302 of Rocky Williams at 1.

the interior drywall work.[1086] Williams said he and Paone did the roofing together, and Paone poured the foundation for the garage.[1087] Other contractors performed other parts of the work.[1088] Williams picked up and delivered most of the materials used at the Girdwood residence in a VECO truck.[1089] In addition to Williams, several VECO employees performed significant work on the project, including Dave Anderson.[1090]

A report prepared in connection with the initial interview of Williams on September 1, 2006, stated that Williams estimated that "99 percent of the construction was done by Paone's company, with the balance handled by sub contractors."[1091] This estimate apparently reflected a misstatement; Williams later clarified that he had meant that 99 percent of the work that was not done by VECO was done by Christensen Builders.[1092]

Williams said that all his work in connection with the Girdwood residence was done while he was on VECO's payroll.[1093] He said he submitted the hours he worked each week, including overtime, to VECO, that he received a paycheck from VECO, and that he was paid between $18 and $18.50 per hour.[1094]

Williams provided varying accounts regarding his review of subcontractor invoices and bills. In Williams's first interview, he stated that he generally was not concerned with the manner in which expenses for the project were handled.[1095]

[1086] Sept. 14, 2006 FBI 302 of Rocky Williams at 2; Sept. 28, 2006 FBI 302 of Rocky Williams at 1 and 2.

[1087] Sept. 14, 2006 FBI 302 of Rocky Williams at 2.

[1088] Sept. 14, 2006 FBI 302 of Rocky Williams; Sept. 28, 2006 FBI 302 of Rocky Williams.

[1089] Sept. 28, 2006 FBI 302 of Rocky Williams at 2.

[1090] Sept. 14, 2006 FBI 302 of Rocky Williams at 2; Sept. 28, 2006 FBI 302 of Rocky Williams at 1-2.

[1091] Sept. 1, 2006 IRS MOI of Rocky Williams at 3.

[1092] Bottini (Schuelke) Tr. Dec.16, 2009 at 288.

[1093] Sept. 1, 2006 IRS MOI of Rocky Williams at 2-3; Sept. 28, 2006, FBI 302 of Rocky Williams at 3.

[1094] Sept. 1, 2006 IRS MOI of Rocky Williams at 3; Sept. 28, 2006, FBI 302 of Rocky Williams at 3.

[1095] Sept. 1, 2006 IRS MOI of Rocky Williams at 3.

He said that he did not see or review the statements before they were sent to Senator Stevens, and that it was his understanding that bills for the work completed by Paone were mailed to the Senator in Washington, D.C., and that Stevens sent payments directly to Paone.[1096]

In subsequent interviews, [redacted], Williams said that he reviewed Paone's invoices to ensure accuracy and passed them on to Bill Allen or an employee at VECO.[1097] Williams said he assumed that the bills subsequently were sent to Senator Stevens, but that he never saw the bills that were actually sent to Stevens.[1098]

Williams said he was at the property full time some months and part time other months.[1099] Williams drove back and forth between his residence in Anchorage and Stevens's property in Girdwood while the work was being done, and he usually traveled to and from the property in a VECO truck.[1100] In the September 28, 2006 interview, Williams estimated that he worked between 15 and 30 hours each week for approximately 10 weeks and that he stopped working at Girdwood in or around Christmas 2000.[1101] Williams told FBI agents that Senator Stevens was present at his Girdwood residence on at least four occasions when Williams was present.[1102] Williams also said that throughout the construction project, Catherine Stevens routinely left long handwritten lists of "to dos" for Williams.[1103] Near the conclusion of Williams's involvement with the project, Senator Stevens wrote Williams a check for $2,000 and gave him two airline tickets as a "tip."[1104]

[1096] Sept. 1, 2006 IRS MOI of Rocky Williams at 3; Sept. 28, 2006, FBI 302 of Rocky Williams at 2.

[1097] Sept. 28, 2006 FBI 302 of Rocky Williams at 2; [redacted]

[1098] [redacted] Aug. 22, 2008 handwritten notes by Joseph Bottini of trial preparation session with Rocky Williams CRM057314-CRM057316.

[1099] Sept. 1, 2006 IRS MOI of Rocky Williams at 4.

[1100] Sept. 1, 2006 IRS MOI of Rocky Williams at 4.

[1101] Sept. 28, 2006, FBI 302 of Rocky Williams at 3.

[1102] Sept. 28, 2006, FBI 302 of Rocky Williams at 3.

[1103] Sept. 28, 2006, FBI 302 of Rocky Williams at 3 ("[Ted] would look around at all the work being done and would say, 'just keep Catherine happy and I'll be happy.'").

[1104] Sept. 14, 2006, FBI 302 of Rocky Williams at 2.

2. Williams's [redacted]

[redacted] Williams said that Augie Paone authorized him to sign invoices on behalf of Christensen Builders for the purchase of construction materials so he could bring them out to the site.[1105] Williams said that he reviewed Paone's invoices to ensure accuracy and passed them on to Bill Allen or to an employee at VECO.[1106] Williams stated that he was "usually out [at the Girdwood site] at least three times a week if not more."[1107] When asked how many hours a week he worked on the Girdwood project, "on average," he stated: "[N]ever less than 24 hours a week. I'd have to make at least two trips out for materials and stuff, and a lot of times I was probably out there at the first part of this, the framing and the stairs and everything going in, I was probably out there every day."[1108]

Although AUSA Bottini was not present [redacted], he recalled meeting Williams in the same time period, possibly in a pre grand jury interview.[1109] According to Bottini, Williams's appearance was normal, but there were signs that he was an alcoholic.

B. The Prosecution Memorandum

On May 21, 2008, the prosecution team submitted a prosecution memorandum to PIN Chief Welch and PIN Principal Deputy Chief Morris recommending that Senator Stevens be charged for failing to report things of value that he received on his United States Senate Financial Disclosure Forms.[1110] The

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[1105] [redacted] Sept. 1, 2006 IRS MOI of Rocky Williams at 4.

[1106] Sept. 28, 2006 FBI 302 of Rocky Williams at 2; [redacted]

[1107] [redacted]

[1108] [redacted]

[1109] Bottini OPR Tr. Mar. 10, 2010 at 388-389. [redacted]

[1110] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001).

memorandum described Rocky Williams's and Dave Anderson's responsibilities in detail:

> Although Christensen was tasked to perform certain renovation jobs at the Girdwood Residence, the entire project was managed by Rocky Williams and Dave Anderson. From July 2000 to May 2001, these two VECO employees spent most of their work time at the Girdwood Residence. Williams and Anderson were responsible for managing both the VECO crews and the Christensen crews. Many of the Christensen workers interviewed in this investigation told us that they took their orders from Williams, because Williams was the foreman and because Christensen's Paone was rarely on site at the project.
>
> Additionally, the investigation has found evidence that TED STEVENS and Catherine Stevens understood Williams' role as foreman and valued his impact on the quality of the renovations being done at the Girdwood Residence. Williams was the liaison between the STEVENS family and the work being done, and Catherine Stevens frequently contacted Williams in connection with aspects of the renovations.[1111]

The memorandum also addressed two potential defenses related to Rocky Williams that the team anticipated Senator Stevens would raise at trial. The first was that Senator Stevens would claim that he paid for all of the work at Girdwood through his payment of Christensen Builders invoices that he received. The memorandum predicted that Stevens might rely on an email that referred to "bills that rocky is trying to get bill [ALLEN] to look at and o.k." to establish that Stevens reasonably "believed that VECO's costs were being incorporated into bills that were being prepared by Christensen Builders as evidenced by the fact that ALLEN was reviewing the bills before they were being sent to STEVENS."[1112]

The second was that Stevens would claim that his wife handled all the transactions, the Senator did not review the bills himself, and he therefore did not

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[1111] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) at 13.

[1112] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) at 69-70.

know that VECO was not paid.[1113] The prosecutors did not think that defense was persuasive: "Although Catherine Stevens was directly involved with invoices from Christensen [Builders] and various vendors (she endorsed all the checks to these entities), it is incredible for STEVENS to claim that he was unaware that VECO's costs had gone unpaid or that these costs were somehow rolled into Christensen's invoices particularly given the massive amounts at issue here."[1114] Williams was relevant to this defense because he had interacted with both the Senator and Mrs. Stevens, and he reviewed the Christensen Builders invoices and passed them on to Allen, who then forwarded them on to Senator Stevens for payment.

C. Williams's Trial Preparation in Alaska

Senator Stevens was indicted on July 29, 2008. On August 7, 2008, the prosecution served Williams with a trial subpoena. From the outset, it was apparent to the prosecution team that Williams was seriously ill. In an August 7, 2008 email, Bottini stated:

> Hot off the press from [SA Kepner].....
>
> Rocky was served about an hour ago. He did not look good yellow complexion and appeared bloated (has to be from his swissed liver) but alert, coherent and cooperative.
>
> He says that he has not talked to anyone on behalf of the defense or to the press and that he has no intention of doing so. He was told that it's up to him whether he chooses to [do] so however.[1115]

A week later, on August 15, 2008, Bottini met with Williams in Anchorage for his first trial preparation session. Bottini summarized their meeting in an email to the prosecution team:

> The Rock does appear gaunt and does have a very sallow/yellowish complexion and appears generally less

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[1113] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) at 73.

[1114] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) at 74.

[1115] Aug. 7, 2008 8:47pm email from AUSA Bottini to PIN Chief Welch, PIN Principal Deputy Chief Morris, AUSA Goeke, and PIN attorney Marsh.

> healthy than when we last saw him which was around late April '07 I wanna say. Gotta be liver impairment.
>
> * * *
>
> Good news is that he is very focused and his recall is good. . . . We chatted him up about TS attorneys [who] may reach out to him. He says he will probably tell them he doesn't want to talk (I believe him) and promises to let us know if and when they try to make contact.[1116]

The next day, Bottini followed up with an additional observation, stating that Williams had "spontaneously stated, '[w]ell, I had my VECO hat on the whole time I was down there.'"[1117] This was relevant to Senator Stevens's knowledge that Williams was a VECO employee on VECO's payroll.

Significantly, neither the August 15, 2008 meeting, nor any of the subsequent August 2008 Alaska trial preparation sessions, resulted in the preparation of an FBI 302 report.[1118] In general, trial preparation sessions were not memorialized in FBI 302 reports unless the witness provided significant new information that had not been covered in previous interviews or grand jury testimony.[1119]

1. The August 20, 2008 Trial Preparation Session

On August 20, 2008, Williams again met with AUSA Bottini at the Anchorage U.S. Attorney's Office; AUSA Goeke and FBI SAs Kepner, Joy, and

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[1116] Aug. 15, 2008 8:54pm email from AUSA Bottini to PIN Principal Deputy Chief Morris, PIN attorney Marsh, AUSA Goeke, PIN attorney Sullivan, Mary Beth Kepner, SA Joy, and paralegal [redacted]

[1117] Aug. 16, 2008, 1:55pm email from AUSA Bottini to Mary Beth Kepner, AUSA Goeke, paralegal [redacted], litigation support manager [redacted], PIN Principal Deputy Chief Morris, PIN attorney Marsh, PIN attorney Sullivan, and SA Joy.

[1118] As discussed in detail *infra*, SA Joy did create an FBI 302 that covered only one statement – favorable to the prosecution – Williams made during the August 22, 2008 trial preparation session with Williams.

[1119] *See, e.g.*, Goeke (Schuelke) Tr. Jan. 8, 2010 at 50-51 (assumed an August 20, 2008 trial preparation session in Washington, D.C., would not be memorialized because it involved material already covered); Bottini (Schuelke) Tr. Dec. 16, 2009 at 57 ("generally, what I have learned from the Bureau is that if [agents] understand it to be a trial prep session, then they're not going to write up a 302.").

Howland were also present.[1120] PIN attorneys Marsh and Sullivan participated by telephone from Washington, D.C.[1121] The evidence indicates that the prosecutors had some difficulty following Williams during this meeting, but were pleased with his ability to answer questions.[1122] Hours after the meeting, Bottini noted in an email to Marsh and Sullivan:

> I know it was tough to follow the Rock meister stuff today, but any general observations about his suitability as a witness?
>
> The stuff about "no generator there" concerns me a bit. Other than that, I think he appears to have pretty good recall in general.[1123]

Some of the information Williams provided during this meeting was favorable to the defense. Bottini's handwritten notes indicated that Williams said on at least two occasions that Senator Stevens said he wanted to pay for the renovation himself ("Wanted to get as many outside K'ors[contractors] Ted wanted to pay himself"; "Ted He wanted to pay himself. Make sure he paid for it, etc."; "Ted wanted to keep it 'w/in his budget'").[1124] The notes added: "TED KNEW THAT ROCKY WORKED FOR VECO."[1125]

[1120] Aug. 20, 2008 handwritten notes of James Goeke CRM089063; Goeke (Schuelke) Tr. Jan. 8, 2010 at 44.

[1121] Aug. 20, 2008 6:09pm email from PIN attorney Marsh to PIN Principal Deputy Chief Morris and PIN attorney Sullivan ("Subject: RE: Rocky debrief on line/Anyone else want to listen in?"); Aug. 20, 2008 6:10pm email from PIN attorney Sullivan to PIN attorney Marsh and PIN Principal Deputy Chief Morris ("I can hang for a while if you want to patch me in").

[1122] At one point during the interview, Marsh emailed Bottini, Goeke, and Sullivan: "GO ROCKY GO." Aug. 20, 2008 6:54pm email from PIN attorney Marsh to AUSA Bottini, AUSA Goeke, and PIN attorney Sullivan.

[1123] Aug. 20, 2008 11:23pm email from AUSA Bottini to PIN attorney Marsh and PIN attorney Sullivan.

[1124] Aug. 20, 2008 handwritten notes by Joseph Bottini of trial preparation session with Rocky Williams CRM057294-CRM057296.

[1125] Aug. 20, 2008 handwritten notes by Joseph Bottini of trial preparation session with Rocky Williams CRM057295. Bottini verified this interpretation of his notes in his December 16, 2009 interview. Bottini (Schuelke) Tr. Dec. 16, 2009 at 85-86, 92-93.

Williams also stated that Allen had him review bills submitted by Augie Paone (Christensen Builders), and then give them to Bill Allen's secretary.[1126] Bottini's notes reflected that Williams said Allen "[d]idn't add my time to Augie's bill."[1127] It was Williams's understanding that Paone's bills ultimately were sent to Senator Stevens, who paid them. Williams said that "Bill Allen asked me to sign off on the Augie bills" and that "that was the only billing [he] did."[1128] Bottini's notes also indicate that Williams said all of his work was billed to VECO ("My time = VECO").[1129]

Bottini's notes also reflected that Williams said he did not work at Girdwood every day, and that when he was not there, someone else, such as Dave Anderson, filled in for him.[1130] This was the only reference in the August 20 notes relating to whether Williams worked at the Girdwood residence full time or part time.

AUSA Goeke's notes from the trial preparation session are similar. They indicate that Williams recalled that Stevens said that he "wanted to pay" for the project; and that Williams was on "VECO time." Significantly, however, Goeke's notes indicate that Williams also said that he was "supposed to go through Augie [Paone]'s bills," and that Williams's hours and Dave Anderson's hours were supposed to be "applied to the billing": "RW supposed to go through Augie's bills →supposed to have RW's time and Dave's time applied to the billing".[1131] That conflicts with Bottini's notes, which reflected that Allen "[d]idn't add my time to Augie's bill."[1132]

[1126] Aug. 20, 2008 handwritten notes by Joseph Bottini of trial preparation session with Rocky Williams CRM057297. Bottini (Schuelke) Tr. Dec. 16, 2009 at 95.

[1127] Aug. 20, 2008 handwritten notes by Joseph Bottini of trial preparation session with Rocky Williams CRM057297.

[1128] Aug. 20, 2008 handwritten notes by Joseph Bottini of trial preparation session with Rocky Williams CRM057298. Bottini (Schuelke) Tr. Dec. 16, 2009 at 95.

[1129] Aug. 20, 2008 handwritten notes by Joseph Bottini of trial preparation session with Rocky Williams CRM057295 and CRM057296.

[1130] Aug. 20, 2008 handwritten notes by Joseph Bottini of trial preparation session with Rocky Williams CRM057297 ("[Rocky] wasn't [at] the chalet everyday – when not there – Dave there, etc."). Bottini (Schuelke) Tr. Dec. 16, 2009 at 95.

[1131] Aug. 20, 2008 handwritten notes by James Goeke of trial preparation session with Rocky Williams CRM089067 Goeke (Schuelke) Tr. Jan 8, 2010 at 49.

[1132] Aug. 20, 2008 handwritten notes by Joseph Bottini of trial preparation session with Rocky Williams CRM057297.

SA Joy's notes also reflected that Senator Stevens "wanted to pay for everything himself" and to "keep it within his budget."[1133] In addition, Joy's notes show that Williams "took Augie's bills . . . to VECO's main office sign off on them."[1134] The notes also show that Williams said he did not work on the Girdwood project full time, and that Dave Anderson was there when Williams was not.[1135]

2. The August 22, 2008 Trial Preparation Session

On August 22, 2008, Williams met again with AUSAs Bottini and Goeke, and SA Joy. Although a witness preparation schedule indicated that Marsh would question Williams at this session,[1136] it had been agreed the prior day that Bottini would handle Williams's testimony at trial.[1137] Thus, the evidence supports Marsh's recollection that he did not participate in this trial preparation. Bottini took the lead in the meeting. Bottini's handwritten notes of the meeting indicated that Williams confirmed that he verified which workers were present at the Girdwood site, that he signed off on Augie Paone's bill, and that he took the bills to VECO's main office and presented them to Bill Allen.[1138] The notes reflected that Williams said Paone provided the Christensen Builders bills to Williams, who reviewed them before taking them to Bill Allen, who then added Williams's and Dave Anderson's time to the bills:

[1133] Aug. 20, 2008 handwritten notes by SA Joy of trial preparation session with Rocky Williams (Exhibit 9 to Bottini OPR transcript at 4 (pages unnumbered)).

[1134] Aug. 20, 2008 handwritten notes by SA Joy of trial preparation session with Rocky Williams (Exhibit 9 to Bottini OPR transcript at 4 (pages unnumbered)).

[1135] Aug. 20, 2008 handwritten notes by SA Joy of trial preparation session with Rocky Williams (Exhibit 9 to Bottini OPR transcript at 4 (pages unnumbered)).

[1136] Aug. 22, 2008 1:57pm email from AUSA Bottini to paralegal [redacted], PIN attorney Marsh, PIN attorney Sullivan, PIN Principal Deputy Chief Morris, SA Kepner, SA Joy, and AUSA Goeke (updated witness preparation schedule).

[1137] PIN Principal Deputy Chief Morris stated in an email that she thought AUSA Bottini was handling Williams as a witness. Aug. 21, 2008 10:00am email to AUSA Bottini, SA Kepner, AUSA Goeke, PIN attorney Marsh, PIN attorney Sullivan, and SA Joy. Four minutes later, Bottini responded: "That is correct – with the caveat that if Dave [Anderson] comes back into the fold – I would suggest that someone else (Nick maybe) should do Rocky . . ." Aug. 21, 2008 2:05pm email from AUSA Bottini to PIN Principal Deputy Chief Morris, SA Kepner, AUSA Goeke, PIN attorney Marsh, PIN attorney Sullivan, SA Joy, and paralegal [redacted]

[1138] Aug 22, 2008 handwritten notes by Joseph Bottini of trial preparation session with Rocky Williams CRM057314-CRM057315. Bottini (Schuelke) Tr. Dec. 16, 2009 at 157-158.

> Augie's bills . . . to Rocky first. Signed off on Augie's stuff[,] verified that [Christensen Builders carpenters] Vern and Mike were there, check their time out, 8 to 5, 5 x week. After verified, took to VECO main office, showed to Bill Left them with Bill for him to add my time + Dave's.[1139]

Williams described that arrangement as the "original agreement" that stemmed from the early meetings with Allen and Senator Stevens in which Stevens said he wanted to pay for everything:

> It was understood that we were down there and that any VECO time/labor would be added in[.] Part of the original agreement as long as we got paid back Rocky assumed that based on what TS had said in 1999.[1140]

However, according to the notes, Williams did not see the bills that were forwarded to the Stevenses, and thus did not know whether Allen "added it in or not."[1141] Moreover, according to Bottini's notes, Williams said that he never discussed this issue with the Stevenses and they never asked Williams whether VECO expenses were included with Christensen Builders bills.[1142]

Goeke's handwritten notes are similar:

> How Augie's bills handled. . . . Went to Rocky first checked off materials that Rocky bought on Augie's acc[oun]ts, checked [redacted] and [redacted] time . . .. Vern and [redacted] 8 5 every day and 5 days a week. Then took to VECO main office → left with Bill to add whatever VECO time etc. was <u>left</u> to <u>add</u> → then sent down to TS.

* * *

[1139] Aug 22, 2008 handwritten notes by Joseph Bottini of trial preparation session with Rocky Williams CRM057314-CRM057315. Bottini (Schuelke) Tr. Dec. 16, 2009 at 157-158.

[1140] Aug 22, 2008 handwritten notes by Joseph Bottini of trial preparation session with Rocky Williams CRM057315-CRM057316. Bottini (Schuelke) Tr. Dec. 16, 2009 at 158-165.

[1141] Aug. 22, 2008 handwritten notes by Joseph Bottini of trial preparation session with Rocky Williams CRM057316-CRM057317. Bottini (Schuelke) Tr. Dec. 16, 2009 at 158.

[1142] Aug. 22, 2008 handwritten notes by Joseph Bottini of trial preparation session with Rocky Williams CRM057317. Bottini (Schuelke) Tr. Dec. 16, 2009 at 158, 166-167.

> Usually on front would sign and put date. Would give to Bill to add time for Rocky and Dave. Understood that TS was going to pay for everybody.[1143]

AUSA Goeke did not recall having previously heard Williams's comments regarding his communications with the Stevenses.[1144] He therefore asked SA Joy, who was also present, to prepare a 302 memorializing Williams's remark.[1145] In an FBI 302 prepared the day after the trial preparation session, Joy wrote:

> WILLIAMS advised he never had any conversations with TED STEVENS or CATHERINE STEVENS in which WILLIAMS made any representation that VECO expenses were placed on CHRIST[E]NS[E]N Builders invoices. Williams further stated that neither TED STEVENS nor CATHERINE STEVENS ever asked WILLIAMS whether any of the VECO expenses, labor[,] or materials, were included in the CHRIST[E]NS[E]N bills.[1146]

The 302 that SA Joy prepared did not include the potentially exculpatory statements Williams made during the trial preparation session, including information regarding Stevens's desire to pay, Williams's review of the Christensen Builders invoices, or Williams's belief that his and Anderson's hours, and possibly all VECO costs, would be added to the Christensen Builders invoices before they were sent to the Stevenses, pursuant to the "original agreement" between Allen and Senator Stevens.

Goeke was asked during his January 2010 interview whether he told SA Joy what to write in his 302, and whether he specifically told him not to include the potentially exculpatory information discussed during the trial preparation session. Goeke maintained that he did not tell Joy what to write; rather, he "asked [Joy] to do a 302 about the general topic of Rocky's recollections of his discussions with Ted and Catherine."[1147] Goeke said that he asked Joy to write up that particular

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[1143] Aug. 22, 2008 handwritten notes by James Goeke of Rocky Williams trial preparation session CRM057193-CRM057194 (emphasis in original); Goeke (Schuelke) Tr. Jan. 8, 2010 at 91-92, 115.

[1144] Goeke (Schuelke) Tr. Jan. 8, 2010 at 123-127; Feb. 24, 2009 FBI 302 of James Goeke at 7.

[1145] Feb. 24, 2009 FBI 302 of James Goeke at 7.

[1146] Aug. 22, 2008 FBI 302 of Rocky Williams.

[1147] Goeke (Schuelke) Tr. Jan. 8, 2010 at 123.

"concept" because he thought that it constituted something new that he had not heard before.[1148] Goeke stated that he did not tell Joy precisely what facts or language should be included in the 302.[1149] He acknowledged he did not ask Joy to memorialize the entire meeting because he thought that Williams's comment regarding his communications with the Senator and Mrs. Stevens was the only item that he had not heard before:

> I recall asking him to do a 302 about the general topic of Rocky's recollections of his discussions with Ted and Catherine.
>
> And to be clear, the reason I was focused on that was because that's the part that I thought was new. The other stuff I didn't think I thought it was stuff we'd heard before . . . . If I had thought that stuff was new, I'd have said, "Do a 302, the whole thing."[1150]

At his interview in January 2010, Goeke explained that he had an "impression" at the time that the other information provided by Williams was "not new information," but could not identify the basis for that impression.[1151] He acknowledged that he had not seen that information documented anywhere, other than in his own and Bottini's handwritten notes.[1152]

Williams's statements regarding his communications with the Stevenses apparently were new; thus, it was appropriate to memorialize them in an FBI 302. Williams's information about his assumption that his and Anderson's hours were added to the Christensen Builders bills was not new on August 22, but it had been new just two days earlier, when, as reflected in Goeke's own notes, Williams said that during his August 20, 2008 trial preparation session. However, neither Goeke nor anyone else asked for that information to be memorialized.

Although it appears that the trial preparation sessions on August 20 and August 22 generated new exculpatory information, there was no indication that

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[1148] Goeke (Schuelke) Tr. Jan. 8, 2010 at 123-127. Goeke also thought that the information might be useful impeachment material in the event Williams said anything to the contrary during his trial testimony. Goeke (Schuelke) Tr. Jan. 8, 2010 at 124-126.

[1149] Goeke (Schuelke) Tr. Jan. 8, 2010 at 124-125.

[1150] Goeke (Schuelke) Tr. Jan. 8, 2010 at 123-124.

[1151] Goeke (Schuelke) Tr. Jan. 8, 2010 at 113.

[1152] Goeke (Schuelke) Tr. Jan. 8, 2010 at 113.

the prosecutors on the case appreciated the significance of the information. There was no email traffic regarding the August 22 preparation session that suggested that Bottini and Goeke believed they had uncovered new information from Williams that they considered damaging to the government's case.

When Bottini was asked during his OPR interview whether the issues uncovered in the August sessions raised concerns, he responded:

> I don't think so. Because, you know, . . . if he was going to testify and present that type of information, I think it was easily dealt with. It was an assumption on his part that really didn't have much of a foundation in fact. You know, that didn't concern me much.[1153]

At about this same time, PIN attorney Sullivan, working in his office in Washington, D.C., reviewed some documents that the defense had provided, including invoices and cancelled checks relating to the Girdwood project, and a note from Rocky Williams to Catherine Stevens. On August 22, 2008, the same day as the second trial preparation session with Williams in Anchorage, Sullivan emailed his conclusions regarding his review to the prosecution team:

> The good news no bombshell in there for VECO or Allen.
>
> Based on the cancelled checks and the handwritten note from Rocky to CAS, it's fairly apparent that TS will say that CAS handled the bills, CAS coordinated with Rocky, and TS didn't know VECO wasn't paid b/c CAS never told him. **To further insulate TS, CAS will likely testify that Rocky told her the VECO costs were rolled into the large Christensen bills.** Alternatively, if CAS doesn't testify, then they try to squeeze this point out of Rocky on cross. If they make this point, TS can then argue that CAS didn't tell him about the VECO costs b/c she thought the VECO costs were included in the Christensen bills.[1154]

[1153] Bottini OPR Tr. Mar. 10, 2010 at 423.

[1154] Aug. 22, 2008 2:22pm email from PIN attorney Sullivan to AUSA Goeke, AUSA Bottini, PIN attorney Marsh, PIN Principal Deputy Chief Morris, PIN Chief Welch, SA Kepner, SA Joy, lit. support mgr [redacted], and paralegal [redacted]r (emphasis added).

The potential defense Sullivan identified in this email had been identified in the prosecution memorandum as a principal defense theory: "STEVENS may . . . assert that he believed that, since the [Christensen Builders' invoices] were coming from VECO, they contained billing for VECO's work as well."[1155] The prosecution memorandum added that the defense could rely on "the fact that ALLEN was reviewing the bills before they were being sent to STEVENS" to support the theory that "VECO's costs were being incorporated" into the Christensen Builders invoices.[1156] Thus, the prosecution team was well aware of this defense theory.[1157]

Although Sullivan sent this email the same day as the second Williams preparation session, we concluded that the prosecution team members who participated in the session likely had not read it before they conducted the session. Sullivan's email was sent at 2:22 p.m. Eastern Standard Time, which was 10:22 a.m. in Anchorage.[1158] A witness preparation schedule circulated on August 22, 2008, indicated that the meeting with Williams was scheduled to start that morning at 10:00 a.m.[1159] If the meeting started as scheduled, Sullivan's email would not have arrived until after the meeting began. Bottini could not recall whether the August 22 meeting started at 10:00 a.m. or not, but he remembered that the meeting with Williams was in a conference room, and if the email arrived after the meeting started he would not have had an opportunity to

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[1155] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) at 68.

[1156] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) at 69.

[1157] *See* Bottini (Schuelke) Tr. Dec. 16, 2009 at 150 ("That particular defense was identified as . . . far back as the PROS memo"); Marsh (Schuelke) Tr. Feb. 2, 2010 at 98; Sullivan (Schuelke) Tr. Jan. 6, 2010 at 404-405 ("I always thought it was one of their potential arguments"); Welch (Schuelke) Tr. Jan. 13, 2010 at 37 ("anticipated defenses"); Morris (Schuelke) Tr. Jan. 15, 2010 at 66-67 (would have recognized as *Brady* material information that Williams thought his and Anderson's time was rolled into the Christensen Builders bills). AUSA Goeke conceded that this defense theory "could have been" identified in the prosecution memorandum, but said, "I couldn't tell you in August, 2008 what my specific view of what I think [Stevens's] defense was going to be, but [its] not unreasonable" to think that I shared the concern identified in Sullivan's email of August 22, 2008. Goeke (Schuelke) Tr. Jan. 8, 2010 at 83-86.

[1158] Aug. 22, 2008 2:22pm email from PIN attorney Sullivan to AUSA Goeke, AUSA Bottini, PIN attorney Marsh, PIN Principal Deputy Chief Morris, PIN Chief Welch, SA Kepner, SA Joy, lit. support mgr [redacted], and paralega [redacted]

[1159] Aug. 22, 2008 1:57pm email from AUSA Bottini to paralega [redacted], PIN attorney Marsh, PIN attorney Sullivan, PIN Principal Deputy Chief Morris, SA Kepner, SA Joy, AUSA Goeke, and paralegal [redacted]

read it on his computer screen.[1160] Neither of the attorneys who were present in Anchorage with Williams recalled Sullivan's email or any part it may have played in generating questions.[1161] SA Joy also had no recollection of the email.[1162] Finally, we found no reply or followup emails from other members of the trial team.

SA Joy's recollection of the August 22 meeting and the FBI 302 he was asked to draft is consistent with Goeke's. According to Joy, he was asked to prepare the 302 by either Bottini or Goeke, or both.[1163] Joy stated that because the meeting was for trial preparation purposes rather than investigatory purposes and was handled by attorneys, he did not take notes and did not even have a notepad with him.[1164] Because he had no notepad, Joy drafted the 302 on his Blackberry and emailed it to himself.[1165] According to SA Joy, the substance of the email was "essentially" dictated to him by one or both attorneys; however, Joy recalled that the substance of the 302 accurately reflected what the witness said.[1166] Joy did not recall the prosecutors reviewing what he drafted or editing the 302 before it was finalized.[1167]

Joy subsequently distributed the 302 in an email to the prosecution team entitled "Important Rocky Williams Statement."[1168] In his March 29, 2010 interview, Joy maintained that no one told him the statement was "important," but that he surmised it was because he was specifically asked to prepare it, he understood that the question had not been asked or answered before, and he

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[1160] Bottini (Schuelke) Tr. Dec. 16, 2009 at156-157.

[1161] Bottini (Schuelke) Tr. Dec. 16, 2009 at 148-151, 155; Goeke (Schuelke) Tr. Jan. 8, 2010 at 79-88.

[1162] Joy (Schuelke) Tr. Mar. 29, 2010 at 84-87.

[1163] Joy (Schuelke) Tr. Mar. 29, 2010 at 63-65.

[1164] Joy (Schuelke) Tr. Mar. 29, 2010 at 66-68.

[1165] Joy (Schuelke) Tr. Mar. 29, 2010 at 69.

[1166] Joy (Schuelke) Tr. Mar. 29, 2010 at 65-66.

[1167] Joy (Schuelke) Tr. Mar. 29, 2010 at 74-76, 79.

[1168] Aug. 23, 2008 4:25pm email from SA Joy to PIN attorney Sullivan, SA Kepner, PIN Principal Deputy Chief Morris, AUSA Goeke, AUSA Bottini, and PIN attorney Marsh (attaching Joy's Aug. 22, 2008 FBI 302).

understood that the statements made "two key points that aided the government in its case."[1169]

3. The August 31, 2008 Trial Preparation Session

Williams met with AUSA Bottini, AUSA Goeke, and SA Joy for another trial preparation session on August 31, 2008.[1170] According to Bottini's handwritten notes, Williams was again questioned about his review of Augie Paone's invoices for work done by Christensen Builders.[1171] Williams reiterated that he picked up the Christensen Builders invoices, reviewed them for accuracy, signed off on the documents, and assumed that his time and Dave Anderson's time would be added to the bills that ultimately were sent to Senator Stevens. Williams said he did not know whether his and Anderson's hours were added or not, and that he never saw the bills after he dropped them off at VECO corporate offices.[1172]

4. Williams's Physical Condition in August 2008

Following the trial preparation session on August 31, 2008, AUSA Goeke noted in an email to PIN attorneys Marsh and Sullivan: "[n]o big issues with Rocky yet but he is not looking good healthwise worse than last week."[1173]

In post trial interviews and Declarations, the entire prosecution team related that Williams had appeared extremely ill prior to the trial. An FBI 302

[1169] Joy (Schuelke) Tr. Mar. 29, 2010 at 80-81.

[1170] Aug. 31, 2008 handwritten notes by Joseph Bottini of trial preparation session with Rocky Williams CRM057324-CRM057349. Aug. 31, 2008 handwritten notes by James Goeke of Rocky Williams trial preparation session CRM057197-CRM057201; Goeke (Schuelke) Tr. Jan. 8, 2006 at 155. SA Joy's notes were blank except for the entry: "RW 8/31/08 11:00am").

[1171] Aug 31, 2008 handwritten notes by Joseph Bottini of trial preparation session with Rocky Williams CRM057327-057328.

[1172] Aug. 31, 2008 handwritten notes by Joseph Bottini of trial preparation session with Rocky Williams CRM057327-057329 ("CB invoices . . . Augie's invoices. Rocky reviewed them – Assumed that my time/Dave's time added to it – Don't know whether that happened or not. – Never saw them after I turned them in. Bill directed me (Rocky) to review the CB invoices . . . make sure guys were doing the work, etc. * * * Rocky would pick the invoices up 1/month – @ Augie's office[.] Discuss what was coming up, etc. Would bring them to VECO – either BA or leave w/ [secretary]"); *see id.* at CRM057335 ("Paone Bills – Reviewed"). Bottini (Schuelke) Tr. Dec. 16, 2009 at 248-254.

[1173] Aug. 31, 2008 3:43pm email from AUSA Goeke to PIN attorney Marsh and PIN attorney Sullivan.

report of an interview of AUSA Bottini related Bottini's description of how Williams's health deteriorated even before he came to Washington, D.C.:

> AUSA Bottini . . . saw Rocky Williams in May of 2007 for followup questions. He described Williams' appearance as okay, but it was apparent that he had been drinking and his hands were shaking. At that time, AUSA Bottini did not detect any inconsistencies in his testimony.
>
> In mid August 2008, the prosecuti[on] team began preparing Rocky Williams for trial in Alaska. AUSA Bottini indicated that Williams' appearance had deteriorated and described him as almost cartoonish. Williams had a distended abdomen and was grayish in color. Williams' eyes had a yellow tint and he seemed to be coughing all the time. AUSA Bottini recalls that . . . Williams told them his doctor had indicated that he had some type of a liver impairment. While still in Alaska, either Chad Joy or Rocky Williams told AUSA Bottini that they had to drain the fluid off of his abdomen to assist in his breathing. . . . AUSA Bottini explain[ed] that Williams t[ook] a long time to prep because he c[ould] only withstand short sessions.[1174]

An FBI 302 of an interview of AUSA Goeke related that Goeke had similar views of Williams's deteriorating health:

> WILLIAMS had come to the USAO in Alaska and GOEKE was shocked at his appearance. GOEKE stated ["his color was yellow, his abdomen was obviously distended, and basically he looked like hell.["][1175]

In a February 23, 2009 Declaration, Goeke described Williams's condition during the late August 2008 Alaska trial preparation sessions in more detail:

> During the 2008 meetings attended with Williams at the USAO, I noticed that Williams' health appeared to have significantly declined since 2006 so much so that I did

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[1174] Feb. 24, 2009 FBI 302 of Joseph Bottini at 7. In AUSA Bottini's March 10, 2010 OPR interview, he confirmed that the February 24 FBI 302 was accurate with respect to the above statements. Bottini OPR Tr. Mar. 10, 2010 at 17-19.

[1175] Feb. 24, 2009 FBI 302 of James Goeke at 7.

> not immediately recognize Williams when I first met him again in 2008. Williams appeared frail, had a yellowish complexion, and had a noticeably distended abdomen. I also noticed that Williams had difficulty breathing and had a bad cough.
>
> * * *
>
> In the days between and following the 2008 meetings with Williams in Alaska, I recall that myself, AUSA Bottini, and others, including SA Joy and SA Kepner, all noted and commented from our own interactions with Williams that he appeared to be in quite poor health. . . . Around this time I also remember learning that Williams had told the FBI that he had either had his abdomen drained of fluid with a needle or was scheduled to have his abdomen drained of fluid.[1176]

SA Joy, the agent charged with handling Williams, stated in a September 2008 affidavit that "[t]he government met with Mr. Williams shortly before he traveled from Anchorage, Alaska to Washington, D.C. At that time, it appeared to the government that Mr. Williams had health related issues. We suggested to Mr. Williams at the time that he contact his doctors to determine whether he was fit enough to travel."[1177]

D. The Disclosures to the Defense Regarding Williams

During this same time period, the prosecution team was preparing letters describing potential *Giglio* and *Brady* information to disclose to the defense. A *Giglio* letter, drafted by AUSA Bottini and reviewed by Goeke,[1178] among others, detailing impeachment information was sent on August 25, 2008.[1179] On September 9, 2008, the government sent a *Brady* letter, which both Bottini and Goeke reviewed.[1180] With respect to Williams, the *Giglio* letter disclosed only that he had a 1984 felony conviction for negligent manslaughter; a 1986 felony

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[1176] Feb. 23, 2009 Declaration of James Goeke, ¶¶ 6-7.

[1177] Sept. 29, 2008 Affidavit of Chad Joy, ¶ 5.

[1178] Goeke (Schuelke) Tr. Jan. 8, 2009 at 36.

[1179] Bottini (Schuelke) Tr. Dec. 16, 2009 at 43.

[1180] Bottini (Schuelke) Tr. Dec. 16, 2009 at 98; Goeke (Schuelke) Tr. Jan. 8, 2009 at 37.

conviction for Failure to Assist/Aid; and a 1999 misdemeanor conviction for Driving While Intoxicated.[1181] The letter added that "[t]he government is also aware of rumors concerning excessive alcohol use by Williams and it is possible that Williams may have an alcohol dependency issue."[1182]

In late August and early September 2008, agents working on the *Stevens* case continued to assemble *Brady* material to be disclosed to the defense. IRS agents working on the case tried to locate and review all of their notes from interviews in addition to memoranda of interviews.[1183] In a September 3, 2008 email to SA Kepner and PIN attorney Sullivan, IRS SA Larry Bateman noted that IRS agents were tracking down their notes and asked Sullivan if he wanted the original notes sent to Washington, D.C., or held in agent files.[1184] He added that, regarding "Brady/Giglio[,] my thought is to be very liberal in interpretation subject to final cuts by the attorneys."[1185]

Sullivan responded on September 4, 2008:

> We will need to see the notes for Rocky. . . . Just a reminder that we should err on the side of caution and, to the extent information is potentially Giglio or Brady, we should produce it.[1186]

SA Bateman replied in a return email that he would comply with Sullivan's requests, and noted that there was some "possible minor impeachment material"

[1181] Aug. 25, 2008 letter from PIN Principal Deputy Chief Morris to defense counsel at 5. The August 25 letter incorrectly identified Williams as "Richard" B. Williams instead of "Robert" B. Williams.

[1182] Aug. 25, 2008 letter from PIN Principal Deputy Chief Morris to defense counsel at 5.

[1183] Sept. 3, 2008 4:24pm email from SA Bateman to SA Kepner, PIN attorney Sullivan, and SA Roberts.

[1184] Sept. 3, 2008 4:24pm email from SA Bateman to SA Kepner, PIN attorney Sullivan, and SA Roberts.

[1185] Sept. 3, 2008 4:24pm email from SA Bateman to SA Kepner, PIN attorney Sullivan, and SA Roberts.

[1186] Sept. 4, 2008 10:41am email from PIN attorney Sullivan to SA Bateman, SA Roberts, SA Kepner, AUSA Goeke, AUSA Bottini, Nicholas March, PIN Principal Deputy Chief Morris, lit. support mgr. [redacted], and paralegal [redacted].

regarding Williams.[1187] Williams had said in his September 1, 2006 interview that "there were no formal plans for the remodel, just sketches," and "credited himself with the plan," when in fact a VECO engineer had prepared detailed drawings.[1188] Bateman noted further that Williams said in his interview that "99% of all work was done by Christensen Builders,"[1189] a fact that, if true, would have undercut much of the government's case, because it was established that Stevens paid Christensen Builders approximately $140,000.[1190]

Later that same day, Sullivan suggested that the group needed to resolve the inconsistencies involving the percentage of work done by Christensen Builders. In an email to the group, Sullivan stated:

> We need to gather up the notes of the interview of Rocky to check whether the report is consistent (or not) with the notes for both interviewing agents. This MOI doesn't make sense to us regarding the 99% of the work was done by [Christensen Builders] and 1% by the subcontractors. It appears he's talking about [Christensen Builders'] own subcontractors (not the VECO stuff), but we should check the notes to see if there's any clarity on this. Rocky's statement makes no sense since in [a] later portion of the MOI he's talking about work that VECO did on the electrical side and the fact that he did work on the project, too.[1191]

[1187] Sept. 4, 2008 1:09pm email from SA Bateman to PIN attorney Sullivan, SA Roberts, SA Kepner, AUSA Goeke, AUSA Bottini, Nicholas March, PIN Principal Deputy Chief Morris, lit. support mgr. [redacted] and paralegal [redacted].

[1188] Sept. 4, 2008 1:09pm email from SA Bateman to PIN attorney Sullivan, SA Roberts, SA Kepner, AUSA Goeke, and AUSA Bottini.

[1189] Sept. 4, 2008 1:09pm email from SA Bateman to PIN attorney Sullivan, SA Roberts, SA Kepner, AUSA Goeke, AUSA Bottini, Nicholas March, PIN Principal Deputy Chief Morris, lit. support mgr. [redacted]; and paralegal [redacted]. Later the same day, Bateman forwarded a finalized "interview/notes list for Brady/Giglio Note Review," that identified the same issues. Sept. 4, 2008 6:19pm email from SA Bateman to PIN attorney Sullivan, PIN Principal Deputy Chief Morris, PIN attorney Marsh, AUSA Goeke, AUSA Bottini, SA Kepner, SA Joy, and SA Roberts.

[1190] *See* Christensen Builders' invoices and corresponding checks from Stevens.

[1191] Sept. 7, 2008 2:39pm email from PIN attorney Sullivan to SA Bateman, AUSA Bottini, lit. support mgr. [redacted], AUSA Goeke, SA Joy, SA Kepner, Nicholas March, PIN Principal Deputy Chief Morris, SA Roberts, and paralegal [redacted].

On September 6, 2008, SA Joy forwarded to PIN attorneys Morris, Marsh, and Sullivan, AUSAs Bottini and Goeke, and SA Kepner a spreadsheet review of [redacted][1192]

In the late afternoon on September 9, 2008, just hours before the *Brady* letter was sent to defense counsel, FBI SA Steven Forrest forwarded the final version of the spreadsheet documenting the FBI's review of FBI 302s for potential *Brady/Giglio* information.[1193] The spreadsheet included issues identified by Bateman in his earlier emails. It noted further that Williams stated in his September 14, 2006 interview that Senator Stevens "want[ed] to hire a contractor that he could pay while discussing the remodel project."[1194]

The September 9, 2008 *Brady* letter addressed one apparent inconsistency in Paragraph 15:

> On September 1, 2006, Robert Williams stated there were no formal plans for the addition at defendant's residence and that Williams sketched the plans for the addition based upon conversations with defendant. Williams also stated that, although he was the general contractor on the project, he did not deal with the expenses and did not recall reviewing Christensen Builders invoices. In a memorandum of interview from the same meeting, a federal law enforcement agent noted that Williams estimated that 99 percent of the work was done by Christensen Builders. In a subsequent interview, Williams stated that he did not recall ever saying that Christensen Builders performed 99 percent

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[1192] Sept. 6, 2008 10:10pm email from SA Joy to PIN attorney Sullivan, SA Kepner, PIN Principal Deputy Chief Morris, AUSA Goeke, AUSA Bottini, and PIN attorney Marsh.

[1193] Sept. 9, 2008 5:55pm email from SA Forrest to SA Joy, PIN attorney Sullivan, SA Kepner, AUSA Bottini, PIN attorney Marsh, AUSA Goeke, and paralegal [redacted] (forwarding final spreadsheet).

[1194] Sept. 9, 2008 5:55pm email from SA Forrest to SA Joy, PIN attorney Sullivan, SA Kepner, AUSA Bottini, PIN attorney Marsh, AUSA Goeke, and paralega [redacted] (forwarding final spreadsheet).

> of the work, and that such a figure was inconsistent with what he knows to have occurred.[1195]

Paragraph 15 is problematic. The second sentence provided incomplete information: "Williams also stated that, although he was the general contractor on the project, he did not deal with the expenses and did not recall reviewing Christensen Builders invoices." Standing alone, the exculpatory nature of the information is not apparent. As discussed at length above, however, Williams consistently stated in his [redacted] trial preparation sessions that he reviewed Christensen Builders monthly invoices for accuracy, that he signed off on them, and that he delivered them to Bill Allen or an employee at VECO's offices. Had this information been included in the *Brady* letter, the defense would at least have understood that Williams made an apparently inconsistent statement. Instead, the statement in the letter supports the prosecution's case, but is the opposite of what Williams told them three times in the weeks prior to the *Brady* letter, namely, that Williams *did* review Christensen Builders invoices prior to providing them to Bill Allen or a VECO employee. That information was not provided to the defense before trial, because neither [redacted] nor any reports of interviews or trial preparation notes were disclosed.

The third item noted in Paragraph 15 that Williams said that 99 percent of the work was done by Christensen Builders was rebutted in the letter itself, which explained that in subsequent interviews Williams stated that "he did not recall ever saying that Christensen Builders performed 99 percent of the work, and that such a figure was inconsistent with what he kn[ew] to have occurred." In AUSA Bottini's December 2009 interview, he was asked when Williams made that clarification. Bottini said he thought SA Joy told him he had called Williams and asked him about the accuracy of his earlier statement, but Bottini could not recall when this occurred.[1196] Bottini stated that he later covered the topic with Williams during a September 20, 2008 trial preparation session.[1197] Bottini's notes of the meeting indicate that Williams said he "probably" did tell the agents in 2006 that 99 percent of the work was done by Christensen Builders.[1198] However, according to Bottini, Williams said during the September 20, 2008 meeting that his prior statement was wrong, and that he probably misspoke to the

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[1195] Sept. 9, 2008 letter from PIN Principal Deputy Chief Morris to defense counsel at ¶ 15.

[1196] Bottini (Schuelke) Tr. Dec. 16, 2009 at 284-285.

[1197] Bottini (Schuelke) Tr. Dec. 16, 2009 at 282-288.

[1198] Sept. 20, 2008 outline and handwritten notes by Joseph Bottini of trial preparation session with Rocky Williams CRM115137 ("Probably heard me right – 99 % – hadn't thought about this for 8 yrs or so"); Bottini (Schuelke) Tr. Dec. 16, 2008 at 283, 286.

agents.[1199] According to Bottini, Williams told him that he meant to say that 99 percent of the work that was not done by VECO was done by Christensen Builders.[1200]

Paragraph 15 of the *Brady* letter also omitted other potentially exculpatory information known to the prosecution team, such as Williams's recollection that: (1) Senator Stevens told Williams and Bill Allen that he wanted to pay for everything, and therefore was pleased to have an outside contractor like Christensen Builders involved so that he would have someone to pay; (2) Williams reviewed the invoices for accuracy; and (3) Williams assumed that Bill Allen added the hours that Williams and Dave Anderson worked on the project to the Christensen Builders bill that was sent to Senator Stevens. The first point was covered in the August 20, 2008 trial preparation session;[1201] the second and third points were covered in all of the August 20, 22, and 31, 2008 sessions.[1202] The second point was also covered in early interviews of Williams, noted in FBI 302 reports, and included in the final *Brady* spreadsheet that SA Forrest sent to Sullivan.[1203] The third point was also noted in a September 28, 2006 FBI 302, and [redacted][1204]

The evidence shows that PIN attorneys Sullivan and Marsh drafted portions of Paragraph 15 of the *Brady* letter.[1205] Both were involved in preparing the letter,

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[1199] Bottini (Schuelke) Tr. Dec. 16, 2009 at 286-287.

[1200] Bottini (Schuelke) Tr. Dec. 16, 2009 at 288.

[1201] Aug. 20, 2008 handwritten notes by Joseph Bottini of Rocky Williams trial preparation session CRM057294-CRM057296; Aug. 20, 2008 handwritten notes by James Goeke of Rocky Williams trial preparation session CRM089067.

[1202] Aug. 20, 2008 handwritten notes by James Goeke of Rocky Williams trial preparation session CRM089067; Aug. 22, 2008 handwritten notes by Joseph Bottini of Rocky Williams trial preparation session CRM057314-CRM057316; Aug. 22, 2008 handwritten notes by James Goeke of Rocky Williams trial preparation session CRM057193-CRM057194; Aug. 31, 2008 handwritten notes by Joseph Bottini of Rocky Williams trial preparation session CRM057327-CRM057329.

[1203] Sept. 14, 2006 FBI 302 of Rocky Williams at 1; Sept. 28, 2006 FBI 302 of Rocky Williams at 1.

[1204] Sept. 28, 2006 FBI 302 of Rocky Williams at 2; [redacted]

[1205] Sullivan sent Marsh a draft version of the *Brady* letter that contained all of the facts in the final version relating to Rocky Williams except the last sentence, which related to Williams's subsequent denial of the accuracy of the 99 percent figure. Sept. 9, 2008 12:09pm email from Sullivan to Marsh. Marsh distributed a draft later the same day that included the language in the

and both acknowledged that they could have been the author of at least a portion of Paragraph 15.[1206] As noted above, Sullivan received some of the information that was included in the paragraph from IRS SA Bateman.[1207] Marsh stated that he had no recollection of drafting the first portion of the paragraph regarding the plans for the Girdwood residence and the review of bills.[1208] He acknowledged that he may have drafted the final sentences in Paragraph 15 regarding Rocky Williams's assertion that his earlier statement regarding Christensen Builders doing 99 percent of the work was inaccurate.[1209] Marsh recalled that someone (he could not recall who) contacted Williams and confirmed that the statement was inaccurate.[1210] Marsh opined that because SA Joy had been the prosecution team's contact with Williams, Joy probably called him.[1211]

In Bottini's December 16, 2009 interview, he was asked why the information regarding Williams that was included in the *Brady* letter was incorrect and incomplete. Bottini stated that he did not know.[1212] He acknowledged that he reviewed the letter on or about the day it was sent, but he had just flown in from Alaska on September 8, the day before the *Brady* letter was sent, and because he was busy preparing for oral arguments on two pretrial motions, he did not devote significant time to it, and did not recall focusing on the paragraph regarding Williams:

> Q. And so, perhaps for that reason you're suggesting, while you reviewed the September 9th letter before it was sent, as you've testified earlier, you either didn't focus on the detail of the letter, or if you did focus on the statement in the letter with respect to whether Rocky Williams reviewed the Christiansen Builders invoices,

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last sentence. Sept. 9, 2008 6:50pm email from Marsh to Bottini, Goeke, Sullivan, Morris, and Welch. The sequence of emails suggests that Marsh drafted the last sentence.

[1206] Sullivan (Schuelke) Tr. Jan. 6, 2010 at 443-447; Marsh (Schuelke) Tr. Feb. 2, 2010 at 109-112, 313-315.

[1207] Sullivan (Schuelke) Tr. Jan. 6, 2010 at 262-268, 443-447.

[1208] Marsh (Schuelke) Tr. Feb. 2, 2010 at 109-112, 313-315.

[1209] Marsh (Schuelke) Tr. Feb. 2, 2010 at 109-112, 313-315.

[1210] Marsh (Schuelke) Tr. Feb. 2, 2010 at 109-112.

[1211] Marsh (Schuelke) Tr. Feb. 2, 2010 at 109-112; Sullivan (Schuelke) Tr. Jan. 6, 2010 at 264-266.

[1212] Bottini (Schuelke) Tr. Dec. 16, 2009 at 116.

> you didn't recall that it was inconsistent with what he told you two weeks before.
>
> A. I didn't. If I would have, you know, flagged that, I would have said something. I would have. I would have said, "Hey, this is not right," you know? I didn't, in reviewing this thing, catch that.[1213]

Bottini also stated in his December 16 interview that at the time he conducted the August 2008 trial preparation sessions, he considered whether the information discussed might require disclosure as exculpatory *Brady* material and decided that it did not.[1214] Bottini noted that in the August 22 and August 31 sessions, Williams said that although he assumed that Allen was forwarding invoices to Senator Stevens that included his hours and Dave Anderson's hours, he did not know what was in the bills, and he never discussed billing with Senator Stevens or Catherine Stevens.[1215] Bottini argued that because Williams's belief was based on his own assumptions, which were not communicated to Stevens, the information was not exculpatory and did not need to be disclosed:

> Q. It seems determinative to you that it's an assumption on Rocky's part. Is that making it inadmissible, and therefore, not *Brady* material? . . . . Because it doesn't have to be admissible. . . . It just can lead to admissible evidence. And if the foreman of the job tells the defense attorney for Mr. Stevens that, "I was under the same impression your client was under. I thought these costs were being wrapped in and being paid for by Ted Stevens," don't you think that's exculpatory material for the defense to learn, so they can find admissible evidence? Don't you think that would be significant information to the defense attorney for Mr. Stevens?
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> A. Again, I was looking at it in the vein of it's an assumption on Williams's part, based upon his belief that, you know, Allen wouldn't do something like this to hurt Senator Stevens.

[1213] Bottini (Schuelke) Tr. Dec. 16, 2009 at 116-118. Bottini OPR Tr. Mar. 10, 2010 at 448-459.

[1214] Bottini (Schuelke) Tr. Dec. 16, 2009 at 181-184, 320-326 .

[1215] Bottini (Schuelke) Tr. Dec. 16, 2009 at 181-184, 320-326 .

> You know, I didn't think of this at the time in the context of, "This is *Brady* information that should be disclosed." I didn't.[1216]

AUSA Goeke was present during the trial preparation sessions in August 2008. In Goeke's January 8, 2010 interview, he stated that he was not involved in drafting the *Brady* letter, and did not know who drafted Paragraph 15.[1217] He acknowledged reviewing the letter, but said he did not catch the inaccuracies in Paragraph 15.[1218] Goeke also stated that he did not consider whether Williams's statements during the trial preparation sessions constituted *Brady* material; no one asked him to report the substance of Williams's statements to Sullivan or Marsh for inclusion in the letter; it did not occur to Goeke to undertake this on his own; and he did not consider it his responsibility.[1219] Goeke stated that he did not review his own notes of the trial preparation sessions in connection with the preparation of the *Brady* letter.[1220]

Goeke initially contested that the information was exculpatory, arguing that it was only Williams's "third party impression" of whether his and Anderson's time was added to the Christensen Builders invoices. Ultimately, however, he agreed that it should have been disclosed to the defense.[1221] When Goeke was asked how the government could have provided information in the *Brady* letter that was the opposite of what a witness had repeatedly said just weeks before, Goeke replied that he did not know.[1222]

PIN attorney Sullivan stated in his January 6, 2010 interview that he had no knowledge of the August 2008 sessions, and had only limited knowledge of Williams's prospective testimony.[1223] There is, however, evidence that Sullivan

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[1216] Bottini (Schuelke) Tr. Dec. 16, 2009 at 181-184, 320-326.

[1217] Goeke (Schuelke) Tr. Jan. 8, 2010 at 168.

[1218] Goeke (Schuelke) Tr. Jan. 8, 2010 at 75-76.

[1219] Goeke (Schuelke) Tr. Jan. 8, 2010 at 63-64, 74-77, 94-109.

[1220] Goeke (Schuelke) Tr. Jan. 8, 2010 at 94.

[1221] Goeke (Schuelke) Tr. Jan. 8, 2010 at 93-107, 109. Goeke acknowledged that he never thought about whether Williams's statements should be disclosed (Goeke (Schuelke) Tr. Jan. 8, 2010 at 108), and that his "third party impression" concept was an after-the-fact argument; "[I]t's not an analysis that I understood at the time." (*id.* at 95, 105).

[1222] Goeke (Schuelke) Tr. Jan. 8, 2010 at 166; *id.* at 74 ("I can't explain").

[1223] Sullivan (Schuelke) Tr. Jan. 6, 2010 at 401-408.

listened by telephone to all or part of the August 20, 2008 trial preparation session with Williams.[1224]

In PIN attorney Marsh's February 2, 2010 interview, he stated that he did not recall Williams's assumptions regarding his hours and whether Senator Stevens was billed for them, although he acknowledged that the material could have exculpatory value.[1225]

PIN Principal Deputy Chief Morris did not participate in the August 2008 trial preparation sessions, and had no recollection of SA Joy's 302, or of Williams's statements regarding his hours.[1226] Morris stated that the information was exculpatory and should have been disclosed.[1227]

PIN Chief Welch was not involved in any of Williams's trial preparation sessions, and was not aware of the substance of Williams's statements during those sessions. Welch acknowledged to OPR that he considered the information uncovered during Williams's August 22, 2008 session to be exculpatory.[1228]

E. Trial Preparation in Washington, D.C.

On September 15, 2008, nine days before the start of the *Stevens* trial, the prosecution team flew Williams to Washington, D.C., to continue preparing him for his testimony.[1229] The defense served Williams with a trial subpoena just prior to his departure. The subpoena specified that he was to appear at the courthouse on October 6, 2008.

[1224] Aug. 20, 2008 6:09pm email from PIN attorney Marsh to PIN Principal Deputy Chief Morris and PIN attorney Sullivan ("Subject: RE: Rocky debrief on line/Anyone else want to listen in?"); Aug. 20, 2008 6:10pm email from PIN attorney Sullivan to PIN attorney Marsh and PIN Principal Deputy Chief Morris ("I can hang for a while if you want to patch me in.").

[1225] Marsh (Schuelke) Tr. Feb. 2, 2010 at 304-312. There is evidence that Marsh listened in by telephone for a least a portion of the August 20 session, where the issue evidently was mentioned. However, in Marsh's OPR interview, he stated that although he listened in on the trial preparation session for a while, he "jumped" off quickly and did not recall anything about it. Marsh OPR Tr. Mar. 25, 2010 at 124-125. It appears that Marsh did not participate in the August 22 session, where the issue was discussed in more detail.

[1226] Morris (Schuelke) Tr. Jan. 15, 2010 at 31-32, 66-71.

[1227] Morris (Schuelke) Tr. Jan. 15, 2010 at 66-68.

[1228] Welch OPR Tr. Mar. 3, 2010 at 356-357.

[1229] Sept. 12, 2008 Sato Travel Itinerary for Robert Williams Sept. 15, 2008 travel from Anchorage AK to Washington DC.

AUSA Bottini and PIN attorney Marsh met with Williams on September 20, 2008, and Bottini went through his own typed outline, asking Williams questions on topics that Bottini planned to cover in his direct examination.[1230] Bottini made handwritten notes on the outline reflecting the answers Williams provided.[1231] Under the typed question, "You play some role in reviewing [Christensen Builders] billing?," the handwritten notes of Williams's response read: "Yes, would go over CB bills each month."[1232] Under the typed question, "What do after you reviewed?," the handwritten note of Williams's response read: "Went to VECO assumed that my time + Dave's time added on." A handwritten entry immediately after that entry reads: "Nobody tell you that? Assumed."[1233] In the typed section entitled "IMPEACHMENT STUFF," there is a subheading labeled "The 99% issue from the MOI of 9/1/2006." Beneath that is the handwritten entry: "They will try to get you to say that TS could have assumed that your time + Dave's time in CB bills, etc."[1234]

The following day, Bottini continued preparing Williams for trial.[1235] Again, Bottini made handwritten notes on the outline reflecting the answers Williams provided.[1236] AUSA Goeke conducted the mock cross examination of Williams

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[1230] Bottini (Schuelke) Tr. Dec. 16, 2009 at 275.

[1231] CRM057044, CRM115117-CR115162 ("Rocky Williams Direct Outline," "Updated 9/20/08 at 9:00 am").

[1232] CRM115139.

[1233] CRM115139.

[1234] CRM115151; Bottini (Schuelke) Tr. Dec. 16, 2009 at 320. In his interview, Bottini suggested that he was merely transcribing questions asked by either another attorney or an agent. Bottini (Schuelke) Tr. Dec. 16, 2009 at 322, 323 ("typically, I don't write down what I am saying"). The handwritten notes contain at least 30 handwritten questions (*e.g.*, "what is that?"; "Know Bill Allen?"; "Recognize?"; "VECO involved?"; "Know that Mark Tyree was paid by VECO?"; "Recall g[oi]ng w/CAS to Classic Flooring?"; "How often there?"), all of which appear to be in Bottini's handwriting, but he could not identify who asked the questions. *See, e.g.*, CRM115117, CRM115121, CRM115129, CRM115138, CRM115147, and CRM115149.

[1235] Bottini (Schuelke) Tr. Dec. 16, 2009 at 333.

[1236] CRM057476-CRM057513 ("Rocky Williams Direct Outline," "Updated 9/21/08 at 8:30 am"). This typed document also contained, in addition to the typed questions, handwritten questions (*e.g.*, "Who actually did that"; CRM057487) that appear to reflect what the questioner said, not what Williams said. There is no evidence identifying any other prosecution team member as being present, but Bottini stated that he would not meet with a witness without an agent present.

later that day, and Bottini and SA Joy attended that session.[1237] Goeke could not recall whether he questioned Williams about his understanding of what the Christensen Builders invoices would include.[1238]

It was readily apparent to the prosecution team, now all located in Washington, D.C., that Williams's health was continuing to deteriorate. SA Joy observed in a September 29, 2008 affidavit:

> When Mr. Williams arrived in Washington, D.C. and met with the government to prepare for his testimony, it was apparent to the government that Mr. Williams' health had deteriorated considerably and that his health related issues warranted medical attention. Between late 2006 and the present, Mr. Williams appeared to have lost weight, his abdomen was distended (and had been previously drained of excess fluid), he appeared jaundiced, his face was gaunt, he had substantially aged, he had chronic coughing spells, and he was frequently short of breath. In addition, Mr. Williams told me that he lacked energy and was unable to walk around the city as he had originally hoped.[1239]

In a February 20, 2009 Declaration, AUSA Bottini described his impression of Williams during the weeks immediately before trial:

> During the week of September 15, 2008, Williams came to the offices of the DOJ Public Integrity Section in Washington, D.C. for additional trial preparation. I noted at this time that Williams' physical condition appeared to have deteriorated since I had last seen him in Anchorage about 10 to 14 days prior. He now was coughing constantly and was obviously having trouble breathing. His abdomen appeared to be even more distended. His complexion was about the same. I recall that Williams told me that he had felt ill since he had arrived in D.C. and that he had not been able to leave

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[1237] Bottini (Schuelke) Tr. Dec. 16, 2009 at 307; Bottini OPR Tr. Mar. 11, 2010 at 459-460.

[1238] Goeke (Schuelke) Tr. Jan. 8, 2010 at 143.

[1239] Sept. 29, 2008 Affidavit of Chad Joy, ¶ 6. This affidavit was filed as an attachment to the Government's Opposition to Defendant's Motion to Dismiss Indictment or for a Mistrial.

> his hotel room. . . . I recall Williams' saying at this time that his breathing difficulty was caused by fluid filling his abdominal cavity. I saw other things that concerned me about Williams' condition at this time. For example, aside from the constant coughing, I observed Williams walking down a hallway at the PIN offices and he had to stop and catch his breath after walking a fairly short distance.[1240]

AUSA Goeke's recollections were similar:

> I next met Williams in Washington D.C., in mid to late September 2008 at the offices of the Public Integrity Section. . . . Williams still appeared frail, still had a yellowish complexion, still had a noticeably distended abdomen, still had difficulty breathing and still had a bad cough. I felt that his overall condition was worse than when I last saw him in Alaska.[1241]

The prosecutors had two interrelated concerns. First, there was obvious concern regarding Williams's health. Not only did Williams appear gravely ill, but he was missing appointments with his doctors because he was in Washington, D.C.[1242] Second, there was concern that Williams's condition impaired his ability to function as a witness. AUSA Bottini described Williams as having "difficulty focusing" and said he was "distract[ed]" and unable to respond to questions because of his "physical discomfort."[1243] Bottini said this was apparent in the

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[1240] Feb. 20, 2009 Declaration of Joseph Bottini, ¶ 26.

[1241] Feb. 23, 2009 Declaration of James Goeke, ¶ 8. Other prosecution team members had similar recollections. PIN attorney Marsh described the first time he saw Williams after he arrived in Washington: "His physical appearance was startling. His face was drawn and yellowish-green in color, and his abdomen was extended. His breathing appeared to be labored, and I remember him taking little gasps at the end of each breath." Feb. 24, 2009 Declaration of Nicholas Marsh, ¶ 4. *See* Sept. 29, 2008 Affidavit of William Welch, ¶ 6 ("I was surprised at how poor he looked and how slow he was moving.").

[1242] Feb. 20, 2009 Declaration by Joseph Bottini, ¶ 27 ("I recall Williams telling myself and others . . . that his doctor was mad at him for missing the appointment"); Feb. 23, 2009 Declaration of James Goeke, ¶ 10 ("[I was] concerned that Williams was apparently missing scheduled medical appointments in Anchorage at a time when his health was visibly deteriorating"); *see* Sept. 29, 2008 Affidavit of Chad Joy, ¶ 7.

[1243] Feb. 20, 2009 Declaration of Joseph Bottini, ¶¶ 27 and 28; *see* Bottini (Schuelke) Tr. Dec. 16, 2009 at 326-332 ("He was in no condition to testify, period.").

mock direct examination on September 20 as well as in the mock cross examination the following day.[1244]

The prosecution team's decision to move Williams back in its witness order also played a role in the decision to allow Williams to return to Alaska to seek medical attention. In AUSA Bottini's February 2009 Declaration, he described the deliberation process that ultimately led to that decision:

> After the last preparation session with Williams, I recall that Mr. Goeke, Mr. Marsh and myself had a discussion about whether Williams should be presented at the beginning of the government's case (as initially planned) or whether we should make sure he got medical treatment and call him later in the case. The paramount concern was not whether Williams was going to be a helpful witness to the government's case there was never any doubt that he was. The primary concern was Williams' physical condition at the time and how that appeared to be affecting his ability to concentrate and answer questions.[1245]

The prosecution team eventually decided that, for tactical reasons, it would be better not to use Williams as a "lead off" witness, but rather to put him on the stand later in the case. As Bottini noted in his Declaration:

> Aside from Williams' physical condition, the decision to not have him as a "lead off" witness was influenced by other concerns. Specifically, there were some significant impeachment issues with Williams. We had information that Williams was a long term alcoholic and we fully expected him to be cross examined about alcohol abuse issues. Williams was also a convicted felon, having been convicted in or around 1985 of a vehicular homicide charge relating to an incident where he killed a person while driving under the influence of alcohol. The court had not excluded the use of that conviction to impeach Williams. Based on these factors, the assessment was that given Williams' obvious need for medical treatment, and given that we believed that he would be a more

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[1244] Bottini (Schuelke) Tr. Dec. 16, 2008 at 301, 326.

[1245] Feb. 20, 2009 Declaration of Joseph Bottini, ¶ 29.

> credible witness after other witnesses had testified, Williams would be more effective as a witness at the end of the government's case rather than up front.[1246]

F. The Decision to Allow Williams to Return to Alaska

AUSAs Bottini and Goeke both recalled that someone asked Williams whether he wanted to return to Alaska to receive medical attention, or instead to seek medical care in Washington, D.C.[1247] It was Goeke's understanding that SA Joy asked Williams his preference.[1248] Both attorneys recalled being told that Williams preferred to return to Alaska to receive medical attention from his own doctors.[1249]

PIN Principal Deputy Chief Morris corroborated Bottini's and Goeke's version of events.[1250] According to Morris, SA Joy told her he was concerned about Williams's health, and did not want Williams "to die on his watch while he was in Washington D.C."[1251] Morris recalled Bottini and Goeke telling her that they were concerned about Williams's health, that he was missing doctor's appointments, and that Williams could not focus because of his sickness.[1252] She also learned, either from Bottini or others, that Williams could be easily led during cross examination.[1253]

[1246] Feb. 20, 2009 Declaration of Joseph Bottini, ¶ 30. AUSA Goeke had similar impressions. Feb. 23, 2009 Declaration of James Goeke, ¶ 9.

[1247] Feb. 20, 2009 Declaration of Joseph Bottini, ¶ 31; Feb. 23, 2009 Declaration of James Goeke, ¶ 10.

[1248] Feb. 23, 2009 Declaration of James Goeke, ¶ 10.

[1249] Feb. 20, 2009 Declaration of Joseph Bottini, ¶ 31; Feb. 23, 2009 Declaration of James Goeke, ¶ 10.

[1250] Feb. 26, 2009 FBI 302 of Brenda Morris at 6-8; Morris (Schuelke) Tr. Jan 15, 2010 at 74-80.

[1251] Feb. 26, 2009 FBI 302 of Brenda Morris at 6.

[1252] Feb. 26, 2009 FBI 302 of Brenda Morris at 6; Morris (Schuelke) Tr. Jan. 15, 2010 at 74-80.

[1253] Feb. 26, 2009 FBI 302 of Brenda Morris at 6.

Morris stated that there were discussions about not calling Williams as a witness, but that she opposed that idea.[1254] Williams and Anderson were the two VECO on site supervisors of the Girdwood renovations, and prior to trial, the prosecution team believed that one or both men would need to testify to describe all of the work that was performed by VECO. Both were considered strong witnesses.[1255] Beginning in mid August 2008, when it was learned that Anderson had signed a false affidavit claiming immunity, there was concern that Anderson's credibility was so damaged that he would be unusable as a witness. Thus, Morris thought that it might be necessary to call Williams to testify about the Girdwood renovations.[1256]

Morris recalled that SA Joy was tasked with approaching Williams and asking him whether he wanted to receive care at a hospital in Washington, D.C., or whether he wanted to return to Alaska.[1257] Joy complied with that direction, and his account is detailed in an FBI 302 report:

> Joy was told to tell Williams that there was a concern for his health and about him missing doctor's appointments and that everyone would be more comfortable if he went back to Alaska and met with his doctor and if his doctor said it was okay for him to return, then he might be put back in the queue to testify.[1258]

In a December 24, 2008 Affidavit, Williams confirmed that he requested that he be allowed to return to Alaska "because the doctors that knew my medical case were all in Alaska."[1259]

[1254] Feb. 26, 2009 FBI 302 of Brenda Morris at 6.

[1255] Morris (Schuelke) Tr. Jan. 15, 2010 at 79.

[1256] Feb. 26, 2009 FBI 302 of Brenda Morris at 6.

[1257] Feb. 26, 2009 FBI 302 of Brenda Morris at 7.

[1258] Feb. 21, 2009 FBI 302 of Chad Joy at 12-13.

[1259] Dec. 24, 2008 Affidavit of Robert Williams, ¶ 6.

According to PIN Principal Deputy Chief Morris, Joy reported back that Williams preferred to return to Alaska for medical treatment, but was willing to return to testify.[1260]

After several discussions among the prosecutors on the case, Bottini and Marsh discussed with PIN Chief Welch their assessment of Williams and his condition, including their preference for having him testify later in the government's case in chief, which they projected would last at least three weeks.[1261] They "collectively agreed that it would be better to call Williams later in the government's case and that Williams should return as soon as possible to Anchorage to be treated by his own physicians."[1262]

Marsh's recollection generally was consistent with that of Bottini, Goeke, and Morris, though there is disagreement on one point: whether, after Williams returned to Alaska, the prosecution team still planned to have him return so that he could be called near the end of the government's case. As noted above, Morris considered Williams to be a valuable witness that the government might need to call, and Bottini planned on having Williams testify near the end of the case. In contrast, Marsh recalled that:

> After a number of discussions with myself, Mr. Bottini, Mr. Goeke, and Ms. Morris, we collectively decided two things: first, that Mr. Williams needed to return to Alaska to get medical treatment and to be diagnosed for his illness; and second, that we could successfully prosecute the *Stevens* case without Mr. Williams' testimony.[1263]

Marsh elaborated in his February 2009 interview, stating that he recalled a conversation with Joy and Morris during the relevant time period in which he told them that they could win the case against Stevens without Williams's testimony.[1264] This assertion is consistent with Morris's recollection that the

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[1260] Feb. 21, 2009 Declaration of Brenda Morris, ¶¶ 26 and 27. AUSA Goeke had a similar recollection. Feb. 23, 2009 Declaration of James Goeke, ¶ 10. In addition, according to Morris, Joy said that Williams would not be able to use his health insurance if he received medical care in Washington, D.C. Feb. 26, 2009 FBI 302 of Brenda Morris at 6.

[1261] Feb. 20, 2009 Declaration of Joseph Bottini, ¶ 32.

[1262] Feb. 20, 2009 Declaration of Joseph Bottini, ¶ 32.

[1263] Feb. 24, 2009 Declaration of Nicholas Marsh, ¶15.

[1264] Feb. 23, 2009 FBI 302 of Nicholas Marsh at 7.

subject of Williams not testifying at all was discussed.[1265] Marsh recalled further, however, that the decision was made that the government was *not* going to call Williams, although he conceded that "he did at some point later hear discussions that WILLIAMS may possibly be called back towards the end of the trial to testify."[1266]

PIN Chief Welch, and everyone else, recalled that the issue was presented to Welch and he decided to allow Williams to go back to Alaska.[1267]

G. Instructions to Williams Regarding his Return to Alaska

There is unanimous agreement among the prosecutors that Williams was not simply told that he could return home. Rather, he was expressly advised that he was *not* released from his trial subpoenas, and that he should contact defense counsel to inform them of his return to Alaska. As Bottini noted in his Declaration:

> [B]efore he left, I spoke with Williams and specifically told him that he was not released from his trial subpoena. I told Williams that we were going to have him return to Anchorage as soon as possible to get treated by his physicians and that we were going to move him from the front of the witness list to the end. I also told Williams that the government's case was projected to take three weeks, and that if he was able to fly back out in a couple of weeks we could call him then. As Williams had also been subpoenaed by the defense, Williams was also asked to contact the law offices of Williams and Connolly to advise them that he had returned to Anchorage to get medical treatment from his physicians. I recall that agent Joy and others were present when all of this was explained to Williams. I also recall Williams telling those present at this time that he had called the Williams and Connolly law offices in Washington, D.C. twice while he was in the District of

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[1265] Feb. 26, 2009 FBI 302 of Brenda Morris at 6.

[1266] Feb. 23, 2009 FBI 302 of Nicholas Marsh at 7.

[1267] Sept. 29, 2008 Affidavit of William Welch, ¶ 8; Welch OPR Tr. Mar. 3, 2010 at 349-350.

> Columbia and had left call back messages, but had not been contacted.[1268]

AUSA Goeke corroborated each of those points.[1269] PIN attorney Marsh also confirmed that SA Joy was instructed by several prosecutors to remind Williams of his continuing responsibility to the government and to the defense.

There is a question whether Williams was simply told to notify defense counsel *regarding* his return to Alaska, or whether he was told to notify them *before* or *after* his return. In Bottini's December 16, 2008 interview, he stated that he instructed Williams to call defense counsel *after* his return to Alaska:

> [Williams] said that he had called twice while he was [in D.C.], and left messages over at the firm, left his cell phone number with them. Hadn't heard back. And so, he was instructed, "When you get home, make sure you call them [and] tell them you went home to get medical treatment."[1270]

PIN attorney Marsh told OPR he also recalled discussions among the prosecutors indicating that Williams would be told to contact defense counsel after he returned to Alaska.[1271] According to Marsh, the rationale was that Williams had left messages with defense counsel while he was in Washington, D.C., and they had never called back.[1272] Marsh added that the prosecution team did not think "there would be any remote possibility whatsoever in any alternate universe or the current one that [the defense] would call Rocky Williams as a witness in

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[1268] Feb. 20, 2009 Declaration of Joseph Bottini, ¶ 33. Bottini made similar representations in a December email regarding a draft response to one of the defendant's post-trial motions. At that time Bottini stated: "Rocky was never released from his subpoena – in fact, I specifically told Rocky that we were going to move him from the front of the witness order to the bottom, that the government's case was projected to take 3 weeks, and that we wanted him to get home and see his doctors as soon as possible and that if he was able to fly back out in a couple of weeks we could call him then." Dec. 23, 2008 3:56pm email from AUSA Bottini to PIN attorney Sullivan, PIN Deputy Chief Hulser, PIN Chief Welch, PIN attorney Marsh, PIN Principal Deputy Chief Morris, James Goeke, and PIN attorney Levin.

[1269] Feb. 23, 2009 Declaration of James Goeke, ¶ 11.

[1270] Bottini (Schuelke) Tr. Dec. 16, 2009 at 332.

[1271] Marsh OPR Tr. Mar. 25, 2010 at 140.

[1272] Marsh OPR Tr. Mar. 25, 2010 at 140.

their case in chief because he the vast majority of his testimony ran directly counter to their case, and no one believed that they were going to call him."[1273]

SA Joy, however, later told agents that there was some discussion about telling Williams to wait until he returned to Alaska before calling the defense:

> Sometime after the meeting with Welch, there was a second meeting in which Nick Marsh wanted Joy to tell Williams about their concerns for his health and about returning to Alaska. There absolutely were discussions about notifying the defense. Joy believes it was discussed to "let's wait until Williams returns back to Alaska before we tell the defense." . . . It was Joy's impression that it was the initial plan to get Williams back to Alaska before Williams contacted the defense.[1274]

Joy claimed, however, that he made at least a subtle effort to persuade Williams to contact the defense prior to leaving Washington:

> Joy has an understanding that what he told Williams was that it was implied for him to call the defense and let them know. Joy was uncomfortable with . . .tell[ing] him not to contact the defense until he gets back to Alaska. Joy does recall that he told Williams that he was under a defense subpoena, but did not direct him to call the defense. Joy is confident that Williams understood his instructions that Joy implied for Williams to contact the defense prior to leaving Washington.[1275]

In a Complaint submitted by SA Joy after the trial, which is discussed in more detail in Chapter Thirteen, *infra*, Joy stated that he told Marsh and others "multiple times that they should advise the defense counsel and the judge before executing their plan [to have Williams return to Alaska]."[1276] Joy stated that he was "ignored."[1277]

[1273] Marsh OPR Tr. Mar. 25, 2010 at 140-141.

[1274] Feb. 21, 2009 FBI 302 of Chad Joy at 12-13.

[1275] Feb. 21, 2009 FBI 302 of Chad Joy at 13.

[1276] Chad Joy Complaint, ¶ 11.

[1277] Chad Joy Complaint, ¶ 11.

Marsh told OPR that he asked PIN Principal Deputy Chief Morris whether the prosecutors should notify defense counsel that they were planning to allow Williams to return to Alaska, and that Morris indicated that she did not think that there was any obligation to do so.[1278] Morris told OPR that someone (she could not recall who) suggested that defense counsel be contacted, and that she favored the idea, but it was understood that it was up to Williams to make that decision.[1279] Morris did not recall Marsh suggesting that one of the prosecutors contact defense counsel.[1280]

AUSA Bottini told OPR that he did not recall any discussion about informing defense counsel that Williams would return to Alaska.[1281] PIN Chief Welch said he did not know why defense counsel was not contacted prior to Williams's departure, but thought the reason was that:

> Williams had already indicated that he didn't want to talk to [defense counsel], number one. Number two, the medical issues were sort of fairly paramount and to the extent they hadn't even returned his calls, by this point in time, you know, we didn't want to keep him around here another day or two, three days with his primary physician calling and saying, "Look. He's missing appointments, missing tests."[1282]

With respect to informing the court, Marsh told OPR that SA Joy asked him whether the government was required to notify the court before sending Williams back to Alaska.[1283] Marsh was unaware of any rule, but he asked PIN Principal Deputy Chief Morris whether any local rule required judicial notification.[1284] According to Marsh, Morris said that she was unaware of any such rule.[1285]

[1278] Marsh OPR Tr. Mar. 25, 2010 at 134-135.

[1279] Morris OPR Tr. Mar. 19, 2010 at 337-339.

[1280] Morris OPR Tr. Mar. 19, 2010 at 337-339.

[1281] Bottini OPR Tr. Mar. 10, 2010 at 427-428.

[1282] Welch OPR Tr. Mar. 3, 2010 at 350-351.

[1283] Marsh OPR Tr. Mar. 25, 2010 at 133-134.

[1284] Marsh OPR Tr. Mar. 25, 2010 at 134-135.

[1285] Marsh OPR Tr. Mar. 25, 2010 at 134-135.

PIN Principal Deputy Chief Morris recalled some discussion of this question:

> We briefly discussed whether we were obligated to inform the Court. We came to the consensus that there was ample time available to give Mr. Williams time to go home, receive medical attention, and return to Washington, D.C. as a witness for the government or the defense.[1286]

In her OPR interview, however, Morris recalled that on a previous occasion in the case (she could not recall when) Judge Sullivan became upset when he was not contacted regarding some issue or decision. Because of that experience, Morris maintained that she and SA Joy favored contacting the court regarding Williams's health issues, even though she recognized that no rule or local practice required it.[1287]

H. Williams Returns to Alaska and Speaks With Defense Counsel

Rocky Williams flew back to Alaska on September 25, 2008, the day of opening statements in the *Stevens* trial.[1288] There is some evidence that Williams may have tried to contact defense counsel before he left. In an affidavit signed after his return, Williams stated:

> I remember calling the defense firm from my cell phone before I left Washington DC. I remember this because I could not make outgoing calls from the phone in my hotel room, and I used my cell phone instead. I remember talking to someone, but I do not remember the person's name.[1289]

In SA Joy's September 29, 2008 Affidavit, he stated:

[1286] Feb. 21, 2009 Declaration of Brenda Morris, ¶ 25.

[1287] Morris OPR Tr. Mar. 19, 2010 at 333-337.

[1288] Virtually There Itinerary for Robert Williams (reflects Williams's Thursday, Sept. 25, 2008 departure from Dulles International Airport at 2:23pm via Minneapolis, Minnesota, arriving in Anchorage, Alaska at 7:41pm).

[1289] Dec. 24, 2008 Affidavit of Robert Williams, ¶ 8. Williams went on to state: "My cell phone carrier is GCI. I do not know where copies of my phone bills are at this time. I moved from a mobile home to my current residence recently and all my personal possessions are displaced." *Id.*

> Prior to leaving Washington, D.C., Mr. Williams informed me on September 24, 2008, that he had contacted defense counsel by telephone and left a message for them that included his cellular telephone number and the hotel where he was staying. According to Mr. Williams, defense counsel did not return his call.[1290]

Both Joy's and Williams's statements suggest that Williams attempted to contact defense counsel shortly before leaving for Alaska, but the calls he referred to could be the ones he made earlier in the week, prior to the decision to allow him to return to Alaska. The defense provided a transcript of a voice mail message left by Williams at 6:13 pm (Eastern Standard Time) on September 26, 2008, one day *after* his return to Alaska, which stated:

> I left a message almost a week and a half ago with your answer service and never heard back from you. This is Robert [B.] Williams. I have a subpoena here that show me, on October 6 showing up for the United States v. Ted Stevens. I was in Washington at that time. Called in by the prosecution when I left the message and was gonna get back with you but you never got back with me. They sent me back to Anchorage to finish up my medical testing. The best way to get a hold of me is on my cell phone at [] and its got voice message and everything else. If you do try to contact me and I don't get back with you within 24 hours, please try again because the phone system up here at ACS is not always the most reliable. Thank you sir. I'll be waiting to hear from you.[1291]

Williams's voice mail message indicated that he had tried to contact defense counsel several days after he arrived in Washington, approximately a week or a week and a half prior to his departure. The call referenced by Joy and Williams in their Declarations probably refers to this earlier attempt. Thus, it appears that Williams did not notify defense counsel regarding his return to Alaska until *after* he was back in Alaska.

At the time Williams called the defense from Alaska, there were still ten days remaining before the defense subpoena required his presence in Washington, D.C.

[1290] Sept. 29, 2008 Affidavit of Chad Joy, ¶ 9.

[1291] Sept. 26, 2008 6:13pm Transcript of voice mail message left by Robert Williams at defense counsel offices.

I. The Motion to Dismiss the Indictment or for a Mistrial

On September 26, 2008, the same day Williams called the defense from Alaska, the government presented VECO Corporation bookkeeper Cheryl Boomershine as a witness.[1292] The centerpiece of Boomershine's testimony was the introduction of Exhibit 177, a two page spreadsheet she prepared that purported to show the costs incurred by VECO Corporation in connection with the Girdwood renovations from October 2000 through April 2001.[1293] The spreadsheet, which incorporated hourly wages for Rocky Williams and Dave Anderson, totaled $188,928.82.[1294] In its opening statement, the government referred to "$188,000" to set forth the value of unreported goods and services Senator Stevens received from Bill Allen and VECO during this time frame.[1295] Other exhibits introduced by the government through Boomershine indicated that Williams worked full time, plus overtime, on the Girdwood project during this period.[1296]

On Sunday afternoon, September 28, 2008, defense counsel contacted Williams and interviewed him by telephone. A defense attorney who participated in the interview subsequently prepared a Declaration summarizing the information Williams provided. According to the Declaration, Williams said he did not work at the Girdwood site full time.[1297]

Shortly after the interview, defense counsel emailed the prosecution team a request, "in conjunction with an emergency motion" the defense was then preparing, that the government provide copies of Williams's grand jury testimony and FBI 302 reports of interviews.[1298] PIN Principal Deputy Chief Morris tried unsuccessfully to reach opposing counsel by telephone to ascertain the subject of the motion.[1299] PIN attorney Marsh followed up shortly thereafter with an email:

[1292] *United States v. Stevens*, Tr. Sept. 26, 2008 (pm) at 6.

[1293] *United States v. Stevens*, Tr. Sept. 26, 2008 (pm) at 17-21.

[1294] *United States v. Stevens*, Government Exhibit 177.

[1295] *United States v. Stevens*, Tr. Sept. 25, 2008 (am) at 42.

[1296] *United States v. Stevens*, Government Exhibit 177.

[1297] Sept 28, 2008 Declaration of defense counsel, ¶¶ 4 and 5.

[1298] Sept. 28, 2008 4:19pm email from defense counsel to PIN Principal Deputy Chief Morris, PIN attorney Marsh, PIN attorney Sullivan, AUSA Bottini, and AUSA Goeke.

[1299] Sept. 28, 2008 4:59pm email from PIN Principal Deputy Chief Morris to defense counsel, PIN attorney Marsh, PIN attorney Sullivan, AUSA Bottini, and AUSA Goeke.

> Following up on Brenda's message, we are still confused as to what your concerns are, but we would very much appreciate an opportunity to discuss them to see if they can be resolved. To that extent and in the spirit of cooperation, we are willing to provide you with a transcript of Mr. Williams' grand jury testimony for your review. Please call one of us at your earliest convenience to discuss.[1300]

Defense counsel filed a Motion to Dismiss Indictment or for a Mistrial later that night. The motion alleged misconduct by the prosecution team:

> Shortly after indictment, defense counsel contacted Mr. Williams and requested an interview. Mr. Williams declined. But on Friday evening Mr. Williams called defense counsel, and today defense counsel were able to interview him for the first time. In three telephone conversations today, Mr. Williams disclosed highly exculpatory information to defense counsel that apparently has been known to the government for years. Among other things, Mr. Williams informed defense counsel that he spent nowhere near 8 hours per day, 6 7 days per week, on the Girdwood home renovation project in direct contrast to the timesheets that the government has placed in evidence to support its central theory that the unpaid cost of the project to Veco was $188,000. This new information gravely undercuts the government's case as described in its opening statement and as presented by government witnesses to date. Yet the government never disclosed this information to defense counsel pursuant to its unquestionable *Brady* obligations. Worse yet, the government has presented evidence at trial that, in light of the information now disclosed to defense counsel by Mr. Williams, can charitably be described as grossly misleading.[1301]

The defense argued that substantially all the information was available to the government either from personal interviews or from Williams's grand jury

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[1300] Sept. 28, 2008 5:17pm email from PIN attorney Marsh to defense counsel, PIN Principal Deputy Chief Morris, PIN attorney Sullivan, AUSA Bottini, and AUSA Goeke.

[1301] Senator Stevens's Motion to Dismiss Indictment or for a Mistrial at 1 (D.D.C., filed Sept. 28, 2008).

testimony.[1302] The defense argued further that, had the information been available prior to trial, the defense would have used it in opening statement, and in the cross examinations of a number of government witnesses who testified regarding Williams, including Cheryl Boomershine.[1303] The defense then stated:

> [G]overnment counsel sent Mr. Williams back to Alaska, on the first day of trial, apparently in the hope that he would continue his policy of declining to speak to defense counsel and that defense counsel would not have this critical exculpatory information in time to cross examine Bill Allen or otherwise to use the information at trial. It then proceeded to offer the Veco accounting records as evidence in support of its $188,000 theory.[1304]

The following morning, September 29, 2008, PIN Principal Deputy Chief Morris sent an email to the prosecution team alerting them to the motion. Bottini responded: "Rocky has never told us that he did not work anywhere near the hours that VECO clocked for him on the Girdwood project."[1305]

J. The Hearing

The court took up the issue at a sidebar on Monday morning. Morris and Marsh disputed the contention that the government had "spirited" Williams out of town because they did not like what he was going to say. Rather, they explained that the government allowed him to go home because of his serious and rapidly deteriorating medical condition:

> MR. MARSH: We've worked with Mr. Williams for a very long time, since 2006, before he came to Washington,

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[1302] Senator Stevens's Motion to Dismiss Indictment or for a Mistrial at 7 (D.D.C., filed Sept. 28, 2008). According to defense counsel, prior to the day of filing, the only information they received regarding Williams was a "heavily redacted 302" and the September 9, 2008 letter setting forth limited *Brady* information regarding a number of witnesses. *Id.* at 7, n.4.

[1303] Senator Stevens's Motion to Dismiss Indictment or for a Mistrial at 8-9 (D.D.C., filed Sept. 28, 2008).

[1304] Senator Stevens's Motion to Dismiss Indictment or for a Mistrial at 9 (D.D.C., filed Sept. 28, 2008).

[1305] Sept. 29, 2008 7:38am email from AUSA Bottini to PIN Principal Deputy Chief Morris, PIN attorney Marsh, PIN attorney Sullivan, AUSA Goeke, SA Kepner, SA Joy, SA Bateman, and SA Roberts.

> D.C. about a month, three weeks ago. The agents that had been working with him, they gave us fair notice that he was much different. In fact, he was almost unrecognizable. He's a chronic alcoholic, and he's lost about 60, 70 pounds, we estimate. He actually looked to be a much different person. We found out that right around the time of our interviews in Alaska he had to undergo a procedure to have fluid drained off of his stomach because he couldn't breathe. He was having trouble getting around. He had a yellowish tint to his body, and he had lost a ton of weight from his face. We brought him here early because in part we wanted to work with him. We will provide the Court with his grand jury testimony. As the Court will see, he's a very good witness for us. We had him here, we worked with him trying to get his body to stabilize.
>
> * * *
>
> Where we made this determination that we had a bigger problem was when we were debriefing him . . . He got a call from his doctors while in the debriefing and finished up and he told the attorneys, the agent, ["]That was my doctor. I'm two weeks late on my tests. They think there's something wrong with my liver.["]
>
> At that point we thought about it. We took stock of our case. We realized we can proceed with this case without Mr. Williams, and we're generally concerned about his health. What we did was we then sent him back, told him to get his tests. He's under subpoena from Williams & Connolly for October 6th. We told him to make sure he contacted them once he got back in town to let them know he was no longer in D.C.[1306]

After the side bar, the two sides argued the motion. With respect to the argument that the defense was unaware that Williams was working on other projects, Marsh noted that other evidence that was turned over to the defense or received from the defense suggested otherwise. For example, an email from Bob Persons to Senator Stevens on August 23, 2000 stated: "I kind of torment Rocky to keep him concentrating on the chalet rather than all the projects Bill

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[1306] *United States v. Stevens*, Tr. Sept. 29, 2008 (am) (bench conference) at 3-6.

keeps him working on."[1307] Other examples were provided as well.[1308] Finally, with respect to the argument that Williams did not work on the Girdwood project full time, Marsh argued:

> What Mr. Williams told the grand jury is that he worked at least 24 hours a week every week, often times more, is consistent with what he has told us. In fact, I can represent to the [Court] that in debriefings in preparing Mr. Williams for his testimony, when asked to estimate how many hours he spent working on the defendant's project, he said approximately 2000.[1309]
>
> Now, this case your Honor it doesn't matter if this, as Ms. Morris stated in her opening argument, it does not matter if these costs billed to VECO were $188,000 or $295,000 or $85,000. What matters is were they more than $265. And to that extent, your Honor, I also note Mr. Paone's testimony . . . in which Mr. Paone three times references the fact that during the Girdwood renovation Mr. Williams left for a significant period of time to go about with his ailing mother and wasn't around in the project.
>
> We never intentionally hid any aspect of what Mr. Williams did. He was one of the employees that worked on the project. There is no doubt from the records that he did a substantial amount of stuff on it, and to that extent[,] [y]our Honor, we also note that if the suggestion is that the numbers are overinflated, the numbers are also to some degree underinflated when looking at this in the totality. Mr. Detmer testified before this Court he spent, in his testimony, over four hundred hours of work on there. The Court can reference Government's Exhibit 177, the Boomershine spreadsheet. Only twenty hours

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[1307] *United States v. Stevens*, Tr. Sept. 29, 2008 (am) at 5-6.

[1308] *United States v. Stevens*, Tr. Sept. 29, 2008 (am) at 6.

[1309] *United States v. Stevens*, Tr. Sept. 29, 2008 (am) at 7. AUSA Bottini's "Rocky Williams Direct Outline" of September 20, 2008, reflects that Williams said he worked "2K" hours. CRM115153. Bottini cited this as an example of Williams's inability to focus: "[T]here is no way that guy worked 2,000 hours on the house"). Bottini (Schuelke) Tr. Dec. 16, 2009 at 327.

> of Mr. Detmer's worked [hours] showed up on that spreadsheet.[1310]

The court asked whether, for reasons stated at the bench conference earlier that morning, the government no longer planned to call Williams to testify in its case in chief. Marsh responded that the government no longer planned to call Williams.[1311]

The court then asked about defense counsel's argument that, had the defense known about Williams, they would have cross examined Boomershine and other witnesses differently. Marsh argued that the cross examination would not likely have differed, but said the government would be willing to bring Boomershine back for further cross examination if necessary. Marsh also argued that "the precise number of hours that Mr. Williams billed is not in any way near the landscape of the universe that gets into *Brady.*"[1312]

In response, defense counsel argued that:

> The clear implication of Ms. Boomershine's testimony and the accounting records that they put in as reliable business records was that Mr. Williams was there working. As our chart reflects, for example, in the month of December 278 hours, all on the Girdwood residence; November, 281 hours. Every day except for Thanksgiving, and the government's case is that those numbers overwhelm any inference that $160,000 that Senator Stevens paid was a fair price for these renovations. The case that they presented in opening and they presented through all these witness[es] is that there was so much work done there that he could not have missed it, that he must have known that VECO was doing a substantial amount of work. Our defense is that

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[1310] *United States v. Stevens*, Tr. Sept. 29, 2008 (am) at 7-9.

[1311] *United States v. Stevens*, Tr. Sept. 29, 2008 (am) at 9. Marsh's statement that the government no longer planned to call Williams was consistent with his recollection of the prosecution team's decision prior to Williams's departure for Alaska. It was not, however, consistent with Bottini's and Morris's recollections. As discussed earlier, both still believed there was at least a significant likelihood that Williams would be a witness.

[1312] *United States v. Stevens*, Tr. Sept. 29, 2008 (am) at 10-11.

> he paid a fair price, and Mrs. Stevens paid a fair price.[1313]

Defense counsel then argued that Senator Stevens's interest in making his wife happy was also exculpatory.[1314] After briefly considering the possibility of a Rule 15 deposition, defense counsel stated: "We'd like him here as a witness, your Honor, and he was here and he was sent back without us knowing."

> THE COURT: It would be better if government counsel had picked the phone up before they unilaterally decided to put him on [a] plane and send him back to Alaska and tell the man to call you when he gets to Alaska. That doesn't make any sense at all I'm still flab[b]ergasted that was the decision . . . especially given the fact that counsel knows, because we had a conversation a week ago, an off the record conversation with counsel, counsel knows I was available to help anyone out with any problems. He could have been deposed here.
>
> * * *
>
> What gave the government authority to give a subpoenaed witness, who has a federal subpoena in his hand, you can leave the jurisdiction because the United States says you can? What gives the United States authority to do that? Why wasn't I consulted about that before the United Sates made a unilateral decision? Now I'm peeved about that.
>
> MR. MARSH: Your Honor, we're sorry.[1315]

Shortly after the argument it was discovered that Cheryl Boomershine had not yet returned to Alaska, and that she was available to return to the witness stand. Consequently, defense counsel conducted additional cross examination. As expected, Boomershine acknowledged that she incorporated the hours reported by Williams into the VECO spreadsheet, but she did not know whether Williams

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[1313] *United States v. Stevens*, Tr. Sept. 29, 2008 (am) at 12 and 13.

[1314] *United States v. Stevens*, Tr. Sept. 29, 2008 (am) at 13.

[1315] *United States v. Stevens*, Tr. Sept. 29, 2008 (am) at 33-38.

actually was present and working at the Girdwood site during all of the hours that were billed to the project.[1316]

That afternoon, the court revisited the Williams issue. Judge Sullivan restated that he was "disturbed" by the government's decision to send a witness under subpoena back to Alaska without notifying the defense or the court:

> It seems to me that [the] government was under an obligation to at least even if it didn't want to share this information with defense counsel to apprise the Court that there was a problem; there was a problem with a witness . . . .[1317]

The court then asked each side to address the specific issue of sanctions in writing, with the government's response coming first, by 9:00 p.m. that evening, followed by the defendant's reply by 8:00 a.m. the following morning.

K. Additional Briefing

The government filed two memoranda with the court on September 29, 2008: Government's Opposition to Defendant's Motion to Dismiss Indictment or for a Mistrial (Opposition), which addressed the defendant's initial motion, and the Government's Supplemental Brief in Support of its Opposition to Defendant's Motion to Dismiss Indictment or for a Mistrial (Supplement), which addressed the sanctions issue. The defense filed its Reply in Support of Senator Stevens's Motion to Dismiss Indictment or for a Mistrial (Reply Memo) the following day.

The government's Opposition closely tracked the arguments raised by PIN attorney Marsh in his oral argument before the court. The government argued that there had been no *Brady* violation because Williams's grand jury testimony established that he worked many hours at the Girdwood site; the defense had other evidence, *e.g.*, the email from Bob Persons, suggesting that Williams worked on other projects during the same time period that he worked at the Girdwood residence.[1318] The Opposition included affidavits signed by PIN Chief Welch and SA Joy setting forth the chronology of Williams's trial preparation; his deteriorating physical condition; his missed medical appointments; his attempt to contact defense counsel while in Washington, D.C.; and the prosecutors'

[1316] *United States v. Stevens*, Tr. Sept. 29, 2008 (am) at 25.

[1317] *United States v. Stevens*, Tr. Sept. 29, 2008 (pm) at 6.

[1318] Government's Opposition to Defendant's Motion to Dismiss Indictment or for a Mistrial at 5-10 (D.D.C., filed Sept. 29, 2008).

direction to Williams to contact defense counsel "and inform them that he was returning to Alaska."[1319] In addition, PIN Chief Welch's affidavit noted the possibility that Williams would be able to return if needed.[1320] Welch apologized to the court for any delay or inconvenience his decision may have caused.[1321]

The Supplement argued that sanctions were not called for because there was no *Brady* violation; the prosecutors were motivated by a concern for Williams's failing health; they were not aware of any rule requiring court approval prior to sending Williams home; and the perceived harm, if any, had been cured by the court and the parties by recalling Cheryl Boomershine and stipulating that other witnesses were unaware of Williams's hours.[1322] Finally, the government noted that they had tried to contact Williams to determine whether he could return to Washington.[1323] The government stated further that if Williams could not return, it would take steps to make him available for a Rule 15 deposition.[1324]

In its Reply, defense counsel argued that a "stern sanction" was needed.[1325] They argued that the government relied on the $188,000 cost figure offered by Boomershine, even as it "knew, and did not tell the defense, that these accounting records were shockingly inaccurate and misleading," because "Mr. Williams spent nowhere close" to the amount of time set forth in records working on Stevens's Girdwood residence.[1326] The Reply elaborated:

> Instead of disclosing this information, it vouched for the inaccurate records in its opening and in its questioning

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[1319] Sept. 29, 2008 Affidavit of Chad Joy (attached to Opposition Memorandum).

[1320] Sept. 29, 2008 Affidavit of William Welch, ¶ 11 (attached to Opposition Memorandum).

[1321] Sept. 29, 2008 Affidavit of William Welch, ¶ 11 (attached to Opposition Memorandum).

[1322] Government's Supplemental Brief in Support of its Opposition to Defendant's Motion to Dismiss Indictment or for a Mistrial (D.D.C., filed Sept 30, 2008).

[1323] Government's Supplemental Brief in Support of its Opposition to Defendant's Motion to Dismiss Indictment or for a Mistrial at 2 (D.D.C., filed Sept 30, 2008).

[1324] Government's Supplemental Brief in Support of its Opposition to Defendant's Motion to Dismiss Indictment or for a Mistrial at 3 (D.D.C., filed Sept 30, 2008).

[1325] Reply in Support of Senator Stevens's Motion to Dismiss Indictment or for a Mistrial at 2 (D.D.C., filed Sept. 30, 2008).

[1326] Reply in Support of Senator Stevens's Motion to Dismiss Indictment or for a Mistrial at 1 (D.D.C., filed Sept. 30, 2008).

> of Ms. Boomershine and, at the same time, dispatched back to Alaska the critical witness whose testimony would prove that the accounting records were misleading.[1327]

The defense also questioned the government's underlying motives in deciding to send Williams back to Alaska without notifying the defense or the court:

> The true explanation is obvious. At the same time Mr. Williams was traveling back to Anchorage, the government in its opening statement was emphasizing that Veco expended $188,000 in costs on the Girdwood renovations. With Mr. Williams safely back in Alaska, the government the next day put in evidence through Ms. Boomershine the Veco accounting records that falsely suggest that Mr. Williams billed hundreds of hours each month to the renovation project. Mr. Williams could have debunked this evidence, as the government well knew, but it had sent him far away from the Court.[1328]

L. The Government's Efforts to Learn About Williams's Status

On September 30, 2008, SA Joy sent an email to FBI SSA Colton Seale in Alaska imploring Seale to do whatever was necessary to ascertain Williams's status:

> If you don't hear from me by noon my time (8 am your time), please send an agent or two to Rocky's house in Diamond Estates Mobile home park to do a welfare check. We sent him home to meet with his doctors because of his significant deteriorating health. By now, you know the judge was upset he wasn't consulted.
>
> * * *
>
> We need to know:
> 1 is he okay?

[1327] Reply in Support of Senator Stevens's Motion to Dismiss Indictment or for a Mistrial at 1-2 (D.D.C., filed Sept. 30, 2008).

[1328] Reply in Support of Senator Stevens's Motion to Dismiss Indictment or for a Mistrial at 6-7 (D.D.C., filed Sept. 30, 2008).

* * *

> 3 has he met with his doctors (when, how many times, any tests run, any results)
>
> 4 we need to determine if he is healthy enough for him to return to DC (we require a doctor to concur with his ability to travel).[1329]

Minutes later, Joy sent a followup email to Seale:

> After discussing this further, our worst case scenario is Rocky could have passed away so if no one answers, we need the agent to look in all the windows. Please call me with the results. Worst case, we may decide we have to have APD/FBI break in the front door.[1330]

The prosecution team's belief that Williams was extremely ill was confirmed late on the night of September 30, 2008. Marsh forwarded a message he had just received:

> We just heard from Rocky. He had the follow up tests by his doctors in [A]nchorage. Result: Rocky was diagnosed today with advanced cirrhosis, with a liver function of approximately 30%. The fluid buildup from his failing liver was creating the swelling around his stomach, which was causing his problem breathing and decreased cardiac function. He's undergoing an asceitiotomy tomorrow (tapping the stomach to drain the fluid).[1331]

PIN Chief Welch responded with an email to the group that read: "Put it in the record tomorrow and demand an apology from [defense counsel]."[1332] PIN attorney Sullivan replied, "Because of privacy reasons for Rocky, it's our preference to send

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[1329] Sept. 30, 2008, 8:27am email from SA Joy to SSA Seale, SA Kepner, AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, PIN attorney Marsh, and PIN Principal Deputy Chief Morris.

[1330] Sept. 30, 2008 8:57am email from SA Joy to SSA Seale, SA Kepner, AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, PIN attorney Marsh, and PIN Principal Deputy Chief Morris.

[1331] Sept. 30, 2008 10:07pm email from PIN attorney Marsh to PIN Chief Welch, AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, and PIN Principal Deputy Chief Morris.

[1332] Sept. 30, 2008 10:09pm email from PIN Chief Welch to PIN attorney Marsh AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, and PIN Principal Deputy Chief Morris.

an email to the Court (copying [defense counsel]) rather than doing it on the record."[1333]

Sullivan then prepared and sent an email to Judge Sullivan apprising him of Williams's status.[1334] The letter noted Williams's failing liver function, the planned abdominal procedure, and other details. It also noted that the prosecutors were endeavoring to obtain Williams's permission to allow the court to speak to a physician *ex parte*, if necessary.[1335]

On October 4, 2008, SA Joy called Williams to get an update on his health. In an email to the prosecution team, Joy described Williams's situation:

> He saw two doctors last week. They drew blood and gave him a flu shot due to his weakened condition.
>
> . . . . I asked him whether he talked to any of his doctors about his ability/inability to travel. The doctor he saw last did not say so its unknown at this point. . . . He continued to cough during our telephone conversation.[1336]

The defense never asked to have Williams flown to Washington, D.C., nor sought to depose him in Alaska.

[1333] Sept. 30, 2008 10:12pm email from PIN attorney Sullivan to PIN Chief Welch, PIN attorney Marsh, AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, and PIN Principal Deputy Chief Morris.

[1334] Sept. 30, 2008 11:59pm email from PIN attorney Sullivan to Judge Sullivan, defense counsel, PIN Principal Deputy Chief Morris, AUSA Bottini, PIN attorney Marsh, AUSA Goeke, SA Kepner, and SA Joy.

[1335] Sept. 30, 2008 11:59pm email from PIN attorney Sullivan to Judge Sullivan, defense counsel, PIN Principal Deputy Chief Morris, AUSA Bottini, PIN attorney Marsh, AUSA Goeke, SA Kepner, and SA Joy.

[1336] Oct. 4, 2008 6:51pm email from SA Joy to SA Kepner, AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, PIN attorney Marsh, and PIN Principal Deputy Chief Morris.

M. Further Court Proceedings

The court redacted references to the costs associated with Williams's hours from the VECO spreadsheet, struck from the record all time records for Williams, and instructed the jury not to consider that evidence.[1337]

The court then stated that the government intentionally used false evidence:

> We're not talking about faulty recollection or inability to recall, we're talking about the United States using documents that the government knows are false, not true.[1338]

As discussed in detail in Chapter Eight, *infra*, the government completed its case in chief by presenting Dave Anderson, who testified about the work he and other VECO employees performed at Girdwood.

Williams's involvement in the Girdwood project continued to be discussed in the trial testimony of the defense's witnesses. As the prosecution team had predicted in its May 21, 2008 prosecution memorandum, the defense attempted to establish that Catherine Stevens paid the bills on the Girdwood project and that she reasonably believed that VECO's costs were incorporated into the invoices that she and Senator Stevens received from Christensen Builders.[1339] Catherine Stevens testified that Christensen Builders was the general contractor on the project, and that she understood that Williams (and Dave Anderson) were paid on the Girdwood project by Christensen Builders.[1340] She noted that Williams had given her a number of documents related to billing, and that Williams's signature appeared on various bills that were attached to invoices that were prepared by Christensen Builders.[1341]

[1337] *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 88-89.

[1338] *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 57.

[1339] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) at 69-70; Aug. 22, 2008 2:22pm email from PIN attorney Sullivan to AUSA Goeke, AUSA Bottini, PIN attorney Marsh, PIN Principal Deputy Chief Morris, PIN Chief Welch, SA Kepner, SA Joy, lit. support mgr [redacted], and paralegal [redacted].

[1340] *United States v. Stevens*, Tr. Oct. 16, 2008 (am) at 64-66; *United States v. Stevens*, Tr. Oct. 16, 2008 (pm) at 14-15, 44-47.

[1341] *United States v. Stevens*, Tr. Oct. 16, 2008 (am) at 76-80 (introducing Defense Exhibit 341, a note from Rocky Williams to Catherine Stevens with Christensen Builders invoice and bills attached); *United States v. Stevens*, Tr. Oct. 16, 2008 (am) at 73-76 (Defense Exhibit 391,

Senator Stevens also testified, stating that Bill Allen was "clearing all the bills from [Christensen Builders], from Rocky, for everybody":

> The process was that the bills would come in and go to Bill Allen for review; if you will recall, he said he would look them over to be sure that I was not being overcharged, and then he cleared them, and they were sent to Catherine.[1342]

On October 28, 2008, the day after the jury returned guilty verdicts, defense counsel sent Attorney General Mukasey a letter listing various allegations of prosecutorial misconduct.[1343] The first allegation related to the government's introduction of VECO records showing $188,000 in costs for goods and services provided, when the government purportedly knew the records were false, and the court's criticism of government counsel for "secretly sending one of [its] witnesses back to Alaska while he was under subpoena, without informing defense counsel or the court."[1344]

N. The Joy Complaint Raises the Williams Issue

In late November 2008, SA Joy filed a Complaint with the FBI alleging that SA Kepner and attorneys on the prosecution team committed various improprieties in the course of the *Stevens* investigation and trial. The Complaint alleged, among other things, that PIN attorney Marsh "inappropriately created [a] scheme to relocate [a] prosecution witness that was also subpoenaed by [the] defense during trial."[1345] The allegation stated:

> During the trial of Ted Stevens, prosecutors subpoenaed Robert Williams. Williams was brought to Washington D.C. weeks before the trial for multiple trial preparatory

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a handwritten list of invoices provided by Rocky Williams, with the name "Rocky" appearing in text, shown to Catherine Stevens; *United States v. Stevens*, Tr. Oct. 16, 2008 (pm) at 83-85 (on redirect, Defense Exhibit, a 12/27/00 Christensen Builders invoice with bills signed by Rocky Williams attached, shown to Catherine Stevens).

[1342] *United States v. Stevens*, Tr. Oct. 17, 2008 (pm) at 65; *see id.* at 98-99.

[1343] Oct. 28, 2008 letter from defense counsel to Attorney General Michael B. Mukasey.

[1344] Oct. 28, 2008 letter from defense counsel to Attorney General Michael B. Mukasey at 1, 3-5.

[1345] Chad Joy Complaint, ¶ 11.

> sessions. Williams health was very poor. I requested that Williams be the first to testify so he could testify, get home, and continue to receive medical attention as necessary. I did not want him to die while we had him in Washington D.C. After the final preparatory session, which included a mock cross examination, prosecutors decided Williams was not a witness the prosecution wanted to use. Nick Marsh advised he came up with a great plan to send Williams home because he was so "concerned" about Williams' health that it would allow prosecutors to send him back to Alaska, even though Williams was also under a defense subpoena. I advised Nick and others multiple times that they should advise the defense counsel and the judge before executing their plan. I was ignored.[1346]

Joy's allegations came as a surprise to the prosecution team. Among other things, it appeared to them that it was inconsistent with an affidavit that Joy prepared during the trial.[1347] The affidavit had indicated (though it did not directly state) that Williams was allowed to go home because of his deteriorating health, not because of a plan by Marsh to spirit Williams out of the jurisdiction and back to Alaska.[1348] Thus, when the prosecution was preparing a response to a post trial defense motion for an evidentiary hearing relating to Dave Anderson, there was a consensus that Joy could not be used as an affiant because he had lied in his Complaint.[1349]

In the months following the submission of his Complaint, Joy was questioned about his recollection of the details of Marsh's alleged plan. During an interview on February 21, 2009, Joy recalled that Williams was easily led during a mock cross examination conducted by AUSA Goeke during a trial preparation session in September 2008.[1350] Joy recalled that after Goeke's mock

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[1346] Chad Joy Complaint, ¶ 11.

[1347] Sept. 29, 2008 Affidavit of Chad Joy.

[1348] Sept. 29, 2008 Affidavit of Chad Joy, ¶¶ 6, 7.

[1349] Dec. 10, 2008 7:08pm email from PIN attorney Marsh to PIN Chief Welch ("We can talk more about this tomorrow, but there are some strong feelings amongst the guys about using him as an affiant given that we know him to have lied in his Complaint. Joe and Jim are each willing to do an affidavit instead, and prefer to do so rather than use Chad if possible.").

[1350] Feb. 21, 2009 FBI 302 of Chad Joy at 11-12.

cross examination, Goeke reported to Marsh and others that Williams generally did not hold up well on cross examination.[1351]

Joy confirmed his recollection in his interview with OPR on September 16, 2009.[1352] However, Joy had no specific recollection in either interview of any exculpatory facts or other damaging evidence that was uncovered that might have caused the prosecution team to want Williams to leave the jurisdiction.[1353] For example, no one was aware at that time of any inconsistency between Williams's prospective testimony and the VECO records.[1354] On the contrary, Joy stated in his February 2009 interview that he did not recall that Williams provided any inconsistent statements or information during the mock cross examination session that conflicted in a significant way with information he had already provided, or with his prospective testimony at trial.[1355] He had a similar response during his OPR interview:

> OPR: [D]id Williams say anything that was new that could be exculpatory?
>
> JOY: I don't recall new items, but other than the fact that he was following [the path of the leading questions], meaning that we hadn't tried out on him.
>
> On the exculpatory side, I don't know for sure whether he what he said was exculpatory, especially since I can't recall exactly what he agreed or I have to assume it was agreement, not disagreements.[1356]

Joy indicated in his February 2009 interview that "the only problem Williams had participating in the sessions were concerns for his health issues."[1357] But in Joy's OPR interview, he did not recall that Williams's health interfered with his performance during the mock cross examination: "his health or lack thereof

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[1351] Feb. 21, 2009 FBI 302 of Chad Joy at 11-12.

[1352] Joy OPR Tr. Sept. 16, 2009 at 524-529.

[1353] Feb. 21, 2009 FBI 302 of Chad Joy at 11; Joy OPR Tr. Sept. 16, 2009 at 530-548.

[1354] Feb. 21, 2009 FBI 302 of Chad Joy at 8-14.

[1355] Feb. 21, 2009 FBI 302 of Chad Joy at 11-12.

[1356] Joy OPR Tr. Sept. 16, 2009 at 525.

[1357] Feb. 21, 2009 FBI 302 of Chad Joy at 11-12.

was there, but I didn't I never saw his health negatively affect his ability to recall details or answer questions."[1358]

In Joy's February 2009 interview, he recalled that after the mock cross examination, he and AUSA Goeke went to Marsh's office and Goeke told Marsh that Williams had not done well. Joy recalled that at this point Marsh came up with a "plan" to send Williams back to Alaska.[1359] In Joy's OPR interview, he stated that he believed that Marsh had suggested sending Williams back to Alaska for underhanded or devious reasons; however, Joy could not define, describe, or identify any such reason, despite repeated attempts.[1360] When Joy was asked what prompted Marsh to say that Rocky should go back to Alaska, Joy stated:

> My recollection is Goeke essentially briefed Mr. Marsh on what occurred during the mock cross examination, and Nick was the one that said, "I've got a great plan" or a great idea so, he introed [sic] that. I don't remember any flow. It was just Goeke explaining to whatever level that I was there for and then Nick introing [sic] the plan.[1361]

When SA Joy was asked why Marsh wanted to send Williams back to Alaska, Joy stated:

> That's one of the big questions in my mind. I just didn't understand any of that part: the plan, the sending him back because of his health. I recognized the and I was very affirmative for wanting to get him to testify and get him out as fast as possible, but the plan, that didn't make any sense to me.[1362]

Joy acknowledged that he did not think it was inappropriate to allow Williams to return to Alaska without notifying the court or the defense; he was just

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[1358] Joy OPR Tr. Sept. 16, 2009 at 526.

[1359] Feb. 21, 2009 FBI 302 of Chad Joy at 11-12.

[1360] Joy OPR Tr. Sept. 16, 2009 at 530-548.

[1361] Joy OPR Tr. Sept. 16, 2009 at 528.

[1362] Joy OPR Tr. Sept. 16, 2009 at 531.

uncomfortable with "Nick's plan" and made his allegation because "I wanted to put it into play, someone to look into it."[1363]

Joy corroborated Bottini, Goeke, Welch, and Morris in recalling that there were several meetings in which the subject was discussed, that a collective decision to allow Williams to return to Alaska was made, and that Welch ultimately approved it.[1364]

O. Additional Defense Filings

On December 5, 2008, the defense filed a Motion for a New Trial, alleging errors by the court and instances of prosecutorial misconduct. With respect to Williams's return to Alaska, the motion argued:

> In a clear violation of the Due Process Clause, the prosecution team never informed counsel for Senator Stevens of the fundamental unreliability of the government's evidence. On the contrary, the government took affirmative steps to conceal this information by denying the defense access to Mr. Williams and Mr. Anderson. Mr. Williams, while under a defense subpoena, was in Washington D.C. for the two weeks prior to trial, but the government sent him back to Alaska on the day of opening statements the same day the lead prosecutor emphasized to the jury the importance of the VECO accounting records and the $188,000 figure. While government counsel claim they sent Mr. Williams 3,300 miles home to receive medical attention (which apparently was unavailable in our Nation's Capital), the prosecutors instructed Mr. Williams to call defense counsel to discuss his obligations under the defense subpoena only after he got back to Alaska.[1365]

While the defendant's Motion for a New Trial was pending, the defense also filed a Motion to Dismiss the Indictment; or, in the Alternative, Motion for a New

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[1363] Joy OPR Tr. Sept. 16, 2009 at 536.

[1364] Feb. 21, 2009 FBI 302 of Chad Joy at 11-13.

[1365] Senator Stevens's Motion for a New Trial at 31-32 (D.D.C., filed Dec. 5, 2008).

Trial, Discovery, and an Evidentiary Hearing.[1366] This motion was based almost entirely on allegations contained in SA Joy's Complaint. The defense emphasized Joy's allegation that Marsh had a "scheme" or "plan" to send Rocky Williams back to Alaska:

> Williams had exculpatory information in his possession that had not been disclosed. See Dkt. 103 at 1, 5 8, Ex. C. When the defense complained, the government claimed that there was no *Brady* related evidence suppressed by the government, and at no time did the government intend to engage in any type of deception." See Dkt. 106 at 1. The government maintained that its decision to send Williams back to Alaska without first notifying the defense or the Court was "made in good faith." *Id.* We now know from the whistleblower that these representations were false.[1367]

In response to the various allegations, the prosecution team tried to obtain an affidavit from Williams regarding his trial preparation and the decision to allow him to go home. In a December 15, 2008 email to the prosecution team, Marsh stated that he had a "list of some other things that we need to get FBI to do ASAP," including re interviewing Williams.[1368]

On December 22, 2008, Rocky Williams was interviewed by FBI SSA Lisa LoCascio and SA Leroy Dempsey at his home. Williams stated that he had an inoperative liver and failing kidneys.[1369] According to the FBI 302, Williams stated:

> FBI SA Chad Joy first asked him if he wanted to go to the hospital in Washington, DC. Williams declined and stated his doctors were all in Alaska that knew his medical case and he would like to go back home to

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[1366] Senator Stevens's Motion to Dismiss the Indictment; or, in the Alternative, Motion for a New Trial, Discovery, and an Evidentiary Hearing (D.D.C., filed Dec. 22, 2008). The defense re-filed substantially the same motion again on January 26, 2009. Senator Stevens's Motion to Dismiss the Indictment; or, in the Alternative, Motion for a New Trial, Discovery, and an Evidentiary Hearing (D.D.C., filed Jan. 26, 2009).

[1367] Senator Stevens's Motion to Dismiss the Indictment; or, in the Alternative, Motion for a New Trial, Discovery, and an Evidentiary Hearing at 7 (D.D.C., filed Dec. 22, 2008).

[1368] Dec. 15, 2008 10:36am email from PIN attorney Marsh to PIN Chief Welch, PIN Principal Deputy Chief Morris, PIN attorney Sullivan, AUSA Bottini, AUSA Goeke.

[1369] Dec. 22, 2008 FBI 302 of Rocky Williams at 1.

> Alaska because he "could not breathe." Upon arriving in Alaska, Williams went to the hospital where fluid was drained from his abdomen.[1370]

When Williams was asked whether he contacted defense counsel before or after he left Washington, D.C., Williams stated that "he could not remember if he called the defense firm from his cell phone before he left Washington, DC, or called when he arrived home in Anchorage."[1371] He added that, because he recently moved out of his mobile home, he did not know where copies of his phone bills were located.[1372]

At PIN Principal Deputy Chief Morris's request, the agents prepared an affidavit for Williams to sign based on information he provided in his interview.[1373] On December 24, 2009, Williams signed the affidavit. Generally, Williams's affidavit was consistent with the FBI 302 cited above. However, there was one difference. In Williams's interview, he stated that he did not recall whether he tried to contact defense counsel before or after he left Washington, D.C., for Alaska.[1374] In his affidavit, he stated that he recalled that he tried to contact defense counsel *before* he left Washington, D.C.:

> I remember calling the defense firm from my cell phone before I left Washington, DC. I remember this because I could not make outgoing calls from the phone in my hotel room, and I used my cell phone instead. I remember talking to someone, but I do not remember the person's name. My cell phone carrier is GCI. I do not know where copies of my phone bills are at this time. I moved from a mobile home to my current residence recently and all my personal possessions were displaced.[1375]

[1370] Dec. 22, 2008 FBI 302 of Rocky Williams at 2.

[1371] Dec. 22, 2008 FBI 302 of Rocky Williams at 2.

[1372] Dec. 22, 2008 FBI 302 of Rocky Williams at 2.

[1373] Dec. 23, 2008 1:01pm email from PIN Principal Deputy Chief Morris to PIN attorney Sullivan, AUSA Bottini, and Marc Levin.

[1374] Dec. 22, 2008 FBI 302 of Rocky Williams at 2.

[1375] Dec. 24, 2008 Affidavit of Rocky Williams, ¶ 8.

In a series of emails in January, 2009, SA Loader explained to PIN attorney Levin that after Williams's December 2008 interview, Williams recalled that he tried to call defense counsel before he left Washington for Alaska, and that Loader edited Williams's draft affidavit accordingly.[1376] In SA Loader's email to Levin, he stated: "Here is the final version. [Williams] did remember making the call to the defense firm prior to leaving his hotel in DC. That is the only substantive change from the draft you reviewed previously."[1377] Levin replied, "[Thanks]. Did he remember that after his initial interview and the 302 was drafted?"[1378] Loader replied, "Yes. He remembered after thinking back through the chain of events because he could not make a long distance call from his hotel room because of how the room was being billed. So he made the call on his cell from the room."[1379]

As discussed above, this version of events is inconsistent with the text of the voice mail message that Williams left with defense counsel on September 26, 2008, the day after Williams returned from Alaska. Williams explained in his voice mail message that he had called defense counsel earlier and had not heard back from them, and that he *had returned* to Alaska to receive medical care.[1380] It appears from that message that Williams left it *after* he had returned to Alaska, not before, and he appeared to be informing defense counsel for the first time of his return, which suggests that he did not try to contact them immediately prior to his departure. It is possible that the recollection Williams was describing was the earlier attempt to contact defense counsel after arriving in Washington, D.C., and not his final attempt to contact them and inform them that he was returning or had returned to Alaska.

Rocky Williams died on December 30, 2008.

In February, 2009, Welch, Morris, Marsh, Sullivan, Bottini, Goeke, and Kepner all completed interviews and/or affidavits that addressed the issues raised

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[1376] Jan. 2, 2009 10:34am email from SA Loader to PIN attorney Levin.

[1377] Jan. 2, 2009 10:34am email from SA Loader to PIN attorney Levin.

[1378] Jan. 2, 2009 11:43am email from PIN attorney Levin to SA Loader.

[1379] Jan. 2, 2009 1:46pm email from SA Loader to PIN attorney Levin.

[1380] Sept. 26, 2008 6:13pm transcript of voice mail message left by Rocky Williams on defense counsel answering service.

in Joy's Complaint. All strongly disagreed with Joy's characterization of the decision to send Williams home as a "plan" or "scheme" put together by Marsh.[1381]

In more recent interviews, a question was raised whether the prosecutors sent Williams back to Alaska because they were afraid that on direct or cross examination he might disclose the potentially exculpatory information that he provided during his August 2008 trial preparation sessions: that Senator Stevens wanted to pay for the Girdwood project; that Williams reviewed Christensen Builders bills for accuracy; and that Williams thought that his and Dave Anderson's hours would be added to the Christensen Builders invoices forwarded to Stevens by Bill Allen. Everyone denied that Williams's statements played any role in the decision. PIN Chief Welch, who made the ultimate decision to allow Williams to return home for health reasons, was unaware of Williams's statements in the August 2008 trial preparation sessions.[1382] PIN Principal Deputy Chief Morris likewise did not know the substance of Williams's August 2008 statements.[1383] Marsh also maintained that he was unaware of Williams's statements in the August trial preparation sessions, or any discussion of substantive problems with Williams's prospective testimony.[1384] Bottini said that his motivation for allowing Williams to return was Williams's deteriorating health, not a desire to get him out of town so that he could not testify regarding his assumptions about how his hours would be billed.[1385] PIN attorney Sullivan said he was not aware of any exculpatory statements made by Williams, and that to his knowledge Williams's statements played no part in the decision to allow Williams

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[1381] Feb. 20, 2009 Declaration of Joseph Bottini, ¶¶ 22-35; Feb. 24, 2009 FBI 302 of Joseph Bottini at 6-11; Feb. 23, 2009 Declaration of James Goeke, ¶¶ 3-13; Feb. 24, 2009 FBI 302 of James Goeke at 7-10; Feb. 20, 2009 Declaration of Mary Beth Kepner, ¶ 21; Feb. 25, 2009 FBI 302 of Mary Beth Kepner at 21-22; Feb. 24, 2009 Declaration of Nicholas Marsh, ¶¶ 22- 27; Feb. 23, 2009 FBI 302 of Nicholas Marsh at 5-8; Mar. 18-19, 2009 FBI 302 of Nicholas Marsh at 3, 5; Feb. 21, 2009 Declaration of Brenda Morris, ¶¶ 21-31; Feb. 26, 2009 FBI 302 of Brenda Morris at 5-7; Feb. 24, 2009 Declaration of Edward Sullivan, ¶¶ 2-8; Feb. 26, 2009 FBI 302 of William Welch at 4-6.

[1382] Welch (Schuelke) Tr. Jan. 13, 2010 at 137-144; Welch OPR Tr. Mar. 2, 2010 at 355 (the only negative issue regarding Williams that Welch was aware of was Williams's drinking).

[1383] Morris (Schuelke) Tr. Jan. 15, 2010 at 24-28, 68.

[1384] Marsh OPR Tr. Mar. 25, 21010 at 127-129; Marsh (Schuelke) Tr. Feb. 10, 2010 at 303-308.

[1385] Bottini (Schuelke) Tr. Dec. 16, 2009 at 307-308, Bottini OPR Tr. Mar. 10, 2010 at 413-423.

to return home.[1386] Finally, AUSA Goeke has maintained that Williams's assumptions regarding his hours played no part in the discussions that led to Williams's return to Alaska.[1387]

III. ANALYSIS

The government's decision to allow Rocky Williams to return to Alaska was based on a genuine concern for Williams's failing health, and a deference to Williams's desire to be treated by his own physicians. The evidence demonstrated that Williams was seriously ill, and that the prosecution team harbored no malign motive in allowing him to return to Alaska for treatment. Unfortunately, the government's conduct attracted a sinister light because of several factors. First, the government did not inform the court or the defense prior to Williams's return to Alaska. Second, the government failed to disclose to the defense information Williams had provided that undercut the prosecution case and bolstered the defense theories. Third, the prosecution team made representations that were contradicted by the non disclosed information. As a result, the decision to allow Williams to return home for medical treatment supported credible inferences that he had been sent home to keep the non disclosed information hidden.

A. The Decision to Allow Williams to Return to Alaska

1. The Decision Did Not Violate Any Ethical or Legal Obligation

Both the prosecution and the defense served Rocky Williams with trial subpoenas pursuant to Federal Rule of Criminal Procedure 17. Rule 17(a) provides that a court clerk must issue blank subpoenas, "signed and sealed," to the party that requests it, and that the party "must fill in the blanks before the subpoena is served." That is what happened in this case. The government's subpoena required that Williams be present at the start of trial, on September 24, 2008; the defense subpoena required that Williams appear in court as a witness on October 6, 2008. Rule 17(g) provides that the court may hold in contempt a witness who, "without adequate excuse, disobeys a subpoena."

The operative language of the government's and the defense's subpoenas to Williams was the same: "YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below" to testify in the *Stevens*

[1386] Sullivan (Schuelke) Tr. Jan. 6, 2010 at 397-408; Sullivan OPR Tr. Mar. 12, 2010 at 529-531 (Sullivan, who always considered Williams to be a strong witness, learned after the fact that he was sent home for health reasons).

[1387] Goeke (Schuelke) Tr. Jan. 8, 2010 at 142-145.

trial.[1388] The government subpoena (though not the defense subpoena) provided further: "This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court." This language suggests that, once served, a subpoenaed witness must appear in court at the appointed date and time and remain present at the courthouse until the court or a court officer grants permission for the witness to leave. In practice, however, the attorneys representing the party that served the subpoena who historically have been considered "officers of the court" determine, without court consultation or approval, whether and when the witness must appear in court to testify. The attorneys have this general authority because they have discretion to determine which witnesses they will call in their case in chief and the order in which those witnesses will be called. Federal courts throughout the country routinely entrust prosecutors and defense attorneys with the responsibility for determining which witnesses are required to appear at the courthouse during each day of trial, and for ensuring that they are present.

The attorneys for each party maintain contact with the witnesses they serve with subpoenas, informing them as to the precise date and time when they need to appear. These dates and times often vary from the dates and times that appear on the subpoenas, as trial schedules are subject to change. Witnesses generally are not required or expected to appear or remain at the courthouse on days when the attorneys know that they will not be called to testify. Moreover, if attorneys representing the party that served the subpoena decide, before or after the start of trial, that a witness's testimony will not be needed, they routinely inform the witness that he or she no longer is required to appear at the courthouse. The attorneys make these decisions without notifying the court or obtaining the court's approval.

In the present case, the prosecution team made arrangements to bring Williams to Washington, D.C., and to pay for his air fare, hotel, and other travel expenses. Williams arrived on September 15, 2008, nine days before the date set by the government's subpoena, and participated in several trial preparation sessions. Williams's failing health led the prosecution team to allow him to return to Alaska to receive medical care from his own physicians. AUSA Bottini and SA Joy both told Williams that he remained subject to the government's subpoena, and that he might still be called as a witness later in the government's case.[1389]

[1388] *United States v. Stevens,* Subpoena issued to Rocky Williams (Aug. 7, 2008); *United States v. Stevens,* Subpoena issued to Robert Williams (Sept. 4, 2008).

[1389] Bottini OPR Tr. Mar. 10, 2010 at 418 ("What I had told Williams was you are still under subpoena, we are going to move you towards the back of the government's witness order."); Feb. 20, 2009 Declaration of Joseph Bottini, ¶ 33. Feb. 23, 2009 Declaration of James Goeke, ¶ 11; Feb 24, 2009 Declaration of Nicholas Marsh, ¶¶ 18-20; *see* Feb. 20, 2009 Declaration of Joseph

The government had no obligation to inform the court if it decided not to present Williams at all; the parties, not the court, generally control what witnesses are presented.[1390] Furthermore, the government had no obligation to inform the court of a decision to change the order in which it will present its witnesses.

Williams traveled back to Alaska on September 25, 2008, eleven days before the defense subpoena required his presence at court. Because the government's subpoena was already in effect, the prosecution team had the authority to insist that Williams remain in Washington; if he chose to depart anyway, he could have been subject to a contempt finding under Rule 17(g). But the prosecution team also had the discretion to allow Rocky Williams to return to Alaska for medical treatment rather than present him as a government witness.

PIN Chief Welch stated later in an affidavit that, at the time the prosecution allowed Williams to return to Alaska, the team estimated that the government's case in chief would take approximately three weeks. Thus, if Williams had to return to testify for the defense, he would not have been needed until the week of October 12, 2008.[1391] In fact, the defense began presenting witnesses on the afternoon of October 9, 2008. Thus, the defense could not have called Williams as a witness before October 9, 2008.

The prosecution team also had no ethical or legal obligation to notify defense counsel that Williams would return to Alaska.[1392] In this regard, we note that the prosecution team was aware that Williams had contacted defense counsel after his arrival from Alaska, and defense counsel had not returned his call. Further, the defense had no legal authority to compel Williams's presence in Washington, D.C., prior to October 6, the date the defense subpoena became effective. Thus, the defense claim that Williams had been in Washington, D.C. "while under a defense subpoena" was rhetorical rather than legal.[1393] Prior to

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Bottini, ¶¶ 29 and 30; Feb. 26, 2009 FBI 302 of Brenda Morris at 6.

[1390] We note that the government subpoenaed Bambi Tyree in the event it needed her testimony, but elected not to present her.

[1391] Sept. 29, 2008 Affidavit of William Welch, ¶ 8.

[1392] The court appeared to recognize that, noting that it "would have been better if government counsel had picked up the phone" to advise the court and the defense before Williams returned to Alaska. *United States v. Stevens*, Tr. Sept. 29, 2008 (am) at 33-34.

[1393] Oct. 28, 2008 letter from defense counsel to Attorney General Michael B. Mukasey at 4.

October 6, 2008, Williams was under no obligation to appear in court at the behest of the defense, to contact them, or even to speak to them.[1394]

Williams's physical condition and the long flight from Anchorage raised the possibility that it might be difficult or even impossible for Williams to return to Washington, D.C., to comply with the defense subpoena. Although we found no evidence that anyone on the prosecution team believed that Williams would not be able to return (indeed, the team was still considering putting him on in its case in chief), the better practice would have been to alert the court and the defense before Williams's departure that Williams was seriously ill. This would have enabled the defense to make an informed decision whether to seek a Rule 15 deposition in anticipation that Williams's health might continue to deteriorate.

2. The Decision Was Based on Concerns for Williams's Health

Defense counsel argued in their October 28, 2008 letter to the Attorney General that by allowing Williams to return to Alaska, "the government took affirmative steps to conceal [exculpatory] information" Williams could provide by "denying the defense access" to him.[1395] Based on the results of our investigation, we concluded that the evidence did not support this allegation.

The evidence demonstrated that the decision to allow Williams to return to Alaska was based on the prosecution team's genuine concern about his failing health. Williams was gravely ill and, as documented contemporaneously, he was visibly deteriorating. On August 7, 2008, when Williams had not yet traveled to Washington, D.C., AUSA Bottini informed his colleagues that, according to SA Kepner, who had just served him with a trial subpoena, Williams "did not look good yellow complexion and appeared bloated."[1396] A week later, Bottini met with Williams and confirmed that Williams "does appear gaunt and does have a

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[1394] We note that, although the defense told the court "We'd like him here as a witness" (*United States v. Stevens*, Tr. Sept. 29, 2008 (am) at 22), the defense took no steps to ascertain whether Williams was healthy enough to return to Washington, D.C., to arrange for his return, to request the court to order the U.S. Marshals Service to retrieve him, or even to request that he be held in contempt under Rule 17(g).

[1395] Oct. 28, 2008 letter from defense counsel to Attorney General Michael B. Mukasey at 4.

[1396] Aug. 7, 2008 8:47pm email from AUSA Bottini to PIN Chief Welch, PIN Principal Deputy Chief Morris, AUSA Goeke, and PIN attorney Marsh.

sallow/yellowish complexion and appears generally less healthy."[1397] Likewise, after the August 31, 2008 trial preparation session, Goeke noted that Williams was "not looking good healthwise worse than last week."[1398]

While still in Alaska, Williams advised Bottini, Goeke, and SA Joy that his doctors had diagnosed a liver impairment, which caused fluid build up in his abdomen that made it difficult to breathe. In addition, Williams advised them that it had been necessary for doctors to drain fluid from his abdomen to help him breathe.[1399] Bottini and Goeke each noticed that Williams had a yellowish complexion, a distended abdomen and had difficulty breathing, and Joy recalled that they advised Williams to consult a doctor to see if he was healthy enough to travel to Washington, D.C.[1400] Accordingly, Williams could "only withstand short [trial preparation] sessions."[1401]

When Williams arrived in Washington, D.C., SA Joy noticed that "it was apparent . . . Mr. Williams' health had deteriorated considerably."[1402] Joy noticed that Williams was "jaundiced," "gaunt," "had chronic coughing spells," and "was frequently short of breath."[1403] Bottini, Goeke, Marsh, and Welch made similar observations.[1404] It is also amply documented that the prosecution team was concerned that, at the same time Williams was visibly worsening, he was missing

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[1397] Aug. 15, 2008 8:54pm email from AUSA Bottini to PIN Principal Deputy Chief Morris, PIN attorney Marsh, AUSA Goeke, PIN attorney Sullivan, SA Kepner, SA Joy, and paralegal [redacted]

[1398] Aug. 31, 2008, 3:43pm email from AUSA Goeke to PIN attorney Marsh and PIN attorney Sullivan.

[1399] *See* Feb. 24, 2009 FBI 302 of Joseph Bottini at 7; Feb. 23, 2009 Declaration of James Goeke, ¶ 6.

[1400] *See* Feb. 24, 2009 FBI 302 of Joseph Bottini at 7; Feb. 23, 2009 Declaration of James Goeke at ¶ 6; Sept. 29, 2008 Affidavit of Chad Joy, ¶ 5.

[1401] Feb. 24, 2009 FBI 302 of Joseph Bottini at 7.

[1402] Sept. 29, 2008 Affidavit of Chad Joy, ¶ 6.

[1403] Sept. 29, 2008 Affidavit of Chad Joy, ¶ 6.

[1404] Feb. 20, 2009 Declaration of Joseph Bottini, ¶ 26; Feb. 23, 2009 Declaration of James Goeke, ¶ 8; Feb. 24, 2009 Declaration of Nicholas Marsh, ¶ 4; Sept. 29, 2008 Affidavit of William Welch, ¶ 6.

appointments with his doctors.[1405] In addition, Williams himself wanted to return to Alaska so he could be treated by his own physicians, who were familiar with his case.

The prosecution team also noticed that Williams's physical ailments made it difficult for him to focus, and this had affected both his mock direct examination and his mock cross examination. They still believed, however, that Williams would be a good witness for the prosecution. Accordingly, even after deciding to allow Williams to return to Alaska for medical treatment, they hoped he would be able to return to testify later in the government's case in chief.[1406]

Ultimately, the decision whether to allow Williams to return to Alaska rested with PIN Chief Welch. Welch, finding the medical issues "paramount," decided to allow Williams to return.[1407]

We found no evidence to support SA Joy's later allegation that Williams's return to Alaska was the fruit of some "scheme" concocted by PIN attorney Marsh. Joy himself could not articulate why the prosecution team would have wanted to send Williams away; as detailed below, neither Joy nor the prosecutors had recognized the exculpatory nature of information that Williams had provided in his trial preparation sessions. Nor, as discussed in Chapter Seven, *infra*, had they noticed the conflict between Williams's statements that he worked part time at Girdwood, and the VECO records that reflected full time plus substantial overtime. To the contrary, the prosecution team believed that Williams was a valuable witness for the prosecution, and had no motive to conceal him from the defense. And SA Joy himself attested to the health related reasons for Williams's return in his September 29, 2008 affidavit. We also note that PIN Chief Welch, who made the final decision, did not know about any of the exculpatory information Williams had provided.

Finally, we found that allowing Williams to return to Alaska was not an attempt to deny the defense access to him. The prosecution team always advised Williams that he could speak with the defense if he wanted to, and Williams had always responded that he did not wish to. Furthermore, the prosecutors did not believe the defense would call Williams because, the prosecutors thought, his

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[1405] *See, e.g.*, Feb. 21, 2009 FBI 302 of Chad Joy at 12-13; Feb. 26, 2009 FBI 302 of Brenda Morris at 6; Feb. 20, 2009 Declaration of Joseph Bottini, ¶ 27; Feb. 23, 2009 Declaration of James Goeke, ¶ 10.

[1406] Feb. 20, 2009 Declaration of Joseph Bottini, ¶ 30; Feb. 23, 2009 Declaration of James Goeke, ¶ 9; Feb. 23, 2009 FBI 302 of Nicholas Marsh at 7.

[1407] Welch OPR Tr. Mar. 3, 2010 at 350-351.

testimony would inculpate rather than exculpate Senator Stevens.[1408] And the team knew that defense counsel had not responded to Williams's notification that he was in Washington, D.C. The prosecution team reminded Williams of the defense subpoena for October 6, 2008, and directed him to inform the defense that he had returned to Alaska. Williams did so, ten days before the effective date of the defense subpoena, and the defense was able to interview him by telephone. Thus, the evidence does not indicate that the prosecution team was trying to hide Williams from the defense. Nevertheless, we noted above that, given Williams's declining health, and the real possibility that he would be too ill to come back to Washington, D.C., it would have been the better practice to alert the defense that Williams was returning to Alaska.

B. The Prosecution Violated its Disclosure Obligations

Based on the results of our investigation, we concluded that the prosecution team's failure to disclose to the defense Williams's information that Senator Stevens said he wanted to pay for all the Girdwood renovations, and that Williams reviewed the Christensen Builders invoices and provided them to Bill Allen (or a VECO employee) with the assumption that his hours, Dave Anderson's hours, and possibly all of VECO's costs, would be added to the Christensen Builders bills, violated the government's obligations under constitutional *Brady* principles and Department of Justice policy (USAM § 9 5.001).

The prosecution memorandum predicted the defense argument that Senator Stevens thought he had paid for all of the work at Girdwood because he paid the Christensen Builders invoices.[1409] In fact, the prosecution memorandum specifically anticipated the argument that Stevens reasonably "believed that VECO's costs were being incorporated" into the Christensen Builders bills.[1410] The prosecution team also realized that Catherine Stevens would "likely testify that Rocky told her the VECO costs were rolled into the large Christensen bills."[1411] PIN attorney Sullivan reiterated this prediction in an email to the entire prosecution team, four weeks before trial, after reviewing documents produced by

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[1408] *See, e.g.*, Marsh OPR Tr. Mar. 25, 2010 at 140-141.

[1409] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001). at 69-70.

[1410] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001). at 69-70.

[1411] Aug. 22, 2008 2:22pm email from PIN attorney Sullivan to AUSA Goeke, AUSA Bottini, PIN attorney Marsh, PIN Principal Deputy Chief Morris, PIN Chief Welch, SA Kepner, SA Joy, lit. support mgr. [redacted], and paralegal [redacted]

the defense. Furthermore, each member of the prosecution team understood this to be a principal defense theory.[1412]

Williams told the government in his 2006 interviews and in his August 20, 2008 trial preparation session that Senator Stevens wanted to make sure that he paid for the renovations, and therefore wanted to have a contractor he could pay.[1413] Williams also said in his August 20, 22, 31, and September 20, 2008 trial preparation sessions that he understood that his and Dave Anderson's time would be added to the Christensen Builders invoices sent to the Senator.[1414] Indeed, both Bottini's and Goeke's notes from the August 22, 2008 session can be read to suggest that Williams said Bill Allen would add *all* VECO costs not just Williams's and Anderson's hours to the Christensen Builders invoices.[1415]

The information Williams provided was favorable to the defense because it directly corroborated a principal defense theory. As AUSA Bottini acknowledged, Williams's belief that his and Dave Anderson's hours would be added to the Christensen Builders invoices was "inconsistent with the government's theory" and "consistent with the defense theory."[1416] Bottini acknowledged further that Williams's belief that his and Anderson's hours would be added to the Christensen Builders invoices "could be" *Brady* material that undercut the government's proof

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[1412] *See* Bottini (Schuelke) Tr. Dec. 16, 2009 at 150; Marsh (Schuelke) Tr. Feb. 2, 2010 at 98; Sullivan (Schuelke) Tr. Jan. 6, 2010 at 404-405; Welch (Schuelke) Tr. Jan. 13, 2010 at 37-38; Morris (Schuelke) Tr. Jan. 15, 2010 at 66-67; Goeke (Schuelke) Tr. Jan. 8, 2010 at 83-86.

[1413] Sept. 14, 2006 FBI 302 of Rocky Williams at 1; Sept. 28, 2006 FBI 302 of Rocky Williams at 1; Aug. 20, 2008 handwritten notes by Joseph Bottini of trial preparation session with Rocky Williams CRM057294-CRM057296.

[1414] Aug. 20, 2008 handwritten notes by James Goeke of Rocky Williams trial preparation session CRM089067 ("supposed to have RW's time and Dave's time applied to the billing"); Aug. 22, 2008 handwritten notes by Joseph Bottini of Rocky Williams trial preparation session CRM057314-CRM057315 ("Left [Christensen Builders invoices] with Bill – for him to add my time + Dave's time"); Aug. 22, 2008 handwritten notes by James Goeke of Rocky Williams trial preparation session CRM057193-CRM057194 ("Left with Bill to add whatever VECO time etc. was <u>left</u> to <u>add</u> . . . give to Bill to add time for Rocky and Dave") (emphasis in original); Aug. 31, 2008 handwritten notes by Joseph Bottini of Rocky Williams trial preparation session CRM057327-CRM057329 ("Assumed my time / Dave's time added).

[1415] Aug. 22, 2008 handwritten notes by Joseph Bottini of Rocky Williams trial preparation session CRM057314-CRM057316 ("**any** VECO time / labor would be added in" to the Christensen Builders invoices, pursuant to the "original agreement" they had with Senator Stevens) (emphasis added); Aug. 22, 2008 handwritten notes by James Goeke of Rocky Williams trial preparation session CRM057193 (invoices left with Bill Allen "to add **whatever** VECO time et cetera was <u>left</u> to <u>add</u>" (bold emphasis added; underlined emphases in original).

[1416] Bottini (Schuelke) Tr. Dec. 16, 2009 at 136.

regarding Senator Stevens's state of mind, a crucial issue in proving a specific intent crime.[1417] Williams's statements showed that he, a foreman of the Girdwood renovations, reviewed the Christensen Builders invoices, passed them along to Bill Allen or a VECO employee, and believed that his, Anderson's, and possibly all VECO costs would be added to the Christensen Builders bills. This would have corroborated Senator Stevens's stated belief that he had paid the entire cost of the renovations because VECO costs were rolled into the Christensen Builders invoices.[1418] Williams's statements were also favorable to the defense because they corroborated Catherine Stevens's testimony (foreseen by the prosecution team) that she paid the Girdwood bills, and she thought the Christensen Builders invoices included Williams's and Anderson's time.[1419]

The information Williams provided, particularly during his trial preparation sessions in August 2008, was material because it went to the heart of the defense theory: Senator Stevens's belief that he paid for all the Girdwood renovations. In the course of this and Mr. Schuelke's investigations, members of the prosecution team conceded that the information was material. PIN attorney Marsh, when asked whether the information could have been "outcome determinative" said that "anything along these lines would have to be construed as *Brady*."[1420] PIN Chief Welch agreed that it should have been disclosed, and PIN Principal Deputy Chief Morris said it was *Brady* information that should have been disclosed.[1421] AUSA Goeke, when asked whether he thought the information in his notes from the August 2008 sessions should have been disclosed, replied, "Yes, I do."[1422] PIN attorney Sullivan described it as "new information that would be discoverable" as exculpatory *Brady* information.[1423] Only AUSA Bottini argued that it may not have been *Brady* information, relying on his argument that Williams only assumed

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[1417] Bottini (Schuelke) Tr. Dec. 16, 2009 at 140.

[1418] The prosecution memorandum characterized as "incredible" the possible claim that Senator Stevens thought the VECO costs "were somehow rolled into Christensen's invoices." May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) at 74.

[1419] *United States v. Stevens*, Tr. Oct. 16, 2008 (am) at 64-66; *United States v. Stevens*, Tr. Oct. 16, 2008 (pm) at 14-15, 44-47.

[1420] Marsh (Schuelke) Tr. Feb. 2, 2010 at 310; *id.* at 312 ("Q: It would be Brady material; correct? A. I think that's correct.").

[1421] Welch (Schuelke) Tr. Jan. 13, 2010 at 146; Morris (Schuelke) Tr. Jan. 15, 2010 at 66-67.

[1422] Goeke (Schuelke) Tr. Jan. 8, 2010 at 109.

[1423] Sullivan (Schuelke) Tr. Jan. 6, 2010 at 412-413.

(rather than knowing as a fact) that his and Anderson's hours would be added to the Christensen Builders invoices.[1424] Bottini acknowledged, however, that it "could" have been *Brady* information, and that it "probably" should have been disclosed "out of an abundance of caution."[1425]

For the reasons stated above, we concluded that the information that Senator Stevens said he wanted to pay for all the Girdwood renovations, that he wanted a contractor he could pay, that Williams reviewed the Christensen Builders invoices and passed them along to Bill Allen (or a VECO employee), and that Williams thought his and Dave Anderson's hours, and possibly all VECO costs, were added into the Christensen Builders bills, was material, and thus the failure to disclose it violated the government's constitutional *Brady* obligations.[1426] In addition, we concluded that the information should have been disclosed under USAM § 9 5.001, which requires disclosure of exculpatory and impeachment information that is "probative of the issues before the court," even if it would not "make the difference between guilt and innocence."[1427] Given the defense theory that Senator Stevens reasonably believed that the Christensen Builders invoices he paid included the VECO costs, the information provided by Williams was clearly exculpatory and impeachment evidence that was "probative" of an issue before the court. Again, it is evident that Williams's information tended to help the defense by bolstering the central defense theory.

D.C. Rule of Professional Conduct 3.8(e) provides that a prosecutor shall not "intentionally fail to disclose to the defense . . . any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused." Because this standard incorporates a *scienter* requirement in addition to the disclosure requirement, we address it in the following section where we discuss the individual culpability of the prosecutors.

We need not determine exactly when the government should have disclosed the information. The government is obligated to disclose exculpatory information "in a manner that gives the defendant a reasonable opportunity either to use the

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[1424] Bottini (Schuelke) Tr. Dec. 16, 2009 at 181-184; Bottini (Schuelke) Tr. Dec. 17, 2009 at 7-8.

[1425] Bottini (Schuelke) Tr. Dec. 16, 2009 at 140; *id.* at 169.

[1426] We note that the prosecutors used Bob Persons's statement about Senator Stevens "covering his ass," even though that, too, appears to be only an assumption on Persons's part.

[1427] USAM § 9-5.001(C). This section specifies that Department of Justice policy "requires disclosure by prosecutors of information beyond that which is 'material' to guilt as articulated in *Kyles v. Whitley*, 514 U.S. 419 (1995), and *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999)."

evidence in the trial or to use the information to obtain evidence for use in the trial." *United States v. Rodriguez*, 496 F.3d 221, 226 (2nd Cir. 2007); *see Weatherford v. Bursey*, 429 U.S. 545, 559 (1997); *United States v. Pollack*, 534 F.2d 964, 973 (D.C. Cir. 1976). In addition, USAM § 9 5.001(D) requires prosecutors to disclose exculpatory information "in sufficient time to permit the defendant to make effective use of that information at trial." The USAM notes that "[i]n most cases, the disclosures required by the Constitution and this policy will be made in advance of trial." USAM § 9 5.001(D).

In the present case, one could argue that the information about Williams reviewing the Christensen Builders invoices was timely disclosed, because it was contained in the [redacted] transcript that was provided to the defense on the evening of September 28, 2008.[1428] The defense did make use of the information at trial, though principally in motions to dismiss the indictment for prosecutorial misconduct. The information that Williams reviewed Christensen Builders invoices was also contained in an FBI 302 that was disclosed later during the trial, after the court found other *Brady* violations and ordered disclosure of all memoranda of interviews.[1429]

Such an argument would not be persuasive. First, the information should have been provided in the September 9, 2008 *Brady* letter; instead, that letter stated the opposite. Second, the [redacted] transcript was not disclosed until four days after opening statements, and five days after Williams had returned to Alaska. And the memoranda of interview were not disclosed until October 2, 2008. Furthermore, the import of Williams's statements could not be fully understood without the information that was never disclosed: that Williams believed, pursuant to the "original agreement" between Senator Stevens and Bill Allen, that Williams's, Anderson's, and possibly all VECO's costs would be added to the Christensen Builders invoices that were sent to the Senator.

In any event, no such argument could be made with respect to the far more exculpatory information that Williams believed his and Anderson's hours, and possibly all VECO's costs, would be rolled into the Christensen Builders invoices. That information was contained only in Bottini's, Goeke's, and Joy's handwritten notes of their trial preparation sessions with Williams. The same is true of Williams's explanation that it was part of the "original understanding" with

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[1428] [redacted]

[1429] Sept. 28, 2006 FBI 302 of Rocky Williams at 2.

Senator Stevens that "any VECO time/labor would be added in."[1430] Those notes were never disclosed to the defense.

C. Culpability for the Government's Failures

1. The Disclosure Failures Were Not Intentional

There is circumstantial evidence that AUSAs Bottini and Goeke knew about Williams's exculpatory information and deliberately withheld it from the defense. The team knew that a central defense theory was that Senator Stevens reasonably believed that the VECO costs were incorporated in the Christensen Builders invoices that he paid. That point was stressed on the same day as Williams's second trial preparation session, when PIN attorney Sullivan, who had just reviewed documents provided by the defense, sent an email to the team stating: "[Catherine Stevens] will likely testify that Rocky told her the VECO costs were rolled into the large Christensen Builders bills."[1431] During the trial preparation session that same day, Williams repeated what he had already said at a trial preparation session two days earlier: he reviewed the Christensen Builders invoices, gave them to Bill Allen or a VECO employee, and believed that his hours, Anderson's hours, and possibly all VECO costs would be added to the Christensen Builders invoices, pursuant to the "original agreement" with Senator Stevens to add "any VECO time / labor" to those invoices.[1432] That exculpatory evidence was new, but it was not memorialized in an FBI 302. Williams also said that he never discussed with the Stevenses whether his time would be added to the Christensen Builders bills.[1433] That specifically rebutted the testimony expected from Catherine Stevens (identified in PIN attorney Sullivan's email of the same day). This inculpatory information, also new, *was* memorialized in an FBI 302, pursuant to Goeke's specific direction to SA Joy. And although it appears that Bottini and Goeke had not read Sullivan's email before conducting the preparation session on August 22, they met again with Williams nine days later, and he said for a *third* time that he reviewed the Christensen Builders invoices, passed them

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[1430] Aug. 22, 2008 handwritten notes by Joseph Bottini of trial preparation session with Rocky Williams CRM057315-CRM057316.

[1431] Aug. 22, 2008 2:22pm email from PIN attorney Sullivan to AUSA Goeke, AUSA Bottini, PIN attorney Marsh, PIN Principal Deputy Chief Morris, PIN Chief Welch, SA Kepner, SA Joy, lit. support mgr [redacted], and paralegal [redacted]

[1432] Aug. 22, 2008 handwritten notes by Joseph Bottini of trial preparation session with Rocky Williams CRM057314-CRM057316; Aug. 22, 2008 handwritten notes by James Goeke of trial preparation session with Rocky Williams CRM193-CRM057194.

[1433] Aug. 22, 2008 handwritten notes by Joseph Bottini of trial preparation session with Rocky Williams CRM057317.

along to VECO, and assumed his and Anderson's hours were added to the Christensen Builders invoices.[1434]

Thus, in the month prior to trial, Williams told prosecutors on three separate occasions that he reviewed the Christensen Builders invoices, and that he thought his and Dave Anderson's hours (at least) would be added to the invoices.[1435] But in the September 9, 2008 *Brady* letter, the prosecution team stated that Williams "did not recall reviewing Christensen Builders invoices."[1436] Nothing was disclosed about Williams's belief that his hours, Anderson's hours, and possibly all VECO costs were added to the Christensen Builders invoices, and Williams was allowed to return to Alaska without any advance notice to the defense.

One could infer intentional misconduct from that series of actions: information known to be exculpatory was suppressed; inculpatory information was preserved; representations were made that were contrary to the suppressed information, but helpful to the prosecution; and the person with the exculpatory information was allowed to depart, with the likelihood that he would be too ill to return.

Based on the results of our investigation, however, we concluded that the evidence did not demonstrate intentional misconduct. The attorneys principally responsible for the disclosure violations were AUSAs Bottini and Goeke. They had first hand knowledge of Williams's exculpatory statements, and they reviewed the draft *Brady* letter that omitted all of that information and misrepresented some of it. AUSA Bottini conducted all three August 2008 preparation sessions with Williams, as well as the fourth session on September 20, 2008. In addition, as of August 21, 2008, Williams was assigned to Bottini as a witness, and even if he erroneously believed that Williams was reassigned to Marsh sometime later, he knew that Williams was "back on my plate" by the time he met with Williams again on September 20, 2008.[1437] Consequently, Bottini was responsible for knowing the *Brady* information relating to Williams. Bottini later explained that

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[1434] Aug. 31, 2008 handwritten notes by Joseph Bottini of trial preparation session with Rocky Williams CRM057327-CRM057329.

[1435] In fact, Williams said this on *four* occasions to Bottini, as his handwritten notes from the September 20, 2008 trial preparation session show that Williams said he reviewed the Christensen Builders invoices, took them to VECO, and "assumed that my time + Dave's time – added on." CRM115139.

[1436] Sept. 9, 2008 letter from PIN Principal Deputy Chief Morris to defense counsel at ¶ 15.

[1437] Bottini (Schuelke) Tr. Dec. 16, 2009 at 296.

he did not think Williams's statements were *Brady* material because Williams just assumed but did not actually know that Bill Allen would add Williams's and Anderson's hours to the Christensen Builders invoices.[1438] He added: "I didn't think of this at the time in the context of, 'This is *Brady* information that should be disclosed,' I didn't."[1439] Bottini later said, however, that he did consciously consider at the time whether Williams's statements were *Brady* information, and that he decided that they were not because they were just assumptions.[1440] Whatever force that argument has is lessened by the prosecution team's willingness to endorse assumptions that favored the prosecution (Bob Persons's alleged assumption that Stevens was "covering his ass" with the Torricelli note; Bill Allen's assumption that Stevens would not want to pay a large VECO bill). Further, Williams provided many pieces of information that were not assumptions, but still were not disclosed: Stevens said he wanted to pay for everything, pursuant to the "original agreement" discussed among Stevens, Allen, and Williams;[1441] Williams reviewed the Christensen Builders invoices; Williams passed the invoices along to Bill Allen (or a VECO employee); Stevens said he was happy to have Christensen Builders involved so he would have a contractor he could pay. Given these facts, his knowledge that information does not have to be admissible to be *Brady*,[1442] and his conflicting testimony, it is difficult to credit Bottini's belated claim that he consciously chose not to disclose Williams's statements because they were only assumptions. Furthermore, even if we credited his claim, our analysis of his conduct would not change.

AUSA Goeke, who participated in the sessions, said he did not consider whether Williams's statements constituted *Brady* material.[1443] And neither Bottini

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[1438] Bottini (Schuelke) Tr. Dec. 16, 2009 at 181-184, 324-325; Bottini (Schuelke) Tr. Dec. 17, 2009 at 7-8.

[1439] Bottini (Schuelke) Tr. Dec. 16, 2009 at 181-184, 320-326; Bottini (Schuelke) Tr. Dec. 17, 2009 at 7-8.

[1440] Bottini (Schuelke) Tr. Dec. 17, 2009 at 183.

[1441] The evidence indicates that Williams was present when this original agreement was discussed. *See* Aug. 20, 2008 handwritten notes by Joseph Bottini of Rocky Williams trial preparation session CRM057291 ("Idea discussed at Classic – @Ted's place – when it was still at the chalet. . . . Me, Ted, Bill"); Aug. 20, 2008 handwritten notes by James Goeke of Rocky Williams trial preparation session CRM089065 ("At Chalet remember talking about improving the Chalet[.] TS/Rocky Williams/Bill Allen"); Goeke (Schuelke) Tr. Jan. 8, 2010 at 58-62, 71-72, 117.

[1442] Bottini (Schuelke) Tr. Dec. 16, 2009 at 19.

[1443] Goeke (Schuelke) Tr. Jan. 8, 2010 at 63-64, 94-109.

nor Goeke reviewed their notes from the August 2008 trial preparation sessions to see if they contained *Brady* material.[1444]

Furthermore, both Bottini and Goeke reviewed the September 9, 2008 *Brady* letter before it was sent to the defense. Bottini said he reviewed the *Brady* letter but did not focus on it, in part because he had just arrived from Alaska on September 8 and was preparing for oral arguments on two pretrial motions. Thus, he did not realize that part of Paragraph 15 stated the opposite of what Williams had told him less than two weeks earlier.[1445] AUSA Goeke also reviewed drafts of the *Brady* letter before it was sent. Goeke, whose notes from the August 20 and 22, 2008 preparation sessions showed that Williams said he reviewed the Christensen Builders bills, said the same thing as Bottini: "I apparently did not catch it."[1446]

In the course of our investigation, we did not find any evidence indicating that Bottini or Goeke (or anyone else on the prosecution team) recognized the exculpatory import of Williams's statements. OPR reviewed thousands of emails sent and received by the prosecution team, and none showed that the significance of Williams's statements was understood or discussed. Nor did any indicate an attempt to suppress the information. Furthermore, no such evidence was developed through any of the interviews of the prosecution team members, agents, supervisors, and support staff. Thus, we concluded that the evidence did not support a conclusion that Bottini or Goeke either appreciated the significance of Williams's statements or deliberately suppressed the statements.

The evidence indicates that PIN attorney Sullivan drafted that portion of Paragraph 15 that stated Williams "did not recall reviewing Christensen Builders

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[1444] Bottini (Schuelke) Tr. Dec. 16, 2009 at 26 ("No one directed [me]" to review his notes); Goeke (Schuelke) Tr. Jan. 8, 2010 at 94.

[1445] Bottini (Schuelke) Tr. Dec. 16, 2009 at 116-118 ("I didn't, in reviewing this thing, catch that"); Bottini OPR Tr. Mar. 10, 2010 at 448-459. In his letter commenting on OPR's draft report, Bottini's counsel argued that Bottini bore no more responsibility for disclosure of the material than the prosecutors who drafted the *Brady* letter because those attorneys also had access to the *Brady* spreadsheet and underlying 302s. Feb. 8, 2011 letter from Kenneth L. Wainstein to OPR at 41. We find this argument unpersuasive because Williams was Bottini's witness and Bottini was present at the various trial preparation interviews during which Williams made the exculpatory statements. As an experienced prosecutor, Bottini should have known there would be no 302s resulting from the trial preparation sessions unless requested by the attorneys. Bottini's presence at the interviews and his responsibility for presenting the witness raised his level of culpability above the attorneys assembling material for the *Brady* letter.

[1446] Goeke (Schuelke) Tr. Jan. 8, 2010 at 76.

invoices."[1447] According to Sullivan, however, he had no knowledge of the Williams trial preparation sessions, and limited knowledge of Williams's expected testimony.[1448] PIN attorney Marsh, who was also involved in drafting the *Brady* letter, also said he had no recollection of Williams's statements concerning the Christensen Builders invoices.[1449] We did not find evidence sufficient to find that either Sullivan or Marsh knew, or should have known, about Williams's pretrial statements. There is evidence that Sullivan listened (on the telephone) to at least part of the August 20, 2008 trial preparation session in which Williams said he reviewed the Christensen Builders invoices.[1450] The evidence does not show that he was listening when Williams said he thought his and Anderson's time was added to the Christensen Builders invoice. Further, we note that only Goeke's notes of that session indicated that Williams said his and Anderson's time was "applied to the billing"; Bottini's notes said the opposite ("didn't add my time to Augie's bill"), so it is possible this point was unclear to Sullivan. The evidence is the same with respect to PIN attorney Marsh (though he was also present for at least part of the September 20, 2008 preparation session).[1451] In addition, neither Sullivan nor Marsh participated in the August 22 or 31 sessions, where the issue was discussed in more detail.

Similarly, neither PIN Chief Welch nor PIN Principal Deputy Chief Morris participated in the August 2008 trial preparation sessions with Williams, and we found no evidence indicating that they ever knew about the exculpatory statements Williams made in those sessions.

The question whether AUSA Bottini or AUSA Goeke violated D.C. Rule of Professional Conduct 3.8(e) is a close one. That rule contains a *scienter* requirement, and is violated only when a prosecutor "intentionally" fails to disclose evidence or information the prosecutor "knows or reasonably should know tends to negate the guilt of the accused." In this case, both Bottini and Goeke knew, or reasonably should have known, that the non disclosed

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[1447] Sept. 9, 2008 12:09pm email from PIN attorney Sullivan to PIN attorney Marsh (attaching draft letter).

[1448] Sullivan (Schuelke) Tr. Jan. 6, 2010 at 401-408.

[1449] Marsh (Schuelke) Tr. Feb. 2, 2010 at 304-312.

[1450] Aug. 20, 2008 6:10pm email from PIN attorney Sullivan to PIN attorney Marsh and PIN Principal Deputy Chief Morris ("I can hang for a while if you want to patch me in.").

[1451] Marsh told OPR that he listened in on the trial preparation session for a while, but "jumped" off quickly and did not recall anything about it. Marsh OPR Tr. Mar. 25, 2010 at 124-125. Marsh sent an email to team members ("Anyone else want to listen in?") at 6:09pm and another ("GO ROCKY GO") during the trial preparation session at 6:54pm.

information tended to negate the guilt of Senator Stevens, but the evidence did not show that they "intentionally" withheld it. Furthermore, we concluded that the prosecution team did not violate D.C. Rule of Professional Conduct 4.1(a) ("knowingly" make a false statement of material fact or law to a third person) because no one on the prosecution team "knowingly" made a misrepresentation to the defense concerning Williams's review of Christensen Builders invoices.

2. Misconduct Findings

The facts detailed above demonstrate that AUSAs Bottini and Goeke engaged in professional misconduct by acting in reckless disregard of their disclosure obligations. They both knew of their disclosure obligations, and of the applicability of those obligations. They also both knew that a central theory of the defense was that Senator Stevens reasonably believed that VECO's costs were rolled into the Christensen Builders invoices. That point was repeated in the email sent to them by PIN attorney Sullivan the same day (August 22, 2008) as the second Williams trial preparation session. That day, Williams told Bottini and Goeke that he reviewed the Christensen Builders invoices, passed them along to Bill Allen (or a VECO employee), and believed the cost of his and Anderson's hours would be added to the Christensen Builders invoices before they were sent to Senator Stevens. In fact, Bottini's notes reflected that Williams said "**any** VECO time / labor would be added in" to the Christensen Builders invoices, pursuant to the "original agreement" they had with Senator Stevens.[1452] Goeke's notes showed that Williams said he left the invoices with Bill Allen "to add **whatever** VECO time etc. was left to add."[1453] The exculpatory value of this information was even more powerful, because it suggested that Williams believed not only his and Anderson's hours were added to the Christensen Builders invoices, but perhaps **all** the VECO costs were. That was exactly the defense predicted in the prosecution memorandum, and reiterated in Sullivan's email on August 22, 2008. Bottini and Goeke should have realized that the information Williams had just told them fit that theory precisely. Furthermore, Williams told them the same thing nine days later, in a trial preparation session on August 31, 2008, and they apparently missed it again. And Bottini missed the significance of that information yet a *fourth* time, when he prepared Williams for trial on September 20, 2008.

For the reasons stated in the prior section, we did not conclude that Bottini or Goeke deliberately suppressed the exculpatory information. The question

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[1452] Aug. 22, 2008 handwritten notes by Joseph Bottini of Rocky Williams trial preparation session CRM057314-CRM057316 (emphasis added).

[1453] Aug. 22, 2008 handwritten notes by James Goeke of Rocky Williams trial preparation session CRM057193 (bold emphasis added; underlined emphases in original).

remains, however, how they repeatedly missed the significance of the information. The evidence suggests that their focus on the evidence that inculpated Senator Stevens, and on what information they believed was accurate, may have made them oblivious to the exculpatory nature of information they did not believe was accurate. For example, Goeke directed SA Joy to memorialize in an FBI 302 the one piece of "new" information learned in the Williams trial preparation sessions that was helpful to the government's case, while the considerable amount of "new" exculpatory information went unremarked. AUSA Bottini later argued that the information was not exculpatory because it was just Williams's assumptions.[1454] Further, he knew the assumptions were wrong: the Christensen Builders invoices did not include Williams's hours, Anderson's hours, or any VECO costs. Thus, Bottini's handwritten notes of the August 31, 2008 trial preparation session contained the following entry, circled: "NOTHING ON THESE SHOWS THAT ROCKY or DAVE'S TIME ACCOUNTED FOR."[1455]

This was not the only occasion on which the prosecution team did not disclose potentially exculpatory information that they thought was wrong. For example, Bottini recalled a "discussion when somebody read" the September 1, 2006 IRS MOI which stated that Williams estimated that Christensen Builders performed 99 percent of the work at Girdwood.[1456] Bottini said, "That's wildly inaccurate," but he did not review the IRS MOI; instead, SA Joy was tasked to "follow up with Williams."[1457] The result was a "clarification" from Williams that he meant 99 percent of the work *that VECO did not perform* was done by Christensen Builders.[1458] The exculpatory information was then presented accompanied by the rebuttal in the *Brady* letter.

Similarly, the *Brady* spreadsheet prepared by agents indicated that Bill Allen said Senator Stevens would have paid a VECO invoice if one had been sent. PIN attorney Marsh, who was preparing the *Brady* letter, thought that

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[1454] Bottini (Schuelke) Tr. Dec. 16, 2009 at 183.

[1455] Aug. 31, 2008 handwritten notes by Joseph Bottini of Rocky Williams trial preparation session CRM057337.

[1456] Bottini OPR Tr. Mar. 11, 2010 at 452; Bottini (Schuelke) Tr. Dec. 16, 2009 at 41-42, 284-285 ("everybody recognized that that had to be wrong, that, you know, 99 percent of the work was not done by Christensen Builders"). PIN attorney Marsh stated that when he saw the 99 percent estimate, "it seemed crazy," and that the prosecution team contacted Williams because that estimate "wasn't consistent with the facts." Marsh (Schuelke) Tr. Feb. 2, 2010 at 109-110.

[1457] Bottini OPR Tr. Mar. 11, 2010 at 452; Bottini (Schuelke) Tr. Dec. 16, 2009 at 41 ("the decision was made to go out and . . . have Rocky re-interviewed about that").

[1458] Bottini OPR Tr. Mar. 11, 2010 at 453 ("clarification" may have happened during a trial preparation session).

information, potentially exculpatory, was wrong.[1459] But rather than review the FBI 302 (the Pluta 302) cited in the spreadsheet, he instructed SA Kepner to call Allen and ask the "hypothetical" question whether he thought Stevens would have paid an invoice for the entire VECO costs on Girdwood. He then typed the answer that Allen "believed that defendant would not have paid the actual costs incurred by VECO" directly into Paragraph 17(c) of the *Brady* letter, which was sent later that day. The letter did not disclose that Allen had said Stevens would have paid a VECO invoice, which was reflected in the FBI 302.

In a similar vein, the team went back to Bill Allen and to Bambi Tyree to secure their denial of suborned perjury because the team did not believe the evidence to the contrary. In that instance, the "accurate" information was used to justify not disclosing the "inaccurate" (and potentially damaging to the prosecution) information.

The *Brady* spreadsheet also contained an entry indicating that Williams said at his September 14, 2006 interview that "TS told RW he wants to hire a contractor that he can pay." That information was omitted from Paragraph 15.

AUSAs Bottini and Goeke were also in the best position to identify the error in Paragraph 15 of the *Brady* letter, which stated that Williams did not recall reviewing the Christensen Builders invoices. Both reviewed the letter, but again, they somehow did not "catch it." They were also in the best position to avoid the disclosure violations by reviewing their own notes of the trial preparation sessions for *Brady* information. Bottini knew *Brady* material could be in handwritten notes.[1460] Goeke also said he "recognized that *Brady* material could exist in notes of prosecutors."[1461] Yet neither reviewed their notes specifically for *Brady* information. Bottini explained that "no one directed" him to review his notes.[1462] He said he relied on his memory that no *Brady* information had come up during the trial preparation sessions.[1463] Goeke said that he would have reviewed his notes if he had believed they contained *Brady* information, but that no one directed him to, so he "relied on [his] memory," and he did not "recall recognizing anything that came up in an interview session I participated in that . . . was *Brady*

[1459] Marsh (Schuelke) Tr. Feb. 2, 2010 at 125.

[1460] Bottini (Schuelke) Tr. Dec. 16, 2009 at 26.

[1461] Goeke (Schuelke) Tr. Jan. 8, 2010 at 19.

[1462] Bottini (Schuelke) Tr. Dec. 16, 2009 at 26.

[1463] Bottini (Schuelke) Tr. Dec. 16, 2009 at 67-68.

material."[1464] We found no evidence suggesting that either Bottini or Goeke believed that someone else would review their handwritten notes from the trial preparation sessions for *Brady* information.[1465]

In addition, both Bottini and Goeke knew that agents were performing the *Brady* review, and both knew that it is the responsibility of prosecutors, not agents, to conduct a *Brady* review.[1466] It is settled doctrine that "the individual prosecutor has a duty to learn" of evidence favorable to the defense, *Kyles v. Whitley*, 514 U.S. at 437, and that duty extends to reviewing the prosecutors's own notes. *Andrews*, 532 F.3d at 906. Goeke did not know if the FBI or IRS agents who conducted the *Brady* review had any knowledge of, or training in, the *Brady* doctrine.[1467]

The non disclosed contents of Bottini's and Goeke's trial preparation notes are detailed above. But in addition, Bottini and Goeke did not review grand jury transcripts, FBI 302s, or IRS MOIs in connection with the *Brady* letter.[1468] Indeed, Bottini did not even review the documents which the agents had "flagged" in the agent created *Brady* spreadsheet.[1469] Thus, when the "99% issue" arose, he did not read the IRS MOI cited as documenting Williams's statement, but rather, thinking the information was "wildly inaccurate," commissioned SA Joy to get a "clarification" from Williams. And he did not review the September 14, 2006 FBI 302 that the *Brady* spreadsheet cited for the proposition that Stevens wanted to hire a contractor he could pay, and that information was omitted from the *Brady* letter.[1470]

[1464] Goeke (Schuelke) Tr. Jan. 8, 2010 at 23, 28, 33.

[1465] Bottini (Schuelke) Tr. Dec. 16, 2009 at 68 ("Q: No one else reviewed your notes for [*Brady*] purposes? A: I don't think so.").

[1466] Bottini OPR Tr. Mar. 10, 2010 at 127-129 ("always" a prosecutor's responsibility); Bottini (Schuelke) Tr. Dec. 16, 2009 at 74-75. Goeke (Schuelke) Tr. Jan. 8, 2010 at 444, 445 (*Brady* review is the responsibility of the attorney, but he knew that agents were conducting the *Brady* review).

[1467] Goeke (Schuelke) Tr. Jan. 8, 2010 at 444.

[1468] Bottini said he kept his *Brady* obligations in mind when he reviewed materials as part of his witness preparations, but could not recall ever identifying any information as *Brady* material. Bottini (Schuelke) Tr. Dec. 16, 2009 at 36-39, 62-66.

[1469] Bottini OPR Tr. Mar. 10, 2010 at 149.

[1470] Bottini stated he did not think Stevens's desire to hire a contractor, or his reason for wanting an entity other than VECO to perform the work at Girdwood, was *Brady* material. Bottini (Schuelke) Tr. Dec. 16, 2009 at 93.

Bottini contended that he did not review FBI 302s or IRS MOIs for *Brady* material because of time constraints ("I certainly didn't have time to do this"), and that it was not his responsibility to identify *Brady* information even relating to his own witnesses for the *Brady* letter.[1471] The time constraints argument carries little weight. Bottini had enough time to conduct at least four trial preparation sessions with Williams; the additional time it would have taken to review two FBI 302s and one IRS MOI would not have been significant. Furthermore, Bottini acknowledged that conducting a *Brady* review for a witness assigned to him "is always an obligation, whether someone tells you to do it or not."[1472] Goeke, too, admitted that "[i]t's an obligation of the attorney to get the *Brady* review identify *Brady* material. I wouldn't trust an agent to do it."[1473]

In summary, Bottini and Goeke each knew that the principal defense theory was that Senator Stevens reasonably believed he had paid all the Girdwood expenses, including the VECO costs, by paying the Christensen Builders invoices. In the weeks before trial, they each heard Williams make statements on three separate occasions (four for Bottini) directly supporting that theory, yet failed to recognize the exculpatory nature of the statements. Neither reviewed their own notes for the September 9, 2008 *Brady* letter disclosures, despite their knowledge that attorney notes can contain *Brady* information. Furthermore, they reviewed the *Brady* letter before it was sent, and failed to realize that Paragraph 15 contained a representation that was the opposite of what Williams had repeatedly told them. Based on their level of experience, they knew, or should have known, that their conduct involved a substantial likelihood that the government's disclosure obligations would be violated, and was objectively unreasonable under the circumstances.[1474] Although we consider Bottini to be more culpable than Goeke, in part because he was more experienced than Goeke and was responsible for handling Williams at trial, we found Goeke's responsibility to be sufficient to support a finding of professional misconduct.

We differentiate our misconduct finding as to AUSA Goeke from our conclusion that he had not committed misconduct with respect to the Torricelli Note issue for the following reasons. Although Goeke attended the April 15, 2008 Allen interview and took notes, he did not attend the September 14, 2008

[1471] Bottini OPR Tr. Mar. 10, 2010 at 159.

[1472] Bottini OPR Tr. Mar. 10, 2010 at 161.

[1473] Goeke (Schuelke) Tr. Jan. 8, 2010 at 445.

[1474] Bottini acknowledged that in his twenty-four years prosecuting criminal cases, this was the "only case I have ever worked on where the attorneys weren't doing the entirety of the *Brady* review." Bottini (Schuelke) Tr. Dec. 16, 2009 at 74-75. Goeke said he had always performed the *Brady* review in his other cases. Goeke (Schuelke) Tr. Jan. 8, 2010 at 445-446.

interview session, and he was not responsible for Allen's trial preparation nor asked to review his notes. Therefore, he was only tangentially involved in the April 15 interview. We determined that it was reasonable for him to expect the attorney handing the key prosecution witness to be responsible for fulfilling the disclosure obligations.

We determined that Goeke was culpable in relation to the Williams exculpatory material, although he was not responsible for preparing or presenting Williams's testimony, because Goeke was intimately involved in multiple interview sessions during which Williams provided the exculpatory information. Moreover, Sullivan's email put Goeke on notice of the importance of Williams's statements; Goeke was aware that agents were not generating 302s of the interviews (unless directed); and Goeke reviewed drafts of the *Brady* letter that did not include the exculpatory information. Therefore, notwithstanding the fact that Goeke had no trial duties with respect Williams as a witness, he should have been aware of the exculpatory information and should have been aware that the material was not provided to the defense in the *Brady* letter.[1475] Accordingly, we concluded that both Bottini and Goeke acted in reckless disregard of their disclosure obligations under *Brady*, *Giglio*, and USAM § 9 5.001.

For the reasons stated in the prior section, we concluded that neither PIN Chief Welch, PIN Principal Deputy Chief Morris, nor PIN attorneys Marsh or Sullivan bore responsibility for the failure to disclose the exculpatory statements made by Williams during his August 2008 trial preparation sessions. Accordingly, we concluded that they did not engage in professional misconduct or exercise poor judgment in this regard.

[1475] In his response to OPR's draft report, Goeke's counsel argued that it was unreasonable for OPR to find Goeke culpable for the failure to disclose the exculpatory material because such a standard would require all attorneys who had contact with a witness to cross-check files for even subtle inconsistencies. Goeke also argued that he was not culpable because he believed that Williams was available to the defense for interview, that Williams's grand jury testimony would be provided to the defense as *Jencks* material, and that Williams identified no inconsistencies during review of his own grand jury testimony. Goeke also argued that he only attended the Williams interviews to gather information relative to another matter and that when he heard material he believed to be exculpatory, he directed the FBI agent to write a 302. Feb. 7, 2011 letter from Bonnie J. Brownell to OPR at 9. We found these arguments unpersuasive and that they do not relieve Goeke of his obligation to notify members of the trial team concerning *Brady* material of which he was aware.

CHAPTER SEVEN
THE VECO RECORDS

I. INTRODUCTION AND SUMMARY

On September 26, 2008, as part of the government's case in chief in the *Stevens* trial, PIN attorney Marsh presented Cheryl Boomershine, a bookkeeper at VECO Corporation, as a witness. Boomershine testified that a spreadsheet she had prepared, Exhibit 177, showed that during an eight month period from August 2000 through March 2001, VECO incurred costs, including labor, of $188,928.82 for work done at Senator Stevens's Girdwood residence. The VECO records on which the spreadsheet was based were introduced as Exhibits 1058 1069, and 1090. The records showed hours worked by several VECO employees, including Rocky Williams and Dave Anderson. According to Boomershine, the amounts paid to Williams and Anderson for their time were included in the $188,928.82 total.

PIN Principal Deputy Chief Brenda Morris asserted in the government's opening statement that VECO kept track of its costs "right down to the penny" for the period of time covered by the records. She added that the $188,000 figure might be a little high, because VECO may have been inefficient, and might be a little low, because other work undertaken by VECO on the project was not included in the total. As Morris stated, "at the end of the day, whether it's $188,000 or whether it's $240,000 or whether its $120,000, the defendant still got it for nothing." Morris did not say anything, however, to suggest that the hours attributed to VECO workers in the VECO records summarized on the spreadsheet had not actually been worked, or were inaccurate.

In the defense opening statement, counsel noted that Senator Stevens paid $160,000 for the Girdwood renovations, and then asked: "How can you send a bill for . . . all these other costs that were run up on the VECO bill?"[1476] At the time, the defense did not have information showing that the VECO records were inaccurate and unreliable because they included hours for workers who were not even at the site.

The spreadsheet and supporting VECO records were admitted as business records, through Boomershine, without objection. Problems began to emerge shortly thereafter when, at defense counsel's request, the government disclosed Rocky Williams's grand jury transcript. Williams [redacted] in November of 2006 that he served as an on site supervisor for the Girdwood job; that he was involved in other projects at the same time; and that, although his

[1476] *United States v. Stevens*, Tr. Sept. 26, 2008 (am) at 69-70.

schedule varied from week to week, he generally was present at the site at least 24 hours per week. In contrast, the VECO documentation that formed the basis for Exhibit 177 indicated that during the relevant time period Williams worked full time plus a large amount of overtime on the Girdwood project.

On September 28, 2008, the same day the prosecution disclosed the Williams grand jury transcript, the defense filed a Motion to Dismiss Indictment or for a Mistrial. The defendant's memorandum argued that the government surreptitiously sent Williams back to Alaska because Williams would have testified that he worked only part time at Girdwood, which proved that the VECO documents introduced by the government were inaccurate or false.[1477] The defense argued further that the government had known for years that Williams worked only part time, yet had knowingly introduced evidence in the form of VECO records, invoices, and timesheets that reflected that he worked at the site full time.

The government filed responses denying the alleged misconduct, and the court heard arguments the following day, September 29, 2008. Judge Sullivan stated that he was "very, very disturb[ed]" by the government's decision to allow Williams who had been subpoenaed by the government and by the defense to return to Alaska without notifying the court or defense counsel. The court allowed the defense to recall Cheryl Boomershine and conduct additional cross examination regarding the accuracy of the VECO records. During this second cross examination, Boomershine testified that because she had not visited the job site herself, she did not know whether Williams had actually worked the hours reflected in the government's exhibits.

Later in the trial, a similar issue emerged with respect to Dave Anderson, another former VECO employee who, like Williams, had been asked by Bill Allen to oversee work done by VECO and other contractors at the Girdwood site. Anderson [redacted] in December 2006 that he oversaw a number of projects at the Girdwood site from mid 2000 through 2004. Significantly, he also [redacted] that he stopped working at the Girdwood site in or about September 2000, began working on another VECO project in Oregon, and did not return to the Girdwood site until sometime between Thanksgiving and Christmas, 2000. The VECO records introduced by the government at trial purported to show that he worked full time on Girdwood during that period.

The defense did not receive a copy of Anderson's grand jury transcript until October 2, 2008, after the court ordered that all reports of interviews and grand

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[1477] Williams, who was identified on the government's witness list, returned to Alaska before trial and was not called to testify. *See* Chapter Six, *supra*.

jury transcripts be disclosed, but before Anderson testified. On October 5, 2008, the defense moved to dismiss the indictment because of government misconduct, alleging that "the government knowingly withheld information that Dave Anderson was in . . . Oregon during a months long period in 2000 when VECO's accounting records show that he billed virtually full time to the Girdwood project. Knowing this, the government put into evidence false VECO accounting records to establish the untrue proposition that Anderson and others billed $188,000 to the renovations."

At a hearing on October 8, 2008, the court found that the government knowingly introduced false evidence at trial: "We're not talking about faulty recollection or inability to recall, we're talking about the United States using documents that the government knows are false, not true." As a sanction, the court ordered that all documentation relating to Williams's and Anderson's hours be stricken from the VECO records admitted as evidence, and instructed the jury not to consider that evidence.

Based on the results of our investigation, we concluded that the government presented false or inaccurate evidence at trial. The VECO spreadsheet and the underlying records reflected costs for hours of labor attributed to Williams and Anderson that exceeded the amount they told prosecutors they had performed. Indeed, the VECO spreadsheet contained charges for Anderson's time for a lengthy time frame during which he was working in Oregon on a different project. Although we concluded that the prosecutors did not knowingly introduce false testimony, we concluded that the prosecution team should have known that information contained in the VECO spreadsheet and underlying documents was not accurate.

In addition, we found that the government violated its disclosure obligations under constitutional *Brady* and *Giglio* principles and Department of Justice policy (USAM § 9 5.001), by failing to disclose information that contradicted the evidence presented in the VECO spreadsheet and underlying documents.

However, we concluded that the members of the prosecution team did not act intentionally or in reckless disregard of their professional obligations, or exercise poor judgment in the matter. We found no evidence that any member of the prosecution team knew that there was a variance between the VECO spreadsheet (and underlying time records) and the actual time spent by either Williams or Anderson on the Girdwood project until the discrepancies between the labor costs reflected on the VECO spreadsheet and the grand jury testimony of Williams and Anderson was raised by the defense at trial. During the investigation, no one from VECO, including Bill Allen, Rocky Williams, and Dave Anderson, informed the prosecutors that Anderson's and Williams's time spent on the Girdwood project was inflated to include time not actually spent at Girdwood.

Although Allen ranted periodically that Williams and Anderson were incompetent "drunks," he did not suggest that they charged to VECO's Girdwood account for time they were not even on the premises. The prosecution anticipated and was prepared for the defense argument that Williams and Anderson were woefully inefficient, but it did not anticipate or prepare for the possibility that their time sheets falsely reflected time not actually spent at the site. Thus, we concluded that the failure of the prosecution team to recognize and appreciate the variance between the labor costs reflected on the VECO spreadsheets and the information provided by Anderson and Williams as to their actual time spent on the site was an oversight, not professional misconduct. We found, further, that the sanction imposed by the court for the government's introduction of the inaccurate records striking the VECO records relating to Williams's and Anderson's labor costs sufficiently and appropriately redressed the prejudice to the defense.

In reaching our conclusion, we also took into account that the accelerated pace of the trial, the lack of centralized supervision, the changes in the composition of the trial team, and the resulting dispersal of responsibility among team members created a situation in which no single member of the prosecution team was assigned to compare the VECO records to the grand jury testimony, witness statements, or work records of Anderson and Williams to ensure that the VECO records were accurate. Accordingly, we concluded that the prosecutors did not commit professional misconduct or exercise poor judgment.

II. FACTUAL BACKGROUND

A. Williams's and Anderson's Interviews [redacted]

1. Interviews with Investigators

On September 1, 2006, teams of IRS agents separately interviewed former VECO employees Rocky Williams and Dave Anderson.[1478] FBI agents, including SA Chad Joy, followed up with a series of interviews of both men shortly thereafter.[1479]

[1478] Sept. 1, 2006 IRS MOI of Rocky Williams; Sept. 1, 2006 IRS MOI of David Anderson.

[1479] Sept. 14, 2006 FBI 302 of Rocky Williams; Sept. 28, 2006 FBI 302 of Rocky Williams; Sept. 3, 2006 FBI 302 of David Anderson; Sept. 11, 2006 FBI 302 of David Anderson; Sept. 26, 2006 FBI 302 of David Anderson; Nov. 30, 2006 FBI 302 of David Anderson;

a. Rocky Williams

In his interviews, Williams described how he had served as a "handyman" on a number of special projects undertaken for VECO CEO Bill Allen.[1480] He said he was present at several meetings with Allen and Senator Stevens in mid 2000, when the idea of renovating Stevens's Girdwood residence was first discussed.[1481] Williams said he served as an on site foreman, overseeing work done by other VECO employees and by Christensen Builders, a contractor that undertook much of the carpentry work on the project.[1482] Williams described in detail the various phases of construction, some of which he participated in directly, and some of which he supervised. Williams said he worked at the site from the project's inception in mid 2000 until approximately March 2001. Williams told the agents that he remained on VECO's payroll the entire time and submitted his hours to, and received paychecks from, VECO.[1483]

In his interviews with the government, Williams noted that he was not present at the Girdwood site full time. The IRS MOI of the interview on September 1, 2006, related that Williams worked at the Girdwood site "full time some months and part time other months."[1484] In a September 28, 2006 interview, Williams estimated that he worked on the project "between 15 and 30 hours per week each week for approximately 10 weeks."[1485] That estimate indicated that Williams had worked a total of 150 300 hours on the Girdwood renovations.[1486]

[1480] Sept. 1, 2006 IRS MOI of Rocky Williams at 2; Sept. 14, 2006 FBI 302 of Rocky Williams at 1.

[1481] Sept. 14, 2006 FBI 302 of Rocky Williams at 1; Sept. 28, 2006 FBI 302 of Rocky Williams at 1.

[1482] Sept. 14, 2006 FBI 302 of Rocky Williams at 1; Sept. 28, 2006 FBI 302 of Rocky Williams at 1.

[1483] Sept. 1, 2006 IRS MOI of Rocky Williams at 2.

[1484] Sept. 1, 2006 IRS MOI of Rocky Williams at 4.

[1485] Sept. 28, 2006 FBI 302 of Rocky Williams at 3.

[1486] The 15-30 hour per week approximation was also related by SA Chad Joy while summarizing a "reinterview" of Williams in a conference call that likely occurred in 2006, that included SA Kepner, PIN attorney Marsh, AUSAs Bottini and Goeke, and others. Undated handwritten notes by AUSA Bottini at 4.

b. Dave Anderson

Anderson also discussed his work at the Girdwood site during his interviews with the government in 2006. Anderson, a welder by trade, was often asked by Bill Allen to undertake various special tasks outside his usual VECO job responsibilities. The FBI 302 of the first interview, conducted by CDC Gonzales and SA Joy, related that Anderson "oversaw" the Girdwood renovations over a four year period, and that he "was responsible for the day to day operations at the job site."[1487] It also detailed the many aspects of the renovations that Anderson was involved in at the Girdwood site.[1488] The FBI 302 did not contain any information indicating that Anderson was in Oregon or absent from the work site for several months in 2000.

The FBI 302 of the November 30, 2006 interview related that Anderson "was out of town during part of the work in the [Girdwood] garage but returned around the time that the sheet rock was complete on the first floor."[1489]

2. [redacted]

a. Rocky Williams

On November 7, 2006, PIN attorney Marsh questioned Rocky Williams [redacted] PIN attorney Sullivan and AUSA Goeke were also present (the transcript indicates that Sullivan left the room shortly after Williams's testimony began).[1490] Williams [redacted] that, most of the time, he was overseeing work done by others, and was making trips in his truck to purchase materials for use at the Girdwood site.[1491] Williams acknowledged that he was not present at the Girdwood site full time, but estimated that he was there "at least three times a week if not more."[1492] When asked how many hours per week "on average" he spent at the Girdwood site, Williams responded: "a good 24, maybe even sometimes more and sometimes I would say never less than 24 hours a

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[1487] Sept. 3, 2006 FBI 302 of "Source" (Dave Anderson) at 1, 3.

[1488] Sept. 3, 2006 FBI 302 of "Source" (Dave Anderson) at 3.

[1489] Nov. 30, 2006 FBI 302 of "Source" (Dave Anderson) at 3-4.

[1490] [redacted]

[1491] [redacted] *see* Sept. 28, 2006 FBI 302 of Rocky Williams at 2.

[1492] [redacted]

week."[1493] He added: "I'd have to make at least two trips out for materials and stuff, and a lot of times I was probably out there at the first part of this, the framing and the stairs and everything going in, I was probably out there every day."[1494]

b. Dave Anderson

On December 6 and 7, 2006, AUSA Goeke questioned Anderson [redacted]; PIN attorneys Marsh and Sullivan were also present.[1495] During Anderson's [redacted], AUSA Goeke asked him if "there c[a]me a time about the time the garage was . . . finished, as you were trying to beat the snow there in the fall, that you left the Girdwood work site to go do something else for VECO?"[1496] Anderson responded that after the "pad . . . for the garage" was set down, he went to Oregon to work on a different VECO project.[1497] AUSA Goeke asked a series of questions to clarify when Anderson was in Oregon, and Anderson ultimately agreed with Goeke's assessment that he left the Girdwood site in mid to late September, and returned "a little bit before Christmas, but after Thanksgiving."[1498] Anderson noted that much of the initial renovation work was completed by the

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1493 [redacted]

1494 [redacted]

1495 [redacted]

1496 [redacted]

1497 [redacted]

1498 [redacted] VECO records indicated that the Girdwood account was billed for 280 hours of Anderson's time in October 2000 (when he was in Oregon), and 130 hours of Anderson's time in November 2000 (when he was in Oregon for most if not all of the month), and 226 hours for his time in December 2000 (when he may have been in Oregon for much of the month). Anderson was asked in his OPR interview whether he could have been mistaken with respect to the timing of his Oregon trip, which would explain why he billed a large number of hours to the project in October, November, and December, but relatively few hours in January (20) and February (60) 2001. Anderson said he "could very well" have been in Oregon in January and February 2001 instead of in October through December 2000, but he was not certain. Anderson OPR Tr. Apr. 9, 2010 at 58-63. As noted above, the FBI 302 of Anderson's interview on November 30, 2006, indicated that Anderson was "out of town" during the December 2000 - January 2001 time frame. Given the details he recalled about the timing of his departure to Oregon, and the details he recalled about what work had been completed at Girdwood in his absence, we found it unlikely Anderson was in Oregon in January and February 2001. Further, his [redacted] that most of the renovations had been completed by the time he returned explains why his hours for January and February 2001 were low.

time he returned.[1499] He went on to describe a number of projects at the residence that he undertook after he returned from Oregon.[1500]

Anderson [redacted] again the following day. AUSA Goeke questioned him, and PIN attorneys Marsh and Sullivan were present. Early in that [redacted] Anderson adverted again to being in Oregon while some work was performed at the Girdwood site.[1501]

At the time that Williams and Anderson [redacted] in 2006, the government had not yet obtained or reviewed VECO's invoices and other materials that detailed the hours that ultimately were reported in corporate records as attributable to the Girdwood project.

B. The VECO Spreadsheet

In November 2006, government agents and attorneys first interviewed Cheryl Boomershine, a bookkeeper for VECO Corporation.[1502] Her responsibilities included preparing financial statements, cash management, and invoice coding.

Agents and prosecutors involved in the *Stevens* investigation enlisted Boomershine's assistance in assessing the costs of the Girdwood renovations that were absorbed by VECO Corporation.[1503] At a February 1, 2007 interview with AUSAs Bottini and Goeke, PIN attorney Sullivan, FBI SA Kepner, and others, Boomershine was asked to generate a spreadsheet of costs incurred in connection with the Girdwood project and to locate supporting documentation.[1504] In an email to PIN attorneys Marsh and Sullivan later that day, PIN Chief Welch stated: "We need certainty about Boomershine's information and documents for the

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[1499] [redacted]

[1500] [redacted]

[1501] [redacted] ("I was doing other things. Oregon. You now, I had other jobs going, so . . . . .").

[1502] Nov. 7, 2006 IRS MOI of Cheryl Boomershine at 1. This interview was attended by IRS SAs Roberts and Bateman, and by AUSA Goeke and FBI SA Kepner.

[1503] Feb.1, 2007 4:40pm email from PIN attorney Sullivan to PIN attorney Marsh and PIN Chief Welch.

[1504] Feb. 1, 2007 handwritten notes of AUSA Bottini of Interview of Cheryl Boomershine; Feb.1, 2007 4:40pm email from PIN attorney Sullivan to PIN attorney Marsh and PIN Chief Welch; Feb.1, 2007 5:05pm email from PIN attorney Sullivan to PIN attorney Marsh and PIN Chief Welch.

[search] warrant before it goes to the front office."[1505] Sullivan responded that they were "pushing Boomershine and VECO's lawyers to give us the job code site (0099) material today or tomorrow. If it is what Boomershine describes, it should have a fairly comprehensive list of all VECO incurred expenses."[1506]

On February 7, 2007, Boomershine provided to the prosecution team the spreadsheet of expenses she generated the previous day.[1507] The spreadsheet, which became Exhibit 177 at trial, reflected costs, including labor, from October 31, 2000, through March 31, 2001, and totaled $188,928.82.

In a February 7, 2007 email to PIN Chief Welch, PIN attorney Marsh described the spreadsheet:

> When the expenses for the Girdwood/TS project started being incurred in 2000, Boomershine started segregating those expenses, within VECO Corporate's accounting system, under a series of job codes that she created exclusively for Girdwood.
>
> Boomershine's Girdwood specific codes still exist, so Boomershine was able to run a query on VECO's computers to identify every invoice that she coded as a Girdwood expense.[1508]

On February 8, 2007, AUSA Goeke questioned Boomershine PIN attorneys Marsh and Sullivan were also present.

[1505] Feb. 1, 2007 4:45pm email from PIN Chief Welch to PIN attorneys Marsh and Sullivan.

[1506] Feb. 1, 2007 5:05pm email from PIN attorney Sullivan to PIN Chief Welch and PIN attorney Marsh.

[1507] Feb.1, 2007 4:40pm email from PIN attorney Marsh to PIN Chief Welch (cc to PIN attorney Sullivan, whose name appears at the bottom as a co-author); Feb. 1, 2007 handwritten notes by AUSA Bottini of Cheryl Boomershine interview.

[1508] Feb.7, 2007 1:09pm email from PIN attorney Marsh to PIN Chief Welch (cc to PIN attorney Sullivan, whose name appears at the bottom as a co-author).

[1509]

[redacted]

[redacted]

[redacted]

1510 [redacted]

1511 [redacted]

1512 [redacted].

1513 [redacted]

1514 [redacted]

1515 [redacted]

1516 [redacted]

It appears that the government received the underlying VECO records on February 25, 2007. In an email of that date to Bottini, Marsh, Sullivan, and Kepner, AUSA Goeke related: "We received the latest VECO docs late Friday. They are composed of the backup documentation for the two spreadsheets Girdwood and [Allen's] house."[1518]

In an April 2007 interview with FBI agents, Boomershine stated that, as requested by prosecutors, she had searched VECO records but was not able to locate payment(s) from Senator Stevens for the costs set forth on the spreadsheet.[1519] On April 4, 2007, AUSA Goeke again questioned Boomershine

The VECO spreadsheet became an important part of the prosecution's case. According to PIN attorney Marsh, the prosecution always intended to use the spreadsheet as an exhibit at trial.[1522] Marsh added that neither he nor anyone else anticipated that use of the spreadsheet would be problematic.[1523]

During the same early 2007 time frame, the prosecution team interviewed a number of former VECO Alaska employees in an apparent effort to ascertain the manner in which Dave Anderson's and other employees' hours were tracked and

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[1517]

[1518] Feb. 25, 2007 1:53am email from AUSA Goeke to AUSA Bottini, PIN attorney Marsh, PIN attorney Sullivan, and SA Kepner.

[1519] Apr. 3, 2007 FBI 302 of Cheryl Boomershine at 1.

[1520]

[1521]

[1522] Mar. 18-19, 2009 FBI 302 of Nicholas Marsh at 1-6.

[1523] Marsh OPR Tr. Mar. 25, 2010 at 25, 52-53, 60-61; Mar. 18-19, 2009 FBI 302 of Nicholas Marsh at 1.

recorded.[1524] The group uncovered information suggesting that VECO Alaska, at least, had taken steps to see that Anderson's hours were reported and recorded properly.

On February 27, 2007, Goeke, IRS SA Roberts, and FBI SA Traven interviewed [redacted] a cost scheduler in VECO Alaska's Fabrication Shop ("Fab Shop"), where Dave Anderson worked.[1525] [redacted] recalled that time sheets with handwritten descriptions such as "Ted Stevens," "Bill Allen," and "Girdwood" were submitted so that the hours could be entered into the company's computerized payroll system.[1526]

An FBI 302 documenting an interview of former VECO Alaska Vice President/Business Manager [redacted] on January 31, 2007, related:

> [redacted] recalled being specifically asked by [redacted] to review the amount of labor hours /materials being spent on the STEVENS' house project. [redacted] told [redacted] there was a small surge in expense and [redacted] wanted to determine the cause. [redacted] confirmed the surge in expenses was due to work being conducted at STEVENS' house over the period of a few months. [redacted] told ANDERSON about the expenses to make ANDERSON aware of the increase in costs to one of ALLEN'S job codes.[1527]

C. The Prosecution Memorandum

The prosecution team, which at this point consisted of AUSAs Bottini and Goeke and PIN attorneys Marsh and Sullivan, prepared a prosecution memorandum seeking authorization to indict Senator Stevens. The memorandum detailed the evidence against Senator Stevens, as well as anticipated defenses.

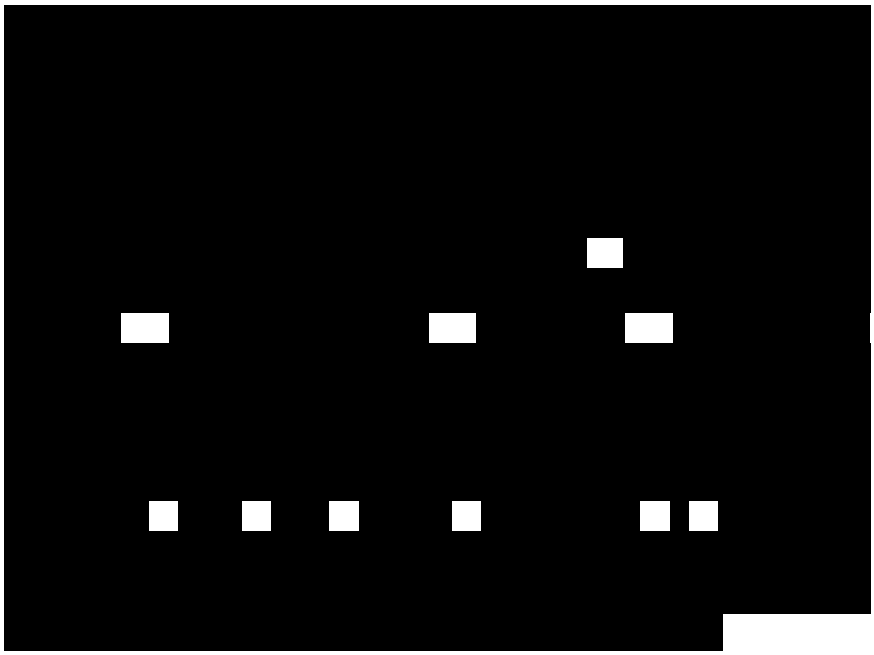
[1524] Jan. 8, 2007 FBI 302 [redacted]; Jan. 12, 2007 FBI 302 [redacted] Jan. 24, 2007 FBI 302 [redacted] Jan. 24, 2007 FBI 302 [redacted] Jan. 31, 2007 FBI 302 [redacted]; Feb. 26, 2007 FBI 302 [redacted]; Feb 27, 2007 FBI 302 [redacted].

[1525] Feb. 27, 2007 FBI 302 [redacted].

[1526] Feb. 27, 2007 FBI 302 [redacted] at 2. This confirmed statements made at prior interviews with former VECO Alaska [redacted] Jan. 8, 2007 FBI 302 of [redacted]; Jan. 12, 2007 FBI 302 of [redacted]; Jan. 24, 2007 FBI 302 of [redacted] at 5-6.

[1527] Jan 31, 2007 FBI 302 of [redacted] at 3.

The document went through many drafts before it was presented to PIN Chief Welch and PIN Principal Deputy Chief Morris on May 21, 2008,[1528] but the sections addressing the spreadsheet and VECO records did not change in any material way. The memorandum explained the VECO spreadsheet, and how Boomershine created it, and identified the total cost in the spreadsheet for the six month period in question **$188,928.82** in bold print.[1529] The memorandum identified Rocky Williams and Dave Anderson as the persons who "managed" the Girdwood renovations, and stated that "[f]rom July 2000 to May 2001, these two VECO employees spent most of their work time at the Girdwood Residence."[1530] In addition, it added that "Anderson further indicated that through April 2001, his salary and expenses were billed to VECO in relation to the Girdwood Residence project."[1531] A two page section described the VECO spreadsheet and its significance:



[1528] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001).

[1529] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) at 12, 20.

[1530] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) at 13.

[1531] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) at 17.

> In early February 2007, [redacted] he government obtained a spreadsheet created by Boomershine for all costs charged by VECO to the Girdwood Residence "0099" job code (the "Boomershine Cost Report"). For the Girdwood Consultants sub code, the spreadsheet listed invoices charged to VECO from October 21, 2000 to April 9, 2001. The code reflected invoices charged by two VECO entities that performed the work on the Girdwood Residence VECO Equipment (which employed Rocky Williams) and VECO Alaska (which employed Dave Anderson and numerous other "fab shop" employees who worked on the Girdwood Residence) as well as multiple invoices from Mark Tyree. The total amount under the Girdwood Consultants code, charged to VECO from October 2000 through April 9, 2001, was $181,699.12. . . .
>
> * * *
>
> The total cost charged to VECO for its work on the Girdwood Residence from October 2000 to April 9, 2001, was **$188,928.82**.[1532]

The prosecution memorandum contained a list of goods and services that VECO provided during the 2000 and 2001 time period at the Girdwood residence that were never paid for by Stevens.[1533] These included, among other things, electrical work, plumbing work, the purchase and installation of a backup generator, the purchase and installation of a new boiler, labor costs associated with the installation of new flooring, the purchase and installation of spray insulation, steel fabrication and installation, the execution by an engineer of architectural drawings, and other items. Some of those items, such as the plumbing, the steel fabrication, and the floor installation, may have been captured on the VECO spreadsheet either separately or as labor provided by VECO Alaska and VECO Equipment. Other items, however, were not included in the spreadsheet, such as the preparation of architectural drawings by VECO engineer John Hess, and all of the work undertaken at the Girdwood site in the months prior to the creation of the Girdwood cost code in late October 2000 and in the

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[1532] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) at 18-20 (emphasis in original).

[1533] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) at 12-30.

months after April 2001, when the Girdwood cost code stopped being used and costs incurred in connection with the Senator's residence were added into the cost code for work on Bill Allen's own home, which began in approximately May 2001.[1534]

The memorandum acknowledged that it was "difficult to provide an exact calculation of the value of the work that Anderson and others performed at the Girdwood residence after April 2001. However, based on the fact that the work in 2001 included, among other things, the addition of a steel staircase and other tasks . . . , we believe that VECO incurred tens, if not hundreds, of thousands of dollars of additional costs during this time frame.[1535] Thus, "[a]dding in the quantified and estimated costs, we believe that we can prove at trial that from 2000 to 2001, VECO incurred more than $200,000 in connection with its work on the Girdwood Residence remodel.[1536] Because of difficulties in accurately estimating unrecorded labor and other costs incurred before and after the period identified on the spreadsheet, the prosecution team considered the $188,000 figure to be an identifiable portion of the total cost.

D. Trial Preparation

The indictment was returned on July 29, 2008, and trial was set to commence on September 25, 2008. In the two months prior to trial, prosecutors met with Rocky Williams and Dave Anderson to prepare them for trial. The prosecution team also began assembling VECO invoices, bills, and receipts that provided the underlying documentation for the numbers that appeared on the spreadsheet, and which they planned to introduce at trial.

1. Evidence Concerning Statements by Williams and Anderson

On August 20, 2008, Williams went to the U.S. Attorney's Office in Anchorage and met with AUSAs Bottini and Goeke, and FBI SAs Kepner, Joy, and Howland; PIN attorneys Marsh and Sullivan participated by telephone. The purpose of the meeting was to prepare him for his trial testimony. Both Bottini and Goeke took notes, but the only reference to whether Williams worked full time or part time on Girdwood was in Bottini's handwritten notes:

[1534] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) at 12-30.

[1535] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) at 21.

[1536] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) at 21.

"[Rocky] wasn't @ chalet everyday
when not there Dave there, etc."[1537]

No FBI 302 report of this meeting was prepared.

In another trial preparation session on August 31, 2008, with AUSAs Bottini and Goeke, Williams stated that he was not asked to keep track of his time, and that he "occasionally would do other stuff," apparently referring to non Girdwood work.[1538] During that same session, Williams stated that he often spent more time on the road than at the actual job site.[1539] Similarly, AUSA Bottini met with Williams again, in Washington, D.C., on September 20, 2008, for a trial preparation session. Bottini made handwritten notes of the session directly on his typed "Rocky Williams Direct Outline." Under the typed question "how often were you [at Girdwood] at this time?", Williams's response is reflected in the handwritten entry: "3x's / week sometimes 4 5x's / week."[1540] Two pages later in the notes, there is a handwritten entry indicating that Marsh ("NAM") showed a document to Williams and asked him questions about it.[1541] Thus, it appears that Marsh was probably present when Williams said he was not always at the Girdwood site. Later in the outline, the handwritten notes indicate that Williams said: "Probably 3 4 hrs./day I was there Depended on what was going on @ the time Would go down twice on weekends, etc."[1542] Bottini acknowledged in his interview on December 16, 2009, that these notes showed that Williams was not at Girdwood for all the time that the VECO accounting records attributed to him.[1543]

[1537] Aug. 20, 2008 handwritten notes of AUSA Bottini of meeting with Rocky Williams, CRM057297; Bottini (Schuelke) Tr. Dec. 16, 2009 at 95.

[1538] Bottini OPR Tr. Mar. 10, 2010 at 410-412; Aug. 31, 2008 handwritten notes of AUSA Bottini of interview of Rocky Williams at CRM057339.

[1539] Bottini OPR Tr. Mar. 10, 2010 at 410-412; Aug. 31, 2008 handwritten notes by AUSA Bottini of Rocky Williams trial preparation session CRM057339. The latter statement raised a peripheral issue regarding Williams's hours. It is unclear whether Williams's statement [redacted] that he was there "24 hours a week" meant that he devoted a total of 24 hours per week to the project – including time spent purchasing materials and transporting them to the job-site – or whether he meant that he was at the job-site 24 hours per week and spent additional time each week buying and transporting materials there. If Williams meant the latter, he might have worked closer to a full-time schedule.

[1540] CRM115135.

[1541] CRM115138.

[1542] CRM115140.

[1543] Bottini (Schuelke) Tr. Dec. 16, 2009 at 308-309.

These documents demonstrate that Bottini and Goeke (and probably Marsh), who had done most of the trial preparation regarding Williams, had information prior to the start of trial that Williams did not work full time on the Girdwood project. In addition, Bottini acknowledged to OPR that he reviewed Williams's grand jury transcript prior to trial.[1544] When asked whether he recalled at the time that Williams had testified that he did not work full time, Bottini answered: "I don't know if I did or not."[1545]

AUSA Bottini stated in his OPR interview that it never occurred to him to review Williams's time cards (which were included in the VECO records supporting the spreadsheet), and he never showed them to Williams to ascertain whether they were accurate.[1546] Nor did Bottini compare Williams's statements with the VECO spreadsheet or records.[1547] Moreover, Bottini did not recall discussing Williams's time cards with any other members of the prosecution team until it became an issue during the trial.[1548] Bottini made similar statements during his December 2009 interview:

> You know, I never scoped the underlying records for that cost report. I never looked at the months of October, November, December, to look and see how much time they were reporting for Rocky and Dave or . . . anybody else.
>
> * * *
>
> . . . . [I]t was just something I never got in the weeds on. I saw the cost report, I knew what the cost report reflected, but I never sat there and went through, you know, the time cards, and saw what exactly they were reporting for Dave or Rocky or any of the other VECO employees.[1549]

[1544] Bottini OPR Tr. Mar. 10, 2010 at 393.

[1545] Bottini OPR Tr. Mar. 10, 2010 at 403.

[1546] Bottini OPR Tr. Mar. 11, 2010 at 518-519.

[1547] Bottini OPR Tr. Mar. 10, 2010 at 412-413, Mar. 11, 2010 at 516-518.

[1548] Bottini OPR Tr. Mar. 11, 2010 at 518-519.

[1549] Bottini (Schuelke) Tr. Dec. 16, 2009 at 258.

PIN attorney Marsh, who introduced the VECO spreadsheet and records at trial through Boomershine, stated to OPR that he did not remember reviewing the Williams grand jury transcript or any Williams 302s as part of any pretrial *Brady* review.[1550] Marsh later acknowledged to the court that he did not review Anderson's grand jury transcript prior to trial.[1551]

AUSA Goeke was not directly asked whether he ever compared Williams's grand jury testimony, or his notes from Williams's trial preparation session, with Williams's timesheets or other VECO records introduced by Boomershine.[1552] Goeke did, however, state that he did not review his own handwritten notes, Williams's grand jury testimony, or Williams's FBI 302s for *Brady* material.[1553]

The evidence demonstrates that AUSA Bottini, at least, recalled a month prior to trial that Anderson had been in Oregon for several months while work was progressing at Girdwood. Bottini's handwritten notes for questions that it appears he planned to ask Anderson on direct examination contain a series of questions that appear to track the questions posed by AUSA Goeke (and the answers given by Anderson) when Anderson [redacted] on December 6, 2006.[1554] The notes begin: "After garage pad poured, you leave job site for a while. Why? Where go? Who took over your role at this time?" After the question, "How long were you gone?", an answer is written in brackets: "[couple of months]."[1555] Several pages later, there is a circled entry at the top, reading: "When DA back from Portland?"[1556] The next page has a circled entry at the top: "Dave leaves →OR," and the notes then contain questions about what work had been done when Anderson was in Oregon; states "In OR for roughly 1½ months," and then queries: "Month when come back?"[1557]

[1550] Marsh OPR Tr. Mar. 25, 2010 at 66-67.

[1551] *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 76-77.

[1552] As noted, Goeke declined to be interviewed by OPR, so we were not able to pursue this issue with him.

[1553] Goeke (Schuelke) Tr. Jan. 8, 2010 at 62-64.

[1554] Bottini OPR Tr. Mar. 11, 2010 at 503-506. Bottini identified the handwritten notes as his; they are not dated, but Bottini said that he thought he created them in August 2008. Bottini OPR Tr. Mar. 11, 2010 at 504. The notes are located at Exhibit 19 to the Bottini OPR transcript.

[1555] Exhibit 19 to the Bottini OPR transcript at 30 (the pages are not numbered).

[1556] Exhibit 19 to the Bottini OPR transcript at 34 (the pages are not numbered).

[1557] Exhibit 19 to the Bottini OPR transcript at 35.

A September 22, 2008 typed outline prepared by Bottini for Anderson's direct testimony at trial also demonstrates Bottini's knowledge of Anderson's absence. The outline appears to have been used in a trial preparation session with Anderson, and it contains Bottini's handwritten notes.[1558] Handwritten notes on page 24 stated: "Dave leaves for OR Fall[.] Up till then worked every day [at] least 50 [hours] per week[.] How long Dave in OR?"[1559] Further down the page it stated: "Back in [6/4 or 6/8] [weeks]." These notations establish that Bottini, who presented Anderson's direct examination at trial, knew about Anderson's time in Oregon prior to the start of trial.[1560] In addition, Bottini acknowledged to OPR that he reviewed Anderson's grand jury transcript when he prepared his trial outline.[1561] He did not, however, review the VECO records, or compare Williams's and Anderson's time sheets with their prior statements.[1562]

2. Preparing the VECO Spreadsheet and Supporting Documents

Prior to the post indictment reshuffling of the trial team, it was anticipated that AUSA Goeke would present Boomershine at trial.[1563] He had questioned her [redacted], and had been involved in obtaining the underlying documentation that would be used at trial.[1564] Shortly before the return of the indictment, however, the composition of the trial team changed, and the Criminal Division Front Office determined that neither Goeke nor Sullivan would handle witnesses at trial. Boomershine ultimately was assigned as Marsh's witness sometime in August 2008.[1565]

[1558] Bottini OPR Tr. Mar. 11, 2010 at 508.

[1559] Bottini OPR Tr. Mar. 11, 2010 at 506-507. The typed outline with handwritten notes is located at Exhibit 20 to the Bottini OPR transcript.

[1560] Bottini OPR Tr. Mar. 11, 2010 at 507.

[1561] Bottini OPR Tr. Mar. 11, 2010 at 500.

[1562] Bottini OPR Tr. Mar. 11, 2010 at 518.

[1563] Marsh OPR Tr. Mar. 25, 2010 at 40-41.

[1564] AUSA Goeke participated in a series of interviews of VECO Alaska employees in early 2007 that discussed the manner in which VECO Alaska kept track of the hours of its employees, including Dave Anderson. Jan. 8, 2007 FBI 302 of [redacted]; Jan. 12, 2007 FBI 302 of [redacted]; Jan. 24, 2007 FBI 302 of [redacted] Jan. 24, 2007 FBI 302 of [redacted] Jan. 31, 2007 FBI 302 [redacted]; Feb. 26, 2007 FBI 302 of [redacted]; Feb 27, 2007 FBI 302 of [redacted].

[1565] Marsh OPR Tr. Mar. 25, 2010 at 40-41.

In Marsh's OPR interview, he also recalled that Goeke had significant involvement in reviewing and sorting the VECO records.[1566] Marsh said that he looked over the VECO records when they came in, but that he was not really familiar with them:

> I remember looking at these around the time they came in, you know, just to make sure that everything sort of looked like it fit, but I can't say that I spent you know, I don't remember ever sitting down with a whole stack and going through them page by page and analyzing them closely.[1567]

Marsh added that he did not recall going over the documents with Boomershine during any trial preparation session in Alaska.[1568] In his OPR interview, Marsh said he regarded Boomershine as akin to a document custodian, because she was not substantively familiar with the underlying documents.[1569]

Although Marsh was responsible for presenting Boomershine's testimony, Goeke remained involved in assembling the exhibits. In an August 23, 2008 email to the prosecution team, AUSA Bottini stated:

> [Goeke, Kepner] and I are pulling stuff for trial exhibits:
>
> * * *
>
> We need to make sure that we have the invoices from VECO Alaska or other subsidiary invoices that were transferred to VECO Corp. (and absorbed by VECO Corp.). It looks like we have most of the VECO AK invoices . . . but we need to make sure that we pull the others.[1570]

[1566] Marsh OPR Tr. Mar. 25, 2010 at 32-33.

[1567] Marsh OPR Tr. Mar. 25, 2010 at 40-41.

[1568] Marsh OPR Tr. Mar. 25, 2010 at 41. Handwritten notes by AUSA Marsh indicate that he interviewed Cheryl Boomershine on August 25, 2008 in Anchorage. They do not indicate that he reviewed VECO records with her.

[1569] Marsh OPR Tr. Mar. 25, 2010 at 44-45.

[1570] Aug. 23, 2008 4:58pm email from AUSA Bottini to PIN attorney Marsh, PIN attorney Sullivan, AUSA Goeke, PIN Principal Deputy Chief Morris, SA Kepner, SA Joy, SA Bateman, and SA Roberts.

On September 1, 2008, Goeke sent an email to the group with a tentative list of trial exhibits, asking:

- How do we want to organize the Girdwood spreadsheet docs?
  - I propose a set of docs by each entry with a separate exhibit number per entry set.
  - we are working on getting a set of originals for all entries on the spreadsheet from C2HMHill [VECO's successor corporation].[1571]

According to Marsh, the VECO records underlying the spreadsheet, including documents showing hours worked by Williams and Anderson, eventually were organized in the manner they were received from VECO, that is, by invoice. Each monthly invoice from either VECO Equipment (Rocky Williams's employer) or VECO Alaska (Dave Anderson's employer) to VECO Corporation was identified as a separate exhibit, with receipts for goods purchased, time cards, and spreadsheets reflecting hours worked, grouped together behind them.[1572]

There is also evidence that PIN attorney Sullivan had some involvement in gathering and organizing the documents underlying the VECO spreadsheet. In an email to SAs Kepner and Joy (copies to AUSAs Bottini and Goeke, and PIN attorneys Marsh and Morris), Sullivan attached several scanned documents, including the documents that became Government Exhibit 1059. Those documents included Williams's time cards for late October and early November 2000, averaging more than 65 hours per week. The scanned documents also included what became Government Exhibit 1064, which showed 130 hours of Anderson's time billed to the Girdwood project in November 2000 (although other evidence showed that he was in Oregon until sometime between Thanksgiving and Christmas). The text of Sullivan's email related: "I believe most of this is stuff we tried to pull when determining Rocky's time on the project."[1573]

[1571] Sept. 1, 2008 11:19pm email from AUSA Goeke to AUSA Bottini, PIN Principal Deputy Chief Morris, PIN attorney Marsh, PIN attorney Sullivan, SA Kepner, SA Joy, SA Bateman, and SA Roberts.

[1572] Marsh OPR Tr. Mar. 25, 2010 at 39-40; Government Exhibits 177, 1058-1069.

[1573] Aug. 19, 2008 4:07pm email from Sullivan to SAs Kepner and Joy, AUSAs Bottini and Goeke, and PIN attorneys Morris and Marsh.

By early September 2008, Goeke was regularly sending updated versions of the prosecution's growing exhibit list to the prosecution team.[1574] In a September 10, 2008 email, Goeke stated: "I am adding all of the supporting materials for the [VECO] spreadsheet."[1575] According to Marsh, the original versions of at least some of the inter company communications were not available until shortly before trial.[1576]

In or around mid September 2008, Marsh reviewed with Goeke and Boomershine the records that had been designated as exhibits.[1577] According to Marsh, although the prosecution team was concerned that the VECO spreadsheet might be under inclusive, because many expenses connected with the Girdwood project were not included in its tally, no one thought that the numbers from the underlying documents that were included in the totals might be inaccurate.[1578]

In his OPR interview, Bottini stated that Goeke and Marsh were the attorneys most heavily involved in putting together the VECO records early in the investigation.[1579] Bottini stated that he sat in on portions of Boomershine's early interviews and helped begin the process of pulling together trial exhibits, but he did not spend time sorting and closely reviewing the VECO records.[1580]

[1574] Sept. 1, 2008 11:18pm email from AUSA Goeke to AUSA Bottini, PIN Principal Deputy Chief Morris, PIN attorney Marsh, PIN attorney Sullivan, SA Kepner, SA Joy, SA Bateman, and SA Roberts; Sept. 4, 2008 12:01am email from AUSA Goeke to AUSA Bottini, PIN Principal Deputy Chief Morris, PIN attorney Marsh, PIN attorney Sullivan, SA Kepner, SA Joy, SA Bateman, and SA Roberts; Sept. 9, 2008 12:19pm email from AUSA Goeke to AUSA Bottini, PIN Principal Deputy Chief Morris, PIN attorney Marsh, PIN attorney Sullivan, SA Kepner, SA Joy, SA Bateman, and SA Roberts; Sept. 10, 2008 9:06pm email from AUSA Goeke to AUSA Bottini, PIN Principal Deputy Chief Morris, PIN attorney Marsh, PIN attorney Sullivan, SA Kepner, SA Joy, SA Bateman, and SA Roberts; Sept. 11, 2008 3:19pm email from AUSA Goeke to AUSA Bottini, PIN Principal Deputy Chief Morris, PIN attorney Marsh, PIN attorney Sullivan, SA Kepner, SA Joy, SA Bateman, and SA Roberts.

[1575] Sept. 10, 2006 9:06pm email from AUSA Goeke to AUSA Bottini, PIN Principal Deputy Chief Morris, PIN attorney Marsh, PIN attorney Sullivan, SA Kepner, SA Joy, SA Bateman, and SA Roberts.

[1576] Marsh OPR Tr. Mar. 25, 2010 at 39-40.

[1577] Marsh OPR Tr. Mar. 25, 2010 at 45, 49.

[1578] Marsh OPR Tr. Mar. 25, 2010 at 51-52, 60-61.

[1579] Bottini OPR Tr. Mar. 11, 2010 at 508-509.

[1580] Bottini OPR Tr. Mar. 11, 2010 at 508-511.

Similarly, PIN attorney Sullivan told OPR that he was not involved in preparing the portions of the case that involved the VECO records:

> I don't believe I ever sat down and reviewed the Boomershine cost report. I may have glanced at it, but nobody ever asked me to go through it, verify, you know, what people were testifying to, to match it up to see if the time was matching up.[1581]

The following charts were created by OPR for this Report based on information that was contained on the VECO spreadsheet and VECO records (Govt. Exhibits 177, 1058 1069, 1090).

Month of work	Invoice date	worker	amt. paid	hrs worked	Exhibit
Aug. 2000	12/2000	Williams	$ 1,963.78	63	1090
Sept. 2000	12/2000	Williams	$ 6,397.11	234.5	1090
Oct. 2000	11/7/00	Williams	$ 7,510.56	268	1058
Nov. 2000	12/5/00	Williams	$ 7,766.69	269.5	1059
Dec. 2000	1/8/01	Williams	$10,651.31	374	1060
Jan. 2001	2/7/01	Williams	$ 6,328.84	228	1061
Feb. 2001	3/6/01	Williams	$ 6,851.95	N/A	1062
Mar. 2001	4/9/01	Williams	$ 6,823.67	N/A	1063
TOTAL			$54,293.91[1582]		

Month of work	Invoice date	worker	amt. paid	hrs worked	Exhibit
Oct. 2000	11/6/00	Anderson	$ 9,389.61	280	1065
Nov. 2000	12/5/00	Anderson	$ 4,394.74	130	1064
Dec. 2000	1/8/01	Anderson	$ 7,672.02	226	1066
Jan. 2001	2/4/01	Anderson	$ 668.20	20	1067

[1581] Sullivan OPR Tr. Mar. 12, 2010 at 522-523.

[1582] Boomershine's trial testimony did not include an explanation of two "recodes" that appear on Exhibit 177. Exhibit 1090, which consists of VECO records, including spreadsheets and Williams's weekly timesheets, shows that hours billed by Williams in August and September 2000 were added to the Girdwood cost code in a December 2000 correction.

Feb. 2001	3/2/01	Anderson	$ 2,090.85	60	1068
Mar. 2001	4/5/01	Anderson	$ 7,351.24	213.5	1069
TOTAL			$31,566.66		

Thus, of the $188,928.82 figure representing VECO's costs on the Girdwood project, more than $85,000 can be attributed to Williams's and Anderson's wages.

3. The *Giglio* and *Brady* Letters

The August 25, 2008 *Giglio* letter identified Williams's and Anderson's prior criminal history and alluded to "rumors" of their "excessive alcohol use," but did not contain any information suggesting that they did not work full time on the Girdwood project, or that the government had inconsistent information on that issue.

Paragraph 15 of the September 9, 2008 *Brady* letter recounted that Williams had given inconsistent accounts of whether 99 percent of the work at Girdwood was performed by Christensen Builders, but did not include any information about inconsistencies in the evidence about whether Williams or Anderson worked full time or part time on the Girdwood project.

E. The Trial

1. The Opening Statement

As the trial grew closer, the trial team began circulating drafts of the opening statement.[1583] On September 20, 2008, PIN attorney Marsh forwarded to Bottini, Goeke, Sullivan, and Kepner some suggested changes, including the following insertion:

> For its work during that same time, VECO kept track of most of the costs, right down to the penny. You'll see VECO's internal billing and accounting records for the chalet project, and you'll see that VECO's portion of the

[1583] Sept. 19, 2008 6:11pm email from PIN Principal Deputy Chief Morris to PIN attorney Marsh, PIN attorney Sullivan, AUSA Bottini, AUSA Goeke, SA Kepner, and SA Joy (draft of Stevens opening statement attached); Sept. 19, 2008 9:24pm email from PIN attorney Marsh to AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, SA Kepner ("Folks - this is as far as I got tonight. Go crazy, Joe and Jim!! (And GO HOME, ED!!)") (draft of Stevens opening statement attached); Sept. 20, 2008 6:34pm email from PIN attorney Marsh to AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, SA Kepner ("Plus redline. Changes to the Christensen vs. VECO section.") (draft of Stevens opening statement attached with redlining).

> work during this period, at VECO's cost, totaled more than $188,000. That figure the $188,000 was probably a little high. Because VECO built oil wells, they probably could have been a little more efficient. You'll also hear that the same figure is probably a little low, because it doesn't include the hundreds of hours of John Hess' architect time, hundreds of hours of an electrician's time, and other things.
>
> But at the end of the day, whether its $188 or $240 or $120 thousand, the question that YOU'RE going to have to answer is, "was it more than two hundred and sixty dollars?"[1584]

The draft is identified in the cover email as "Opening v.8.wpd," suggesting that it was the eighth version of the document. It is the first version that contained the phrase "right down to the penny." The email (and attachment) was not sent to Morris (though it was forwarded to Morris by Goeke twenty minutes later).[1585] Marsh explained in his OPR interview that the "rest of the trial team" was trying to fix some "factual inaccuracies," and were "collaboratively" coming up with a "different opening that we could send to her."[1586]

In Marsh's OPR interview, he did not specifically recall making the changes in the redlined version he forwarded, although he acknowledged that the redlined draft appeared to have been emailed from his computer and that he may have drafted the language.[1587] Marsh maintained that the editing was a group effort.[1588]

In Marsh's OPR interview, he acknowledged that the "right down to the penny" phrase "probably shouldn't have been something that we put in" because the government did not intend to argue that VECO record keeping was precise.[1589]

[1584] Sept. 20, 2008 6:34pm email from PIN attorney Marsh to AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, SA Kepner ("Plus redline. Changes to the Christensen vs. VECO section.") (draft of Stevens opening statement attached with redlining).

[1585] Sept. 20, 2008 6:53pm email from AUSA Goeke to PIN Principal Deputy Chief Morris and AUSA Bottini, PIN attorneys Marsh and Sullivan, and SA Kepner.

[1586] Marsh OPR Tr. Mar. 25, 2010 at 86, 87.

[1587] Marsh OPR Tr. Mar. 25, 2010 at 91-92.

[1588] Marsh OPR Tr. Mar. 25, 2010 at 91-92.

[1589] Marsh OPR Tr. Mar. 25, 2010 at 92-93.

Marsh explained that the prosecution team expected defense counsel to argue that the numbers were inflated because Rocky Williams and Dave Anderson were inefficient and drunk, or because an oil company could not efficiently build a residential deck.[1590] The prosecution team also wished to convey to the jury that the records were under inclusive, and that the total therefore was low.[1591] According to Marsh, the point of the language in the opening statement was to emphasize *not* that the VECO records and the $188,000 figure were precise, but rather that the number might *not* be precise, and that such imprecision was not important, because whether the total was $188,000, or $240,000, or $120,000, the number was still more than the gift reporting threshold ($260 per year) for the time frame covered by the spreadsheet. As Marsh stated:

> So . . . we didn't want [Morris] to go in and . . . say "this is the report that shows you exactly how much this project costs," because we thought it didn't include a lot of stuff that should have been on there, and we also didn't want . . . to play into the hands of [defense counsel] saying "look at all these inefficiencies." . . . like it says here, whether it's 188,000 or 240,000 or 120,000 doesn't matter. The question is, is it more than $260. That's the point we were trying to [make].[1592]

Morris kept most of the suggested changes in the draft opening, and used the following language in her opening statement on September 25, 2008:

> Because the public couldn't know the Senator wasn't paying his bills for its work during that same time frame, VECO kept track of most of the costs right down to the penny. You'll see VECO's internal billing system and accounting records for the chalet project, and you'll see that VECO's portion of the work during this period of time and VECO's cost totaled more than $188,000, again during this period of time. That figure, $188,000, could be possibly a little high because VECO built oil wells, not houses. They probably could have been a little more efficient at times, but, hey, the cost is always good when the price is free. So you'll al[so] learn that the same

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[1590] Marsh OPR Tr. Mar. 25, 2010 at 90, 93-94.

[1591] Marsh OPR Tr. Mar. 25, 2010 at 90-92.

[1592] Marsh OPR Tr. Mar. 25, 2010 at 90-92. The $260 figure was the gift reporting threshold for 1999-2002. The amount was raised to $285 for 2003, and to $305 for 2004-2006.

> figure you may also learn that the same figure is a little low because the architect, Hess' time was billed in there along with the electricians and some other stuff, but at the end of the day, whether it's $188,000 or whether it's $249,000 or whether it's $120,000, the defendant still got it for nothing. He had to disclose it, was obligated to disclose it, but instead he chose not to.[1593]

Moments later, in connection with Senator Stevens's knowledge of the work VECO was doing, Morris stated:

> The evidence will clearly show a man who is very mired in the details of his finances. VECO never got a dime, much less $188,000 as its internal records reflect, and the defendant never disclosed receiving this benefit from VECO in relation to the renovation and expansion of the chalet on his financial disclosure forms. If you look at the financial disclosure forms, it's as if VECO was never there.[1594]

In the defense opening statement, counsel referred to the $188,000 "labor costs that were unbilled" but were "on the VECO books and records," and, after noting that Senator Stevens had paid $160,000 for the Girdwood renovations, asked rhetorically: "how can you send a bill for something like all of these other costs that were run up on the VECO bill . . .?"[1595] The principal point the defense made was that Bill Allen never told Senator Stevens about any VECO bill, and that the Stevenses would have paid if they had been billed.[1596] Defense counsel also suggested, however, that the VECO cost figure was high because the VECO workers were not efficient.[1597] At the time, the defense had the VECO spreadsheet and the underlying VECO documents, but did not have the information about Williams's part time status and Anderson's time in Oregon. Had that information been disclosed, the defense could have argued that the VECO records were inaccurate and unreliable.

[1593] *United States v. Stevens*, Tr. Sept. 25, 2008 (am) at 42.

[1594] *United States v. Stevens*, Tr. Sept. 25, 2008 (am) at 43.

[1595] *United States v. Stevens*, Tr. Sept. 26, 2008 (pm) at 69-70.

[1596] *United States v. Stevens*, Tr. Sept. 26, 2008 (pm) at 69-70.

[1597] *United States v. Stevens*, Tr. Sept. 26, 2008 (pm) at 70.

2. Boomershine's Testimony

Cheryl Boomershine testified the following day, on September 26, 2008. PIN attorney Marsh conducted her direct examination.[1598] Boomershine testified that during the relevant time period she worked for VECO Corporation, the parent corporation of various subsidiaries, including VECO Alaska and VECO Equipment.[1599] Boomershine stated that it was her job to prepare financial statements for the parent corporation, to review all accounts payable information and enter it into the computerized accounting system under the appropriate cost codes.[1600]

Boomershine explained that the subsidiaries often incurred costs for which the parent corporation was responsible, and the subsidiary would send an invoice to the parent, which Boomershine, in her role as accounting systems manager, would enter for processing and payment:

> Q. And what types of information generally would be included in . . . such an invoice from a sub to corporate?
>
> A. If they were labor costs, they would have the supporting document that showed the names of the employees and the hours and then their cost. If there were materials charges, then there would be the support, the copies of those material invoices as support behind their invoice.
>
> Q. And when those invoices and the supporting documentation came to VECO Corporation, where would they go?
>
> A. They would come to my desk.[1601]

Marsh then showed Boomershine Exhibits 1058 1093, which consisted of, among other things, a number of invoices with underlying documentation

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[1598] *United States v. Stevens*, Tr. Sept. 26, 2008 (pm) at 6.

[1599] *United States v. Stevens*, Tr. Sept. 26, 2008 (pm) at 8-9.

[1600] *United States v. Stevens*, Tr. Sept. 26, 2008 (pm) at 10-11.

[1601] *United States v. Stevens*, Tr. Sept. 26, 2008 (pm) at 12-14.

attached.[1602] Under Marsh's questioning, Boomershine verified that these were VECO documents that she processed, that they were kept by VECO Corporation in the regular course of business, and that it was the regular practice of VECO Corporation to keep those records.[1603] Marsh then moved for the admission of the exhibits, and they were admitted without objection.[1604]

Boomershine was then shown Government Exhibit 177, the two page spreadsheet that Boomershine had prepared in February 2007.[1605] As noted above, the largest component was the "Girdwood Consultants" category, which accounted for $181,699.12 of the $188,928.82 total cost reflected on the spreadsheet.[1606] Marsh asked Boomershine whether she was able to determine that the information kept in VECO's computer system was "accurate."[1607] Boomershine replied affirmatively.[1608] Marsh then asked whether the electronic information contained in the computer system and in printouts such as Exhibit 177 were used in the normal course of business at VECO Corporation; Boomershine again replied in the affirmative.[1609] Marsh then moved for the admission into evidence of Government Exhibit 177, and it was admitted without objection.[1610]

Boomershine testified about the various invoices and explained how the costs reflected on the invoices appeared on the spreadsheet.[1611] Marsh did not go through all of the invoices and underlying documentation, but he did specifically identify some of the labor costs incurred by Rocky Williams and Dave Anderson, among others, and had Boomershine point out where those costs were reflected

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[1602] *United States v. Stevens*, Tr. Sept. 26, 2008 (pm) at 14-15.

[1603] *United States v. Stevens*, Tr. Sept. 26, 2008 (pm) at 14.

[1604] *United States v. Stevens*, Tr. Sept. 26, 2008 (pm) at 14-15.

[1605] *United States v. Stevens*, Tr. Sept. 26, 2008 (pm) at 17; Exhibit 177.

[1606] *United States v. Stevens*, Tr. Sept. 26, 2008 (pm) at 10-11.

[1607] *United States v. Stevens*, Tr. Sept. 26, 2008 (pm) at 18.

[1608] *United States v. Stevens*, Tr. Sept. 26, 2008 (pm) at 18.

[1609] *United States v. Stevens*, Tr. Sept. 26, 2008 (pm) at 18.

[1610] *United States v. Stevens*, Tr. Sept. 26, 2008 (pm) at 18.

[1611] *United States v. Stevens*, Tr. Sept. 26, 2008 (pm) at 19-45.

on the spreadsheet, at one point asking that the entries be circled on the overhead screen so it would be easier for the jury to identify the figures being discussed.[1612]

Boomershine testified that she did not personally know what Williams was actually doing at Girdwood; she simply entered and processed invoices that had been approved.[1613]

There was little cross examination by defense counsel. Defense counsel's questioning did, however, clarify an aspect of the invoices that Marsh did not address, that is, that Bill Allen specifically had approved and signed off on nearly all of the invoices from VECO Equipment (Rocky Williams's employer) and VECO Alaska (Dave Anderson's employer).[1614]

3. The Defense Moves for Dismissal of the Indictment or a Mistrial Based on the Inaccuracy or Falsity of the VECO Records

As discussed in detail in Chapter Six, *supra*, Rocky Williams flew back to Alaska on September 25, 2008, the day of opening statements in the *Stevens* trial.[1615] The following day, the government introduced the VECO spreadsheet and supporting documents showing that Williams and Anderson were billed full time, plus overtime, to the Girdwood project during the period covered by the spreadsheet. On Sunday afternoon, September 28, 2008, defense counsel spoke with Williams by telephone.[1616] As recounted earlier, defense counsel learned during the course of their interviews that Williams did not work at the Girdwood project full time, and that he submitted his hours to VECO with "the expectation that [the company] would bill the proper percentage of his time to the appropriate cost codes."[1617]

[1612] *United States v. Stevens*, Tr. Sept. 26, 2008 (pm) at 21, 24-25, 28-30.

[1613] *United States v. Stevens*, Tr. Sept. 26, 2008 (pm) at 24-25.

[1614] *United States v. Stevens*, Tr. Sept. 26, 2008 (pm) at 54-56.

[1615] Virtually There Itinerary for Rocky Williams (reflects Williams's Thursday, Sept. 25, 2008 departure from Dulles International Airport at 2:23pm via Minneapolis, Minnesota, arriving in Anchorage, Alaska at 7:41pm).

[1616] Sept 28, 2008 Declaration of [defense counsel].

[1617] Sept 28, 2008 Declaration of [defense counsel], ¶ 7.

Shortly after the interview, defense counsel requested and received from the prosecution a copy of Williams's grand jury testimony.[1618] The defense filed a Motion to Dismiss Indictment or for a Mistrial later that same night, alleging that the prosecution failed to disclose exculpatory information showing that Williams did not work on Girdwood as much as the spreadsheet indicated, and that the government introduced the spreadsheet knowing that it was inaccurate ("It can charitably be described as grossly misleading").[1619] The defense argued further that, had the information been available prior to trial, the defense would have used it in its opening statement, and in the cross examinations of a number of government witnesses who testified regarding Williams, including Cheryl Boomershine, John Hess, and others.[1620] The defense also argued that the government deliberately sent Williams back to Alaska so the defense would not have the information at trial.[1621]

Upon learning of the defense's motion, Bottini's first email response included the following statement: "Rocky has never told us that he did not work anywhere near the hours that VECO clocked for him on the Girdwood project."[1622] In Bottini's OPR interview, he stated that, although Williams told prosecutors that he worked part time on the Girdwood project, he never told prosecutors that VECO failed to record and allocate his hours correctly.[1623] Thus, although Bottini was aware that Williams was only at the site on a part time basis, he did not realize that the VECO records did not accurately reflect Williams's (and Anderson's) hours:

> OPR: In other words, at the time this issue blew up in court, you all had not made the linkage between what the witnesses that is, Rocky and Dave had told you

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[1618] Sept. 28, 2008, 4:19pm email from defense counsel to PIN Principal Deputy Chief Morris, PIN attorney Marsh, PIN attorney Sullivan, AUSA Bottini, and AUSA Goeke.

[1619] Senator Stevens's Motion to Dismiss Indictment or for a Mistrial at 1 (D.D.C., filed Sept. 28, 2008).

[1620] Senator Stevens's Motion to Dismiss Indictment or for a Mistrial at 8-9 (D.D.C., filed Sept. 28, 2008).

[1621] Senator Stevens's Motion to Dismiss Indictment or for a Mistrial at 9 (D.D.C., filed Sept. 28, 2008).

[1622] Sept. 29, 2008, 7:38am email from AUSA Bottini to PIN Principal Deputy Chief Morris, PIN attorney Marsh, PIN attorney Sullivan, AUSA Goeke, SA Kepner, SA Joy, SA Bateman, and SA Roberts.

[1623] Bottini OPR Tr. Mar. 11, 2010 at 522-526.

> about their hours with what the corporation reflected as being their hours?
>
> THE WITNESS: That's right.[1624]

Bottini added:

> A I had no idea no idea that the VECO records were reflecting time that Rocky and ultimately Dave had spent on that project when they weren't there. I didn't know that.[1625]

The court took up the motion the next morning. That hearing is detailed in Chapter Six, *supra*, and will only be summarized here. PIN attorney Marsh and PIN Principal Deputy Chief Morris explained to the court that the government did not "spirit" Williams out of town because they did not like what he was going to say; rather, the government allowed him to go home because of his serious and rapidly deteriorating medical condition.[1626] Marsh argued that it did not matter if the costs billed to VECO were $188,000 or $295,000 or $85,000; what mattered was that they were more than $260 (the gift reporting threshold). He argued further that, although Williams's hours may have been inflated, other workers' hours were under reported or not included, and that Williams did a great deal of work at Girdwood, so the undisclosed information regarding his hours did not rise to the level of *Brady* material.[1627]

The court asked whether the government still planned to call Williams to testify in its case in chief, and Marsh responded no.[1628] In response to a question from the court, Marsh stated that the government would be willing to bring Boomershine back for further cross examination if necessary.[1629]

[1624] Bottini OPR Tr. Mar. 11, 2010 at 526.

[1625] Bottini OPR Tr. Mar. 11, 2010 at 526-527.

[1626] *United States v. Stevens*, Tr. Sept. 29, 2008 (am) (bench conference) at 3-6.

[1627] *United States v. Stevens*, Tr. Sept. 29, 2008 (am) at 7-9.

[1628] *United States v. Stevens*, Tr. Sept. 29, 2008 (am) at 9. Marsh's statement that the government no longer planned to call Williams was consistent with his recollection of the prosecution team's decision prior to Williams's departure for Alaska. It was not, however, consistent with Bottini's and Morris's recollections. As discussed earlier, both still believed there was at least a significant likelihood that Williams would be a witness.

[1629] *United States v. Stevens*, Tr. Sept. 29, 2008 (am) at 9-10.

In response, defense counsel argued:

> The clear implication of Ms. Boomershine's testimony and the accounting records that they put in as reliable business records was that Mr. Williams was there working. As our chart reflects, for example, in the month of December 278 hours, all on the Girdwood residence; November, 281 hours. Every day except for Thanksgiving, and the government's case is that those numbers overwhelm any inference that $160,000 that Senator Stevens paid was a fair price for these renovations. The case that they presented in opening and they presented through all these witness[es] is that there was so much work done there that he could not have missed it, that he must have known that VECO was doing a substantial amount of work. Our defense is that he paid a fair price, and Mrs. Stevens paid a fair price.[1630]

After briefly considering the possibility of a Rule 15 deposition of Rocky Williams, defense counsel stated, "We'd like him here as a witness, your Honor, and he was here and he was sent back without us knowing."[1631]

Shortly after the argument it was discovered that Cheryl Boomershine had not yet returned to Alaska, and that she was available to be recalled for additional cross examination. Accordingly, Boomershine was recalled and defense counsel conducted additional cross examination.[1632] She testified that she incorporated the hours reported by Williams into her spreadsheet, but she did not know

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[1630] *United States v. Stevens*, Tr. Sept. 29, 2008 (am) at 12 and 13. We note that defense counsel's calculations of Williams's hours for the months of November (281 hours) and December (278 hours) vary from the totals reflected in the chart prepared by OPR (269.5 hours in November and 374 hours in December). The totals vary because defense counsel's totals reflect the precise numbers of hours worked each month, whereas the OPR totals reflect the hours for which payment was requested on monthly invoices sent to VECO Corporation by VECO Equipment (Rocky Williams's employer) and VECO Alaska (Dave Anderson's employer). The latter totals included days from the preceding month. Thus, the OPR total of 269.5 hours for November reflected work done from October 23 through November 19, and the OPR total of 374 hours for December reflected work done from November 20 through December 31. Invoices requesting payment for each month's work generally were submitted approximately one week into the following month.

[1631] *United States v. Stevens*, Tr. Sept. 29, 2008 (am) at 22.

[1632] *United States v. Stevens*, Tr. Sept. 29, 2008 (am) at 49-74.

whether Williams actually was present and working at the Girdwood site during the hours that were billed to the project.[1633]

The court revisited the Williams issue in the afternoon of the same day. Judge Sullivan reiterated that he was "disturbed" by the government's decision to "send" a witness under subpoena back to Alaska without notifying the defense or the court.

The government argued in its Opposition Memorandum that there had been no *Brady* violation because Williams's grand jury testimony established that he worked many hours at the Girdwood site; and the defense had other evidence, including emails from other witnesses, suggesting that Williams worked on other projects during the same time period that he worked at the Girdwood residence.[1634] The government's Supplemental Memorandum argued that sanctions were not called for because there was no *Brady* violation, and any perceived harm had been cured by recalling Boomershine and stipulating that other witnesses were unaware of Williams's hours.[1635]

In its Reply Memorandum, defense counsel argued that a "stern sanction" was needed.[1636] They argued that the government relied on the $188,000 cost figure offered by Boomershine, even as it "knew, and did not tell the defense, that these accounting records were shockingly inaccurate and misleading," because "Mr. Williams spent nowhere close" to the amount of time working on Girdwood as the VECO records indicated.[1637] The Reply Memorandum elaborated:

> Instead of disclosing this information, it vouched for the inaccurate records in its opening and in its questioning of Ms. Boomershine and, at the same time, dispatched back to Alaska the critical witness whose testimony

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[1633] *United States v. Stevens*, Tr. Sept. 29, 2008 (am) at 49-74.

[1634] Government's Opposition to Defendant's Motion to Dismiss Indictment or for a Mistrial at 5-10 (D.D.C., filed Sept. 29, 2008).

[1635] Government's Supplemental Brief in Support of its Opposition to Defendant's Motion to Dismiss Indictment or for a Mistrial (D.D.C., filed Sept. 30, 2008). The government also asserted (at 3) that it had tried to contact Williams to determine whether he could return to Washington, and that if he could not, the government would take steps to make him available for a Rule 15 deposition.

[1636] Reply in Support of Senator Stevens's Motion to Dismiss Indictment or for a Mistrial at 2 (D. D.C., filed Sept. 30, 2008).

[1637] Reply in Support of Senator Stevens's Motion to Dismiss Indictment or for a Mistrial at 1 (D.D.C., filed Sept. 30, 2008).

> would prove that the accounting records were misleading.[1638]

4. The Anderson Hours are Challenged

Several days later, on October 2, 2008, in response to other apparent failures to disclose *Brady, Giglio,* or other relevant evidence, the court ordered the government to provide to the defense copies of all FBI 302s and grand jury testimony in unredacted form.[1639] The government endeavored to comply. On October 5, 2008, after reviewing this material, defense counsel filed a Motion to Dismiss the Indictment Due to the Government's Intentional and Repeated Misconduct. The Motion argued:

> Dave Anderson's grand jury testimony is even more damning to the government than the information from Rocky Williams. Anderson testified that he was in Portland, Oregon, 1,500 miles from Alaska, for a two to three month period while the Girdwood renovations were taking place, from mid to late September 2000 until shortly before Christmas.
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> * * *
>
> During that same period, VECO's accounting records, which the government offered into evidence at trial as supposedly reliable business records, reflect that Anderson billed virtually full time to the Girdwood project codes. . . . All of that time a total of 566 hours for October through December 2000 is included in the $188,000 figure that the government offered into evidence through Ms. Boomershine.[1640]

The Motion added:

> The government knew this information was false. Three members of the prosecution team were present in the

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[1638] Reply in Support of Senator Stevens's Motion to Dismiss Indictment or for a Mistrial at 1-2 (D.D.C., filed Sept. 30, 2008).

[1639] *United States v. Stevens*, Tr. Oct. 2, 2008 (am) at 19, 29, 51-53,

[1640] Senator Stevens's Motion to Dismiss Indictment Due to the Government's Intentional and Repeated Misconduct at 10-11 (D.D.C., filed Oct. 5, 2008).

> grand jury room when Dave Anderson testified. . . . Yet the government never produced the transcript, or any summary of this information, as *Brady* material. It affirmatively put Ms. Boomershine's testimony, and the false accounting records, into evidence without qualification and despite knowing that those records were inaccurate.[1641]

In support of the assertion that the prosecutors knowingly introduced false evidence regarding Williams's and Anderson's hours, the defense noted that the government chose not to call the "two witnesses [Williams and Anderson] whose timecards made up a substantial part of the billings reflected in the [inaccurate VECO] records."[1642]

The government filed an initial response on October 5, 2008, and a more detailed response on October 6, 2008.[1643] The government argued that having Anderson's grand jury testimony sooner would not have aided the defense in preparing for Boomershine because Boomershine simply entered the hours she received; she did not know if they were accurate or not. The government argued further that it provided other information before trial that revealed Anderson's absence to the defense, such as contractor Augie Paone's grand jury testimony that Anderson did not start on the project until December 2000, and information showing that Anderson was frequently intoxicated. In addition, the government argued that Anderson, Williams, and other VECO employees worked many hours at Girdwood that were not included in the VECO spreadsheet, and that the government had always maintained that the spreadsheet was not precise and that the true cost figure could be anywhere from $120,000 to $240,000.[1644]

[1641] Senator Stevens's Motion to Dismiss Indictment Due to the Government's Intentional and Repeated Misconduct at 11 (D.D.C., filed Oct. 5, 2008).

[1642] Senator Stevens's Motion to Dismiss Indictment Due to the Government's Intentional and Repeated Misconduct at 12 (D.D.C., filed Oct. 5, 2008).

[1643] Government's Initial Opposition to Defendant's Motion to Dismiss the Indictment for Alleged Misconduct (D.D.C., filed Oct. 5, 2008); Government's Opposition to Defendant's Motion to Dismiss Due to Alleged Misconduct (D.D.C., filed Oct. 6, 2008).

[1644] Government's Opposition to Defendant's Motion to Dismiss Due to Alleged Misconduct at 15-20 (D.D.C., filed Oct. 6, 2008).

5. The October 8, 2008 Hearing

On October 8, 2008, the court held a hearing addressing, among other things, the government's failure to disclose Anderson's grand jury testimony.[1645] PIN attorney Marsh handled the argument for the government, and he reiterated the points made in the government's response.[1646] The court, however, did not accept Marsh's explanations, and was critical of the government's conduct:

> THE COURT: The government knew that Anderson had taken an oath before the grand jury and said, I'm in Portland. I was in Portland during those two or three months. The government reread the records, though, because you did circle the records. Someone circled them. So you know, these are the records. Someone circled them. . . . VECO spent a hundred and eighty thousand, plus these are the records. Anderson was there. Williams was there. And all along the government knew that was a lie.
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> MR. MARSH: Your Honor, certainly, Mr. Anderson was gone for a seven week period, but, Your Honor, we didn't we put the records on as a place holder, and if the Court's brief indulgence
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> * * *
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> THE COURT: You had to have closed your eyes to that testimony.
>
> MR. MARSH: Absolutely not, Your Honor.
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> * * *
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> MR. MARSH: . . . the way we looked at these costs, there was a significant amount of them that was put in by VECO that never got on this spreadsheet, and we looked at these as the records that VECO kept we represent them as records VECO kept we always submitted, and the part of Ms. Morris' opening that the defense didn't

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[1645] *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 52-90.

[1646] *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 52-90.

> read is that she said, look, this could be a hundred and twenty thousand; it could be 220,000; it could be 188,000, but the point is there's a lot. There's a ton of Mr. Anderson's time in particular that never got on the spreadsheet.
>
> THE COURT: And I may agree with you. Maybe it boils down to
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> * * *
>
> We're not talking about faulty recollection or inability to recall, we're talking about the United States using documents that the government knows are false, not true.
>
> MR. MARSH: We just didn't see it that way, and we just didn't look at the case that way, and it may be that we I understand, Your Honor. I understand.
>
> * * *
>
> THE COURT: But you have an obligation to look over those records. You have an obligation to look over people's testimony. This is your evidence.[1647]

Later in the hearing, after it became apparent that Marsh handled Boomershine's testimony and Dave Anderson's grand jury testimony in 2006, Marsh stated that he himself had not detected the inconsistency:

> THE COURT: Is it significant or not? Again, I'm not being personal. I have a high regard for the attorneys, but is it significant or not that Mr. Marsh was the attorney in the grand jury proceeding?
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> MR. MARSH: Your Honor, I
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> THE COURT: And also the attorney I believe my recollection is that attorney presenting the business records.

[1647] *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 54-59.

> MR. MARSH: I did put in Ms. Boomershine. And Mr. Anderson's grand jury time was almost two years ago, and I can tell you that I was not one of the people who re reviewed Mr. Anderson's grand jury testimony. I did not have any intentional did not have any intent to do that. I did not have knowledge at the time. Certainly, I'm imputed to it, Your Honor, but I can tell you as an officer of the Court, when we put that on, I did not know that.[1648]

During Marsh's OPR interview, he recalled being "surprised" when the issue of Anderson's hours surfaced: "I'm sure at some point, he would have said it in one of our debriefs, but it certainly wasn't on my mind and I had no memory of it going into the trial."[1649] Marsh recalled being present for one pretrial meeting in Alaska when the entire prosecution team met with Anderson to discuss an apparently false affidavit that he had signed.[1650] Marsh did not recall attending other trial preparation sessions in either Anchorage or Washington where the question of Anderson's absence from the Girdwood project would have been raised.[1651] OPR has not identified any notes or records that suggest that Marsh was present during those sessions.

The court sanctioned the government by striking references to Rocky Williams's and Dave Anderson's hours from the VECO records:

> THE COURT: It's very troubling that the government would utilize records that the government knows were false. And there's just no excuse for that whatsoever, and, therefore the sanction for the utilization of those records for Williams and the other gentlemen, Anderson, is that they'll be stricken from the evidentiary records . . . and the Court will instruct the jury not to consider that evidence at all.[1652]

[1648] *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 76-77.

[1649] Marsh OPR Tr. Mar. 25, 2010 at 80.

[1650] Marsh OPR Tr. Mar. 25, 2010 at 78-79.

[1651] Marsh OPR Tr. Mar. 25, 2010 at 78-79.

[1652] *United States v. Stevens*, Tr. Oct. 9, 2008 (pm) at 89-90.

6. The Government Presents Anderson as a Witness

Prior to the October 8 hearing, the prosecution had decided not to call Anderson as a witness. After the hearing, however, the government changed course. Although the government had stated in court earlier that day that it planned to rest its case, PIN Principal Deputy Chief Morris announced in an email to Judge Sullivan and defense counsel that, in light of the day's events, the government planned to put Anderson on the stand the following morning as the government's last witness.[1653] The decision to call Anderson as a witness was made by PIN Chief Welch, who insisted that Anderson be called in order to reestablish that Anderson and other VECO employees had, in fact, worked large numbers of hours on the Girdwood project.[1654]

Anderson testified on October 9, 2008.[1655] AUSA Bottini handled the direct examination. Anderson described the various projects he undertook at the Girdwood residence in considerable detail, stating that he worked approximately ten hours a day, six days a week.[1656] Anderson related, [redacted] that sometime in October 2000 he went to Oregon to work on another project, and remained there until around mid December, when he returned.[1657] The defense did not cross examine him.

Near the end of trial, on October 13, 2008, the defense filed a Motion to Strike VECO Accounting Records Pursuant to Federal Rules of Evidence 802 and 803(b).[1658] The defense argued that, although the court struck the portions of the VECO records that related to work done by Rocky Williams and Dave Anderson, it had become apparent that all of the VECO records lacked the "basic indicia of trustworthiness" that allowed them to be admitted under the business records exception to the hearsay rule, Rule 803(6).[1659]

[1653] Oct. 8, 2008, 7:02pm email from PIN Principal deputy Chief Morris to Judge Sullivan, Judge Sullivan's clerk, defense counsel, AUSA Goeke, PIN attorney Marsh, PIN attorney Sullivan, and AUSA Bottini.

[1654] Welch OPR Tr. Mar. 10, 2010 at 397-398.

[1655] *United States v. Stevens*, Tr. Oct. 9, 2008 (am) at 23.

[1656] *United States v. Stevens*, Tr. Oct. 9, 2008 (am) at 28.

[1657] *United States v. Stevens*, Tr. Oct. 9, 2008 (am) at 52.

[1658] Senator Stevens's Motion to Strike VECO Accounting Records Pursuant to Federal Rules of Evidence 802 and 803(6) (D.D.C., filed Oct. 13, 2008).

[1659] Senator Stevens's Motion to Strike VECO Accounting Records Pursuant to Federal Rules of Evidence 802 and 803(6) at 1 (D.D.C., filed Oct. 13, 2008).

The government opposed the motion, arguing that the court had already stricken the evidence relating to Williams's and Anderson's work and the other VECO records were sufficiently reliable because they met the criteria set forth in Rule 803(6); that is, they were created contemporaneously with events, and prepared and maintained in the regular course of business by employees with a "duty to make an accurate record as part of a continuing job or occupation." The government also argued that it did not need to prove that the records were completely accurate, because accuracy goes to weight rather than admissibility of evidence, and that the defense had an opportunity to challenge the reliability of the records through the cross examination of Boomershine, Allen, and Anderson (whom the defense chose not to question).[1660]

The court denied the defendant's motion in an unpublished minute order on October 19, 2008.

F. Post-Trial Proceedings Relating to the VECO Records

1. Briefs Addressing Allegations of Misconduct

The jury returned guilty verdicts on October 27, 2008. The following day, defense counsel sent a letter to Attorney General Mukasey raising allegations of prosecutorial misconduct.[1661] The first allegation concerned the government's introduction of VECO records showing $188,000 in costs for goods and services provided when the government purportedly knew the records were false.[1662]

On December 5, 2008, the defense filed a Motion for a New Trial, alleging a long list of errors by the court and instances of misconduct by the government.[1663] The first instance of government misconduct raised by the defense was identified with the subtitle, "Knowing Presentation of False Evidence."[1664] This was a reference to the government's introduction at trial of VECO records purporting to show $188,000 in expenses, with employees Rocky Williams and Dave Anderson working full time throughout the project, when, in

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[1660] Government's Response in Opposition to Defendant's "Motion to Strike VECO Accounting Records" at 1-8 (D.D.C., filed Oct. 14, 2008).

[1661] Oct. 28, 2008 letter from defense counsel to Attorney General Michael B. Mukasey.

[1662] Oct. 28, 2008 letter from defense counsel to Attorney General Michael B. Mukasey at 1, 3-5.

[1663] Senator Stevens's Motion for a New Trial (D.D.C., filed Dec. 5, 2008).

[1664] Senator Stevens's Motion for a New Trial at 31 (D.D.C., filed Dec. 5, 2008).

fact, Williams had worked on the project part time, and Anderson had been absent for an extended period while working on a different project.[1665]

The government filed a response stating:

> No member of the prosecution team realized that the VECO accounting records covered a time period when Anderson was not in Alaska, or that Williams' grand jury testimony was inconsistent with his time sheets. To be sure, the government had the grand jury transcripts and members of the team had reviewed the testimony of Anderson and Williams in preparation for trial. Thus, the prosecution may be charged with constructive knowledge of what the testimony entailed. 10/8/08 P.M. Tr. 52. But no one actually noticed any discrepancy between the witnesses' testimony and the accounting records before those records were introduced at trial.[1666]

The government went on to state, in a footnote:

> This is not as surprising as it may seem at first. Williams and Anderson were two among more than 40 VECO employees who testified before the grand jury about working on the Girdwood residence, and they testified before the government had obtained either the VECO accounting spreadsheet or the underlying backup documentation.[1667]

By the time the government was preparing its response to Stevens's Motion for a New Trial, Liza Collery, an attorney in the Criminal Division's Appellate Section, had been assigned to assist the prosecution team in responding to the Motion for a New Trial. At one point Collery raised a question regarding the prosecutors' knowledge:

> I note that our 10/6 response to W&C's third misconduct motion states that we have, "from opening

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[1665] Senator Stevens's Motion for a New Trial at 31-32, 40-42 (D.D.C., filed Dec. 5, 2008).

[1666] Government's Opposition to Defendant's Motion for a New Trial at 33 (D.D.C., filed Jan. 16, 2008).

[1667] Government's Opposition to Defendant's Motion for a New Trial at 33 (D.D.C., filed Jan. 16, 2008).

> statements, represented the VECO cost accounting as a spreadsheet with likely substantial variance. *** This is partly because of anomalies concerning, for instance, Mr. Anderson departing for seven weeks, ***..." p.17. Doesn't this remark suggest that we HAD noticed the "anomal[y]" that Anderson wasn't there, at least by the time of opening statements? Also, I note that nowhere in this 31 page pleading do we state that we HADN'T noticed the anomaly.[1668]

Both Marsh and Morris responded (in separate emails). Marsh stated:

> The 10/6 response, like our other responses, had so many cooks in the briefwriting that we definitely missed some issues. . . . We should have . . . made a statement in there that none of the government prosecutors noticed the Anderson discrepancy at the time the accounting records were admitted. That is, to my knowledge, an absolutely true statement. I know that I had not noticed that discrepancy, and I know that each and every other attorney told me during trial that they also missed it.
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> * * *
>
> In our Brady disclosures and in multiple other disclosures, we produced information . . . showing that Dave Anderson and Rocky Williams were thought to have been drinking on the job while working at the chalet, were not actually working while at the chalet, etc. We also disclosed information that some individuals told us/the GJ that they thought the project was inefficiently run and that it took too long to do. We further disclosed information that Bill Allen thought the project cost too much, which would have related to the spreadsheet and the costs set forth therein. . . . [T]hose were the types of "substantial variance[s]" we were concerned with prior to the trial.[1669]

[1668] Jan. 8, 2009 1:34pm email from Criminal Division appellate attorney Liza Collery to PIN Principal Deputy Chief Morris, PIN attorney Marsh, and PIN attorney Sullivan.

[1669] Jan. 8, 2009 5:36pm email from PIN attorney Marsh to Criminal Division appellate attorney Collery, PIN Principal Deputy Chief Morris, and PIN attorney Sullivan.

Morris then followed up the next day as follows:

> Liza, you're right about the pleadings. One of the reasons that I think we had a hard time articulating how we missed excluding Dave's absence from the accounting records is that the VECO records were always a placeholder. We could never accurately pinpoint the dollar number VECO spent on the project because there were a number of workers that worked on the project and weren't paid out of that account, but were paid by VECO. . . . We knew we could never fully justify the amount, but we used it as a range.[1670]

2. The Hearing on the Government's Motion to Dismiss with Prejudice

On April 7, 2009, the court held a hearing on the government's motion to dismiss the case with prejudice. Judge Sullivan stated that in "nearly 25 years on the bench, I've never seen anything approaching the mishandling and misconduct that I've seen in this case."[1671] After referring to the government's failure to meet "its discovery obligations," the court cited to the "fail[ure] to produce Rocky Williams' exculpatory grand jury testimony," and to its "fail[ure] to turn over exculpatory statements from Dave Anderson."[1672] The court appeared to deride the claims made by the prosecution team during trial that the witness' statements were "immaterial."[1673] Further, in a reference that appeared to encompass the failure to disclose the Williams and Anderson statements, the court stated that the government "repeatedly failed" to comply with "discovery orders and . . . *Brady*."[1674]

When the court granted the government's motion to dismiss the case with prejudice, it had not ruled on the pending post trial motions.

[1670] Jan. 9, 2009 10:34am email from PIN Principal Deputy Chief Morris to Criminal Division appellate attorney Collery, PIN attorney Marsh, and PIN attorney Sullivan.

[1671] *United States v. Stevens*, Apr. 7, 2009 Tr. at 3.

[1672] *United States v. Stevens*, Apr. 7, 2009 Tr. at 4, 5.

[1673] *United States v. Stevens*, Apr. 7, 2009 Tr. at 4, 5.

[1674] *United States v. Stevens*, Tr. Apr. 7, 2009 (am) at 7.

III. ANALYSIS

A. The VECO Records Presented at Trial Were False or Inaccurate

Based on the results of our investigation, we concluded that the government presented inaccurate or unreliable evidence at trial in the form of the VECO spreadsheet and underlying records. The spreadsheet figures, based on the invoices and time cards in the underlying records, purported to show the expenses attributed to the Girdwood project for a specific time frame. In its opening statement, the government asserted that VECO kept track of the expenses "right down to the penny." But the records were not accurate or reliable, as demonstrated by information known to the government but not timely disclosed to the defense.

1. The Inaccuracy of the VECO Records

The VECO spreadsheet and underlying records showed that Rocky Williams worked on the Girdwood project full time, plus substantial overtime, from September 2000 through March 2001. The records attributed more than 200 hours to Williams's labor for each of those months; indeed, two of the months were more than 260 hours, and one was more than 370 hours.[1675] That information was contradicted by what Williams had repeatedly told the prosecutors, namely, that he had only worked part time on the Girdwood renovations. There was no evidence, however, that Williams informed the prosecutors that his time cards reflected full time (and overtime) work on the Girdwood project during the relevant time period.

In his first interview, in September 2006, approximately five years after completion of the project, Williams told investigators that he worked at the Girdwood site "full time some months and part time other months."[1676] Later that same month, Williams estimated that he worked on the Girdwood project "between 15 and 30 hours per week each week for approximately 10 weeks."[1677] Under this estimate, the maximum number of hours Williams worked on the Girdwood project was 300. Williams repeated that estimate in a conference call he had with

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[1675] The records did not indicate a specific number of hours worked for February 2001 or March 2001, but they did reflect that total amount billed for Williams's work for those two months. When compared to the hours worked and amount billed for the months for which both figures are listed, it is clear that more than 200 hours in February and March of 2001 were attributed to Williams.

[1676] Sept. 1, 2006 IRS MOI of Rocky Williams at 4.

[1677] Sept. 28, 2006 FBI 302 of Rocky Williams at 3.

the prosecution team, likely in 2006. The VECO records introduced at trial, however, attributed more than 1,800 hours to Williams;[1678] one month alone (December 2000) exceeded the 300 hour estimate. Both of those statements were documented in investigative reports available to the prosecutors.

[redacted] Williams stated that he was at the Girdwood site "three times a week if not more"; when asked how many hours per week he worked "on average," Williams responded: "never less than 24 hours a week."[1679] The VECO records that were introduced, however, showed Williams almost always working more than 60 hours per week, and often more than 70 hours per week.

Notes taken by AUSA Bottini of pretrial preparation sessions with Williams on August 20 and 31, 2008, reflected that Williams again stated that he was not at the Girdwood site every day, and that he worked on "other stuff," apparently referring to non Girdwood related work. And on September 20, 2008, Bottini noted on his outline for a direct examination of Williams: "Probably 3 4 hrs./day I was there . . . ."

The evidence demonstrates that Williams consistently told the prosecution team that he worked part time, not full time, on the Girdwood project. That evidence severely undermined the VECO spreadsheet and VECO records that attributed enormous amounts of hours to Williams's labor on the Girdwood project.

The VECO spreadsheet and underlying records showed that Dave Anderson worked on the Girdwood project full time, plus substantial overtime, from October 2000 through December 2000. The records attributed hundreds of hours to Anderson's labor for that time period. That information was contradicted by what Anderson had repeatedly told the prosecutors, namely, that he was working on a different matter, in Oregon, during that time period.

On November 30, 2006, Anderson told investigators that he had been "out of town during part of the work in the [Girdwood] garage," and he identified that time frame as December 2000 to January 2001.[1680] We infer that Anderson discussed his absence from the Girdwood site with at least AUSA Goeke some time before [redacted] December 6, 2006, because Goeke used

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[1678] This figure is based on the specific hourly totals the VECO records ascribed to September, October, November, and December of 2000, and January of 2001, combined with the estimate of hours for February and March 2001 described in footnote 1629, *supra*.

[1679] [redacted]

[1680] Nov. 30, 2006 FBI 302 of "Source" (Dave Anderson) at 3-4.

leading questions to specifically elicit from Anderson the time period during which he was in Oregon rather than working on Girdwood:

> Q. Did there come a time about the time the garage was skinned in and finished, as you were trying to beat the snow there in the fall, that you left the Girdwood work site to go do something else for Veco?[1681]

The leading nature of the question, referring to the specific state of the work on the garage and to Anderson's personal motivations, suggests that Goeke was prompting Anderson with information Anderson had given him previously; they are not the kind of details Goeke would have invented and incorporated into a question.[1682] Anderson responded, "Yes," and related that he went to Oregon after some work on the garage had been completed.[1683] Goeke followed up: "So you were down in [Oregon] for quite a while then?" Anderson replied: "Yeah, a couple months."[1684] Goeke then asked additional questions to clarify when Anderson was in Oregon, and summarized the information in another question to Anderson:

> Q. So does it sound right, if you came back a little bit before Christmas, but after Thanksgiving from [Oregon], and you were gone down there for a couple of months, it sounds like you would have left Alaska sometime in late September to mid September?"
>
> A. Yeah, that would be about right.[1685]

Having clarified the time frame, and after establishing that Rocky Williams supervised the Girdwood project when Anderson was in Oregon, Goeke asked several additional questions in which he referred expressly to Anderson being in Oregon for several months: "for obvious reasons it would be hard to keep track and supervise a project in Alaska when you're down working on something else

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[1681] [redacted]

[1682] We were not able to confirm this point with AUSA Goeke, as he declined to be interviewed for this investigation. AUSA Bottini confirmed, however, that there was a "pre-grand jury interview" with Anderson in December 2000. Bottini OPR Tr. Mar. 11, 2010 at 469.

[1683] [redacted]

[1684] [redacted]

[1685] [redacted]

in Oregon?"; "for those couple months you were gone, you don't know how the invoices were taken care of . . .?"[1686]

This exchange demonstrates that in December 2006, at least AUSA Goeke was focused on the fact that Anderson was not working on the Girdwood project from mid to late September until sometime between Thanksgiving and Christmas 2000. Anderson's testimony about his time in Oregon was not a casual comment that prosecutors did not pick up on; it was deliberately elicited testimony that AUSA Goeke took pains to clarify and develop. During [redacted] Anderson referred to being in Oregon while work was performed at the Girdwood site.[1687]

Anderson's [redacted] [redacted] squarely contradicts the VECO spreadsheet and VECO records, which attributed to him hundreds of hours of labor on the Girdwood project for a period in which he was in Oregon working on something else.

2. The Opening Statement Exacerbated the Falsity or Inaccuracy of the VECO Records

In the government's opening statement, PIN Principal Deputy Chief Morris stated that "VECO kept track of most of the costs right down to the penny." She then referred to VECO's "internal billing system," and said that "VECO's costs [for the Girdwood renovation] totaled more than $188,000."[1688] This reference is clearly to the VECO spreadsheet and supporting VECO records, which did, in fact, show the costs down to the penny: $188,928.82.

As demonstrated in Section II E. of this Chapter, *supra*, the "right down to the penny" language appeared for the first time in the eighth draft of the opening statement, which was sent by PIN attorney Marsh to the other team members. Although it appears that Marsh coined the phrase, all of the other prosecution team members reviewed the draft, and none objected to the phrase.

Marsh acknowledged to OPR that the phrase "probably shouldn't have been something that we put in" because, he asserted, the prosecution team did not intend to argue that VECO record keeping was precise.[1689] Rather, Marsh said

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1686 [redacted]

1687 [redacted]

1688 *United States v. Stevens*, Tr. Sept. 25, 2008 (am) at 42.

1689 Marsh OPR Tr. Mar. 25, 2010 at 92-93.

that the VECO spreadsheet and records were only intended to show how VECO's internal records accounted for the time and expense of the Girdwood project, and to demonstrate that "the project was substantial" and was above the $260 threshold triggering Senator Stevens's reporting requirements.[1690] We did not find that argument persuasive. The words used in the opening statement assert plainly that VECO's record keeping was precise. The government represented that VECO tracked its costs on the Girdwood project "right down to the penny . . . during [the] period of time" covered by the VECO spreadsheet. The natural import of those words conveyed precision.

Both Marsh and Morris noted that the opening statement asserted that the $180,000 figure could be "a little high because VECO built oil wells, not houses," and could be "a little low" because it did not include many expenses.[1691] Thus, they argued that the $180,000 figure was just a "placeholder," a starting point for establishing that a "substantial" amount of work was done by VECO, and that variations (up or down) from that figure were anticipated, but would not be material because no deduction would take the figure lower that $260.[1692]

Again, we did not find this argument persuasive. Nothing in the government's opening statement suggested that the VECO records were not accurate for the period they covered, or that they were padded with hours that were not actually worked. Stating that the figure could be a little high because VECO builds oil rigs rather than houses, and thus its work may have been inefficient, does not suggest that the hours attributed to the Girdwood project in VECO's records were inaccurate. Similarly, stating that the figure may be a little low because the VECO records did not reflect all the costs does not suggest that the hours it did record were inaccurate.

B. The Prosecution Violated its Disclosure Obligations

Based on the results of our investigation, we concluded that the prosecution team's failure to timely disclose the information about Williams's part time status and Anderson's spent time in Oregon violated the government's obligations under constitutional *Brady* principles and Department of Justice policy (USAM § 9 5.001).

[1690] Marsh OPR Tr. Mar. 25, 2010 at 95-96, 91-92.

[1691] *United States v. Stevens*, Tr. Sept. 25, 2008 (am) at 42; *see* Marsh OPR Tr. Mar. 25, 2010 at 91, 98-100; Morris OPR Tr. Mar. 19, 2010 at 347-348.

[1692] Marsh OPR Tr. Mar. 25, 2010 at 93-99; Morris OPR Tr. Mar. 19, 2010 at 347-348 ($188,000 figure was a "safe ballpark"); *see United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 54-59.

At the time that Rocky Williams and Dave Anderson testified before the grand jury in late 2006, the prosecution team had not received or reviewed the VECO billing records that were eventually admitted at trial, nor had Boomershine yet created the VECO spreadsheet. Thus, their testimony which chronicled substantial amounts of work by both men at Senator Stevens's Girdwood residence over a period of months and years would have appeared purely inculpatory. Williams's [redacted] that he was only at the Girdwood site on a part time basis only would not have seemed important; as long as he and other VECO employees put in significant hours installing products and materials that Senator Stevens did not pay for, there was nothing exculpatory about the information. Further, when AUSA Goeke questioned Anderson [redacted] about his time in Oregon, the purpose appears to have been to establish that Williams was in charge at Girdwood when Anderson was absent. Anderson's [redacted] detailed the substantial amount of work he did at the Girdwood site, and thus appeared to inculpate Senator Stevens. The number of hours charged each month to Anderson's work at Girdwood was not an issue at the time.

The potentially exculpatory nature of their testimony would not have become apparent until the prosecution team obtained and analyzed the VECO records. The VECO spreadsheet was created two months after Anderson's grand jury testimony, and the government obtained the underlying VECO records a few weeks after that, on February 25, 2007.

By the time of the initial drafts of the prosecution memorandum in early 2008, it was clear that the prosecution team intended to use the VECO spreadsheet and underlying documents to prove at trial that the "total cost charged to VECO for its work on the Girdwood Residence from October 2000 to April 9, 2001, was **$188,928.82**."[1693] At this point, the information about Williams's part time status and Anderson's time in Oregon became exculpatory.

That evidence was favorable to the defense because, as detailed above, Williams's and Anderson's [redacted] [redacted] statements gravely undercut the hours of labor imputed to them in the VECO records. Williams had estimated that he spent a total of 150 300 hours on the entire Girdwood project, yet the VECO records attributed more than 370 hours to his work in one billing period alone, and more than 1,800 hours over an eight month period. Anderson was in Oregon during a time period when hundreds of hours of his time was billed to the Girdwood account. That inconsistency did more than undercut the accuracy of the portrayal of Anderson's hours; it suggested that the VECO records

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[1693] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) 18-20 (emphasis in original).

as a whole were untrustworthy, and that they included costs unrelated to the renovations.

The evidence undercutting the VECO records was also material because it went to the heart of the defense case. The prosecution memorandum foresaw that the defense would argue that Senator Stevens thought he paid for all of the work on Girdwood.[1694] That was, in fact, a central defense theory. In its opening statement, the defense countered the government's reference to the $188,000 VECO costs by stating that Senator Stevens paid $160,000 for the Girdwood renovations, and that he believed that covered the entire cost. The defense derided "all of these other costs that were run up on the VECO bill,"[1695] a theme that could have been strongly reinforced if the defense had known that the VECO costs reflected not merely inefficiencies, but included hundreds of hours of labor ascribed to employees who were not even there.[1696]

When the information about Williams and Anderson was disclosed mid trial, the defense argued that "those numbers [in the VECO records] overwhelm any inference that $160,000 that Senator Stevens paid was a fair price for these renovations. The case [the government] presented in opening and they presented through all these witness[es] is that there was so much work done there that he could not have missed it." The reference to "those numbers" encompassed the VECO spreadsheet which showed $188,928.82 in costs. The hours and costs attributed to Williams's and Anderson's labor accounted for more than $85,000, almost 50 percent of that figure. Thus, as the VECO numbers were whittled

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[1694] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) at 67.

[1695] *United States v. Stevens*, Tr. Sept. 26, 2008 (pm) at 69-70.

[1696] SA Kepner's notes from the September 20, 2006 interview of Bill Allen contain the following entry: "Employees were being charged to the [Girdwood project] when they had no other work. Probably didn't do work." *See* Kepner notes attached to FD-448, indicating that notes were faxed by CDC Gonzalez to FBI GC on March 31, 2009. Kepner failed to create an FBI 302 of this interview (that failing is addressed in Chapter Twelve, *infra*), so this information cannot be imputed to all of the prosecutors. Notes of that interview taken by Allen's attorney, Robert Bundy, however, show that AUSA Goeke (and SA Joy) was also present for this interview. But at the time of the interview, the issue of possible irregularities in VECO's records had not arisen, and it is understandable that Goeke either missed or forgot Allen's statement.

down, the defense theory became more and more plausible.[1697] That, in turn, was precisely the defense tack the prosecution team had expected.[1698]

The government could have tried to prove its case without any VECO records, relying instead on just the testimony of the many VECO employees who worked there, and on Senator Stevens's own knowledge (as shown by the Torricelli Note) that he had not paid VECO. But once the government decided to introduce the VECO records, it had an obligation under *Brady* and Department of Justice policy (USAM § 9 5.001), to disclose the information in its possession that cast serious doubt on the accuracy of those records.

For the reasons stated above, we concluded the information about Williams's part time status and Anderson's absence from the Girdwood site was favorable and material, and thus the failure to disclose it violated the government's constitutional *Brady* obligations. Like the court, we were not persuaded by the prosecutors' arguments that the information was not material. We note, however, that even if one could argue that the information was not material under *Brady* principles, it should have been disclosed pursuant to Department of Justice policy, which requires disclosure of exculpatory and impeachment information that is "probative of the issues before the court," even if it would not "make the difference between guilt and innocence." USAM § 9.5001(C).[1699] Because the government sponsored the VECO spreadsheet and records to demonstrate that VECO performed work at Girdwood for which Senator Stevens did not pay, the information about Williams's and Anderson's hours that contradicted that evidence was clearly exculpatory and impeachment evidence that was "probative of [an] issue[] before the court." Furthermore, USAM § 9 5.001(C)(2) provides that a prosecutor "must disclose information that . . . casts a substantial doubt upon the accuracy of any evidence including but not limited to witness testimony the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence." In this case, the information about Williams's and

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[1697] In her interview during the Schuelke investigation, PIN Principal Deputy Chief Morris acknowledged that the information concerning Anderson's extended absence from the Girdwood site "should have been" disclosed as *Brady* information. Morris (Schuelke) Tr. Jan. 15, 2010 at 258-259.

[1698] *See* FBI 302 of Nick Marsh, Mar. 18-19, 2009 at 3 ("Marsh advised [that] the prosecutors had always believed that [the defense] would attempt to whittle down what was perceived as the cost by VECO to renovate the chalet"); Marsh OPR Tr. Mar. 26, 2010 at 579 (no corrections to "the 302s or the declaration").

[1699] This section specifies that Department of Justice policy "requires disclosure by prosecutors of information beyond that which is material to guilt as articulated in *Kyles v. Whitley*, 514 U.S. 419 (1995), and *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999)."

Anderson's hours cast a substantial doubt on the accuracy of the VECO records, and also bore on the admissibility of the VECO spreadsheet and the VECO records. In fact, the court struck from the record evidence relating to Williams's and Anderson's hours precisely because it was not reliable.[1700]

D.C. Rule of Professional Conduct 3.8(e) provides that a prosecutor shall not "intentionally fail to disclose to the defense . . . any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused." Because this standard incorporates a *scienter* element in addition to the disclosure requirement, we address it in the following section where we discuss the individual culpability of the prosecutors.

We need not determine exactly when the government should have disclosed the information about Williams's part time status and Anderson's absence from the Girdwood site. The government is obligated to disclose exculpatory information "in a manner that gives the defendant a reasonable opportunity either to use the evidence in the trial or to use the information to obtain evidence for use in the trial." *United States v. Rodriguez*, 496 F.3d 221, 226 (2nd Cir. 2007); *see Weatherford v. Bursey*, 429 U.S. 545, 559 (1997); *United States v. Pollack*, 534 F.2d 964, 973 (D.C. Cir. 1976). In addition, USAM § 9 5.001(D) requires prosecutors to disclose exculpatory information "in sufficient time to permit the defendant to make effective use of that information at trial." The USAM notes that "[i]n most cases, the disclosures required by the Constitution and this policy will be made in advance of trial." USAM § 9 5.001(D).

In the present case, the information about Williams was disclosed mid trial, after Boomershine had highlighted for the jury the VECO spreadsheet and records, and only after the defense had interviewed Williams, learned that he had only worked part time on the Girdwood renovations, and specifically requested Williams's grand jury testimony. With respect to Anderson, the government disclosed his grand jury transcript mid trial, and only after the court found other *Brady* violations and ordered the disclosure of all grand jury transcripts and FBI 302s. In neither case can the disclosure be deemed timely under the *Brady* doctrine or the USAM.

C. Culpability for the Government's Failures

1. The Prosecutors Did Not Knowingly Present False Testimony

The defense alleged that the prosecution team knowingly presented false evidence by introducing the VECO records, and that it tried to prevent the defense

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[1700] *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 89-90.

from learning of the falsity by not calling Williams or Anderson as witnesses (which would have triggered disclosure of, at a minimum, their grand jury transcripts pursuant to the *Jencks* Act); by sending Williams back to Alaska; and by preventing the defense from having access to Anderson. The court, for its part, accused the prosecution team of knowing that the VECO records were "a lie" and of "closing [its] eyes" to the conflicting evidence.

Based on the results of our investigation, we concluded that the prosecution team did not realize the VECO spreadsheet and records were inaccurate when they were introduced at trial. The evidence supported the prosecutors' assertions that no member of the prosecution team ever compared the VECO records with the various statements of Williams and Anderson, and thus the discrepancies went undiscovered. PIN attorney Marsh presented the VECO records at trial, but he did not think the exact hours worked by Williams or Anderson mattered, and did not review their grand jury testimony or FBI 302s prior to trial. AUSA Bottini knew that Williams had worked part time and that Anderson went to Oregon, but Bottini never compared their statements with the VECO records. OPR reviewed thousands of emails sent by the prosecutors to each other throughout the *Stevens* case, but we did not find any email traffic or other communications indicating that anyone ever compared Williams's and Anderson's statements with the VECO records. Further, as detailed in Chapter Six, *supra*, we concluded that the decision to allow Williams to return to Alaska was based on his need for medical treatment, not on any desire to hide exculpatory information from the defense. Likewise, the evidence did not support the allegation that the government tried to prevent the defense from contacting Anderson.[1701]

PIN attorney Marsh presented Boomershine as a witness and introduced the VECO records. Marsh told OPR he reviewed the records with Goeke and Boomershine shortly before trial, but that he did not have any reason to think the records were inaccurate.[1702] He did not recall ever "auditing the underlying time records," explaining that it was "indisputable" that the work done by VECO at

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[1701] The defense claim that the government actively tried to impede its access to Anderson is unfounded. The government could not accede to the defense request to accept service of a subpoena for Anderson, or provide Anderson's address to the defense, because it had no authority to do so. When Anderson was in Washington, D.C., prior to trial, the government offered to facilitate service of the subpoena. Accordingly, we concluded that the prosecutors did not violate D.C. Rule of Professional Conduct 3.4(a), which prohibits obstructing another party's access to evidence. Nor is there any evidence that anyone on the prosecution team ever counseled Anderson not to speak with the defense, so we found no violation of D.C. Rule of Professional Conduct 3.4(f).

[1702] Marsh OPR Tr. Mar. 25, 2010 at 45, 49-52.

Girdwood far exceeded the $260 per year reporting threshold, so it "didn't matter" if the costs were "$40,000 or $90,000 or $270,000."[1703]

Marsh stated that he did not review the Williams grand jury testimony or 302s prior to trial; he assumed the attorney assigned to a witness would be responsible for reviewing that witness's material for *Brady* information.[1704] AUSA Bottini, not Marsh, was assigned to handle Williams (although Marsh had been assigned to handle Williams as late as August 20, 2008). Marsh had questioned Williams in the grand jury, but almost two years had passed since that time, and the exculpatory nature of Williams's statements about working part time at Girdwood would not then have been apparent. There is also evidence that Marsh attended (by telephone) at least part of an August 20, 2008 meeting with Williams conducted by AUSA Bottini, at which Williams said that he was not at the Girdwood site every day and that Anderson filled in when he was absent.[1705] Further, it appears that Marsh was probably present during the September 20, 2008 trial preparation session with Williams, at which Williams said he was at Girdwood "3x's /week sometimes 4 5x's / week."[1706] However, even if Marsh had been present when Williams said he was not at Girdwood every day, he may not have appreciated its exculpatory value because he did not think the precise number of hours worked by Williams was relevant, given the evidence that he did a considerable amount of work for which VECO was never paid.[1707] As Marsh explained in his February 2010 interview: "I never put together the fact that Anderson had been gone during" the time period covered by the VECO spreadsheet; "[i]t got overlooked."[1708]

Likewise, Marsh did not review the Anderson [redacted] transcript prior to trial.[1709] Again, he attended at least part of Anderson's [redacted] in December 2006, but the testimony about Anderson's trip to Oregon would not

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[1703] Marsh OPR Tr. Mar. 25, 2010 at 54-56.

[1704] Marsh OPR Tr. Mar. 25, 2010 at 68-70.

[1705] Bottini's notes of that meeting reflected: "[Rocky] wasn't @ chalet everyday [;] when not there – Dave there, etc." CRM057297; Bottini (Schuelke) Tr. Dec. 16, 2009 at 95.

[1706] CRM115135. Marsh may also have been present when Williams said during that same trial preparation session that he was at Girdwood "Probably 3-4 hrs. / day . . . – Depended what was going on." CRM115140.

[1707] *See* Marsh OPR Tr. Mar. 25, 2010 at 65-66.

[1708] Marsh (Schuelke) Tr. Feb. 2, 2010 at 76, 80.

[1709] Marsh (Schuelke) Tr. Feb. 2, 2010 at 74.

then have seemed exculpatory.[1710] For the reasons stated above, we found the evidence sufficient to support Marsh's assertion that he was not aware of the Williams and Anderson information that contradicted the VECO records.

We also credited AUSA Bottini's assertion that he was not aware that the VECO records were inconsistent with the statements made by Williams and by Anderson. The evidence demonstrated that Bottini knew about Williams's part time status and Anderson's trip to Oregon. Bottini was responsible for presenting both Williams and Anderson in the event they were called as witnesses. He was not present for their grand jury appearances, but he reviewed the transcripts of their testimony and the memoranda of their interviews prior to trial.[1711] As detailed above, [redacted] Williams worked part time at Girdwood.[1712] Bottini also met several times with Williams in the month prior to trial, and his notes reflect that Williams said he was not at Girdwood "everyday[;] when not there Dave there"; that he performed non Girdwood related work; and that he was at Girdwood "[p]robably 3 4 hrs./day."[1713]

Similarly, Bottini knew about Anderson's time in Oregon. Bottini's handwritten notes and typed outline for the direct examination of Anderson, both of which parallel Anderson's [redacted], show that he knew and planned to elicit testimony about Anderson's trip to Oregon.[1714]

[1710] Marsh was present for Anderson's [redacted]

[1711] Bottini OPR Tr. Mar. 10, 2010 at 393 (reviewed the Williams FBI 302s and grand jury transcript).

[1712] *See, e.g.*, Sept. 1, 2006 IRS MOI of Rocky Williams at 4 ("full-time some months and part-time other months"); Sept. 28, 2006 FBI 302 of Rocky Williams at 3 (estimated that he worked "between 15 and 30 hours per week each week for approximately 10 weeks"); and [redacted]

[1713] Aug. 20, 2008 handwritten notes of AUSA Bottini, CRM057297; Aug. 31, 2008 handwritten notes of AUSA Bottini, CRM057339; Sept. 20, 2008 handwritten notes by AUSA Bottini on "Rocky Williams Direct Outline," CRM115140.

[1714] Bottini OPR Tr. Mar. 11, 2010 at 503-507; Exhibit 19 (handwritten notes) to the Bottini OPR transcript at 30 ("After garage pad poured, you leave job site for a while. Why? Where go? . . . How long were you gone?"), 34 ("When DA back from [Oregon]?"), and 35 (circled entry: "Dave leaves → OR"); Exhibit 20 (typed outline) to the Bottini OPR transcript ("Dave leaves for OR – Fall"; "How long Dave in OR?"; "Back in 6/4 or 6/8 [weeks]").

Bottini did not, however, review the VECO records to analyze the hours of labor they attributed to Williams or Anderson: "I never scoped the underlying records for the [VECO spreadsheet]. I never looked at the months of October, November, December, to look and see how much time they were reporting for Rocky and Dave or . . . anybody else." Bottini explained that "it wasn't my part of the case, you know?"[1715] Bottini told OPR that although he attended portions of Boomershine's early interviews, and helped begin the process of pulling together the trial exhibits, it never occurred to him to review Williams's time cards, or to show them to Williams to see if they were correct.[1716]

The fact that Bottini planned to elicit testimony from Anderson about his time in Oregon supports the conclusion that he did not realize it conflicted with the VECO records, and that he was not trying to hide the information.[1717]

The one attorney on the prosecution team who was personally involved in both the Williams/Anderson evidence and the VECO records evidence was AUSA Goeke. Goeke attended Williams's [redacted] As detailed above, Goeke asked Anderson a series of questions eliciting the time frame during which Anderson was in Oregon. Goeke was also present for the trial preparation sessions in which Williams said he was not at the Girdwood site everyday, and worked on non Girdwood related things ("other stuff"). In addition, the evidence demonstrated that Goeke was involved in obtaining the underlying VECO records, and in putting those materials together as trial exhibits. Goeke's knowledge of the VECO records stemmed from the fact that, prior to the trial team re shuffle immediately before indictment, Boomershine had been his witness. Thus, when Boomershine was reassigned to PIN attorney Marsh, Marsh had Goeke "walk" him through the VECO records to explain what they meant.[1718]

Goeke declined to be interviewed by OPR, so we were not able to inquire whether he ever compared Williams's and Anderson's grand jury testimony (and

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[1715] Bottini (Schuelke) Tr. Dec. 16, 2009 at 258; *see* Bottini OPR Tr. Mar. 10, 2010 at 412-413; Mar. 11, 2010 at 516-518.

[1716] Bottini OPR Tr. Mar. 11, 2010 at 508-511, 518-119

[1717] We found no evidence indicating that the initial decision not to present Anderson in the government's case-in-chief was because of any concern about his trip to Oregon.

[1718] Marsh OPR Tr. Mar. 25, 2010 at 45; Marsh OPR Tr. Mar. 25, 2010 at 72 ("I do remember on at least one occasion sitting down with [Goeke] and sort of getting a general lay of the land. . . . The time I remember was when he was in Washington, very shortly in advance of Boomershine coming in – Ms. Boomershine coming in to be prepped for trial that Jim and I sat down and he sort of walked me through generally what the records were.").

interview statements) with the VECO records. In his January 2010 interview, however, Goeke acknowledged that he did not review Williams's grand jury transcript, FBI 302s, or notes for *Brady* material, because he assumed that was the responsibility of the attorney handling each witness.[1719]

Although Goeke had first hand knowledge of both sides of the Williams/Anderson and VECO records equation, we could not conclude that he realized that the evidence was conflicting. We found no evidence that he actually analyzed the Williams time cards or the line items for Anderson's hours in the VECO Alaska invoices. Given the general understanding on the prosecution team that the VECO records established "$40,000 or $90,000 or $270,000"[1720] of uncompensated labor, such that proving the exact amount was not important, it is understandable that Goeke would not have added the time cards or studied the invoices closely, and that he would not have had reason to hide the conflicts if he had appreciated them. Further, we found no evidence of any communications among the prosecution team suggesting that anyone had compared the information about Williams's and Anderson's hours with the VECO records.

PIN attorney Sullivan was present when Anderson and Boomershine [redacted], and had some early involvement in pulling together information obtained from Boomershine and VECO during the investigative phases of the case. He also participated (by telephone) in one trial preparation session with Williams (August 20, 2008) in which Williams said he was not at the Girdwood site everyday.[1721] Nevertheless, given his restricted role on the trial team, it is not surprising that he did not review the grand jury transcripts or the memoranda of interview for Williams or Anderson prior to trial. Nor was he involved in analyzing the VECO records, even if he had some logistical involvement in putting them together. As Sullivan explained to OPR: "I don't believe I ever sat down and reviewed the Boomershine cost report. I may have glanced at it, but nobody ever asked me to go through it, verify, you know, what people were testifying to, to match it up to see if the time was matching up."[1722] We found no evidence suggesting that Sullivan realized the conflicts between Williams's and Anderson's statements and the VECO records.

[1719] Goeke (Schuelke) Tr. Jan. 8, 2010 at 62-64.

[1720] Marsh OPR Tr. Mar. 25, 2010 at 54-56.

[1721] Sullivan was present at the start of Rocky Williams's [redacted]

[1722] Sullivan OPR Tr. Mar. 12, 2010 at 522-523.

We recognize that in an October 6, 2008 brief, the government stated that it knew "from opening statements" that the VECO costs summarized in the spreadsheet contained "variance[s]," in the sense that it was both over and under inclusive, and that the brief referred to "Anderson departing for seven weeks" as one example of a "variance."[1723] We concluded, however, that the reference to Anderson's time in Oregon did not indicate that the prosecutors realized at the time of opening statements that the VECO costs incorporated ghost hours for Anderson. Four days earlier, in response to a court order, the government disclosed to the defense many grand jury transcripts, including Anderson's. On October 5, 2008, the defense moved to dismiss the case, citing Anderson's grand jury testimony to argue that the VECO records were false. With those facts now highlighted, the prosecution team adverted to them as just another example of the "variance" that it had always recognized. The prosecutors did not mean to suggest that they knew about this particular "variance" at the time the trial started, though the brief could be read to that effect. Rather, they meant to convey that they knew there would be "variance," but that they did not know about this particular variance until the defense raised it.[1724]

Finally, we found no evidence that either PIN Principal Deputy Chief Morris or PIN Chief Welch knew of the conflicting evidence. Morris told OPR that she did not know that the VECO records attributed more hours to Williams and Anderson than they actually worked.[1725] Morris did not become part of the trial team until shortly before the indictment was returned in July 2008, so she was not present for Williams's, Anderson's, or Boomershine's grand jury testimony. As the lead trial attorney, Morris had command responsibility for the entire case, but that did not entail the responsibility to know every fact about every witness. Further, she was not assigned to handle Williams, Anderson, or Boomershine at trial, and cannot reasonably be charged with knowledge of conflicting evidence at that level of detail. Although Morris referred to the spreadsheet in her opening statement, citing the $188,000 VECO cost figure, she was not familiar with the underlying documents and viewed the $188,000 figure as a "placeholder" rather than an

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[1723] Government's Opposition to Defendant's Motion to Dismiss Due to Alleged Misconduct 17 (D.D.C., filed Oct. 6, 2008).

[1724] *See* Jan. 8, 2009 5:36pm email from PIN attorney Marsh to Criminal Division appellate attorney Collery, PIN Principal Deputy Chief Morris, and PIN attorney Sullivan; Jan. 9, 2009 10:34am email from PIN Principal Deputy Chief Morris to Criminal Division appellate attorney Collery, Marsh, and PIN attorney Sullivan; Morris (Schuelke) Tr. Jan. 15, 2010 at 351.

[1725] Morris OPR Tr. Mar. 19, 2010 at 342-346.

exact amount to be proven.[1726] The evidence indicates that Welch, too, was not familiar with the details of Williams's and Anderson's statements.[1727]

We note that the prosecution team disclosed the grand jury transcript of [redacted] prior to trial. [redacted] Furthermore, when the defense requested the Williams grand jury transcript on September 28, 2008, the prosecution team provided it that same evening. Those disclosures suggest that the prosecution team was not trying to conceal information that it knew conflicted with the VECO records. In this respect, we also note that Bottini's trial outline for Anderson indicated that he planned to elicit testimony about Anderson's time in Oregon during direct examination.

For the reasons detailed above, we concluded that the prosecutors did not knowingly present false evidence, or knowingly fail to correct false evidence, and thus did not violate the standard set forth in *Napue v. Illinois*, or DC RPC Rules 3.3(a)(4) ("knowingly" offer false evidence) or 3.3(a)(1) ("knowingly" fail to correct a false statement). Furthermore, with respect to representations made to the court and to defense counsel about the government's disclosures, we concluded that the prosecutors did not violate the standards set forth in DC RPC Rules 4.1(a) ("knowingly" make a false statement of material fact or law to a third person) or 3.4(c) ("knowingly" disobey an obligation). Thus, we concluded that no member of the prosecution team engaged in intentional professional misconduct in this regard.

2. The Disclosure Violations Were Not Intentional

The facts detailed above demonstrate that no member of the prosecution team recognized the conflict between Williams's and Anderson's statements and the VECO records. There was no evidence that anyone suppressed Williams's and Anderson's statements because they conflicted with the VECO records; to the contrary, AUSA Bottini planned to elicit from Anderson testimony about his time in Oregon. In addition, we found no evidence that any member of the prosecution team acted with the purpose of concealing the Williams and Anderson statements, knowing that such concealment would violate the government's disclosure

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[1726] Morris OPR Tr. Mar. 19, 2010 at 347-348.

[1727] *See* Welch OPR Tr. Mar. 3, 2010 at 476 (did not know what Williams's hours were, so they could not have entered his mind as a factor to consider in his decision to allow Williams to return to Alaska).

[1728] *See United States v. Stevens*, Tr. Oct. 14, 2008 (am) at 109-110 [redacted]

obligations. Thus, although we found that the prosecution team violated its disclosure obligations, we concluded that no member of the prosecution team engaged in intentional professional misconduct in this regard.

We concluded, further, that the evidence does not support a finding that any prosecutor acted in reckless disregard of his professional obligations or exercised poor judgment in the matter of the VECO records. We found no evidence that any member of the prosecution team knew that there was a variance between the VECO spreadsheet (and underlying time cards) and the actual time spent by either Williams or Anderson on the Girdwood project, until the discrepancies between the labor costs reflected on the VECO spreadsheet and the testimony of Williams and Anderson was raised by the defense at trial. During the investigation, no one from VECO, including Bill Allen, Rocky Williams, and Dave Anderson, informed the prosecutors that Anderson's and Williams's time spent on the Girdwood project was inflated to include time not actually spent at Girdwood. Although Allen ranted periodically that Williams and Anderson were incompetent "drunks," he did not suggest that they charged to VECO's Girdwood account for time they were not even on the premises. The prosecution anticipated and was prepared for the defense argument that Williams and Anderson were woefully inefficient, but it did not anticipate or prepare for the possibility that their time sheets falsely reflected time not actually spent at the site. Thus, we concluded that the failure of the prosecution team to recognize and appreciate the variance between the labor costs reflected on the VECO spreadsheets and the information provided by Anderson and Williams as to their actual time spent on the site was an oversight, not professional misconduct. We found, further, that the sanction imposed by the court for the government's conduct striking the VECO records relating to Williams's and Anderson's labor costs sufficiently and appropriately redressed the prejudice to the defense.

In reaching our conclusion, we also took into account that the accelerated pace of the trial, the lack of centralized supervision, the changes in the composition of the trial team, and the resulting dispersal of responsibility among team members created a situation in which no single member of the prosecution team was assigned to compare the VECO records to the grand jury testimony, witness statements, or work records of Anderson and Williams to ensure that the VECO records were accurate. Accordingly, we concluded that the prosecutors did not commit professional misconduct or exercise poor judgment.

CHAPTER EIGHT
ALLEGATIONS RELATING TO DAVE ANDERSON

I. INTRODUCTION AND SUMMARY

Dave Anderson was an FBI "confidential human source" who testified as a government witness at the trial of Senator Stevens in October 2008. In November 2008, approximately one month after the conclusion of the trial, Anderson sent a letter to Judge Sullivan alleging that government prosecutors and agents had promised Anderson and his family and friends immunity from prosecution, and that they caused him to lie about his immunity while testifying at trial. Anderson alleged further that government agents and prosecutors committed other improprieties while preparing him to be a witness.

Anderson worked as a welder and handyman in the Construction Division of VECO Alaska, a subsidiary of VECO Corporation. He was also the nephew of VECO CEO Bill Allen, and was often assigned by Allen to perform special jobs that were outside the scope of work usually performed by the Alaska based oil services company. In or about July 2000, Allen asked Anderson to help oversee the renovation of Senator Stevens's residence in Girdwood, Alaska. Anderson was present at the Girdwood site for much of the work that was done there, both by VECO employees and by other contractors. Although most of the renovation work was undertaken from July 2000 through mid 2001, Anderson periodically went back to the Girdwood site to assist in various projects until 2004.

In September 2006, Anderson was interviewed by FBI Special Agent Chad Joy and FBI CDC Eric Gonzalez as part of the *Stevens* investigation. The agents determined that Anderson could provide valuable information regarding the Girdwood renovations, and Anderson became an FBI confidential source. [redacted]

After the completion of the work at the Girdwood property, Anderson lost his job at VECO. Anderson had secretly become involved in a romantic relationship with [redacted], a former girlfriend of Bill Allen. When Allen found out, he allegedly retaliated against Anderson in various ways, including firing him and causing Anderson's home to be demolished. Anderson sent letters to Allen's and VECO's attorney, purportedly seeking a severance package. Because the letters mentioned Anderson's involvement in the Girdwood project and certain other questionable activities, Allen viewed the letters as a veiled extortion attempt. Allen and Anderson eventually reached a settlement agreement in which Allen paid Anderson $30,000 and Anderson agreed to leave Alaska. Nevertheless, Anderson

claimed that Allen threatened him on a number of occasions, and put out a "contract" on his life.

Unemployed and homeless, Anderson moved in with [redacted]. He became close to [redacted] family, including [redacted] who was also a subject in the ongoing Polar Pen investigation of political corruption in Alaska. [redacted].

In March 2008, [redacted] learned that Bill Weimar, a former private operator of half way houses in Alaska, was under investigation for unlawfully funneling money [redacted]. [redacted] aware that the investigation was moving in [redacted] direction, became concerned that [redacted] would soon be charged. [redacted] Anderson shared this concern. Anderson, with assistance from [redacted], prepared an affidavit for Anderson's signature claiming that Anderson had been promised full immunity for himself and 13 friends and family members, [redacted] in exchange for Anderson's cooperation in the investigation of Senator Stevens. Anderson signed the affidavit in March 2008, but it was not disclosed to anyone at the time.

On July 29, 2008, a grand jury in the District of Columbia returned the indictment against Senator Stevens. Shortly thereafter, a September 2008 trial date was set.

In August 2008, Bill Weimar pled guilty to public corruption charges that included a conspiracy charge that Weimar funneled campaign money to [redacted] who was identified in the Information filed in connection with Weimar's plea agreement as "Candidate A." News of the plea frightened [redacted] On August 13, 2008, [redacted] attorney, called SA Joy, told him about the affidavit Anderson signed alleging the immunity agreement, and faxed him a copy. SA Joy and SA Steve Forrest went to [redacted] house and met with Anderson regarding the affidavit. SA Joy met with Anderson again a week later, this time accompanied by CDC Gonzalez. During these meetings, and later in several trial preparation sessions, Anderson admitted that, although he signed the affidavit, he knew the contents of the affidavit were untrue, and that [redacted] had drafted the affidavit and supplied the names of everyone for whom immunity was claimed. SA Joy and CDC Gonzalez both maintained that they never promised Anderson or anyone else immunity, and that the only agreement they had with Anderson was that they would not ask him questions regarding his family (including [redacted]); they would only ask questions regarding the renovation of Senator Stevens's Girdwood residence.

In light of credibility issues raised by the admittedly false affidavit, prosecutors in the *Stevens* case were ambivalent about calling Anderson as a witness. After the trial started, a tentative decision was made not to call

Anderson. The night before the government was to rest its case, however, the prosecutors changed their minds and decided to call Anderson because a new problem had surfaced in the government's case.

Early in the trial, the government had introduced VECO corporate records indicating that Anderson and another VECO employee, "Rocky" Williams, had worked full time on the Girdwood project between October 2000 and March 2001. Early in the trial, the defense learned that Williams had only worked part time on the project, which indicated that the VECO records introduced by the government were inaccurate. Near the end of the government's case, after having an opportunity to read Anderson's grand jury transcript, defense counsel learned that during a period from approximately October through mid December 2000, Anderson had gone to Oregon to work on another project, even though his time during this period had continued to be charged on VECO accounting records to the Girdwood project. The defense filed a motion to dismiss the indictment for intentional and repeated misconduct, arguing that the government introduced the VECO records despite knowing them to be false.

In light of these circumstances, the prosecution decided to call Anderson to testify that he had, in fact, worked at Girdwood on a number of projects that were never billed to Stevens nor paid for by him, and to show the jury that the government had nothing to hide with respect to Anderson. Anderson testified on October 9, 2008, and described the various projects he worked on at the Girdwood residence. When asked about the affidavit, Anderson admitted that it was not accurate. He also stated, however, that although immunity was never expressly given, he understood that there was a kind of "gentlemen's agreement," a "handshake" that Anderson took as immunity, even though the word "immunity" was not used by the agents. Defense counsel did not cross examine Anderson.

After the trial, in November 2008, Anderson and SA Joy helped set up a meeting between [redacted] and [redacted] attorney and the Polar Pen prosecution team. [redacted] was told that [redacted] remained a target of the investigation. According to AUSA Bottini, [redacted] appeared shaken.

The next day, November 15, 2008, Anderson faxed to SA Joy a letter addressed to Judge Sullivan, alleging that he did not tell the truth at trial, that in fact the government *had* promised that Anderson and his family and friends would not be prosecuted; that the government "instructed" Anderson to "sugar coat it and get it swept under the rug at trial"; that the government had him study his grand jury transcripts for months to refresh his recollection; that prosecutors provided Anderson with a "time line" of events to refresh his memory and gave him "sticky tabs" to mark pages so that he could reread them until he "recalled them correctly"; and that they intentionally left documents in the room that he was not

supposed to read. Several days later, Anderson sent his letter to the court, which filed it on November 20, 2008.

On November 21, 2008, the defense filed a motion for an evidentiary hearing on the matter. The government filed its initial response the same day, and a more detailed response on December 15, 2008, that recounted their experiences with Anderson [redacted]. The following day, Anderson followed up with another letter to the court, restating and clarifying the allegations in his November 15, 2008 letter. No evidentiary hearing was held. All charges against Senator Stevens were dismissed on April 7, 2009.

Based on the results of our investigation, we concluded that the prosecution did not present false testimony through Anderson. The evidence indicated that the government did not promise immunity to Anderson and his family and friends. The government agents and prosecutors denied promising any immunity, and we found their denials credible. Anderson, for his part, has changed his story several times, but at the end acknowledged to OPR that he was not promised immunity. Anderson admitted that he was simply trying to protect [redacted], and he explained that his claim was based on his own feeling that he and his family and friends *should* have been promised immunity because, unlike Bill Allen (whose family received immunity), Anderson felt that he and his family had not done anything wrong.

In addition, OPR found that the evidence did not support Anderson's other claims about improper conduct by the prosecutors in the course of preparing him to testify. Consequently, OPR found that no prosecutor or agent engaged in misconduct or exercised poor judgment with respect to any of the allegations raised by Anderson.

II. FACTUAL BACKGROUND

A. Dave Anderson Becomes an FBI Confidential Human Source

Anderson became a confidential human source for the FBI in the Polar Pen investigation in early September 2006.[1729] He was approached because agents learned from Title III intercepts that Anderson had worked on the renovation of Senator Stevens's Girdwood residence.[1730] As noted earlier, Anderson was VECO

[1729] Sept. 3, 2006 FBI 302 of David Anderson at 1. Because Anderson was a Confidential Human Source, he is identified in all FBI 302s, 1023s, and other form reports simply as "Source." Anderson was interviewed by IRS agents two days before the FBI's initial interview, on September 1, 2006. Sept. 1, 2006 IRS MOI of David Anderson.

[1730] Seale OPR Tr. Sept. 2, 2009 at 25-26.

CEO Bill Allen's nephew, had worked for Allen, and lived with [redacted] Allen and [redacted] both were early targets of the Polar Pen investigation.[1731]

FBI SA Chad Joy was designated as Anderson's "handler."[1732] Joy was a relatively new agent, and he was given this assignment, according to FBI SSA Colton Seale, because he was available and he needed the experience.[1733] At Seale's request, CDC Eric Gonzalez accompanied SA Joy for the initial interview of Anderson. In Seale's mind, Anderson was a potentially valuable source, and even though Joy was inexperienced, Gonzalez who had spent years as an agent developing and operating sources in drug cases was the most seasoned source handler in the Anchorage, Alaska office.[1734]

From the first interview, on September 3, 2006, it was apparent that Anderson had valuable information regarding the renovation work at Girdwood, as well as on relationships between Bill Allen and a number of Alaska political figures, including Senator Stevens.[1735] A series of interviews with Anderson followed.[1736] On December 6 and 7, 2006, Anderson [redacted]

[1731] Seale OPR Tr. Sept. 2, 2009 at 26.

[1732] Seale OPR Tr. Sept. 2, 2009 at 31-33.

[1733] Seale OPR Tr. Sept. 2, 2009 at 29-31.

[1734] Seale OPR Tr. Sept. 2, 2009 at 31, 35, 37

[1735] Sept. 3, 2006 FBI 302 of David Anderson at 1. In a December 15, 2008 affidavit, CDC Gonzalez provided additional information regarding this initial interview that was not contained in Joy's 302. Response to Defendant's Motion for Discovery and for an Evidentiary Hearing (D.D.C. Dec. 15, 2008) (attaching Dec. 15, 2008 Affidavit of Eric Gonzalez). According to Gonzalez, during the interview, Anderson expressed "concern" regarding girlfriend [redacted] who was an early target of the Polar Pen investigation. Joy and Gonzalez purportedly assured Anderson that they "were not there to interview him on any matter relating [redacted] Dec. 15, 2008 Affidavit of Eric Gonzalez [redacted] is identified in the affidavit as "[redacted] Member A"). They said their sole reason for interviewing him was to learn what he knew regarding the renovations made by VECO to Stevens's Girdwood residence. According to Gonzalez, no immunity was promised to Anderson, [redacted] or anyone else. Dec. 15, 2008 Affidavit of Eric Gonzalez.

[1736] Sept. 3, 2006 FBI 302 of David Anderson; Sept. 7, 2006 FBI 302 of David Anderson; Sept. 11, 2006 FBI 302 of David Anderson (7 interviews on that date); Sept. 26, 2006 FBI 302 of David Anderson; Oct. 19, 2006 FBI 302 of David Anderson; Nov. 30, 2006 FBI 302 of David Anderson.

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During much of the renovation, Anderson served as a *de facto* on site supervisor, responsible for day to day operations, budget oversight, and for ensuring that contractors got paid.[1740]

Although other

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[1740] Sept. 3, 2006 FBI 302 of David Anderson at 1.

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contractors and subcontractors performed much of this work, Anderson, Williams, and other VECO employees were involved as well.[1747]

In Anderson's [redacted] and in various interviews, he described in detail the various residence related projects in which he and other VECO employees participated.[1748] These included: preparing the house to be lifted; assisting in the lifting of the house; assisting in the construction of an addition to the house; overseeing the installation of electrical wiring, plumbing, baseboard heating, and a boiler; installation of framing and flooring in newly constructed sections of the house; construction and installation of a set of metal stairs; construction of upper and lower level decks outside the house; installation of gutters; construction of a "safe" room with a safe to conceal valuables; installation of a large generator; installation in the garage of various amenities, including shelving, a loft, a sink, a boxing speed bag, and a set of tools; the installation of heat tape on the roof of the garage; assistance with moving in and assembling furniture; and other tasks.[1749] Anderson also monitored other small projects that were not strictly related to the renovation or improvement of the house, such as hanging outdoor lights on the railings of the decks, along the roof line, and on a large tree on the Stevens property.[1750]

Anderson provided additional information regarding VECO's role in the work at Girdwood. Anderson said that VECO trucks were frequently parked at the Girdwood residence; that VECO equipment was frequently used; that Senator Stevens and his wife were both on the premises at various times and were aware that VECO employees performed much of the work there; and that as far as Anderson knew Stevens was not billed for work that was undertaken by VECO or for materials that were provided by VECO.[1751] Anderson said that Bill Allen constantly repeated that they "had to keep it quiet," which Anderson interpreted to mean that Allen did not want anyone knowing that VECO was paying for the

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[1747] Sept. 3, 2006 FBI 302 of David Anderson at 1.

[1748] [redacted] Sept. 3, 2006 FBI 302 of David Anderson.

[1749] Sept. 3, 2006 FBI 302 of David Anderson at 3; [redacted]

[1750] Sept. 3, 2006 FBI 302 of David Anderson at 3; [redacted]

[1751] Sept. 3, 2006 FBI 302 of David Anderson at 1-3.

work.[1752] At times workers were told to remove VECO trucks from the premises so that they would not be seen.[1753]

Anderson also provided information relevant to other potentially criminal activity, stating, for example, that he was directed by Allen to make large contributions to the campaigns of various politicians, after which he would be reimbursed, and that he was responsible for the logistics of organizing fundraisers for various politicians.[1754]

B. Anderson's Personal Life

FBI agents and prosecutors considered Anderson a useful witness because of his direct involvement in the work that was done at the Girdwood residence. However, it was clear from the outset that Anderson's personal life raised a number of potential credibility issues.

Within days of Anderson's initial meeting, for example, FBI agents working on the investigation learned that, notwithstanding Anderson's new status as a confidential source, he had told [redacted] a target of the Polar Pen investigation that he was cooperating with the FBI.[1755] In the months that followed, Anderson told others that he was a "confidential informant," including his landlord, who at the time was threatening to evict him, and various reporters, who published lengthy articles based primarily on information provided by Anderson and featuring quotes from him.[1756]

[1752] Sept. 3, 2006 FBI 302 of David Anderson at 1.

[1753] Sept. 3, 2006 FBI 302 of David Anderson at 2.

[1754] Sept. 3, 2006 FBI 302 of David Anderson at 3-4.

[1755] Seale OPR Tr. Sept. 2, 2009 at 46.

[1756] Seale OPR Tr. Sept. 2, 2009 at 51-52. A lengthy article by journalist Tony Hopfinger featuring Anderson's description of work done at the Girdwood residence appeared in the *Seattle Times* on December 26, 2007. T. Hopfinger, "Foreman: Stevens Remodel Figure is Way Off," *Seattle Times*, Dec. 26, 2007. A second story by Hopfinger detailing Anderson's relationship with Bill Allen and the Girdwood project, among other things, appeared in the *Anchorage Press* on January 2, 2008. T. Hopfinger, "Bill & Ted's Excellent Adventure," *Anchorage Press*, Jan. 2, 2008. Anderson also was in frequent contact with reporter Richard Mauer regarding [redacted] Bill Allen, and others. Mar. 18, 2008, FBI 1023 re David Anderson; May 1, 2008, FBI FD-209a re David Anderson; July 28, 2008, FBI 209a re David Anderson; Aug. 18, 2008, FBI FD 209a re David Anderson. On August 3 and August 4, 2008, articles by Mauer appeared in the *Anchorage Daily News* regarding VECO's involvement in the renovation of Stevens's Girdwood home. Both articles relied on Anderson as a source.

Anderson was also known to have drinking problems. He had several arrests and/or misdemeanor convictions for driving while intoxicated.[1757]

In or around 2003, Anderson struck up a friendship with [redacted], then girlfriend of Bill Allen and daughter of [redacted][1758] [redacted] broke up with Allen and became involved with Anderson. According to Anderson, they initially kept their relationship a secret from Allen, fearing that he would be jealous. Eventually, Allen found out and allegedly retaliated in various ways.[1759] According to Anderson, Allen fired him from VECO because of his relationship with [redacted] and threatened him with physical harm on several occasions.[1760] Also, according to Anderson, Allen had VECO employees ransack Anderson's home, demolish it, and remove it from its site.[1761]

Anderson, out of work and struggling financially, wrote a letter to VECO attorney [redacted] on October 3, 2005. In Anderson's letter, he recounted how Allen had unfairly fired Anderson after he had worked at VECO for 25 years; how Allen had directed Anderson to work on personal projects for Senator Stevens and others; how Anderson had made political contributions to various candidates and

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[1757] As mentioned in the government's August 25, 2008 *Giglio* letter, Anderson had a pending Alaska state prosecution for operating a motor vehicle while intoxicated (AS § 28.35.030).

[1758] Sept. 2, 2006 FBI 302 of David Anderson at 1-6. The contents of this 302 consist of a detailed "Timeline," [*sic*] that was emailed to Joy by Anderson or [redacted], that apparently was reproduced by SA Joy in an FBI 302 report format. The date, September 2, 2006, precedes SA Joy's first meeting with Anderson. When SA Joy was asked about this apparent anomaly, he could not specifically recall how he obtained information from Anderson prior to his first meeting with him. He opined that he probably called Anderson in advance of the meeting to confirm that he would be at home, and Anderson – knowing that he would be meeting with Joy the following day – emailed the information to him in advance. Joy OPR Tr. Sept. 16, 2009 at 579-581. The 302 states that the information was received via email. Sept. 2, 2006 FBI 302 of David Anderson ("Timeline") [*sic*] at 1. A second 302 prepared by SA Joy bears the same September 2, 2006 date. This report consists of Joy's transcription of two letters sent by Anderson to [redacted], attorney for Bill Allen and VECO, on October 3, 2005 and October 18, 2005. These letters evidently were also emailed from Anderson to SA Joy on September 2, 2006. Sept. 2, 2006 FBI 302 of David Allen ("Oct. 3 and 18, 2005 letters").

[1759] Sept. 2, 2006 FBI 302 of Dave Anderson (Time line); Sept. 2, 2006 FBI 302 of David Anderson (Oct. 3 and 18 letters).

[1760] Sept. 2, 2006 FBI 302 of Dave Anderson (Time line); Sept. 2, 2006 FBI 302 of David Anderson (Oct. 3 and 18, 2005 letters).

[1761] Sept. 2, 2006 FBI 302 of Dave Anderson (Time line); Sept. 2, 2006 FBI 302 of David Anderson (Oct. 3 and 18, 2005 letters); [redacted]

then been reimbursed for them by Allen; how Allen had threatened Anderson with physical harm; and how VECO employees had destroyed his home.[1762]

Allen evidently viewed these letters as blackmail.[1763] Anderson eventually signed an agreement with Allen's attorney providing that, in exchange for $30,000, Anderson would agree not to disclose his dealings with Bill Allen or VECO.[1764] Anderson said that he was directed by Bill Allen to leave Alaska, and was told that if he returned he would be killed.[1765] Anderson said that a reporter told him that Allen had put out a contract to have Anderson killed. There is evidence that Allen seriously considered having Anderson killed.[1766]

Anderson's dispute with Bill Allen left Anderson without work and in serious financial trouble. On various occasions between September 2006 and August 2008, in response to pleas for help from Anderson, FBI agents provided Anderson with benefits he needed for basic subsistence, including food subsidies, a gasoline card, payment of several months rent at a hotel, a cell phone, and mileage and transportation expenses.[1767] The cell phone was provided in large part to ensure that Anderson could be reached by FBI agents if necessary.[1768]

Over time, Anderson developed a close relationship with [redacted] father, [redacted]

[1762] Sept. 2, 2006 FBI 302 of David Anderson (Oct. 3 and 18, 2005 letters).

[1763] Search Warrant, No. 3:06-mj-00116-JDR, Aug. 29, 2006 Affidavit of FBI SA Mary Beth Kepner, ¶¶ 139-142; Kepner OPR Tr. Oct. 14, 2009 at 637-638.

[1764] Sept. 3, 2006 FBI 302 of David Anderson at 5.

[1765] Sept. 3, 2006 FBI 302 of David Anderson at 5; Sept. 2, 2006 FBI 302 of David Anderson (Oct. 3 and 18, 2005 letters).

[1766] In Kepner's August 29, 2006 search warrant affidavit, she stated: "ALLEN and [redacted] were so angered by David Anderson's extortion that the two discussed having Anderson killed. For instance on December 21, 2005, ALLEN and [redacted] discussed how Anderson would "get hurt" and that the two need to get "an alibi" for when it happened. Later interceptions, however, revealed that ALLEN and [redacted] appeared to have abandoned this scheme, largely because of Anderson's poor state of health and their belief that Anderson would die of natural causes." Search Warrant, No. 3:06-mj-00116-JDR, Aug. 29, 2006 Affidavit of FBI SA Mary Beth Kepner at 78 n. 27.

[1767] Aug. 25, 2008 letter from PIN Principal Deputy Chief Morris to defense counsel, at 4-5.

[1768] Aug. 12, 2008 10:04pm email from SSA Colton Seale to CDC Eric Gonzalez, SA Joy, and SA Kepner.

C. March 2008: Anderson Executes an Affidavit

As noted above, the Polar Pen investigation developed information implicating . On March 13, 2008, the FBI approached Bill Weimar, a former operator of halfway houses in Alaska, and told him that he was under investigation for unlawfully funneling money to a state legislative candidate. [1770] After the meeting, Weimar sent a handwritten letter informing him of the FBI's visit and providing details of the meeting.[1771] Later, "freaked out" went to Weimar's home to discuss the matter.[1772]

subsequently sought out Anderson and [1773] On March 14, 2008, the day after the FBI's meeting with Weimar, Anderson contacted SA Joy.[1774] He told Joy that had traveled four hours to meet with Anderson and at their cabin, and that a reporter had contacted and told him that he would be the next one to be arrested by the FBI.[1775] Anderson expressed concern over health, and asked Joy if the reporter's statements

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[1769] Mar. 18, 2008 FBI 1023 re David Anderson.

[1770] Mar. 7, 2008 Electronic Communication (EC) re Mar. 13, 2008 interview of William Weimar (prepared by SA Kepner). Kepner's report describes the focus of the interview, *i.e.*, involvement with Weimar: "The subject interview of WILLIAM WEIMAR, a business owner, involves his illegal funding o . In August of 2004, the Anchorage Division obtained a Title III order to monitor the telephone conversations of WILLIAM WEIMAR. These conversations revealed that WEIMAR had illegally funded SA Kepner told OPR that she did not prepare a 302 of the interview because "we got no positive information out of him." Kepner OPR Tr. Oct. 13, 2009 at 272.

[1771] May 13, 2008 FBI 302 of William Weimar.

[1772] May 13, 2008 FBI 302 of William Weimar.

[1773] Mar. 14, 2008 FBI 1023 re David Anderson.

[1774] Mar. 14, 2008 FBI 1023 re David Anderson.

[1775] Mar. 14, 2008 FBI 1023 re David Anderson.

were correct.[1776] Joy told Anderson he could neither confirm nor deny the information.[1777]

Two days later, on March 16, 2008, Anderson contacted Joy again.[1778] Anderson expressed his concern for [redacted] stating that [redacted] told him he had heard that someone testified before the grand jury regarding his involvement, and that he was to be arrested the following Monday.[1779] Anderson reiterated his concern for [redacted][1780] Joy asked Anderson to suggest that [redacted] come in to discuss his concerns. Anderson confirmed that [redacted] knew that Anderson was cooperating with the FBI.[1781]

The following day, on March 17, 2008, Anderson again contacted Joy, relating that he and [redacted] wanted to meet with the FBI on March 18, 2008 at [redacted] home.[1782] Anderson told Joy that the reporter had told [redacted] that he was implicated in the "corrections" matter (one of a number of investigations the FBI was conducting at that time).[1783]

On March 18, Anderson and SA Joy had yet another telephone conversation.[1784] According to Joy, Anderson stated that [redacted] wanted immunity "so he can sleep at night."[1785] Anderson added that [redacted] used to be a politician so he may have screwed up a few times but overall he is still a good man."[1786] Anderson also expressed a personal motivation for his concern regarding [redacted]

[1776] Mar. 14, 2008 FBI 1023 re David Anderson.

[1777] Mar. 14, 2008 FBI 1023 re David Anderson.

[1778] Mar. 16, 2008 FBI 1023 re David Anderson.

[1779] Mar. 16, 2008 FBI 1023 re David Anderson.

[1780] Mar. 16, 2008 FBI 1023 re David Anderson.

[1781] Mar. 16, 2008 FBI 1023 re David Anderson.

[1782] Mar. 17, 2008 FBI 1023 re David Anderson.

[1783] Mar. 17, 2008 FBI 1023 re David Anderson. The FBI 1023 states that [redacted] told [redacted] hat Source [redacted] was involved in the corrections matter." This appears to be a misstatement; SA Joy may have meant to state that [redacted] was involved in the corrections matter.

[1784] Mar. 18, 2008 FBI 1023 re David Anderson.

[1785] Mar. 18, 2008 FBI 1023 re David Anderson.

[1786] Mar. 18, 2008 FBI 1023 re David Anderson.

stating that "[i]f [redacted] has to hire an attorney, [redacted] will have to sell his house and [Anderson] will end up losing [his] residence because it will also be sold to help pay for the [redacted] sic) legal fees."[1787]

Later the same day, Anderson and [redacted] adopted a different approach. They called Joy again, but this time asserted that [redacted] had not done anything wrong or illegal and that a meeting would be a waste of time.[1788] [redacted] evidently told Anderson and [redacted] that he was innocent but would only cooperate with the FBI if he was provided with "full immunity."[1789] In an affidavit prepared after the *Stevens* trial in December 2008, SA Joy said that he told Anderson and [redacted] that the FBI did not have the power to provide immunity, that only government prosecutors could enter into an immunity agreement, and that it was unlikely that [redacted] would receive immunity.[1790] No meeting with [redacted] occurred at that time.

Unbeknownst to SA Joy and the Polar Pen team, one week later, on March 25, 2008, Anderson signed an affidavit claiming that in August 2006 at the outset of Anderson's relationship as a confidential source with the FBI the FBI and the IRS promised immunity for all conduct within a ten year period to Anderson, [redacted], and a dozen other family members and friends. Specifically, the affidavit stated:

> On or about August of 2006 the Federal Bureau of Investigation Special Agent Chad Joy, Eric Gonzale[z] and agents from the United States Treasury Department asked to speak to me regarding my knowledge of political corruption in the State of Alaska. I at that time stated to them that I would openly and fully discuss any and all matters of political corruption in exchange for the clear understanding that I and my immediate family and friends: [redacted]

[1787] Mar. 18, 2008 FBI 1023 re David Anderson.

[1788] Mar. 18, 2008 FBI 1023 re David Anderson (second Mar. 18, 2008 telephone conversation with Dave Anderson).

[1789] Mar. 18, 2008 FBI 1023 re David Anderson (second Mar. 18, 2008 telephone conversation with Dave Anderson).

[1790] Dec. 15, 2008 Affidavit of SA Chad E. Joy, ¶ 8.

> receive full immunity from any prosecution that may arise over the last ten year period.[1791] This immunity was granted by all parties and confirmed at this meeting and subsequent meetings. Additionally, I have reconfirmed this immunity for the above listed people during the course of my testifying before the Grand Jury three separate times and at approximately forty subsequent meetings with the Federal Bureau of Investigation at various locations.
>
> It has come to my attention that I may not be available to confirm this prearranged agreement of immunity for the above listed people as information given to me by the Federal Bureau of Investigation and others that a contract to murder me has been discovered. In the event of my murder I have issued this sworn statement to clarify my arrangement with the Federal Bureau of Investigation.
>
> I have taken all these actions freely without the advice of a lawyer. The immunity agreement is binding upon myself, the Federal Bureau of Investigation and any other government agency.[1792]

The affidavit was notarized. The alleged "contract to murder" refers to Anderson's concern that Bill Allen would make good on his alleged oft stated desire to have Anderson killed. The existence of this affidavit did not become known to the FBI or federal prosecutors involved in the *Stevens* case until August 2008.

[1792] Affidavit of David Anderson, Mar. 25, 2008.

D. August 2008: Anderson's Affidavit is Disclosed to the Prosecution Team

On April 8, 2008, Anderson and [redacted] called SA Joy, and [redacted] expressed concern about her father's criminal exposure and her own exposure for conduct that might have occurred as a result of her involvement in her father's [redacted][1793] [redacted] requested an opportunity to meet with SA Joy to discuss her concerns.

On May 13, 2008, William Weimar and his attorney met with prosecutors at the U.S. Attorney's Office in Anchorage to review the case against him. The meeting was attended by AUSAs Bottini and Goeke, PIN attorneys Marsh and Sullivan, FBI SA Kepner, and IRS SA Bateman.[1794] The following night, Weimar met with [redacted] to tell [redacted] all of the details he could recall about the presentation of evidence.[1795]

On July 29, 2008, a grand jury in Washington, D.C., returned the indictment against Senator Stevens.

On August 3, 2008, an article written by reporter Richard Mauer entitled "VECO Men Sparked Stevens Remodel," appeared in the *Anchorage Daily News*. The article featured Dave Anderson as a source. SA Joy, upon learning of the article, sent an email to SA Kepner stating:

> I am reallllllly pissed. I'm in a bad mood because of my 5th child and his big mouth and that he gets away with misleading me. I want to tell him I don't trust him, make him feel bad, let him apologize, beg for another chance, forgive him, then share with him the "secret" info about

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[1793] Apr. 8, 2008 FBI 302 re David Anderson [redacted] According to SA Joy's report [redacted] explained that she had owned a home in Anchorage and a cabin in Caswell that Bill Allen had renovated, at a cost of approximately $100,000 – $120,000. Later, [redacted] sold the [redacted] home, using her father as agent in the real estate transaction. [redacted] received the commission on the sale of the property. [redacted] was concerned that this might be viewed as an illegal monetary contribution. In addition, [redacted] handled much of the paperwork concerning the campaign, including preparation of [redacted] and disclosures. [redacted] expressed concern that she might have criminal exposure from her involvement in these activities.

[1794] May 13, 2008 FBI 302 of William Weimar.

[1795] May 13, 2008 FBI 302 of William Weimar.

> [redacted] to bring him back to the table. I can't tell you how mad I am.[1796]

The "secret info" to which Joy referred was the knowledge that, in a matter of days, Weimar would plead guilty in a way that directly implicated [redacted].[1797]

On August 8, 2008, SA Joy followed up on his plan, telling Anderson as a "courtesy" that Bill Weimar was pleading guilty the following Monday to public corruption charges that included a conspiracy charge alleging that Weimar funneled campaign contributions to [redacted].[1798] On August 11, 2008, Weimar pled guilty to conspiracy to commit mail fraud, 18 U.S.C. § 371, and to structuring financial transactions, 31 U.S.C. § 5324(a)(3).[1799] [redacted][1800]

Weimar's plea apparently had a powerful effect on [redacted], his daughter [redacted] and, indirectly, on Dave Anderson. On August 12, Anderson called Joy and told him that he had been fighting with [redacted], was "probably going to be kicked out of the cabin," and needed help.[1801] Joy said he would see what he could do, but made no promises.[1802] [redacted] called later and said that Anderson was "just being himself" and that everything was fine."[1803]

[1796] Aug. 3, 2008 11:31am email from SA Joy to SA Kepner; Joy OPR Tr. Sept. 16, 2009 at 600-601.

[1797] Joy OPR Tr. Sept. 16, 2009 at 602-604.

[1798] Aug. 8, 2008, Aug. 10, 2008 FBI Contact Report re David Anderson ("On 08/08/08, SA Joy advised [Dave Anderson] Bill Weimar was pleading guilty the following Monday involving public corruption charges that included a conspiracy charge. Within the charging documents, Weimar admits that he, Candidate A, and Consultant A conspired to illegally provide campaign contributions to benefit Candidate A. SA Joy advised Source tha [redacted]. SA Joy advised this was a courtesy advisement.").

[1799] *United States v. Weimar*, 3:08-cr-00089-JWS Plea Agreement, Information, and Factual Basis for Plea (Aug. 11, 2008) (D. Alaska).

[1800] *United States v. Weimar*, 3:08-cr-00089-JWS Plea Agreement, Information, and Factual Basis for Plea (Aug. 11, 2008) (D. Alaska).

[1801] Aug. 12, 2008 FBI 1023.

[1802] Aug. 12, 2008 FBI 1023.

[1803] Aug. 12, 2008 FBI 1023.

In an email to SSA Seale, CDC Gonzalez, and SA Kepner, Joy wrote:

> [redacted] appears to be wanting to use [D]ave as leverage and has been making [D]ave think we are going to go after him too for the conduit campaign contributions, money laundering, and extortion. [redacted] supposedly hired a family lawyer to cover everyone, including [D]ave. I think [redacted] is trying to protect himself by freaking everyone out. [redacted] had [redacted] turn off their cabin phone service. I have no way to contact [D]ave now.
>
> [redacted] told [D]ave some lies about his contact with me, which I believe is [redacted] attempt to manipulate [D]ave against me. [redacted] may want to come out as the leader and controller of [D]ave so he can derive some benefit from [D]ave's government assistance, similar to BA and [redacted][1804]

Joy discussed Anderson's situation with AUSA Bottini. Bottini told Joy that he opposed providing assistance to Anderson on grounds that it would seriously compromise his credibility as a witness.[1805] In an email to his FBI colleagues, Joy expressed frustration with Bottini's unwillingness to help Anderson:

> I talked to Bottini about all of this to brainstorm what the lawyers might consider reasonable. Bottini does not appear supportive of any payments on behalf of [D]ave. No hotel, no replacement cell phone, nothing. Bottini said to wait for the call tomorrow and then tell him we are looking into it.[1806]

[1804] Aug. 12, 2008 9:24pm email from SA Joy to SSA Seale, CDC Gonzalez, and SA Kepner.

[1805] Aug. 12, 2008 9:24pm email from SA Joy to SSA Seale, CDC Gonzalez, and SA Kepner. In an email to the trial attorneys, Bottini stated: "Chad just called to report tha [redacted] has thrown Dave out of the cabin – supposedly this is fallout over the [redacted] issues – all stemming from the Weimar plea. Looks like they are somehow blaming Dave for this which is, of course, totally irrational. . . . I told Chad that anything we do for this guy is obviously more baggage x power of 10 at this point. It will look like he is trying to extort us coming down the stretch, etc." Aug. 12, 2008 9:13pm email from AUSA Bottini to PIN attorneys Marsh and Sullivan, PIN Principal Deputy Chief Morris, and AUSA Goeke.

[1806] Aug. 12, 2008 9:24pm email from SA Joy to SSA Seale, CDC Gonzalez, and SA Kepner.

Gonzalez responded to Joy's email, stating that the government should provide assistance to Anderson including, at a minimum, a cell phone so that Anderson could be reached.[1807] He also suggested that the government might consider "use" immunity for Anderson.[1808] Finally, Gonzalez disagreed with Bottini's conclusion that Anderson should not receive help.[1809] SSA Colton Seale agreed with Gonzalez, reasoning that they needed to provide Anderson a cell phone ("We can't be at this point and not be able to reach him").[1810]

By this time the government had already provided Anderson with approximately $6,200 of assistance in various forms, including hotel rooms and apartment rent, lunch, debit cards to cover food and gasoline expenses, mileage and transportation expenses for meeting with the FBI, and a pre paid cell phone.[1811]

On August 13, 2008, Anderson called SA Joy and told him that he was contemplating using a lawyer [redacted] had hired as a family attorney.[1812] According to Joy, Anderson expressed concern that he could be charged with money laundering or blackmail relating to the conduit campaign contributions. Joy told Anderson that he could not guarantee anything, but that he could either

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[1807] Aug. 12, 2008 9:54pm email from CDC Gonzalez to SA Joy, SSA Seale, and SA Kepner.

[1808] Aug. 12, 2008 9:54pm email from CDC Gonzalez to SA Joy, SSA Seale, and SA Kepner. When a witness is given "use" immunity, it means that the government cannot use any statements that the witness makes against the witness in a subsequent prosecution. For example, if a witness who has been given "use" immunity admits in testimony before a grand jury that he robbed a bank, he can still technically be prosecuted for the robbery; however, his admission before the grand jury cannot be used as evidence against him.

[1809] In a second subsequent email, Gonzalez disagreed with Bottini's reluctance to help Anderson, and raised several questions, including whether [redacted] might be telling Anderson not to cooperate. Aug. 12, 2008 9:58pm email from CDC Gonzalez to SA Joy, SSA Seale, and SA Kepner.

[1810] Aug. 12, 2008 10:04pm email from SSA Seale to CDC Gonzalez, SA Joy, and SA Kepner.

[1811] As part of trial preparation, SA Joy was tasked with compiling a list of all the benefits the government had provided to Anderson since he became a confidential source, so that it could be disclosed to the defense. Aug. 22, 2008 11:53am email from SA Joy to AUSAs Bottini and Goeke, PIN attorneys Morris, Marsh, and Sullivan, SA Kepner, and IRS SA Bateman. Aug. 25, 2008 letter from PIN Principal Deputy Chief Morris to defense counsel. There is no record of Anderson receiving anything in addition to what is described above.

[1812] Aug. 13, 2008 FBI 1023 re David Anderson.

get an attorney or approach the prosecutors regarding immunity.[1813] According to Joy, he advised Anderson that he was not sure whether [redacted] family attorney could help Anderson, as [redacted] and Anderson's concerns were different. After further discussion, Anderson told Joy that he had decided to use [redacted] attorney, [redacted] Joy suggested that Anderson meet with [redacted], explain his situation, then have [redacted] call Joy or the U.S. Attorney's Office.[1814]

[redacted] called Joy shortly after Joy finished talking to Anderson.[1815] [redacted] stated that [redacted] had an affidavit signed by Anderson stating that Anderson and many "family members" were given immunity from all prosecution related to any crime committed within the past ten years. Joy requested a copy, which was faxed from [redacted] office shortly thereafter. The affidavit was the March 25, 2008 document set forth above.[1816] Attached to the affidavit were copies of two business cards. One card had SA Joy's name on it; the other card had SA Mary Jo Herrett's name printed on it, with SA Kepner's name handwritten on it, together with her phone number. Joy asked [redacted] whom [redacted] represented. According to SA Joy, after some hesitation, [redacted] stated that he represented only [redacted], and not Dave Anderson.[1817]

Joy and SA Steve Forrest drove to Anderson's residence and met with him regarding the affidavit the same day.[1818] According to Joy, Anderson stated that [redacted] drafted the affidavit and Anderson signed it. Although no one forced Anderson to sign, he said he felt pressured to sign because he was in the middle of a "mess" caused by his relationship with [redacted] and her father, [redacted].[1819] According to Joy, Anderson admitted that the contents were not accurate. Anderson stated further that he had previously told agents that he did not want [redacted] and her family "involved with his cooperation with the government," but recognized that neither he nor anyone else received

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[1813] Aug. 13, 2008 FBI 1023 re David Anderson.

[1814] Aug. 13, 2008 FBI 1023 re David Anderson. This 1023 was transcribed on November 18, 2008, after SA Joy and the prosecution team received a copy of Anderson's Nov. 15, 2008 letter to Judge Sullivan.

[1815] Aug. 13, 2008 FBI 302 of [redacted].

[1816] Aug. 13, 2008 FBI 302 of [redacted] Aug. 13, 2008 fax from [redacted] to SA Joy.

[1817] Aug. 13, 2008 FBI 302 of [redacted].

[1818] Aug. 13, 2008 FBI 1023 re David Anderson.

[1819] Aug. 13, 2008 FBI 1023 re David Anderson.

immunity.[1820] Anderson said [redacted] put in all the names of people who purportedly received immunity.[1821] Anderson stated further that he believed he could remove the inaccurate portions to make the affidavit accurate. He did not understand the implications of a false affidavit and how it could hurt his credibility.[1822]

In his April 9, 2010 OPR interview, Anderson, in the presence of his own attorney, essentially corroborated Joy's version of events.[1823] He stated that he and [redacted] rather than [redacted] drafted the affidavit.[1824] Anderson initially maintained that his purpose in preparing the affidavit was to "clarify" his agreement and protect himself and his family and friends, although he admitted upon further questioning that, to his knowledge, no one named in the affidavit except [redacted] was ever considered a target of any investigation.[1825] Anderson admitted further in his OPR interview that although he claimed in the affidavit that he and 13 other named persons had been given immunity by the FBI agents during their very first meeting and in subsequent meetings, in fact no list of names was ever provided to the agents, and the agents never told Anderson that he or anyone else had "immunity."[1826] On the contrary, Anderson specifically

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[1820] Aug. 13, 2008 FBI 1023 re David Anderson.

[1821] Aug. 13, 2008 FBI 1023 re David Anderson.

[1822] Aug. 13, 2008 FBI 1023 re David Anderson. The substance of Joy's conversation with Anderson is corroborated by emails sent shortly after the interview. An email from AUSA Bottini to the prosecution team recounting his conversation with Joy noted: "Chad met with Dave in Wasilla this afternoon: Dave acknowledged signing the affidavit[;] Dave acknowledged that some things in the affidavit are not true[;] Dave said that [redacted] drafted the affidavit[;] Dave signed the affidavit because [redacted] sic] pressured him to do so." Aug. 13, 2008, 9:31pm email from AUSA Bottini to PIN attorneys Morris, Marsh, and Sullivan, and SAs Joy and Kepner. SA Joy confirmed the substance of the conversation minutes later, stating: "Dave believed he could revise the statement and it wasn't a big deal. When I told him he could no longer be a witness/useful, he blamed everyone else and told us we could f@+# ourselves." Aug. 13, 2008 5:38pm email from SA Joy to AUSA Bottini, PIN attorneys Morris, Marsh, and Sullivan, and SA Kepner.

[1823] Anderson OPR Tr. Apr. 9, 2010 at 2, 3, 27-28. Anderson was interviewed by telephone from his home [redacted]. Anderson's attorney participated by telephone from his office in Anchorage, Alaska.

[1824] Anderson OPR Tr. Apr. 9, 2010 at 28-29, 35-36.

[1825] Anderson OPR Tr. Apr. 9, 2010 at 23-29, 33.

[1826] Anderson OPR Tr. Apr. 9, 2010 at 16, 18-19, 67-71.

stated that he asked the agents for immunity for himself and his family, and they said "no."[1827]

Anderson admitted that the agents told him that if he cooperated regarding the *Stevens* case, the agents would not ask Anderson for information regarding his family and friends, including [redacted].[1828] Anderson also admitted that the affidavit was an attempt on his part to unilaterally "refine" the agreement to ensure protection for himself and his family:

> OPR: . . . they wouldn't ask you about your family members in connection with the political corruption investigation, isn't that what they said to you?
>
> ANDERSON: Basically.
>
> OPR: All right. And isn't that the agreement that you understood, that they just weren't going to make you turn on your family and friends, but only cooperate as to Bill Allen and other people on the Girdwood project? Isn't that what they said?
>
> ANDERSON: Yes. Yeah, that's basically it.[1829]

E. The Prosecution Team Considers Using Anderson as a Trial Witness

After learning of Anderson's affidavit, the FBI considered "closing out" Anderson as a confidential source.[1830] Anderson's conduct appeared to warrant closure.[1831] Likewise, the prosecution team had concerns about using Anderson

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[1827] Anderson OPR Tr. Apr. 9, 2010 at 70-71.

[1828] Anderson OPR Tr. Apr. 9, 2010 at 20-21.

[1829] Anderson OPR Tr. Apr. 9, 2010 at 20-21.

[1830] In an email to SAs Bart Boodee and Karen Smith that was sent the day after Anderson's affidavit disclosure, Joy vented his frustration: "My WONDERFUL CHS . . . created an affidavit with a bunch of false information saying we gave him and everyone in his family immunity from anything they did in the last 10 years. He rendered himself useless to the Ted Stevens trial – yesterday he was a key witness. Today he is worthless." Aug. 14, 2008 9:09am email from SA Joy to SAs Boodee and Smith.

[1831] In response to Joy's inquiry regarding closure, SS Robert Enriquez wrote: "Unless you wish to make a compelling argument to keep the CHS open, this would meet the criteria to warrant "closure with cause." Aug. 14, 2008 5:13pm email from SA Enriquez to SAs Boodee, Joy,

as a witness. In an August 14, 2008 email setting forth trial witness preparation sessions, AUSA Bottini noted, with respect to Anderson, that he "probably [is] a no go at this point."[1832]

Nevertheless, no firm decision was made at that time either to "close out" Anderson as a confidential source or to permanently drop him from the list of potential trial witnesses. Although Anderson's credibility was undermined by the affidavit, he was still a knowledgeable person in the unlawful conduct charged in the *Stevens* indictment. In any case, with trial still several weeks away, there was no need to make a final decision in this regard.

SA Joy forwarded copies of the various reports he had prepared regarding Anderson to the prosecutors for their review.[1833] Joy understood that, despite the affidavit, it might still be necessary to use Anderson as a witness. Thus Joy, recognizing that his August 13, 2008 meeting with Anderson might be subject to scrutiny and disclosure to defense counsel, prepared a one paragraph FBI report that recounted his conversation with Anderson that day.[1834]

On August 20, 2008, one week after Joy and Forrest met with Anderson regarding the affidavit, Joy and CDC Gonzalez traveled to Anderson's and [redacted] cabin for another meeting regarding Anderson's affidavit. No FBI report was prepared, and no notes have been found. An email from SA Joy to the prosecution team immediately after the interview suggests that the meeting was viewed as a success, inasmuch as Anderson again acknowledged that he had not received immunity, and that he wanted to cooperate.[1835] The email stated:

> I just met with Dave and [redacted]. They are back on board. Dave apologized many times for blind siding me

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Rios, Smith, and SSA Seale.

[1832] Aug. 14, 2008 3:45pm email from AUSA Bottini to PIN attorneys Welch, Morris, Marsh, and Sullivan, AUSA Goeke, SAs Kepner, Roberts, [redacted], and Joy, and IRS SA Bateman.

[1833] On August 18, 2008, SA Joy emailed copies of 43 reports to AUSA Bottini, who then forwarded them to other members of the team. Aug. 18, 2008, 10:12pm email to AUSAs Bottini and Goeke, and PIN attorneys Morris, Marsh, and Sullivan ("The small army of Dave Anderson 302s ..... All 43 of them").

[1834] Aug. 13, 2008 FBI 1023 re David Anderson.

[1835] Aug. 20, 2008 2:18pm email from SA Joy to PIN attorneys Morris, Marsh, and Sullivan, AUSAs Bottini and Goeke, SSA Seale, and SA Kepner.

> with the affidavit. He knows and understands that no one has immunity and it was never given.[1836]

An affidavit prepared several months later by CDC Gonzalez regarding his two meetings with Anderson corroborated Joy's email:

> Mr. Anderson acknowledged that no promise of immunity was ever given by me or SA Joy. Mr. Anderson and [redacted] expressed their concern for [redacted] SA Joy and I restated our promise to not ask any questions regarding [redacted], and that we had lived up to our word. Mr. Anderson apologized for signing the Affidavit . . . .[1837]

In Anderson's April 9, 2010 OPR interview, he corroborated Gonzalez's account, stating that he asked the agents for immunity for himself and his family and that the agents said no.[1838]

Anderson was scheduled to come for a witness preparation session two days later, on August 22, 2008. AUSA Bottini noted in an email to the group that he anticipated spending the afternoon with Anderson doing a "damage control assessment" and then having him return the following week while everyone was present so the entire team could collectively assess Anderson's viability as a witness.[1839]

The FBI shared the prosecution team's ambivalence regarding Anderson. An August 22, 2008 email from SSA Colton Seale to FBI SA Kevin Constantine (FBI CID), SAC Kevin Fryslie, and others noted:

> [O]ne of our other main cooperators, Dave Anderson, filed an affidavit stating we had promised him and his entire family (including [redacted]) immunity in

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[1836] August 20, 2008 2:18pm email from SA Joy to PIN attorneys Morris, Marsh, and Sullivan, AUSAs Bottini and Goeke, SSA Seale, and SA Kepner.

[1837] Dec. 15, 2008 Affidavit by FBI SSA Eric B. Gonzalez. Gonzalez's affidavit appears to have been based on his own (and possibly Joy's) recollection; there was no FBI 302 or notes of the meeting. Dec. 12, 2008, 5:35pm email from SSA Seale to PIN attorneys Marsh and Sullivan, and AUSAs Bottini and Goeke.

[1838] Anderson OPR Tr. Apr. 9, 2010 at 69.

[1839] Aug. 20, 2008, 11:31pm email from AUSA Bottini to SA Joy, PIN attorneys Morris, Marsh, and Sullivan, AUSA Goeke, and SA Kepner.

> return for his cooperation. This of course is totally false and Anderson admitted to us that the affidavit actually had been prepared by [redacted] but he did sign it. This certainly is problematic. We've met with him a couple of times since we found out about this and he has admitted he knows it was totally false and it wasn't his idea, but we're still uncertain whether he'll testify. My feeling is that he still brings a lot to the case and is a compelling witness as he was the guy on the ground and he tells his story well, but he can be a bit volatile at times, and the attorneys are uncertain whether they want to use him.[1840]

AUSA Bottini and SA Joy met with Anderson on August 22 and went through the "wood shedding process" regarding the affidavit.[1841] In an email sent to the prosecution team the following day, Bottini observed that it was "pretty clear" that Anderson wanted to testify at trial and that "he gets it now that he has really screwed up."[1842]

In a Declaration executed several months later, Bottini described the trial preparation activities involving Anderson, including the August 22, 2008 meeting with Anderson and SA Joy.[1843] According to Bottini, Anderson admitted that his affidavit was false, that no immunity had been offered, that [redacted] drafted the affidavit, and that he (Anderson) was pressured by [redacted] and [redacted] to sign it.[1844] Bottini added that Anderson tried to justify his actions by claiming that he believed that there had been a "gentlemen's agreement" with FBI agents who had initially interviewed him that he would not have to provide information against any family members.[1845]

[1840] Aug. 22, 2008 1:21pm email from SSA Seale to SSA Kevin Constantine, ASAC David Heller, SAC Kevin Fryslie, and SAs Kepner, Joy, Sparks, Herrett, Howland, and Forrest.

[1841] Aug. 23, 2008 7:37pm email from AUSA Bottini to SAs Joy and Kepner, PIN attorneys Morris, Marsh, and Sullivan, AUSA Goeke, IRS SA Bateman, and Dennis Roberts.

[1842] Aug. 23, 2008 7:37pm email from AUSA Bottini to SAs Joy and Kepner, PIN attorneys Morris, Marsh, and Sullivan, AUSA Goeke, IRS SA Bateman, and Dennis Roberts.

[1843] Dec. 15, 2008 Declaration of Joseph Bottini, ¶¶ 4-18.

[1844] Dec. 15, 2008 Declaration of Joseph Bottini, ¶ 4; Dec. 11, 2008 8:39pm email from AUSA Bottini to AUSA Goeke and PIN attorney Marsh (attached draft insert to United States' Response to Defendant's Motion for Discovery and for an Evidentiary Hearing (D.D.C. Dec. 15, 2008) at 14-18.

[1845] Dec. 15, 2008 Declaration of Joseph Bottini, ¶ 4.

Bottini told Anderson that the prosecution team had not made a decision about whether they would use him as a witness because of the "fallout" over what he had done, and that they would need to discuss the issue as a group after everyone had a chance to meet and assess him.[1846] In Bottini's December 2008 Declaration, he asserted that he told Anderson several times that "all the government wanted was the truth from him including about how he came to sign that affidavit."[1847] Anderson responded that he had not realized that the March affidavit was "such a significant matter."[1848]

According to Bottini, while at the U.S. Attorney's Office, Anderson also began reviewing his two grand jury transcripts and related exhibits. Bottini told Anderson that, in the event that he was called as a witness at trial, a transcript of his grand jury testimony would be provided to the defense before he testified, and he could be cross examined about his prior testimony.[1849] Anderson was provided with a copy of his grand jury testimony in a binder, without any highlighting, tabs, or other markings, and asked to review it in preparation for a possible cross examination.[1850] Bottini said Anderson was also told that his present recollection about the events in question should control, even if his present recollection conflicted with what he might have said in his grand jury testimony.[1851]

Anderson was placed in a conference room at the U.S. Attorney's Office to review his transcripts.[1852] SA Joy frequently checked on Anderson and reported that Anderson's progress was extremely slow; after approximately two hours, Anderson had read only about the first 25 pages of the 229 total pages of grand jury transcript.[1853] SA Joy, who also executed an affidavit on December 15, 2008,

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[1846] Aug. 23, 2008 7:37pm email from AUSA Bottini to SAs Joy and Kepner, PIN attorneys Morris, Marsh, and Sullivan, AUSA Goeke, IRS SA Bateman, and Dennis Roberts.

[1847] Dec. 15, 2008 Declaration of Joseph Bottini, ¶ 5.

[1848] Dec. 15, 2008 Declaration of Joseph Bottini, ¶ 5.

[1849] Dec. 15, 2008 Declaration of Joseph Bottini, ¶ 6.

[1850] Dec. 15, 2008 Declaration of Joseph Bottini, ¶ 6.

[1851] Dec. 15, 2008 Declaration of Joseph Bottini, ¶ 8.

[1852] Dec. 15, 2008 Declaration of Joseph Bottini, ¶ 7.

[1853] Dec. 15, 2008 Declaration of Joseph Bottini, ¶ 7; Dec. 15, 2008 Affidavit of SA Chad Joy, ¶¶ 13-15; [redacted]

corroborated Bottini's version of events.[1854] According to Joy, on occasions when Anderson was in the office reviewing materials, Joy checked in on him every 10 to 30 minutes.[1855]

In light of Anderson's slow progress, he was asked to return to the U.S. Attorney's Office the following week to continue his review. According to Bottini, Anderson continued his review the following Monday, August 25, 2008.[1856] He was again placed in a small conference room with a table and some chairs and spent the entire day reviewing his transcript. Anderson's progress continued to be extremely slow.

According to Bottini, Anderson returned to the U.S. Attorney's Office the following morning, August 26, 2008, and continued his review of his grand jury transcripts in the same small conference room.[1857] That afternoon, as originally planned, Anderson met with the entire prosecution team, including PIN Principal Deputy Chief Morris, AUSAs Bottini and Goeke, PIN attorneys Marsh and Sullivan, FBI SA Joy, and IRS SA Bateman.[1858] Anderson appeared forthcoming, stating, among other things, that he signed the affidavit as a "CYA"; he was nervous about the investigation and he was under a lot of pressure; he did not write the affidavit, although he did sign it; that the affidavit was not true; and that he just wanted to keep his "family" and [redacted] "out of this."[1859]

Although Anderson again acknowledged that no one specifically said he had immunity, he again claimed that he had reached a "gentlemen's agreement" during his early meetings with SA Joy and CDC Gonzalez.[1860] AUSA Bottini

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[1854] Dec. 15, 2008 Affidavit of Chad Joy, ¶¶ 12-19.

[1855] Dec. 15, 2008 Affidavit of Chad Joy, ¶ 15.

[1856] Dec. 15, 2008 Declaration of Joseph Bottini, ¶¶ 9-10.

[1857] Dec. 15, 2008 Declaration of Joseph Bottini, ¶ 10.

[1858] Aug. 26, 2008 handwritten notes by SA Kepner of meeting with Dave Anderson; Dec. 15, 2008 Declaration of Joseph Bottini, ¶¶ 10-12.

[1859] Aug. 26, 2008 handwritten notes by SA Kepner of meeting with Dave Anderson.

[1860] Aug. 26, 2008 handwritten notes by SA Kepner of meeting with Dave Anderson. In a Declaration attached to the United States' Response to Defendant's Motion for Discovery and for an Evidentiary Hearing, PIN attorney Marsh "specifically recall[ed] Anderson expressing his regret about signing the affidavit because he knew the contents were false." Marsh also recalled AUSA Bottini "telling Anderson that what Anderson needed to do was to tell the truth – whatever the truth was – about not only the March Affidavit, but about any question that got posed to him. Dec. 15, 2008 Declaration of Nicholas Marsh, ¶¶ 5 and 6.

understood from talking several times with Anderson that the "gentlemen's agreement" was the agents' representation to Anderson that they would not ask him to provide information against his own family."[1861]

In Anderson's OPR interview, he was asked why, if he understood that he had a "gentlemen's agreement," did he not say he had a gentlemen's agreement in his affidavit rather than immunity. Anderson did not directly answer that question. However, he conceded that he had asked the agents for immunity for himself and his family (including [redacted]) but that the agents said they could not or would not promise it to him.[1862]

> OPR: I just want to go back to this whole business about what the agent said to you that led you to believe what you've told us today. What I hear you saying is that you thought you had a gentleman's agreement that everybody in your family who is connected to you closely would be protected if you cooperated?
>
> ANDERSON: Right.
>
> OPR: Right? And the term that you keep stressing is gentlemen's agreement, correct?
>
> ANDERSON: Yeah.
>
> OPR: And that nobody ever used the word immunity, right?
>
> ANDERSON: No, it was never immunity.
>
> OPR: Then let me ask you this, why did you keep using the word immunity? You used the word immunity in your affidavit, you used immunity in the letter to the judge, why did you use that word on those two occasions?
>
> ANDERSON: Well, because I thought of it as being immunity.

[1861] Bottini OPR Tr. Mar. 11, 2010 at 486.

[1862] Anderson OPR Tr. Apr. 9, 2010 at 67-71.

OPR: Well, I think what you said today is that you thought of it as being a gentlemen's agreement. Why didn't you say in the affidavit that you thought you had a gentleman's agreement, and why didn't you say in the letter to the judge that you thought you had a gentlemen's agreement?

ANDERSON: Well, I'm not a lawyer, so I, you know

OPR: All right. But where did you get the word immunity from?

ANDERSON: Well, that's the way I kind of looked at it as being

* * *

OPR: when the agents talked to you back in September of '06 did you know what immunity was?

ANDERSON: Well, yeah, I know what it is.

OPR: Well, and then why didn't you ask them? Why didn't you say give me, I want immunity for my friends and family if you knew what the word meant?

ANDERSON: I did.

OPR: But you told us that all you had was a gentleman's agreement.

ANDERSON: I know, but I asked them for immunity.

* * *

OPR: And did they say that they were giving you immunity for you and your family?

ANDERSON: No.

* * *

OPR: Are you saying that you asked for immunity and the agents said no?

ANDERSON: Exactly. . . . [1863]

This passage demonstrates that whatever Anderson thought the "gentlemen's agreement" meant, he knew that he and his family and friends did not have immunity.

According to AUSA Bottini, following the group discussion of the March affidavit, Bottini and Joy went through some substantive trial preparation with Anderson.[1864] They showed Anderson a number of photos that had been identified as potential exhibits and asked him questions about them.[1865] By that evening, Anderson's trial preparation still was not complete; arrangements were made for him to return on the morning of September 4, 2008.[1866] Still, no decision had been made regarding whether to call Anderson as a witness.

On September 4, 2008, Anderson again met with AUSA Bottini and SA Joy for additional trial preparation.[1867] According to Bottini, he again went through Anderson's anticipated testimony with him.[1868] Photographs that were potential trial exhibits and other materials, including receipts and invoices, may have been shown to him.[1869] At the end of the session, the March affidavit was addressed again. According to Bottini, Anderson stated that he had told [redacted] about his version of the "gentlemen's agreement" between himself and the FBI agents, that is, that he would not have to provide information against family members.[1870] Anderson said that [redacted] took that information and turned it into the portion of the March affidavit which stated that the FBI had granted immunity from criminal prosecution to [redacted] and others.[1871] Anderson reiterated that he knew the affidavit

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[1863] Anderson OPR Tr. Apr. 9, 2010 at 67-71.

[1864] Dec. 15, 2008 Declaration of Joseph Bottini, ¶¶ 10-12.

[1865] Dec. 15, 2008 Declaration of Joseph Bottini, ¶¶ 10-12.

[1866] Dec. 15, 2008 Declaration of Joseph Bottini, ¶ 12.

[1867] Dec. 15, 2008 Declaration of Joseph Bottini, ¶ 13.

[1868] Dec. 15, 2008 Declaration of Joseph Bottini, ¶ 13.

[1869] Dec. 15, 2008 Declaration of Joseph Bottini, ¶¶ 13, 16.

[1870] Dec. 15, 2008 Declaration of Joseph Bottini, ¶ 13.

[1871] Dec. 15, 2008 Declaration of Joseph Bottini, ¶ 13; Aug. 26, 2008 handwritten notes by SA Kepner of meeting with Dave Anderson. As noted above, in Anderson's OPR interview he maintained that he and [redacted] rather than [redacted], drafted the affidavit. Anderson OPR Tr. Apr. 9, 2010 at 25-27, 35-38.

was false in this regard when he signed it, but that he was under "a lot of pressure" from [redacted] and [redacted].[1872]

In Bottini's Declaration, he maintained that he again told Anderson that, if he testified, the affidavit would need to be addressed during his testimony and he would need to tell the truth about it; Anderson was reluctant to "give up" [redacted] but agreed to tell the truth.[1873] Bottini told Anderson that on direct examination, it might be possible for the prosecutor to ask only whether someone other than Anderson had drafted the affidavit. However, Bottini warned Anderson that he would have to tell the truth if he was asked on cross examination who drafted the affidavit.[1874]

A few weeks later, Anderson flew to Washington, D.C., to continue his trial preparation. He met with attorneys on several occasions at the PIN offices. On several occasions, Anderson came to the office simply to continue reviewing his grand jury testimony.[1875] Anderson again read very slowly.

Although the prosecution team planned to have AUSA Bottini conduct Anderson's direct examination at trial, AUSA Goeke assisted in preparing Anderson on various occasions during this time period. In a December 15, 2008 Declaration, Goeke stated that he and SA Joy met with Anderson several times in Washington to help him prepare for his testimony. Goeke stated that he showed Anderson documents and photographs that the prosecution team expected to use during his prospective testimony, including invoices that Anderson had signed for materials that were delivered to the Girdwood residence.[1876] On at least one

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[1872] Dec. 15, 2008 Declaration of Joseph Bottini, ¶ 13; Aug. 26, 2008 handwritten notes by Mary Beth Kepner of meeting with Dave Anderson. Five days later, on September 9, 2008, the prosecution sent a *Brady* letter to defense counsel. Included in the letter, at ¶ 16, was the following statement: "On August 13, 2008, David Anderson stated he signed an affidavit on March 25, 2008; the affidavit was drafted by [redacted] chose the individual names that would be included in the affidavit; Anderson felt pressured to sign the affidavit because of his relationship with [redacted] daughter; the affidavit contains numerous false statements; and that he and other individuals mentioned in the affidavit were not promised, offered, or actually given immunity. Sept. 9, 2008 letter from PIN Principal Deputy Chief Morris to defense counsel at 3. The inclusion of Anderson and his affidavit in the *Brady* letter indicates that the prosecution team still considered Anderson a potential witness.

[1873] Dec. 15, 2008 Declaration of Joseph Bottini, ¶ 14.

[1874] Dec. 15, 2008 Declaration of Joseph Bottini, ¶ 14.

[1875] Dec. 15, 2008 Declaration of James Goeke, ¶ 8.

[1876] Dec. 15, 2008 Declaration of James Goeke, ¶¶ 9, 10.

occasion, Anderson reaffirmed that his March affidavit was false.[1877] According to Goeke, each time he met with Anderson, he and the agent repeatedly told Anderson that if he was called to testify, he was expected "to simply tell the truth, no more no less."[1878] On each occasion, Anderson "reaffirmed that he was telling the truth and would continue to do so."[1879]

According to AUSA Bottini's Declaration, he and Joy met with Anderson just one time in Washington, D.C., for trial preparation purposes, on October 8, 2009, the day before he testified at trial.[1880] According to Bottini, he asked Anderson substantially the same questions that he asked him the following day at trial and showed Anderson the same exhibits that he showed him during his direct examination.[1881] Bottini also discussed areas of likely cross examination, and again warned Anderson that he would have to tell the truth about the March affidavit.[1882]

SA Joy, who was present for all or almost all of Anderson's visits to the U.S. Attorney's Office in Anchorage and the PIN offices in Washington, D.C., recalled that on a few occasions Anderson was left alone in a room to read his grand jury transcripts.[1883] On each occasion, Joy provided Anderson with "information and restrictions"; told him how to contact Joy if he needed something; informed him that the offices were secure, and that he could not wander around; and advised him not to look at anything other than what was provided to him.[1884] As noted above, Joy checked on Anderson every ten to thirty minutes.[1885]

F. Anderson Testifies at the *Stevens* Trial

As the trial progressed, the prosecution team tentatively decided that it would not be necessary to use Anderson as a witness. That perspective changed

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[1877] Dec. 15, 2008 Declaration of James Goeke, ¶ 10.

[1878] Dec. 15, 2008 Declaration of James Goeke, ¶ 10.

[1879] Dec. 15, 2008 Declaration of James Goeke, ¶ 10.

[1880] Dec. 15, 2008 Declaration of Joseph Bottini, ¶ 18.

[1881] Dec. 15, 2008 Declaration of Joseph Bottini, ¶ 18.

[1882] Dec. 15, 2008 Declaration of Joseph Bottini, ¶ 18.

[1883] Dec. 15, 2008 Affidavit of Chad Joy, ¶ 15.

[1884] Dec. 15, 2008 Affidavit of Chad Joy, ¶ 15.

[1885] Dec. 15, 2008 Affidavit of Chad Joy, ¶ 15.

on the evening of October 8, 2008 when, after stating in court earlier in the day that the government planned to rest, PIN Principal Deputy Chief Morris announced in an email to Judge Sullivan and defense counsel that, in light of the day's events, the government planned to put Anderson on the stand the following morning as the government's last witness.[1886]

The reason for this change began on October 5, 2008, when defense counsel filed a Motion to Dismiss the Indictment Due to the Government's Intentional and Repeated Misconduct. As detailed in Chapters Six and Seven, *supra*, the motion alleged that the government withheld from the defense information that Williams only worked part time on the Girdwood project, and that Anderson was in Oregon for a "months long" period during the Girdwood project, and knowingly put into evidence false VECO records that showed both men working full time, plus overtime. The motion also alleged that the government actively sought to prevent the defense from subpoenaing Dave Anderson.[1887]

The government filed an initial response on October 5, 2008, and a more detailed response on October 6, 2008.[1888] In the latter response, the government argued, among other things, that the government provided substantial evidence before trial regarding Anderson's time at the site and his efficiency (or lack thereof), and that any inaccuracy regarding Anderson's hours was immaterial, in light of the overall cost of the project.[1889] The government also asserted that it had not tried to prevent the defense from subpoenaing Anderson. Although the prosecution had refused to accept service for Anderson or to provide his address when requested by the defense, it had no authority to do either.[1890] Ultimately,

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[1886] Oct. 8, 2008, 7:02pm email from PIN Principal Deputy Chief Morris to Judge Sullivan, Judge Sullivan's law clerk, and defense counsel.

[1887] Senator Stevens's Motion to Dismiss the Indictment Due to the Government's Intentional and Repeated Misconduct at 2 (D.D.C., filed Oct. 5, 2008).

[1888] Government's Initial Opposition to Defendant's Motion to Dismiss the Indictment for Alleged Misconduct (D.D.C., filed Oct. 5, 2008); Government's Opposition to Defendant's Motion to Dismiss Due to Alleged Misconduct (D.D.C., filed Oct. 6, 2008).

[1889] Government's Opposition to Defendant's Motion to Dismiss Due to Alleged Misconduct at 15-19 (D.D.C., filed Oct. 6, 2008).

[1890] Government's Opposition to Defendant's Motion to Dismiss Due to Alleged Misconduct at 19-20 (D.D.C., filed Oct. 6, 2008).

after Anderson had arrived in Washington, D.C., the government agreed to facilitate service.[1891]

On October 8, 2008, the court accused government prosecutors of introducing evidence (the VECO records) that they knew was false.[1892] The court sanctioned the government by striking from the record timesheets and other material from the VECO records introduced as evidence that showed the costs associated with Dave Anderson's and Rocky Williams's hours on the Girdwood project.[1893]

Following the hearing that evening, the prosecution decided to present Anderson as a witness. PIN Chief William Welch told OPR that he made that decision.[1894] Welch believed that Anderson's direct testimony would provide a way to introduce evidence comparable to what had been removed or redacted by the court to show the amount of work that was done at the Girdwood residence by VECO employees Anderson and Williams.[1895]

On October 9, 2008, Dave Anderson testified.[1896] AUSA Bottini handled the direct examination. Anderson described the various projects he undertook at the Girdwood residence in considerable detail, stating that he worked some ten hours a day, six days a week, at approximately $28 30 per hour.[1897] Anderson stated, [redacted] that some time in October 2000, he went to Oregon to work on another project, and remained there until about mid December, when he returned.[1898]

[1891] Government's Opposition to Defendant's Motion to Dismiss Due to Alleged Misconduct at 20 (D.D.C., filed Oct. 6, 2008). The defense also briefly raised the issue at the October 8, 2008 hearing regarding their motion. *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 40-41. The court did not rule on the issue.

[1892] *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 35-93. This issue is discussed in detail in Chapter Seven, *supra*.

[1893] *United States v. Stevens*, Tr. Oct. 9, 2008 (pm) at 61-63.

[1894] Welch OPR Tr. Mar. 3, 2010 at 397-400.

[1895] Welch OPR Tr. Mar. 3, 2010 at 397-400.

[1896] *United States v. Stevens*, Tr. Oct. 9, 2008 (am) at 23.

[1897] *United States v. Stevens*, Tr. Oct. 9, 2008 (am) at 28, 42, 66.

[1898] *United States v. Stevens*, Tr. Oct. 9, 2008 (am) at 52.

Near the end of Anderson's direct examination he was asked several questions about the March 2008 affidavit:

> Q. Mr. Anderson, let me ask you about something that occurred earlier this year. Did you sign an affidavit that wasn't completely accurate?
>
> A. Yes, I did.
>
> Q. Tell the jury about that.
>
> A. Okay. We drafted, basically I tried to keep like my loved ones protected in the best way that I can through all this. It's been a long road. I mean, it's been a long, hard road, so you know, I tried to keep them protected as much as I can, you know, through all this, because it has been a long road.
>
> Q. All right. Did you sign an affidavit that said that a number of people had been given immunity by the United States government from criminal prosecution?
>
> A. Yes, I did.
>
> Q. Do you know that that was not true?
>
> A. Yes. That was never said. It was kind of a gentlemen's agreement, you know. You know, that's what I work off of.
>
> Q. All right.
>
> A. A handshake, you know, so, you know, I take it as an immunity, but it was never that was never said.
>
> Q. Did you draft the affidavit?
>
> A. I didn't draft it, but I signed it.
>
> Q. Did you know that it wasn't true when you signed it?

A. Yes.[1899]

There was no cross examination by defense counsel, and Anderson had no further participation in the trial.[1900]

G. Anderson Sends a Letter to Judge Sullivan

After the trial, on Wednesday, November 12, 2008, [redacted] the attorney representing [redacted], left AUSA Bottini a voice mail message indicating that [redacted] was in his office at the time and wanted to talk to the Polar Pen prosecutors.[1901] Bottini called Kepner, and the two of them returned [redacted] call. During the return call, [redacted] reiterated that [redacted] wished to meet with the prosecutors in person. A meeting was set for Friday, November 14, 2008 at 2:00 p.m.[1902] [redacted] asked if he could bring a stenographer; Bottini refused, saying that the meeting would not be recorded.[1903]

As [redacted] meeting approached, Polar Pen agents and prosecutors received a number of communications from Anderson. At 9:00 a.m. on the morning of November 14, 2008, Anderson left voice mail messages on SA Joy's cell phone and desk phone and on AUSA Bottini's office phone.[1904] Messages left for Joy indicated that Anderson was in Anchorage at a Day's Inn and was available to help "smooth things over" with respect to the meeting the prosecution team had scheduled with [redacted] later that day.[1905] SA Joy returned the call and reached Anderson, who stated that he was there to "show support" for [redacted] and that he wanted [redacted] to

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[1899] *United States v. Stevens*, Tr. Oct. 9, 2008 (am) at 80-81.

[1900] *United States v. Stevens*, Tr. Oct. 9, 2008 (am) at 82.

[1901] Nov. 21, 2008, 1:55pm email from AUSA Joseph Bottini to PIN attorneys Welch, Morris, and Marsh, AUSA Goeke, SSA Seale, SAs Joy, Sparks, and Kepner, and IRS SA Bateman (Bottini prepared a lengthy summary of the November 12, 2008 meeting with [redacted] for use in preparing the government's response to a motion filed by Stevens).

[1902] Nov. 21, 2008, 1:55pm email from AUSA Bottini to PIN attorneys Welch, Morris, and Marsh, AUSA Goeke, SSA Seale, SAs Joy, Sparks, and Kepner, and IRS SA Bateman.

[1903] Nov. 21, 2008, 1:55pm email from AUSA Bottini to PIN attorneys Welch, Morris, and Marsh, AUSA Goeke, SSA Seale, SAs Joy, Sparks, and Kepner, and IRS SA Bateman.

[1904] Nov. 14, 2008 FBI 1023 of telephone communication with David Anderson.

[1905] Nov. 14, 2008 FBI 1023 of telephone communication with David Anderson. In Anderson's OPR interview, he did not recall his involvement in trying to facilitate this meeting. Anderson OPR Tr. Apr. 9, 2010 at 40.

"work things out" with the government.[1906] According to SA Joy, Anderson said that [redacted] was "an integral part of the family and that if anything happened to him, the family would fall apart."[1907]

Anderson's voice mail to Bottini was similar, stating: "Hello Joe, Dave Anderson. Hey, I'm in town and I know you got a meeting with [redacted] today, [redacted] and I was hoping possibly that you and I and Chad, or Mary Beth and whatever could get together and talk a little bit before he goes in there and then we could try to iron this thing out with [redacted]"[1908] Bottini, upon learning of the call, called Joy and Kepner and told them to tell Anderson that it would be inappropriate for him to communicate with [redacted] without [redacted] attorney being present.[1909]

At 2:00 in the afternoon, [redacted] and [redacted] arrived at the U.S. Attorney's Office in Anchorage AUSA Bottini, SA Kepner, SA Sparks, [redacted], and [redacted]t were present in the room; IRS SA Bateman was present by phone. The meeting that followed lasted just a little over four minutes, and ended abruptly.[1910] In an email sent after the meeting, Bottini described [redacted] as appearing "shaken up."[1911]

Bottini recounted the meeting in an email to the prosecution team, stating that he began the meeting by saying that it was the prosecutors' understanding

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[1906] Nov. 14, 2008 FBI 1023 of telephone communication with David Anderson.

[1907] Nov. 14, 2008 FBI 1023 of telephone communication with David Anderson.

[1908] Nov. 21, 2008, 4:18pm email from SSA Seale to PIN attorneys Welch, Morris, Marsh, and Sullivan, AUSAs Bottini and Goeke, and SAs Joy and Kepner (with attached transcript of the Nov. 14, 2008 voice mail message from Dave Anderson to AUSA Bottini).

[1909] Nov. 20, 2008, 1:19pm email from AUSA Bottini to PIN attorneys Morris, Marsh, and Sullivan, AUSA Goeke, SSA Seale, and SAs Joy and Kepner ("Basically Dave called some time Friday morning and left a voice mail for me - he said he and [redacted] were in town and that they wanted to meet with me before [redacted] came in later that day to see whether we could 'work things out.' Needless to say, I didn't call him back. I talked to Chad and Mary Beth and asked them to let Dave know that since [redacted] has a lawyer, we could not meet with them to discuss [redacted] issues.").

[1910] Nov. 21, 2008, 1:55pm email from AUSA Bottini to PIN attorneys Welch, Morris, and Marsh, AUSA Goeke, SSA Seale, SAs Joy, Sparks, and Kepner, and IRS SA Bateman.

[1911] Nov. 14, 2008, 7:19pm email from AUSA Bottini to PIN attorneys Marsh and Sullivan, IRS SA Bateman, and AUSA Goeke; Nov. 21, 2008; 1:55pm email from AUSA Bottini to PIN attorneys Welch, Morris, and Marsh, AUSA Goeke, SSA Seale, SAs Joy, Sparks, and Kepner, and IRS SA Bateman.

that [redacted] wished to speak with them and that they were there "to listen."[1912] According to Bottini, [redacted] said that he knew his name had come up in the *Weimar* case, that Bill Allen had said things about him, and that [redacted][913] [redacted] then asked the group of prosecutors and agents, "Is there something you guys want to tell us?"[1914] Bottini replied that they had nothing to say, that [redacted] had told them that [redacted] wished to talk to them. [redacted] then stood up and said, "Come on, [redacted], we're leaving."[1915]

According to Bottini, [redacted] looked "confused" and apparently did not want to leave.[1916] He sat down again and said, in substance, that he did not know what to talk about with them.[1917] [redacted] then told him, "Don't talk to the police."[1918]

According to Bottini, at this point SA Kepner "jumped in" and told [redacted] that "there was one thing he needed to know," and that was that [redacted] was "absolutely a target of the investigation."[1919] She explained that government agents and prosecutors sometimes share evidence with targets in order to provide the targets with the opportunity to "work things out," but that the prosecution team had not

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[1912] Nov. 21, 2008, 1:55pm email from AUSA Bottini to PIN attorneys Welch, Morris, and Marsh, AUSA Goeke, SSA Seale, SAs Joy, Sparks, and Kepner, and IRS SA Bateman.

[1913] Nov. 21, 2008, 1:55pm email from AUSA Bottini to PIN attorneys Welch, Morris, and Marsh, AUSA Goeke, SSA Seale, SAs Joy, Sparks, and Kepner, and IRS SA Bateman. Frank [redacted]

[1914] Nov. 21, 2008, 1:55pm email from AUSA Bottini to PIN attorneys Welch, Morris, and Marsh, AUSA Goeke, SSA Seale, SAs Joy, Sparks, and Kepner, and IRS SA Bateman.

[1915] Nov. 21, 2008, 1:55pm email from AUSA Bottini to PIN attorneys Welch, Morris, and Marsh, AUSA Goeke, SSA Seale, SAs Joy, Sparks, and Kepner, and IRS SA Bateman.

[1916] Nov. 21, 2008, 1:55pm email from AUSA Bottini to PIN attorneys Welch, Morris, and Marsh, AUSA Goeke, SSA Seale, SAs Joy, Sparks, and Kepner, and IRS SA Bateman.

[1917] Nov. 21, 2008, 1:55pm email from AUSA Bottini to PIN attorneys Welch, Morris, and Marsh, AUSA Goeke, SSA Seale, SAs Joy, Sparks, and Kepner, and IRS SA Bateman.

[1918] Nov. 21, 2008, 1:55pm email from AUSA Bottini to PIN attorneys Welch, Morris, and Marsh, AUSA Goeke, SSA Seale, SAs Joy, Sparks, and Kepner, and IRS SA Bateman.

[1919] Nov. 14, 2008, 7:19pm email from AUSA Bottini to IRS SA Bateman, PIN attorneys Marsh and Sullivan, and AUSA Goeke; Nov. 21, 2008, 1:55pm email from AUSA Bottini to PIN attorneys Welch, Morris, and Marsh, AUSA Goeke, SSA Seale, SAs Joy, Sparks, and Kepner, and IRS SA Bateman.

planned on making such a presentation on that day.[1920] According to Bottini, [redacted] then stated that he and [redacted] would "wait for the dog and pony show" and the meeting ended.[1921]

The following evening, November 15, 2008, Joy received a call from Anderson, who told him that he was sending a letter to Judge Sullivan, Senator Stevens's attorneys, and Joy.[1922] Anderson refused to share the substance of the letter with Joy, but said that everything in the letter was true and accurate.[1923] Anderson further stated that he was providing Joy with a "courtesy copy" of the letter because Joy had always been good to him and "straight up" in their "50/50 partnership."[1924] Anderson's letter was faxed to Joy approximately two hours later, at 9:17 p.m.[1925]

Anderson stated in his letter that he lied in his trial testimony, that in fact government agents and prosecutors had guaranteed Anderson and members of his family immunity if he testified as he did at trial, and that he had "concerns" regarding various aspects of his trial preparation:

> I am writing this letter to you to clarify my testimony during the trial. I testified to the fact that there was never immunity for me or my family and friends. That is simply not true.
>
> * * *
>
> I am not a lawyer. . . . I am simply a welder.
>
> * * *

[1920] Nov. 14, 2008, 7:19pm email from AUSA Bottini to IRS SA Bateman, PIN attorneys Marsh and Sullivan, and AUSA Goeke; Nov. 21, 2008, 1:55pm email from AUSA Bottini to PIN attorneys Welch, Morris, and Marsh, AUSA Goeke, SSA Seale, SAs Joy, Sparks, and Kepner, and IRS SA Bateman.

[1921] Nov. 21, 2008, 1:55pm email from AUSA Bottini to PIN attorneys Welch, Morris, and Marsh, AUSA Goeke, SSA Seale, SAs Joy, Sparks, and Kepner, and IRS SA Bateman.

[1922] Nov. 15, 2008 FBI 1023 re David Anderson.

[1923] Nov. 15, 2008 FBI 1023 re David Anderson.

[1924] Nov. 15, 2008 FBI 1023 re David Anderson.

[1925] Nov. 15, 2008 Letter from David Anderson to Judge Sullivan.

> The final comments during my testimony focused on an Affidavit that was signed in March 2008. I understood that if I testified that this was not an accurate document we would all be able to continue with life and we even covered it during the closed door sessions I had with the prosecution. Before I took the witness stand that day I had the understanding that the agreement would be honored or I would never have testified, I would have pleaded the fifth. The prosecution has NEVER denied that they had agreed that they would leave my family and friends alone free of prosecution through the Department of Justice and Treasury Departments investigations. They (Special Agent Chad Joy and Eric Gonzalez) have never denied that they looked into my eyes and shook my hand agreeing to leave these people out of any and all investigations in exchange for my cooperation and testimony.[1926]

Anderson went on to "convey some other concerns" he had about the trial, stating, among other things:

> 1. The prosecution had me study my Grand Jury testimony for several months and all the way up to the week of my testimony. . . . They have helped me with refreshing my memory by showing me the 360 [degree] pictures and the satellite imaging. They showed me the whole job and we have gone over that.
>
> 2. There was an Affidavit that I wrote in March 2008 that laid out the agreement that I had with the Department of Justice. I said that the word IMMUNITY was not mentioned during our discussions while under oath but I said that under distress [sic]. The agreement was that if I cooperated my entire family would be safe from the investigation(s) of the Department of Justice and also the Treasury Department as agreed at the picnic table at the cabin. The Department . . . has never ever denied that they shook my hand on this agreement but instructed me on how to sugar coat it and get it swept under the rug during the trial as they have told the court just the opposite.

[1926] Nov. 15, 2008 Letter from David Anderson to Judge Sullivan.

3. The Department . . . provided me with the time line for the Ted Stevens job. . . . [W]hen I couldn't come up with a time line [*sic*] on my own they found ways to create the time line by reminding me of dates and events that occurred. I was also showed invoices that I had singed [sic] to help me recall the time line and my activities.

4. While I studied the documents behind closed doors in the Federal Building they even provided me with sticky tabs that I could mark the pages with so that if the memories were fuzzy I could read and reread these documents until I recalled them correctly. They set folders out on the desk and slid them away from me telling me that I was not to read them. They left them in the room and closed the door. Of course I read it all. I even called a friend and read the grand jury testimony to them all while in the Federal Building.

5. There was a contract to have me murdered issued by Bill and [redacted] Allen. The government has given both of [redacted] for crimes they have committed and they refuse to honor their agreement with me. I am scared for my life because of that, but now that I have written this letter to you I am certain I will never receive protection for me and my loved ones. They have left me hanging out there.

6. I testified at the Grand Jury that I had been in Oregon while VECO billed my time elsewhere. Of course it was never my job to figure out where my paycheck would come from. I was told by the Department of Justice they did not have to provide the defense with my testimony from the Grand Jury until 24 hours before I took the stand. The Prosecution had always known where I spent my time and how.

7. Without the preparation from the prosecution and the reminders from them about my activities and the agreement I had with them about my family and myself I would not have given the same testimony. Without a shadow of a doubt I believe this trial would have gone much differently.

> 8. They also allowed Bill Allen, in another corruption case, to assert that I had blackmailed him without correcting the record. That was a completely false accusation and he is their witness who lies and the prosecution would not correct it even after numerous complaints.[1927]

As noted above, the letter was faxed to SA Chad Joy on November 15, 2008. A nearly identical letter was sent to Judge Sullivan via FedEx on November 19, 2008, and filed by the court on November 20, 2008.[1928]

Anderson's November 15, 2008 letter took the prosecution team by surprise. In response to SA Joy's email forwarding a copy of Anderson's letter, CDC Eric Gonzalez, who had accompanied Joy on the earliest interviews of Anderson and had helped recruit him as a source, replied, "Let this serve as my 'official' denial of ever offering Anderson and his [] family any immunity, or of ever shaking his trembling hand, looking him in his sunken eyes and promising to leave his family alone."[1929] Joy replied, "He is going to be closed for cause. He's saying he perjured himself and disregarded instructions from the [FBI] among other things . . . ."[1930] In a subsequent email, Joy added, "I'm just disappointed he's agreeing to lie for [redacted] using him in an attempt to scare us into giving him a pass."[1931]

[1927] Nov. 15, 2008 Letter from David Anderson to the Judge Sullivan.

[1928] The letter to Judge Sullivan is largely identical to the letter sent to Chad Joy, except that an additional paragraph was added. At the bottom of the first page, immediately before the numbered paragraphs begin, the letter that was sent to Judge Sullivan additionally states: "On 10-02–2008 Document Number 126-3 for Case 1:08-cr-00231-EGS was introduced to you without my knowledge and Paragraph 16 is not true and is completely false. The Department of Justice introduced this exhibit with full knowledge that it was not true." Doc. No. 243-2 (D.D.C., filed Nov. 20, 2008). Anderson is referring to the Sept. 9, 2008 *Brady* letter from PIN Principal Deputy Chief Morris to Stevens's defense counsel. Paragraph 16 of the letter states that Anderson's March 25, 2008 affidavit was false, drafted by [redacted], and contained numerous false statements, including the assertion that [redacted] and others were offered, promised, or given immunity. The October 2, 2008 "Document 126-3" to which Anderson refers in fact was a submission filed by Senator Stevens -- not the government -- as Exhibit B in Senator Stevens's Emergency Motion to Dismiss Indictment or for a Mistrial Due to Government's Continuing *Brady* Violations, (D.D.C., filed Oct. 2, 2008).

[1929] Nov. 16, 2008 12:28pm email from CDC Gonzalez to SA Joy.

[1930] Nov. 16, 2008 12:42pm email from SA Joy to CDC Gonzalez.

[1931] Nov. 16, 2008 12:48pm email from SA Joy to CDC Gonzalez.

Gonzalez agreed, stating, "Hopefully we'll nail . . . Anderson for being a liar and weak."[1932]

The prosecution team appears to have had little, if any, direct contact with Anderson after the letter was sent to the court. SA Joy attempted to reach out to Anderson, without success. In a November 18, 2008 email to prosecutors, Joy announced that he received a voice mail from Anderson that morning. According to Joy, "Dave said he saw that I called yesterday, that I can call him if I want, I don't have to worry about him anymore because everyone's going to be getting out of the state, including [redacted]."[1933] Later on the same day, in the course of forwarding supplemental reports regarding Anderson to prosecutors, SA Joy stated that, "for the record," he was "officially closing Dave without notification to him."[1934]

H. The Parties Respond to Anderson's Allegations

In the days following receipt of Anderson's letter, the prosecution team members began preparing an *ex parte* submission to the court that addressed the allegations raised in Anderson's letter. An attempt was made to ascertain who actually sent the letter. FBI agents, investigating potentially obstructive conduct by [redacted],[1935] were able to obtain a videotape of Dave Anderson *and* [redacted] sending the fax from a Kinko's/FedEx store. According to SA Kepner, who recounted her observations in an email to the prosecution team, [redacted] appeared to be the person in charge.[1936] Days later, a second Kinko's/FedEx video was

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[1932] Nov. 16, 2008 12:50pm email from CDC Gonzalez to SA Joy.

[1933] Nov. 18, 2008 1:04pm email from SA Joy to AUSAs Bottini and Goeke, PIN attorneys Morris, Marsh, and Sullivan, SSA Seale, and SA Kepner. The following day, after the call was downloaded and transcribed, Joy clarified in an email that it appeared Anderson said that everyone [redacted] was leaving the state. November 19, 2008. 9:26pm email from SA Joy to AUSAs Bottini and Goeke, PIN attorneys Morris, Marsh, and Sullivan, SSA Seale, and SA Kepner.

[1934] Nov. 18, 2008 1:04pm email from SA Joy to AUSAs Bottini and Goeke, PIN attorneys Morris, Marsh, and Sullivan, SSA Seale, and SA Kepner.

[1935] Nov. 21, 2008 3:48pm email from PIN attorney Marsh to AUSAs Bottini and Goeke, PIN attorneys Welch, Morris, and Sullivan, SSA Seale, and SAs Joy and Kepner [redacted]

[1936] Nov. 21, 2008 2:10pm email from SA Kepner to PIN attorneys Morris, Marsh, and Sullivan, AUSAs Bottini and Goeke, SSA Seale, and SA Joy ("The fedex video on 11/15/08 at approximately 9 pm shows both Dave and [redacted] sending a fax from the store. [redacted] appears to be the one leading the activity."); Nov. 21, 2008 10:42am email from SA Kepner to PIN attorneys Morris, Marsh, and Sullivan, AUSAs Bottini and Goeke, SSA Seale, and SA Joy ("[redacted] paid for the

acquired depicting the sending of the letter by fax to defense counsel. In the video, Dave Anderson is present at the store with [redacted], who appeared to be the person who actually sent the fax.[1937]

Work on the submission to the court continued. The prevailing sentiment among the prosecution team was that agents and prosecutors had done nothing wrong with regard to Anderson, and that his erratic and contradictory behavior was caused by Anderson's own "nuttiness" and pressure from [redacted].[1938] On the evening of November 20, 2008, Marsh circulated a draft of the government's *ex parte* submission.[1939]

The prosecution team's plan of submitting an *ex parte* memorandum to the court regarding the Anderson letter was overtaken by events the following day, November 21, 2008, when the team learned that defense counsel had filed a motion requesting discovery and an evidentiary hearing regarding Anderson's allegations.[1940] The prosecution team decided to recast its *ex parte* submission to

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fax and was the person who actually sent the fax. Basically, other then writing out the cover sheet, [D]ave just followed [redacted] around.").

[1937] Dec. 4, 2008 3:18pm email from AUSA Bottini to PIN attorneys Welch, Morris, Marsh, and Sullivan, and AUSA Goeke.

[1938] In a November 20, 2008 (6:27pm) email from PIN Principal Deputy Chief Morris to the prosecution team, she noted, "I've spoken with Nick and we think there is still more information we need, outside of Chad's 302s in order to give full notice to the court of Dave's nuttiness. We really need the details and dates on the approach to Weimar, the calls from [redacted] and the date the first affidavit was signed. We should flesh out the events leading up to the Weimar plea, how we got Dave's first affidavit, as well as the date Dave did his first 180 with the affidavit. We should have our notice culminate with the specifics of the last two weeks leading up to [redacted] contact with Joe, the meeting, when and what happened. Nick and I don't have these specifics. Not all of them may ultimately appear in our notice to the court, but we should try to provide the court with as much detail as we can. We want the judge to recognize that Dave and his relatives are loose cannons and to see how all of these events are interrelated and all go back [redacted]." Nov. 20, 2008 6:10pm email from Brenda Morris to Colton Seale, Joseph Bottini, Chad Joy, James Goeke, Nicholas Marsh, Edward Sullivan.

[1939] Nov. 20, 2008 6:27pm email from Nicholas Marsh to Brenda Morris, Colton Seale, Joseph Bottini, Chad Joy, James Goeke, and Edward Sullivan ("I have attached the current working draft of the ex parte submission, which includes notes in some places where further details are needed.").

[1940] Senator Stevens's Motion for Discovery and an Evidentiary Hearing Regarding Allegations in Letter from David Anderson (filed Nov. 21, 2008) ("The letter makes startling allegations of government misconduct."). In addition, on November 19, 2008, Stevens's defense attorney, sent to a letter to the Attorney General again requesting that the Department of Justice commence an investigation into alleged prosecutorial misconduct in the *Stevens* case, citing allegations contained in Anderson's November 15 letter. Nov. 19, 2008 letter from defense counsel

the court as a response to Stevens's motion.[1941] The team filed a short "initial" response the same day, and a more detailed submission on December 15, 2008.[1942]

The government's Initial Response asserted that the letter was false and briefly recounted the circumstances that led to its submission: that Anderson did not prepare the affidavit; that, when confronted, he admitted it was not true; that he testified truthfully at trial; and that his subsequent repudiation of his own trial testimony was false.[1943]

The government's December 15, 2008 Supplemental Response included a lengthy description of the FBI's relationship with Dave Anderson and [redacted] although [redacted] was not mentioned by name.[1944] It also contained Declarations from AUSA Bottini, AUSA Goeke, and PIN attorney Marsh, and an affidavit from CDC Gonzalez.[1945] The sworn statements corroborated each other. The Declarations were circulated among the group prior to their inclusion in the

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to Attorney General Michael B. Mukasey.

[1941] In an email to the group, PIN Principal Deputy Chief Morris stated: "Well it's too late to file this ex parte. Dave must have sent the letter and now Stevens has filed motion for a hearing. We need to now address the motion in the same way as the notice. We need to get this done ASAP!" Nov. 21, 2008 1:02pm email from Morris to PIN attorneys Welch, Marsh, and Sullivan, AUSAs Bottini and Goeke, SSA Seale, and SAs Joy and Kepner.

[1942] Initial Response to Defendant's Motion for Discovery and for an Evidentiary Hearing (filed Nov. 21, 2008) ("Initial Response"); United States Response to Defendant's Motion for Discovery and for an Evidentiary Hearing (filed Dec. 15, 2008) ("Supplemental Response").

[1943] Initial Response at 1-3. In the government's Initial Response, the prosecution stated that it had "obtained substantial additional evidence, including both documents and video surveillance, that prove the falsity of . . . Anderson's allegations and that further explicitly prove . . . Anderson's collusion with an interested party in the preparation and transmission of . . . Anderson's letter." The government planned to submit the additional information to the court in a subsequent filing three days later. Initial Response at 3-4.

[1944] [redacted] Supplemental Response at 1.

[1945] Supplemental Response, Doc. 253; Dec. 15, 2008 Affidavit of Eric B. Gonzalez; Dec. 15, 2008 Declaration of Joseph W. Bottini; Dec. 15, 2008 Declaration of James Goeke; Dec. 15, 2008 Declaration of Nicholas Marsh. PIN Principal Deputy Chief Morris did not submit an affidavit. She explained to Marsh: "I spoke to Bill [Welch] and I'm not submitting an affidavit. If we have to be heard in court, I would be the one to argue and I can state that I was present in Alaska when Dave admitted that he was not given immunity." Dec. 15, 2008 11:30am email from Morris to PIN attorneys Welch, Marsh, and Sullivan, and AUSAs Bottini and Goeke.

December 15, 2008 response.[1946] They also are generally consistent with emails, FBI 302 and 1023 reports, and other available information.

The Declarations all categorically deny that Anderson or any of his friends or family members were ever promised or given immunity. In addition, the Declarations address the other allegations raised by Anderson. For example, Anderson's letter indicated that the government prosecutors intentionally left documents in the room that Anderson was not supposed to review, knowing that, once left alone, he would review them. In Bottini's Declaration, he stated that Anderson was placed in a conference room with his own grand jury transcript and asked to review it. He was not given access to the grand jury transcripts of any other witnesses or memoranda of interviews of other witnesses during this or any other trial preparation session.[1947] Bottini acknowledged that there may have been a trial cart in the conference room Anderson was sitting in that had copies of photographs in folders that had been identified as potential trial exhibits.[1948]

Bottini further maintained that, to his knowledge, Anderson was never asked to "sugarcoat" or hide facts; he was never asked to do anything except "tell the truth about everything, including the false affidavit"; he was never provided with a "time line" of events; and he was never asked to reread documents until he remembered things "correctly."[1949] The copy of Anderson's grand jury transcript that was provided to him was unadorned with any marks, highlighting, or tabs. Bottini said Anderson was asked to review photographs and other documents, such as receipts, to refresh his recollection as to when certain events occurred.[1950]

Goeke's Declaration contains similar denials. Goeke estimated that he met with Anderson at least twice in Washington, D.C., and that each session lasted approximately one hour.[1951] Goeke stated that he never met with Anderson alone; an agent was always present.[1952] He stated further that, to his knowledge, no one showed Anderson any documents or photographs that were unrelated to his

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[1946] Dec. 10, 2008 7:08pm email from PIN attorney Marsh to PIN Chief Welch (plan to have AUSAs Bottini and Goeke draft affidavits for "collective review and consideration").

[1947] Dec. 15, 2008 Declaration of Joseph Bottini, ¶ 7.

[1948] Dec. 15, 2008 Declaration of Joseph Bottini, ¶ 7.

[1949] Dec. 15, 2008 Declaration of Joseph Bottini, ¶¶ 15-17.

[1950] Dec. 15, 2008 Declaration of Joseph Bottini, ¶¶ 15-17.

[1951] Dec. 15, 2008 Declaration of James Goeke, ¶ 9.

[1952] Dec. 15, 2008 Declaration of James Goeke, ¶ 9.

potential testimony at trial, nor was Anderson ever provided with a "time line," or with a tabbed or highlighted copy of his grand jury testimony.[1953] Goeke said that Anderson was never told to re read documents until he recalled something "correctly," nor was he instructed on how to "sugar coat" his testimony about the March Affidavit or otherwise have it "swept under the rug."[1954]

The government did not submit a declaration from SA Joy, who had more contact with Anderson than anyone else. Joy evidently was asked near the outset of the controversy involving Anderson's letter to prepare an affidavit, and he did so.[1955] However, just days after the receipt of Anderson's November 15, 2008 letter, SA Joy submitted a Complaint to FBI Headquarters alleging that SA Kepner and attorneys on the prosecution team committed various improprieties in the course of the *Stevens* investigation and trial. The Complaint alleged, among other things, that PIN attorney Marsh had devised a "plan" to send Rocky Williams home to Alaska for medical care.[1956] SA Joy's allegations of misconduct appeared to contradict an affidavit he had signed earlier in the trial that recounted the seriousness of Williams's medical condition and the need for him to return to Alaska.[1957]

Joy's Complaint caused the prosecution team to have doubts as to whether an affidavit prepared by Joy could be submitted in good faith.[1958] Prosecutors recognized that because of Joy's role as Anderson's "handler," it would be difficult to address all of Anderson's allegations without a statement from him. On the other hand, the team believed that Joy had made false accusations in his Complaint, and that he could not, therefore, credibly be called upon to tell the truth with respect to Anderson. In a December 10, 2008 email to PIN Chief Welch, PIN attorney Marsh discussed the approach taken with respect to Joy:

[1953] Dec. 15, 2008 Declaration of James Goeke, ¶ 11.

[1954] Dec. 15, 2008 Declaration of James Goeke, ¶¶ 11, 12.

[1955] Dec. 15, 2008 Affidavit of Chad E. Joy.

[1956] Chad Joy Complaint, ¶ 11.

[1957] Affidavit in Support of Government's Opposition to Defendant's Motion to Motion for Disqualification [sic] (signed by SA Chad Joy) (filed Sept. 29, 2008).

[1958] Dec. 2, 2008, 12:29 pm email from PIN Chief Welch to PIN attorneys Morris, Marsh, and Sullivan, and AUSAs Bottini and Goeke (acknowledging that he received a copy of Joy's Complaint on December 1, 2008 and was authorized to distribute it to members of the prosecution team); Dec. 10, 2008 7:08pm email from PIN attorney Marsh to PIN Chief Welch.

> Joe and Jim are working on all of the prep related Anderson allegations. They're putting together the portion of the brief that denies all of those allegations, and they're identifying all individuals needed to support those denials. Then they're going to put together short draft affidavits for collective review and consideration. Right now, it is unclear whether or not all of the foregoing can be done without obtaining an affidavit from Chad Joy. We can talk more about this tomorrow, but there are some strong feelings amongst the guys about using him as an affiant given that we know him to have lied in his complaint. Joe and Jim are each willing to do an affidavit instead, and prefer to do so rather than use Chad if possible.[1959]

AUSA Goeke agreed: "[D]o we even need an affidavit from Chad given that the allegations in Dave's letter seem focused on trial prep, i.e., the prosecutors?"[1960]

Ultimately, the government did not file an affidavit from Joy with its Supplemental Response. However, SA Joy finalized and signed an affidavit that traced his experiences with Anderson and addressed the issues raised in Anderson's November 15, 2008 letter. Joy's affidavit, along with the one prepared by Eric Gonzalez, was attached to an FD 209 report prepared on December 12, 2008, which documented the August 20, 2008 meeting involving Anderson, [redacted], SA Joy, and CDC Gonzalez.[1961]

Joy's unfiled affidavit is consistent with the Declarations prepared by the prosecutors. Joy maintained that he never provided Anderson with a time line, and that Anderson was only shown "relevant pictures and documents" that he might see during his testimony to refresh his recollection.[1962] At one point, in response to a request by Anderson, Joy provided him with "sticky tabs" to allow him to "flag portions of his grand jury transcripts that he wanted to discuss or review later."[1963] Joy stated that he never flagged or highlighted items for

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[1959] Dec. 10, 2008 7:08pm email from PIN attorney Marsh to PIN Chief Welch.

[1960] Dec. 13, 2008 9:11pm email from AUSA Goeke to PIN attorneys Welch, Morris, Marsh, and Sullivan, and AUSA Bottini.

[1961] Aug. 20, 2008 FD-209 authored by Chad Joy.

[1962] Dec. 15, 2008 Affidavit of Chad Joy, ¶ 16.

[1963] Dec. 15, 2008 Affidavit of Chad Joy, ¶ 17.

Anderson, or told Anderson that he needed to reread documents until he recalled something correctly, nor did he observe anyone else doing these things.[1964]

I. The Second Letter from Anderson

On December 16, 2008, the day after the government submitted its Supplemental Response, defense counsel forwarded to the prosecution team a copy of a follow up letter they received by fax from Anderson, that was addressed to Judge Sullivan.[1965] The letter constituted Anderson's response to the memorandum filed by the government the previous day. It restated many of the same allegations raised in his letter of November 15, 2008:

> In paragraph 3 of my letter to you dated November 15, 2008 I discuss the fact that I would have pleaded the fifth had I have known that an agreement had not been made for immunity. I would like to be perfectly clear…. I would have pleaded the fifth.
>
> I have to call to your attention several inconsistencies in the Government[']s documents that I have noticed. Again, I am not a lawyer.
>
> 1. Special Agent Chad Joy who was my agent for the last 2+ years has not signed an affidavit disputing my claims.
>
> 2. The fact that Bill [redacted] Allen had a contract to murder me is not discussed, disputed or acknowledged. That was the whole reason for my affidavit that was notarized in March 2008. I was traveling with my friend and was concerned for my safety. That is the whole and only reason that affidavit was written. The government likes to diffuse that accusation by saying it was to benefit someone…it was to protect ME. [redacted] My thought process was that if it was

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[1964] Dec. 15, 2008 Affidavit of Chad Joy, ¶ 17.

[1965] Dec. 16, 2008 11:10am email from defense counsel to PIN attorneys Morris, Marsh, and Sullivan, and AUSAs Bottini and Goeke (with attached Dec. 15, 2008 letter from David Anderson to the Honorable Emmet Sullivan).

in writing and anything happened to me people would know where to look. The government has continually covered up this fact.

3. The government does not deny providing me with tabs to mark my testimony that I could not fully remember. They keep insisting that I said they marked pages or provided me with other people[']s grand jury testimony. I have never made such an accusation. I am simply saying that they helped provide me with a time line. If I did not naturally recall an event I could mark it and reread it until it came together. If they had not assisted me with the time line I would not have been able to accurately recall all events. Seeing the invoices and pictures certainly helped.

4. They did leave me in the Washington, DC Federal Building to review pictures, invoices and documents. When the agents left the room they left a file/book that they referred to as pertinent information and instructed me not to read it. Well curiosity got the better of me and I called my friend in [redacted] in Washington DC and read parts of it over the phone. Naturally this should be traceable.

5. Over the past 2+ years I have had HUNDREDS of contacts with the FBI. They imply in their response to you that I have had limited contact with them. I am of the opinion that if you were privy to all of the contacts you would see just what kind of pressure I have been under. It literally has been hundreds of contacts.

6. The federal; [sic] Government in their response vehemently indicates that until March of 2008 there was NEVER a discussion of immunity. Whether a ge[n]tleman's handshake or otherwise. For the record I would like to refer you to a reporter named Mr. Tony Hopfinger who met me well before that date. He has seen the documents under seal regarding the murder for hire scheme and also is aware that from day one I believed

> immunity was granted. I urge you to contact him at [telephone numbers omitted].

On December 23, 2008, defense counsel filed a reply memorandum, arguing that the government's response consisted largely of the prosecution team's own self serving statements, and that an evidentiary hearing was necessary to explore Anderson's claims.[1966]

Ultimately, no evidentiary hearing occurred in connection with the letters submitted by Anderson. All charges against Senator Stevens were dismissed by the court on the government's motion on April 7, 2009. In dismissing the charges, Judge Sullivan did not comment on the substance of either of Anderson's letters.

Anderson's allegations were addressed during interviews with the subjects of OPR's investigation. The prosecution team members unequivocally denied that Anderson ever was promised immunity for himself or his family and friends.[1967] They also maintained that there was nothing improper about Anderson's trial preparation; he was not shown documents that he should not have seen; he was not provided with a written time line; and his grand jury transcript was untabbed and unmarked.[1968]

J. The OPR Interview of Anderson

On April 9, 2010, OPR interviewed Dave Anderson, who was located by investigative agents in [redacted], by telephone. Anderson's attorney, [redacted] participated by telephone from Anchorage. Several comments Anderson made during the course of his interview bear directly on the veracity of the allegations he made in his letters to Judge Sullivan.

First, although Anderson stated in his March 2008 affidavit and in letters to the court that agents had promised Anderson and his family "immunity" from prosecution, he admitted to OPR that not only had the agents not promised

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[1966] Senator Stevens's Reply in Support of Motion for Discovery and an Evidentiary Hearing Regarding Allegations in Letter From David Anderson, at 1-4 (filed Dec. 23, 2008).

[1967] Bottini OPR Tr. Mar. 11, 2010 at 472, 492-493; Marsh OPR Tr. Mar. 25, 2010 at 165; Welch OPR Tr. Mar. 3, 2010 at 469-470; Morris OPR Tr. Mar. 19, 2010 at 443-444; Joy OPR Tr. Sept. 16, 2009 at 612-613.

[1968] Bottini OPR Tr. Mar. 11, 2010 at 493-497; Marsh OPR Tr. Mar. 25, 2010 at 166-167.

immunity, but that Anderson had specifically requested immunity during his early interviews and the agents had explicitly refused.[1969]

Second, one of Anderson's motives in preparing his affidavit, disclosing it to the agents and prosecutors, and sending the letters to Judge Sullivan also became apparent: Anderson was angry because he believed that prosecutors had given Bill Allen and his family "immunity" in exchange for Allen's cooperation, yet they refused to give Anderson and his family immunity, even though Anderson believed he (unlike Allen) had done nothing wrong:

> OPR: Are you saying that you asked for immunity and the agents said no?
>
> ANDERSON: Exactly. And, you know, and I told them, I said I know you gave Bill immunity, why can't I have it?
>
> OPR: All right. What did they say to that?
>
> ANDERSON: They said well, you're all right, don't worry about it.
>
> * * *
>
> OPR: But they didn't give you the immunity that Bill got, right?
>
> ANDERSON: Right.
>
> OPR: All right. And that upset you that Bill Allen, who in your view had done terrible things, was going to get some form of immunity for [redacted], while you, who had done nothing wrong, wasn't even going to get immunity for his immediate family?
>
> ANDERSON: Well put.
>
> OPR: Right? Isn't that what upset you?
>
> ANDERSON: Yes, it is.

[1969] Anderson OPR Tr. Apr. 9, 2010 at 70-71.

> OPR: And that's what's upset you from that day, and on the day that you did the affidavit, and the day that you sent the letter to the court that Bill Allen, the crook, got something for the benefit of [redacted] while you, who did nothing wrong, got nothing for his family?
>
> ANDERSON: Exactly.[1970]

Thus, it is apparent that Anderson was motivated not only by his desire to secure immunity for [redacted] whom he viewed as family, but also by what he perceived as an injustice: that he was not receiving the same consideration as Bill Allen, a man who had committed crimes and who he believed had tried to have him killed. Anderson's own statements demonstrate that neither Anderson nor his family and friends were given immunity, and that Anderson understood that they did not have it.

OPR also asked Anderson to explain his allegations that the prosecutors improperly coached his trial testimony. Anderson told OPR that prosecutors showed him invoices, bills, photographs, and other documents and "helped my recollection of what happened."[1971] Anderson noted that the prosecutors had him participate in a mock trial examination.[1972] Anderson stated that prosecutors also left him alone in a room after setting folders out on the desk and telling him not to read the files.[1973] Anderson stated that he looked at the files and called [redacted] and read her information from the files.[1974] However, Anderson could not recall any of the information in any of the files he claimed to have reviewed.[1975] Anderson also acknowledged that the files could have contained his grand jury testimony and the accompanying exhibits.[1976] When asked if there was anything "troubling or of concern" about being allowed to review his own grand jury transcripts, Anderson stated: "I don't have any problem with it."[1977]

[1970] Anderson OPR Tr. Apr. 9, 2010 at 71-72.

[1971] Anderson OPR Tr. Apr.9, 2010 at 53.

[1972] Anderson OPR Tr. Apr.9, 2010 at 53.

[1973] Anderson OPR Tr. Apr.9, 2010 at 54.

[1974] Anderson OPR Tr. Apr.9, 2010 at 54-55.

[1975] Anderson OPR Tr. Apr.9, 2010 at 56-57.

[1976] Anderson OPR Tr. Apr.9, 2010 at 58.

[1977] Anderson OPR Tr. Apr. 9, 2010 at 52.

AUSA Bottini denied that the prosecution team coached Anderson.[1978] Bottini told OPR that prosecutors showed Anderson an unmarked, untabbed version of his grand jury testimony, and that Anderson read very slowly, taking more than one session to read over his testimony.[1979] Bottini stated that he showed Anderson photos and documents to refresh his memory, and that he was not aware of any time that Anderson was left alone with Polar Pen documents.[1980]

III. ANALYSIS

A. The Alleged Immunity Promise

Based on the results of our investigation, we concluded that the prosecution did not present false testimony through Anderson. The evidence indicated that the government did not promise immunity to Anderson and his family and friends, and that Anderson knew no such promise was ever made.

When he was first interviewed in early September 2006 by SA Joy and CDC Gonzalez, Anderson told them that he was concerned about the potential criminal exposure of his [redacted]. The agents responded that they only wanted to ask him questions about the Girdwood residence, not about [redacted] and that Anderson would not be required to cooperate against [redacted] At his OPR interview, Anderson admitted that he had asked the agents for immunity for himself, his family, and friends, and that they expressly refused it.[1981] Anderson admitted further that he was told that if he cooperated against Senator Stevens, he would not be asked for information about [redacted] or other family members or friends.[1982]

In March 2008, the Polar Pen investigation developed information that directly implicated [redacted] in potential criminal activity. On March 13, SA Kepner informed Bill Weimar that he was under investigation for, among other things, illegally funneling campaign contributions to [redacted]. Although Weimar later pled guilty to a conspiracy charge for that conduct, his immediate reaction was to send a handwritten letter to [redacted] detailing what he had learned from the FBI. [redacted] in turn, spoke to Anderson, who contacted the FBI. In a

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[1978] Bottini OPR Tr. Mar. 11, 2010 at 494-496.

[1979] Bottini OPR Tr. Mar. 11, 2010 at 494-496.

[1980] Bottini OPR Tr. Mar. 11, 2010 at 494-496.

[1981] Anderson OPR Tr. Apr. 9, 2010 at 70-71.

[1982] Anderson OPR Tr. Apr. 9, 2010 at 20-21.

series of telephone calls that the FBI memorialized contemporaneously, Anderson said he heard that [redacted] would be arrested, and he expressed concern about [redacted] On March 18, Anderson told SA Joy that [redacted] wanted immunity, and expressed fear that Anderson would lose his house [redacted] Having received no promises or comfort from the FBI, Anderson called again and related that [redacted] would only cooperate if [redacted] received "full immunity." SA Joy told Anderson that only prosecutors could provide immunity, and that it was unlikely [redacted] would receive it.

Significantly, there is no mention in any of the contemporaneously recorded accounts of these communications of Anderson ever claiming that the FBI had already granted immunity to [redacted] as well as to various family members and friends. Indeed, Anderson's entire course of conduct from March 13 to March 18, 2008, is inconsistent with Anderson's later claim that the FBI had promised immunity for [redacted] in September 2006 when they first met with Anderson.

On March 25, 2008, a week after his fruitless efforts to assist [redacted] with the FBI, Anderson signed the affidavit alleging that the FBI (and the Treasury Department) had promised "full immunity from any prosecution that may arise over the last ten year period" for Anderson, [redacted] and twelve other named persons. Anderson repudiated the affidavit the same day that it was transmitted to the FBI (August 13, 2008), telling SAs Joy and Forrest that [redacted] drafted it, and that he had felt pressured to sign it. Anderson adhered to the repudiation through the trial preparation and the *Stevens* trial.[1983] After the trial, when the government was again looking closely at [redacted] Anderson re embraced his affidavit. Just one day after an unsuccessful meeting between [redacted] and prosecutors and agents, Anderson sent his letter to Judge Sullivan re adopting his prior affidavit, and claiming that the government "instructed me on how to sugar coat it." More than one year later, when the pressure on [redacted] had evaporated, Anderson re repudiated his affidavit in his interview with OPR investigators (though he now claimed that [redacted] rather than [redacted] had drafted it).

The circle of Anderson's adoptions and repudiations of his affidavit provides a strong reason to question his credibility. With the exception of his statements to OPR, from whom he could not receive any benefit, he appears to have told each party (the government and [redacted]) what he thought that party wanted to hear. Combined with his other credibility issues, such as a serious drinking problem, there is reason to disbelieve anything he says with respect to the affidavit, including his repudiations of it. The fact that his most recent version (to OPR) is

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[1983] Anderson's affidavit dated March 25, 2008, was disclosed to the defense. The defense did not cross-examine Anderson at trial.

that the government did not make any immunity promises is no guarantee that he will not revert to the opposite position if his circumstances change.

There are several factors, however, that weigh in favor of crediting his admission that no immunity promises were made. First, the claims made in the affidavit are facially implausible. It strains credulity to believe that CDC Gonzalez (who was very experienced at handling cooperators) and SA Joy promised, on behalf of the Department of Justice *and* the Department of the Treasury, blanket immunity over a ten year period for whatever criminal acts 14 people may have committed. The agents knew that any such promise would have been well beyond their authority (as Joy told Anderson in March 2008, when he advised that only prosecutors could confer immunity). Furthermore, the fact that the agents would have had no idea what criminal conduct might be immunized by such a promise makes it highly unlikely that they would have considered or made such a promise. Likewise, Anderson's claim in his affidavit that the "immunity agreement" was binding on all government agencies deserves no credence.

Second, Anderson's own conduct was inconsistent with a belief that he and his family and friends had been promised immunity in September 2006. In March 2008, Anderson contacted the FBI repeatedly after [redacted] became "freaked out" that the criminal investigation of Bill Weimar was implicating [redacted]. In five telephone calls over five days, Anderson expressed concern about [redacted] fear that he (Anderson) [redacted] and tried to broker a meeting, arguing that [redacted] was a "good [redacted] who "may have screwed up." In the fourth call, Anderson related that [redacted] wanted immunity, and in the fifth retracted the offer for a meeting, claiming that [redacted] would only cooperate if [redacted] was provided with "full immunity." None of those calls makes any sense if, as Anderson later claimed, the government had already promised immunity to [redacted]. In particular, the request for immunity is inconsistent with a belief that it had already been granted. Moreover, it appears that Anderson did not claim in any of those contemporaneously memorialized calls that [redacted] had already been promised immunity.

Similarly, in April 2008, two weeks after Anderson signed his affidavit but months before he disclosed it to the FBI, he and [redacted] called SA Joy to express concern about [redacted] According to the contemporaneous FBI 302 report, [redacted] requested an opportunity to meet with the FBI to discuss the situation. This contact makes no sense if Anderson truly believed at the time that [redacted] who is one of the 14 persons named in Anderson's affidavit as having been promised 10 years' worth of immunity already had immunity.

Third, Anderson's affidavit is demonstrably false in some respects. He claimed in the affidavit that he "reconfirmed" the alleged immunity "during the course of my testifying before the Grand Jury three separate times." The grand jury transcripts belie that claim. Anderson only testified twice before the grand jury (on December 6 and 7, 2006), and he was not given immunity, nor was any immunity even discussed for [redacted] or the other twelve relatives and friends listed in Anderson's affidavit. In fact, after acknowledging that he received approximately $3,800 in assistance from the FBI "for living expenses," he was specifically asked whether he received any other benefits from the FBI, the USAO, or the Department of Justice. Anderson replied: "No."[1984]

Fourth, we found credible the agents' and prosecutors' denials that they promised the immunity alleged in Anderson's affidavit. Their denials are consistent with the contemporaneous records of the contacts with Anderson, and there are no material discrepancies in their accounts. Furthermore, Anderson corroborated key aspects of their accounts when he was interviewed by OPR. For example, Anderson confirmed to OPR that he was only told that he did not have to cooperate against [redacted] and his family, not that [redacted] would be given immunity. He also admitted that he never had information that anyone listed in his affidavit, except for [redacted], was ever considered a target of any government investigation.

Fifth, Anderson's admissions to OPR deserve some credence because they are consistent with his course of conduct in March and April 2008 and with his numerous statements to agents and prosecutors during the investigation, trial preparation, and at trial. The fact that Anderson signed the affidavit, and then later re embraced it, at precisely the times that [redacted] criminal exposure seemed most dangerous, combined with [redacted] and [redacted] involvement in drafting the affidavit and in sending the letters to Judge Sullivan, undercuts the plausibility of the benefits it claims for [redacted]. Furthermore, Anderson had nothing to gain one way or the other when he was interviewed by OPR. In that context, his statements against self interest (admitting that no immunity promise had been made, and that he simply felt that he should have received such a promise because Bill Allen's family got immunity) should be accorded some weight. Thus, Anderson's continued clinging to his vague "gentlemen's agreement" appears to be nothing more than a projection of his own wishful thinking, a distortion of the agents' promise that he would not have to cooperate against his family.[1985]

[1984] Williams GJ Dec. 7, 2006 at 37-41.

[1985] AUSA Bottini attested in his Declaration that Anderson admitted to him that he told [redacted] that he (Anderson) would not have to cooperate against his own family and friends, and that took that information and turned it into the portion of the March 2008 affidavit that claimed the immunity for [redacted] and other family and friends. Dec. 15, 2008 Declaration of Joseph Bottini, ¶ 13.

Based on the results of our investigation, we concluded that the government did not promise immunity to Anderson and his family and friends, and did not sponsor false testimony when the government presented Anderson at trial. Indeed, Anderson's trial explanation for why he created the inaccurate affidavit "We drafted, basically I tried to keep like my loved ones protected in the best way that I can" encapsulates both his conduct and his motives.

B. The Alleged Misconduct in Trial Preparation

On November 15, 2008, the day after the unsuccessful meeting between prosecutors and [redacted] at which SA Kepner informed [redacted] that [redacted] was "absolutely a target of the investigation," Anderson sent his letter to Judge Sullivan recanting his trial testimony and re embracing his affidavit. As noted above, [redacted] were involved in transmitting Anderson's post trial letters to the court. In addition to his claims of promised immunity, Anderson raised a series of allegations concerning his pretrial preparation that essentially amounted to a claim of improper witness coaching. Based on the results of our investigation, we determined that Anderson's claims were unfounded.

Anderson's credibility problems, detailed above, substantially undercut any weight that can be given to his accusations. Most of his allegations, moreover, do nothing more than cast in a sinister light standard trial preparation practices. For example, Anderson alleges that the prosecution "had me study my Grand Jury testimony for several months." That is an appropriate trial preparation technique; indeed, a prosecutor would be remiss not to have a witness review the witness's own prior testimony. The hint of impropriety suggested by Anderson's reference to "several months" is misleading; the review took a long time starting in Alaska and finishing in Washington, D.C. because Anderson read extremely slowly.[1986] At his OPR interview, when asked whether there was anything "troubling or of concern" about being allowed to review his own grand jury transcripts, Anderson stated: "I don't have any problem with it."[1987]

Likewise, Anderson's claim that the prosecutors "refresh[ed]" his memory by showing him photographs of the Girdwood site does not indicate anything improper. AUSAs Bottini and Goeke, and SA Joy (in his unfiled affidavit) all

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[1986] In Anderson's letter of November 15, 2008, he refers in paragraph 4 to reading "folders" that the prosecutors left on the desk. In that context, Anderson said he "called a friend" and "read the grand jury testimony to them" [*sic*]. The prosecutors denied providing Anderson access to any grand jury transcripts except his own, and in his December 16, 2008 letter, Anderson asserted that he "never" alleged that he had seen "other people[']s grand jury testimony."

[1987] Anderson OPR Tr. Apr. 9, 2010 at 52.

explained that the documents shown to Anderson were potential trial exhibits related to Anderson's testimony, and we found no evidence that undermined their claims. Anderson's reference to a "time line" also appears to implicate nothing more than the standard practice of showing a witness potential exhibits, such as invoices, to help refresh the witness's recollection. At his OPR interview, Anderson admitted that the "time line" was not a written document: "[I]t wasn't like it was wrote down, but they showed me pictures and helped my recollection of what happened."[1988] In the present case, Anderson's anticipated testimony covered events that occurred eight years earlier, and it was appropriate to show him documents to assist him in placing events in context. AUSA Bottini stated that he advised Anderson to tell the truth, and that Anderson's present recollection should control even if it conflicted with his prior testimony to the grand jury. Both Bottini and Goeke stated that Anderson was not told to "sugarcoat" or hide facts, and that he was not told to re read documents until he remembered events "correctly." We found Bottini and Goeke more credible than Anderson on these points.

Anderson alleged that the government "even provided me with sticky tabs [so] that I could mark the pages" of his grand jury transcripts so he could re read them if his memory was "fuzzy." Anderson's attempt to portray this as sinister is unpersuasive. SA Joy stated in his unfiled affidavit that, in response to a request from Anderson, he provided Anderson with "sticky tabs" to allow him to "flag portions of his grand jury transcripts that he wanted to discuss or review later." On December 15, 2008, the prosecutors filed Declarations asserting that they provided Anderson with transcripts of his own grand jury testimony that were not highlighted, tabbed, or marked. In response, Anderson clarified in his December 16, 2008 letter (at paragraph 3) that he "never" claimed that the prosecutors marked his transcripts in any way. Providing "sticky tabs" to a witness for his own use in reviewing his grand jury transcript is not improper.

Anderson alleged further that the prosecutors left a file of "pictures, invoices, and documents" in the room where he was reviewing his own grand jury transcripts and "instructed me not to read it."[1989] According to Anderson, he looked at the materials and even read some of the information over the telephone

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[1988] Anderson OPR Tr. Apr. 9, 2010 at 53. Anderson did not claim in his November 15, 2008 letter that the prosecutors gave him a *written* time line. The prosecutors, in their affidavits filed with the court on December 15, 2008, denied providing a time line to Anderson. In his responsive letter dated December 16, 2008 (at paragraph 3) Anderson clarified that the prosecutors "helped provide me with a time line" when he could not "recall an event."

[1989] November 15, 2008 letter at paragraph 4; December 16, 2008 letter at paragraph 4.

to [redacted] [1990] He insinuates, without directly alleging, that the prosecutors left the file in the room knowing that he would read the materials.[1991] The suggestion, again unarticulated, is that the prosecutors hoped the materials would influence Anderson's testimony in some way.

Anderson's allegation is inchoate; he could not identify any of the alleged materials, or explain how they could have influenced any part of his recollection or testimony.[1992] AUSA Bottini stated that there may have been a trial cart in the conference room where Anderson reviewed his grand jury transcript, but said that the cart would only have contained potential trial exhibits. Again, the evidence did not indicate any impropriety on the part of the prosecution team.

Finally, Anderson's letter of December 16, 2008, noted that the government's filing responding to his November 15, 2008 letter did not include an affidavit from SA Joy. The suggestion is that SA Joy, who participated in some of the trial preparation, could not "dispute" Anderson's claims. As discussed above, the government decided not to include an affidavit from Joy because they were concerned that statements he had sworn to in the "Joy Complaint" contradicted statements he had previously sworn were true. Consequently, they were not confident they could submit an affidavit from him in good faith. The evidence, however, shows that Joy vigorously disputed Anderson's allegations. In an email to CDC Gonzalez written one day after Anderson's November 15, 2008 letter, Joy stated: "I'm just disappointed he's agreeing to lie for [W]ard." And in his unfiled affidavit, Joy rejected all of Anderson's allegations.

For the reasons stated above, we concluded that the evidence did not support Anderson's allegations of trial preparation improprieties.

[1990] Anderson OPR Tr. Apr. 9, 2010 at 54.

[1991] At his OPR interview, Anderson stated: "it's kind of like leaving chocolate out on a table in front of a little kid and telling him not to get one." Anderson OPR Tr. Apr. 9, 2010 at 54.

[1992] Anderson OPR Tr. Apr. 9, 2010 at 54-57.

CHAPTER NINE
THE LAND ROVER CHECK

I. INTRODUCTION AND SUMMARY

Count One of the indictment alleged that Senator Stevens engaged in a scheme to conceal his continuing receipt of "hundreds of thousands of dollars' worth of things of value" from VECO and Bill Allen by failing to report them, as was required, on his United States Senate Financial Disclosure Forms."[1993] One thing of value identified in the indictment was a new 1999 Land Rover Discovery received from Bill Allen in exchange for a 1964½ Ford Mustang and a $5,000 check.[1994] According to the indictment, the Land Rover was "purchased new for approximately $44,000," and at the time of the transfer, "the 1964½ Ford Mustang was worth less than $20,000."[1995]

On direct examination on September 30, 2008, as well as on cross examination on October 6, 2008, Allen testified that he paid approximately $44,000 for the 1999 Land Rover.[1996] Upon further cross examination, however, Allen acknowledged that he did not have any records to confirm the amount that he had paid for the vehicle.[1997] After the defense presented Allen with the vehicle invoice and sticker price for the vehicle that he purchased, he conceded that the original dealer invoice price for the 1999 Land Rover was $37,515.[1998]

On October 7, 2008, on redirect examination, AUSA Bottini showed Allen a document and asked him if it refreshed his recollection regarding how much he had paid for the Land Rover.[1999] Allen responded in the affirmative and identified the document as a copy of a check in the amount of $44,339.51, dated May 25,

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[1993] *United States v. Stevens*, Indictment at 4, ¶ 15 (D.D.C., filed July 29, 2008).

[1994] *United States v. Stevens*, Indictment at 6, ¶ 18 (D.D.C., filed July 29, 2008).

[1995] *United States v. Stevens*, Indictment at 6 ¶ 18 (D.D.C., filed July 29, 2008). An undated, 63-page PowerPoint presentation of the case prepared by the prosecution for the Assistant Attorney General of the Criminal Division lists Stevens's benefit from the transaction as $19,000 to $24,000 (at page 37).

[1996] *United States v. Stevens*, Tr. Sept. 30, 2008 (pm) at 81; *United States v. Stevens*, Tr. Oct. 6, 2008 (pm) at 43.

[1997] *United States v. Stevens*, Tr. Oct. 6, 2008 (pm) at 43.

[1998] *United States v. Stevens*, Tr. Oct. 6, 2008 (pm) at 54.

[1999] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 87-88.

1999, that he used to purchase the 1999 Land Rover.[2000] AUSA Bottini then moved the admission of the check into evidence and it was admitted without objection.[2001]

It was later discovered that the check used by AUSA Bottini to refresh Allen's recollection had not been disclosed to the defense.[2002] Consequently, the defense filed a motion to dismiss the indictment or for a mistrial, arguing that the prosecution had violated Federal Rule of Criminal Procedure 16 by failing to disclose items material to the preparation of the defense.[2003] On October 8, 2008, Judge Sullivan ruled that the check was evidence that should have been disclosed in discovery.[2004] As a sanction, Judge Sullivan struck from the record all evidence concerning the Land Rover/Mustang exchange and instructed the jury accordingly.[2005]

In its January 16, 2009 Opposition to Defendant's Motion for a New Trial, the government acknowledged that the Land Rover check should have been produced in discovery.[2006] During the April 7, 2009 hearing on the government's motion to set aside the verdict and dismiss the indictment with prejudice, Judge Sullivan included the government's failure to turn over the Land Rover check as one of the instances in which, in his view, the government had failed to meet its disclosure obligations.[2007]

Based on the results of our investigation, we concluded that the prosecution's failure to disclose the Land Rover check to the defense prior to trial was arguably a violation of Rule 16, but was not the result of intentional professional misconduct or reckless disregard of an unambiguous obligation or standard. In light of the circumstances, we concluded that the prosecution's

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[2000] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 87-88.

[2001] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 88.

[2002] Oct. 7, 2008 8:38pm email from AUSA Bottini to defense counsel.

[2003] Senator Stevens's Motion to Dismiss the Indictment or For Mistrial Due to Government's Failure to Comply with Federal Rule of Criminal Procedure 16(a)(1)(E) (D.D.C., filed Oct. 8, 2008).

[2004] *United States v. Stevens*, Tr. Oct. 8, 2008 (am) at 90.

[2005] *United States v. Stevens*, Tr. Oct. 8, 2008 (am) at 90.

[2006] Government's Opposition to Defendant's Motion for a New Trial (D.D.C., filed Jan. 16, 2009).

[2007] *United States v. Stevens*, Tr. Apr. 7, 2009 (am) at 4-5.

failure to disclose the check prior to trial was an excusable mistake. We concluded further that the prosecution's failure to disclose the Land Rover check after locating it, but while Allen was still being cross examined, violated Rule 16(c), but that the violation did not rise to the level of professional misconduct.

II. FACTUAL BACKGROUND

A. Initial Interviews of Bill Allen

On September 8, 2006, SA Kepner informed PIN attorney Sullivan that she had learned additional information from Bill Allen about the Land Rover/Mustang exchange.[2008] According to SA Kepner, when Stevens received the 1999 Land Rover from Allen, he "gave Allen his 1964 Ford Mustang" and "a check for the difference in value b/w the two vehicles," which Allen deposited into his personal checking account.[2009] Kepner told Sullivan that Allen's bank account records showed, and Allen confirmed, that the amount of the only check Allen received from Stevens around that time was $5,000.[2010] SA Kepner informed Sullivan that at the time of the transaction, the Land Rover was worth $44,000, and the Mustang was worth approximately $15,000.[2011] The information came from a September 6, 2006 interview with Allen attended by Allen's attorney, Bob Bundy, SA Kepner, and AUSA Goeke.[2012] Later, in a March 10, 2007 interview, Allen told the government that he believed Stevens knew he (Stevens) was getting "a deal" on the Land Rover/Mustang trade.[2013]

[2008] Sept. 8, 2006 1:13pm email from PIN attorney Sullivan to PIN Deputy Chief Welch, PIN Principal Deputy Chief Morris, Acting PIN Chief Edward Nucci and copied to PIN attorney Marsh and Sullivan at 2.

[2009] Sept. 8, 2006 1:13pm email from PIN attorney Sullivan to PIN Deputy Chief Welch, PIN Principal Deputy Chief Morris, Acting PIN Chief Nucci and copied to PIN attorney Marsh and Sullivan at 2.

[2010] Sept. 8, 2006 1:13pm email from PIN attorney Sullivan to PIN Deputy Chief Welch, PIN Principal Deputy Chief Morris, Acting PIN Chief Nucci and copied to PIN attorney Marsh and Sullivan at 2.

[2011] Sept. 8, 2006 1:13pm email from PIN attorney Sullivan to PIN Deputy Chief Welch, PIN Principal Deputy Chief Morris, Acting PIN Chief Nucci and copied to PIN attorney Marsh and Sullivan at 2.

[2012] Sept. 6, 2006 FBI 302s of Bill Allen (purportedly transcribed Sept. 7, Sept. 9, and Sept. 13, 2006).

[2013] Mar. 10, 2007 FBI 302 of Bill Allen.

B. The Search Warrant Affidavit

The Land Rover/Mustang exchange was referenced in SA Kepner's July 27, 2007 affidavit in support of the application for a search warrant for Stevens's Girdwood residence.[2014] In the affidavit, SA Kepner stated that Allen purchased a 1999 Land Rover Discovery from a dealership in Alaska on June 4, 1999, and thirteen days later, on June 17, 1999, transferred the vehicle to Senator Stevens. Kepner indicated that the value of the Land Rover was approximately $44,000, stating: "[b]ank records from both VECO's corporate accounts[2015] and ALLEN's personal accounts reflect payments around that time to a Land Rover dealership of more than $44,000."[2016]

C. The Prosecution Memorandum

The May 21, 2008 prosecution memorandum related that Allen told the government that Allen told Stevens in the spring of 1999 that he had purchased a new Land Rover Discovery for his grandson, but was having reservations about giving it to his grandson. Allen asked Stevens if he would be interested in obtaining a new car for his daughter, Lily.[2017] Stevens expressed interest in the vehicle, and they eventually agreed to exchange the new 1999 Land Rover Discovery for Stevens's 1964½ Mustang and a check for $5,000.[2018]

[2014] Affidavit of SA Mary Beth Kepner In Support of Application for Search Warrant for 138 Northland Road, Girdwood, Alaska. July 27, 2007 at 53.

[2015] Although the search warrant affidavit and, as noted below, the prosecution memorandum state that VECO's corporate accounts reflect payments to a Land Rover dealership around the time of the exchange, we were unable to identify those records during our investigation. PIN Attorney Marsh told OPR that he was heavily involved in the preparation of the prosecution memorandum and that much of its language was taken from the search warrant affidavit. Marsh OPR Tr. Mar. 25, 2010 at 379-381. Marsh also said he was a principal drafter of the search warrant affidavit and believes that he knew about the Land Rover check (and presumably the VECO records referenced) at some point, but shifted his focus to the indictment, which did not reference the Land Rover check (or other bank records) once it was returned. Marsh OPR Tr. Mar. 25, 2010 at 378-382.

[2016] Affidavit of SA Mary Beth Kepner In Support of Application for Search Warrant for 138 Northland Road, Girdwood, Alaska at 53 (July 27, 2007).

[2017] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) at 34-35.

[2018] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) at 34-35. According to IRS Property Appraisal and Liquidation Specialist Steven D. Hopkins, officially, there is no 1964½ Ford Mustang. The moniker was given to the1965 Mustangs manufactured between April and August 1964, before the manufacturing plants were retooled. Buyers of the early Mustangs coined the

The prosecution memorandum repeated the statement made in SA Kepner's July 27, 2007 affidavit: "Bank records from both VECO's corporate accounts and ALLEN's personal accounts reflect payments around that time to a Land Rover dealership of more than $44,000."[2019] The memorandum stated that although Stevens claimed in a 1999 letter to Allen that he believed the value of the Mustang was $25,000, an FBI commissioned antique car specialist placed the value of the Mustang in 1999 at approximately $8,000.[2020] The memo concluded: "even under STEVENS' purported valuation," the exchange was not even.[2021]

D. The Indictment

The indictment listed the value of the Land Rover as "approximately $44,000."[2022] Specifically, the indictment provided:

> Thereafter, in or about June, 1999, ALLEN transferred a new 1999 Land Rover Discovery, which ALLEN had purchased new for approximately $44,000, to STEVENS in exchange for STEVENS' 1964 Ford Mustang and $5000. At the time ALLEN transferred the 1999

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phrase "sixty-four and a half" in an effort to make their cars more valuable. Sept. 12, 2008 1:42pm email from Hopkins to SA Bateman. Hopkins also noted that based on the production date, November 7, 1964, the Mustang that belonged Senator Stevens, would be a 1965. Sept. 9, 2008 6:58pm email from Hopkins to SA Bateman; Sept. 14, 2008 1:42pm email from SA Bateman to PIN attorney Marsh, PIN attorney Sullivan, SA Dennis Roberts, AUSA Goeke, AUSA Bottini, PIN Principal Deputy Chief Morris, SA Joy, and SA Kepner. Kepner had noted that the vehicle was registered as a 1965 Mustang on August 5, 2008. Aug. 5, 2008 2:33pm email from SA Kepner to PIN attorney Marsh, PIN attorney Sullivan, AUSA Goeke, AUSA Bottini, and PIN Principal Deputy Chief Morris. Based on Kepner's observation, prosecutors questioned whether the description of the Mustang in the indictment needed to be changed, but decided that there was no material variance because there were references to the vehicle as a 1964½ Mustang in communications between Allen and Stevens, and thus, sufficient evidence to support the allegation as stated in the indictment. *See* series of Aug. 5, 2008 emails among Sullivan, Kepner, Marsh, Goeke, Bottini and Morris.

[2019] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) at 34-35.

[2020] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) at 35.

[2021] May 21, 2008 Recommendation to Prosecute THEODORE F. STEVENS, Current United States Senator, for False Statements (18 U.S.C. § 1001) at 34-35.

[2022] *United States v. Stevens*, Indictment at 6, ¶18 (D.D.C., filed July 29, 2008).

Land Rover Discovery to STEVENS, the 1964½ Ford Mustang was worth less than $20,000.[2023]

Prior to trial, the Land Rover/Mustang vehicle exchange was a subject of email communication among members of the prosecution team.[2024] The primary focus of the emails was the model year and inspection of the Mustang, and the retention of an automobile appraiser to testify at trial.[2025] Additionally, a September 17, 2008 email from Principal Deputy Chief Morris to PIN attorney Marsh offered suggestions on how to address the value of the Mustang during the prosecution's opening statement.[2026]

Although not addressed in the prosecution memorandum or by Allen's trial testimony, handwritten notes from SA Kepner and from Allen's attorney, Robert Bundy, reflect that Allen told the government during a September 6, 2006 interview that Senator Stevens was going to give Allen several guns as part of the

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[2023] *United States v. Stevens*, Indictment at 6, ¶18 (D.D.C., filed July 29, 2008). It is not clear from where the "less than $20,000" value assigned to the Mustang in paragraph 18 of the indictment comes or how the prosecution determined the value of the benefits that Stevens received through the transaction. SA Larry Bateman told OPR that the prosecutors never asked the IRS to analyze the Land Rover/Mustang transaction and that he did not know who did such an analysis. Bateman OPR Tr. Mar. 21, 2010 at 89-90.

[2024] *See, e.g.,* Aug. 7, 2008 11:45am email from PIN attorney Edward Sullivan to AUSA Bottini, PIN Principal Deputy Chief Morris, and PIN attorney Marsh; Aug. 19, 2008 5:38pm email from PIN Principal Deputy Chief Morris to SA Kepner, AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, PIN attorney Marsh, and SA Joy.

[2025] *See, e.g.*, Aug. 5, 2008 2:39pm email from PIN attorney Sullivan to SA Kepner, PIN attorney Marsh, AUSA Goeke, AUSA Bottini, and PIN Principal Deputy Chief Morris; Aug. 5, 2008 9:12pm email from PIN attorney Marsh to PIN attorney Sullivan, AUSA Bottini, PIN Principal Deputy Chief Morris, SA Kepner and AUSA Goeke; Sept. 9, 2008 9:07pm email from SA Larry Bateman to SA Kepner, PIN Principal Deputy Chief Morris, AUSA Goeke, AUSA Bottini, PIN attorney Sullivan, SA Roberts, PIN attorney Marsh and SA Joy; Aug. 6, 2008 8:43pm email from AUSA Bottini to PIN Principal Deputy Chief Morris, PIN attorney Marsh, PIN attorney Sullivan, and AUSA Goeke with reference to obtaining a subpoena for automobile appraiser [redacted] According to his April 7, 2008 report, [redacted] assigned a then-current (April 2008) value of $7,000 to $10,000 to the Mustang based on a "limited external inspection." Apr. 11, 2008 FBI 302 of [redacted] also opined that the value of the Mustang "certainly would not have been greater in 1999 than the current appraised value" and "would probably be the same." *Id.* The value of the 1999 Land Rover in 2005, the year in which Stevens's daughter Lily, traded the Land Rover for another new vehicle purchased by a VECO employee, was also addressed.

[2026] Sept. 17, 2008 3:52pm email from PIN Principal Deputy Chief Morris to PIN attorney Marsh.

consideration for the Land Rover.[2027] However, according to both sets of notes, Allen said the guns remained at Stevens's Girdwood residence until 2003 or 2004.[2028] Bundy's notes from the interview also reflect that Allen told the government there was "no way [I] would have done [the trade] for [the] 5K difference."[2029]

The notes (and later Allen's testimony) also reflect that Senator Stevens and Allen discussed trading the guns for the Mustang a few years later when Stevens wanted the Mustang back.[2030] As addressed in detail elsewhere in this report, four different FBI 302s with varying amounts of information were prepared for Allen's September 6, 2006 interview.[2031] Although two of the 302s indicate that Allen and Stevens discussed exchanging guns for the Mustang in 2002 2003, none reflects that Allen told the government that the guns were a part of the 1999 Land Rover/Mustang exchange.[2032]

Allen later told OPR that the original Land Rover/Mustang exchange involved only the cars and cash, and that the guns had not been part it.[2033] Allen stated that there were five or six guns in total, some rifles, and some pistols.[2034] Allen said that long after the Land Rover/Mustang trade, Stevens said he wanted the Mustang back and gave Allen the guns for the Mustang.[2035] Allen said that he knew the guns were not worth as much as the Mustang and indicated that Stevens "just wanted the Mustang back."[2036] Allen gave the guns to [redacted]

[2027] Sept. 6, 2006, SA Kepner Handwritten Notes at 2-3; Sept. 6, 2006, Robert C. Bundy Handwritten Notes of Meetings With Prosecutors and Federal Agents at 35-36.

[2028] Sept. 6, 2006, SA Kepner Handwritten Notes at 2-3; Sept. 6, 2006, Robert C. Bundy Handwritten Notes of Meetings With Prosecutors and Federal Agents at 35-36.

[2029] Sept. 6, 2006, Robert C. Bundy Handwritten Notes of Meetings With Prosecutors and Federal Agents at 33.

[2030] *United States v. Stevens*, Tr. Sept. 30, 2008 (pm) at 88-92; Sept. 6, 2006, Robert C. Bundy Handwritten Notes of Meetings With Prosecutors and Federal Agents at 36; Sept. 6, 2006, SA Kepner Handwritten Notes at 2-3.

[2031] See Chapter Twelve of this report for a detailed discussion of this issue.

[2032] *See* Kepner OPR Tr. Feb. 18, 2010 exhibits 4B, 4C, 4D, and 4E.

[2033] Jun. 12, 2010 FBI 302 of Bill Allen at 7.

[2034] Jun. 12, 2010 FBI 302 of Bill Allen at 7.

[2035] Jun. 12, 2010 FBI 302 of Bill Allen at 7.

[2036] Jun. 12, 2010 FBI 302 of Bill Allen at 8.

Allen, who is a gun collector.[2037] Allen told OPR that he had not had the guns appraised.[2038]

E. Opening Statements

In its opening statement on September 25, 2008, the prosecution identified the Land Rover/Mustang exchange as one of the "unpaid financial benefits" that Senator Stevens received.[2039] Specifically, the prosecution described the exchange as "a sweetheart trade" in which the defendant "received for his 34 year old Mustang . . . and $5,000 . . . a brand new Land Rover Discovery that was worth $44,000."[2040]

The defense described the Mustang as a car that Senator Stevens "loved dearly" and allowed his daughter to "drive around town," but parted with "when his daughter got to an age where he wanted to put her in a safe car."[2041] The defense also stated that one of the reasons Stevens wanted to part with the car was that "Bill Allen really wanted it."[2042] The defense maintained, however, that "[Stevens] believed the trade was absolutely fair for that car. You don't have to report some trade that you believe is fair. He certainly had no intent to violate the law."[2043]

F. Bill Allen's Trial Testimony

On September 30, 2008, Bill Allen testified on direct examination about his exchange of a new Land Rover for a 1964½ Mustang convertible. Questioned by AUSA Bottini, Allen testified that Stevens knew that Allen liked older cars, and offered to sell his 1964½ Mustang to Allen because he (Stevens) needed a new car for his daughter, Lily.[2044] Allen told Stevens he had a new Land Rover that he had bought for his grandson, but had decided not to give it to him. The two agreed to

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[2037] Jun. 12, 2010 FBI 302 of Bill Allen at 8.

[2038] Jun. 12, 2010 FBI 302 of Bill Allen at 8.

[2039] *United States v. Stevens*, Tr. Sept. 25, 2008 (am) at 32.

[2040] *United States v. Stevens*, Tr. Sept. 25, 2008 (am) at 32.

[2041] *United States v. Stevens*, Tr. Sept. 25, 2008 (am) at 79.

[2042] *United States v. Stevens*, Tr. Sept. 25, 2008 (am) at 80.

[2043] *United States v. Stevens*, Tr. Sept. 25, 2008 (am) at 80.

[2044] *United States v. Stevens*, Tr. Sept. 30, 2008 (pm) at 80.

exchange the Land Rover for the Mustang plus a check for $5,000.[2045] Allen testified that he paid "somewhere around $44,000" for the Land Rover.[2046]

Allen also testified that he believed the Mustang was worth $15,000 to $20,000 at the time of the exchange in 1999, and that he did not consider the trade to be equal.[2047] Allen said he entered into the trade anyway "[b]ecause I like Ted."[2048] As documentary support for the value of the transaction, the government offered copies of the $5,000 check and a June 24, 1999 letter from Stevens to Allen explaining the terms of the trade (Government Exhibit 609).[2049] Stevens began the letter stating: "I'm delighted we could work out a trade for the 1964½ Mustang."[2050] Stevens then stated that the Mustang was a "two owner" car and that he had it "substantially rebuilt" after obtaining it in 1980.[2051] Stevens listed a number of repairs that he had made to the car, and stated:

> Enclosed is my check for $5,000.00 in addition to the Mustang in trade for your 1999 Land Rover, which I understand is almost new. The Mustang is in mint condition and is worth $25,000.00. The costs associated with detailing the car and shipping it to you in Seattle will run about $2,170.00. I figure the total, including the Mustang, I'm sending you is $32,170.00.[2052]

Stevens closed the letter by directing Allen to contact one of his staff members if he had "questions in regard to paperwork for transfers."[2053]

[2045] *United States v. Stevens*, Tr. Sept. 30, 2008 (pm) at 80-88.

[2046] *United States v. Stevens*, Tr. Sept. 30, 2008 (pm) at 81.

[2047] *United States v. Stevens*, Tr. Sept. 30, 2008 (pm) at 82, 86, 88.

[2048] *United States v. Stevens*, Tr. Sept. 30, 2008 (pm) at 88.

[2049] *United States v. Stevens*, Tr. Sept. 30, 2008 (pm) at 83-84.

[2050] Jun. 24, 1999 letter from Ted Stevens to Bill Allen (Government Exhibit 609).

[2051] Jun. 24, 1999 letter from Ted Stevens to Bill Allen (Government Exhibit 609).

[2052] Jun. 24, 1999 letter from Ted Stevens to Bill Allen (Government Exhibit 609).

[2053] Jun. 24, 1999 letter from Ted Stevens to Bill Allen (Government Exhibit 609).

On cross examination, Allen was asked how he recalled the amount he paid for the Land Rover.[2054] Allen testified that although he did not have any records from the purchase, he recalled that he had purchased two identical Land Rovers for his two grandsons, and that each had cost $44,000.[2055] Defense counsel challenged Allen's recollection regarding the price of the vehicle and offered into evidence the vehicle sticker and dealer invoice for a 1999 Land Rover Discovery, Defense Exhibits 4000 and 4001, which showed a sticker price of $42,125.00 and a dealer invoice price of $37,515.00.[2056]

The defense had not previously disclosed those documents to the prosecution, and AUSA Bottini objected to their admission pending a showing that they were for the same vehicle that Allen traded to Stevens.[2057] The documents were admitted following a bench conference in which defense counsel explained that he had another document that linked the documents to the vehicle purchased by Allen.[2058] The defense also moved into evidence the Alaska Certificate of Vehicle Title, Defense Exhibit 561, which showed that a vehicle with the vehicle identification number that appeared on the sticker and dealer invoice was titled to Allen on June 4, 1999.[2059]

Defense counsel concluded the cross examination of Bill Allen the following morning, October 7, 2008.[2060] AUSA Bottini began his redirect examination immediately thereafter.[2061] During the redirect examination, Bottini asked Allen to confirm how much he paid for the Land Rover.[2062] Recalling the documents presented by the defense the previous day, Allen responded, "I thought it was 44, but I guess it was 42, now."[2063] AUSA Bottini then showed Allen a copy of a May

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[2054] *United States v. Stevens*, Tr. Oct. 6, 2008 (pm) at 43.

[2055] *United States v. Stevens*, Tr. Oct. 6, 2008 (pm) at 43.

[2056] *United States v. Stevens*, Tr. Oct. 6, 2008 (pm) at 52-54.

[2057] *United States v. Stevens*, Tr. Oct. 6, 2008 (pm) at 47-49.

[2058] *United States v. Stevens*, Tr. Oct. 6, 2008 (pm) at 47-53; *United States v. Stevens*, Tr. Oct. 6, 2008 (redacted bench conferences) (pm) at 3-4.

[2059] *United States v. Stevens*, Tr. Oct. 6, 2008 (am) at 50-52.

[2060] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 79.

[2061] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 79.

[2062] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 87-88.

[2063] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 87-88.

25, 1999 check from Allen to Land Rover of Anchorage in the amount of $44,339.51[2064] and asked if it refreshed Allen's recollection as to the price of the Land Rover:

> Q. Let me show you what we have marked for identification as Government's Exhibit 1122. If you take a look at that for a moment, Mr. Allen; do you recognize what that is?
>
> A. Yes, that's my check. It says $44,000.
>
> Q. Forty four thousand even or
>
> A. $44,339.51
>
> Q. Does that refresh your recollection as to how much you paid for the Land Rover?
>
> A. Yeah.
>
> Q. How much did you pay for the Land Rover?
>
> A. Well, that check.
>
> Q. And what's the amount of the check, again?
>
> A. $44,339.51.[2065]

AUSA Bottini then moved the admission of the check, Government Exhibit 1122, and it was admitted without objection.[2066]

G. The Defense Motion to Dismiss the Indictment

Later on the evening of October 7, 2008, at 5:07 p.m., defense counsel sent AUSA Bottini an email asking "whether you have previously produced the check that was used in Bill Allen's re direct," and if so, to "identify where it is contained

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[2064] *United States v. Stevens*, Government Exhibit 1122.

[2065] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 87-88.

[2066] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 88.

in your production."[2067] AUSA Bottini responded via email at 8:38 p.m., stating that the check had not been produced because the government had not intended to use it in its case in chief:[2068]

> We did not produce a copy of the check as we never intended to introduce it in our case in chief. It was not until we were surprised by the introduction of the Land Rover corporate exhibits that you introduced during Allen's cross examination (which we had never seen before despite our repeated requests for reciprocal discovery production) that we considered the Allen check. We located a copy of the check this morning.[2069]

Defense counsel responded to AUSA Bottini's email at 9:27 p.m.:[2070]

> [W]e are disappointed (to put it mildly) that you did not produce that check pursuant to your obligations under Rule 16 (which are different than the reciprocal discovery obligations of a defendant, which are more limited).[2071] We will take that up with the Court.[2072]

AUSA Bottini sent an email to Judge Sullivan, copied to defense counsel, at 11:00 p.m. that night. In the email, Bottini explained that the government had been surprised by the exhibits used by the defense in its attempt to impeach Allen on cross examination as to the value of the Land Rover, and:

> [s]ought out and located a copy of the cancelled check . . . [and]. . . introduced the check during redirect to rebut

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[2067] Oct. 7, 2008 5:07pm email from defense counsel to AUSA Bottini.

[2068] Oct. 7, 2008 8:38pm email from AUSA Bottini to defense counsel.

[2069] Oct. 7, 2008 8:38pm email from AUSA Bottini to defense counsel.

[2070] Oct. 7, 2008 9:27pm email from defense counsel to AUSA Bottini.

[2071] Rule 16(a)(1)(E)(i) and (iii) provide that "[u]pon 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: (i) the item is material to preparing the defense; or (iii) the government intends to use the item in its case-in-chief at trial; or the item was obtained from or belongs to the defendant." A defense request under Rule 16(a)(1)(E) triggers reciprocal discovery obligations under Rule 16(b)(1)(A).

[2072] Oct. 7, 2008 9:27pm email from defense counsel to AUSA Bottini.

> the new records used by defendant and to rehabilitate the testimony that Allen provided on direct examination concerning the $44,000 figure.[2073]

AUSA Bottini also explained that defense counsel asserted that the check should have been produced prior to its use at trial pursuant to the Federal Rule of Criminal Procedure 16.[2074]

The following morning, October 8, 2008, the defense filed a "Motion to Dismiss the Indictment or for Mistrial Due to Government's Failure to Comply with Federal Rule of Criminal Procedure 16(a)(1)(E)."[2075] The defense argued that the $44,339.51 check was a "central piece of evidence" that was "clearly material to preparing the defense" because "it allegedly relates to the first so called gift in the indictment the 1999 automobile transaction."[2076] The defense contended that the government's failure to produce the check was a violation of Rule 16(a)(1)(E) because defense counsel had asked the government to provide "all documents material to preparing the defense" by letter dated August 1, 2008, immediately following the arraignment.[2077]

Later that morning, Judge Sullivan heard from the government on the issue of the alleged Rule 16 violation. AUSA Bottini argued for the prosecution, explaining that, given the volume of material produced in pretrial discovery, at first it had not been clear whether the check had been disclosed.[2078] However, once it appeared that the check had not been produced, he told defense counsel that the check was not something that the prosecution had intended to use in its case in chief, because Allen had consistently said that he paid approximately

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[2073] Oct. 7, 2008 11:00pm email from AUSA Bottini to Judge Sullivan.

[2074] Oct. 7, 2008 11:00pm email from AUSA Bottini to Judge Sullivan.

[2075] Senator Stevens's Motion to Dismiss the Indictment or For Mistrial Due to Government's Failure to Comply with Federal Rule of Criminal Procedure 16(a)(1)(E) (D.D.C., filed Oct. 8, 2008).

[2076] Senator Stevens's Motion to Dismiss the Indictment or For Mistrial Due to Government's Failure to Comply with Federal Rule of Criminal Procedure 16(a)(1)(E) at 2 (D.D.C., filed Oct. 8, 2008).

[2077] Senator Stevens's Motion to Dismiss the Indictment or For Mistrial Due to Government's Failure to Comply with Federal Rule of Criminal Procedure 16(a)(1)(E) at 2 (D.D.C., filed Oct. 8, 2008).

[2078] *United States v. Stevens*, Tr. Oct. 8, 2008 (am) at 3.

$44,000 for the Land Rover.[2079] AUSA Bottini said that the government had not viewed the check as "material to the preparation of the defense" and, "[i]f anything, it's inculpatory" because "[i]t corroborates what Allen says he paid for the vehicle."[2080]

AUSA Bottini also argued that the defense never indicated that what Allen paid for the Land Rover was disputed.[2081] According to Bottini, it was not until Allen's cross examination that the government learned that the value of the new 1999 Land Rover would be an issue.[2082] Bottini stated further that the prosecution had not thought of the check, which they found the previous morning, until the defense offered the vehicle price sticker and dealer invoice as evidence of the value of the Land Rover in 1999.[2083] Bottini asserted that the government "simply disagree[d]" that the check was "somehow material to the preparation of the defense" and did not "view this as something that we had an obligation to produce as part of pretrial discovery."[2084]

Judge Sullivan asked why the check was not material to the preparation of the defense, regardless of whether or not it was exculpatory, because the defense may not have sought to impeach Allen on the value of the Land Rover if the check had been disclosed.[2085] AUSA Bottini responded that, "[i]f anything, every indication was, is that they were going to attack the valuation of the other vehicle, of the Mustang."[2086] Bottini explained that had there been an indication that the 1999 value of the Land Rover was going to be an issue, the check "might have been something that we fronted out earlier, but there wasn't."[2087]

Judge Sullivan also asked why the government had not utilized the check during its examination of Allen, stating that the check would have "supported the

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[2079] *United States v. Stevens*, Tr. Oct. 8, 2008 (am) at 3.

[2080] *United States v. Stevens*, Tr. Oct. 8, 2008 (am) at 3-4.

[2081] *United States v. Stevens*, Tr. Oct. 8, 2008 (am) at 4.

[2082] *United States v. Stevens*, Tr. Oct. 8, 2008 (am) at 4.

[2083] *United States v. Stevens*, Tr. Oct. 8, 2008 (am) at 4.

[2084] *United States v. Stevens*, Tr. Oct. 8, 2008 (am) at 4.

[2085] *United States v. Stevens*, Tr. Oct. 8, 2008 (am) at 5.

[2086] *United States v. Stevens*, Tr. Oct. 8, 2008 (am) at 5.

[2087] *United States v. Stevens*, Tr. Oct. 8, 2008 (am) at 5.

testimony of a convicted felon."[2088] AUSA Bottini responded, "[w]e just didn't see that it was something that we needed to do."[2089]

The court addressed the defense motion to dismiss during the afternoon session on October 8, 2008, and heard additional argument from the parties.[2090] In response to a direct question from Judge Sullivan, AUSA Bottini indicated that the check was found after the cross examination of Allen had concluded.[2091] Defense counsel then argued that the government should have given the check to the defense as soon as they found it, prior to the start of Allen's redirect examination.[2092] Defense counsel also stated that, given the short amount of time that elapsed between Allen's cross and redirect examinations, it was "frankly not credible" that the prosecution found the check after cross examination was over.[2093]

AUSA Bottini repeated his assertion that the prosecution did not produce the check to the defense because it was not going to be used in the government's case in chief:

> The Court: So the government made a decision to intentionally not disclose that check to defense counsel then.
>
> Mr. Bottini: I wouldn't say that. . . . We made a decision to prove the allegations as far as the $44,000 value of the vehicle by presenting Mr. Allen's testimony in which he consistently

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[2088] *United States v. Stevens*, Tr. Oct. 8, 2008 (am) at 6.

[2089] *United States v. Stevens*, Tr. Oct. 8, 2008 (am) at 6.

[2090] *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 24-32.

[2091] *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 30.

[2092] *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 30-31.

[2093] *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 31. Review of the trial transcript reveals that there was no recess or break between the conclusion of Allen's cross-examination and the beginning of his redirect examination. *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 79. According to defense counsel, Allen was cross-examined for an hour and a half prior to his redirect examination on the morning of October 7, 2008. *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 31.

> The Court: But you are telling me you were aware you had the check, but you decided that because you were not going to use it in your case in chief, there was no obligation to produce it, correct?
>
> Mr. Bottini: Correct. Yes.[2094]

Defense counsel also argued that it was not clear that the check admitted on redirect examination was the check Allen used to purchase the Land Rover traded to Senator Stevens.[2095] Defense counsel said that he attempted to ask AUSA Bottini about Allen's other automobile purchases via email the previous evening, but received no reply:

> I asked questions of Mr. Bottini last night. Can you tell us . . . we understand through multiple vehicle transactions, that Mr. Allen bought many cars. Can you tell us about his other car purchases? Can you send us the other check for that time period? And once again they haven't responded to our my questions."[2096]

Defense counsel stated further: "[F}rom where we sit, it looks like a sandbag, Your Honor."[2097] Finally, the defense asserted that it had been prejudiced because attempts to subpoena Allen's bank records were unsuccessful.[2098] As a sanction

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[2094] *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 27.

[2095] *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 26, 32.

[2096] *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 25-26. OPR reviewed copies of Allen's Key Bank account records found in boxes from the "Polar Pen War Room" at the USAO-Alaska. A copy of the May 25, 1999 check for $44,339.51 to "Land Rover of Anchorage" was found along with copies of several other checks to car dealerships. However, none of the other checks was to "Land Rover of Anchorage," was from 1999, or was more than $14,000. OPR's review of boxes from the "Polar Pen War Room" at the USAO-AK revealed a May 25, 1999 "Offer to Purchase Motor Vehicle" signed by Bill Allen. The vehicle to be purchased was a Land Rover Discovery II. The purchase price was $43,942.11 and the amount due on delivery (with license, title, registration, and document preparation charge) was $44,339.51. The VIN of the vehicle described in the offer to purchase matched the VIN on the dealer invoice and the sticker price admitted into evidence as Defense Exhibits 4000 and 4001. Additionally, on September 6, 2006, Bill Allen told investigators that he had purchased only one of the Land Rovers outright and had financed the other one to help his grandson establish a credit history. *See* Sept. 6, 2006, SA Kepner Handwritten Notes at 2; Sept. 6, 2006, Robert C. Bundy Handwritten Notes of Meetings With Prosecutors and Federal Agents at 34.

[2097] *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 31.

[2098] *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 32.

for the government's failure to produce the Land Rover Check, defense counsel requested a dismissal or a mistrial and asserted: "At the very least, the car evidence should be stricken from this case."[2099]

Prior to ruling, Judge Sullivan asked AUSA Bottini to confirm when the government learned about the check. At that time, AUSA Bottini responded that the government learned about the check before cross examination concluded.[2100]

Judge Sullivan found the $44,000 check to be material under Rule 16 and struck all evidence concerning the Land Rover/Mustang exchange from the record:[2101]

> With respect to the check for $44,000, it is clear to the Court that that evidence is indeed, material. It's evidence that should have been produced to the defendant, and it's inexcusable that the government did not produce that evidence to the defendant, so therefore, the Court will strike the evidence with respect to the automobile issue and will also instruct the jury that the government had an obligation to produce all material evidence to the defendant, and it failed to do so; therefore, the court has stricken the evidence with respect to the automobile issue and it will instruct the jury not to consider it.[2102]

H. The Jury Instruction

Judge Sullivan indicated that he would craft an appropriate jury instruction that evening.[2103] At 6:30 p.m., Judge Sullivan's law clerk sent counsel for the parties a proposed jury instruction via email.[2104] Defense counsel responded with an email recommending that the instruction include a statement that the

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[2099] *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 32.

[2100] *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 34.

[2101] *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 32, 90.

[2102] *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 90.

[2103] *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 90.

[2104] Oct. 8, 2008 6:30pm email from Judge Sullivan's law clerk to PIN attorney Marsh, PIN Principal Deputy Chief Morris, PIN attorney Sullivan, AUSA Goeke, AUSA Bottini, and defense counsel.

government knowingly presented false and inaccurate evidence.[2105] That same evening, October 8, 2008, the government filed a motion asking Judge Sullivan to reconsider his proposed jury instruction to the extent that the instruction commented on the reasons for excluding testimony and evidence about the Land Rover/Mustang vehicle exchange.[2106]

The following morning, October 9, 2008, Judge Sullivan stated that he would give essentially the same instruction that he had previously outlined:

> [S]o the instruction I'll give is that the government had an obligation to provide certain information to the defendant. It did not do so. As a result I'm striking the testimony and evidence regarding two matters that you heard testimony about. The first relates to the alleged transaction between the defendant and Mr. Allen whereby Mr. Allen transferred a new Land Rover to the defendant in exchange for the defendant's 1964 and a half Ford Mustang and $5,000. I'm striking all testimony and evidence regarding that transaction from the record, and it must not be considered by you or play any role in your deliberations.[2107]

Judge Sullivan made clear that this was the instruction he would give over the government's objection and notwithstanding the defense's recommendation.[2108]

Judge Sullivan gave the following instruction to the jury during the afternoon session of trial on October 9, 2008:

> The government had an obligation to provide certain information to the defendant, and it did not do so. As a result, I am striking the testimony and evidence regarding two matters that you heard testimony about. The first relates to the alleged transaction between the defendant and Mr. Allen, whereby, Mr. Allen transferred

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[2105] Oct. 8, 2008 7:58pm email from defense counsel to Judge Sullivan's law clerk, Judge Sullivan, PIN attorney Marsh, PIN Principal Deputy Chief Morris, PIN attorney Sullivan, AUSA Goeke, AUSA Bottini, and defense counsel.

[2106] Government's Motion for Reconsideration at 2 (D.D.C., filed Oct. 8, 2008).

[2107] *United States v. Stevens*, Tr. Oct. 9, 2008 (am) at 4.

[2108] *United States v. Stevens*, Tr. Oct. 9, 2008 (am) at 5, 8.

> a new Land Rover to the defendant in exchange for the defendant's 1964 ½ Ford Mustang and $5,000. I am striking all testimony and evidence regarding that transaction from the record, and it must not be considered by you or play any role in your deliberations.[2109]

Based on the government's request that morning,[2110] Judge Sullivan instructed the jury further:

> You're not to consider the stricken evidence, nor the reason for its exclusion in your deliberations or in assessing the other evidence remaining in the case.[2111]

III. THE JOY COMPLAINT AND A MOTION FOR A NEW TRIAL

On December 1, 2008, OPR received from the OIG an undated memorandum ("Joy Complaint") written by SA Chad Joy, alleging misconduct by the prosecution team.[2112] Among SA Joy's allegations was:

> [SA] Kepner and others decided not to provide defense counsel [Bill] Allen's bank account documents. During the trial of Ted Stevens, the prosecution decided to use a check of Allen's as an exhibit even though it had not previously been turned over in discovery. Prosecutors decided not to provide that check to the court and defense before using it as a government exhibit. The defense and the judge were upset.[2113]

On December 5, 2008, the defense filed a motion for new trial pursuant to Federal Rule of Criminal Procedure 33, citing the Joy Complaint.[2114] The defense

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[2109] *United States v. Stevens*, Tr. Oct. 9, 2008 (pm) at 62-63.

[2110] *United States v. Stevens*, Tr. Oct. 9, 2008 (am) at 9-10.

[2111] *United States v. Stevens*, Tr. Oct. 9, 2008 (pm) at 63.

[2112] Chad Joy Complaint, ¶ 1.

[2113] Chad Joy Complaint, ¶ 9(b) .

[2114] Senator Stevens's Motion for a New Trial (D.D.C., filed Dec. 5, 2008). Federal Rule of Criminal Procedure 33 provides, in pertinent part: "(a) Defendant's Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of

cited "[t]he Government's Multiple Instances of Misconduct," including, "intentionally withholding critical evidence from the defense about the Mustang Land Rover transaction and then using it to rehabilitate Mr. Allen on redirect examination."[2115] The defense argued that striking the evidence was "not sufficient to cure the prejudice to Senator Stevens," and that the government's use of the undisclosed check "unfairly undermined defense counsel's cross examination of Mr. Allen and bolstered the credibility of the government's most critical witness."[2116] The defense argued that "[t]he jury was thus left with a more favorable impression of Mr. Allen's testimony across the board, not merely regarding the Mustang transaction," and "[a] new trial is required to cure this prejudice."[2117]

The government filed its opposition on January 16, 2009.[2118] Regarding the Land Rover check, the government confirmed that it had not produced the check in discovery and, citing Rule 16(a)(1)(E), acknowledged that its failure to do so was "error."[2119] The government argued that its error was remedied, however, when the Court struck all evidence relating to the Land Rover/Mustang exchange, "and damaged the government's credibility in the eyes of the jury."[2120]

The government also argued that the defense assertion that the government's discovery error was grounds for a new trial "ma[de] no sense," noting that if the government had produced the check and used it at trial, "Allen's credibility would have been 'bolstered' in any event."[2121] The government noted that the defense "cited no authority suggesting that a new trial is required when,

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justice so requires."

[2115] Senator Stevens's Motion for a New Trial at 28 (D.D.C., filed Dec. 5, 2008).

[2116] Senator Stevens's Motion for a New Trial at 35 (D.D.C., filed Dec. 5, 2008).

[2117] Senator Stevens's Motion for a New Trial at 35 (D.D.C., filed Dec. 5, 2008).

[2118] Government's Opposition to Defendant's Motion for a New Trial (D.D.C., filed Jan. 16, 2009).

[2119] Government's Opposition to Defendant's Motion for a New Trial at 40 (D.D.C., filed Jan. 16, 2009). The government also cited *United States v. Marshall*, 132 F.3d 63, 69-70 (D.C. Cir. 1998) (continuance sufficient remedy for Rule 16 discovery violation where violation did not prejudice defendant's substantial rights).

[2120] Government's Opposition to Defendant's Motion for a New Trial at 41 (D.D.C., filed Jan. 16, 2009).

[2121] Government's Opposition to Defendant's Motion for a New Trial at 41 (D.D.C., filed Jan. 16, 2009).

as a result of a discovery error, a witness is proven to have testified truthfully, especially as regards a collateral matter."[2122] Finally, the government stated in a footnote: "The prosecutor did not use the check in Allen's direct examination because he had forgotten that it existed."[2123]

The same day, January 16, 2009, the defense filed an opposition to the government's motion for reconsideration. In addition to attacking the government's handling of the Joy Complaint, the defense argued that the government had engaged in a "pattern" of "making false representations and otherwise failing to perform its duties under the Constitution and the Rules."[2124] Included in the defense's list of false representations was "[w]hen the government failed to produce the bank records of Bill Allen and then sprang them on the defense, it claimed this check was immaterial to the defense."[2125]

IV. THE PROSECUTION TEAM DECLARATIONS

In January 2009, members of the prosecution team began drafting affidavits and Declarations to address the issues raised in the Joy Complaint. The final versions were completed in February.[2126] Additionally, in February 2009, the Acting AAG for the Criminal Division assigned attorneys from the Criminal Division's Domestic Security Section, Fraud Section, and Narcotic and Dangerous Drug Section (NDDS) to conduct the post trial litigation in the case.[2127] Those

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[2122] Government's Opposition to Defendant's Motion for a New Trial at 41-42 (D.D.C., filed Jan. 16, 2009).

[2123] Government's Opposition to Defendant's Motion for a New Trial at 41 (D.D.C., filed Jan. 16, 2009). That statement is inconsistent with the position taken by the government in court on October 8, 2008, which was that the government was aware of the check and chose not to use it.

[2124] Senator Stevens's Opposition to Government Motion for Reconsideration and to Vacate January 14, 2009 Order That the Attorney General Personally Sign a Declaration Under Oath at 1-2 (D.D.C., filed Jan. 16, 2009).

[2125] Senator Stevens's Opposition to Government Motion for Reconsideration and to Vacate January 14, 2009 Order That the Attorney General Personally Sign a Declaration Under Oath at 3 (D.D.C., filed Jan. 16, 2009).

[2126] Declaration of Joseph Bottini, Feb. 20, 2009; Affidavit of SA Kepner, Feb. 20, 2009; Declaration of Brenda Morris, Feb. 21, 2009; Declaration of James Goeke, Feb. 23, 2009; Declaration of Nicholas Marsh, Feb. 24, 2009.

[2127] Motion of the United States to Set Aside the Verdict and Dismiss the Indictment with Prejudice at 1 (D.D.C., filed Apr. 1, 2009). Paul O'Brien, then Chief of NDDS, David Jaffe, Deputy Chief of the Domestic Security Section, and William Stuckwisch, a senior trial attorney of the Criminal Fraud Section were assigned to conduct the post-trial litigation in the case after PIN Chief

attorneys interviewed members of the prosecution team in preparing to respond to various defense motions and a possible evidentiary hearing.[2128] Several of the Declarations and witness statements specifically addressed the allegation that the government intentionally withheld the Land Rover check from the defense.[2129]

In his Declaration of February 20, 2009, AUSA Bottini stated that the government produced to the defense "a substantial number of bank account records" in pretrial discovery, and he assumed Allen's bank account records were included in the production.[2130] Bottini stated: "While the Allen bank account records were obviously in the government's possession, I did not recall before trial that we had obtained these records and I also do not recall ever seeing a copy of the 'Allen' check before trial."[2131] AUSA Bottini explained what happened at trial:

> Allen was cross examined about the purchase price of the Land Rover and the defense introduced documents which purported to show that the Land Rover may have been purchased for an amount less than what Allen recalled. Before Allen's re direct examination, I believe either agent Joy or agent Kepner provided me with a copy of a check from Allen's account (the "Allen check") which showed that Allen had, in fact, paid approximately $44,000 for the vehicle.[2132]

Welch, PIN Principal Deputy Chief Morris, and the other attorneys in the Criminal Division were held in contempt on February 13, 2009.

[2128] Motion of the United States to Set Aside the Verdict and Dismiss the Indictment with Prejudice at 1 (D.D.C., filed Apr. 1, 2009). In February and March 2009, members of the original prosecution team were interviewed in preparation for litigation on the pending defense motions, and where appropriate, to supplement their previously prepared affidavits. Present at each interview were FBI agents and NDDS Chief O'Brien. Each interview was summarized in an FBI 302. The accounts in the FBI 302s of the circumstances surrounding the introduction of the Land Rover check into evidence are generally consistent with what the witnesses and subjects told OPR. They are cited herein to the extent they are inconsistent or contain information not contained elsewhere.

[2129] Declaration of James Goeke, Feb. 23, 2009; Declaration of Joseph Bottini, Feb. 20, 2009; Affidavit of SA Kepner, Feb. 20, 2009.

[2130] Declaration of Joseph Bottini, Feb. 20, 2009, ¶¶ 16, 19, 20. Although the Declaration stated that Bottini signed it on February 20, 2008, the date on the document appears to be a mistake as the document addresses events that took place after February 2008.

[2131] Declaration of Joseph Bottini, Feb. 20, 2009, ¶ 17.

[2132] Declaration of Joseph Bottini, Feb. 20, 2009, ¶ 18.

AUSA Bottini stated that it was only after Allen's testimony concluded that he learned that Allen's bank records had not been produced in discovery.[2133] According to Bottini:

> [T]he Allen check was simply not something that had been "flagged" as significant to the government's case because the issue relating to the automobile transaction had always been viewed as the value of the 1964½ Mustang that Senator Stevens had traded to Allen for the Land Rover not the value of the Land Rover. . . .[I]t did not appear that the purchase price of the Land Rover was even going to be an issue until it came up during Allen's cross examination. . . . No one on the trial team had considered that there would be any serious question about that, and for this reason, the 'Allen check' was simply not something that had been considered as a government exhibit.[2134]

SA Kepner characterized the failure to disclose the check to the defense as "unintentional error."[2135] In her February 20, 2009 affidavit, SA Kepner stated: "Not all of Allen's bank account records were produced as part of the discovery to the defense because they did not contain information relevant to the charges and they did not contain exculpatory information."[2136] SA Kepner stated further: "Although the $44,000 check was referenced in my search warrant affidavit that was produced to the defense, the check was inadvertently not produced and should have been included in our discovery."[2137] Significantly, one of Kepner's January 2009 draft affidavits contained the following statement: "*I* did not include all of Allen's bank account records as part of the discovery to the defense because *I* did not believe they contained information relevant to the charges and did not contain exculpatory information."[2138]

[2133] Declaration of Joseph Bottini, Feb. 20, 2009, ¶¶ 19, 20.

[2134] Declaration of Joseph Bottini, Feb. 20, 2009, ¶ 20.

[2135] Affidavit of SA Kepner, Feb. 20, 2009, ¶ 20.

[2136] Affidavit of SA Kepner, Feb. 20, 2009, ¶ 20.

[2137] Affidavit of SA Kepner, Feb. 20, 2009, ¶ 20.

[2138] Eight-page Draft Affidavit of SA Kepner marked PIN0667-PIN0674 at ¶ 13, January 2009 (emphasis added). The fact that SA Kepner's draft affidavit indicates that it was she who determined that the check was not inculpatory and thus not required to be disclosed in discovery to the defense relates to a broader problem: That of the prosecutors assigning the agents the task

AUSA Goeke asserted in his February 23, 2009 Declaration that the first time he became aware of the Land Rover check was during trial when, while at the PIN offices working on motions, he received a call from an agent who was at the courthouse asking him to locate the check in a specific folder.[2139] Goeke did not recall who called to ask him to look for the check, but said that it was "clear to me at the time that the person calling me was simply relaying the request for someone else."[2140] Goeke said that SA Joy was with him when he was asked to look for the check.[2141] Goeke stated: "Ultimately, I located a photocopy of the check in a folder."[2142] Goeke also recalled that he noticed that the copy of the check he located did not have a Bates number on it and believed that he told the person who called, "if [the check] was to be used at trial, a copy with a bates number needed to be located."[2143]

AUSA Goeke stated that he did not know why the check had not been produced in discovery, but was "unaware of any one on the government trial team making an affirmative decision to suppress the check at issue from the defense."[2144] Rather, he believed "the existence of the check for the Land Rover was forgotten or overlooked during the discovery process"; "otherwise [it] . . . would have been produced in discovery because the check was helpful to the government."[2145]

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of the *Brady/Giglio* review without sufficient direction or supervision.

[2139] Declaration of James Goeke, Feb. 23, 2009, ¶ 22.

[2140] Declaration of James Goeke, Feb. 23, 2009, ¶ 23.

[2141] Declaration of James Goeke, Feb. 23, 2009, ¶ 23.

[2142] Declaration of James Goeke, Feb. 23, 2009,¶ 22; Feb. 24, 2009 FBI 302 of AUSA Goeke at 4. During our investigation we were unable to resolve who physically located the check in the PIN offices during trial. Although AUSA Goeke recalled finding a copy of the check, so did SA Herrett. SA Herrett said that she was in the PIN offices when the issue of the Land Rover check came up during Allen's cross-examination and that she, SA Bateman, SA Roberts, SA Kepner and others looked for documents pertaining to the value of the Land Rover. SA Herrett said that she remembered that she found a check and believed it was for the price of the Land Rover. Mar. 16, 2009 FBI 302 of SA Herrett at 9. SA Joy also recalled that it was Herrett who found the check. Feb. 21, 2009 FBI 302 of SA Joy at 4. PIN attorney Sullivan recalled that AUSA Goeke helped look for the check and that AUSA Goeke found a copy of the check or SA Kepner had a copy of check. Sullivan OPR Tr. Mar. 12, 2010 at 536.

[2143] Declaration of James Goeke, Feb. 23, 2009, ¶ 7.

[2144] Declaration of James Goeke, Feb. 23, 2009, ¶ 7.

[2145] Declaration of James Goeke, Feb 23, 2009, ¶ 6.

Although the government originally asserted that it did not disclose the Land Rover check prior to trial because the check was not going to be used in the government's case in chief, the majority of the prosecution team was not aware that the government had the check when the government's discovery was produced and when trial started. AUSA Bottini told OPR that he did not recall being aware that the prosecution had the check before trial and did not recall having seen it.[2146] PIN attorney Marsh told OPR that he "didn't realize we had [the check]" as the trial approached.[2147] PIN Attorney Sullivan told OPR: "I didn't even think about the Bill Allen checks until this whole Land Rover check issue came up [at trial]."[2148] SA Joy said that he first learned of Allen's bank records during the trial when Allen was testifying.[2149]

PIN attorney Marsh recalled that he realized during Allen's testimony that the check for the Land Rover would have been useful, and began wondering why the government had not collected Allen's bank records during the investigation.[2150] He stated further that he had been unaware that the government had subpoenaed and possessed Allen's bank records, including the check.[2151] He recalled that the

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[2146] Bottini OPR Tr. Mar. 10, 2010 at 371-372. OPR's review of a box found in the "Polar Pen War Room" at the U.S. Attorney's Office in Alaska yielded three versions of a typed outline, prepared by AUSA Bottini, for the examination of Allen. The first version of the outline is dated September 1, 2008, and contained a section entitled, "The 1999 Vehicle Transfer - New Land Rover for Mustang and Cash," with questions addressing how the proposal to exchange the vehicles arose, how the transfer was actually made, and what Allen did with the Mustang once he obtained it. The second version is dated September 12, 2008 and contained the same section with the same typed questions and statements, plus two additional questions concerning whether Allen and Stevens made another trade agreement concerning the Mustang and guns. The September 12, 2008 version of the outline also contained several handwritten notes in red, blue, and black ink, including what appear to be answers to some of the questions set forth in the outline. The third and final version of the outline, dated September 24, 2008, included additional questions about the Land Rover/Mustang exchange, and incorporated many of the handwritten notes on the September 12, 2008 outline. It also included a note in blue ink with a square drawn at the end of the section that reads, "Need 44K check for Land Rover." AUSA Bottini told OPR that he prepared the outline for his examination of Bill Allen and that he used it for the final preparation sessions with him, updating it as the trial date approached. Bottini stated that he used the September 24, 2009 version of the outline during trial, and wrote the words "Need 44K check for Land Rover" on the outline during trial after he was told by SA Kepner or PIN Attorney Marsh that the government had the check. Bottini OPR Tr. Mar. 10, 2010 at 309, 362.

[2147] Marsh OPR Tr. Mar. 25, 2010 at 377-378.

[2148] Sullivan OPR Tr. Mar. 12, 2010 at 537.

[2149] Feb. 21, 2009 FBI 302 of Joy at 3.

[2150] Feb. 23, 2009 FBI 302 of Marsh at 10.

[2151] Feb. 23, 2009 FBI 302 of Marsh at 10.

next morning, SA Kepner found the check and brought it to him.[2152] Marsh also said he did not realize that the check had not been turned over in discovery, as the check had been referenced in the search warrant and, in his view, should have been disclosed.[2153]

Marsh admitted to OPR, however, that he was "principally involved" in drafting the *Stevens* search warrant affidavit, which referenced the existence of bank records reflecting the purchase price of the Land Rover, and that he had now "been able to determine" that he knew about the check "at some point."[2154] However, Marsh did not believe that he ever saw the check prior to trial because if he had, he said he would have put the specific amount of the check in the affidavit.[2155] Marsh guessed that Kepner told him she had found the check and he relied on her to tell him the approximate amount.[2156] AUSA Bottini said he did not have a role in writing the *Stevens* search warrant affidavit or the prosecution memorandum.[2157]

According to AUSA Bottini, the focus of the 1999 Land Rover/Mustang exchange had been the value of the Mustang, not the value of the 1999 Land Rover.[2158] PIN attorney Sullivan told OPR that no one thought the value of the Land Rover was being challenged and that the issue was always about the value of the Mustang because it was vintage.[2159] Marsh told OPR: "We always knew. I mean, I think collectively, everybody knew that Allen had told us that he thought he paid $44,000 for the thing. We put that in the indictment."[2160] Marsh also agreed that it was fair to say that the trial team thought the issue was the valuation of the Mustang and not until the value of the Land Rover came up did

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[2152] Feb. 23, 2009 FBI 302 of Marsh at 11.

[2153] Feb. 23, 2009 FBI 302 of Marsh at 11.

[2154] Marsh OPR Tr. Mar. 25, 2010 at 378-379.

[2155] Marsh OPR Tr. Mar. 25, 2010 at 379.

[2156] Marsh OPR Tr. Mar. 25, 2010 at 379.

[2157] Bottini OPR Tr. Mar. 10, 2010 at 373.

[2158] Bottini OPR Tr. Mar. 10, 2010 at 360.

[2159] Sullivan OPR Tr. Mar. 12, 2010 at 539.

[2160] Marsh OPR Tr. Mar. 25, 2010 at 382.

the government focus on how much the Land Rover cost and the check that Allen wrote for it.[2161]

Marsh agreed that in preparing for trial "in a normal case" it "would have been standard to have an order of proof" and to look for all of the documents you are going to use with each witness.[2162] Marsh admitted that no order of proof was done in the *Stevens* case, stating, that the trial team "didn't have time in this case to do it."[2163]

AUSA Bottini said that after the defense introduced the Land Rover sticker price into evidence at trial, either Kepner or Marsh leaned over to him and said, "You know, we've got that check, we need to introduce it."[2164] Marsh said that he thinks he "learned during the incident or in the aftermath" that Kepner had the check in a folder that she was carrying with her.[2165] [redacted] the litigation support manager at the U.S. Attorney's Office in Alaska, recalled that it was Kepner who called and asked [redacted] to review the discovery sent out from the office to see if a check to a car company had been included.[2166] SA Kepner said that when the check became an issue at trial, she asked the agents to attempt to locate it in the evidence room.[2167]

Despite AUSA Bottini's representation in court on October 8, 2008, that the prosecution was aware of the check and decided not use it, it appears that the prosecution team did not make a conscious decision not to use the check in the government's case in chief. AUSA Bottini told OPR that on October 7, 2008, he asked Marsh and SA Kepner why the check had not been disclosed in discovery, and was told, he believed by Marsh, that the check was not considered "material" to the government's case in chief.[2168] Bottini also said that he was "not sure" that

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[2161] Marsh OPR Tr. Mar. 25, 2010 at 388.

[2162] Marsh, OPR Tr. Mar. 25, 2010 at 383-384.

[2163] Marsh, OPR Tr. Mar. 25, 2010 at 383-384.

[2164] Bottini OPR Tr. Mar. 10, 2010 at 361.

[2165] Marsh OPR Tr. Mar. 25, 2010 at 379.

[2166] [redacted] OPR Tr. Aug. 19, 2009 at 52.

[2167] Feb. 25, 2009 FBI 302 of Kepner at 23.

[2168] Bottini OPR Tr. Mar.10, 2010 at 365-366.

there was a conscious decision not to turn over the bank records.[2169] Bottini opined, "I think this is something that people just didn't think about."[2170]

Contrary to the implication in his Complaint, SA Joy told interviewers that it was not his impression that the prosecution team had intentionally attempted to hide the document, but, "for whatever reason," had decided not to produce it prior to trial.[2171] Joy also said that it was possible that the check was missed or simply forgotten about and that he did not recall any discussions about using the check during pretrial preparation.[2172] AUSA Bottini also said that the check was not discussed during trial preparation with Allen.[2173]

Bill Allen told OPR that he did not see the check prior to trial and was not told prior to trial that he would be shown the check at trial.[2174] Allen said that the prosecutors had said nothing to him to indicate that they had the check and that he therefore called SA Kepner to tell her about the check and the added options.[2175]

AUSA Bottini denied attempting to "sandbag" the defense with the check, and said that the check would have been helpful to the prosecution's case. Bottini told OPR that having the check "would certainly have helped" prove the value of the Land Rover on direct examination.[2176] We found that the evidence supported the prosecution team's assertion that the government overlooked the Land Rover check, and thus had not intended to use it in its case in chief.

Although the attorneys on the trial team maintained that they were not aware, or did not recall, that the government possessed the check at the beginning of trial, once they became aware of the check they assumed a copy of it was part of the discovery that had been turned over to the defense. PIN attorney Sullivan

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[2169] Bottini OPR Tr. Mar.10, 2010 at 365-366.

[2170] Bottini OPR Tr. Mar.10, 2010 at 365-366.

[2171] Feb. 21, 2009 FBI 302 of SA Chad Joy at 4.

[2172] Feb. 21, 2009 FBI 302 of SA Chad Joy at 4.

[2173] Feb. 24, 2009 FBI 302 of AUSA Bottini at 11.

[2174] Jun. 12, 2010 FBI 302 of Bill Allen at 8.

[2175] Jun. 12, 2010 FBI 302 of Bill Allen at 9.

[2176] Bottini OPR Tr. Mar. 10, 2010 at 366.

shared that view.[2177] PIN attorney Marsh said that he had "a vague memory that I actually thought at some point that they [Allen's bank records] had or that they would have been in the electronic stuff that went over."[2178] AUSA Bottini told OPR that he believed that the check had been produced in discovery.[2179]

As noted earlier, the general file keeping in the *Stevens* case was disorganized. For example, we found no discovery log, correspondence file, or pleadings file. (Bottini told OPR that he did not know who kept a discovery log.)[2180] Parts of the discovery production were handled by the U.S. Attorney's Office in Alaska, and other parts by PIN in Washington, D.C.; no one office or person was in charge.[2181] AUSA Goeke also indicated that no one person had been tasked with coordinating evidence and discovery: "In my opinion, due to the volume of materials involved in the *Stevens* case, no single member of the trial team was familiar and knowledgeable about every piece of evidence and discovery in the case."[2182]

Criminal Division Appellate Section attorney Liza Collery, who was assigned to the case in December 2008 to assist with litigation on the pending defense motions and with preparing the anticipated post trial appeal, interviewed the members of the prosecution team in December 2008 and January 2009.[2183] According to the FBI 302 of her March 2009 interview, Collery said, "Kepner took the blame[,] explaining she felt it was inculpatory and she did not understand the obligation to turn it over. Nobody believed the check would ever become an issue at trial."[2184]

[2177] Sullivan OPR Tr. Mar. 12, 2010 at 538.

[2178] Marsh OPR Tr. Mar. 25, 2010 at 387.

[2179] Bottini OPR Tr. Mar. 10, 2009 at 376.

[2180] Bottini OPR Tr. Mar. 10, 2009 at 364. From OPR's investigation, it appears that no discovery log was ever created.

[2181] Marsh (Schuelke) Tr. Feb. 2, 2010 at 39, 42, 44; Feb. 24, 2009 FBI 302 of AUSA Goeke at 4.

[2182] Declaration of James Goeke, Feb. 23, 2009, ¶¶ 7, 22.

[2183] Mar. 17-18, 2009 FBI 302 of Liza Collery at 1-3.

[2184] Mar. 17-18, 2009 FBI 302 of Liza Collery at 12-13.

V. ANALYSIS

The court concluded that the $44,339.51 Land Rover check was material to the preparation of the defense and should have been produced to the defendant pursuant to Federal Rule of Criminal Procedure 16. Judge Sullivan commented that had the check been disclosed, the defense would not have sought to impeach Allen on the value of the Land Rover: "They wouldn't have gone in that area had they had that check."[2185] Although the prosecution originally argued that it was not required to disclose the check because it had not intended to use it in its case in chief and that it was not material to the preparation of the defense, the government ultimately conceded that the failure to produce the check in discovery was an "error" pursuant to Rule 16(a)(1)(E)(i).

Based on the results of our investigation, we concluded that the government's failure to produce the check to the defense in pretrial discovery was arguably a violation of Rule 16(a), but concluded that the prosecutors did not engage in professional misconduct or exercise poor judgment. We concluded, further, that the government violated Rule 16(c) by failing to timely disclose the Land Rover check after they found it, when Allen was still being cross examined. They instead waited until Allen's redirect examination to disclose it. However, we did not find the prosecution team's failure to timely disclose the Land Rover check to constitute professional misconduct. We found no evidence that the prosecution intentionally concealed the check from the defense, or acted in reckless disregard of their discovery obligations. We also concluded that the prosecution did not deliberately withhold the check until Allen's redirect examination so it could ambush the defense with strong evidence that corroborated Allen's testimony and improved Allen's image in the minds of the jurors.

A. Rule 16 Standards

Federal Rule of Criminal Procedure 16 governs discovery in criminal cases, and provides, in pertinent part, that upon a defendant's request, "the government must permit the defendant to inspect and to copy . . . documents . . . within the government's possession custody, or control" if the document is "material to preparing the defense" or if "the government intends to use the item in its case in chief at trial." If the defendant makes a Rule 16 request and the government complies, "then the defendant must permit the government, upon request, to inspect and to copy . . . documents . . . within the defendant's possession, custody, or control" if "the defendant intends to use the item in the defendant's case in chief at trial." The duty to disclose is continuing: "A party who discovers

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[2185] *United States v. Stevens*, Tr. Oct. 8, 2008 (am) at 5.

additional evidence or material before or during trial must promptly disclose its existence to the other party or the court." Fed. R. Crim. P. 16(a) (c).

In the present case, the defense made a discovery request on August 1, 2008, that encompassed Rule 16 materials, and specifically identified "documents reflecting or relating to the valuation of items or services that the indictment alleges the defendant received and did not report on his Senate Financial Disclosure Forms."[2186] The indictment identified the Land Rover as one of the things of value Stevens received that was not reported on the Senate Financial Disclosure Forms. The Land Rover check was in the "government's possession, custody, and control," and it reflected or related to the valuation of the Land Rover. Thus, as the government did not plan to use the check in its case in chief, the government was required to disclose the Land Rover check under Rule 16 only if the check was "material to preparing the defense."

Federal Rule of Criminal Procedure 16 does not define "material" or address what it means for evidence to be "material to preparing the defense." The United States Court of Appeals for the District of Columbia Circuit has held that evidence is considered material under Rule 16 "as long as there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal." *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) (citing *Caicedo Llanos*, 960 F.2d 158, 164 n.4 (D.C. Cir. 1992)). The court observed that "[t]his materiality standard normally 'is not a heavy burden.'" *Id.* (internal citations omitted). In *Caicedo Llanos*, the court noted that the materiality element required that the evidence bear "some abstract logical relationship to the issues in the case" and that there be "some indication that the pretrial disclosure of the disputed evidence would [enable] the defendant significantly to alter the quantum of proof in his favor." *Caicedo Llanos*, 960 F.2d at 164 n.4; *see United States v. Graham*, 83 F.3d 1466, 1473 74 (D.C. Cir.1996) (same).

In *United States v. Marshall*, 132 F.3d 63, 67 (D.C. Cir. 1998), the D.C. Circuit held that inculpatory, as well as exculpatory, evidence could be material to the preparation of the defense: "[I]nculpatory evidence, after all, is just as likely to assist in 'the preparation of the defendant's defense' as exculpatory evidence." The court noted that "'[t]he phrase authorizes defendants to examine government documents material to the preparation of their defense against the Government's case in chief." *Marshall*, 132 F.3d at 67 n.1. The *Marshall* court reasoned that the defendant's possession of inculpatory evidence prior to trial may allow him to "'alter the quantum of proof in his favor' in several ways: by preparing a strategy to confront the damaging evidence at trial; by conducting an investigation to

[2186] Aug. 1, 2008 letter from defense counsel to PIN attorney Marsh at 3-5.

attempt to discredit that evidence; or by not presenting a defense which is undercut by such evidence." *Marshall*, 132 F.3d at 68.

Construing the totality of the phrase, "material to preparing the defense," as used in Rule 16,the court stated that "it is just as important to the preparation of a defense to know its potential pitfalls as it is to know its strengths." *Marshall* 132 F.3d at 67. The *Marshall* court saw "no reason why inculpatory evidence could not serve the functions mentioned in *Lloyd* as well as exculpatory evidence." *Id.* at 68.

B. <u>Disclosure Obligations</u>

1. <u>Rule 16 (a)(1)(E)(i)</u>

The facts in this matter are similar to those in *Marshall*. As in *Marshall*, the disputed evidence tended to inculpate rather than exculpate the defendant. To the extent the Land Rover check established that the Land Rover was worth more than the Mustang plus $5,000, Senator Stevens had an obligation to report that (assuming the difference was greater than $260). Hence, under the logic of the *Marshall* decision, the Land Rover check was arguably material to the preparation of the defense. As Judge Sullivan noted, if the defense had known that the prosecution had objective evidence of the value of the Land Rover, it may have spent its resources on other aspects of the defense rather than challenge Allen's recollection of what he paid for the Land Rover.

On the other hand, the *Marshall* court recognized that the materiality of evidence from the defense's perspective is not always obvious to a prosecutor prior to trial, noting that a prosecutor is not required to speculate as to the materiality of evidence based on unknown defense strategies. Thus, the *Marshall* court ruled that "[t]o give rise to a disclosure obligation, the evidence's materiality must, of course, be evident to a reasonable prosecutor." *Marshall*, 132 F.3d at 69 n.2.

Members of the prosecution team asserted that the government had not viewed the Land Rover check as "material to the preparation of the defense" because the government was not aware that the defense intended to challenge the purchase price of the Land Rover. In its opening statement, the prosecution said that the "unpaid financial benefits that the defendant received from 1999 through 2006" included "a sweetheart trade" in which the defendant received "for his 34 year old Mustang, [which] was not in mint condition, and $5,000 . . . a brand new Land Rover Discovery that was worth $44,000." The defense stated in its opening that Stevens believed "the trade was absolutely fair for that car," but gave no indication that the jury should not believe that the Land Rover was worth $44,000.

The email exchanges between the prosecution and the defense on the evening of October 7, 2008, demonstrate that the defense did not produce to the prosecution prior to trial the vehicle invoice and sticker price it used to cross examine Allen on the value of the Land Rover. AUSA Bottini stated in his email response to the defense's query about whether the Land Rover check had been disclosed in discovery: "We were *surprised* by these *new exhibits,* as we had not seen them prior to the cross examination."[2187] Bottini also represented to the court that the check was used on Allen's redirect examination "to rebut the *new records* used by defendant."[2188] These contemporaneous exchanges support the contention that the government was not aware that the defense intended to use the sticker price and the invoice at trial.[2189]

Additionally, the evidence supported the prosecutors' assertions that the focus in developing evidence had been the value of the Mustang, not the value of the Land Rover. Numerous email exchanges and documents, dated as early as May 2007 and as late as October 7, 2008, addressed the year, condition, and valuation of the Mustang. But we found no discussion of the value of the Land Rover at the time it was traded for the Mustang. Also, in assisting PIN Principal Deputy Chief Morris prepare the opening statement, PIN attorney Marsh suggested in a September 17, 2008 email that she add language informing the jurors that they would "probably hear a lot about the value of that [M]ustang" from a "number of witnesses."[2190] Marsh made no suggestions for how to address the value of the Land Rover, however.

These circumstances distinguish the present case from *Marshall,* where it was readily foreseeable to a reasonable prosecutor that evidence linking the defendant to a pager used in controlled drug transactions with a confidential informant was material to the defendant's preparation of his defense. Here, the

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[2187] Oct. 7, 2008 11:00pm email from AUSA Bottini to Judge Sullivan, Judge Sullivan's clerk, PIN Principal Deputy Chief Morris, PIN attorney Marsh, PIN attorney Sullivan, AUSA Goeke, and defense counsel (emphasis added).

[2188] Oct. 7, 2008 11:00pm email from AUSA Bottini to Judge Sullivan, Judge Sullivan's clerk, PIN Principal Deputy Chief Morris, PIN attorney Marsh, PIN attorney Sullivan, AUSA Goeke, and defense counsel.

[2189] In his October 7, 2008 email to defense counsel, AUSA Bottini indicated that the defense should have disclosed the Land Rover sticker price and invoice to the government prior to trial in response to one of the government's "repeated requests for reciprocal discovery production." Although AUSA Bottini did not identify any specific requests, we noted that the government requested reciprocal discovery from the defense pursuant to Rule 16 at least twice in letters dated August 4, 2008 and September 2, 2008.

[2190] Sept. 17, 2008 3:49pm email from PIN attorney Marsh to PIN Principal Deputy Chief Morris.

defense never indicated that it would challenge the value of the Land Rover, and the prosecutors had a reasonable basis for believing that the defense would focus on the more difficult to prove value of the Mustang. Thus, it is understandable that the prosecutors did not think about the Land Rover check as something that could enable the defendant to "significantly to alter the quantum of proof in his favor" by "preparing a strategy to confront the damaging evidence at trial; by conducting an investigation to attempt to discredit that evidence; or by not presenting a defense which is undercut by such evidence." *Marshall*, 132 F.3d at 68.

For the reasons stated above, we concluded that the materiality element of Rule 16 was not clearly and unambiguously applicable to the Land Rover check. Consequently, although it can be argued that the government violated Rule 16(a), we concluded that the evidence did not support a finding of professional misconduct against any member of the prosecution team. Further, under the circumstances described above, we found that the prosecution team did not exercise poor judgment, although it appears, once again, that the team was not sufficiently aware of its own evidence.

2. Rule 16(a)(1)(E)(ii)

Based on the results of our investigation, we concluded that the prosecution team did not intend to use the Land Rover check in its case in chief, and thus did not violate Rule 16(a)(1)(E)(ii). We credited the prosecutors' assertions that they did not believe the defense would challenge the valuation of the Land Rover, and that they were not aware of (or had forgotten) the Land Rover check. Their focus was on the value of the Mustang, not the Land Rover; the prosecution team did not consider the check until the purchase value of the Land Rover was challenged by the defense.

We also noted that the pretrial conduct of the trial team did not suggest that the government was aware of the check immediately prior to trial. AUSA Bottini's notes and typewritten outlines for the direct examination of Bill Allen contained no references to the check. With the exception of the entry "Need 44K check for Land Rover" on page 25 of the September 24, 2008 outline, which Bottini explained was added during trial, Bottini's handwritten notes in the margins of his examination outlines do not refer to the check either. Finally, Allen told OPR that he never discussed the check with prosecutors during trial preparation sessions, and that the first time he saw the check in connection with the trial was when AUSA Bottini used it during Allen's redirect examination. These circumstances, coupled with the fact that Bottini and others on the trial team conceded that the check would have been helpful to the prosecution, led us to conclude that the government had not intended to rely on the check in its case in chief.

3. Rule 16(c)

Rule 16(c) requires a party who discovers additional evidence or material during trial to "promptly" disclose its existence to the opposing party if it is subject to discovery under Rule 16, and the other party requested it. Once the defense challenged the value of the Land Rover during Allen's cross examination, the government arguably had a duty to disclose the check to the defense immediately pursuant to Rule 16(c), because the materiality of the check was arguably evident to the reasonable prosecutor. *See Marshall*, 132 F.3d at 67.

The evidence shows that, upon locating the check, the government did not immediately disclose the check to the defense, while Allen was still being cross examined, but rather waited until Allen's redirect examination. AUSA Bottini conceded to OPR that he probably first came into contact with the check the evening of the day before the check was admitted into evidence, well before the cross examination of Allen concluded.[2191]

Several members of the prosecution team, including AUSA Bottini, explained that they did not know that the check had not previously been disclosed to the defense. However, the government's poor organization and record keeping regarding discovery does not absolve it of the requirement to meet its discovery obligations. Because the materiality of the check became apparent during the cross examination of Bill Allen, the government violated Rule 16(c) by failing to disclose it to the defense immediately upon locating it during Allen's cross examination, rather than waiting until Allen's redirect examination.

AUSA Bottini, who handled Allen as a witness, was primarily responsible for the failure to timely disclose the Land Rover check after it was found. We concluded, however, that he did not engage in professional misconduct. First, we found no evidence that he acted with the purpose of violating the government's disclosure obligations, and thus concluded that he did not commit intentional professional misconduct. Second, his failure to appreciate the need to disclose the Land Rover check to the defense before the cross examination of Allen was completed did not represent a gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation. The check was found at night, after trial. Under the reasoning of the *Marshall* case, Bottini should have provided the Land Rover check to the defense the following morning, before the cross examination of Allen resumed. We note, however, that Bottini was not familiar with the unique parameters of the *Marshall* decision, which was not the law in Alaska. Thus, his intent to use the Land Rover check to rehabilitate his witness did not appear to implicate any Rule 16 obligations.

[2191] Bottini OPR Tr. Mar. 10, 2010 at 362, 374-376.

Further, Bottini did provide the Land Rover check to the defense before he began the redirect examination, and the defense did not object to the admission of the check into evidence.

Finally, we considered whether Bottini exercised poor judgment on this issue. An attorney exercises poor judgment when, faced with alternative courses of action, he or she chooses a course of action that is in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take. We did not find that Bottini exercised poor judgment because he did not understand the issue to be a choice between immediate disclosure and disclosure before beginning his redirect. Thus, we concluded that he did not choose a course of action that was in marked contrast to one an attorney exercising good judgment would be expected to take. Rather, he made a mistake by not advising the defense before they resumed cross examining Allen that the Land Rover check had been found.

4. D.C. Rule of Professional Conduct 3.4(d)

We considered whether the prosecution team violated D.C. Rule of Professional Conduct 3.4(d), which provides that an attorney shall not "fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party." The defense's August 1, 2008 request for "documents reflecting or relating to the valuation of the items . . . that the indictment alleges the defendant received" was clearly proper. Thus, the issue is whether the prosecution made reasonably diligent efforts to comply with that request.

In response to the defense's Rule 16 discovery request, on August 7, 2008, the prosecution provided the defense with a 500 gigabyte hard drive with "documents, recordings, and other media" that the prosecution indicated included "Rule 16 discovery."[2192] The prosecution also provided the defense with compact disks and hard copy documents of Rule 16 discovery on August 15, 2008.[2193] On August 19, 2008, prosecutors informed defense counsel: "It appears that material covered by Rule 16 has been produced," indicated that agents were "double checking," and to the extent any material covered by Rule 16 had been "inadvertently overlooked," the government would produce it immediately.[2194]

As addressed above, the prosecutors reasonably did not appreciate that the check was material to the preparation of the defense because it was not evidence

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[2192] Aug. 8, 2008 letter from PIN attorney Marsh to defense counsel.

[2193] Aug. 15, 2008 letter from PIN attorney Sullivan to defense counsel.

[2194] Aug. 19, 2008 6:42pm email from PIN attorney Sullivan to defense counsel.

that would obviously increase or enhance the proof that was favorable to the defendant. We also credited prosecutors' assertions that the government did not intend to use the check in its case in chief. Consequently, under the circumstances, we did not conclude that the failure to produce the Land Rover check violated the government's duty of diligence.

CHAPTER TEN
THE MISSING GRAND JURY TRANSCRIPTS

I. INTRODUCTION AND SUMMARY

On October 2, 2008, as a result of the court's ruling that the government had violated its *Brady* obligations with respect to the Pluta 302 (*see* Chapter Four, *supra*), the court ordered the government to produce to the defense all the FBI 302s and memoranda of interviews, as well as grand jury transcripts. Over the next two days, the prosecution team made four productions of grand jury transcripts to the defense.

On October 5, 2008, the defense expressed concern that the production of grand jury transcripts was incomplete: one transcript of SA Kepner's testimony to the D.C. grand jury indicated that she had testified previously before that grand jury, but the productions had not included an earlier transcript of Kepner testimony before the D.C. grand jury. The prosecution team determined that there was an additional transcript Kepner's testimony to the grand jury on April 25, 2007 that it did not have in its possession. The government procured a copy of the transcript from the court reporting service and provided it to the defense the next day, October 6.

The defense argued that the April 25, 2007 transcript contained exculpatory information because Kepner had testified that Bill Allen blamed himself for not billing Senator Stevens for repair work, and for not "follow[ing] through with the invoice for Senator Stevens when [Stevens] asked for the renovations invoice." Thus, the defense argued that the government had again violated its *Brady* obligations. When the court dismissed the government's case on April 7, 2009, it referred to the government's failure to produce "a critical grand jury transcript containing exculpatory information."[2195] That reference appears to be to the April 25, 2007 transcript of SA Kepner's testimony.

On December 2, 2008, the defense informed the prosecution that further review of the transcripts suggested that additional Kepner grand jury testimony had not been disclosed. Prosecutors found that a second transcript from the D.C. grand jury, from April 27, 2007, was also missing. The prosecution procured a copy of the transcript from the court reporting service and provided it to the defense the following day. The defense did not claim that the second transcript contained *Brady* material.

[2195] *United States v. Stevens*, Tr. Apr. 7, 2009 (am) at 5.

Based on the results of our investigation, we concluded that the government's failure to timely disclose the April 25 and April 27, 2007 grand jury testimony of SA Kepner was, as the government asserted, inadvertent. The court reporting service, pursuant to its custom, had sent the transcripts to a local Assistant U.S. Attorney who had briefly been assigned to attend the grand jury proceedings, but who had long since left both the case and the Department of Justice. Upon learning of the additional transcripts, the prosecution team took prompt steps to procure and disclose them. It appears that the April 25, 2007 transcript did contain *Brady* information, but we found no evidence that any member of the prosecution team (other than SA Kepner) knew of the transcript. Furthermore, given the unique circumstances that led to the prosecution team not possessing the transcripts, we concluded that the failure to produce the transcripts was inadvertent, and no prosecutor acted improperly, committed professional misconduct, or exercised poor judgment in connection with the failure to disclose the transcripts.

II. FACTUAL BACKGROUND

A. The District Court Orders Production of Grand Jury Transcripts

On Thursday, October 2, 2008, the court heard argument on the defense emergency motion to dismiss the case based on the government's alleged "continuing *Brady* violations."[2196] The defense asserted that the case should be dismissed because it had just received two FBI 302s containing *Brady* material that should previously have been produced.[2197] The government's September 9, 2008 *Brady* letter had stated that Bill Allen "believed the defendant would not have paid the actual costs incurred by VECO."[2198] However, the defense argued, the recently disclosed FBI 302s were "absolutely 100 percent opposite."[2199] The court determined that there had been a *Brady* violation.[2200] Although the court declined to dismiss the case, the court directed the government to produce for the defense all the FBI 302s and memoranda of interviews that it had, as well as all grand jury transcripts.[2201]

[2196] Senator Stevens's Emergency Motion to Dismiss Case or For a Mistrial Due to Government's Continuing *Brady* Violations (D.D.C., filed Oct. 2, 2008).

[2197] *United States v. Stevens*, Tr. Oct. 2, 2008 (pm) at 3-5.

[2198] *United States v. Stevens*, Tr. Oct. 2, 2008 (pm) at 4.

[2199] *United States v. Stevens*, Tr. Oct. 2, 2008 (pm) at 4.

[2200] *United States v. Stevens*, Tr. Oct. 2, 2008 (pm) at 51.

[2201] *United States v. Stevens*, Tr. Oct. 2, 2008 (pm) at 51-53.

B. The Production of Grand Jury Transcripts

According to AUSA Bottini, after the court's order, he and AUSA Goeke were asked by PIN Principal Deputy Chief Morris to go through the Polar Pen grand jury transcripts and produce those that were relevant to the *Stevens* case.[2202] In preparing the production, he and Goeke reviewed the transcripts in the PIN offices. The prosecution team had received electronic copies of the Alaska grand jury transcripts from the court reporting service, and Bottini had an Alaska grand jury transcript directory.[2203] This allowed him to review the transcripts on screen, search for "Stevens" electronically, and print out the relevant transcripts at the PIN office.[2204]

Bottini said that the D.C. grand jury transcripts were all in hard copy, and that he and Goeke had to read through them and decide whether they were relevant.[2205] However, because all of the D.C. grand jury transcripts related to the *Stevens* case (as opposed to other Polar Pen cases), he suspected they were all relevant.[2206] Bottini did not recall how he and Goeke obtained the D.C. grand jury transcripts that they reviewed, and did not recall a log for the D.C. grand jury transcripts.[2207] He did recall that the D.C. grand jury transcripts were "scattered around a little bit" and had not been collected in one spot.[2208] Bottini stated that this was because review of the grand jury transcripts for *Brady* material had been assigned to PIN attorneys who were not on the *Stevens* trial team.[2209] He could not remember whether he and Goeke or a paralegal went around to the various PIN attorneys' offices to collect the transcripts.[2210]

Although he did not recall that anyone was specifically in charge of complying with the court's October 2, 2008 order, AUSA Goeke remembered helping Bottini review several grand jury transcripts "to make sure we got all the

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[2202] Bottini OPR Tr. Mar. 10, 2010 at 353-355.

[2203] Bottini OPR Tr. Mar. 10, 2010 at 354-355.

[2204] Bottini OPR Tr. Mar. 10, 2010 at 355.

[2205] Bottini OPR Tr. Mar. 10, 2010 at 355.

[2206] Bottini OPR Tr. Mar. 10, 2010 at 355.

[2207] Bottini OPR Tr. Mar. 10, 2010 at 356.

[2208] Bottini OPR Tr. Mar. 10, 2010 at 356-357.

[2209] Bottini OPR Tr. Mar. 10, 2010 at 356.

[2210] Bottini OPR Tr. Mar. 10, 2010 at 356-357.

grand jury transcripts handed off."[2211] He also recalled going through the PIN offices "scrambling" to find the transcripts and being told that they were "scattered around" and "could be in the offices of some of the people who are reviewing them."[2212] Goeke stated that he recalled "having a reaction" to learning that PIN attorneys who had no experience on the case had been asked to conduct some of the *Brady* and *Giglio* review.[2213]

On the evening of October 2, 2008, a defense team courier retrieved the government's production of grand jury transcripts for several witnesses.[2214] A 9:30 p.m. email with the subject "Grand Jury Transcripts Produced Evening of 10/02" from AUSA Bottini to the other prosecution team members confirmed that the transcripts were picked up, and listed the names of the witnesses.[2215] Most of the transcripts were of testimony before the Alaska grand jury; none was for the testimony of SA Kepner.[2216]

Over the next two days, AUSA Bottini emailed members of the prosecution team lists of the transcripts given to the defense in a second, third, and fourth production of grand jury transcripts.[2217] The list for the second production included 25 transcripts of SA Kepner's testimony before the Alaska and D.C.

[2211] Goeke (Schuelke) Tr. Jan. 8, 2010 at 172.

[2212] Goeke (Schuelke) Tr. Jan. 8, 2010 at 438-439, 456.

[2213] Goeke (Schuelke) Tr. Jan. 8, 2010 at 455-456.

[2214] Oct. 2, 2008 9:30pm email from Bottini to PIN attorney Sullivan, PIN Principal Deputy Chief Morris, PIN Attorney Marsh, AUSA Goeke.

[2215] Oct. 2, 2008 9:30pm email from Bottini to PIN attorney Sullivan, PIN Principal Deputy Chief Morris, PIN Attorney Marsh, AUSA Goeke. Between October 2 and 4, 2008, Bottini sent four emails to the trial team listing all the grand jury transcripts provided to the defense in each of the four separate productions.

[2216] Oct. 2, 2008 9:30pm email from Bottini to PIN attorney Sullivan, PIN Principal Deputy Chief Morris, PIN Attorney Marsh, AUSA Goeke.

[2217] Oct. 3, 2008 11:04am email from AUSA Bottini to PIN Principal Deputy Chief Morris, PIN attorney Marsh, PIN attorney Sullivan, SA Kepner, SA Joy, and AUSA Goeke ("Second Grand Jury Transcript Production - 10-03-08 REVISED"); Oct. 3, 2008 1:24pm email from AUSA Bottini to PIN Principal Deputy Chief Morris, PIN attorney Sullivan, PIN attorney Marsh, AUSA Goeke, SA Kepner, and SA Joy ("Third Grand Jury Production"); Oct. 4, 2008 7:18pm email from AUSA Bottini to AUSA Goeke, PIN attorney Marsh, PIN Principal Deputy Chief Morris, PIN attorney Sullivan, SA Kepner and SA Joy ("Fourth Production of GJ 10.4.08").

grand juries.[2218] Six of the transcripts were from the D.C. grand jury, and the earliest of the six was from her testimony on May 9, 2007.[2219] According to AUSA Bottini's emails, the third production of transcripts included three of SA Kepner's appearances before the Alaska grand jury, but none from her testimony before the grand jury in D.C. The fourth did not include any transcripts of SA Kepner's grand jury testimony.[2220]

At 1:40 p.m. on October 3, 2008, PIN attorney Sullivan sent an email to defense counsel explaining that the prosecution had an additional set of grand jury materials, believed to be the last, that the defense could pick up: "There is another box of materials that is ready for you. I will leave it with our front desk. We believe this is the last of the grand jury material, but will double check."[2221]

According to defense counsel, on October 4, 2008, the government informed them that it had found two additional grand jury transcripts of testimony from [redacted].[2222] The government also stated that, out of an abundance of caution, it was producing ten other transcripts it believed to be irrelevant to the *Stevens* matter.[2223]

C. The April 25, 2007 Kepner Grand Jury Transcript

The four productions did not include a transcript of SA Kepner's testimony before the D.C. grand jury on April 25, 2007. AUSA Bottini, PIN attorney Sullivan, and AUSA Glen Donath of the U.S. Attorney's Office for the District of Columbia

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[2218] Oct. 3, 2008 11:04am email from AUSA Bottini to PIN Principal Deputy Chief Morris, PIN attorney Marsh, PIN attorney Sullivan, SA Kepner, SA Joy, and AUSA Goeke.

[2219] Oct. 3, 2008 11:04am email from AUSA Bottini to PIN Principal Deputy Chief Morris, PIN attorney Marsh, PIN attorney Sullivan, SA Kepner, SA Joy, and AUSA Goeke.

[2220] Oct. 3, 2008 1:24pm email from AUSA Bottini to PIN Principal Deputy Chief Morris, PIN attorney Sullivan, PIN attorney Marsh, AUSA Goeke, SA Kepner, and SA Joy; Oct. 4, 2008 7:18pm email from AUSA Bottini to AUSA Goeke, PIN attorney Marsh, PIN Principal Deputy Chief Morris, PIN attorney Sullivan, SA Kepner and SA Joy.

[2221] Oct. 3, 2008 1:40pm email from PIN attorney Sullivan to defense counsel with carbon copies to PIN Principal Deputy Chief Morris, PIN attorney Marsh, AUSA Bottini, and AUSA Goeke.

[2222] Supplemental Memorandum in Support of Senator Stevens's Motion to Dismiss the Indictment Due to the Government's Intentional and Repeated Misconduct at 1-2 (D.D.C., filed Oct. 6, 2008).

[2223] Supplemental Memorandum in Support of Senator Stevens's Motion to Dismiss the Indictment Due to the Government's Intentional and Repeated Misconduct at 1-2 (D.D.C., filed Oct. 6, 2008).

(USAO DC) were present for that testimony.[2224]

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[redacted]

[redacted]

[redacted]

[redacted]

D. The Defense Determines that a Transcript is Missing

On October 5, 2008, defense counsel sent an email to members of the prosecution team expressing concern that the government's Friday, October 3, 2008 production of grand jury transcripts was incomplete. Addressed to PIN attorney Sullivan, the email stated that the May 9, 2007 transcript of SA Kepner's testimony before the D.C. grand jury contained several questions that implied that Kepner had testified before the D.C. grand jury prior to May 9, 2007, and that the defense did not have an earlier D.C. transcript for Kepner. The defense asked the government to "confirm again whether the government has produced all grand jury transcripts as ordered by the court last Thursday."[2232]

At 4:42 p.m. on October 5, 2008, PIN attorney Sullivan sent an email to the other members of the trial team stating that he had spoken to SA Kepner and had confirmed that Kepner had testified before the D.C. grand jury prior to May 9, 2007:

> Spoke to MBK re: the transcript. She says in July she tried to locate the transcript while out here so that she could prep. Apparently, it was missing even then. We'll have to order another one, I'm afraid.[2233]

During his OPR interview, AUSA Bottini stated that he learned on October 5, 2008, that PIN attorney Marsh had somehow discerned that SA Kepner's April 25, 2007 grand jury transcript had not been produced in discovery and was not in the office.[2234] Bottini said that Marsh contacted the court reporter on Sunday afternoon and asked her to make another copy of the transcript and get it to the PIN offices.[2235] Bottini stated that he did not play a role in the efforts to get another copy of the transcript.[2236]

PIN attorney Marsh told OPR that he recalled that the prosecution team was not able to find the transcript, "determined that it wasn't there," and "went and

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[2232] Oct, 5, 2008 2:28pm email from defense counsel to PIN attorney Sullivan, PIN Principal Deputy Chief Morris, PIN attorney Marsh, AUSA Goeke, and AUSA Bottini.

[2233] Oct. 5, 2008 4:42pm email from PIN attorney Sullivan to PIN attorney Marsh, AUSA Goeke, AUSA Bottini, PIN Principal Deputy Chief Morris.

[2234] Bottini OPR Tr. Mar. 10, 2010 at 357.

[2235] Bottini OPR Tr. Mar. 10, 2010 at 357.

[2236] Bottini OPR Tr. Mar. 10, 2010 at 357.

got a new one."[2237] However, he did not recall who searched for it, or know how or by whom the date of the missing transcript was determined.[2238]

PIN attorney Sullivan told OPR that he recalled being notified by an attorney on the defense team that it appeared that a grand jury transcript was missing, but could not recall how he "somehow [] figured out that there may, in fact, be a missing grand jury transcript."[2239]

On October 5, 2008, the defense filed a motion to dismiss the indictment "due to the government's intentional and repeated misconduct."[2240] The motion did not, however, refer to the missing Kepner grand jury testimony.[2241] The government's initial response of October 5, 2008, also did not address SA Kepner's missing grand jury testimony.[2242]

On October 6, 2008, following a 15 minute afternoon recess during Bill Allen's cross examination, the defense informed the court that it had that day, at 2:10 p.m., received additional grand jury testimony that had been missing from the government's productions.[2243] Defense counsel explained to the court, "over the weekend we read the grand jury transcripts, and through our hard work, we were able to determine that there was some missing grand jury testimony. We received that today at 2:10 p.m. right after the lunch break. It appears to be full [of] *Brady* material . . . ."[2244] Later, PIN attorney Marsh explained to the court what happened with the production of the transcript and the substance of the testimony it contained:

[2237] Marsh OPR Tr. Mar. 26, 2010 at 572.

[2238] Marsh OPR Tr. Mar. 26, 2010 at 572-573.

[2239] Sullivan OPR Tr. Mar. 12, 2010 at 447-448.

[2240] Motion to Dismiss the Indictment Due to the Government's Intentional and Repeated Misconduct (D.D.C., filed Oct. 5, 2008).

[2241] Motion to Dismiss the Indictment Due to the Government's Intentional and Repeated Misconduct (D.D.C., filed Oct. 5, 2008).

[2242] Government's Initial Opposition to Defendant's Motion to Dismiss the Indictment for Alleged Misconduct (D.D.C., filed Oct. 5, 2008). The government filed a full response to the defense motion to dismiss on October 6, 2008, Government's Opposition to Defendant's Motion to Dismiss Due to Alleged Misconduct (D.D.C., filed Oct. 6, 2008). The missing Kepner grand jury transcripts were not mentioned therein.

[2243] *United States v. Stevens*, Tr. Oct. 6, 2008 (pm) at 50.

[2244] *United States v. Stevens*, Tr. Oct. 6, 2008 (pm) at 50.

> Consistent with the Court's order, we produced over a hundred 302s and I think more than 50 grand jury transcripts. Yesterday, we learn yesterday afternoon, we inadvertently left one out. So we got it and copied and it and gave it to defense counsel today. Now it is in fact the summary grand jury testimony of Agent Kepner, and what she does is she introduces all the other grand jury transcripts that we've already given . . . and she summarizes them for the grand jury. We wanted to let the Court know that it was an inadvertent production [sic], but on the other hand, it's a summary of the information that they've already received. . . .
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> Your Honor, I don't believe there's any new information in there, and, certainly, it comes from the whole investigation . . . .[2245]

The court did not address the defense claim that the transcript contained *Brady* information and did not impose a sanction on the government for its delay in providing SA Kepner's April 25, 2007 grand jury testimony to the defense.

Later that day, October 6, 2008, the defense filed a supplemental memorandum in support of its October 5, 2008 motion to dismiss the indictment, challenging government counsel's statement that Kepner's testimony on April 25, 2007, presented no new information. The defense argued that the transcript contained "substantial *Brady* material that should have been disclosed before trial."[2246] The most significant *Brady* material, the defense asserted, "is Ms. Kepner's testimony about the critical matter of Bill Allen's failure to provide Stevens despite his repeated requests with bills for work on his house."[2247] The

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[2245] *United States v. Stevens*, Tr. Oct. 6, 2008 (pm) at 95-96 [redacted] When interviewed by Mr. Schuelke and OPR, Kepner would not state definitively whether she reviewed any Alaska grand jury transcript in its entirety prior to testifying before the D.C. grand jury, but rather stated that she reviewed portions of the transcripts based on the questions that she knew the prosecutors would be asking. *See* Kepner Shuelke Tr. Aug. 24, 2009 at 183-185; Kepner OPR Tr. Oct. 14, 2009 at 694-697.

[2246] Supplemental Memorandum In Support of Senator Stevens's Motion to Dismiss the Indictment Due to the Government's Intentional and Repeated Misconduct at 2 (D.D.C., filed Oct. 6, 2008).

[2247] Supplemental Memorandum In Support of Senator Stevens's Motion to Dismiss the Indictment Due to the Government's Intentional and Repeated Misconduct at 2 (D.D.C., filed Oct. 6, 2008).

defense cited SA Kepner's testimony as follows: "In relation to the invoice for the labor provided by Chugach Sewer & Drain, Ms. Kepner testified:

> Mr. Allen blames that on himself. He felt that he, didn't follow through, just like he didn't follow through with the invoice for Senator Stevens when he asked for the renovations invoice. Again, he you know, Bill Allen didn't follow through and provide him with the information that Senator Stevens needed to pay that invoice."[2248]

The defense argued that SA Kepner's testimony was "critical exculpatory information" and that the fact that Bill Allen blamed himself for his failure to provide Stevens with bills "goes to the heart of Senator Stevens's defense."[2249] Defense counsel stated that, in view of its argument that Bill Allen deliberately kept bills from Stevens, SA Kepner's grand jury testimony "would have figured prominently in defense counsel's opening statement and the cross examination of witnesses who testified about invoices."[2250] The government did not file a written response to the defense's October 6, 2008 supplemental memorandum.

The court heard argument on the defense motions to dismiss, including the motions to dismiss for discovery failures, on the afternoon of October 8, 2008.[2251] In his argument, defense counsel specifically mentioned the government's failure to turn over SA Kepner's April 25, 2007 grand jury transcript as an example of the government's failure to disclose *Brady* material despite the government's representations that it had given the defense everything:[2252]

> . . . and then, Your Honor, over the weekend we're pouring through the Grand Jury transcripts and, lo and

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[2248] Supplemental Memorandum In Support of Senator Stevens's Motion to Dismiss the Indictment Due to the Government's Intentional and Repeated Misconduct at 2 (D.D.C., filed Oct. 6, 2008) (emphasis added by the defense).

[2249] Supplemental Memorandum In Support of Senator Stevens's Motion to Dismiss the Indictment Due to the Government's Intentional and Repeated Misconduct at 3 (D.D.C., filed Oct. 6, 2008).

[2250] Supplemental Memorandum In Support of Senator Stevens's Motion to Dismiss the Indictment Due to the Government's Intentional and Repeated Misconduct at 3 (D.D.C., filed Oct. 6, 2008).

[2251] *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 23-24.

[2252] *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 42, 43.

> behold, we see one of Ms. Kepner's Grand Jury transcripts that seems to indicate notwithstanding representation after representation after representation, they've given us everything, lo and behold, it looks as though there is another one. . . . We got it at two o'clock in the middle of Mr. Allen's testimony and there is more *Brady* material in there that we filed a supplemental motion on about the Chugach repair bill that so much has been made out of in this case.[2253]

The court declined to dismiss the case, but criticized the government for its failure to disclose exculpatory evidence.[2254] The court did not specifically address the government's failure to turn over SA Kepner's April 25, 2007 grand jury transcript and did not impose a sanction directly related thereto.

E. The April 27, 2007 Kepner Grand Jury Transcript

After the verdict, but while defense motions were still pending, defense counsel informed the prosecution team that the defense was still concerned that it had not received all of SA Kepner's D.C. grand jury transcripts.[2255] In a letter dated December 2, 2008, defense counsel asked the government to confirm that it had produced "all grand jury transcripts as ordered by the Court."[2256] Defense counsel noted that the May 9, 2007 transcript of SA Kepner's testimony contained a statement [redacted] Defense counsel stated that the defense reviewed Kepner's May 11, 2007 transcript, found no such testimony, and was "thus left wondering whether there are additional transcripts from the D.C. grand jury that have not

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[2253] *United States v. Stevens*, Tr. Oct. 8, 2008 (pm) at 42, 43. The defense reference to "the Chugach repair bill that so much has been made out of in this case" is a reference to information contained in an FBI 302 of a Feb. 28, 2007 interview of Bill Allen (the Pluta 302) concerning invoices for repair to the boiler at Stevens's Girdwood residence. According to the 302, Allen asked Chugach to bill him for the labor for the repair and to send Senator Stevens an invoice for the materials only. Allen stated that he later received an email from Stevens in which Stevens stated that due to ethics concerns, he thought that he (Stevens) rather than Allen, should pay for the labor for the repair. Allen's statements concerning the bills for the boiler repair were redacted completely from the government's September 17, 2008 production of the Pluta 302 and partially from the October 1, 2008 production.

[2254] *United States v. Stevens,* Tr. Oct. 8, 2008 (pm) at 78, 89-90, 92.

[2255] Dec. 2, 2008 10:24am email from defense counsel to PIN attorney Marsh (attaching Dec. 2, 2008 letter from the defense to PIN attorney Marsh).

[2256] Dec. 2, 2008 10:24am email from defense counsel to PIN attorney Marsh.

been provided to us."[2257] Defense counsel listed all the grand jury transcripts then in the defense's possession.[2258]

The following morning, December 3, 2008, PIN attorney Sullivan emailed the prosecution team members, confirming that there was indeed a Kepner D.C. grand jury transcript that had not been turned over to the defense.[2259] Sullivan informed the prosecution team that it appeared the transcript was from April 27, 2007, and was not in the prosecution's possession.[2260] PIN attorney Sullivan stated that he had spoken to the court reporter and had arranged to have PIN administrative personnel pick up an expedited original copy of the transcript from the court reporter's office outside of Annapolis, Maryland, in an attempt to provide the defense with the transcript by the close of business that day.[2261] In a later email, Sullivan stated that he was personally going to Annapolis to pick up the transcript.[2262] In his OPR interview, PIN attorney Sullivan stated that although he distinctly recalled calling the court reporting company about the April 27, 2007 transcript, he did not recall the details of how he determined which grand jury transcript was missing.[2263]

At 1:13 p.m. that afternoon, Sullivan sent a follow up email informing the prosecution team that the court reporting service reported that its standard practice was to send transcripts to the local U.S. Attorney's office if an AUSA from that office was present at the proceeding.[2264] Sullivan added that because an AUSA (Glen Donath) from D.C. had been in the grand jury, the court reporting

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[2257] Dec. 2, 2008 10:24am email from defense counsel to PIN attorney Marsh (Attachment: Dec. 2, 2008 letter from the defense to Marsh)

[2258] Dec. 2, 2008 letter from defense counsel to Marsh.

[2259] Dec. 3, 2008 10:57am email from PIN attorney Sullivan to AUSA Goeke, AUSA Bottini, PIN attorney Marsh, PIN Principal Deputy Chief Morris, and PIN Chief Welch.

[2260] Dec. 3, 2008 10:57am email from PIN attorney Sullivan to AUSA Goeke, AUSA Bottini, PIN attorney Marsh, PIN Principal Deputy Chief Morris, and PIN Chief Welch.

[2261] Dec. 3, 2008 10:57am email from PIN attorney Sullivan to AUSA Goeke, AUSA Bottini, PIN attorney Marsh, PIN Principal Deputy Chief Morris, and PIN Chief Welch.

[2262] Dec. 3, 2008 11:31am email from PIN attorney Sullivan to AUSA Goeke, AUSA Bottini, PIN attorney Marsh, PIN Principal Deputy Chief Morris, and PIN Chief Welch.

[2263] Sullivan OPR Tr. Mar. 12, 2010 at 447-449.

[2264] Dec. 3, 2008 1:13pm email from PIN attorney Sullivan to PIN Principal Deputy Chief Morris, AUSA Goeke, AUSA Bottini, PIN attorney Marsh, and PIN Chief Welch.

service sent the transcript of the April 25, 2007 session to him.[2265] Sullivan stated that the reporting service representative assumed that the April 27, 2007 transcript had been treated the same way, but the records were not clear in that regard:[2266] Packing lists from Free State Reporting INC. show that the April 25, 2007 transcript was received by the USAO DC on May 9, 2007 and that the April 27, 2007 transcript was received by that office on May 14, 2007.[2267] Both transcripts were received and signed for by the same individual whose signature is illegible on both packing lists. The April 25, 2007 transcript was listed as "Ordered By: Glen Donath" "Section DCCRF," and the April 27, 2007 transcript was listed as "Ordered By: Joseph Bottini," with no other identifying division or section information. Sullivan told OPR that, at the time, the trial team had thought all the transcripts were coming to them.[2268]

AUSA Donath was assigned to the Fraud and Public Corruption Section at the USAO DC and had been asked by his supervisors to represent the USAO DC's interests in the event his office became involved in the investigation of Senator Stevens.[2269] He was also asked to support the *Stevens* prosecution team, particularly with its work before the D.C. grand jury, and was in the grand jury when the matter was opened and, he believes, on two other occasions when the lead FBI agent testified.[2270] Donath told OPR that after an early meeting with Welch, Marsh, and Sullivan at the PIN offices, it became clear to him that with attorneys from both PIN and the U.S. Attorney's Office in Alaska on the case, he was not needed, and any involvement on his part would be minor, just an accommodation to his supervisors at the USAO DC.[2271] Donath's view of his minor role in the *Stevens* matter was shared by PIN attorney Sullivan, who said

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[2265] Dec. 3, 2008 1:13pm email from PIN attorney Sullivan to PIN Principal Deputy Chief Morris, AUSA Goeke, AUSA Bottini, PIN attorney Marsh, PIN Chief Welch. The USAO-DC assigned Donath to accompany the PIN attorneys in the grand jury.

[2266] Dec. 3, 2008 1:13pm email from PIN attorney Sullivan to PIN Principal Deputy Chief Morris, AUSA Goeke, AUSA Bottini, PIN attorney Marsh, PIN Chief Welch.

[2267] May 9, 2007 Free State Reporting, INC. Packing List; May 14, 2007 Free State Reporting, INC. Packing List.

[2268] Sullivan OPR Tr. Feb. 19, 2010 at 135-136.

[2269] Donath OPR Tr. Oct. 16, 2009 at 6, 13.

[2270] Donath OPR Tr. Oct. 16, 2009 at 6, 15-17.

[2271] Donath OPR Tr. Oct. 16, 2009 at 14.

that PIN Chief Welch made it clear to Donath that he was "coming in late" and "was going to be viewed as a the fifth wheel."[2272]

Donath confirmed that although he could not recall the dates, he had received copies of one or two grand jury transcripts of testimony of SA Kepner.[2273] He explained that because his role in the case had been minor and he was not an attorney of record, he assumed that members of the prosecution team had also received copies of the transcripts.[2274] Because he did not have an active role in the case, Donath did not review the transcripts, discuss the transcripts with members of the prosecution team, or make efforts to give the transcripts or copies of the transcripts to members of the trial team.[2275] Donath did not speak to anyone on the prosecution team about the location of the transcripts: "They never asked me for those transcripts and it never would have occurred to me that they didn't have them."[2276] PIN attorney Sullivan told OPR that he thought the transcripts were coming directly to PIN because at some point Donath stopped attending the grand jury sessions and eventually left the USAO.[2277]

AUSA Donath left the Department of Justice in August 2007, more than one year before the *Stevens* trial.[2278] He did not recall what became of the transcripts upon his departure.[2279] He assumed the *Stevens* documents were left for the AUSA who replaced him; as it turned out, he was not replaced by anyone.[2280] OPR's review of the *Stevens* case grand jury transcripts revealed that former AUSA Donath's name appears only on the April 25, 2007 Kepner grand jury transcript.

By cover letter dated December 3, 2008, PIN Principal Deputy Chief Morris forwarded a copy of SA Kepner's April 27, 2007 D.C. grand jury transcript to the

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[2272] Sullivan OPR Tr. Feb. 19, 2010 at 133-134.

[2273] Donath OPR Tr. Oct. 16, 2009 at 19.

[2274] Donath OPR Tr. Oct. 16, 2009 at 19-21.

[2275] Donath OPR Tr. Oct.16, 2009 at 19-21.

[2276] Donath OPR Tr. Oct. 16, 2009 at 21.

[2277] Sullivan OPR Tr. Feb. 19, 2010 at 135.

[2278] Donath OPR Tr. Oct. 16, 2009 at 5-6.

[2279] Donath OPR Tr. Oct. 16, 2009 at 22-26.

[2280] Donath OPR Tr. Oct. 16, 2009 at 22-26.

defense.[2281] The letter stated that the prosecution had discovered that day, based on the December 2, 2008 letter from defense counsel, that the transcript was not in PIN's possession and thus had not been produced.[2282] The letter stated further that the testimony had been transcribed by the "same court reporting service that had to expedite another transcript to us that was not in our possession. It appears that these two transcripts were never forwarded to the Public Integrity Section."[2283]

Prior to the close of business on December 3, 2008, Morris emailed to Judge Sullivan copies of the government's letter to defense counsel and the April 27, 2007 Kepner grand jury transcript. Morris explained that a transcript of some of SA Kepner's grand jury testimony had not been provided to PIN by the court reporting service and therefore had not been produced.[2284] She further noted that Kepner did not testify at trial and that, once notified by the defense the previous day that the transcript was missing, the government immediately located the court reporter, obtained a copy of the transcript, and provided it to the defense.[2285]

Defense counsel confirmed receipt of the letter and the transcript that evening by email and asked again that the government "confirm that we now have **all** transcripts from the D.C. grand jury?"[2286] In response, Morris stated in an email: "[PIN attorney Marsh] has confirmed that you have received all D.C. grand jury transcripts that we possess, and that should be all D.C. grand jury transcripts. We will check again to confirm."[2287] Morris immediately sent an email to the prosecution team stating that she would be out of the office the following

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[2281] Dec. 3, 2008 Letter from PIN Principal Deputy Chief Morris to defense counsel.

[2282] Dec. 3, 2008 Letter from PIN Principal Deputy Chief Morris to defense counsel.

[2283] Dec. 3, 2008 Letter from PIN Principal Deputy Chief Morris to defense counsel.

[2284] Dec. 3, 2008 4:23pm email from PIN Principal Deputy Chief Morris to Judge Sullivan.

[2285] Dec. 3, 2008 4:23pm email from PIN Principal Deputy Chief Morris to Judge Sullivan.

[2286] Dec. 3, 2008 5:59pm email from Defense counsel to PIN Principal Deputy Chief Morris (emphasis in original).

[2287] Dec. 3, 2008 6:03pm email from PIN Principal Deputy Chief Morris to defense counsel.

day and asking Marsh to "triple check to confirm that all DC grand jury transcripts have been provided."[2288]

On December 19, 2008, Judge Sullivan convened a hearing to address the Joy Complaint.[2289] When asked by the court if grand jury testimony had been disclosed to the defense recently, PIN Principal Deputy Chief Morris confirmed that it had.[2290] She explained that the testimony had not been disclosed previously because PIN had never received it, as the court reporting service had sent the transcript to the U.S. Attorney's Office rather than to PIN.[2291] The court did not ask any follow up questions and there was no further discussion of the Kepner grand jury transcripts at that hearing.[2292]

Although the defense filed another motion to dismiss the case on December 22, 2008, it did not refer to the government's failure to turn over the Kepner April 27, 2007 grand jury transcript in support of its motion.[2293] In a July 6, 2009 interview with OPR, defense counsel stated that he did not recall that the April 27, 2007 grand jury transcript contained anything critical that the defense believed it should have had prior to trial.[2294]

OPR reviewed the transcript of SA Kepner's April 27, 2007 grand jury testimony and concurred with the defense counsel's assessment that it did not contain *Brady* material.

F. Post-Trial Pleadings

In a January 16, 2009 pleading, the defense argued that the government had engaged in a "pattern" of "making false representations and otherwise failing

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[2288] Dec. 3, 2008 6:04pm email from Principal Deputy Chief Morris to PIN attorney Marsh, AUSA Bottini, PIN attorney Sullivan and AUSA Goeke.

[2289] *United States v. Stevens*, Tr. Dec. 19, 2008 (am) at 3-4 (sealed).

[2290] *United States v. Stevens*, Tr. Dec. 19, 2008 (am) at 12 (sealed).

[2291] *United States v. Stevens*, Tr. Dec. 19, 2008 (am) at 12-13 (sealed).

[2292] *United States v. Stevens*, Tr. Dec. 19, 2008 (am) at 12-13 (sealed).

[2293] Senator Stevens's Motion to Dismiss the Indictment; or, in the Alternative, Motion for a New Trial, Discovery, and Evidentiary Hearing (D.D.C., filed Dec. 22, 2008).

[2294] Cary OPR Tr. July 6, 2009 at 73-74.

to perform its duties under the Constitution and the Rules."[2295] Included in the defense's list was, "[w]hen the government failed to turn over a critical grand jury transcript containing exculpatory information, it claimed that it was 'inadvertent'."[2296] Although the defense did not explicitly identify the critical grand jury transcript as that of SA Kepner's April 25, 2007 D.C. grand jury appearance, the defense cited the discussion of the delay in the production of the April 25, 2007 transcript on October 6, 2008.[2297]

During the April 7, 2009 motion hearing, Judge Sullivan included the government's failure to turn over "a critical grand jury transcript containing exculpatory information" as one of the instances in which, in his view, the government "[a]gain and again, both during and after the trial . . . was caught making false representations and not meeting its discovery obligations."[2298] Adopting the language from the January 16, 2009 defense pleading, Judge Sullivan stated, "[w]hen the Government failed to turn over a critical grand jury transcript containing exculpatory information, it claimed that it was 'inadvertent.'"[2299] Judge Sullivan did not identify the grand jury transcript or the exculpatory information contained therein.[2300] After hearing from both sides, Judge Sullivan granted the government's motion to set aside the verdict and to dismiss the indictment with prejudice.[2301]

III. ANALYSIS

Based on the results of our investigation, we found that the prosecution team failed to produce Kepner's grand jury testimony from April 25 and 27, 2007, pursuant to the court's October 2, 2008 order, and that the April 25, 2007

[2295] Senator Stevens's Opposition to Government Motion for Reconsideration and to Vacate January 14, 2009 Order That the Attorney General Personally Sign a Declaration Under Oath at 2 (D.D.C., filed Jan. 16, 2009).

[2296] Senator Stevens's Opposition to Government Motion for Reconsideration and to Vacate January 14, 2009 Order That the Attorney General Personally Sign a Declaration Under Oath at 3 (D.D.C., filed Jan. 16, 2009).

[2297] Senator Stevens's Opposition to Government Motion for Reconsideration and to Vacate January 14, 2009 Order That the Attorney General Personally Sign a Declaration Under Oath at 3 (D.D.C., filed Jan. 16, 2009).

[2298] *United States v. Stevens*, Tr. Apr. 7, 2009 (am) at 4.

[2299] *United States v. Stevens*, Tr. Apr. 7, 2009 (am) at 5.

[2300] *United States v. Stevens*, Tr. Apr. 7, 2009 (am) at 5.

[2301] *United States v. Stevens*, Tr. Apr. 7, 2009 (am) at 48.

testimony contained exculpatory information. However, given the unusual circumstances under which the court reporting service provided the transcripts to the DC USAO rather than PIN, we concluded that the prosecution team's failure to produce the material was inadvertent and did not constitute professional misconduct.

The prosecution team had a clear and unambiguous obligation to comply with Judge Sullivan's order to produce the grand jury transcripts. Moreover, the April 25, 2007 transcript contained information that Bill Allen blamed himself for not providing Stevens with an invoice when he asked for one. That information was exculpatory, and went to a central part of the defense case.

Following the court's October 2 order, AUSAs Bottini and Goeke reviewed the Polar Pen grand jury transcripts, located those relevant to the *Stevens* case, and produced them to the defense. The transcripts were not stored in one location, either electronically or in hard copy, and did not have an accompanying log. Rather, the transcripts were scattered around various PIN offices, possibly as a result of the *Brady* review of the D.C. transcripts by PIN attorneys not assigned to the Polar Pen investigation. Over the next two days, the prosecution provided more than 50 grand jury transcripts in four separate productions (that included 25 transcripts of SA Kepner's testimony before Alaska and D.C. grand juries). However, none of the productions included SA Kepner's D.C. grand jury testimony for April 25 and 27, 2007.

Former AUSA Donath told OPR that his office assigned him to assist the prosecution team in the Stevens matter before the D.C. grand jury and that he was present for Kepner's April 25, 2007 testimony. USAO DC records confirmed that the office received Kepner's April 27, 2007 transcript on May 9, 2007, and her April 27, 2007 transcript on May 14, 2007. Documentation from Free State Reporting INC. confirmed that the two Kepner transcripts were sent to the DC USAO rather than PIN. Donath recalled receiving the transcripts, but he assumed, given his minor role, that other members of the prosecution team also received copies. Donath did not review or forward the transcripts to the other team members before he resigned from the USAO in August 2007.

Kepner later told Sullivan that she had been unable to locate the April 25, 2007 transcript when preparing Allen for trial; thus, she had been aware it was missing, but did not communicate this fact to the prosecutors until Sullivan specifically asked her to find the transcript. Our investigation revealed no evidence that the trial prosecutors were aware that the two transcripts were missing, or that the USAO DC had received them. The prosecution team's failure to maintain a log of the witnesses that testified before the grand jury contributed to the problem. Nevertheless, OPR concluded that the prosecutors' failure to comply with the court's order to produce the grand jury transcripts was not

willful, but rather was inadvertent. Accordingly, we concluded that the prosecutors commit professional misconduct or exercise poor judgment in connection with the missing Kepner grand jury transcripts.

CHAPTER ELEVEN
THE ALLEGED SIGNALING TO ALLEN BY ATTORNEY BUNDY

I. INTRODUCTION AND SUMMARY

On the afternoon of October 6, 2008, Judge Sullivan interrupted Bill Allen's cross examination and told a man seated in the gallery not to make gestures to the witness on the witness stand.[2302] The man, Robert Bundy, was Allen's personal attorney, and Judge Sullivan believed he was nodding at Allen in an effort to influence Allen's answers.[2303] Not wanting to delay the trial, on October 7, 2008, Judge Sullivan accepted Declarations from witnesses and told the parties that he would keep the Declarations in chambers while he considered how to address the matter.[2304]

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[2302] *United States v. Stevens*, Tr. Oct. 6, 2008 (pm) at 76-83.

[2303] *United States v. Stevens*, Tr. Oct. 6, 2008 (pm) at 76-83.

[2304] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 12; *United States v. Stevens*, Tr. Oct. 7, 2008 (pm) at 19-20.

[redacted]

Based on the results of our investigation, we concluded that the evidence did not establish that Robert Bundy signaled Bill Allen in an attempt to influence his trial testimony. Further, we concluded that, to the extent the evidence suggested that such signaling may have occurred, we found no evidence implicating any government actor prosecutors or agents in the alleged signaling.

II. FACTUAL BACKGROUND

On October 6, 2008, Judge Sullivan called out to a man sitting in the gallery during Bill Allen's cross examination: "Excuse me. Don't interfere with the question, sir. In the first row with the notepad; you . . . ."[2315] Judge Sullivan's

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[2315] *United States v. Stevens*, Tr. Oct. 6, 2008 (pm) at 76.

comments were directed to Robert Bundy, Allen's attorney.[2316] Judge Sullivan continued, "Don't make any gestures to the witness on the witness stand."[2317]

Later, after the jury was excused for the evening, Judge Sullivan directed his attention back to Bundy: "Who are you? For the record, you were nodding to the witness before he gave an answer."[2318] After Bundy identified himself, Judge Sullivan stated, "Well, let me tell you one thing: Don't you ever come in this courtroom and nod to any witness in an effort to influence an answer: do you understand me?"[2319] Judge Sullivan indicated that he would issue an order to show cause why Bundy should not be held in contempt of court and asked Bundy to leave the courtroom.[2320]

Stating,"It was clear to the Court that he was signaling an answer," Judge Sullivan asked counsel for the parties what they saw.[2321] PIN Principal Deputy Chief Morris, AUSA Bottini, and defense counsel Brendan Sullivan stated that they did not see Bundy signal Allen.[2322] Judge Sullivan stated: "I'm really disturbed that an attorney would sit out there and attempt to communicate with a witness, and it was clear to me what I saw. It was very disturbing."[2323] AUSA Bottini told Judge Sullivan, "I don't think we saw that, what you saw, but I do know Mr. Bundy, and I would be quite surprised if that was an intentional gesture on his part."[2324]

At trial the following morning, October 7, 2008, before Bill Allen's cross examination continued, Judge Sullivan asked whether Bundy was in the courtroom.[2325] Defense counsel informed the court that he had received a call

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[2316] *United States v. Stevens*, Tr. Oct. 6, 2008 (pm) at 82; Nov. 3, 2009 USAO-DC MOI of Robert C. Bundy (Nov. 5, 2009).

[2317] *United States v. Stevens*, Tr. Oct. 6, 2008 (pm) at 76.

[2318] *United States v. Stevens*, Tr. Oct. 6, 2008 (pm) at 82.

[2319] *United States v. Stevens*, Tr. Oct. 6, 2008 (pm) at 82.

[2320] *United States v. Stevens*, Tr. Oct. 6, 2008 (pm) at 82-83.

[2321] *United States v. Stevens*, Tr. Oct. 6, 2008 (pm) at 82.

[2322] *United States v. Stevens*, Tr. Oct. 6, 2008 (pm) at 83, 101.

[2323] *United States v. Stevens*, Tr. Oct. 6, 2008 (pm) at 101.

[2324] *United States v. Stevens*, Tr. Oct. 6, 2008 (pm) at 101.

[2325] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 8.

from someone at Bundy's law firm the prior evening asking whether the defense objected to Bundy being present in the courtroom.[2326] Defense counsel told the court that he had answered "yes."[2327] Upon learning that Bundy was not in the courtroom, Judge Sullivan asked if Bundy were in the hallway and stated: "I have some comments prepared for him. I expected him to be here."[2328] Judge Sullivan stated:

> I know exactly what I saw, and I saw someone attempting to communicate with a witness in a way that suggests . . . how a question should be answered, and he was nodding his head left to the right as if to tell the witness say "no", and it was clear to me, no doubt at all in my mind, and he's fortunate he went out that door, instead of the back door with the marshals yesterday.[2329]

In response to Judge Sullivan's request for the government's position on the matter, PIN Principal Deputy Chief Morris stated that government counsel did not see any signaling, that government counsel had "nothing but good things to say about Mr. Bundy," that Bundy was well respected in the community, and that the idea of Bundy signaling answers to Allen was "very hard to believe."[2330] Judge Sullivan appeared to accept Morris's representation that government counsel did not see the alleged signaling: "I know you didn't [see it]."[2331]

Morris told OPR that she "didn't see it at all."[2332] Morris said she was focused on Allen when there was "an outburst from the bench" with Judge Sullivan "yelling at somebody in the courtroom."[2333] At first, Morris thought Judge Sullivan was upset with her again, but then realized that he was directing his comments at Bundy, who was seated in the gallery.[2334] Morris said that she did

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[2326] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 8-9.

[2327] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 8-9.

[2328] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 9.

[2329] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 9.

[2330] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 10.

[2331] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 9.

[2332] Morris OPR Tr. Mar. 19, 2010 at 434.

[2333] Morris OPR Tr. Mar. 19, 2010 at 434.

[2334] Morris OPR Tr. Mar. 19, 2010 at 434.

not know what had transpired.[2335] Morris noted that Bundy is a former U.S. Attorney, is "very gentlemanly," and the head of the ethics committee.[2336]

Judge Sullivan commented that Allen was seeking a 5K[2337] and that Bundy's behavior could be considered an obstruction of justice.[2338] Defense counsel added that Senator Stevens's personal attorney, Phillips, had been in the courtroom the previous afternoon and had alerted an attorney on the defense team that he believed he saw Bundy signaling to Allen during Allen's cross examination.[2339]

Judge Sullivan stated that he considered asking Mr. Bundy and the witness about the incident, but noted their Fifth Amendment rights not to be compelled to answer questions that could implicate them in criminal conduct.[2340] He also contemplated referring the matter to the U.S. Attorney's Office to address whether an obstruction of justice had occurred.[2341] However, Judge Sullivan told the parties that he did not want "to get sidetracked from the ultimate objective of the Court," which was to finish the trial.[2342] Nevertheless, Judge Sullivan said that he would allow defense counsel to ask Allen if he had discussed his testimony with anyone, or observed signals while testifying.[2343]

[2335] Morris OPR Tr. Mar. 19, 2010 at 435.

[2336] Morris OPR Tr. Mar. 19, 2010 at 435. According to the website of Dorsey & Whitney, LLP, where Bundy is of counsel, Bundy is the chair of the Alaska Bar Association's Rules of Professional Conduct Committee. www.dorsey.com/people/deatil.aspx?Attorney=1210&mode=full (last visited Jun. 4, 2010).

[2337] "[S]eeking a 5K" is a reference to section 5K1.1 of the U.S. Sentencing Guidelines, which allows, upon government motion, a court to "depart downward" in sentencing if the defendant provided "substantial assistance" to the authorities in the investigation or prosecution of others. U.S.S.G. § 5K1.1 (2009); 18 U.S.C. § 3553(e) (2003). Allen had pled guilty to federal bribery, conspiracy, and tax violations on May 7, 2007, but had not been sentenced at that time of the *Stevens* trial.

[2338] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 10.

[2339] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 10-11.

[2340] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 11.

[2341] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 11.

[2342] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 12.

[2343] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 12.

Shortly thereafter, attorney Creighton Magid,[2344] a partner at Bundy's law firm, addressed the court.[2345] Magid explained that Bundy vehemently denied signaling Allen, and that he [Magid] had come to court that day as counsel for Allen because Bundy believed he was barred from the courtroom.[2346] Magid also stated that he had called defense counsel the previous evening to see if the defense objected to Bundy's being in court, and that he was appearing because the defense had objected.[2347] Magid mentioned Bundy's background as the former U.S. Attorney for the District of Alaska, and expressed concern that the record of the case reflected "[i]n open court with the press a statement by a defense counsel as to what somebody else supposedly saw," when Bundy "was not in a position to defend himself."[2348] Judge Sullivan responded: "That's a good point and at some point, the Court may direct that a declaration be filed by the person who made the observations on the defendant's legal team, and then I'll deal with that."[2349]

During cross examination on October 7, 2008, Allen confirmed having seen Bundy seated in the front row during his testimony the previous day.[2350] However, Allen denied that Bundy signaled answers to him.[2351] Defense counsel asked Allen, "[D]id you see him nodding his head when you gave certain answers?"[2352] Allen responded, "No, he did not do that."[2353] Allen later told OPR that he found it difficult to hear during cross examination and that he purposely looked directly at defense counsel when he was speaking; therefore, he could not see Bundy.[2354]

[2344] A partner at Dorsey & Whitney, LLP, Mr. Magid's first name is "Creighton." However, he is incorrectly identified as "Fred Magid" in the trial transcript.

[2345] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 13.

[2346] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 13.

[2347] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 13-14.

[2348] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 15.

[2349] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 15.

[2350] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 66.

[2351] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 66.

[2352] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 66.

[2353] *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 66.

[2354] Jun. 12, 2010 FBI 302 of Bill Allen, at 9.

[redacted]

[redacted]

Defense counsel presented the Declarations to the court and the prosecution during the afternoon session of trial on October 7, 2008, asserting

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[2355] Oct. 7, 2008 Declaration of Simon A. Latcovich at 1.

[2356] Oct. 7, 2008 Declaration of Simon A. Latcovich at 1.

[2357] Oct. 7, 2008 Declaration of Simon A. Latcovich at 1.

[2358] Oct. 7, 2008 Declaration of Simon A. Latcovich at 1.

[2359] Oct. 7, 2008 Declaration of William D. Phillips at 1.

[2360] Oct. 7, 2008 Declaration of William D. Phillips at 1.

[2361] Oct. 7, 2008 Declaration of William D. Phillips at 1.

[2362] Oct. 7, 2008 Declaration of William D. Phillips at 1.

[2363] Oct. 7, 2008 Declaration of William D. Phillips at 2.

[2364] Oct. 7, 2008 Declaration of William D. Phillips at 2.

that they corroborated Judge Sullivan's belief that Bundy was signaling answers to Allen.[2365] Judge Sullivan stated that he would keep the Declarations in chambers and directed that counsel not make the Declarations public.[2366] Judge Sullivan indicated that he would likely ask the U.S. Attorney's Office to investigate the allegations and that he may refer the matter to the court's grievances committee.[2367] Judge Sullivan concluded the discussion by stating, "I'll keep these and give it further thought and let you know what I plan to do."[2368]

[2365] *United States v. Stevens*, Tr. Oct. 7, 2008 (pm) at 19.

[2366] *United States v. Stevens*, Tr. Oct. 7, 2008 (pm) at 19-20.

[2367] *United States v. Stevens*, Tr. Oct. 7, 2008 (pm) at 20.

[2368] *United States v. Stevens*, Tr. Oct. 7, 2008 (pm) at 20.

[2369] Oct. 7, 2008 5:25pm email from Robert Bundy to AUSA Bottini.

At an October 18, 2008 hearing to address the parties' proposed jury instructions, Judge Sullivan rejected defense counsel's Supplemental Proposed Jury Instruction No. 44 on signaling or coaching witnesses.[2379] The proposed jury instruction read: "The Court and others observed the attorney representing Government witness Bill Allen giving signals to Allen regarding how he should respond to questions. You should give this fact as much weight as you find in your judgment it deserves."[2380] Judge Sullivan commented that he did not convene a hearing on the issue and that he had not "heard any testimony from anyone who observed anything."[2381] He also commented that the alleged witnesses had not been cross examined and that the "text of those declarations have not been tested in any appropriate fact finding hearing . . . ."[2382]

In explaining further why he was not inclined to give the proposed instruction, Judge Sullivan stated, "as a matter of fact, it's not been proven that this man inappropriately communicated with the witness. I mean, I may be completely wrong with what I said."[2383] Judge Sullivan also commented, "[f]or all I know, the man may have had some neurological problems that prompted him to shake his head," and "[i]n fairness, I never gave him a chance to explain it."[2384]

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2379 *United States v. Stevens*, Tr. Oct. 18, 2008 (pm) at 87-91.

2380 *United States v. Stevens*, Tr. Oct. 18, 2008 (pm) at 89-90.

2381 *United States v. Stevens*, Tr. Oct. 18, 2008 (pm) at 87.

2382 *United States v. Stevens*, Tr. Oct. 18, 2008 (pm) at 87, 91.

2383 *United States v. Stevens*, Tr. Oct. 18, 2008 (pm) at 91.

2384 *United States v. Stevens*, Tr. Oct. 18, 2008 (pm) at 88-89.

Although the defense believed that the questionable behavior by Bundy had gone on for a "substantial period," Judge Sullivan commented that he did not know how long the behavior had continued, stating, "I know I saw one instance, and I immediately stopped it."[2385]

Judge Sullivan also noted that the defense questioned Allen about whether his attorney was present and whether his attorney was signaling or communicating with him, which Allen denied.[2386] Judge Sullivan indicated that in light of the above, the general instruction that he always gives, "you can consider the behavior of the witness on the witness stand" was sufficient.[2387] Judge Sullivan concluded by stating, "But what I'll do after this case is over, I just don't know."[2388]

III. POST-TRIAL EVENTS

On February 25, 2009, FBI agents and prosecutors interviewed SA Kepner in preparation for the government's response to the Joy Complaint and several pending post trial defense motions.[2389] SA Kepner told her interviewers that she did not observe Allen's attorney coaching him at trial.[2390] Kepner also stated that she did not believe Allen would have been able to interpret signals from someone seated in the gallery or be coached because of his eye problems.[2391]

[2385] *United States v. Stevens*, Tr. Oct. 18, 2008 (pm) at 89.

[2386] *United States v. Stevens*, Tr. Oct. 18, 2008 (pm) at 87-88.

[2387] *United States v. Stevens*, Tr. Oct. 18, 2008 (pm) at 88.

[2388] *United States v. Stevens*, Tr. Oct. 18, 2008 (pm) at 88.

[2389] Feb. 25, 2009 FBI 302 of SA Kepner.

[2390] Feb. 25, 2009 FBI 302 of SA Kepner at 29.

[2391] Feb. 25, 2009 FBI 302 of SA Kepner at 29. Our investigation did not reveal evidence to corroborate SA Kepner's indication that Allen had problems with his eyes. However, [redacted] his suggests that Allen may have had difficulty seeing Bundy while he watched his questioners.

[redacted]

[redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted].

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

V. ANALYSIS

Based on the results of our investigation, we concluded that the evidence did not establish that Robert Bundy signaled Bill Allen in an attempt to influence his trial testimony. Further, we concluded that, to the extent the evidence suggested that such signaling may have occurred, we found no evidence implicating any government actor prosecutors or agents in the alleged signaling.

Although Judge Sullivan stated initially that there was "no doubt in my mind" that Bundy had signaled Allen,[2481] he later acknowledged that he may have been "completely wrong" about his belief that Bundy signaled to Allen, that there may have been another reason for Bundy's nodding, and that Bundy had not been given an opportunity to explain his behavior.[2482] A member of the defense team declared that although he observed Bundy nodding, he was unable to tell if Bundy was signaling to Allen. Bundy and Allen both denied that Bundy tried to communicate with Allen while Allen was on the witness stand. Members of the prosecution team also denied seeing Bundy attempt to gesture to Allen. Furthermore, witness statements and medical reports indicated that Allen had cognitive and hearing difficulties, and several witnesses stated that Allen often watched the lips of the person speaking to him closely, an activity that would have made it difficult for him to communicate with his personal attorney at the same time. Finally, there was evidence that Bundy was seated next to, and communicating with, another attorney during Allen's testimony on October 6,

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2481 *United States v. Stevens*, Tr. Oct. 7, 2008 (am) at 9.

2482 *United States v. Stevens*, Tr. Oct. 18, 2008 (am) at 88-91.

2008, and that his nodding and gesticulations were part of Bundy's conversation with her.

Furthermore, we found no evidence that any members of the prosecution team were aware of, or witnessed, any attempt by Bundy to signal to Allen during Allen's testimony.

CHAPTER TWELVE
ANALYSIS OF FBI 302 ISSUES

I. INTRODUCTION AND SUMMARY

On March 23, 2009, CDC Eric Gonzalez directed SA Mary Beth Kepner to search her files for any FBI 302s, notes, or other documents reflecting interviews of Bill Allen, particularly regarding any interview of Allen on April 15 and 18, 2008. CDC Gonzalez's request came as a result of the O'Brien team's discovery of emails among the prosecutors indicating that Allen was interviewed on those dates. Later that day, Kepner provided to Gonzalez her handwritten notes for the April 18 interview, but she said she could not find any notes of the interview three days earlier.[2483] When asked by Gonzalez why she did not prepare a 302 for the April 15 interview, Kepner responded that the debriefing "did not go well."[2484]

SA Kepner's failure to prepare a 302 for what was clearly a substantive pre indictment witness interview that should have been memorialized prompted OPR to examine Kepner's practices with respect to the preparation of 302s for witness interviews in the *Stevens* case. We found that the April 15 and 18, 2008 interviews were not the only Allen interviews for which Kepner failed to prepare a 302 or to properly maintain and safeguard her interview notes.

In addition, we examined the production of Allen 302s to the defense following the court's order of October 2, 2008, directing the government to produce to the defense *all* interview reports for the government's witnesses in the case. As a result of that order, Kepner was charged with responsibility for collecting all Allen 302s and arranging for their production to the defense. We found that Kepner failed to provide the defense with all the 302s she had prepared for Allen interviews. In particular, Kepner provided the prosecutors with two 302s for Allen interviews held on September 6, 2006, that she did not include among the 302s she produced to the defense. Those 302s, we found, contained false preparation dates, making it appear as though the reports were prepared the day after the interviews when, in fact, Kepner prepared them *two years* after the fact.

Based on the results of our investigation, we found [redacted]

[2483] Kepner thereafter provided to Gonzalez her notes of other Allen interviews (*e.g.*, September 20, 2006) for which there was no corresponding 302.

[2484] *See* March 23, 2009, FBI 302 of Kepner interview by CDC Eric Gonzalez. OPR found Kepner's notes of the April 15, 2008 Allen interview in a box containing miscellaneous, unrelated documents pertaining to the Polar Pen investigation. The box was one of 89 banker's boxes delivered to OPR by the FBI Anchorage Division in January 2010.

In this section of the report, we discuss the FBI's procedures for memorializing witness interviews. We then provide an overview of the witness interviews, particularly of Bill Allen,) deviated from FBI protocols in the *Stevens* case.

II. FBI PROCEDURES FOR MEMORIALIZING WITNESS INTERVIEWS

The FBI's Manual of Administrative Operations and Procedures (MAOP) sets forth the requirements for memorializing witness interviews.[2485] These procedures are designed to ensure that all relevant information derived from a witness interview is memorialized in a complete, accurate, and timely fashion; that the interview notes and reports are reviewed and preserved in electronic and hard copy format; and that both interview reports and notes are readily retrievable by the case agent or any other authorized FBI employee. Prosecutors and other agents rely upon an agent's compliance with these procedures. The accuracy and completeness of witness interview reports are essential to the effective and proper prosecution of federal criminal cases. An agent's failure to comply with these procedures could result in information not being disclosed to the prosecution or the defense.

In a typical FBI criminal investigation, two agents generally attend witness interviews; one takes the lead on questioning, while the other takes notes of the witness's responses. Following the interview, one of the agents drafts an FBI 302, the standard form by which the FBI memorializes witness interviews.[2486] The 302

[2485] *See* MAOP, Part 2 10-13.3(3): "Whenever a person being interviewed could be called upon to testify at any time in the future in a trial, administrative-type hearing, or quasi-judicial proceedings, the results of the interview shall be reported on FD-302." In this report, we refer to FD-302s as "FBI 302s" because that is how they are commonly referred to in judicial proceedings and in everyday speech.

[2486] Starting in 2007, the FBI implemented a new form, the Confidential Human Source Reporting Document, FD-1023, for use when the subject interviewed is a Confidential Human Source (CHS). Before the implementation of the FD-1023, interviews of a CHS were memorialized in a standard FBI 302, but instead of using the interviewee's name, he was referred to as a "source." The requirements for the preparation, review, recording, and electronic uploading of the

will bear one or more FBI file numbers. One file number would be for the primary investigation. In this case, all the 302s would bear the Polar Pen file number. Where, as here, there are subordinate or individual investigations to which the interview pertains, the 302 would also bear the appropriate "subfile" number.[2487]

The drafting agent circulates the draft 302 to the other agent(s) to review for accuracy and completeness, and to initial and return to the drafting agent. Under MAOP § 10 12(3), the original interview notes "must be retained" in the case file. The drafting agent places the original interview notes into an envelope designated as an FD 340, also known as a 1A envelope.[2488] The requirement that the original notes of a witness interview must be placed in a 1A envelope, and thus be maintained in the evidentiary section of the case file, is a recognition by the FBI that these notes are themselves evidence and must be maintained as scrupulously and consistently as other items of evidence in an investigation.

The drafting agent gives the 302 and 1A envelope containing the notes to the Supervisory Special Agent (SSA) for review and approval. The SSA returns the 302 and the notes to the drafting agent, who then gives the complete set to a Support Services Technician (SST) for entry into the FBI's Automated Case Support (ACS) system. The SST uploads an electronic copy of the 302 to every file and subfile listed on that 302.[2489] This process ensures that the 302 will be

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FBI 302 remained in effect. The FBI's procedures and requirements with regard to the FD-1023 are similar, except that the FD-1023 is set up to be completed in an electronic format with an automatic uploading once the form is complete. The vast majority of witness interviews in the Polar Pen investigation were memorialized in FBI 302s. For brevity's sake, therefore, this Report will refer to "302s" to include collectively both FBI 302s and FD-1023s.

[2487] For example, eventually there was a Bill Allen ("BALLEN") subfile, so any 302 involving Bill Allen should also have borne that number. If the 302 related to an interview of a Confidential Human Source, it should also bear the CHS file number.

[2488] The FBI uses the 1A envelope to hold items of evidence that do not require that a chain of custody be established, such as a photo spread shown to a witness, photographs, or copies of emails or other documents provided by a witness to an agent. Items of evidence that would otherwise qualify for designation as 1A evidence but are too voluminous or bulky to fit into the 1A envelope, such as a banker's box of records voluntarily handed over by a witness, are designated as 1C evidence. Evidence for which a chain of custody must be maintained, such as items seized during the execution of a search warrant or during a search of a person incident to arrest, are designated as 1B evidence.

[2489] For a CHS interview, the first file number listed on the 302 is the CHS number, and a copy of that 302 must be uploaded to that file. The 302 must also list the main case file number, as well as any applicable subfiles that have been opened. For example, an interview with Bill Allen conducted after the FBI had opened him as a CHS and had assigned him a CHS number should have listed at least Bill Allen's CHS file and the Polar Pen file. If the interview concerned Senator Stevens or Peter Kott, for example, the subfiles that had been established as "TSTEVENS" or

accessible to any authorized FBI employee in the country, not just the case agents.

The ACS program automatically assigns a "serial number" for that 302 for each file and subfile into which the 302 is uploaded. The serial numbers are assigned in chronological order based on when the report is uploaded to ACS, not based on the date of the interview or the date the report was purportedly written. Moreover, a separate serial number is assigned within each file and subfile, so that, for example, the same 302 might be assigned serial number "X" in the investigation file and serial number "Y" in the CHS file.

The drafting agent is responsible for ensuring that the SST receives the original 302 for filing. Hard copies of the 302 are placed in all files and subfiles listed on the 302, with the original 302 filed in the first file listed. So, for example, the original 302 for a debriefing of Allen after he became a CHS should be filed in his CHS file.

The handwritten interview notes are not uploaded to ACS, but the existence of the 1A envelope (with the names of the witness, the agents and the interview date) is reflected in ACS and assigned a serial number. The 1A envelope with the original agent notes are filed in the first file listed. For example, a 302 concerning a debriefing of Bill Allen should list his CHS file number first, and the 1A envelope with the original agent's notes from that debriefing should be placed in the appropriate part of Allen's CHS file.

Under FBI policy and practice, the 302 is to be completed within five days of the witness interview.[2490] In the upper right hand corner of the 302 is a section for inserting the "Date of Transcription." MAOP Section 10 13.4 specifies that this date shall be the date when "the typing was completed."

The date on which a 302 is written can be very important if the accuracy or completeness of the 302 is ever questioned. Agents are trained and expected to create thorough notes, so that a complete and accurate account of the interview can be prepared. The timeliness of the 302's preparation is important because a lengthy passage of time, during which the agent's memory may fade, may affect the reliability of the 302. A 302 written just one or two days after the interview

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"PKOTT" should have also been listed. There should thus have been an ACS upload into at least Allen's CHS file and the Polar Pen file, as well as any subfile listed.

[2490] The "five-day rule," as it is commonly referred to, is contained in MAOP § 10-13.4: "Date of dictation must be within five working days." Because most agents now type their own 302s rather than dictate them for someone else to type, the five-day rule has been applied, as a matter of policy and practice, to an agent's typing of the 302.

might well be considered more reliable, for example, than one written two years later. As SA Kepner told OPR, the reason behind the FBI's five day rule is that it creates "[a] better chance of being accurate."[2491]

These FBI procedures help ensure that all witness statements are recorded in a timely and accurate manner; that the 302s can be readily accessed, in hard copy or electronic format, by the case agent or any other authorized agent; that the original interview notes are maintained as evidence, noted in ACS, and retrievable; that 302s can be compared to the original notes; that the FBI and prosecutors can be confident all witness statements are identified and available for discovery review; and that the government can comply with all discovery obligations and any court orders concerning the review or production of witness statements.

III. OPR'S INVESTIGATION

OPR's investigation revealed that SA Kepner [redacted]

The court in *Stevens* specifically ordered production of 302s on two occasions. First, on September 16, 2008, the court ordered the government to provide redacted 302s containing *Brady* material by September 17, 2008.[2492] Second, on October 2, 2008, "persuaded there [wa]s a *Brady* violation," the court ordered the government to immediately turn over the FBI 302s and IRS interview memoranda (MOI), in unredacted form, for every witness in the case.[2493] Kepner's failure to create 302s and produce them to the prosecutors adversely affected the government's ability to comply with the court's orders.

Kepner was the lead agent on the Polar Pen investigation and the *Stevens* case; she was also Bill Allen's handler after he became a confidential source.[2494]

[2491] Kepner OPR Tr. Oct. 14, 2009 at 521.

[2492] *United States v. Stevens*, Tr. Sept. 16, 2008 (pm) at 30.

[2493] *United States v. Stevens*, Tr. Oct. 2, 2008 (am) at 19, 29.

[2494] As the lead agent, Kepner was primarily responsible for interviewing Allen as well as for having Allen participate in consensually recorded conversations, both telephonically and in person, with subjects of the investigation.

Kepner was also in charge of collecting Bill Allen 302s and producing them to the defense pursuant to the court's October 2 order.

We investigated Kepner's conduct with respect to the preparation of Allen 302s and the preservation of interview notes. We reconstructed Kepner's (and other agents') interviews of Allen by collecting all available 302s and notes of such interviews, and by reviewing the notes of Allen's lawyer, Robert Bundy, who attended most of the interviews of his client. We found the following significant facts from our review of the evidence surrounding Allen others' interviews:

1) Kepner created false the transcription dates on two 302s covering Allen interviews on September 6, 2006; the two 302s were purportedly finalized on September 7, 2006, the day after the interviews, when in fact they were not written until two years later during the *Stevens* trial;

2) Kepner was responsible for producing all Allen 302s to the defense on October 3, 2008, following the court's order of the previous day; however, Kepner did not produce to the defense 302s for the two Allen interviews on September 6, 2006, or the 302s covering Allen interviews on January 13 and February 9, 2007;

3) Eight interviews of Allen were never memorialized or otherwise disclosed to the defense;

4) Kepner's notes of five of the eight Allen interviews identified above were only located long after the *Stevens* trial; her notes, if any existed, of the other three interviews have not been produced by her or found by OPR;

5) Kepner's 302s for certain Allen interviews differ, in material respects, from Kepner's notes, or her co agent's notes, and/or Bundy's notes; and

6) Kepner neither prepared a 302 nor preserved any notes from an interview of Senator Stevens's aide, [redacted], on May 1, 2008.

IV. THE BACKDATED SEPTEMBER 6, 2006 ALLEN 302s

The notes and 302s relating to interviews Kepner conducted of Bill Allen on September 6, 2006, demonstrate the irregularities in her preparation and maintenance of reports of interviews, and highlight the difficulties OPR encountered in attempting to locate all the 302s and to determine their creation dates. The interview began in the morning and was attended by SAs Kepner and Kadera, AUSA Goeke, Bill Allen, and Allen's lawyer, Robert Bundy. It resumed after lunch with the same attendees, except Kadera. Because Kadera took notes for the first half and Kepner for the second, and because the 302s were divided

into recounting the morning and afternoon sessions separately, we have treated this day of questioning Allen as two separate interviews.

The two interviews resulted in the creation of at least 5 different 302s, of varying levels of consistency with the agents' own notes. In addition, we found the beginning of a sixth 302 on Kepner's laptop computer, although that draft was apparently abandoned after a single paragraph.

During her OPR interview, Kepner admitted backdating two of the 302s by more than two years, making it appear that they had been prepared the day after the interview when the events would have been fresh in her memory.[2495] Notably, although Kepner sent two of the remaining three 302s from the September 6 interviews to the prosecutors,[2496] she did not provide them to the defense.[2497]

A. The Morning Session on September 6, 2006

The notes of this interview, which were taken by Kadera, are two pages long, and detail the history of Allen's relationship with Senator Stevens, his monetary contributions to Stevens and other candidates, and Allen giving Stevens's son [redacted] a job with VECO at the request of [redacted], who worked for Stevens. According to the notes, Allen said that Stevens told him that he did not have to hire [redacted].

1. The 302 Bearing a Transcription Date of September 13, 2006

The first draft of the 302 created for the September 6 morning session was written seven months later by SA Kadera, who sent it by email in draft form to Kepner on March 30, 2007, along with another 302 that he had drafted for a

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[2495] Kepner OPR Tr. Feb. 18, 2010 at 137. After initially stating that she did not know how she decided to choose September 7, 2006, as the date to put on the backdated 302s, she then agreed that it was probably to make it look as though the 302s had been written immediately after the interviews. Kepner OPR Tr. Feb. 18, 2010 at 225.

[2496] In an April 19, 2007, email to Marsh, Bottini, Goeke, Sullivan, and two IRS agents, Kepner sent copies of a 302 from the morning session bearing a transcription date of September 13, 2006, and a 302 of the afternoon session bearing a transcription date of September 9, 2006. Apr. 9, 2007 2:50pm email from SA Kepner to PIN attorney Marsh, AUSA Goeke, AUSA Bottini, PIN attorney Sullivan, SA Bateman, and SA Roberts.

[2497] Although disclosure of discoverable information is usually the prosecutor's responsibility, Kepner assumed the responsibility in this case as she prepared a box of 302s to be sent to the defense. Kepner OPR Tr. Feb. 18, 2010 at 149-150.

September 27, 2006 Allen interview.[2498] The draft 302 for September 6, 2006, bears a purported transcription date of September 13, 2006, but Kadera admitted in his OPR interview that this date was not accurate.[2499] This first 302 had several mistakes. First, it referred to Allen not by his name but as a "source," and it bears the file number not only for the Polar Pen case, but also a CHS file number, as though Allen were a source at the time the 302 was supposedly prepared.[2500] Allen was not opened as a source by the FBI, and no CHS number was assigned to him, until October 6, 2006, a month later than this 302 purports to have been written.[2501]

Kadera told Kepner in his cover email of March 30, 2007, that he had underlined some sections in the 302 to highlight for her the passages in which he had not understood what Allen had referred to, asking for her help in clarifying those passages. He also informed her that he had placed his interview notes in her mailbox.

Kepner edited Kadera's draft by deleting the underlinings in Kadera's version, correcting a misspelled name, making some minor clarifications, and correcting the erroneous CHS number that Kadera had included. Kepner did not correct the "Date of Transcription" date to show that this 302 was actually prepared approximately seven months later than indicated. She also did not correct the erroneous reference to Allen as a "source" for an interview that took place one month before he was opened as a CHS. She did not have Kadera review the 302 and initial it; nor did she submit this 302 and the accompanying 1A envelope with the interview notes to her SSA for review; nor did she cause it to be uploaded into ACS. No hard copy was ever placed in the FBI's files. Kepner did, however, include this version of the 302 in her set of 56 Allen 302s emailed to the prosecutors on April 19, 2007. This version of the 302 was then saved to the PIN share drive, where OPR eventually found it. Neither this 302 nor any other 302 concerning this interview was ever disclosed to the defense.

There is another version of this 302. On May 15, 2009, six weeks after the *Stevens* case was dismissed, but while other Polar Pen investigations were

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[2498] These 302s were among the group that Kadera delivered and Kepner wrote in late March 2007, after the PIN attorneys had informed the FBI of their concern over the lack of 302s for interviews of Allen and Rick Smith.

[2499] In contrast, the other 302 included in that email to Kepner accurately listed a date of transcription of March 30, 2007.

[2500] Kadera actually typed an erroneous CHS number. Kepner corrected this number when she edited this draft and sent it to the prosecutors in April 2007, as discussed below.

[2501] *See* July 26, 2010 FBI-EC by SA Harmke.

continuing, PIN Acting Chief Raymond Hulser sent an email to SSA Brian Hastie (who had replaced Colton Seale on the Polar Pen investigation), informing Hastie that the first 302 Hulser had for Bill Allen was an interview from September 1, 2006. Hulser noted that the FBI had approached and interviewed Allen on August 30, 2006, and he needed any 302s or notes from the first interview of Allen.

The reason Hulser did not have the Allen 302 for the "flip session" of August 30, 2006, was that it was never uploaded to ACS. This prompted FBI Anchorage management to send an office wide email asking agents to search for all Allen 302s and notes, in an effort to determine whether any other Allen 302s, besides the Allen August 30, 2006 302, had not been entered into ACS. As a result of the inquiry, management learned from Kadera that the September 6, 2006 morning session 302, along with the 302 from the September 27, 2006 Allen interview (noted above and discussed below), had not been uploaded to ACS, and directed Kepner and Kadera to complete the 302s and enter them into the system immediately.[2502] Kadera informed OPR that Kepner did not tell him that she had sent a version of this 302 to the prosecutors back in 2007. Kepner also did not tell him that she had created a new 302 in the fall of 2008 for the interview on the morning of September 6, 2006.

For this final version of the Kadera drafted 302, Kepner and Kadera made almost no changes to Kadera's original version that he had emailed to Kepner on March 30, 2007. The underlining was deleted, but otherwise this version had none of the corrections and improvements that Kepner had made before she emailed Kadera's draft to the attorneys on April 19, 2007. Even the correction of the mistaken CHS number that Kadera had initially typed in March 2007 was not retyped, as Kepner had done before sending that version on to the prosecutors, but instead someone simply struck through the erroneous CHS number by hand and wrote the correct number in its stead. This final version of the 302 still bears the finalized date of September 13, 2006, and still refers to Allen as "source." It is this version that was uploaded into ACS on May 28, 2009, seven months after the completion of the *Stevens* trial.

[2502] Kadera sent an email to Kepner on May 17, 2009: "Please come find me regarding some old polar pen 302s that apparently did not make it into the file, but the notes did. I know, I think it's crazy too." In addition, ASAC Heller spoke with both agents about their failure to comply with the FBI's requirements for writing up 302s. On May 25, 2009, ASAC Heller sent an email to another Anchorage SSA, Kadera's supervisor Lisa Locasio, in which he referred to his speaking to Kepner and Kadera "with reference to the delinquent FD-302 they had started in September of 2006 but was not transcribed until 2007. I counseled both agents of the necessity to comply to the policy of 5 days between conducting an interview and the completion of the FD-302." ASAC Heller treated this as a performance issue and instructed SSA Locasio to place a note in their "drop files," which are informal personnel files maintained at the local office. When OPR examined the FBI drop files for Kadera and Kepner, however, there was no note recording their failure to prepare 302s in a timely manner.

In her initial interview with OPR in October 2009, Kepner denied knowing why the 302s for the morning session on September 6, 2006, and for the September 27, 2006 interview, were not placed in the file or uploaded to ACS.[2503] She also said that they were never provided to the prosecution team.[2504] She was mistaken in this, however, as each of these two 302s were among those she emailed to the prosecutors on April 19, 2007.

As we discuss below, Kepner's erroneous belief was attributable to her failure to ensure that all Allen 302s were uploaded to ACS so that they would be accessible to all authorized agents. Instead, Kepner prepared and saved Allen 302s on her work computer and emailed those Allen 302s to the prosecutors. In preparing to leave Alaska in September 2008 for the *Stevens* trial, Kepner downloaded all Allen 302s to an external hard drive. However, she said she downloaded the 302s from ACS, not from her computer. Because ACS, unlike her computer hard drive, did not have all the Allen 302s, the contents of the external hard drive were incomplete. Thus, these two 302s (as well as others we discuss below) were missing from Kepner's external hard drive.

2. The 302 Bearing a Transcription Date of September 7, 2006

OPR found another 302 for the morning session of the September 6, 2006 Allen interview, bearing a purported transcription date of September 7, 2006. This 302 is not a minor variation on the version drafted by SA Kadera in March 2007. Rather, this is an entirely different recounting of the interview, written two years after the fact by Kepner.

Whereas the Kadera drafted 302 with a purported September 13, 2006 transcription date was two and half pages long and contained a complete account of almost everything reported in Kadera's interview notes, this September 7 version is only one page long. Kepner corrected the referral to Allen as a "source" and eliminated the CHS number. The only file number listed is the "BALLEN" subfile in the Polar Pen case. Kepner's 302 omits many of the details from Kadera's notes concerning Allen's history with Stevens, as well as some of the details about [redacted] getting a job with VECO, but it does include Senator Stevens's telling Allen that he did not have to hire [redacted] The omissions in this 302 render it a less thorough and accurate record of what Allen said, but it does not appear that any of the omitted information constituted *Brady* or *Giglio* material.

[2503] Kepner OPR Tr. Oct. 14, 2009 at 528.

[2504] Kepner OPR Tr. Oct. 14, 2009 at 529.

Kepner never provided the draft of this 302 to Kadera or SSA Seale for review, nor was it ever serialized and uploaded to ACS. Neither the original nor a hard copy is in the Polar Pen file, and it was not included among the 302s that Kepner emailed to the prosecutors in 2007 and 2008. Instead, this 302 came to OPR's attention only because it was included in the PDF of Allen 302s that Kepner emailed to SSA Seale (who forwarded it to Brenda Morris) on March 12, 2009, in response to Morris's efforts to gather the Allen 302s to provide to the O'Brien team.

After a thorough search by FBI computer technicians who assisted OPR, the only other place this 302 has ever been found is on Kepner's external hard drive, which she brought with her to Washington for the *Stevens* trial.[2505] The computer metadata for this 302 show that its creation date, its modification date, and its "last accessed" date are all October 2, 2008. That was the same day that the court ordered the government to turn over to the defense all 302s and other memoranda of witness interviews. The metadata also show that within minutes of the date and time of creation for this 302, Kepner's hard drive was connected to a printer located in the PIN offices. This suggests that a copy of the 302 was printed out at that time. Kepner told OPR that she did not know whether she ever gave a copy of this 302 to any prosecutor (or anyone else).[2506] It was not disclosed to the defense.

B. The Afternoon Session on September 6, 2006

The Allen interview of September 6, 2006, adjourned at midday and resumed that afternoon with the same participants, except for Kadera. SA Kepner's handwritten notes of this interview session show that most of the afternoon session focused on two vehicles that had been purchased by Bill Allen and traded for vehicles owned by Senator Stevens for the benefit of Stevens's daughter, Lily.[2507]

According to Kepner's notes, Allen said he bought a Land Rover in 1999 for one of his grandsons, but [redacted], Allen changed his mind about giving him the vehicle. Allen visited Stevens in Washington, D.C., and saw Stevens's 1964½ Mustang convertible. Allen proposed trading the Land Rover for the Mustang. Allen estimated the Land Rover was worth $43,000 to

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[2505] We found no trace of this 302 on any of the other FBI hard drives, on Kepner's laptop computer or her thumb drive, on the PIN "S:" drive, or on any of the prosecutors' hard drives.

[2506] Kepner OPR Tr. Feb. 18, 2010 at 146, 169.

[2507] Kepner's notes from the afternoon session of the September 6, 2006 interview were among those that Kepner provided to CDC Gonzalez on March 23, 2009.

$44,000 and that the Mustang was worth $15,000 to $20,000. In addition to trading him the Mustang, Stevens also gave Allen a check for $5,000, which Allen deposited into his checking account at Key Bank. Stevens shipped the Mustang to the Seattle area where it remained in the garage of a female friend of Allen, in the same condition as when he acquired it.

Kepner's notes indicate that in 2002 or 2003, Stevens wanted the Mustang back and suggested to Allen that they trade the car for several guns that Stevens had at the Girdwood house. The notes indicate that Stevens's wife did not like the guns, and that Allen's [redacted] collected guns. The guns were in the closets and cellar of the Girdwood home. At the time of the interview, [redacted] had removed them to [redacted].[2508]

Bundy's notes from this interview, by contrast, provide more information about Allen's statements about the check from Senator Stevens, and link the gun transaction with the Land Rover/Mustang exchange. Bundy's notes reflect that Allen said "TS gave the difference in a check."[2509] When Kepner told Allen that she had seen a check for "only $5K"[2510] to him from Senator Stevens around the time of the car exchange, Allen responded: "No way would have done for $5K difference" and "check ought to have come from [Catherine's] bank."[2511] Kepner then checked a spreadsheet of Allen's bank deposits and told him there was one from July 1, 1999, from Senator Stevens for $5,000.[2512]

Bundy's notes indicate that the guns were part of the Land Rover/Mustang exchange (Allen said the guns were "in swap").[2513] Bundy's notes, in contrast to Kepner's, indicate that even though Allen did not pick up the guns until several years later, they were included, along with the check from Stevens, as part of the Land Rover/Mustang deal:

Trade includes (1) vehicle (Mustang)
(2) $5K

[2508] Bundy's notes say: "B picked up guns before [redacted] in 2003 or 2004." RB-AWP-OPR 000035.

[2509] RB-AWP-OPR 000033.

[2510] RB-AWP-OPR 000033.

[2511] RB-AWP-OPR 000033.

[2512] RB-AWP-OPR 000034.

[2513] RB-AWP-OPR 000035.

(3) guns.[2514]

According to Bundy's notes, the guns stayed at Girdwood for several years after the vehicle exchange. Allen quoted Senator Stevens as telling him that Allen had to "go get those guns because [Catherine is] raising hell; doesn't like guns."[2515] Allen said he picked them up in 2003 or 2004 before [redacted] moved back to [redacted].[2516] Bundy's notes also reflect Allen as saying that, when Stevens later wanted the Mustang back, Stevens asked Allen, "Why don't you trade me for guns."[2517]

According to Kepner's notes, Allen also described a later vehicle exchange. In 2005, Bill Allen told Stevens that the 1999 Land Rover he had traded for the Mustang would probably go bad. Allen had purchased four vehicles from Kenai Chrysler, including a Jeep for $34,000. Stevens had told Bill Allen that Lily wanted a Jeep. Allen had an employee, [redacted]" deliver the Jeep to Lily in California, where she gave [redacted] the Land Rover and a check. [redacted] then drove the Land Rover [redacted] and gave it to one of Allen's grandsons. Allen believed the Land Rover was worth $17,000.[2518] Bill Allen thought he told Stevens how much the Jeep cost, and that Stevens thought this was a good deal.

1. <u>The 302 Bearing a Transcription Date of September 9, 2006</u>

The first 302 Kepner prepared for the September 6, 2006 afternoon session bears a "date of transcription" of September 9, 2006, and is two pages long. This 302 was never reviewed by an SSA, given a serial number in any FBI file, uploaded to ACS, or placed in hard copy in the FBI's files in Anchorage. It was, however, included among the 56 Allen 302s that Kepner sent by email to the prosecutors on April 19, 2007. Kepner prepared this 302 at least ten days before she emailed it to the prosecutors, because the FBI's computer metadata show that it had been modified on April 9, 2007.

As discussed previously, the FBI's MAOP mandates that an agent list the date the 302 is finalized as the "date of transcription," but SA Kepner admitted in her first interview with OPR that this date was routinely inaccurate on her 302s.

[2514] RB-AWP-OPR 000036.

[2515] RB-AWP-OPR 000036.

[2516] RB-AWP-OPR 000036.

[2517] RB-AWP-OPR 000036. This suggests that, contrary to Bundy's notes, the guns had not been part of the initial exchange.

[2518] *See* Sept. 6, 2006 notes of SA Kepner.

According to Kepner, the transcription date on her 302s sometimes merely reflected the date she began typing the report, even if she did not complete and finalize the 302 until much later.[2519] Contrary to FBI requirements, therefore, the "date of transcription" is not a reliable indicator of when SA Kepner prepared a 302.

As additional evidence that the September 9, 2006 date is incorrect, this 302 bears the same error as the Kadera drafted 302 from the morning session: even though the FBI did not open Allen as a CHS and did not assign him a CHS number until more than a month after this 302 purports to have been finalized, Kepner listed Allen's CHS file number and referred to him in the narrative only as "source."

Given that April 9, 2007, is the earliest date for which the metadata show this 302 existed, and given that in late March and early April 2007 Kepner and Kadera wrote and finalized numerous 302s concerning Allen interviews from the late summer and autumn of 2006, it is reasonable to infer that this 302 was created in late March or early April 2007, approximately seven months later than the date it purports to have been prepared.

Although a 302 is supposed to be a complete and accurate account of what a witness says during an interview, comparing Kepner's notes with this 302 shows that she omitted many of Allen's statements from the 302. The omissions include several statements relating to the Land Rover/Mustang exchange that were potentially exculpatory. The notes indicate, "Rare Mustang has a 298 [engine]," but this is not included in the 302. In addition, the notes indicate that, after Allen said that the Land Rover was worth $43,000 or $44,000 and the Mustang was worth $15,000 to $20,000, Allen said "Ted gave him the difference. Deposited check into Key Bank account."

By contrast, the 302 omits the description of the check as being for "the difference" but gives a precise dollar figure: "The source recalled that in addition to the Mustang, STEVENS gave him a check in the amount of $5,000 which he/she deposited into his/her checking account at Key Bank." The 302 omits any reference to the Mustang being "rare."

Bundy's notes show that Allen said that in exchange for the new Land Rover he received not only the Mustang and the check, but also an assortment of guns. Neither Kepner's notes nor her 302 indicates that the guns were part of the Land Rover/Mustang exchange.

[2519] Kepner OPR Tr. Oct. 14, 2009 at 560.

These omissions and additions are significant because the government's theory was that Stevens had benefitted from an uneven trade. By omitting the statements about the guns, the 302 is more consistent with the government's theory than Bundy's notes from that interview.[2520]

Another difference between Kepner's notes and her 302 concerns the existence of any trade involving the guns at all. As mentioned previously, Kepner's notes contain many details about this incident, including the locations of the guns in the cellar and closets in Girdwood, their eventual location with [redacted], and their being picked up in 2002 03 and being transferred several years later.

The 302, on the other hand, states that Allen recalled Stevens expressing interest in getting his Mustang back, then stated: "STEVENS had a number of guns that he could swap for the Mustang. Apparently, STEVENS' wife, CATHERINE STEVENS, did not like having the guns. *The trade of the guns for the Mustang never occurred.*" (Emphasis added.) This is the entirety of the 302's discussion of the guns. This statement in the 302 is not an accurate account of what the witness said during the interview, as reflected in the agent's own notes as well as Bundy's.

Although this 302 was sent to the prosecutors in the April 19, 2007 email from Kepner, and although OPR found it on the PIN "S:" drive, it was never disclosed to the defense in the *Stevens* case.

2. <u>The 302 Bearing a Transcription Date of September 7, 2006</u>

Kepner wrote a second 302 about this same interview, with a purported "date of transcription" of September 7, 2006. This second 302 is one and a half pages long, shorter than the 302 she wrote bearing the transcription date of September 9, 2006. Like the other 302, however, this 302 was never disclosed to the defense. Kepner told OPR that she did not think she provided this 302 to the

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[2520] However, in an interview with OPR on June 12, 2010, Allen provided a version significantly different from what Bundy's notes reflect about his statements concerning the guns. To OPR, he stated that the guns were not part of the initial transaction involving the new Land Rover and the used Mustang, which he said only involved vehicles and money. Rather, he said that long after that exchange, Stevens wanted the Mustang back. One day while Allen was at the Girdwood house, Stevens said he would trade the guns for the Mustang, and he then retrieved five or six guns, including pistols and rifles, and handed them to Allen, who put them in his own vehicle and eventually delivered them to [redacted] [redacted]. Allen told OPR that he never appraised the guns nor was any paperwork done to transfer title, and that the guns were not worth the same as the Mustang. Allen also told OPR that the government did have the guns appraised. June 12, 2010 FBI 302 of Bill Allen.

prosecutors.[2521] As we discuss below, the circumstantial evidence suggests that Kepner prepared this 302 on October 2, 2008, and provided it to the prosecutors. The evidence also shows, however, that Kepner was responsible for producing Allen 302s to the defense, but she did not include this 302 in the production.

Whereas the previously discussed 302 with the transcription date of September 9, 2006, mistakenly referred to Allen only as "source," and listed a CHS number that had not yet come into existence, this second version avoided that mistake. This 302 refers to Allen by name and lists no CHS number.

As with the other 302 Kepner prepared two years after the interviews concerning the morning session, bearing the same purported transcription date of September 7, 2006, Kepner never provided a draft of this 302 to Kadera and her SSA for review; nor was it ever serialized or uploaded into ACS. Neither the original nor a hard copy is in the Polar Pen file, and it was not included among the 302s that Kepner emailed to the prosecutors in 2007 and 2008. This afternoon session 302 was only discovered by OPR because it was in the PDF file attached to the email from Kepner to SSA Seale (and then forwarded to PIN Principal Deputy Chief Morris) on March 12, 2009, months after the *Stevens* trial. The only other place we found this 302 was on the external hard drive that Kepner brought to Washington, D.C., for the *Stevens* trial.

This 302 is shorter than the 302 Kepner wrote in the spring of 2007 with the purported September 9, 2006, transcription date, because it omits even more of Allen's statements from the interview notes than did the earlier 302. It also differs from the earlier 302 on several substantive points. For example, whereas the earlier 302 stated that Stevens had provided Allen a check for $5,000 in addition to the Mustang in exchange for the Land Rover, this 302 simply stated: "STEVENS also gave ALLEN a check which was deposited into his KeyBank account."[2522] In addition, the new 302 more accurately recounts what the notes showed Allen said about the later attempted trade of Stevens's guns for the Mustang, including that Stevens did give the guns to Allen.[2523]

Based on the analysis of the metadata by the FBI, the evidence indicates that Kepner wrote this 302 on October 2, 2008. The metadata reflect the "creation

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[2521] Kepner OPR Tr. Feb. 18, 2010 at 146-147.

[2522] This 302 also differs on a significant detail from Kepner's notes, which state: "Ted gave him the difference."

[2523] The previous 302 had stated only, "The trade of the guns for the Mustang never occurred." This newer 302 went into detail, consistent with the notes, about the location of the guns and the details of the exchange, and stated, "STEVENS then traded the guns for the Mustang."

date," the "modified date," and the "last accessed date" as all being October 2, 2008. That was the day that Judge Sullivan ordered the Government to provide the defense with all 302s and other interview memoranda. This 302, which was backdated by more than two years, was never provided to the defense.

Although Kepner said she was not sure whether she provided this 302 to the prosecutors, we found substantial circumstantial evidence not only that she did, but that she did so at the time the metadata indicate it was created and printed: October 2, 2008. On the evening of October 4, 2008, two days after the court's disclosure order, AUSA Bottini emailed to Sullivan a document Bottini prepared, raising possible arguments in anticipation of defense claims that the Allen 302s provided the previous day in response to the court's order contained *Brady/Giglio* material that the government should have provided much earlier. The document attached to Bottini's email carried the heading: "Possible Issues with other 302s/MOIs Just Discovered."[2524] The document then identifies, among others, a 302 for an Allen interview on September 6, 2006 and anticipates a claim from the defense that the 302 contains *Brady* information pertaining to where Allen claimed that Lily Stevens picked up the Land Rover. AUSA Bottini's description of the factual issue matches this 302, and no other. Thus, we found that Kepner did in fact provide at least this falsely dated 302, and probably the other one as well, to the prosecutors. The *Brady* argument that Bottini anticipated, however, never came because the defense never received this 302, or for that matter, any 302 for any Allen interview on September 6, 2006. Kepner admitted that she was responsible for gathering all Allen 302s and putting the package together to provide to the defense.[2525]

C. Kepner's Statements Regarding the Multiple September 6, 2006, 302s

OPR interviewed Kepner under oath on October 13 and 14, 2009, and on February 18, 2010. At the time of the first interview, OPR had discovered the two 302s from the September 6, 2006, morning session (the one Kadera wrote with a purported transcription date of September 13, 2006, and the one Kepner wrote with a purported transcription date of September 7, 2006). By this time, however OPR had only discovered a single 302 for the afternoon session the version bearing a transcription date of September 7, 2006.

[2524] Bottini told OPR that he meant "just discovered" to indicate that the 302s identified on his attachment were recently provided to the defense as "discovery," not that they had just been found. Bottini OPR Tr. Mar. 10, 2010 at 246.

[2525] Kepner OPR Tr. Feb. 18, 2010 at 186-187.

With regard to the two morning session 302s, Kepner initially stated that she had "no idea" why there would be two different 302s for the same interview.[2526] She said that if she "had to guess," it looked as though she had written the version with the September 7 transcription date.[2527] She could not explain why she had written this 302, because Kadera had taken the notes.[2528] Kepner told OPR that she could not say whether this 302 was ever sent to a supervisor.[2529] She also said she was unaware that neither this 302 nor the other 302 with a September 7 transcription date were ever uploaded to ACS.[2530]

OPR asked Kepner if she knew when the two 302s with the September 7 transcription dates were actually finalized. She replied: "I have no idea."[2531] She also denied knowing why neither of these 302s was in ACS or the hard copy file.[2532]

Kepner told OPR that she remembered writing one 302 while she was in Washington, D.C., but she could not remember which one.[2533] She denied, however, that the 302 she wrote in Washington, D.C., was any of the ones that OPR had shown her during the interview.[2534] Kepner later modified this statement, saying that she thought she typed the 302 for the September 6 afternoon session "probably on the date that I said I typed it [September 7, 2006]."[2535] She said that she thought that she typed the other 302 (from the morning session with a September 7 transcription date) in Washington, D.C., in preparation for trial.[2536] She realized that she had notes that were missing a 302,

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[2526] Kepner OPR Tr. Oct. 14, 2009 at 532.

[2527] Kepner OPR Tr. Oct. 14, 2009 at 538.

[2528] Kepner OPR Tr. Oct. 14, 2009 at 539-540.

[2529] Kepner OPR Tr. Oct. 14, 2009 at 545.

[2530] Kepner OPR Tr. Oct. 14, 2009 at 545.

[2531] Kepner OPR Tr. Oct. 14, 2009 at 562.

[2532] Kepner OPR Tr. Oct. 14, 2009 at 562.

[2533] Kepner OPR Tr. Oct. 14, 2009 at 570-571.

[2534] Kepner OPR Tr. Oct. 14, 2009 at 571.

[2535] Kepner OPR Tr. Oct. 14, 2009 at 586.

[2536] Kepner OPR Tr. Oct. 14, 2009 at 586.

so she "typed it for the first time."[2537] "I think I prepared a Bill Allen 302 in D.C., one 302."[2538] She stated that she needed to get the 302 written for purposes of a *Brady* spreadsheet she was preparing.[2539]

By the time of the February 18, 2010 Kepner interview, OPR had found the longer version of the September 6, 2006 302 bearing a purported transcription date of September 9, 2006. In advance of the interview, OPR provided to Kepner and her attorneys copies of all the September 6 302s,[2540] as well as the computer metadata relating to them. At the second interview, Kepner's testimony changed from her earlier statements on this matter.

Kepner told OPR during her second interview that, with more time to think about the September 6, 2006 302s, she now believed that she might have prepared two 302s after she came to Washington, D.C., for the *Stevens* trial.[2541] Kepner stated that she created 302s in Washington, D.C., because she had notes for which she could not find a corresponding 302.[2542] Before coming to Washington, D.C., for trial preparation and trial, Kepner said that she downloaded the Allen 302s from ACS onto a portable external hard drive that she brought with her.[2543] OPR pointed out to her that several 302s were never placed in ACS, and Kepner responded:

> [It] sounds to me like I was totally disorganized with those 302s and had drafts written just like the cyber drafts that we had here that got lost, you know, that never got uploaded into ACS. You know, unfortunately, you know, I was disorganized with this, you know, I was

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[2537] Kepner OPR Tr. Oct. 14, 2009 at 587.

[2538] Kepner OPR Tr. Oct. 14, 2009 at 588.

[2539] Kepner OPR Tr. Oct. 14, 2009 at 594.

[2540] OPR provided Kepner's attorneys with copies of 302s relating to the morning session, bearing a transcription date of September 7, 2006, and two versions of the 302 bearing a transcription date of September 13, 2006; OPR also provided copies of the 302s relating to the afternoon session, bearing a September 7, 2006, transcription date and a September 9, 2006, transcription date.

[2541] Kepner OPR Tr. Feb. 18, 2010 at 105-106.

[2542] Kepner OPR Tr. Feb. 18, 2010 at 107.

[2543] Kepner OPR Tr. Feb. 18, 2010 at 108.

> overwhelmed and, you know, I lost materials that had you know, I lost notes, I lost 302s.[2544]

Kepner again identified the 302 of the morning session with a September 7 transcription date as being one that she believed she prepared in Washington, D.C., in preparation for the September 9, 2008 *Brady* letter.[2545] She also told OPR that although she did not have a "specific recollection of it," based on what she had now seen she thought that she prepared the other 302 with a September 7, 2006 transcription date (relating to the afternoon session) in Washington, D.C., in September 2008 for purposes of the *Brady* spreadsheet.[2546]

Kepner told OPR that she had brought to Washington, D.C., not only the 302s she could find but also any interview notes that she could find, and that she reviewed all of those for *Brady* material.[2547] She prepared a 302 when she could not find one to correspond to her notes, so that she could document the interviews if prosecutors needed to refer to the interviews in the *Brady* letter.[2548] Kepner cited the Kadera drafted 302 with the transcription date of September 13, 2006, as an example of a 302 that she could not find, so she took Kadera's notes and wrote the 302.[2549]

Kepner admitted that the September 7, 2006 transcription date that she put on the two 302s when she wrote them in Washington was "false."[2550] She stated that she "probably" picked the date of "September 7, 2006" as the transcription dates for these new 302s to make it appear that they were done promptly after the interview.[2551] Kepner acknowledged to OPR that her backdating two 302s had

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[2544] Kepner OPR Tr. Feb. 18, 2010 at 109-110.

[2545] Kepner OPR Tr. Feb. 18, 2010 at 119.

[2546] Kepner OPR Tr. Feb. 18, 2010 at 134.

[2547] Kepner OPR Tr. Feb. 18, 2010 at 120. Kepner denied, however, that she had brought the notes of the April 15 and 18, 2008, Allen interviews with her, saying those "must have been located in a different spot." Kepner OPR Tr. Feb. 18, 2010 at 122. She said that she "was totally disorganized at that point in time. I had things everywhere. I had piles everywhere. You know, I'm embarrassed to tell you, but I had things – they were in disarray." Kepner OPR Tr. Feb. 18, 2010 at 126-27.

[2548] Kepner OPR Tr. Feb. 18, 2010 at 120.

[2549] Kepner OPR Tr. Feb. 18, 2010 at 128.

[2550] Kepner OPR Tr. Feb. 18, 2010 at 136.

[2551] Kepner OPR Tr. Feb. 18, 2010 at 225.

caused her some anxiety.[2552] In light of that, she said she did remember creating two 302s with false dates: "I remember doing something like this, but I don't remember what 302s they were or even if it was multiple or what it was, but I do remember after we talked about it last time that I created 302s in D.C."[2553]

When Kepner told OPR that she typed these backdated 302s for purposes of having documentation to support the *Brady* spreadsheet, OPR noted to her that the spreadsheet listed that Allen said on September 6, 2006, that Lily Stevens had provided a check for $13,000 and the used Land Rover in exchange for the new Jeep.[2554] Neither the 302s that Kepner said she prepared for the spreadsheet, nor the interview notes, had this $13,000 figure, however.[2555] Kepner denied that this indicated that she had not actually prepared the backdated 302s for purposes of the spreadsheet: "My best recollection is it was in preparation for the *Brady* review. That's all I can tell you. That's the best memory I have of it."[2556]

When shown the computer metadata from her external hard drive listing the creation dates for these backdated 302s as being October 2, 2008, Kepner said that such a date "does not comport with my memory."[2557] She repeated that her memory was that she needed to write these 302s in conjunction with the *Brady* spreadsheet, and although it "could have been done other times," she did not think so.[2558]

When OPR informed Kepner that the earlier 302s from the morning and afternoon sessions had been included in her April 19, 2007 email of 302s to the PIN attorneys, and that those two 302s were on the PIN share drive and could have been accessed without her needing to write new ones, Kepner said that she had not been thinking about where the PIN attorneys might have those 302s, nor did she ever ask anybody about them.[2559] She also told OPR that although she

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[2552] Kepner OPR Tr. Feb. 18, 2010 at 137.

[2553] Kepner OPR Tr. Feb. 18, 2010 at 139.

[2554] Kepner OPR Tr. Feb. 18, 2010 at 157.

[2555] Kepner OPR Tr. Feb. 18, 2010 at 157, 167-168.

[2556] Kepner OPR Tr. Feb. 18, 2010 at 169. Kepner told OPR that she did not know that the information she had put in her *Brady* spreadsheet concerning September 6, 2006, was not included in the September 9, 2008, *Brady* letter. *Id.* at 184.

[2557] Kepner OPR Tr. Feb. 18, 2010 at 178.

[2558] Kepner OPR Tr. Feb. 18, 2010 at 178-179.

[2559] Kepner OPR Tr. Feb. 18, 2010 at 132.

had access on her own to the PIN share drive, it did not occur to her to look there for the missing 302s.[2560]

Kepner reiterated that she never told anyone on the trial team, including any of her fellow agents, that she could not find the September 6, 2006 302s corresponding to the notes she had.[2561] While she was in Washington, D.C., she never asked Kadera if he had written a 302 for his portion of the interview.[2562] She added that no one ever asked her to prepare the new 302s.[2563]

Kepner told OPR that she could not remember whether she ever provided PIN attorney Marsh with the newly typed, backdated 302s, but she "had them available for him in the event he needed them."[2564] She said that she could not remember whether these two 302s were among the 302s assembled in response to the Court's October 2, 2008 order to produce all memoranda of witness interviews to the *Stevens* defense attorneys.[2565] She said she believed that they were turned over and did not know that no 302s from September 6, 2006, were ever turned over.[2566] She said that, in that case, she must have forgotten to include them in the package of documents prepared for production to the defense.[2567]

OPR also found a one paragraph draft of yet another September 6, 2006 Allen 302 on Kepner's laptop computer. This draft 302 relates to the afternoon session, lists Kepner as its author, lists a transcription date of September 6, 2006, and has only one substantive paragraph, describing Allen's two grandsons. The metadata show that this draft was created on September 11, 2008, and last

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[2560] Kepner OPR Tr. Feb. 18, 2010 at 152.

[2561] Kepner OPR Tr. Feb. 18, 2010 at 145-146.

[2562] Kepner OPR Tr. Feb. 18, 2010 at 155.

[2563] Kepner OPR Tr. Feb. 18, 2010 at 171.

[2564] Kepner OPR Tr. Feb. 18, 2010 at 146.

[2565] Kepner OPR Tr. Feb. 18, 2010 at 147.

[2566] Kepner OPR Tr. Feb. 18, 2010 at 148.

[2567] Kepner OPR Tr. Feb. 18, 2010 at 150.

accessed on May 21, 2009.[2568] Kepner stated that she did not remember anything about this draft 302, nor did she know why she prepared it.[2569]

The existence of this partial 302, created on September 11, 2008, is inconsistent with Kepner's statement that she prepared the two 302s with the purported September 7, 2006 transcription date in September 2008, in conjunction with the writing of the *Brady* letter. The *Brady* letter was completed and sent to the defense on September 9, 2008, two days before this 302 was started. If she had written and completed those two 302s for purposes of that letter, there would have been no reason to start writing yet another version just two days later. This 302 is more consistent with an initial but abandoned effort by Kepner on September 11, 2008, to write a 302 about the debriefing, followed by her later writing complete 302s on or about October 2, 2008.

V. ALLEN INTERVIEWS NOT DISCLOSED TO THE DEFENSE

A. Interviews Memorialized But Not Disclosed

We found that there were four Allen 302s that were not provided to the defense: two 302s covering the two interview sessions on September 6, 2006; one 302 for an interview on January 13, 2007; and one for February 9, 2007. The failure to produce these four 302s violated the court's order of October 2, 2008, directing the government to produce all witness interview reports to the defense immediately. We have previously discussed the facts pertaining to the September 6, 2006 302s.

1. The January 13, 2007 Interview

SAs Kepner and Pluta interviewed Allen on January 13, 2007, about a hunting trip that VECO had purchased for $35,000 at a charity auction in which [redacted] participated, and about plumbing work that Mark Tyree performed at Girdwood and at Allen's residence. This interview was written as two 302s: one about the hunting trip and the other about Tyree's plumbing work. The 302 concerning the hunting trip was typed on January 18, 2007, uploaded into ACS on January 19, 2007, and emailed by Kepner to the prosecutors on April 19, 2007, and again on July 17, 2008. The prosecutors produced this 302, which had nothing to do with Senator Stevens, to the defense attorneys.

[2568] May 21, 2009, was four days after SA Kadera's email to Kepner telling her that he needed to see her about some old Polar Pen 302s that apparently did not make it into the file, although the notes did.

[2569] Kepner OPR Tr. Feb. 18, 2010 at 215-16.

The other 302, concerning Tyree and his work at Girdwood, was never uploaded into ACS, nor were copies placed in the relevant FBI files. Kepner sent this 302 to the prosecutors with her April 19, 2007 email, but the government did not disclose this 302 to the defense.

The notes for this interview were not placed into a 1A envelope in a timely manner. Rather, these notes were among the sets of notes that Kepner gave to CDC Gonzalez on March 23, 2009, and which CDC Gonzalez sent to the FBI Headquarters that same day. The notes were placed into a 1A envelope and recorded on ACS on March 26, 2009.

Kepner was responsible for collecting and producing Allen 302s to the defense. Although this 302 was provided to PIN by email from Kepner and was maintained on the PIN computer share drive, Kepner did not have it. According to Kepner, she downloaded all Allen 302s from the ACS before going to Washington, D.C., the trial. She said relied on those 302s for purposes of production to the defense. Because Kepner never caused the January 13, 2007 Allen interview to be filed or placed on ACS, that 302 was not among the 302s she had in her possession at the time production was mandated.

2. The February 9, 2007 Interview

Kepner apparently interviewed Allen twice on February 9, 2007; one interview she conducted with SA Pluta, while the other she conducted alone. The former was never memorialized; the latter was memorialized in a 302 but never produced to the defense. We discuss the former in the next section.

The interview of Allen that Kepner handled alone and memorialized in a 302 related solely to VECO's projects in the Middle East. This 302 was included in Kepner's April 19, 2007 email of Allen 302s to prosecutors, but it was never uploaded to ACS. This 302 should have been disclosed to the defense pursuant to the court's October 2, 2008 order, but Kepner did not include it with the Allen 302s she collected for production to the defense.

B. Allen Interviews that were Never Memorialized

Based on our review of Kepner's, Bundy's, and the prosecutors' notes of Allen interviews, we found that no 302 was ever prepared for eight Allen interviews conducted by Kepner (along with others in some instances).

1. The September 20, 2006 Interview

On September 20, 2006, SA Kepner, SA Joy, and AUSA Goeke interviewed Allen extensively about how the Girdwood project developed, who worked on it,

and its costs. Allen also spoke about Dave Anderson, Anderson's work on the Girdwood project, Anderson's relationship with [redacted], and Anderson's alleged attempt to extort Allen. As we discuss in greater detail in Chapter Four, Allen spoke on some of the same subjects that he addressed in his April 15, 2008 interview. Significantly, no 302 was ever prepared for either interview.

Kepner's notes for this interview were among the sets of notes she provided to CDC Gonzalez in late March 2009, after she had been directed to search for her notes from the April 15 and April 18, 2008 Allen interviews. On March 31, 2009, CDC Gonzalez faxed these 6 pages of notes, as well as 3 pages of notes from an August 17, 2007 Allen interview, to FBI Deputy General Counsel Elaine Lammert, with the cover sheet notation "More notes from Mary Beth."[2570]

The portions of Kepner's notes most relevant to the *Stevens* case include Allen's statements that Williams and Anderson were alcoholics; that Williams was gone from the project before Allen's motorcycle accident on July 8, 2001; and that VECO paid to get Williams alcohol treatment. Allen said he had never seen the invoices on Stevens's house and that Bob Persons received invoices and gave them to Catherine Stevens. Allen also said in this interview that he did not know if VECO invoiced Stevens for the work on his house, and that it should have cost $100,000 to $125,000 for labor and materials, if done correctly. Bundy's notes from this interview, totaling 10 pages, are consistent with Kepner's.[2571] OPR found no evidence that a 302 for this interview was ever prepared by either Kepner or Joy.

2. The October 10, 2006 Interview

Bundy's notes also show that there was an interview of Allen on October 10, 2006. OPR has found no FBI notes or 302 for this interview, nor any other reference to it in the government's materials. Thus, were it not for Bundy's notes, the existence of this interview would not have come to light. In addition to Allen and Bundy, the attendees were Kepner and an FBI agent named "Chad."[2572] The interview dealt with Senator Stevens and the Russian Far East program in which VECO was interested.[2573]

[2570] OPR has found no evidence that these notes were ever placed in a 1A envelope or uploaded into ACS.

[2571] RB-AWP-OPR 000043-45.

[2572] Both SA Chad Joy and SA Chad Kadera worked on the Polar Pen investigation and participated in other Allen interviews.

[2573] RB-AWP-OPR 000074.

3. The November 15, 2006 Interview

On November 15, 2006, Bundy's notes reflect a Kepner interview of Allen for which OPR has found no 302 or agent notes. The only participants listed are Kepner, Allen, and Bundy. According to Bundy's notes, Allen first discussed several non *Stevens* topics. Then, turning to the Girdwood project, he spoke about who some of the contractors were, such as Mark Tyree for plumbing. On the subject of billing, the notes state:

> Final invoice by Augie [illegible] paid by Ted
> paid by Veco by putting expenses on Bill's house
> then paid by Bill
>
> In Ted's [illegible] project went over budget[2574]
>
> Last Augie invoice April '01
>
> Minor project being done into 2001 when Bill's house
> being done.[2575]

4. The December 29, 2006 Interview

Kepner interviewed Bill Allen on December 29, 2006, taking 5 pages of notes in a spiral bound stenographic notebook. Her notes do not reflect the presence of anyone else at this interview. She never placed the notes into a 1A envelope, nor did she ever create a 302. The existence of this interview only came to light by happenstance on August 21, 2009, when a supply technician in the FBI Anchorage Division found the notebook in a stack of similar notebooks on a shelf in the supply room. The technician noticed that there were several sets of handwritten notes in the notebook and brought it to the attention of her supervisors, who forwarded the notebook to OPR. None of these notes was ever placed in a 1A envelope or uploaded to ACS.

These notes show that the two major topics covered in the interview were the work on the Girdwood project and the vehicle exchanges. With regard to Girdwood, Allen discussed the various contractors and the specifics of some of the work. Allen said that he had a conversation with Senator Stevens on a plane about the project and had made rough drawings, and had a VECO architect design plans that he showed to either Senator Stevens or his wife. Allen said he

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[2574] RB-AWP-OPR 000077.

[2575] RB-AWP-OPR 000078.

had not had many conversations with Senator Stevens or his wife about the progress of the renovations, but Bob Persons and Rocky Williams did.

Concerning the car exchanges, Allen related that, in 1999, Senator Stevens said that his daughter, Lily, needed a car and Allen told him he had one. As to the Jeep deal, Allen said that he had a conversation with Lily Stevens in which he told her the Land Rover was worth $20,000 and that the difference was $13,000. Allen said he told Lily Stevens that he owed Senator Stevens for the guns and she said, "No, I need to pay for it."

The notes reflect that Allen also said Senator Stevens later asked for the Mustang back, and that Stevens suggested a trade of the guns for the Mustang: "Bill suggested that he call it even and Lily not pay the difference because of the guns. Bill wanted to redo Mustang before he gave it back which was why he didn't transfer title."

These statements by Allen were favorable to the defense in the *Stevens* case. Allen's statements were consistent with the defense theory that the Land Rover/Jeep transaction was not a "sweetheart deal" but instead was an even exchange: Allen told Lily Stevens that her Land Rover was worth $20,000; that the difference in value for the Jeep he had bought was $13,000; and Lily wrote a check for that amount.

Kepner's notes showed that Allen said he had suggested to both Senator Stevens and his daughter Lily that Lily need not pay the difference in value "because of the guns." According to Allen, both Senator Stevens and Lily Stevens declined this opportunity to forgo paying the $13,000 difference and insisted on paying the difference.

The government disclosed some of these facts to the defense by producing before trial Kepner's affidavit in support of an application for a search warrant for the Girdwood residence, signed July 27, 2007. There, in a section discussing the chronology of the Jeep purchase and the exchange for the used Land Rover, Allen is quoted as saying that he told Lily Stevens that her Land Rover was worth $20,000 and that Lily paid $13,000 back to Allen.[2576]

In the government's pretrial notice of intent to introduce other crimes evidence, there is also a discussion of the Jeep transaction and the values of the vehicles. That pleading also mentions that the Jeep was worth approximately $34,000 and that the check from Lily Stevens was for $13,000, but it omits any indication that Allen ever said that the Land Rover was worth $20,000. Rather,

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[2576] July 27, 2007, Affidavit in Support of Application for Search Warrant, at 56.

the pleading states simply: "At the time of this exchange, the 1999 Land Rover had an approximate value of $9,000."[2577]

Allen's view that this was essentially an even exchange was also noted in the 302 memorializing the first interview of Allen, on August 30, 2006, in which Allen described the Jeep transaction briefly. He is quoted as saying that "he thinks that the transaction was legitimate and that TED STEVENS received no financial benefit as a result."[2578] That 302 was not produced to the defense until October 2, 2008, following the court's order to disclose all interview memoranda.

There was never a disclosure to the defense, on the other hand, of Allen's statement to Kepner on December 29, 2006, that he told both Lily Stevens and Senator Stevens that they need not pay for the difference in the Jeep and Land Rover values "because of the guns," and that they had declined that offer (with Lily Stevens saying, "No, I need to pay for it").

5. The February 9, 2007 Interview

Bundy's notes show that on February 9, 2007, he and Allen met with SAs Kepner and Pluta. The agents played several video and audio recordings from court ordered electronic surveillance involving discussions Allen had with Rick Smith, primarily regarding Peter Kott. The notes show that Allen explained to the agents what he meant in certain passages (for example, "what he was talking about in terms of money over the yrs: his fund raising over the years").[2579] Pluta questioned him concerning how VECO bonuses came about ("Were bonuses given to execs to help [facilitate] them make campaign contribs? Yes").[2580] OPR and the FBI have been unable to locate any agent notes or a 302 memorializing this session.[2581] Although this interview did not deal directly with Senator Stevens, it arguably contained *Giglio* information concerning Allen and, at a minimum,

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[2577] Government's Notice of Intent to Introduce Evidence or, in the Alternative, Notice Pursuant to Rule 404(b) at 6 (D.D.C., filed Aug. 14, 2008).

[2578] Aug. 30, 2006, FBI 302 of Bill Allen at 5.

[2579] RB-AWP-OPR 000130.

[2580] RB-AWP-OPR 000131.

[2581] Kepner did prepare a 302 to memorialize an interview with Allen on this same date, February 9, 2007, but that 302 apparently is from a separate interview that she conducted without Pluta. That 302, which was never disclosed to the defense, relates solely to VECO's projects in the Middle East. Bundy's notes, by contrast, make no mention of VECO's operations in the Middle East, further supporting the conclusion that there were two interviews that day, one involving only Allen and Kepner focusing on the Middle East, and the other involving Allen, Bundy, Kepner, and Pluta and focusing on Smith, Kott, and campaign contributions.

should have been memorialized and produced to the prosecutors for the disclosure determination.

6. The August 17, 2007 Interview

On August 17, 2007, Kepner and ASAC David Heller interviewed Allen in Bundy's presence. Bundy's notes show that the topics discussed included whether Allen knew of any gifts to Catherine Stevens, and a lengthy discussion of VECO's efforts to obtain a contract with the National Science Foundation and any role Senator Stevens might have played in that.[2582] Kepner's notes from this interview were among those sent by CDC Gonzalez to FBI Deputy General Counsel Lammert on March 31, 2009.[2583] Like Bundy's notes, Kepner's notes show that Allen discussed VECO's efforts to obtain a contract with the National Science Foundation and Senator Stevens's knowledge of or involvement in that.

7. The April 15, 2008 Interview[2584]

Kepner took three pages of notes from the Bill Allen April 15, 2008 interview that she conducted along with Bottini, Goeke, Marsh, and Sullivan.[2585] Allen discussed approximately 21 of the documents that had been produced to the government by Stevens's attorneys on April 8, 2008, including the Torricelli Note. These notes, and their importance, are discussed in Chapter Four, *supra.*

8. The April 18, 2008 Interview

On April 18, 2008, Allen was interviewed again by Kepner, Bottini, Goeke, and Marsh. Kepner found her notes from this interview only after CDC Gonzalez had instructed her on March 23, 2009, to search for all her notes and 302s regarding Allen interviews, especially those relating to April 15 and 18, 2008.

Kepner's notes show that several more documents produced by Stevens's attorneys the preceding week were shown to Allen. With regard to a handwritten accounting from Christensen Builders with projected expenses, Allen said he had not seen the accounting and that he had told Rocky Williams that he did not want

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[2582] RB-AWP-OPR 000234-40.

[2583] OPR has found no evidence that these notes have ever been placed into a 1A envelope or uploaded into ACS.

[2584] The April 15, 2008 interview and the corresponding notes are discussed in detail in Chapter Four, *supra*.

[2585] These notes were found by OPR on January 14, 2010, among 89 boxes of materials that the Anchorage FBI office had sent to the Department of Justice.

Stevens spending too much on the renovations. Allen said he may have seen the accounting but that he did not recall.

Allen also said that when he got back after his motorcycle accident in July 2001, he saw the expenses on his own home and assumed that the Stevens house expenses were similarly out of control. He said that in "boot camp" in Arizona, Stevens told Allen he needed to get the paperwork on the house together. At the end of this page of notes, Kepner wrote: "BA didn't want VECO invoices to go to TS. If he did he would go through them carefully."[2586]

VI. OMISSIONS AND DISCREPANCIES IN THE ALLEN 302s

A 302 should be a complete and accurate account of everything relevant that the witness stated during an interview. A comparison of the 302s with the notes of what Allen said during the interviews revealed that Kepner sometimes omitted from the 302s significant portions of Allen's statements, or wrote them in a way that differed from what her own notes and those of other agents or of Bundy reflected about Allen's statements.

We have previously discussed discrepancies between the notes and those 302s that, although written, were not disclosed to the defense. With regard to 302s that *were* eventually disclosed to the defense, there are additional examples of discrepancies and omissions between the notes and the 302s.

A. The February 28, 2007 Interview

On February 28, 2007, SAs Kepner and Pluta interviewed Allen about the Girdwood project, a 2004 press inquiry concerning VECO's role in that project, and Dave Anderson's alleged blackmail attempt. This resulted in a 302 that was ultimately produced to the *Stevens* defense, in redacted form, on October 1, 2008, and in unredacted form following the court's October 2, 2008 order.[2587]

[2586] Bundy's notes from this interview are only 2 pages long and are generally consistent with Kepner's notes.

[2587] This became known as the "Pluta 302." It was included in a redacted form, along with a redacted IRS MOI, in a letter dated October 1, 2008, from PIN Principal Deputy Chief Morris to defense counsel relating the recent discovery of information that "could arguably constitute some cumulative *Brady* material" that had previously been provided in summary form. After the court ordered all 302s and other interview memoranda be produced to the defense, this 302 was produced in an unredacted form after the court ordered the production of unredacted reports on October 2, 2008.

The 302 stated that the issue of reimbursing VECO for John Hess's work was never discussed between Allen and Senator Stevens; that Allen never invoiced Stevens for that work; and that Allen thought Stevens would have paid an invoice if he had received one. Allen said that Stevens did pay invoices from Christensen Builders. Allen also said that Stevens told him that he (Stevens) needed to pay some of Allen's invoices. Stevens said he wanted to pay Allen, and requested that Allen provide him with an invoice. Allen never complied with that request and Stevens never again asked him for an invoice for the renovations. In 2006, when a plumber had to do some repair work on the Girdwood boiler, Allen paid the labor and this was noted on a bill sent to Stevens. Stevens sent Allen an email saying that he thought he (Stevens) should pay for the plumber. Allen did not provide him with the invoice.

In the portion of Bundy's notes following Allen's description of Steven's request to pay for the boiler repair, Allen is quoted: "Whatever I would have given him he would have paid for."[2588]

Bundy's notes reflect that Allen said Stevens asked for a bill after the Girdwood renovations were done:

> Ted: Bill, we've got to get all this done. I know I have to pay you, so we need to get this done. Get me something so I can pay you.
>
> Bill: I was embarrassed couldn't get around to it. Should have given him some [illegible]
>
> Within month or 2 of April of 01 this conversation
>
> DNR any more discussion of need for invoices.[2589]

In 2004, when Senator Stevens got a call from a newspaper, Stevens told Allen "the ethics people were on his ass, we've gotta get this done." [2590] Later in the interview, after discussing Dave Anderson, Allen said that Stevens did not say anything about any invoices. The notes then conclude:

> Talked to him on phone, Ted probably would
> Never talked about it again

[2588] RB-AWP-OPR 000148.

[2589] RB-AWP-OPR 000150.

[2590] RB-AWP-OPR 000150.

Too touchy (D. Anderson stuff).[2591]

B. The March 10, 2007 Interview

On March 10, 2007, SAs Kepner and Dunphy interviewed Allen. Kepner wrote up this interview into two separate 302s.

A comparison of these two 302s with Dunphy's notes of the March 10, 2007 interview, as well as the notes taken by Bundy, shows that Kepner omitted some details and modified others when she wrote the 302s. For example, the 302s omitted Allen's statements that he got VECO engineer John Hess involved, and that at some point Stevens mentioned to him that he had a bank loan.

The shorter 302 addresses, very generally, the allegation that Allen had secured a false sworn statement from Bambi Tyree, as discussed in Chapter Five, *supra.* This 302 states, in its entirety: "The source has never made a statement under oath that he/she knew was false or misleading nor has the source encouraged others to make a false statement under oath."

Bundy's notes reflect that Kepner asked Allen if he had ever lied under oath, to which he replied, "no"; if he had ever been deposed, to which he replied he had been during a VECO matter; and if he had ever asked anyone else to make a false statement, to which he replied, "no."[2592]

The FBI notes for this part of the interview also show more context than is reflected in the generic assertions of the 302. Dunphy's notes state: "Deposed? Yes. No false statements. No encouragement to others to do so.[redacted]

The second 302 from this interview sets out a brief version of the two separate vehicle exchanges. With regard to the first, the 302 states that the Land Rover was worth about $44,000, that the Mustang was worth between $15,000 and $20,000, and that Senator Stevens also gave Allen a check for $5,000 as part of the deal.

Dunphy's notes state that Allen was not sure Stevens knew what the Land Rover was worth, but "probably not." The notes also state that Allen thought the Mustang would be worth more some day. The notes conclude on this topic: "Probably knew he was getting a good deal. BA knew it was a good deal."

[2591] RB-AWP-OPR 000151.

[2592] RB-AWP-OPR 000165.

Bundy's notes contain more details than either Dunphy's notes or Kepner's 302. As for the value of the Mustang, Allen said he had told Stevens that the Mustang would be worth a lot of money and that it was now worth $25,000 to $30,000.[2593] Allen did not recall if he had ever told Stevens that the Land Rover was worth $44,000. Allen "probably just told him: give me $5000."[2594]

In contrast to these notes, however, the 302 related that Allen said that the exchange was for the Mustang and $5,000. As for Stevens's knowledge of the value of the deal, the 302 only says: "The source believed that STEVENS knew he was getting a deal on the Land Rover." The 302 makes no reference to Allen telling Stevens that the Mustang would be worth a lot of money, nor to Allen's belief that Stevens probably did not know how much the Land Rover was worth, nor to Allen's belief that the Mustang was worth $25,000 to $30,000 at the time of the interview.

The 302 stated that Allen did not recall how the Land Rover was delivered to Lily Stevens. This contrasts with Allen's statement as reflected in the (never disclosed) September 6, 2006, interview. Dunphy's notes reflect that Allen said he "probably gave it to her up in AK." Bundy's notes read: "BA thinks he gave LR to Lilly [sic] in Anch."[2595]

Regarding the later exchange involving the Jeep, both sets of notes record that Allen said that the value of the 1999 Land Rover that Lily Stevens owned was $20,000, and recount that Allen said his grandson's Land Rover (purchased at the same time as the one that went to Lily Stevens) was worth $15,000 to $18,000, but was not in good shape. Allen said the Blue Book value was close to $20,000. Both sets of notes state that Allen believed he could get a good deal on a Jeep and was able to buy it for $34,000. Both sets of notes also say that Allen said he put the car in an employee's name because he did not want anyone to know that he was getting the car for Senator Stevens. Both notes say that VECO paid to ship the Jeep from Alaska to Washington state, and that there had been no discussion of this with Stevens. Both sets of notes indicate that Allen said that the employee and [redacted] drove the Jeep to California.

Both sets of notes list the worth of the Jeep as $34,000 and say that there was a credit of $20,000 for the Land Rover, leaving a $14,000 difference. Neither set of notes refers to the size or method of payment from Stevens to make up for the difference in value.

[2593] RB-AWP-OPR 000168.

[2594] RB-AWP-OPR 000168.

[2595] RB-AWP-OPR 000168.

By contrast, the 302 omits most of those details, while supplying one that is in neither set of notes. The account of this exchange in the 302 states, in its entirety:

> In 2005, the source told STEVENS that his grandson was having a great deal of trouble with his Land Rover Discovery and that LILY's Land Rover would ultimately have the same problems. The source said that he/she could get a good deal on a Jeep Cherokee. A deal was reached with STEVENS in which LILY traded her 1999 Land Rover Discovery and $13,000 for a Jeep Grand Cherokee which was valued at approximately $34,000.

Thus, the 302 omits: what Allen said about the employee's involvement; Allen's desire to hide the fact he was buying the vehicle for Senator Stevens; the value of the Land Rover; VECO's paying to ship the Jeep to Washington; and [redacted] and the employee driving it to California to give to Lily Stevens. On the other hand, the 302 asserts that Allen said that Lily Stevens traded the Land Rover and $13,000, even though the $13,000 figure is not mentioned in either set of notes. In fact, the notes set the figure at $14,000.

The significance of these omissions is that the details provided by Allen and reflected in the notes are more consistent with the defense theory that Stevens did not have any reason to believe he was getting any financial benefit through these transactions. With regard to the first deal, the notes show that, although Allen thought Stevens probably knew he was getting a good deal, Stevens also probably did not know how much the Land Rover was worth, and that Allen told Stevens that the Mustang would be worth a lot of money.

With regard to the Land Rover/Jeep transaction, the omission in the 302 of Allen's statements concerning his belief that the used Land Rover was worth $20,000 and his calculation that the difference in value between the Land Rover and the new Jeep was approximately what Lily Stevens paid, bolstered the government's theory that this was a "sweetheart deal" whereby Stevens knew he was getting a material benefit.

VII. OTHER WITNESS INTERVIEW NOT MEMORIALIZED BY KEPNER

We found that Kepner attended an interview of Senator Stevens's aide, [redacted], but failed to either prepare a 302 or preserve any notes from the interview. In his OPR interview, PIN Attorney Marsh stated that, on April 30 or May 1, the prosecution team interviewed Stevens's aide, [redacted], who confirmed that the Torricelli Note was "consistent with normal practice" and not

"created after the fact."[2596] OPR recovered handwritten notes by AUSAs Bottini and Goeke indicating that the team interviewed [redacted] on May 1, 2008. [redacted] was represented by counsel. Goeke's notes indicate that he, Bottini, Sullivan, Marsh, and SA Kepner were present. However, OPR found no evidence that SA Kepner took notes during the interview or created a 302 of the [redacted] interview.[2597]

VIII. KEPNER'S EXPLANATIONS

In her OPR interview, Kepner acknowledged that witness interviews must be memorialized, but claimed that 302s were not a high priority in the Polar Pen investigation:

> [I]nterviews are priority paperwork, although the way this case was being handled by the attorneys, actually 302s weren't priority. They weren't turning the 302s over. They were in on all the pertinent information. So, you know, it should have been and I know 302s are something that should be done, but in the whole scheme of things, it became a lower priority doing this sort of paperwork."[2598]

Kepner told OPR, however, that PIN Chief Welch expressed concern (in 2007) that months had passed without 302s being done "for the upcoming *Stevens* trial."[2599] She understood that Welch was concerned that the prosecutors have the documentation in place to back up the interviews.[2600]

Kepner denied that in some cases 302s would not be prepared at all because of their low priority, saying, "We'd get to them at a later period of time."[2601] Kepner acknowledged that she later found notes that had never been turned into 302s: "So, obviously, there were things that were missed."[2602] Kepner

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[2596] Marsh OPR Tr. Mar. 26, 2010 at 563.

[2597] Marsh OPR Tr. Mar. 26, 2010 at 564.

[2598] Kepner OPR Tr. Oct. 14, 2009 at 494-495.

[2599] Kepner OPR Tr. Oct. 14, 2009 at 499.

[2600] Kepner OPR Tr. Oct. 14, 2009 at 500.

[2601] Kepner OPR Tr. Oct. 14, 2009 at 500.

[2602] Kepner OPR Tr. Oct. 14, 2009 at 501.

told OPR that none of the attorneys instructed her, either directly or indirectly, that she did not need to worry about preparing 302s in a timely manner, or at all.[2603]

Kepner's primary explanation for her lateness or failure to prepare 302s that the prosecutors "were not turning the 302s over" is difficult to reconcile with certain other facts. For example, many of the interviews for which the 302s were prepared in an untimely fashion, and many of the interviews for which no 302s were ever prepared at all, took place one to two years before Senator Stevens was indicted. However, emails among the prosecutors indicate that even post indictment, in August 2008, the prosecutors were still deciding how to conduct discovery and whether to produce the 302s in pretrial discovery. It is difficult to accept that in the fall of 2006, for example, that Kepner failed to write 302s because she knew the attorneys would not disclose them to the defense a year or two hence.

Kepner's explanation is also difficult to reconcile with the way she prepared her *Brady* spreadsheets. She told OPR that she prepared the spreadsheets from the 302s. If certain interviews containing *Brady* information were never reduced to writing in a 302, it would be virtually impossible for the government to fulfill its *Brady* obligations through a review of what Kepner knew was an incomplete collection of interview memoranda.

IX.

[2603] Kepner OPR Tr. Oct. 14, 2009 at 502.

[redacted]

[redacted]

[redacted]

CHAPTER THIRTEEN
ANALYSIS OF SA CHAD JOY'S ALLEGATIONS

I. INTRODUCTION AND SUMMARY

On November 23, 2008, approximately one month after the verdict in the *Stevens* trial, SA Chad Joy emailed to the FBI Inspections Division an eight page letter (the "Joy Complaint") alleging "serious violations of policy, rules, and procedures as well as possible criminal violations" by his fellow agent, SA Mary Beth Kepner, during the Polar Pen investigation generally, and by the prosecutors and Kepner during the *Stevens* prosecution. In this section of the report, we address the allegations that implicate the conduct of SA Kepner during the Polar Pen investigation, including the investigation of Senator Stevens. The allegations of the Joy Complaint concerning the conduct of the prosecutors relating to the *Stevens* trial are addressed in Chapters Six and Seven of this report.

Joy raised many misconduct allegations concerning Kepner's conduct in the Polar Pen investigation from 2003 through the *Stevens* trial in the fall of 2008. Joy alleged that Kepner: (1) mishandled her sources in numerous respects, including socializing with and accepting things of value from them; (2) made unauthorized disclosures of sensitive law enforcement information to her sources, to her husband, and to the media; (3) shared FBI equipment with her husband; and (4) mishandled evidence obtained during the investigation. Joy maintained in his letter that his allegations were precipitated by "serious problems" in "case mismanagement" he encountered during the *Stevens* trial; the publication of Frank Prewitt's book, "*Last Bridge to Nowhere*," which revealed sensitive investigative information and mentioned Joy by name; and the alleged failure of the FBI Anchorage Division's management to address the "problems" with Kepner's conduct that he had previously brought to their attention.[2611]

[redacted]

[2611] Joy expressed concern about retaliation and requested "any and all whistleblower protections available." Joy Complaint, ¶ 7. Joy resigned from the FBI on November 20, 2009.

[redacted]

[redacted]

[redacted]

[redacted]

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CHAPTER FOURTEEN
CONCLUSIONS

In the foregoing Chapters, and in this Chapter, we have articulated specific findings with respect to individual attorneys and agents who were involved in the *Stevens* prosecution. We have refrained, however, from making specific findings with respect to the conduct of the late PIN attorney Nicholas Marsh.

I. SUMMARY OF FINDINGS

A. The Torricelli Note

For the reasons detailed in Chapter Four, *supra*, we concluded that the government violated its obligations, under constitutional *Brady* and *Giglio* principles and Department of Justice policy (USAM § 9 5.001), by failing to disclose Allen's April 15, 2008 statements that he did not recall discussing the Torricelli Note with Persons, and that the value of VECO's work on Girdwood was $80,000 $100,000. Neither statement by Allen was disclosed to the defense before or during the *Stevens* trial. We concluded further that the government violated its disclosure obligations with respect to information contained in an FBI 302 of a February 28, 2007 interview of Bill Allen (the "Pluta 302") and an IRS MOI of an Allen interview on December 11 12, 2006.

We concluded that the disclosure violations were not intentional. We concluded, however, that AUSA Bottini engaged in professional misconduct by acting in reckless disregard of his disclosure obligations with respect to the Torricelli Note, the Pluta 302, and the IRS MOI for December 11 12, 2006.

We concluded that PIN Principal Deputy Chief Brenda Morris exercised poor judgment by failing to supervise the *Brady* review, delegating the redaction of interview reports to SA Kepner, and failing to ensure that the prosecution team attorneys reviewed Kepner's redactions.

We concluded further that PIN Chief Welch, PIN attorney Sullivan, and AUSA Goeke did not commit professional misconduct or exercise poor judgment with respect to the disclosure violations.

B. Information Relating to Bambi Tyree

For the reasons detailed in Chapter Five, *supra*, we concluded that statements made in the government's September 9, 2008 *Brady* letter were clear misrepresentations of the facts, in violation of an attorney's duty of truthfulness in statements to others under D.C. Rule of Professional Conduct 4.1(a). The statements related to information about Bill Allen's involvement in procuring a

false sworn statement from Bambi Tyree, in which she denied having a sexual relationship with Allen when she was a minor. We also concluded that government attorneys violated their disclosure obligations under *Brady* and *Giglio* and Department of Justice policy (USAM § 9 5.001), by failing to disclose to the defense information concerning Allen's role in Bambi Tyree's false sworn statement.

With respect to the misrepresentations and the disclosure violations, we concluded that although AUSA Bottini and AUSA Goeke were aware of the Tyree *Brady* material, they did not commit professional misconduct because neither knowingly made or endorsed the misrepresentations in the *Brady* letter or made the decision to not disclose the Bambi Tyree information. Nevertheless, we concluded that AUSA Bottini, as the trial attorney responsible for Bill Allen, exercised poor judgment by failing to inform his supervisors that certain representations in the *Brady* letter were inaccurate. We further concluded that PIN Chief Welch, PIN Principal Deputy Chief Morris, PIN attorney Sullivan and AUSA Goeke did not commit professional misconduct or exercise poor judgment in connection with the misrepresentations or disclosure violations.

C. Allegations Relating to Rocky Williams

For the reasons detailed in Chapter Six, *supra*, we concluded that the prosecution team did not violate any obligation to the court or the defense in allowing Rocky Williams to return to Alaska. We noted, however, that the better practice would have been to alert the court and the defense before Williams's departure, thus enabling the defense to make an informed decision whether to seek a Rule 15 deposition. In addition, we found no evidence to support SA Joy's allegation that Williams's return to Alaska was the fruit of some "scheme" by PIN attorney Marsh. To the contrary, the decision was motivated by Williams's need for medical treatment, not by a desire to prevent the defense from learning any information from Williams.

We also concluded, however, that the prosecution team violated its disclosure obligations under the *Brady* doctrine and Department of Justice policy (USAM § 9 5.001), by failing to disclose information provided by Rocky Williams relating to his work on the Girdwood renovations. We concluded that the information that Senator Stevens said he wanted to pay for all the Girdwood renovations, that he wanted a contractor he could pay, that Williams reviewed the Christensen Builders invoices and passed them along to Bill Allen (or a VECO employee), and that Williams thought his and Dave Anderson's hours, and possibly all VECO costs, were added into the Christensen Builders bills, was material and favorable to the defense, and thus the failure to disclose it violated the government's constitutional *Brady* obligations. We determined that the violations were not intentional, but that AUSAs Bottini and Goeke engaged in

professional misconduct by acting in reckless disregard of their disclosure obligations. We concluded further that PIN Chief Welch, PIN Principal Deputy Chief Morris, and PIN attorney Sullivan did not engage in professional misconduct or exercise poor judgment in this respect.

D. The VECO Spreadsheet and Records

For the reasons detailed in Chapter Seven, *supra*, we concluded that the government presented false or inaccurate evidence at trial in the form of the VECO spreadsheet and the underlying records reflecting costs for hours of labor attributed to Rocky Williams and Dave Anderson that exceeded the amount they told prosecutors they had performed. In addition, we concluded that the prosecution team violated its disclosure obligations under *Brady* and *Giglio* and Department of Justice policy (USAM § 9 5.001), by failing to disclose information that contradicted the evidence presented in the VECO spreadsheet and underlying documents.

We found, however, that the prosecution team did not realize that the VECO spreadsheet and records were inaccurate when they were introduced at trial. The evidence supported the prosecutor's assertions that no member of the prosecution team ever compared the VECO records with the various statements of Williams and Anderson, and thus the discrepancies went undiscovered. We found, further, that the accelerated pace of the trial, the lack of centralized supervision, and the dispersal of responsibility created a situation in which no member of the prosecution team was assigned, or independently undertook, to compare the VECO records to the anticipated testimony of Anderson and Williams. Therefore, we concluded that the prosecutors did not knowingly introduce false evidence or act in reckless disregard of their disclosure obligations. We concluded that the errors were inadvertent, and that no member of the prosecution team acted improperly, committed professional misconduct, or exercised poor judgment.

E. Allegations Relating to Dave Anderson

For the reasons detailed in Chapter Eight, *supra*, we concluded that Dave Anderson's allegation that the government promised him and 13 friends and family members immunity was not supported by the evidence. Anderson changed his story several times, but at the end he acknowledged to OPR that he was not promised immunity, and that his claim was based on his own feeling that he and his family and friends should have been promised immunity. In addition, we found that the evidence did not support Anderson's claims that government attorneys and agents acted improperly in the course of preparing him for his trial testimony.

F. The Land Rover Check

For the reasons detailed in Chapter Nine, *supra*, we found that AUSA Bottini's failure to timely disclose the Land Rover check to the defense violated Federal Rule of Criminal Procedure 16, but, under the circumstances, constituted a mistake rather than professional misconduct or poor judgment. We concluded that PIN Chief Welch, PIN Principal Deputy Chief Morris, AUSA Goeke, and PIN attorney Sullivan bore no responsibility for the disclosure violation.

G. The Missing Grand Jury Transcripts

For the reasons detailed in Chapter Ten, *supra*, we concluded that the prosecution team's failure to timely disclose the April 25 and April 27, 2007 grand jury testimony of SA Kepner was, as the government asserted, inadvertent. The court reporting service, pursuant to its custom, had sent the transcripts to a local Assistant U.S. Attorney who had briefly been assigned to attend the grand jury proceedings, but who had long since left both the case and the Department of Justice. When the prosecution team learned of the additional transcripts, the prosecution team took prompt steps to procure and disclose them. Although the April 25, 2007 transcript appears to have contained *Brady* information, we found no evidence that any member of the prosecution team (other than SA Kepner) knew of the transcript's existence. Therefore, we found that the failure to timely produce the transcripts was simple inadvertence, and no member of the prosecution team acted improperly, committed professional misconduct, or exercised poor judgment.

H. The Alleged Signaling to Allen by Attorney Bundy

For the reasons detailed in Chapter Eleven, *supra*, we concluded that the evidence did not establish that Robert Bundy signaled Bill Allen in an attempt to influence his trial testimony. Further, we concluded that, to the extent the evidence suggested that such signaling may have occurred, we found no evidence implicating any government actor prosecutors or agents in the alleged signaling.

I. Analysis of FBI 302 Issues

J. Analysis of SA Chad Joy's Allegations

II. INDIVIDUAL FINDINGS

A. PIN Chief William M. Welch II

We concluded that PIN Chief Welch did not commit professional misconduct or exercise poor judgment with respect to any of the disclosure violations identified in the report.

B. PIN Principal Deputy Chief Brenda K. Morris

We concluded that PIN Principal Deputy Chief Morris exercised poor judgment by failing to supervise the *Brady* review, delegating the redaction of interview reports to SA Kepner, and failing to ensure that the team attorneys reviewed Kepner's redactions. We concluded that she did not commit professional misconduct or exercise poor judgment with respect to any of the other disclosure violations identified in the report.

C. PIN attorney Edward P. Sullivan

We concluded that PIN attorney Sullivan did not commit professional misconduct or exercise poor judgment with respect to any of the disclosure violations identified in the report.

D. AUSA Joseph W. Bottini

We concluded that the government violated its obligations under constitutional *Brady* and *Giglio* principles and Department of Justice policy

(USAM § 9 5.001), concerning the Torricelli Note, the Pluta 302, and the IRS MOI for December 11 12, 2006. We found that AUSA Bottini acted in reckless disregard of his disclosure obligations by failing to provide this information to the defense.

We concluded that statements made in the government's September 9, 2008 *Brady* letter concerning information about Bill Allen's involvement in securing a false sworn statement from Bambi Tyree, in which she denied having a sexual relationship with Allen when she was a minor, were clear misrepresentations of the facts, in violation of an attorney's duty of truthfulness in statements to others under D.C. Rule of Professional Conduct 4.1(a). We also concluded that government attorneys violated their disclosure obligations under *Brady* and *Giglio* and Department of Justice policy (USAM § 9 5.001), by failing to disclose information concerning the Bill Allen Bambi Tyree situation. We concluded that AUSA Bottini did not commit professional misconduct with respect to either the misrepresentations in the *Brady* letter or the failure to disclose the information to the defense. Nevertheless, we concluded that AUSA Bottini, as the trial attorney responsible for Bill Allen, exercised poor judgment by failing to inform his supervisors that the representations in the *Brady* letter regarding the Tyree issue were inaccurate and misleading.

We concluded that AUSA Bottini acted in reckless disregard of his disclosure obligations under the *Brady* doctrine and Department of Justice policy (USAM § 9 5.001), by failing to disclose information relating to Rocky Williams's work on the Girdwood renovations.

OPR also found that AUSA Bottini's failure to timely disclose the Land Rover check to the defense violated Federal Rule of Criminal Procedure 16, but, under the circumstances, constituted a mistake rather than professional misconduct or poor judgment.

We concluded that AUSA Bottini did not commit professional misconduct or exercise poor judgment with respect to any of the other disclosure violations identified in the report.

E. AUSA James A. Goeke

We concluded that AUSA Goeke acted in reckless disregard of his disclosure obligations under the *Brady* doctrine and Department of Justice policy (USAM § 9 5.001), by failing to disclose information relating to Rocky Williams's work on the Girdwood renovations.

We concluded that AUSA Goeke did not commit professional misconduct or exercise poor judgment with respect to any of the other disclosure violations identified in the report.

F. SA Mary Beth Kepner