



U.S. Department of Justice
Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

May 23, 2012

Joseph W. Bottini, Esquire
Assistant United States Attorney
Federal Building - U.S. Courthouse.
222 West 7th Avenue 9
Room 253
Anchorage, Alaska 99513

Re: Disciplinary Proposal of Kevin A. Ohlson, Chief, Professional Misconduct Review Unit

Dear AUSA Bottini:

I have been designated to serve as the deciding official in this disciplinary matter arising out of the August 15, 2011 report of investigation by the Office of Professional Responsibility (OPR) entitled *Investigation of Allegations of Prosecutorial Misconduct in United States v. Theodore F. Stevens, Crim. No. 08-231(D.D.C. 2009) (EGS)* (Report). Because the Report contained findings of professional misconduct against Assistant United States Attorneys (AUSAs), the Report was forwarded to the Professional Misconduct Review Unit (PMRU) for consideration of disciplinary action. Kevin Ohlson, Chief of the PMRU, made a determination that the OPR findings were supported by the evidence and the law and as a result, assigned the matter to PMRU attorney Terrence Berg for consideration of disciplinary action. Berg solicited *Douglas*¹ factor information from United States Attorney Karen Loeffler. Berg reviewed the Report and disagreed substantively with its conclusion that you committed professional misconduct. Consistent with procedures in the PMRU, Berg submitted a draft memorandum to Chief Ohlson. After reviewing Berg's draft memorandum, Chief Ohlson remained convinced that the OPR findings of misconduct were supported by the evidence and the law. Therefore, he sought authorization from the Deputy Attorney General (DAG) to serve as the proposing official. On December 3, 2011, the DAG authorized Chief Ohlson to issue a proposal, but he also directed that Chief Ohlson provide Berg's draft to the employees at issue if he (Ohlson) issued a disciplinary proposal. Accordingly, Chief Ohlson provided copies of Berg's draft memorandum to you and your counsel. On December 9, 2011, Chief Ohlson issued a proposal that you be suspended for a period of 45 days. Ohlson's proposal was based on a charge that you recklessly disregarded your disclosure obligations in the *Stevens* case. The charge contained three specifications each of which was based on findings contained in the Report. On January 25,

¹*Douglas v. Veterans Administration*, 5 MSPR 280 (1981).

2012, you submitted your written response to the proposal. On March 13, 2012, you provided your oral response. In short, while admitting that you made mistakes in the case, you contest each specification of the charge. The matter is now ripe for decision.

I. Background

OPR investigates allegations of attorney misconduct to determine whether an “attorney committed professional misconduct in the exercise of his or her authority to investigate, litigate or provide legal advice.” OPR Analytical Framework (Framework).² OPR finds professional misconduct when it concludes that an attorney “intentionally violate[d] or act[ed] in reckless disregard of an obligation or standard imposed by law, applicable rule of professional conduct, or Department regulation or policy.” *Id.* The Framework provides, “If OPR concludes that an attorney did not commit professional misconduct, OPR determines whether the attorney exercised poor judgment, engaged in other inappropriate conduct, made a mistake, or acted appropriately under all the circumstances.” *Id.* OPR uses a preponderance of evidence standard to reach factual determinations. Report p. 125.

In this matter, OPR concluded that you engaged in professional misconduct in reckless disregard of your disclosure obligations created by law (*Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972)) and Department policy (USAM § 9-5.001). Report pp. 670-71. In addition, OPR concluded that you exercised poor judgment by failing to inform your supervisors about inaccuracies in a *Brady* disclosure letter that was sent to defense counsel on September 9, 2008. *Id.* at 671. OPR considered whether your conduct violated D.C. Rule of Professional Conduct (DCRPC) 3.8(e), but determined that the evidence was insufficient to support a finding that you intentionally failed to disclose exculpatory evidence to the defense. *Id.* at 193. OPR also considered whether you violated Rule 4.1(a)(knowingly making a false statement of material fact to a third person), Rule 3.3(a)(1) (knowingly failing to correct false evidence), and Rule 3.3(a)(4) (knowingly offering false evidence), but likewise concluded that the evidence was insufficient to support a finding of a violation of those rules. *Id.*

Chief Ohlson’s proposal charged you with violating your discovery obligations and identified three separate specifications. Specification 1 related to your failure to disclose allegedly exculpatory information that you learned during interviews of witness Bill Allen on April 15 and 18, 2008. Specification 2 related to your failure to timely provide exculpatory information contained in a particular FBI Form 302 (FBI 302 or 302) and in a Memorandum of Interview (MOI) prepared by Internal Revenue Service Criminal Investigations. Specification 3 related to your failure to disclose exculpatory information provided by witness Robert “Rocky” Williams. I will address the specifications and your responses to them *seriatim*. In doing so, I have considered the Report; your response to the Report and its attachments, which included the

²<http://www.justice.gov/opr/framework.pdf>.

Berg memorandum (Berg memo); your oral response; your testimony before OPR; and your testimony before Henry F. Schuelke, III and William B. Shields, who conducted a criminal contempt investigation and who shared their deposition transcripts with OPR. In evaluating your conduct, I will apply OPR's Framework.

II. Charge and Specifications

Charge: Reckless Disregard of Your Disclosure Obligations under *Brady*, *Giglio*, and Department of Justice Policy

Specification 1: Failure to disclose information from the April 15 and 18, 2008 Bill Allen interviews

Factual Background

The charges against Senator Stevens arose out of alleged non-disclosures in a Financial Disclosure Statement he was required to file annually with the Senate. Count 1 of the Indictment alleged that Stevens "engaged in a scheme to conceal a material fact, that is, his continuing receipt of hundreds of thousands of dollars' worth of things of value from a private corporation and its chief executive officer by, among other things, failing to report them, as was required, on Stevens' required yearly Financial Disclosure Forms." Indictment p. 4. The indictment alleged that Bill Allen and his company VECO provided the unreported things of value to Stevens. *Id.* at 4-5. Count 1 of the Indictment lists the undisclosed things of value as follows:

- (1) The exchange of a new 1999 Land Rover valued at \$44,000 for \$5000 cash and a 1966 ½ Mustang valued at \$20,000;
- (2) Improvements to Stevens's residence in Girdwood, Alaska, between the summer of 2000 and December 2001, valued at over \$200,000;
- (3) Improvements to the Girdwood residence in 2002, valued at approximately \$55,000;
- (4) Improvements to the Girdwood residence in 2004 and 2005, valued in excess of \$305 for each of those two years; and
- (5) Labor costs for improvements to the Girdwood residence in 2006, valued in excess of \$1,000.

Id. at 6-11. Counts 2-7 charged Stevens with making a false statement in a matter within the jurisdiction of the United States by filing in each of years 2002 through 2007 Financial Disclosure Forms that failed to disclose either that he had received the listed items as a gift from Allen or that he owed a liability to Allen for the cost of the goods or services provided.

The OPR finding of misconduct that underlies Specification 1 relates to items 2 and 3 above. Prior to indictment, the government had anticipated that Stevens would defend himself

regarding these charges by claiming that he believed he had paid for the 2000 to 2001 renovations because he had fully paid a contractor that was retained to do much of the work. Report p. 284. In addition, the government learned prior to trial that part of Stevens's defense would involve Stevens's attempts to get Bill Allen to send him an invoice for the work that was done at Girdwood. First, the government had identified evidence that on at least one occasion, Stevens had made a request for an invoice and included that information in the March 3, 2008 version of the prosecution memorandum. *Id.* at 146. Further, the government met with counsel for Stevens (the defense) in February 2008 for purposes of presenting some information about the government's case and proposing a plea. *Id.* at 52. Stevens rejected the proposal, and as the prosecution team subsequently sought a charging decision from then Criminal Division Assistant Attorney General (AAG) Alice Fisher, the government learned that the defense planned voluntarily to produce boxes of documents to the government. *Id.* See also Transcript of Interview by Schuelke and Shields (Bottini/Schuelke) p. 352. AAG Fisher insisted that the government receive and review the documents prior to making a charging decision. Report p. 52.

On April 8, 2008, the defense provided five boxes of documents to the government. *Id.* at 53. The five boxes of documents included two notes from Stevens to Allen in which Stevens requested that Allen send him a bill for the work done at the Girdwood residence. *Id.* at 144. The notes were dated October 6, 2002, and November 8, 2002. *Id.* The October 6 note (the Torricelli note) not only asked for a bill, but told Allen to "remember Torricelli," a reference to then Senator Robert Torricelli. The government's prosecution memorandum indicated that Torricelli was admonished in July 2002 for accepting gifts from a wealthy fundraiser and that one week before Stevens sent the note, Torricelli had withdrawn from his Senate re-election race. *Id.* at 147-48. The Torricelli note also observed, "Friendship is one thing. Compliance with these ethics rules entirely different." *Id.* at 144. The government assumed that the notes related to work that VECO had done at the Girdwood residence in 2002. *Id.* at 149. This assumption made sense because the bulk of the work on the major Girdwood renovations that began in 2000 was completed in the Spring of 2001. See Transcript of Interview by OPR (Bottini/OPR) p. 515.

The government correctly assessed that the notes—like much evidence in the hands of competent lawyers—cut both ways. On the one hand, the notes evidenced an intent by Stevens to pay for the benefits he received from Allen and to comply with ethics rules and thereby had some tendency to negate the suggestion that Stevens engaged in a purposeful scheme to conceal gifts. On the other hand, the government had no evidence that Stevens's importuning had prompted Allen to send a bill, so the notes arguably confirmed Stevens's knowledge that he owed a liability—albeit a liability of unknown amount—to Allen. Since Stevens had reported neither gifts nor liabilities, the notes were certainly relevant to but not devastating to the government's potential case. Contemporaneous communications among the government lawyers confirmed that assessment. In an April 11, 2008 memorandum to Public Integrity Section (PIN) Chief William Welch, PIN Trial Attorney Nicholas Marsh reported "that the notes were 'both harmful and helpful' to Senator Stevens." *Id.* at 148.

Despite the fact that the notes arguably cut both ways, they were clearly the subject of conversation among the prosecution team, and the documents the defense provided prompted the scheduling of a meeting with Allen for the purpose of discussing the documents with him. *See id.* at 146-47; Bottini/Schuelke pp. 386-87. That meeting occurred on April 15, 2008. Allen was present in Anchorage with his attorney Bob Bundy and FBI Special Agent Mary Beth Kepner, AUSA Jim Goeke, and you. Report p. 150. Marsh and PIN Trial Attorney Ed Sullivan participated by telephone. *Id.* Marsh primarily questioned Allen while Kepner showed him documents. *Id.* Your role was initially to take notes. Bottini/OPR p. 277. During the interview, Allen reported that he probably did receive the notes, but provided two reasons why he did not send an invoice in response. First, he said he did not want Stevens to pay for the work. Report p. 153. Second, he indicated that it would have been hard to send an invoice because his men who were on the job—Williams and Dave Anderson—were always drunk and screwed up the job resulting in VECO's costs being much higher than market value. *Id.* at 152-57 (citing notes of participants). Although the timing of the Stevens notes suggested they pertained to work done in 2002, the discussion about why Allen never sent an invoice appeared to relate to the original 2000-01 renovations. Allen stated that he believed the VECO actual costs were about \$250,000, but that the fair market value of the work VECO performed was more like \$80,000. *Id.* Allen became very upset when discussing Williams and Anderson's work. Despite efforts to calm Allen down, the interview was terminated shortly after the discussion about the notes. Bottini/OPR pp. 277-83. Although this interview occurred prior to indictment in the presence of Special Agent Kepner, she did not prepare an FBI 302 of the interview. Report at 151. You took twenty-two pages of notes during the meeting, and your notes regarding the discussion of the Torricelli note took up four pages. *Id.* at 152. After the meeting, various members of the prosecution team asked Bundy to speak with Allen to clarify some of his responses. *Id.* at 159.

The prosecutors met with Allen again on April 18, 2008. You described to OPR how Allen clarified his responses. You said that Allen reported that he did not send Stevens a bill when he got the 2002 notes simply because he did not want Stevens to pay for the work. Bottini/OPR pp. 289-90. You further indicated that Allen clarified that Stevens again pressed him for a bill in either late 2004 or early 2005, and it was at that point that Allen indicated he would be unable to prepare a reliable bill because of Williams and Anderson. *Id.* at 289-95. Specifically, you testified:

- A. . . . [W]hat Allen had been trying to say on the 15th and clarified on the 18th was ["I couldn't figure out how to do a bill for the guy, because Dave and Rocky, who had been in charge of overseeing his work down there, screwed everything up. They didn't have any paperwork on it. I couldn't figure out how to generate a bill.["]

WAINSTEIN: That is in the 2005 time frame?

THE WITNESS: This is in 2005, yes.

BY [OPR]:

Q. 2004 or 2005?

A. The winter of '04/'05, yes.

Id. at 294. You indicated that the timing of Stevens's 2004/2005 request for a bill coincided with his being under investigation by the Senate Ethics Committee. *Id.* at 290-94. Although Allen provided clarifying information about why he did not send Stevens a bill after receiving the 2002 notes, he stuck with his assessment that the fair market value of the VECO work was about \$80,000. Report p. 160. At the time of these interviews, it was uncertain whether Stevens would ever be charged, so no assignments had been made regarding the role of any of the attorneys at a possible trial. Bottini/OPR pp. 285-86. Because you had a better relationship with Allen than some of the other attorneys, however, you thought it was probable that Allen would be your witness if there were a trial. *Id.* at 287-88.

On July 14, 2008, the prosecution team met with Matt Friedrich, the Acting AAG for the Criminal Division, and his Principal Deputy Rita Glavin to make a presentation regarding possible indictment. As recently as late June 2008, you were under the impression that the case would not be indicted, and you so informed your United States Attorney (USA) when he asked you. Bottini/Schuelke pp. 315-19. As a result of your providing this information to your USA, he asked you to take over a death penalty case that the United States Attorney's Office (USAO) in Alaska was prosecuting. *Id.* at 316. Thus, in July both before and after the July 14 meeting in Washington, you began working on the capital case under the assumption that Stevens would not be indicted. *Id.* at 318-19. Stevens had executed an agreement to toll the statute of limitations until July 31, 2008, so a decision to charge or seek an additional tolling agreement needed to be made before that date. Sometime after a July 22, 2008 meeting among defense counsel, the Deputy Attorney General, Friedrich, and Welch, the Criminal Division made the decision to indict the case, and the indictment was presented on July 29, 2008. Report p. 1, 56. The day before the indictment, Welch advised the prosecution team that PIN Principal Deputy Chief Brenda Morris would serve as lead counsel in the case, you would be "second chair," and Marsh was relegated to third chair. *Id.* at 59. Prior to that decision, Welch had advocated to Friedrich that Marsh should be lead counsel in the case, but the Criminal Division management determined to insert Morris in that role. *Id.* 58-59. On the day that Welch identified the trial participants, he told you that Bill Allen would be your witness. Bottini/OPR p. 92. Stevens was arraigned on July 31, 2008, and during the arraignment his counsel requested a speedy trial so that the trial would precede the November 2008 election in which Stevens was a candidate. Report p. 2. United States District Judge Emmet G. Sullivan suggested beginning the trial on October 9, 2008, but Morris countered with a proposal that the case begin on September 22, 2008. *Id.* at 3. In so doing, she assured the court that the suggestion was informed by the government's consideration of its discovery obligations. *Id.* Thus, the newest lawyer to the Stevens team obligated the government to be ready for trial fifty-three days from the date of arraignment. You told OPR that during the July 14, 2008 meeting, Friedrich asked whether the government was "ready to go," and that the team responded that it was ready. *Id.* at 55. Welch indicated that

prior to indictment he had inquired of Marsh as to the government's readiness and then tested his response by asking Marsh to provide all of the Allen 302s. *Id.* When Marsh was able to comply with that request in an hour, Welch determined that the team had sufficiently organized the discovery. *Id.* at 55-56.

On August 7, 2008, just one week after arraignment, 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." *Id.* at 5. This material was provided to satisfy the government's discovery obligations under Fed.R.Crim.P. 16. Consistent with earlier trials arising out of the Polar Pen investigation, the government intended to provide *Brady* and *Giglio* information by way of letter rather than disclosing FBI 302s or other reports of interview in which the information was contained. *Id.* This practice was consistent with your practice as an AUSA in Alaska. Bottini/OPR p. 109. You understood that PIN had assigned the *Brady* review to agents and other attorneys in PIN. *Id.* at 110. You traveled to Washington on September 8, 2008, and on September 9, 2008, the government sent its *Brady* disclosure letter to the defense. Bottini/OPR p. 192; Report p. 105.

On September 14, 2008, you met with Allen in Washington in a trial preparation session. Report p. 163. During this session, Allen advised that he now recalled that he spoke with Bob Persons after receiving the Torricelli note. *Id.* Persons was Stevens's friend and Girdwood neighbor and was reporting to Stevens about the work on the house. *Id.* at 7. Allen further said that Persons told him Stevens was "just covering his ass" by sending the note. *Id.* at 163-65. Kepner, Bundy, and you were present at the meeting in addition to Allen. *Id.* at 163. This information differed from the information provided by Allen during the April 15 and 18, 2008 interviews in that Allen had earlier said he had no recollection of speaking with Persons about the note. At no point, however, did the government disclose to the defense the fact that Allen had not reported the Persons conversation when questioned in April.

You elicited the "covering his ass" information from Allen when he testified at trial. *Id.* at 169. Allen also testified that the conversation with Persons was one of the reasons he did not send Stevens a bill after receiving the notes. *Id.* at 67. On cross-examination, the defense questioned Allen about when he first told the government about the "covering his ass" conversation with Persons and whether it was just recently. *Id.* at 170-71. The questioning included the following exchange:

- 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.

Id. at 170. Neither you nor any other member of the trial team corrected this statement even though Allen had told you about the “covering his ass” conversation within the previous three weeks. *Id.* at 171.

After the trial, the defense filed a motion asserting that the government fabricated the “covering his ass” testimony, in part relying on the fact that the statement was not contained in any FBI 302s regarding interviews of Allen. *Id.* at 174. The government responded in part by asserting:

[I]t 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.

Id. at 175. Thereafter, Special Agent Chad Joy, one of the agents who worked on the case, filed an affidavit making a number of allegations of misconduct by the original prosecution team. *See id.* at 18. The Criminal Division appointed a second prosecution team (the review team) to investigate the Joy allegations. *Id.* at 175. The review team located notes pertaining to the April 15 and 18, 2008 meetings with Allen and determined that the notes contained exculpatory information that was not provided to the defense. *Id.* at 175-76. As a result of this discovery, the government moved to vacate the conviction and dismiss the indictment against Stevens. *Id.* at 175. The court granted that motion on April 7, 2009. *Id.* at 19.

OPR’s Conclusions

OPR concluded that the government was obligated by law and policy to disclose to the defense the exculpatory information from the April 15 and 18, 2008 interviews of Allen. *Id.* at 188. OPR first examined whether the non-disclosure was intentional and concluded that it was not. *Id.* at 189-92. OPR indicated that the “perhaps most important[.]” reason for its conclusion was its failure to find any direct evidence in emails or otherwise that prior to the inquiries by the review team, you or others remembered that Allen failed to recall on April 15, 2008, that he had spoken with Persons about the Torricelli note. *Id.* at 192. In other words, OPR credited your testimony and the testimony of others that the failure to disclose the April 15 and 18, 2008 exculpatory information was not the product of a conscious decision. Therefore, consistent with OPR’s analytical framework, which requires that action be purposeful or knowing in order to constitute intentional misconduct, OPR concluded that no government prosecutor committed intentional misconduct regarding this issue. *Id.* at 189.

OPR next examined whether any individual member of the prosecution team had committed professional misconduct in connection with the failure to disclose the April 15 and 18 information. *Id.* at 194. OPR concluded that neither Welch, Morris, Sullivan, nor Goeke

committed misconduct. *Id.* at 194-95. Because Marsh died prior to the issuance of the OPR report, OPR did not determine whether he engaged in misconduct. *Id.* at 195 n. 761. OPR did conclude, however, that you committed reckless misconduct in connection with the non-disclosure of the April 15 and 18 exculpatory information. *Id.* at 195. More specifically, OPR concluded:

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. . . . 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.

Id. OPR also found fault with your failure to correct Allen's testimony at trial that he had not only recently disclosed the "covering his ass" statement to the government. OPR concluded that you did not violate DCRPC 3.3(a)(4) because you did not knowingly offer evidence you knew to be false. Indeed, you did not offer the evidence that Allen provided on cross-examination. *Id.* at 198. OPR also concluded that you did not fail to correct perjured testimony, crediting your assessment, confirmed by the record, that Allen was confused by the defense's questions. *Id.* OPR concluded, however:

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. 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 truthful information to the defense, provides further evidence that Bottini acted in reckless disregard of his disclosure obligations.

Id. at 198-99 (footnotes omitted). Chief Ohlson explicitly adopted the OPR findings as the basis for his proposal, and it is the findings set forth above that underlie Specification 1. Proposal p. 2.

Your Response

In your response to the proposal you set forth broad objections to OPR's conclusions while also stating specific objections to each finding. Your broad objections are that (1) OPR misapplied its own standards to reach unsupported conclusions about intent, (2) OPR faulted you

for team failures caused in large part by dysfunctional management, (3) OPR's misconduct findings depend on a post hoc substitution of OPR's preferred trial preparation model for the one your superiors actually adopted—and upon which you reasonably relied, (4) OPR viewed your conduct in the most negative possible light, and (5) OPR ignored your unassailable record for professionalism and integrity. Response pp. 2-4. You also endorsed the analysis of the Berg memo, which concluded that you did not commit professional misconduct but rather exercised poor judgment. *Id.* at 5-6.

I will primarily address your broad objections in connection with the individual specifications. With respect to your assertion that OPR viewed your conduct in the most negative possible light, however, I note that OPR examined at least eight allegations of malfeasance in the Stevens prosecution and found no misconduct in the majority of them. OPR also did not conclude that you engaged in intentional misconduct and in so doing credited your lack of recollection of the April 15, 2008 interview session even though you recalled that meeting in significant detail after seeing your notes. *See e.g.* Bottini/Schuelke p. 531. And, after sharing a draft of its report with you and obtaining your response, OPR altered one of its findings in your favor. Report p. 21 n. 39. OPR's examination of the information pertaining to the matter was exhaustive, and nothing in the Report or the process that preceded it suggests anything other than OPR's good faith attempt to assess accurately your acknowledged mistakes in the matter.

Your assertion that OPR faulted you for team failures caused in large part by dysfunctional management could be relevant in multiple ways. First, the Rules of Professional Conduct address both a supervisor's responsibility regarding the professional conduct of subordinates and a subordinate's right to rely on a supervisor's resolution of an arguable question of professional duty. DCRPC 5.1 and 5.2. Rule 5.1 provides:

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm or government agency, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm or agency conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

A supervisor's failure to meet these obligations would constitute professional misconduct on the part of the supervisor, but would not necessarily exonerate a subordinate who violates a professional obligation. Regardless of whether a supervisor's failures constitute professional misconduct or simply poor management, those failures can be relevant to assessing whether the subordinate's conduct constituted professional misconduct. For example, OPR's analytical

framework regarding findings of reckless misconduct requires *inter alia* a finding that the attorney's conduct was "objectively unreasonable under all the circumstances." Report at 125. The "circumstances" would certainly include management's actions in the matter. Thus, regardless of whether any supervisor's actions constituted misconduct, a question not before me, I agree with you that the management of the case is a relevant circumstance for evaluation of your conduct.

Rule 5.2 provides:

- (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
- (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

This rule makes clear that supervisory action exonerates a subordinate only when the subordinate has relied on the supervisor's resolution of an arguable question of professional duty.

In his draft, Berg relied heavily on OPR's failure to hold supervisors more directly accountable in determining that you did not commit misconduct. In his introduction, he cited three primary reasons why he disagreed with OPR's findings. He noted first that the Stevens prosecution was a team effort and that the team should be held fully responsible as individuals and collectively for the mistakes that were made. Berg memo p. 3. In this vein, he concluded that OPR had inconsistently applied its recklessness standard to members of the team. He concluded that this inconsistent application did not "hold the team as a whole, or its supervisors, properly responsible for the impact that their individual and collective conduct had on the disclosure violations." *Id.* With all respect to Berg, whom I hold in the highest regard, this conclusion suggests that because OPR failed to hold everyone accountable, then no one should be held accountable. This point seems particularly problematic when it is made without reference to Rules 5.1 and 5.2, which Berg did not cite. My aim is to evaluate your conduct taking into account the circumstances in which you operated, but my agreement or disagreement with OPR's approach to any of the other subjects of its investigation does not control. As I observed, the conduct of management relates to the objective reasonableness of your conduct under the circumstances, and that is how I will consider it unless, with respect to a particular finding, Rule 5.2 controls. In addition, the extent to which other team members contributed to or made your failures more likely may be a mitigating circumstance relevant to the *Douglas* factor analysis. *Douglas v. Veterans Administration*, 5 MSPR 280, 305 (1981) (Directing that disciplinary officials consider *inter alia* "mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter.")

Second, Berg concluded that the conduct of supervisors was “of equal or comparatively greater consequence in causing the disclosure violations and created a unique and extremely difficult set of circumstances under which line attorneys were required to function.” *Id.* at 4. In that regard, he arguably placed more emphasis on the supervisory conduct than you did in your interview with OPR. You testified as follows:

Q. . . . [C]ould you talk specifically . . . about how, if in any way, those decisions, the front office’s involvement or the change of the trial team, affected any of the major issues at trial that the investigations are looking at? For example, Bambi Tyree issues, the Torricelli note issues, or the Pluta 302, for example. If the stuff going on from, you know, this front office shake-up, and maybe the front office’s involvement and decisions, did it affect any of those issues?

A. I don’t know that I could tell you that any of those decisions were a direct cause of any of the issues that came up at trial.

Q. Uh-huh.

A. What they did affect, particularly with me personally, was what I had sort of budgeted in my mind as my time to prepare.

Learning that I was going to be doing the summation, whenever that was, September the 11th, and being told that I needed to produce a draft of the closing by the following week, that put a serious dent in my budgeted time to prepare.

As did taking Rocky back. Now, the front offices, I don’t think they were responsible for that, but personally, that, I think, affected my ability to prepare.

Q. Okay.

A. Had I known that I was going to be doing the summation out of the blocks on this thing, and that I had to produce a draft, I would have done that well in advance of coming out here to D.C.

It was time that took, that was taken away from me, that I couldn’t afford to lose, in my view.

Q. Okay.

A. But any direct causal link between those decisions and, and the issues that arose at trial, I can’t tell you there is a direct link. But I think it affected, you know, the overall atmosphere of preparing for trial.

Bottini/OPR pp. 98-99. I do not completely discount the impact of management decisions in light of your testimony, but your testimony is relevant to my assessment of your conduct and suggests that Berg overstated the significance of the management issues at least with respect to the discrete matters involved here.

Third, Berg concluded that “although . . . clear failures of judgment occurred, amounting to negligence, the evidence does not show by a preponderance that you committed reckless misconduct.” *Id.* I will fully consider the bases for his determination in addressing your conduct.

Finally, with respect to your broad points, I confirm that I am conducting this review fully cognizant of your previously “unassailable record of professionalism and integrity.” Having reviewed 1,485 transcript pages of testimony you provided to OPR and to the Special Prosecutor, considered the reference letters you submitted with your response, interacted with you during your oral response, considered the factors that led OPR to conclude that your conduct was not intentional, and heard your current USA, who has worked with you for over twenty years, describe you as “the finest person I have ever met,” I have no qualms about OPR’s finding that your acknowledged mistakes in this case were not intentional. Among other things, I noted your testimony before the Special Prosecutor that you were “not looking forward to being involved in the prosecution of Ted Stevens,” and that you would not have been disappointed had the prosecution been declined. Bottini/Schuelke pp. 407-08. Any suggestion that the mistakes that you made were the product of a purposeful attempt to convict Senator Stevens by withholding exculpatory information is inconsistent with your reluctance to participate in the prosecution and with your otherwise unblemished twenty-six plus years as a Department prosecutor. In addition, any notion that you intended to withhold exculpatory information from the defense is contradicted by your undisputed efforts to cause disclosure of the Bambi Tyree information despite considerable resistance from attorneys in Washington. Goeke first raised the issue in March 2007, Report p. 257; you and he raised it again in October 2007, after the *Kott* trial and before the *Kohring* trial, *id.* at 261; you and he raised it again in December 2007, when the media reported benefits that Allen allegedly had provided to Tyree’s family, *id.* at 223; you raised it again during the indictment presentation meeting on July 14, 2008, after the PIN attorneys made only oblique reference to Allen’s “shady background,” *id.* at 228; you raised it again in connection with the preparation of the August 2008 *Giglio* letter, Bottini/Schuelke pp. 753-72; and then you and he raised it again in connection with the preparation of the *Brady* letter, *see* Report p. 96. I will later address the poor judgment finding regarding the actual disclosure that was made regarding Tyree. However, your actions in continuing to press to alert the defense to the information that Allen had asked Tyree to lie even after being admonished by Welch in regards to this issue that “you work for PIN” contradict any notion that you undertook to intentionally withhold exculpatory information in the case. Your background is not irrelevant but is less relevant to assessing a finding of reckless misconduct that does not depend on a conscious decision to withhold exculpatory evidence.

As noted, OPR’s finding of reckless misconduct against you for the failure to disclose the information from Allen’s April 15 and 18, 2008 interviews depends largely on

your failure to search for and find your notes of that interview and your failure to correct the testimony of Allen at trial. With respect to the failure to find the notes, you make a number of points. First, you observe that at the time of the interview, the case was not indicted, it was unclear if it ever would be indicted, and it was likewise unclear whether if the case was indicted, Allen would be your witness. You argue that Allen's statements at the interview were not particularly significant when made and only took on significance when he later told you in the trial preparation session about the "covering his ass" comment by Persons. You point out that as a result of those factors, you were not yet creating witness folders and that you put your notes in a file folder labeled "Documents to show BA on April 15" instead of in a witness folder and that you failed to locate the notes as you were preparing to present Allen as a witness because of the mislabeling. You also note that unbeknownst to you and inconsistent with FBI policy, Kepner did not prepare an FBI 302 of the interview. Had Kepner prepared an FBI 302, when you later asked her for all of the Allen 302s on a thumb drive, *see* Bottini/OPR pp. 141-42, you would have received that FBI 302, and your recollection about the interview would have been refreshed. You further argue that OPR's finding of misconduct regarding your failure to conduct a thorough enough search for notes is premised only on the fact that whatever search you conducted was unsuccessful.

Turning now to these points you raise specifically regarding the non-disclosure of the April 15 and 18 interview information, I note as a starting point that assessing culpability for non-disclosure of forgotten facts or unlocated notes is a mind-bending endeavor. How can someone be held responsible for failing to disclose information that he had actually forgotten? On the other hand, government prosecutors have a clear and unambiguous legal obligation to make sure that they make full disclosure of *Brady* information in the possession of the government. The United States Attorney's Manual (USAM) requires that prosecutors err on the side of disclosing exculpatory and impeaching information. USAM § 9-5.001.B.1 With this obligation comes an obligation to search government files to locate the information. The USAM provides, "It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all the members of the prosecution team." USAM § 9-5.001.B.2. Prosecutors take notes and agents document investigative steps in part because failures of memory are inevitable. Ensuring that compliance with discovery obligations does not exclusively depend on the imperfect recollection of the prosecutors and agents assigned to the matter requires a comprehensive review of that documentation. In other words, "I forgot" cannot be the end of the matter when examining admitted discovery failures.

You are correct that the case was not indicted at the time of the April 15 interview, and witnesses had not been assigned. On the other hand, you foresaw at that time that you might very well take Allen as a witness at any trial. While discussing the April 15

interview, you testified, "I assumed that down the road if I was going to be part of a trial team, which was still unclear to me even if we indicted, that I was probably going to wind up with Bill Allen." Bottini/OPR p. 288. I find it relevant both that the interview was pre-indictment and that you had some idea that Allen would be your witness at any trial.

Your assertion that the statements made by Allen during the interview were not significant at the time is only partially correct.³ First, Allen's acknowledgment that he probably received the Torricelli note and its companion note was significant information. There was some question from the prosecution at the time about whether the notes the defense provided were genuine, so Allen's statement that he probably received the notes was itself favorable to Stevens. Your notes of the September 14, 2008 trial preparation session with Allen seem to confirm this assessment. In reference to Allen's having told you that he had seen the Torricelli note, you wrote, "BA seen this!!" Report p. 164. Second, the prosecution asked Allen the logical question of why he did not send a bill after receiving the notes. This question led to Allen's losing his temper while discussing the inefficiency of Williams and Anderson and to his statement that the value of VECO's services were far less than VECO's actual expenses. Bottini/OPR p. 278. Allen said at the April 15 interview that although VECO's expenses may have totaled \$250,000 for the project, the fair market value of the goods and services provided was between \$80,000 and \$100,000. See Report p. 153. The government was aware that Stevens had paid Christensen Builders approximately \$140,000 for work performed at the Girdwood residence. See Report at 300. Thus, valuation evidence that might support an argument that Stevens reasonably believed he had paid full price for the improvements would be favorable to Stevens. On the other hand, the threshold amount for reporting gifts and liabilities is well below \$80,000, so this evidence did not exonerate Stevens. It was, nonetheless, favorable to a potential claim that he thought he had received no gift and had no liability because he had paid in full for VECO's original renovation work.⁴ I agree that Allen's failure to recall any conversation with Persons did not become a prior inconsistent statement and disclosable as *Giglio* evidence until after Allen told you about the "covering his ass" statement on September 14, 2008. However, the April 15 interview was not otherwise insignificant. You took twenty-two pages of notes, four of which pertained to the Torricelli note. *Id.* at 152. The 2002 notes from Stevens to Allen were a topic of discussion among the prosecution team, Allen's discussion of them was

³Berg made a similar observation that focused solely on Allen's failure to recall the Persons conversation, Berg memo p. 31, despite acknowledging that the valuation information was favorable to Stevens. *Id.* at 43.

⁴Although the prosecution team saw the 2002 notes from Stevens to Allen as most pertinent to Stevens's failure to pay for work performed in 2002, the valuation information from Allen clearly referenced the 2000-01 work. The indictment values the work performed in 2002 at \$55,000. Indictment p. 9.

significant, and you and your colleagues should have recognized at that time that you would likely have disclosure obligations arising out of that interview if the case got indicted. Further, you should have taken note of the information in part because it was relevant to the decision to indict the case.

I also agree that had Kepner completed a FBI 302 regarding the April 15 interview as was required by FBI policy, Report p. 565 n. 2485, your retrieval of the collection of Allen 302s would likely have been sufficient to remind you of the April 15 and 18 interviews and perhaps led to a disclosure. But, as an AUSA with over twenty years experience, you should have known and, in fact did know, that an FBI 302 is not a transcript and that attorney notes of an interview could contain exculpatory information not reported by an agent in a 302. You testified:

- Q That's not a controversial item, is it? Rough notes get reviewed for *Brady*, right?
- A They should certainly always be reviewed.
- Q Agent notes and attorney notes?
- A They both should be reviewed.

Bottini/Schuelke p. 587.

You have correctly made the point that the *Brady* review was later primarily coordinated by PIN, and that it involved review of memoranda of interview and 302s by Special Agents and review of grand jury transcripts by PIN attorneys. Bottini/OPR p. 110. Thus, PIN did not assign you to conduct the *Brady* review. You acknowledged that having agents review 302s for *Brady* materials differed from your usual practice and that in your cases in the past, you had conducted the *Brady* review yourself. *Id.* at 111. You testified that you thought the delegation was appropriate, and that you did not question it because of the press of time. Bottini/OPR pp. 128-29. You also testified that managing the *Brady* review process was not "on your plate" because you were not "the lead attorney on the case" and because "it wasn't something that I thought was my decision to make, as to how was this going to be accomplished." *Id.* at 132. You also knew, however, that the ongoing *Brady* review did not include a review of your notes. Bottini/Schuelke p. 26-28. You indicated that the box that contained your notes from the April 15 and 18 interviews went to Washington contemporaneously with your own travel on September 8, 2008. *Id.* at 569-70. You also acknowledged that your usual practice was to file interview notes in a witness folder and to review those notes in anticipation of trial preparation sessions with the witness. Bottini/Schuelke pp. 62-64. And, you acknowledged that while reviewing notes in preparation for trial prep sessions, you would also consider whether those notes contain *Brady* information. *Id.* Finally, you also confirmed that as one of the prosecutors on the

team, you had a personal obligation to comply with *Brady* obligations. Bottini/Schuelke pp. 36-37.

You also argued that OPR based its determination that your search for notes was insufficient on *res ipsa loquitur* logic, that is, you failed to find the notes, therefore the search was inadequate. You acknowledge that the notes were in your possession, that they were in box that contained information significant enough that you shipped it to Washington when you traveled there for trial, and that the notes were in a folder “misabeled” “Documents to show BA on April 15.” You testified:

A . . . I think I missed those notes because of the way that folder was labeled. If I would have written on that tab “Notes of Interview of Bill Allen on April 15 and April 18, 2006 [sic],” I probably would have pulled it and looked at it.

BY SHIELDS:

Q Is that were [sic] they both were, April 18 and April 15, in that same folder?

A Well, my folder that says “Documents to show to BA on April 15th,” has my notes for April 18th written on the cover of the manila folder, and then on the inside [f]lap of the folder. That’s how I think I missed it.

Bottini/Schuelke p. 571. This testimony suggests that during the course of your preparation you actually saw the folder labeled “Documents to show BA on April 15” but did not look in it (or at it, since it had notes written on it). I infer this conclusion from your testimony that you would have located the notes had the folder been labeled otherwise. The label would make no difference if you never saw the folder. OPR made a similar observation:

[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.

Report p. 196.

OPR also reasoned the Stevens notes were significant enough that Allen’s first report that Persons told him that Stevens was only “covering his ass” when he sent the notes should have prompted you to search your files and your memory and to consult your colleagues about whether Allen had previously been asked about the notes. *Id.* Acknowledging that it

is very difficult to evaluate accurately what an attorney's reaction should have been to events as they occurred, I tend to agree that many prosecutors would have greeted Allen's last-second disclosure of a statement of this type with considerable skepticism leading them to inquire specifically into whether Allen had previously provided the information, and if not, why not. Allen had been interviewed on multiple occasions about Stevens. When he provided just weeks before trial what was, at least at first glance, bombshell information about an important piece of evidence, many experienced prosecutors would have immediately wanted to know why they had not heard this before. Under such circumstances, one reason for no prior disclosure might be that the government never asked him. Another reason might be that the government asked him and he gave a different response. The *Brady* letter—sent just five days prior to the interview with Allen—disclosed other reasons why Allen had not sent Stevens a bill after Stevens requested one. *Brady* letter p. 3. On the other hand, I also recognize that you did share the information with your colleagues, some of whom were present for the April 15 interview, and none of them alerted you to the prior inquiry. Further, the Report notes that when Marsh told Morris about the “covering his ass” statement, Morris remembered that Allen had been asked about the notes, but that she “‘didn’t connect up that, well, why didn’t he say that earlier.’”⁵ Report p. 180. Had Morris discussed this recollection with you, you may have recalled the meeting or conducted further inquiry of your colleagues or further consulted your files.

In Berg's analysis, he “weighed heavily” OPR's application of its standard to Morris in assessing its finding against you. Berg memo p. 41. He wrote, “In my judgment, if the lead trial attorney is aware, when the government's key witness comes up with a ‘bombshell’ statement about a document, that the witness had been interviewed about that document previously, that knowledge creates a clear obligation to go back and investigate what the witness said the first time around.” *Id.* In my view, Berg places too much emphasis here on Morris's role as “lead attorney.” Morris was new to the case, had not reviewed all of the Allen 302s, had not been present during the April 15 and 18 interviews, was not present for the September 14 prep session, was not responsible for presenting Allen as a witness, and knew that you were responsible for presenting Allen and that you had been assigned to the investigation of Stevens for most of its duration. You on the other hand had

⁵Berg cites Morris's failure in response to Marsh's notification to direct the team to conduct additional due diligence as one of the circumstances pertinent to the assessment of the reasonableness of your conduct. I differ only slightly in that by this point you had been designated as second chair for the case, Allen was your witness, and Allen told you and no other prosecutor about the statement. *See also* Bottini/OPR pp. 160-61. Therefore, I find that you should not have needed anyone to direct you to conduct further due diligence. For this reason, I conclude that Morris's failure to advise you that she recalled that Allen had previously confirmed his receipt of the notes is the relevant circumstance as opposed to her failure to direct additional due diligence.

sat through the April 15 and 18 interviews, taken 22 pages of notes of which you had actual possession, had responsibility for Allen as a witness at trial, and were present when Allen communicated the “bombshell” statement about why he did not send Stevens a bill, which statement contradicted the *Brady* letter that was forwarded to you by email just five days previously. Although I understand that the drafting of the *Brady* letter was being handled by Marsh and Sullivan, you should have at least read closely the part that dealt with your witness. In addition, Morris did not resolve a question of arguable professional duty that would alleviate your responsibility pursuant to DCRPC 5.2. Thus, even if Berg is correct that Morris should have done more, that does not eliminate the requirement to consider whether you met your professional obligations in the case. Berg seems almost to have found his above-quoted conclusion determinative with respect to his assessment of your conduct. I do not agree with that approach.

OPR also concluded that you should have corrected the record when Allen testified on cross-examination at trial regarding the timing of his disclosure of the “covering his ass” statement to the government. You respond that Allen was clearly confused by the questioning and therefore did not commit perjury, pointing out also that his final response to counsel’s effort to elicit information about the date of the disclosure was “Hell, I don’t know.” Response p. 19. You contend that this answer was accurate, and hence you had no obligation to correct the record. Prior to the “Hell, I don’t know” response, Allen testified:

- 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.

As I noted during the oral response, this testimony must be put in context. I agree that there is a possible interpretation of the quoted question that counsel was asking Allen when the conversation with Persons occurred. However, the Stevens-to-Allen notes were dated 2002—six years prior to trial. You elicited the testimony about the notes on direct and asked Allen when he had the conversation with Persons. Allen testified that the conversation occurred between the two notes, that is after October 6, 2002, and before November 8, 2002. Trial transcript

10-1-08am, pp. 66-67. Thus, in the jury’s view, there would have been no reason for defense counsel to suggest to Allen on cross-examination that the conversation with Persons was recent. Although Allen may have been confused, the jury would have had no reason to believe that defense counsel’s questions related to the timing of the conversation with Persons. While Allen ultimately testified that he did not know when he told the government, in response to the above quoted question, he also indicated that he had not just recently told the government. That testimony was not correct. I agree that the specific language of DCRPC 3.3 did not unambiguously require you to correct the record. However,

at that point, armed with the knowledge of the actual date of Allen's disclosure, the defense could have further cross-examined him and contended that he had perjured himself by seeking to withhold from the jury the fact that after many, many interviews with the government he had only recently disclosed the "covering his ass" statement. You could certainly have argued in response that Allen was merely confused; however, the timing of Allen's disclosure became *Giglio* information at that point because you knew it contradicted some of Allen's testimony. Although you had a plausible retort to possible cross-examination of Allen on that issue, that did not excuse you from providing the information to counsel or correcting the record yourself. All that being said, I also recognize that you had a keen understanding of Allen's mental issues, and that, as OPR often notes, trials are semi-spontaneous events during which snap judgments are made only to be second-guessed in hindsight. Nonetheless, I agree with OPR that your decision not to correct Allen's testimony or to advise counsel of the date of Allen's disclosure is relevant to assessing your conduct on this issue.

Analysis

Having discussed my views of the facts and issues raised both by you and Berg, I now address those facts in the context of OPR's analytical framework. OPR finds reckless misconduct 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.

The obligations to disclose exculpatory evidence under *Brady*, *Giglio*, and USAM § 9-5.001 are clear and unambiguous. The evidence cited by OPR and your testimony confirm your awareness of these obligations. Therefore, I find the first element of OPR's standard met in this case.

The question of whether, based on your experience, you should have known that your "conduct involve[d] a substantial likelihood that [you would] violate, or cause a violation of, the obligation or standard" is a difficult question analytically. I earlier confirmed that considering your previously unblemished record in the Department and other factors, I am satisfied that you did not act intentionally. You noted in your response that you

had crafted a list of items that should be disclosed pursuant to *Giglio*. Response p. 8. Your efforts to convince PIN to disclose the Tyree allegations reflected a clear understanding of the requirement to disclose such information. However, you seem to have taken a less careful approach to the disclosure of factual information that was favorable to Stevens. You apparently failed to attribute significance to the exculpatory nature of the information Allen provided during the April 15 and 18 interviews including his admission that he probably received the Stevens notes and his assessment of the fair market value of VECO's work. Although this was a pre-indictment interview, in some ways the timing of the interview exacerbates the problem. While you and others were making recommendations to supervisors in Washington about whether to indict the case—perhaps the most critically important decision in any case—you learned of arguably exculpatory information that you failed to treat as significant. When those interviews concluded, instead of placing notes into a folder that would certainly be located in the event Allen became your witness (an event that you anticipated), you put them in a previously-created folder labeled “Documents to show BA on April 15.” Then, after the indictment when you were assigned Allen as a witness, you confronted what you quickly learned was an incredibly compressed trial preparation schedule. You learned that as a result of that compression, agents were reviewing 302s for exculpatory information, but you also knew that no one had asked for your notes. You knew that attorney notes should be reviewed for *Brady* material, but you had no reason to think that anyone—agents or attorneys—was reviewing attorney notes. As you began to prepare Allen for trial, you reviewed his 302s so you were generally aware of what Allen had previously said to the government. As you prepared for trial, you apparently encountered the folder labeled “Documents to show BA on April 15.” Even though that label clearly inferred that Allen had been interviewed and shown documents on April 15, you did not look in the folder, which was in a box of documents that you transported to Washington for trial. Then, when Allen told you about the Persons conversation on September 14, 2008, despite your familiarity with prior Allen interviews, you did not examine why Allen had not previously provided that information. Having read the *Brady* letter just five days prior to Allen's disclosure of the “covering his ass” comment, you should have known that this reason for Allen's not sending a bill to Stevens contradicted the information provided in the letter. Finally, when Allen testified at trial and failed to confirm that he had only recently communicated the “covering his ass” statement to the government, you failed to correct that testimony or to provide the defense with the information that arguably contradicted Allen's testimony.

Allen was unquestionably the most important witness at trial, and he was testifying pursuant to a cooperation agreement. As an experienced prosecutor, you would have known that government attorneys must always be sensitive to the possibility that cooperating witnesses will seek to provide information favorable to what they believe the government's position to be. Yet, when Allen gave you a bombshell at the last minute, you seem merely to have embraced it, and then failed to make clear to the defense when it became an issue at

trial that the information was recently disclosed. I find by the preponderance of the evidence that you should have known that the above-listed series of actions or inactions “involve[d] a substantial likelihood that [you would] violate, or cause a violation of” your disclosure obligations.

Finally, I turn to whether your conduct was objectively unreasonable under all of the circumstances. I have previously discussed many of the circumstances that either Berg or you cited in connection with this issue and balanced those circumstances when I found countervailing considerations. In my view, the compressed trial schedule that resulted from Stevens’s request for a speedy trial, which was compounded by Morris’s agreement to a trial date two weeks prior to the date the court suggested, is the most relevant circumstance. I also note that you had not been preparing for indictment prior to July 2008 because you had no indication the case actually would be indicted, and I recognize the difficult circumstances of your being an AUSA in Alaska working under the direction of PIN in a case to be tried in Washington. On the other hand, I also weigh heavily the decision in this case to disclose exculpatory information by way of *Brady* letter and your failure to engage in that process even when you observed practices that differed from your own. When the Department decides to decide what is exculpatory or not rather than to provide discovery broader than legally required, it is incumbent upon the Department to err on the side of caution as set forth in the USAM. You knew that the government would not provide 302s to the defense, you knew that no one had reviewed your notes, and you did not ask to see any other prosecutor’s notes of Allen’s interviews. And then, when Allen provided arguably inaccurate testimony about the timing of his disclosure, you sat silent. Furthermore, although Morris was designated as lead counsel in the case, your substantive role was significant. This was not a case in which the “second chair” was an attorney brought in late in the game to assist a “lead counsel” who had overseen the investigation from the beginning. Under such circumstances, deference to the lead counsel’s direction on discovery would be more understandable. However, you participated in the investigation of the matter, conducted the direct examination of the government’s most critical witness, gave the closing argument, and were more knowledgeable about the case than Morris. Despite the fact that the assignment of *Brady* review to agents differed from your own practice and your understanding that the attorneys and not agents are responsible for compliance with *Brady* obligations, you did not review the spreadsheets prepared by the agents, nor conduct any other check of the agents’ work, nor undertake to review attorney notes that you knew were not part of the agents’ review. Under these circumstances, I find your conduct was objectively unreasonable.

For all of the above reasons, I sustain Specification 1.

Specification 2: Failure to turn over statements made by Bill Allen that were contained in an FBI 302 and an IRS MOI.

Factual Background

On February 28, 2007, FBI Special Agents Michelle Pluta and Kepner interviewed Allen and memorialized his statements in a 302 that Pluta wrote (the Pluta 302). Report p. 116. The Pluta 302 reflected that Allen told the agents that he believed that Stevens would have paid a bill for the services of John Hess, the VECO engineer who designed the 2000-01 Girdwood improvements, if he had been presented with it. *Id.* at 124. Similarly, on December 11 and 12, 2006, IRS Special Agent Larry Bateman interviewed Allen and memorialized his statement in an IRS MOI (Bateman MOI). *Id.* at 184. This Bateman MOI contained a similar statement that “[i]f Rocky Williams or Dave Anderson had invoiced Ted or Catherine Stevens for VECO’s work, Bill Allen believes they would have paid the bill.” *Id.* at 118.

Marsh was actually aware of the Pluta 302 prior to trial based on the spreadsheet prepared by the agents who conducted the *Brady* review. *Id.* at 103. The spreadsheet noted that the Pluta 302 indicated “that Allen ‘believed that T[e]d Stevens would have paid an invoice if he received one.’” *Id.* (Brackets in original). Marsh tasked Kepner to follow up with Allen because the information contradicted Marsh’s recollection. *Id.* Kepner spoke to Allen and reported back to Marsh. *Id.* Based on this report, the September 9, 2008 *Brady* letter represented:

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.

Brady letter p. 3. This representation was not consistent with the Pluta 302 or the IRS MOI, but apparently reflected what Allen told Kepner on September 9, 2008. *Id.* The *Brady* spreadsheet prepared by the agents did not identify the IRS MOI as containing *Brady* information. *Id.* at 81-82.

After the government sent the *Brady* letter, the defense asked for the information in a more useable format. *Id.* at 111. On September 16, 2008, Judge Sullivan ordered the government to produce the *Brady* information in the form of redacted FBI 302s and directed that the disclosure occur the next day. *Id.* at 135. In order to achieve this task, Kepner

undertook to review and redact the Allen 302s. *Id.* at 114. She determined appropriate redactions by reviewing the *Brady* letter and then redacting from any 302 the information that was not included in the *Brady* letter. *Id.* at 115-16. She reviewed the Pluta 302. *Id.* at 116. Because the statement concerning Stevens's willingness to pay a bill for Hess's services was not included in the *Brady* letter, Kepner redacted it. *Id.* She then provided the redacted 302s to PIN attorney Sullivan. *Id.* PIN attorney Sullivan emailed Morris advising that he had the redacted 302s and noting that they needed to be reviewed prior to their being provided to the defense. *Id.* at 116-17. Despite Sullivan's email, the 302s were provided to the defense without further review. *Id.* at 117.

On October 1, 2008, Marsh reviewed Jencks material in anticipation of the possibility of Pluta's testifying, and he realized that the statement regarding Stevens's willingness to pay for Hess's services had been redacted. *Id.* He notified the team and consulted with Welch, who directed that prosecutors disclose the 302 to the defense. *Id.* at 118.⁶ The team then conducted a *Brady* review of all 302s and in that process located the Bateman MOI. *Id.* That evening, Marsh sent a letter to the defense disclosing the Pluta 302 and the Bateman MOI. *Id.* 118-19. This disclosure occurred during a point in the trial when Allen had begun but not yet finished testifying. *Id.* at 118.

OPR's Conclusions

OPR concluded that you committed professional misconduct in connection with the failure to disclose to the defense the Pluta 302 and the Bateman MOI. OPR did not conclude that any other member of the trial team committed misconduct in connection with this non-disclosure. OPR reasoned that you were responsible for preparing Allen to testify, that this responsibility required your reviewing the reports of interview pertaining to Allen, that you were aware that identifying and disclosing exculpatory information is the responsibility of the prosecutor and not the investigating agents, that you provided no guidance to the agents conducting the review, and that you did not review the agent-prepared *Brady* spreadsheets until discovery issues began to "pop up" at trial. Report pp. 199-200. OPR concluded that you abdicated your responsibility to conduct *Brady* review of materials pertaining to your witness. *Id.* at 200. Thus, OPR concluded that you committed professional misconduct by recklessly disregarding your obligations under *Brady* and USAM § 9-5.001. *Id.* at 201.

Your Response

In your response, you concede that it was error not to disclose the Pluta 302 and the Bateman MOI sooner than they were disclosed. Response p. 8. You contend, however, that

⁶Your recollection was that everyone agreed to turn over the 302. Bottini/OPR p. 209.

OPR's rationale for finding you to have engaged in misconduct is flawed. Your substantive argument begins with disagreement with the "gravamen" of OPR's finding of misconduct, that is that you failed to conduct a *Brady* review of the Allen 302s. *Id.* Indeed, OPR concluded:

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 his failure to review Allen's interview reports for *Brady* information presented a substantial likelihood that he would violate his obligations.

Report pp. 200-01. You point out, however, that you told OPR, and OPR acknowledged, that when you reviewed the 302s to prepare yourself to present Allen as a witness, you "had in mind to make note of any *Brady* or *Giglio* material contained in them, but nothing 'leaped out' at" you. *Id.* at 200. Both Berg and you contend that there is no clear and unambiguous requirement to review reports of interview twice—once for trial preparation purposes and once for *Brady* purposes. I agree with both of you, but that is not the end of this inquiry.

With respect to the remainder of OPR's rationale for its misconduct finding, you respond, "[T]he other basis for OPR's recklessness finding—that AUSA Bottini did not insert himself to oversee the *Brady* review performed by FBI and IRS agents—ignores the circumstances surrounding AUSA Bottini's conduct, even though recklessness is a context-dependent state of mind." Response p. 10. The context that you claim OPR failed to consider appropriately included many of the factors cited in connection with the failure to disclose the information from the April 2008 interviews—the unexpected indictment, the compressed trial preparation schedule, the dysfunctional management, the compartmentalized division of labor, and your travel to Alaska the day before the *Brady* letter was sent.

Notably, in its analysis of the *Brady* non-disclosures, OPR observed:

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.

Report p. 193. OPR concluded, however, 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.

Id. at 199. By these two statements, OPR seems to be saying that Morris was responsible for creating the "crux of the problem." Berg wrote, "The actions that were substantially likely to cause a *Brady* violation were first, PIN Principal Deputy Chief Morris' authorization of the delegation of the *Brady* review of witness interview reports to the agents and second, the PIN attorneys' decision not to include all of the items the agents identified as *Brady* in the *Brady* letter." Berg memo pp. 29-30 (footnote omitted).

OPR and Berg appear to be in some agreement with respect to the first point even though you testified that you did not think the assignment of the *Brady* review to the agents was improper. Bottini/OPR pp. 128-29. I depart company with Berg on his second point, however. Although it is clear that Sullivan and Marsh were crafting the *Brady* letter, they continuously shared drafts of the letter with the trial team, including you. At 5:55 pm on September 9, 2008, and prior to when the *Brady* letter was finalized, FBI SA Steve Forrest sent the agents' final spreadsheet to Kepner, Joy, Marsh, Goeke, Sullivan, a paralegal, and you for review. Report p. 100. At 6:50 pm, Marsh sent the trial team a revised *Brady* letter. *Id.* At 8:09 pm he sent the final version, which was transmitted to the defense thirty minutes later. *Id.* at 104-05. The spreadsheet Forrest sent identified the Pluta 302 as containing *Brady* information, noting that it stated "Allen 'believed that T[e]d Stevens would have paid an invoice if he received one.'" *Id.* at 103 (brackets in original).

You testified:

WAINSTEIN: And am I right that the process of pulling together a potential *Brady* to then possibly get included in that letter was also being overseen by the people over at PIN?

THE WITNESS: That is what I understood.

WAINSTEIN: Then when you received -- to the extent that you looked at the spreadsheet and there were directions or requests for guidance from the agents, did you, was it your understanding that those were directed at you or

directed to the people who were running the *Brady* process?

THE WITNESS: I thought this was for the purpose of the *Brady* letter is what I understood it to be. And whoever was, you know, drafting this, or taking the information and making a decision about it, that is who was going to act on it. That is what I understood.

BY [OPR]:

Q. So, even though you are one of the recipients on these e-mails you are assuming this is somebody else's task.

A. Right.

Q. I am just being kept in the loop, is that --

A. That's right. Yes, I mean, Goeke and I weren't tasked with drafting that second letter. So, I assumed that whoever was taking care of this at PIN -- and, by this time, I thought it was Sullivan had sort of, you know, taken on the responsibility of drafting the disclosures. So, that is who I assumed was, you know, receiving this information and acting on it.

Q. Yes, I saw in the Schuelke deposition that I think you said that at a certain point Sullivan was doing it by default. I mean, how did that happen?

A. Well, because I don't remember any kind of finite plan for this. You know, like, Ed, you will be responsible for the *Brady* review. I don't remember that. But, he sort of, it, from the e-mail traffic, it is clear to me that he took on that role.

Bottini/OPR pp. 153-55. Although Sullivan and Marsh had clearly taken the impetus to draft the *Brady* letter, I am troubled by your assumption that they continued to email you drafts only to "keep you in the loop." As an experienced prosecutor, you knew that the assignment of the *Brady* review was atypical, and you knew that you had a personal discovery obligation to meet. There is no evidence that you communicated to either Sullivan or Marsh that you were relying exclusively on them to get the *Brady* letter right. They would have been justified in assuming that the absence of an objection from you meant that you had reviewed the pertinent materials and acquiesced in the plan. There is no evidence that you ever told them that you were not reviewing the materials that they sent to you or that they knew you had received. Other than Morris, you had the most prominent role on the trial team, had responsibility for the government's key witness, and had significant historical knowledge about the investigation. Nonetheless, apparently you decided based on unconfirmed assumptions not to participate meaningfully in the preparation of the *Brady* letter. At the very least, you should have carefully reviewed those portions of the spreadsheet pertaining to Allen and similarly closely reviewed those portions of the *Brady* letter pertaining to Allen. Yet, you told Schuelke, "I mean, I was basically just

reading through [the *Brady* letter], you know, for format. I wasn't reading it for accuracy." Bottini/Schuelke p. 246. You also testified:

- Q But if I understood you correctly, you didn't even bother reading the final letter?
- A I skimmed it. I didn't say that I didn't read it, but I didn't read it in any detail for accuracy.

Id. at 774.

When we discussed this issue during your oral response, you said that you were simply too busy at that time to review the letter in a meaningful way. Oral response pp. 116-17. I understand that you were at this same time preparing for a motions hearing the next day that had been assigned to you at the last minute. However, at the very least you should have told your fellow prosecutors that you did not have time to review their emails. Otherwise, they were entitled to rely on their likely belief that you voiced no objection because you had no objection after reviewing what they sent you. Because you were the member of the team who at that point had the most knowledge about Allen, Sullivan and Marsh would have benefitted from your input on the letter. In many ways, you were the government's last clear chance to get the disclosure correct, but you paid little attention to the process on the assumption that people less familiar with Allen were handling it and that your careful review was unneeded. In my view, although the indications were that Sullivan and Marsh were handling the *Brady* review, you should have verified the scope of their effort before deciding that your own responsibilities were being met by others.

Berg addressed your failure to review the spreadsheets and your failure to review carefully the *Brady* letter to assess whether you committed misconduct in connection with the government's failure to disclose the Pluta 302 and the Bateman MOI. With respect to your failure to review the spreadsheet, he concluded that your "explanation (that [you] understood . . . that the spreadsheets were being prepared specifically to be used by the drafters of the *Brady* letter, and that [you] did not believe that it was your responsibility to review them [was] not at all unreasonable in light of the need to divide labors among the attorneys to get a colossal amount of work done in a very short period." Berg memo p. 30. With respect to your having only skimmed the *Brady* letter, he observed:

Where Bottini's understanding at the time was that the PIN attorneys had done a thorough and careful job in preparing the letter, and he was relying on that fact, just as OPR determined that Principal Deputy Morris was entitled to rely on the other attorneys to be thorough, the evidence does not support by a preponderance that he knew or should have known that his actions were creating a substantial likelihood of a disclosure violation.

Id. (footnote omitted). Berg cites as the only example of OPR's determination that Morris was entitled to rely on others OPR's conclusion that she was entitled to rely on you to meet the *Brady* obligations regarding Allen. *Id.* n. 137 (citing Report p. 201). In that example, OPR found that Morris was entitled to rely on you because Allen was your witness and you had superior knowledge of the 302s pertaining to him. Report p. 201. OPR also observed that the investigation had uncovered no evidence that Morris had actual knowledge of the Pluta 302 before the issue was raised on October 1, 2008. *Id.* at 201. Morris was not a recipient of the Forrest email that attached the *Brady* spreadsheets. *Id.* at 100.

Analysis

I now turn once again to address these facts in the context of OPR's framework. Once again, the obligations to disclose exculpatory evidence under *Brady*, *Giglio*, and USAM § 9-5.001 are clear and unambiguous. Thus, I find the first component of OPR's reckless misconduct findings satisfied.

The next element of OPR's finding requires a determination that you knew or should have known, based on your experience and the unambiguous applicability of the obligation or standard, that your conduct involved a substantial likelihood that you would violate, or cause a violation of, the obligation or standard. Thus, proof of this element requires *inter alia* that the obligation or standard—in this case *Brady*, *Giglio*, and the USAM—unambiguously applies. In your oral response, you questioned whether information that Allen believed that Stevens would pay a bill that he received constituted *Brady* information. Oral response pp. 132-36. However, in your written response, you acknowledged that the failure to disclose the 302 earlier was error. Response p. 8.

You testified in connection with the Schuelke investigation as follows:

Q Do you recall any discussions concerning preparing a 302 for purposes of a *Brady* or *Giglio* disclosure that also was to include an incriminating version of essentially the same events? You follow me?

A Yes, I think I know what you're talking about. I don't recall a discussion about a 302 -- are you referring to the September 9 interview of Allen?

Q I am.

A I don't recall there being a discussion that I was part of relating to that being reduced to a 302. I don't recall being --

Q Well, what do you recall about it?

A You know, I was traveling all day on the 8th, got here in the night of the 8th, went over to PIN Tuesday morning, the 9th. The earliest thing that I recall is seeing Mary Beth Kepner on her cell phone in the hallway

outside Nick Marsh's office. *And I don't remember if I asked her, or if she told me, you know, that she had just finished talking to Bill Allen, and that the reason she had called him is that Nick wanted to clarify what Allen meant when he said at varying times, you know, Ted Stevens wanted to pay a bill.* I didn't think much about it. You know, I don't even remember her relating to me right then, "And here is what Bill says." I found out about that later, in some form or fashion, because I was aware of him saying, "Look, you know, I don't think Ted would have paid the whole freight. But if we would have given him a reduced bill, I think he would have paid something." And, you know, statements to that effect. I don't even remember looking at the *Brady* letter later that day, when it got circulated, and looking at the letter and going, "Oh, okay. Well, here is what Allen must have said today." I mean, I read through the thing, but I didn't go through that letter with any kind of a fine tooth to say, you know, "Well, where is the information for that?" But I did look at it.

Bottini/Schuelke pp. 241-42 (emphasis added). When pressed, you again stated:

What I recall is that I think Kepner explained to me that Nick had asked -- Nick Marsh had asked -- her to call Allen to clarify what he meant when he said at varying times that he thought Ted Stevens -- Senator Stevens -- would have paid a bill.

And what I understood there to be was some confusion in Marsh's mind as to, you know, Allen said X on this date, said Y on that date, you know. We need him to clarify, you know, "What did you mean when you said the Senator would pay a bill?" That's what was told to me.

Id. at 245. This testimony makes clear that on the same day that the *Brady* letter was sent, you were conscious of the fact that Allen had said on previous occasions that Stevens wanted to pay a bill. Marsh directed Kepner to speak with Allen about the issue because he had reviewed the *Brady* spreadsheet that indicated in connection with the Pluta 302 that Allen said that Stevens would have paid a bill. So the agents reviewing 302s for *Brady* information flagged as exculpatory Allen's statement that Stevens would have paid a bill, then Marsh saw that entry in the spreadsheet and thought it significant enough that he asked Kepner to ask Allen what he meant, and when Kepner asked Allen, he provided a statement that was less favorable to Stevens. Then, Marsh incorporated only the less favorable version in the *Brady* letter. At 6:20 pm on September 9, he emailed the team a draft letter that contained the information Allen recently provided, but did not include the information from the source document that prompted him to ask Kepner to reach out to Allen nor did it report what you apparently knew at the time that Allen had said on prior occasions, to wit that

Allen had unreservedly said Stevens would have paid a bill. Report p. 100-03. Then at 8:09 pm, Marsh emailed the final version that contained the same language as the earlier version. *Id.* at 104-05.

Five days later, Allen told you that Persons said that Stevens was covering his ass when he sent the notes in October and November 2002. Thus in the span of the previous five days, Allen's version of events had gone from Stevens would have paid a bill, to Stevens would have paid a reduced bill, to Stevens was just "covering his ass" when he asked for a bill. And, your testimony establishes that in the five-day period you were actually aware of all three versions yet took no steps to advise the defense of the evolution of Allen's version of events.

I earlier noted that your efforts to cause disclosure of the Tyree information contrasted with your handling of substantively favorable information, and this instance represents another example of that contrast. You should have known, regardless of what effort Marsh directed, that the government's obligation to disclose exculpatory information is broader than an obligation to disclose only that information in the light most favorable to the government. The information in the Pluta 302 was not withheld because Morris approved the agents' review of 302s for *Brady* material. In fact, the agents identified the information in the Pluta 302 as exculpatory. The information was not disclosed because Marsh, with your knowledge, sought a more favorable version of the evidence from Allen, and then disclosed only that version. In fact, the new information from Allen made the earlier versions prior inconsistent statements and disclosable. Then, when just five days later Allen told you that Persons said that Stevens's requests for bills were just Stevens "covering his ass," Allen's earlier statements that Stevens would have paid a bill—statements of which you were consciously aware—once again became prior statements inconsistent with Allen's new statement that Stevens was covering his ass.

I conclude that *Brady*, *Giglio*, and the USAM applied unambiguously to the disclosure of the Pluta information, and that based on the facts set forth above you either knew or should have known that your failure to ensure that the information was disclosed involved a substantial likelihood that you would violate, or cause a violation of, your discovery obligations. Because the information was actually disclosed to the defense while Allen was still on the witness stand, it is possible that a backwards-looking analysis might conclude that a *Brady* violation did not actually occur. *Brady* requires that the government disclose material, favorable evidence "in sufficient time to permit the defendant to make effective use of that information at trial." USAM § 9-5.001.D (citing *Weatherford v. Bursey*, 429 U.S. 545, 559 (1997); *United States v. Farley*, 2 F.3d 645, 654 (6th Cir. 1993)). It is possible that the disclosure of the information from the Pluta 302 occurred in sufficient time to permit the defense to make effective use of it at trial. After disclosure, the government contended that the information was cumulative and that the defendant was not

prejudiced by the timing of the disclosure. *See e.g.* Trial transcript 10-2-08am, pp. 16-17. The defense strongly contended otherwise in part because it was deprived of discussing the information in its opening statements. *See* Trial transcript 10-2-08am, pp. 4-5. Ultimately, the court denied the defendant's motion for mistrial although the court agreed that there was a *Brady* violation. Trial transcript 10-2-08pm, p. 51. Regardless of the merits of that debate, Department policy requires disclosure of the exculpatory evidence "reasonably promptly after it is discovered." *Id.* The timing of the disclosure did not comply with the USAM provision. The disclosure was not made when the court ordered the government to disclose the 302s that contained the *Brady* information because Kepner over-redacted the 302. The disclosure may not ever have been made had Marsh not noticed the over-redaction in connection with his preparation for calling Pluta as a witness. On these facts, I conclude that the subsequent disclosure does not negate your earlier failure to take steps to ensure that the information of which you were actually aware was timely and accurately disclosed in the *Brady* letter.

The next question is whether your actions were objectively unreasonable under all of the circumstances. As I earlier noted, you testified that you did not think that any of the management actions directly led to the mistakes that were made. There is no evidence that your decision not to take steps to disclose Allen's statements was based on a supervisor's resolution of an arguable question of professional responsibility. Marsh was not your supervisor, and even if you had taken direction from him throughout the investigation, at the point this issue came up on September 9, 2008, you were effectively second chair in the case, and he was third chair. Under these circumstances, Marsh was not a supervisory lawyer with authority to alleviate your professional obligations pursuant to DCRPC 5.2. Further, because you were actually aware of the statements, the fact that you operated under a compressed preparation schedule mitigates your conduct but does not excuse it. Finally, as I noted previously, the government decided and you were aware that the government did not intend to provide 302s to the defense. Therefore, it was incumbent on the team to strictly adhere to the USAM requirement, informed by Supreme Court caselaw, that you err on the side of disclosure. USAM 9-5.001 and *see Kyles v. Whitley*, 514 U.S. 419, 439-440 (1995) ("... [A] prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. *See [United States v.] Agurs*, 427 U.S. 97, [108 [(1976)], ... ('[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure'). This is as it should be. Such disclosure will serve to justify trust in the prosecutor as 'the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done.' *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.") For all of the above reasons, I find that your conduct in failing to disclose the information in the Pluta 302 and the Bateman MOI was objectively unreasonable under the circumstances.

Therefore, I sustain specification 2.

**Specification 3: Failure to disclose information from trial preparation sessions with
government witness Robert “Rocky” Williams**

Factual Background

Robert “Rocky” Williams was a VECO employee and worked on the Girdwood renovations. During the course of the investigation, he testified before the grand jury and was interviewed on three occasions resulting in the preparation of an IRS MOI and two FBI 302s. Report pp. 279 and 283. OPR set forth in its Report the substance of the information that Williams provided and during interviews. *Id.* at 279-283. Among other things, Williams said that Allen selected him to serve as foreman of the Girdwood improvement project and that he was on VECO’s payroll while working at Stevens’s house.

Subsequent to the indictment, Goeke and you met with Williams in Alaska to begin preparing him to testify. In particular, you met with Williams on August 20, 2008. *Id.* at 286. SAs Kepner and Joy were present, and Marsh and Sullivan participated by phone for at least part of the interview. *Id.* 286-87. Your notes reflect that during the interview, Williams said that Stevens said he wanted to pay for the renovations and that he wanted to keep it within budget, that he (Williams) did not work at Girdwood full time during the renovations, that Stevens was aware that Williams worked for VECO, that he (Williams) reviewed the bills of Augie Paone prior to providing them to Bill Allen, and that he (Williams) did not add his time to Paone’s bills. *Id.* at 287-88. Paone owned Christensen Builders (CB), the contractor that was retained to perform some of the work at Girdwood. *Id.* at 4, 8. Goeke’s notes for that meeting differ from your notes in that Goeke’s notes reflect that Williams also said, “RW supposed to go through Augie’s bills →supposed to have RW’s time and Dave’s time applied to the billing.” *Id.* at 288.

Williams met with Goeke, Joy and you again on August 22, 2008. *Id.* at 289. Berg set forth your notes from that meeting as follows:

Augie’s bills –

→to Rocky ____.

Signed off on Augie’s stuff –

Verified that Vern and Mike were there

→Check their time out

Letter to Joseph W. Bottini, Esquire
Subject: Disciplinary Proposal of Kevin A. Ohlson, Chief, Professional
Misconduct Review Unit

Page 34

8-5 – 5x week –
After verified –
→took to VECO main
office –
showed to Bill.

-- Left with Bill –
for him to add my time +
Dave's →

– If Bill was there
– IF not – then left it there
w/ Sec'y or w/ Billie –

**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 this based
on what TS had said in 1999 –**

--- **Never saw what BA forwarded
to TS + CAS –**

--- **DON'T KNOW WHETHER
HE ADDED IT IN OR NOT, ETC.**

– **Knew Bill was under
a microscope – didn't think
that he would do anything
to hurt TS, etc.**

*– No conversations w/ TS or CAS
re: whether VECO stuff was added
into Augie's bill -- . . .

--- No conversations w/ TS or CAS
re: does this cover everything?? ---
NO.

Berg memo, pp. 51-52 (Emphasis in Berg's original; footnotes omitted). From these notes, it appears that Williams told you that he understood that Anderson's and his time would be added to the bills after Williams gave them to Allen, but that he did not know whether that ever happened. The notes also reflect that Williams knew Allen was under a microscope regarding the project and that he did not think that Allen would do anything to hurt Stevens. The meaning of that portion of the notes referring to the "original agreement" is a matter of dispute among OPR, Berg, and you.

Goeke's notes from that meeting were generally consistent with yours. In relevant part they provided:

→How Augie's bills handled.

* * *

(3) then took to VECO main ofc →
**left with Bill to add whatever
VECO time etc. was left to add** →
then send down to TS; →

→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 everything**

→charge for work force, etc. – would come through VECO;

→**part of original agreement**

→**As long as paid back then everything
would be fine**

→**original discussion**

→**assumption that was going on . . .**

→Subsequent conversations.

Any conversations with –

TS
CAS
that bills were all inclusive?

--- NO

--- Had to know under a microscope . . .

* * *

assumed ground rules were
VECO would bill TS.

Id. at 53-54 (Emphasis in Berg's original; footnotes omitted).

Because he thought that Williams had never before mentioned that he had not discussed his billing assumptions with Catherine or Ted Stevens, Goeke asked Joy to write a 302 with respect to that part of the interview. Report p. 291.

On that same date, PIN attorney Sullivan emailed the prosecution team regarding his review of documents provided by the defense. Among other things, he noted:

[I]t'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.

Id. at 293.

Williams met again with Goeke, Joy, and you on August 31, 2008, and he provided similar information about his review of Paone's bills. He once again indicated that he reviewed the bills, provided them to VECO, and assumed that Anderson's and his time would be added. *Id.* at 296.

On August 25, 2008, the government sent to the defense a *Giglio* letter that you drafted and had others review. The letter advised the defense that Williams "had a 1984 felony conviction for negligent manslaughter; a 1986 felony conviction for Failure to Assist/Aid; and a 1999 misdemeanor conviction for Driving While Intoxicated." *Id.* at 298-

99. It also reported that the government was aware of rumors that Williams abused alcohol and that he may have an alcohol dependency problem. *Id.* at 299.

As earlier discussed, while you were still engaging in trial preparation activities in Alaska, PIN assigned the *Brady* review to agents, and then undertook to draft the *Brady* letter. The final September 9, 2008 Brady letter included one paragraph about Williams. That paragraph read in its entirety:

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 of the work, and that such a figure was inconsistent with what he knows to have occurred.

Id. at 301-02.

Marsh and you met with Williams in Washington on September 20, 2008. *Id.* at 308. During this trial preparation session, Williams provided information consistent with the information provided during his earlier sessions. *Id.* You annotated a typed outline that you had prepared for Williams's direct examination. The annotations indicated that Williams confirmed that he reviewed Paone's bills and then provided them to Allen, assuming that Anderson's and his time would be added. *Id.* Your outline noted that no one told Williams that his time was being added on, but that he assumed it. *Id.*

Goeke and you met with Williams again the next day, and Goeke conducted a mock cross-examination of him. *Id.* at 308-09. Because Williams's health had become a major concern, the government decided to have him return to Alaska for medical treatment. *Id.* Because the government anticipated that Williams would testify, the government would have been obligated to disclose his grand jury testimony no later than after his direct examination during trial. 18 U.S.C. § 3500. The government was not treating FBI 302s or IRS MOIs as Jencks Act material; therefore, the government did not anticipate providing those documents to the defense. Nonetheless, as a result of developments during the trial, the government provided the grand jury testimony and reports of interview to the defense during the trial. *See* Berg memo p. 65 n. 267.

OPR's conclusions

OPR concluded that information provided by Williams during the trial preparation sessions was exculpatory and that *Brady* required its disclosure. In particular, OPR cited four exculpatory bits of information that the prosecution should have disclosed as follows:

- (1) Stevens said he wanted to pay for all the Girdwood renovations;
- (2) Stevens wanted a contractor he could pay because the work was “over the limit;”
- (3) Williams reviewed the Christensen Builders invoices and passed them along to Bill Allen (or a VECO employee); and
- (4) Williams thought his and Dave Anderson’s hours, and possibly all VECO costs, were added into the Christensen Builders bills.

Report p. 26, 280. OPR concluded that no government actor intentionally withheld the information, and therefore concluded that no government actor violated DCRPC 3.8. *Id.* at 354-59. On the other hand, OPR found that you committed professional misconduct by recklessly disregarding the *Brady* and USAM disclosure obligations. *Id.* at 26, 363. This finding underlies Chief Ohlson’s third specification.

Your Response

In your response, you addressed the first three statements separately from the fourth. Thus, you first addressed Williams’s assumptions about Allen’s adding in the VECO costs to the Christensen bills, contending that neither *Brady* nor the USAM clearly and unambiguously required disclosure. Response pp. 21-26. You argue that OPR based its determination that the assumptions were disclosable on its allegedly flawed conclusion that the combining of invoices was part of the “original agreement” between Allen and Stevens. *Id.* at 22-23. You next addressed the remaining Williams assertions that Stevens wanted to pay the full cost of Girdwood, that Stevens wanted a contractor he could pay, and that Williams reviewed the CB invoices. *Id.* at 26-30. With respect to this information, you contend that Stevens’s own statements were known to him and that the government was therefore not obligated to disclose them. With respect to Williams’s review of the bills, you point out that his grand jury testimony included that information and that the government would have been obligated to disclose that testimony pursuant to the Jencks Act. You also contended that it was objectively reasonable for you to rely on the *Brady* review conducted by agents and supervised by PIN. Response p. 30.

Berg similarly parsed the information although he concluded that the four statements cited by OPR were “exculpatory and that the prosecution team violated *Brady* and USAM

§ 9-5.001 in failing to turn it over to the defense in a timely manner.” Berg memo pp. 45-46. Berg found, however, that you did not commit professional misconduct. Berg characterized as “questionable” your determination that the information regarding Williams’s assumptions was not *Brady* information, but nonetheless concluded that your assessment was not objectively unreasonable. *Id.* at 78. With respect to the other statements OPR cited, Berg concluded that their non-disclosure was primarily the result of the assignment of the *Brady* review to agents, an assignment that PIN manager Brenda Morris approved. *Id.* at 78-79. Berg concluded nonetheless that you exercised poor judgment. *Id.* at 79.

Analysis

As Berg and you point out, the government is not under an obligation to disclose to a defendant information of which the defendant is already aware. In *United States v. Mahalick*, 498 F.3d 475 (7th Cir. 2007), a defendant charged with being a felon in possession of a firearm argued that the government violated its *Brady* disclosure obligations by failing to provide information to the defendant regarding a statement he had made to an ATF agent upon arrest. The court observed, “[T]he government cannot be said to have suppressed evidence of what the defendant himself said, ‘because the defendant [], being part[y] to the conversation, [was] equally aware. *Brady* requires disclosure only of exculpatory material known to the government but not to the defendant.’” *Id.* at 478 (Brackets in internal quotation in original; citations omitted). As Berg and you also point out, the *Brady/Giglio* outline on the Department’s intranet website cites *Mahalick* as an example of a case illustrating the point that “*Brady* cannot be violated if the defendant has actual knowledge of relevant information.” In its discussion of the government’s *Brady* obligations, OPR noted, “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).” Report p. 127.

The USAM policy addressing disclosures of *Brady* and *Giglio* information requires disclosure of more information than *Brady*, but it does not specifically require that the government disclose information about which the defendant is already aware. In its discussion of the USAM, OPR recognized that the USAM requires broader disclosures, but it did not address whether the USAM requires the government to disclose information of which the defendant is already aware. For these reasons, I generally agree that you were not under a clear and unambiguous obligation to disclose Williams’s report of statements Stevens made.

At the time of the trial preparation sessions, the government intended to call Williams as a witness in the case. Therefore, the government would have been under an

obligation to disclose Williams's grand jury testimony. 18 U.S.C. § 3500. Williams testified in the grand jury that he reviewed CB's bills. Thus, at the time of the trial preparation interviews and the *Brady* letter, you understood that the prosecution would have disclosed Williams's assertion that he reviewed CB's bills no later than after Williams's testimony on direct examination. Further, the transcript was actually provided to the defense on September 28, 2008, even though Williams had not testified. Report p. 353. OPR considered and rejected the argument that the information that Williams reviewed the CB bills was therefore timely disclosed. *Id.* OPR noted that the defense did not attempt to use the information at trial, *id.*, so any assessment of the defense's ability to use that particular information effectively is somewhat speculative. The rule in the District of Columbia also appears to be that *Brady* trumps Jencks so that a timely Jencks disclosure might not necessarily satisfy *Brady* obligations. *See United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005) ("*Brady* always trumps . . . Jencks . . .," citing *United States v. Tarantino*, 846 F.2d 1384, 1414 n. 11 (D.C.Cir.1988)). Regardless of whether the disclosure of the information that Williams reviewed CB's bills was timely, however, the fact remains, as OPR observed, that the "far more exculpatory information" that Williams understood that VECO's costs would be added to CB's bills was never disclosed.

Even if you did not need to disclose to Stevens the statements that Williams attributed to him and if the government timely disclosed the information that Williams reviewed CB's bills, those conclusions would not warrant consideration of the non-disclosure of Williams's assumptions about Allen's adding VECO's costs to CB's bills in isolation. The Supreme Court has observed:

While the definition of *Bagley* materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, *see Brady*, 373 U.S., at 87, 83 S.Ct., at 1196-1197), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

Kyles v. Whitley, 514 U.S. 419, 437-38 (1995). Furthermore, the USAM provides, "Recognizing that it is sometimes difficult to assess the materiality of evidence before trial, prosecutors 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.

Whether or not the government technically was required to disclose Stevens's statements about his desire to pay for the entirety of the Girdwood renovation and for a contractor he could pay, that information puts Williams's assumption about the adding in of VECO costs in a context that is relevant to assessing its exculpatory value. Berg's and your analyses focus on whether Williams's assumption reflected an "original agreement" to combine invoices. You argue, that your notes "prove the same point [you] made in [your] testimony: the 'original agreement' was simply that VECO would renovate the Girdwood residence and that Senator Stevens wanted to pay." Response p. 24. However, the fact that Stevens had told Allen, from the inception of their discussions, that he wanted to pay for the renovations was relevant to any assessment of the basis for and import of Williams's assumption that Allen was adding VECO's costs to CB's bills. Williams's further statements that Stevens wanted to pay because the project was "over the limit" and Williams recognition that Allen was "under a microscope" both likely contributed to his assumption that everyone was going to follow the rules and his belief that Allen would not "do anything to hurt TS." In short, if Williams believed based on conversations among Allen, Stevens, and himself, that Allen would be adding VECO costs to the CB bills, then perhaps that is what Stevens thought too. The government knew that Stevens had received and paid no VECO bills, but also anticipated "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." On these facts, your determination that Williams's statements were not exculpatory because they merely reflected assumptions was, at the very least, not an "err on the side of caution" assessment.

Berg relies on your having actually passed judgment on the disclosure decision and his assessment that your judgment was "objectively reasonable" to conclude that you did not commit misconduct. However, your testimony as to the level of deliberation you gave this information is confusing. In the light most favorable to you, your testimony indicates that you gave it fleeting consideration. You testified as follows:

- Q Did you think about whether or not it should be disclosed --
A I don't remember --
Q -- between August the 22nd and the commencement of the trial?
A I don't remember. I don't remember thinking about that, or having conversations with anybody about it. And I don't -- you know, I'm not sure who all was present for this particular session. I don't think it was just myself there, as far as any of the other attorneys of record. But I

don't remember having any conversations about this and saying, "Should we disclose it," or, "Do we have to disclose it?" You know, to me, given that Williams -- you know, that we had nothing to indicate that Williams was part of any plan to provide financial benefits to Senator Stevens, you know, his assumption that this was getting taken care of and being done correctly, I don't -- you know, I just -- I don't believe that that's something that should have been disclosed. And I don't remember thinking about it at the time, or having conversations with anybody about it at the time.

Bottini/Schuelke pp. 175-76.

Q . . . He asked you whether or not it crossed your mind that it may be *Brady* material. You said, "I didn't think it was." Does that mean it did cross your mind --

A No, no.

Q -- and you decided that it wasn't?

A No, I don't think it crossed my mind and I made some calculated decision about whether -- should we or shouldn't we. I don't remember having that sort of, you know, debate with me or with anybody else.

Id. at 177-78.

Q . . . And if the foreman of the job tells the defense attorney for 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 Stevens?

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. 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.

Q Well, when you say you think of it as an assumption, you think now of it as an assumption. It's not the analysis you did at the time, is that correct?

A You know, I don't remember some protracted debate internally, or with anybody else, about, you know, is that disclosable as *Brady* material. You know --

Q Well, that's my question. Did you think about it at all?

A I don't remember if I did or not. But I can tell you that, you know, at the time that wasn't something that jumped out and grabbed me, because Rocky Williams is assuming that this is what happened.

Id. at 182-84.

A . . . But at the time I just didn't think of this as something that should have been disclosed. That's the best I can do for you.

Id. at 188-89.

Q And my question is, at this point, on the -- literally, on the eve -- almost literally, on the eve of trial, it still doesn't cross your mind that this is *Brady* material, that this is exculpatory information? That the foreman on the job thought exactly what the defendant is going to testify that he thought? "I assumed that the bills were rolled into Christiansen Brothers (sic)?"

A It didn't.

Q That still doesn't cross your mind?

A No.

Id. at 323-24. Your testimony continued to the following day, and the questioning began by revisiting the issue:

Q I want to briefly revisit our discussion yesterday of the August 22nd '08 interview of Rocky Williams.

A Okay.

Q I have a simple question, because I don't think the record is clear on this point. Did you consciously consider disclosing what Williams had to say about the 1999 conversation among himself, Allen and Stevens, and that his understanding was that his time was to be added to the Christensen bills after he reviewed them, that basic account that he gave you. Did you consciously consider disclosing that as *Brady* material or did you not consciously consider it?

A I recall thinking at the time that Williams was making an assumption. That's what I recall, and based upon what I understood him to be saying, that he assumed that that was what was going to happen. No one had told him that was going to happen. It was merely an assumption on his part. But that was something that was not potentially disclosable. I do remember thinking that [sic] the time.

Q So the answer is yes, you consciously considered it?

A I believe I did.

Q And came to the judgment that it need not be disclosed because it was an assumption on his part?

A I think that's correct.

Id. at 347-48.

Berg wrote, "AUSA Bottini consistently testified that he did not consider the statements to be *Brady* material because, in Bottini's judgment, the statements represented an unfounded 'assumption' that was not only not supported by the facts but also had not been communicated at any time to anyone else." Berg memo pp. 75-76. He later concluded, "I would have less difficulty agreeing with a finding that Bottini's judgment may have been in error, and that the better, wiser, and more legally correct decision would have been to disclose this 'assumption' prior to trial, but exercising judgment, even flawed judgment, is not the same as being reckless." *Id.* at 77-78. I agree with Berg's statement in the abstract, but the level of deference to afford any judgment depends on the level of effort that preceded it. Even if I resolve the conflict in your testimony in your favor and conclude that you actually did make a judgment at the time, the testimony establishes at most that you made a snap, unilateral decision and did no research to confirm it.

Berg also attributes significance to the fact that the outline you prepared for your direct examination of Williams referenced his assumptions. In Berg's view, the outline evidences your intent to elicit the assumption information at trial and contradicts any suggestion that you intended to hide the information from the defense. He wrote, "At a minimum, this outline shows that AUSA Bottini was not attempting to suppress Williams' assumption and that had Williams been called as either a government or a defense witness, this information would have been made available in time for effective use at trial." *Id.* at 57. However, on Berg's logic, this outline also suggests that you thought the information was relevant and admissible. Berg further observed that your outline included a section entitled "Impeachment Stuff," and that you included within that section, "'They will try to get you [Williams] say [sic] that TS should have assumed that your time and Dave's time – in CB bills, etc.'" *Id.* at 57. He then concludes, "While Bottini recognized that the defense might try to exploit it, he viewed the assumption as part of the government's case, not as *Brady*." *Id.* at 58. Once again, with all respect to Berg, he missed this point—if you thought the information was admissible and that the defense might seek to exploit it, then you should have concluded that it was *Brady* information. The defense might have sought to exploit the information because it was helpful to the defense if admissible. Further, the government does not satisfy its *Brady* obligations by eliciting previously undisclosed exculpatory information in its case in chief. Although it is possible that such disclosure might be deemed timely or at least not prejudicial in hindsight, the USAM explicitly requires, "Exculpatory information must be disclosed reasonably promptly after it is discovered."

USAM 9-5.001.D.1. You discovered Williams's assumptions no later than August 22, 2008.

I next turn to the impact of the *Brady* review and the *Brady* letter on this issue. The agents' *Brady* review identified information that was not included in the *Brady* letter. OPR wrote, "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." Report p. 361. The *Brady* letter disclosures with respect to Williams were deeply flawed. First, the letter stated, "[T]he government has completed its review of agents' notes, formal memoranda, and grand jury transcripts for Brady/Giglio material. . . . The following information is being furnished to you in a manner consistent with our prior agreement." *Brady* letter p. 1. Although the letter notes that it does not contain the entire universe of *Brady* and *Giglio* information, it infers that in combination with the August 25, 2008 *Giglio* letter and prior disclosures, it completes the *Brady/Giglio* picture. *Id.*

Paragraph 15 of the letter pertains to Williams. With one exception it discloses only information Williams provided during a September 1, 2006 interview, all of which was inconsistent with information Williams later provided. In that sense, the letter appears to have been designed to facilitate cross-examination of Williams if he testified; however, the letter did not disclose its purpose. In other words, the letter did not disclose Williams's subsequent statements that were inconsistent with his September 1, 2006 interview except with respect to the one statement that was exculpatory on its face. For example, the letter noted that Williams said that there were no plans for the renovations. *Id.* That statement does not appear to be exculpatory on its face, but the government knew that statement to be inconsistent with Williams's later confirmation that VECO's John Hess drew plans.

The letter disclosed that Williams said on September 1, 2006, that he did not review CB bills. *Brady* letter p. 3. That statement likewise does not appear to be exculpatory on its face, but the government knew that it was inconsistent with Williams's expected testimony.

The letter notes that Williams said on September 1, 2006, that CB performed 99% of the work at Girdwood. *Brady* letter p. 3. That statement is exculpatory on its face, but the letter explicitly reports that Williams later explained that he meant only that CB performed 99% of the work that VECO did not perform. *Id.*

As noted earlier, you received a draft of the *Brady* letter with paragraph 15 and then later received the final version of the letter before it was sent to the defense. You indicated that you read the letter but did not raise any objection to its form or content. In assessing your conduct, Berg placed significant weight on the assignment of the *Brady* review, which was approved by PIN, and your ability to rely on it. He notes that you were "aware of how meticulous the review appeared to be in part due to Trial Attorney Sullivan copying the

entire team on his emails to the agents in which he stressed that the agents should not only gather all the Rocky Williams memoranda of interviews, but also search for and review all of their handwritten notes for those interviews.” Berg memo pp. 58-59 (footnote omitted). Of course, you also received emails attaching copies of the *Brady* spreadsheets and the draft *Brady* letter, and you knew that the *Brady* review could not possibly include new information provided to you during trial preparation sessions.

OPR cited as one of the bases for its finding of misconduct that you did not read your trial preparation notes in connection with the *Brady* letter. Report p. 361. You responded that you did not need to read your notes because the information was fresh in your mind. Response p. 29. You argue you recalled no *Brady* material arising during Williams’s trial preparation sessions not because you did not review your notes but because you did not think the information was *Brady*. *Id.* Since you have indicated the information was fresh in your mind, I will assess your culpability assuming that you were consciously aware of the information from the trial preparation sessions when you received and reviewed the *Brady* letter.

I now turn to the consideration of your actions regarding the Williams’s disclosures in the context of OPR’s analytical framework. Once again, your obligations under *Brady*, *Giglio*, and the USAM are clear and unambiguous, and you were aware of them. So the first prong of the reckless misconduct analysis is satisfied.

The next element of OPR’s finding is whether you knew or should have known, based on your experience and the unambiguous applicability of the obligation or standard, that your conduct involved a substantial likelihood that you would violate, or cause a violation of, the obligation or standard. As noted earlier, proof of this element requires *inter alia* that the obligation or standard—in this case *Brady*, *Giglio*, and the USAM—unambiguously applies. You and Berg argue that your determination that Williams’s assumptions were not *Brady* information was objectively reasonable. Although not controlling, the views of others have relevance to an assessment of whether any particular assessment is objectively reasonable. OPR reports that Welch, Morris, Marsh, Sullivan and Goeke all indicated during the course of the investigation that Williams’s information was *Brady* or at least that it should have been disclosed. Report p. 351. Berg also concluded that the information was “exculpatory and that the prosecution team violated *Brady* and USAM § 9-5.001 in failing to turn it over to the defense in a timely manner.” Berg memo p. 45-46. Although I agree that the government had plenty of arguments to counter the Williams evidence, that does not mean that it was not favorable, potentially admissible, and possibly outcome impacting. Your analysis of this evidence was too narrow. Williams reported that Stevens wanted a contractor that he could pay because the job was “over the limit” and that he understood that Allen was under the microscope. On these facts, Williams’s assumptions were not merely unfounded, but were based on

arguably the same information that Stevens would base his assumption that the CB bills included all costs. I am not suggesting that the evidence exonerates Stevens, but I find that the totality of the information available to the government makes Williams's assumptions disclosable *Brady* information. At any rate, a USAM directive to err on the side of disclosure with respect to exculpatory information clearly and unambiguously required the disclosure of Williams's assumptions. In light of Sullivan's contemporaneous email describing Stevens's anticipated defense, I also conclude that you should have known that non-disclosure of this information created a substantial likelihood that you would violate, or cause a violation of, the obligation or standard.

Finally, the third prong of OPR's framework requires analysis of whether your actions were objectively unreasonable under all of the circumstances. I conclude that they were. In his memo, Berg wrote, "OPR credits PIN Principal Deputy Chief Morris for being able to rely on the other AUSAs to be thorough and does not hold her responsible. ROI at 201. In a team prosecution, all of the attorneys as a practical matter rely on the work of each other as professional colleagues." Berg memo p. 58 n. 246. As I noted earlier, however, OPR credited Morris for being able to rely on you specifically because you had superior knowledge of the case. OPR concluded with respect to the *Brady* disclosures regarding Allen:

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.

Report at 201. Unlike Morris, you did not come late to the trial team, and you had knowledge superior to your colleagues--with the possible exception of Goeke--regarding the information Williams provided during trial preparation sessions. I agree with Berg that all attorneys rely on the work of each other, but when Sullivan and Marsh sent you drafts of the *Brady* letter they were relying on your knowledge of the case and expecting what would be your valuable input. I fully recognize that you were busy preparing for a motions hearing, but the shortcomings of the *Brady* letter were glaring. The letter reported that Williams did not review CB bills, for example, when he had told you so recently that it was still fresh on your mind that he had. The letter reported that Allen said that Stevens would not have paid a full bill when Williams had told you that Stevens wanted to pay for everything at Girdwood and wanted a contractor he could pay.

Compliance with *Brady* is a critically important part of a prosecutor's job. Most importantly, it ensures the defendant a fair trial. You knew or should have known that the

proof of the case would depend on whether the government could prove that Stevens knew that he had received a gift from or owed a liability to Allen. You knew or should have known that you confronted a hotly contested trial and that the completeness of the *Brady* letter would be critical to the fairness of the trial and the long-term viability of any conviction. You knew that, unlike in your own practice, agents were conducting the *Brady* review. You knew information from the Williams trial preparation sessions that no one else but Goeke knew. The *Brady* letter is only 6 pages in total and contains only one paragraph regarding Williams. Yet despite all of these facts, you conducted a cursory review of the *Brady* letter and made at best a snap judgment about the exculpatory nature of the Williams assumptions without conducting any research or consulting with your colleagues. I find these actions objectively unreasonable under the circumstances.

For all of the above reasons, I sustain specification 3.

Your response argues that the discovery failures in the Stevens prosecution were a collective failure and that OPR failed to examine the role that “dysfunctional management” played in that failure. Response p. 37. I do not disagree with the premise that management issues are a relevant consideration, but at the same time, it would be painting with too broad a brush to simply attribute individual failures to alleged “dysfunctional management.” I have tried to assess each of the specifications with a sensitivity to whether any particular action resulted from management’s involvement and addressed that issue above. For example, your failure at the time of the Allen interviews in April 2008 to recognize the potentially exculpatory nature of the information Allen provided did not result from dysfunctional management. The case had not yet been indicted, and the time pressure that resulted from the speedy trial request had not yet commenced. Similarly, you noted that the Criminal Division front office assigned you the closing argument and then required that you provide a draft prior to the beginning of trial creating an unexpected burden on your time. Bottini/OPR p. 98. However, you also noted that that assignment occurred on September 11, 2008, two days after the *Brady* letter was sent. While some have criticized the late assignment of Morris as lead counsel, you testified that you thought it was “brilliant” and that you were “happy with that personally.” *Id.* 182. Finally, as earlier noted, you also testified that the management actions were not a direct cause of any of the issues that arose in the case. *Id.* at 98.

I also very much understand the time pressures that you were under to prepare the case for trial and that you were thousands of miles from home in an unfamiliar forum working under the supervision of a Department component rather than your United States Attorney. I am also aware, however, that Department prosecutors throughout this country labor under incredible work pressures and time burdens almost every time they prepare for trial. Ted Stevens was not entitled to a fairer trial than any other criminal defendant who

appears in a federal courtroom, but he was entitled to a fair trial. Your client's policy required you to err on the side of caution regarding disclosures of favorable information not because this defendant was a Senator but because that is what the Department expects in every case, particularly where there are not countervailing witness security or national security concerns. Based on my analysis above, you failed to do that. Having met you during your oral response and heard glowing praise of you from your United States Attorney, who was present during that response, I do not reach the conclusions I have reached herein lightly. However, after a very careful consideration of your oral and written responses and Berg's memorandum, I am persuaded that the preponderance of evidence supports each specification in the proposal, and I sustain the charge that you recklessly disregarded your discovery obligations under *Brady*, *Giglio*, and Department of Justice policy.

III. Penalty

A. Poor judgment

In assessing the penalty for the proposal, Chief Ohlson adopted and considered as an aggravating factor OPR's finding that you exercised poor judgment by failing to inform your supervisors that the representations made by the government in the *Brady* letter regarding Bambi Tyree were inaccurate and misleading. In your response to the proposal, you contest this poor judgment finding as well.

Factual background

The Report sets forth the facts underlying the Tyree issues beginning on page 207, and I will not restate them in full here. On multiple occasions throughout the course of the Polar Pen investigation, of which the Stevens case was a part, the government discussed its obligation to disclose information that Allen had asked Bambi Tyree to lie under oath about whether Allen had had sex with Tyree when she was underage. During the course of these discussions, the government identified four pertinent documents related to *United States v. Boehm*, an earlier case in which Tyree was a witness. Those documents included:

1. A 2004 pleading in the *Boehm* case in which the government represented, "Allen asked Tyree to meet with his attorney, James Gilmore, and give a sworn statement stating that she never had sex with Allen. Tyree did so." Report p. 208.
2. An FBI 302 written by Special Agent John Eckstein in 2004 that said, "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." *Id.* at 210.

3. Eckstein's notes from the Tyree interview, which were consistent with the 302, including that Tyree "'signed aff at BA's request.'" *See id.* at 222, 241.
4. AUSA Frank Russo's notes from a Tyree interview or interviews in which he appeared to have written that Tyree signed the affidavit at Allen's request, but then struck through that information and wrote that the affidavit was Tyree's idea. *Id.* at 210.

During the course of the discussions, the government interviewed a number of potential witnesses. Allen denied that he had asked anyone to lie under oath. *Id.* at 212. Eckstein did not specifically recall his interview with Tyree, but stood by his 302. *Id.* at 215-16. Russo seemed to recall that Tyree said Allen told her to lie, but when confronted with his notes, he said he might have been mistaken in the *Boehm* pleading. *Id.* at 218-19. Tyree said the false document was solely the product of Allen's attorney and her. *Id.* at 220. You spoke with Tyree's attorney, who was present for the interview that generated the 302, and the attorney reported that Tyree did not say in the interview that Allen asked her to lie in the affidavit. *Id.* at 219 n. 844.

As noted earlier, the question of whether to disclose the Tyree information came up on multiple occasions. Goeke raised it in March 2007 in connection with the obtaining of a search warrant in the Stevens investigation. *Id.* at 211. On that occasion, Welch decided that the government did not need to include the information in the search warrant affidavit. *Id.* at 212. Goeke and you raised it again after the September 2007 trial in *United States v. Kott* to discuss whether the government had disclosure obligations in the *Kott* case or in the upcoming trial of *United States v. Victor Kohring*. *Id.* at 216-17. Marsh spoke with the Professional Responsibility Advisory Office (PRAO) regarding the government's disclosure obligations. *Id.* at 220-21. Based on the information Marsh provided, PRAO advised that there was no disclosure obligation. *Id.* at 222. Marsh advised Morris of PRAO's opinion, and the government made no disclosures in either *Kott* or *Kohring* regarding Allen having told Tyree to lie. *Id.* at 223.

In December 2007, Goeke and you learned of a forthcoming article in an Alaska newspaper regarding ties between Allen and Tyree's family. *Id.* at 223. As a result, Goeke and you raised the disclosure issue with PIN again. *Id.* Marsh contacted PRAO again, shared the information about the article, and PRAO offered the same advice. *Id.* 223-24. Despite being advised of PRAO's conclusion, Goeke continued to press for disclosure of the information prompting Welch to send an email on December 20, 2007, advising that the government would not disclose the information based on PRAO's advice, that "[w]e've done all that we are going to do on the matter," admonishing Goeke and you that you "work for PIN" on this case, and that these were the marching orders until he spoke with your United States Attorney. *Id.* at 226.

The next day, a PRAO attorney sent Marsh and Sullivan an email confirming PRAO's advice. *Id.* at 224. That email reflected that the PRAO opinion was based on incorrect information. *Id.* In particular, the email set forth the following inaccurate information:

(1) SA Eckstein's notes "reflect that at the time of the interview [Bambi] was adamant that the lie was her own idea"; (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"; and (3) the "absence of any evidence supporting the notion that [Allen] had pressed Bambi to lie in the [Boehm] [c]ase.

Id. (Brackets in OPR's original; footnotes omitted). On January 3, 2008, Marsh forwarded the PRAO email to Goeke and you and separately to Welch. *Id.* at 225.

In April 2008, the Criminal Division requested a memorandum that addressed the strengths and weaknesses of a potential prosecution of Stevens. *Id.* at 227. Marsh shared a draft memorandum with you. *Id.* The draft referred to Allen's "shady background," and you questioned Marsh about whether the memorandum should include a specific reference to the Tyree issue. *Id.* Marsh rejected your suggestion and submitted a memorandum that listed Allen's shady background as a potential problem for Allen as a witness. *Id.* at 227-28.

On July 14, 2008, Goeke and you flew to Washington to meet with the Criminal Division management to discuss a potential indictment of Stevens. Because the PIN team did not raise the Tyree allegations during the meeting, you raised the issue and advised that PRAO had advised that there was no disclosure obligation. *Id.* at 228; Bottini/OPR pp. 78-79. You raised the issue at this juncture not because you were seeking more input on the disclosure issue but because you felt that the individuals making the decision to indict the case should be aware of the information. Bottini/OPR pp. 77-78.

After the indictment, the government began preparing a motion *in limine* to limit cross-examination of Allen. On August 14, 2008, prior to the filing of the motion, you again raised the Tyree false statement issue again advocating raising it at least as a "rumor which we investigated and disproved." *Id.* at 230. Goeke also emailed in support of a disclosure. *Id.* 230-31. Marsh conveyed opposition to the disclosure. *Id.* at 231. Welch responded on another issue raised in the emails, but did not address the Tyree issue. *Id.* On August 18, 2008, in connection with the preparation of the *Giglio* letter, you emailed Morris, Marsh, Goeke, Sullivan, and Kepner, and noted the group needed to decide whether to include the following:

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.

Id. at 232. Three days later, you suggested another version of a possible disclosure. *Id.* Marsh strongly argued against it, and Morris agreed. *Id.* at 233-34. Their view prevailed. *Id.* at 233.

The question of disclosure of the information regarding Allen's relationship with Tyree next arose in connection with the *Brady* letter and a defense motion to compel. *Id.* at 235. Initially, the prosecution team discussed whether to retrieve the Alaska Police Department (APD) file on its investigation of Allen. *Id.* Welch told OPR that he met with Friedrich and Glavin and that they instructed him that PIN should not obtain the file. *Id.* On September 5, 2008, the court held a telephone conference to address the defense's request for information about gifts that Allen gave to family members of the underage females with whom he was alleged to have had sex.⁷ *Id.* The next day, Kepner emailed the Eckstein 302 to Morris, Goeke, Bottini, Marsh, Sullivan, and Joy. *Id.* at 237. She also forwarded *inter alia* the 302s from the 2007 interviews of Allen and Tyree. *Id.* On September 7, 2008, Goeke, Kepner, and you interviewed Allen again, and he specifically denied directing Tyree to submit a false affidavit. *Id.* at 237-38.

On September 7, 2008, the team circulated drafts of the *Brady* letter that included some information about Allen and Tyree, including that Allen denied paying anyone to make a false statement, but did not propose disclosing the contents of the Eckstein 302, Eckstein's notes, or the *Boehm* pleading. *Id.* at 92-95.

At 12:16 am on September 8, 2008, Goeke sent an email to Welch, Morris, Marsh, Sullivan, Kepner, Joy, and you regarding the Tyree issue. Prior to your departure from Alaska for Washington on September 8, 2008, you sent an email at 9:53 am east coast time suggesting that the government should "approach the matter as if the defense ha[d] access to the *Boehm* filings 'which erroneously assert that Allen asked Bambi to make a false statement.'" *Id.* at 239. At 11:48 am, Marsh emailed the team noting that Welch had asked to see the relevant page from the *Boehm* brief and AUSA Russo's notes. *Id.* at 239-40. Goeke sent Russo's notes to Welch, Morris, Marsh, Sullivan, and you at 12:38 pm. *Id.* at 240 n. 956. At 12:39 pm, Goeke sent the same group excerpts from the *Boehm* brief. *Id.* at 241. At 12:43 pm, Sullivan sent Welch, Morris, and Marsh the PRAO email from December 2007. *Id.* At 4:00 pm, Welch, Morris, Marsh, and Sullivan met to discuss the

⁷In the August 25, 2008 *Giglio* letter, the government had advised the defense that APD had investigations of Allen involving two different juvenile females.

issue. *Id.* at 241-42 and 242 n. 969. Welch told the PIN team to err on the side of caution and disclose the information. *Id.* at 241. He also told the PIN 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.” *Id.* at 242. At 5:47 pm, Goeke emailed Eckstein’s notes to Welch, Morris, Marsh, Sullivan, and you. *Id.* In the email, Goeke informed:

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.

Id. at 240 (brackets in OPR’s original). At 8:53 pm, Marsh sent to Welch, Morris, Sullivan, Goeke, and you a new draft *Brady* letter that added a paragraph about Allen that read:

[W]e 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]⁸ 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.

Id. at 98 (Brackets in OPR’s original).

The final version of the September 9, 2008 *Brady* letter contained a paragraph identical to the above-quoted paragraph (the Tyree paragraph) from Marsh’s September 8, 8:53 pm draft. OPR noted that a number of additional drafts containing revisions circulated on September 9, 2008, but described no revisions to the Tyree paragraph. *Id.* at 99-105. Sullivan sent a draft to *inter alia* Welch, Morris, Marsh, Goeke and you at 10:16 am. *Id.* at 99. Marsh sent Welch, Morris, Sullivan, Goeke, and you a draft at 6:50 pm. *Id.* at 100. At 8:09 pm, Marsh sent the final draft to the same group. *Id.* at 104.

⁸OPR substituted Tyree’s name where the letter referred to “the other female.”

On September 22, 2008, the APD referred to the USAO in Alaska a potential Mann Act investigation of Allen. *Id.* at 245. The USAO requested recusal, and on October 7, 2008, the APD case was assigned to the Child Exploitation and Obscenity Section (CEOS) of the Criminal Division. *Id.* at 246-47. On October 13, 2008, the government informed the defense that the APD investigation had been transferred to CEOS but that they did not think Allen was aware of any federal investigation. *Id.* CEOS received the APD investigative file and provided it to PIN on or about October 14, 2008. *Id.* at 247-48. Welch reviewed the file on either October 14 or 15. *Id.* at 248. Upon seeing the Eckstein 302 for the first time, Welch questioned Goeke's earlier characterization of Eckstein's notes as ambiguous. *Id.* Welch said that up to that point he had seen only Russo's notes (even though Goeke had emailed Eckstein's notes on September 8) and that Marsh, Goeke, and you told him that Russo said he must have been mistaken in the pleading. *Id.* Having now seen the 302, Welch decided to disclose the entire APD file to the defense, with the exception of Department emails regarding the recusal. *Id.* The prosecution provided the file to the defense on October 16, 2008. *Id.* at 252. The file contained the Eckstein 302 but not his notes. *Id.* at 252. Although the Eckstein 302 reported that Tyree said that she signed a false affidavit at Allen's request, the defense apparently did not raise that issue with the court. OPR notes that at bench conferences subsequent to the disclosure of the APD file, the defense addressed only their concern about whether Allen would have been aware that he was under investigation and whether the jury should have received an instruction about that. *Id.* at 252-53.

OPR's Conclusions

OPR identified a number of inaccuracies in the Tyree paragraph. First, the characterization of the information available to the government as a "suggestion" that Allen asked Tyree to lie understated the level of information available to the government. *Id.* at 255. The "suggestion" was contained in an FBI 302 and in a government pleading. Second, the *Brady* letter represented that the government was unable to find any evidence to support the suggestion. *Id.* The letter indicated that in so concluding, the government relied on interviews of Allen and Tyree, Russo's notes, and Eckstein's notes. This representation clearly implied that there was no evidence among that information that supported the suggestion. However, Eckstein's notes affirmatively represented that Tyree completed the false affidavit at Allen's request. In addition, the list of information was incomplete and failed to mention Eckstein's 302 and the *Boehm* pleading. *Id.* OPR also took issue with the representation that the investigation of the matter was thorough. *Id.* at 257.

Despite the letter's identified flaws, OPR did not conclude that you committed professional misconduct in regards to the letter. *Id.* at 267. However, OPR concluded that you "exercised poor judgment by failing to apprise [your] supervisors, Morris and Welch, of the errors in the Tyree paragraph of the *Brady* letter." *Id.* at 268. OPR reasoned in part, "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 [sic] paid closer attention to an issue so consequential to the trial.” *Id.* OPR also assessed whether you exercised poor judgment in connection with the non-disclosure of the actual Tyree information. *Id.* at 276. OPR concluded that its poor judgment finding regarding the *Brady* letter and the Tyree paragraph encompassed the non-disclosure issue. *Id.* In other words, OPR concluded that had you advised Morris and Welch of the flaws in the Tyree paragraph, you would have met your obligations with respect to the disclosure issue as well. *Id.*

Your response

Your response to the poor judgment finding first claims that OPR failed to consider your failure to identify flaws in the Tyree paragraph of the *Brady* in the context in which it occurred. Response p. 34-35. Second, you argue that OPR should have credited more significantly your persistent advocacy for disclosure of the Tyree information. *Id.* at 36. Third, you contend that you actually did notify PIN supervisors of information that OPR claims you withheld. *Id.* Finally, you suggest that OPR treated Goeke and you differently even though you were similarly situated with respect to this issue. *Id.* at 37. Your point in making this argument is not that you thought OPR treated Goeke too favorably. *Id.*

Analysis

I have earlier commented on my concerns that your failure to review closely the *Brady* letter before it went out was among my considerations in agreeing with some of OPR’s earlier findings. Here, however, your persistent efforts to cause disclosure of the Tyree issue and the direct participation by PIN supervisors Welch and Morris on this specific issue distinguish your actions from other issues.

As I have noted, Goeke and you raised the issue on numerous occasions, and on each occasion, you were advocating *for* disclosure. In response to your persistent efforts, Welch told you in no uncertain terms in December 2007 that the issue was resolved and that you worked for PIN in the matter. You specifically raised the issue in the indictment review meeting with Friedrich and Glavin. Welch and Morris were present, but had you not spoken up, the Acting Assistant Attorney General may well have considered the indictment without knowing that the government’s principle witness had allegedly had sex with underage minors and then encouraged one of them to lie about it. Then, when the issue came up again in connection with the *Giglio* letter, you advocated raising it. When it came up again in the process of drafting the *Brady* letter, in an effort to prompt disclosure, you suggested that the team should operate as if the defense had the *Boehm* pleading that represented that Tyree had lied at Allen’s request. And you made all of these efforts despite a PRAO opinion that disclosure was not required.

You knew that you had faxed the Eckstein 302 to PIN on October 4, 2007, prior to Welch's "you work for PIN" email. Report p. 216. On September 6, 2008, Kepner emailed the 302 to Morris, and you were copied with that email. Therefore, as of that date, you knew that Morris had the Eckstein 302 that said, "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." Then you were copied with September 8, 2008 emails from Goeke that forwarded to Welch and Morris among others Russo's notes (12:38 pm), relevant excerpts from the *Boehm* brief (12:39 pm), and Eckstein's notes (5:47 pm). It is unfortunate that Goeke characterized the Eckstein notes in his email as "ambiguous," because they are not, and Welch's testimony suggests that he relied on that characterization rather than actually looking at the notes. See Report p. 248. Nonetheless, you had no way of knowing on September 9, 2008, that Welch had not read the attachment to the 5:47 pm email from Goeke. Furthermore, you knew that Morris had received the notes and the 302, and you knew that Welch and Morris were both copied on the emails that attached drafts of the Tyree paragraph on September 8, 2008, at 8:53 pm, and on September 9, 2008, at 10:16 am, 6:50 pm, and 8:09 pm.

OPR's poor judgment finding was exclusively based on your failure to advise Welch and Morris of the flaws in the Tyree paragraph. *Id.* at 268, 276. At most, OPR should have based its finding on the failure to disclose the inaccuracies to Welch *or* Morris. When Welch finally reviewed the Eckstein 302, he reacted by asking one of his deputies, "How is this fucking ambiguous?" *Id.* at 248. He had a point. For these reasons, I am unpersuaded by OPR's assessment that because you knew what Russo and Eckstein had later recalled about their conversations with Tyree, you had materially superior knowledge about the accuracy of the Tyree paragraph. Welch's assessment was correct, and Morris received the 302 by email three days prior to the date of the *Brady* letter. You had just arrived in Washington and were busy preparing for a motions hearing the next day. Although I have noted that those facts did not excuse your failure to weigh in on those issues about which you did have superior knowledge, the Tyree paragraph was not one of those issues. For these reasons, I do not adopt OPR's finding that you exercised poor judgment regarding the Tyree issue by not informing Morris and/or Welch of information that was within their grasp.

B. Douglas factor analysis

I find assessing the appropriate punishment in this case difficult because it requires the consideration of factors almost at each end of the spectrum. On the one hand, you have had a twenty-six year career as an Assistant United States Attorney during which you have earned a reputation as the go-to guy in your office. Asked to submit information pertinent to the *Douglas* factor analysis, United States Attorney Loeffler wrote:

I have personally known and worked with him for over 23 years, and would say, without reservation, that he is the most respected lawyer in the office, and without a doubt, one of the finest people I have ever met. Over my long relationship with Bottini, I have seen him step up again and again to take on any task required to benefit the office or any person in the office. The examples of this are almost too numerous to detail. No task has ever been too small or too difficult if the office or the Department needed him. I have second chaired cases lead [sic] by him, and he has second chaired cases lead [sic] by me. In his long career, he has never turned down a request to aid any person or the office. His dedication to the mission of the Department of Justice is unparalleled.

She reported that over the last twenty-five years you had never received a performance evaluation at other than the highest level. She reports that she has had and still has every confidence in your ability to carry out the responsibilities of an AUSA.

In addition, your response to the proposed discipline included letters of support from a wide variety of sources. A few notable observations are summarized below:

- From a colleague in your office who has worked with you since 2003: “Joe is one of the public servants of whom the Department of Justice should be most proud, one of those who truly believes in doing right and seeking justice, and who has dedicated his life to that goal.”
- From a former Criminal Division attorney and current Associate Law Professor: “[H]is character and reputation for truth and veracity, for honesty and fair dealing, and for adhering to the highest standards of legal ethics are of the highest order.”
- From a former United States Attorney: “It was clear from the beginning that Bottini had the unconditional respect and support of all in the United States Attorney’s Office, and in the Federal law enforcement community. He provided quiet leadership without any trace of self promotion or self interest.”
- From a former colleague and current private practitioner: “Joe Bottini is and has been for well over twenty years a hard working public servant serving the interests of justice. His reputation for fairness, honestly [sic] and hard work is well deserved. His history of treating defendants with respect and doing his job without personal agenda is well known.”
- From another former United States Attorney: “It is not an exaggeration to refer to Joe as the backbone of the Criminal Division and the glue that held it together. In addition to his well deserved stature in the office, Bottini is known to all as a man of honesty. He is highly regarded for his integrity and sound

judgement by the courts and the defense bar. . . . Joe Bottini's actions are not controlled by ego or the desire of media attention."

- From a criminal defense lawyer in Alaska: "I have known Joe Bottini professionally for at least 16 or 17 years and I have litigated several criminal cases against him. . . . Bottini's practice has always been to let opposing counsel know of all evidence against the defendant that is required. On many occasions, Bottini informed me of very persuasive evidence that was not required to be disclosed short of trial. This has allowed my clients to make intelligent and informed decisions in a timely fashion regarding their cases. . . . I have never known him to withhold evidence. He has always been candid, truthful and forthcoming."
- From a former member and President of the Board of Governors of the Alaska Bar Association: "I can state, without any reservation, that Bottini is a lawyer of exceptional skill and commitment, keen intelligence, and a man of high moral character. He is the kind of person for whom the expression 'straight arrow' was invented. He takes public service seriously. It not only defines his career, it defines his life. It defines him, as a person."
- From a former colleague and current criminal defense attorney: "I have long thought that Joe possessed all of the best qualities of a federal prosecutor. He is a very able lawyer: talented, self-disciplined and hard working. In addition, Joe has always demonstrated another quality that I think equally important. His advocacy is ever moderated by an innate sense of fairness, courtesy and justice."
- From a criminal defense attorney: "I would go to the bank on Bottini's word."
- From a retired Coast Guard officer and former Special Assistant U.S. Attorney: "In short, Joe Bottini is one of those rare individuals who is universally liked, trusted, admired and respected. He is a model Federal prosecutor, and a very fine man."

On the other hand, OPR found, and I have agreed, that you committed reckless professional misconduct in the *Stevens* case. I noted that the assessment of the appropriate punishment required consideration of information *almost* at both ends of the spectrum because OPR did not find that you committed intentional misconduct. I agree with Chief Ohlson that your otherwise stellar career might not outweigh a finding of intentional misconduct. However, reckless misconduct is also very serious and resulted here in both the government's and the defendant's being deprived of a trial outcome that carried with it the validity that comes with full disclosure of exculpatory information. However, your over twenty-five year career and the strong endorsements by your United States Attorney and the individuals quoted above confirm that your actions were mistakes of the head, not the heart. Collectively your actions were reckless, but they were not malevolent. Against that backdrop, I will address the *Douglas* factors *seriatim*.

1. *The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.*

Aggravating: The offense was serious and was directly related to your responsibilities. There were three specifications underlying the charge, all of which I found proved by a preponderance of the evidence.

Mitigating: The offense was not intentional nor was it committed maliciously or for gain.

2. *The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position.*

Aggravating: AUSAs serve a critically important public function. The public's confidence in the justice system depends in part on their knowledge that criminal defendants who are tried and convicted in federal courts have been afforded the full benefit of their constitutional rights. *Brady* and *Giglio* are based on constitutional principles. Your actions in this case undermine the public's confidence in the criminal justice system.

Mitigating: At the time of the Stevens trial, you were not in a supervisory position.

3. The employee's past disciplinary record.

Aggravating: None.

Mitigating: You have not been previously disciplined since joining the Department in 1985.

4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability.

Aggravating: None.

Mitigating: Your United States Attorney reported that you have received the highest performance rating throughout your tenure as an AUSA. You

have now been an AUSA for over twenty-six years. According to the United States Attorney and those others who submitted letters on your behalf, you have been the go to guy in your office, are invariably dependable, and work well with your co-workers.

5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties.

Aggravating: None.

Mitigating: Your current United States Attorney reports that she maintains the utmost confidence in your work and that she has continued to assign you significant work in your district. She also reports that the judges maintain confidence in your abilities and that you have performed your duties diligently and effectively since the *Stevens* case was dismissed in April 2009.

6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses.

Aggravating: None.

Mitigating: OPR rarely finds that Department prosecutors have committed professional misconduct in connection with their disclosure obligations. Based on my experience and awareness of OPR matters for six of the last seven years, the proposed 45-day suspension is longer than actual punishments received by Department attorneys found to have engaged in misconduct in the past.

7. Consistency of the penalty with the applicable agency table of penalties.

Not applicable: The Department does not have a table of penalties.

8. The notoriety of the offense or its impact upon the reputation of the agency.

Aggravating: The Department's failures in this case have been extraordinarily notorious. When the Department learned of the non-disclosure of information from the April 2008 interviews, the Department not only agreed to vacate Stevens's conviction but to dismiss the indictment against him. The Department was chastised harshly by the trial judge

even when it moved to dismiss the indictment. The court found the violations so serious that it appointed a Special Prosecutor to investigate whether the Department attorneys had committed criminal contempt of court. The results of that investigation, recently made public, have prompted the submission of proposed legislation that would alter in favor of criminal defendants the carefully crafted constitutional balance between a defendant's right to a fair trial and the public's right to see that justice is done. In part in response to the violations in this case, the Department issued new discovery guidance for prosecutors, appointed a National Criminal Discovery Coordinator, and implemented new training requirements for prosecutors new and experienced. These measures were designed not only to ensure future compliance with discovery obligations but to repair the damage that this case did to the reputation of federal prosecutors everywhere. I recognize that in some ways, the huge impact that this matter has had on the Department is a result not of the magnitude of your conduct but on the identity of the defendant. However, as I noted earlier, you were or should have been aware that this defendant was a sitting Senator and that discovery failures in this case could have an impact much broader than the already significant impact on the case. I am loathe to endorse weighty consideration of the notoriety of your conduct for fear that it could be misperceived as a determination that my assessment of the appropriate punishment depends in part on the status of this defendant. A failure to disclose material exculpatory information is serious misconduct in ANY case. The law compels, however, that I consider the notoriety of the conduct, and this conduct was extremely notorious.

Mitigating: None.

9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question.

Aggravating: *Brady* and *Giglio* are well known, constitutionally-based rules of disclosure with which every prosecutor is familiar. The Department's policy at USAM § 9-5.001 has existed in its current form since 2006. As a prosecutor with over twenty years experience at the time of the trial, you were certainly clearly aware of your disclosure obligations.

Mitigating: None.

10. Potential for employee's rehabilitation.

Aggravating: None.

Mitigating: Your USA continues to have confidence in your ability to handle significant cases in your office. I have little doubt that whatever rehabilitation you needed has been previously accomplished by the almost three-year threat of a criminal prosecution and by the negative impact that this very public matter has had on you personally.

11. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter.

Aggravating: None.

Mitigating: There were a number of mitigating circumstances surrounding your actions, many of which I have previously discussed. First, the indictment of Stevens was unexpected at the time so much so that you had been assigned a capital case in your own office just prior to the indictment. Therefore, despite the fact that the indictment decision had been long on the table, it ultimately was resolved quickly, and the indictment was presented just two weeks after the indictment review meeting in Washington. Second, the compressed trial preparation period undoubtedly had an impact on your performance here. Although I did not find that the time compression was so extraordinary as to have altered the substantive outcome of your objections to the proposal, it is mitigating. Morris was the newest member of the trial team, and at Stevens's arraignment she proposed a trial date two weeks *earlier* than the court had suggested. She agreed to the date despite undoubtedly knowing little about the Department's level of preparedness to go to trial. The impact of this factor is diluted somewhat by the fact that when Acting AAG Friedrich asked at the July 14, 2008 meeting whether the trial team was ready to go, the team advised him that it was ready. Bottini/OPR pp. 84-85. You indicated you were pleased by the late addition of Morris to the trial team. However, by Morris's own admission, she was a reluctant participant in the case and did not assume a leadership role on the team other than in court. Report p. 64. Although Morris's efforts to ameliorate the hurt feelings of some of the team members is understandable, those efforts resulted in the team's lacking a leader

during the critical preparation stages of the case. This lack of leadership resulted in confusion regarding the attorneys' roles and lack of explicit direction as to who was responsible for what. Again, I did not find that this lack of leadership should control the outcome of your response to the proposal. The absence of leadership was evident and arguably should have resulted in you, as second chair, assuming more responsibility and in your making sure that the team met its discovery obligations. On the other hand, I recognize that because your office was recused from the case you were working under the leadership of people you did not know well and may have had some reluctance to assume a leadership role on the team.

12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Aggravating: As Justice Sutherland observed many years ago, "The 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 shall be done." *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935). Unlike private practitioners, AUSAs face the constant challenge of meeting their obligations to their own client—the United States—while also ensuring the fairness of the proceeding to the other side—a criminal defendant. In Justice Sutherland's words, the prosecutor may strike hard blows, but is not at liberty to strike foul ones. *Id.* The obligation described by Justice Sutherland is solemn, and the failure to meet it is serious. Fortunately, Department prosecutors meet that obligation in the vast majority of cases, but it would be a disservice to the public that we serve if the Department were to treat lightly failures when they do occur. Although most Department prosecutors do not need the threat of serious punishment to motivate them to meet their disclosure obligations, it is important that the sanctions in such cases accurately reflect the seriousness of the conduct so that prosecutors understand the Department's deep commitment to ensuring that the outcomes of federal criminal trials are fair and consistent with our constitutional responsibilities.

Mitigating: As I noted earlier, I am confident that any deterrence that you personally need has already occurred.

Balancing the often conflicting factors cited above, I have determined that a forty-day suspension without pay is the appropriate sanction for your conduct in this case. I reduced the proposed punishment by five days based on my determination not to adopt OPR's finding of poor judgment, which was an aggravating factor on which Chief Ohlson relied in part. I appreciate and respect your long career in the Department, but I also find that the non-disclosure of exculpatory evidence is among the most serious transgressions that a Department attorney can commit. I find that in light of the fact that your conduct in this matter interfered with or adversely affected the agency's mission, this penalty is fully warranted and will promote the efficiency of the federal service.

IV. Right to Appeal

You may appeal this decision to the Merit Systems Protection Board (MSPB). *See* 5 C.F.R. § 752.405. The MSPB Regulations are found at 5 C.F.R. § 1201 or you may access them through their website at <http://www.mspb.gov>. In order for your appeal to be considered by the MSPB, it must be submitted no later than 30 days after your receipt of this decision. I have included an appeal form for your convenience. You may file online at <http://www.e-appeal.mspb.gov> or you may send the enclosed appeal form to:

Merit Systems Protection Board
Western Regional Office
201 Mission Street
Suite 2310
San Francisco, CA 94105-1831

If you wish to raise an issue of discrimination in relation to this action, you may file either a mixed case appeal with the MSPB at the address above no later than 30 calendar days after the date you receive this letter, or you may file a mixed case complaint by contacting the Equal Employment Opportunity Staff of the Executive Office for U.S. Attorneys at (202) 252-1450 or (877) 781-1444, within 45 calendar days of the date you receive this letter. You may not initially file both a mixed case complaint and an appeal on the same matter; whichever forum you choose first shall be considered an election to proceed in that forum.

A copy of this decision letter has been sent to you, via email, on May 23, 2012, and a copy will be provided to your attorney via electronic mail today. Please acknowledge receipt of this letter in the space provided below and either return a hard copy of the signed

Letter to Joseph W. Bottini, Esquire
Subject: Disciplinary Proposal of Kevin A. Ohlson, Chief, Professional
Misconduct Review Unit

Page 65

letter to me at the above address or e-mail a scanned copy of the same to me at

Sincerely,



Scott N. Schools
Associate Deputy Attorney General

Enclosure

cc: Kenneth L. Wainstein, Esquire
Cadwalader, Wickersham & Taft LLP

Raymond C. (Neil) Hurley
Acting Counsel
Office of Professional Responsibility

Kevin A. Ohlson
Chief
Professional Misconduct Review Unit

The Honorable. Karen I. Loeffler
United States Attorney

I acknowledge receipt of this decision as noted below:

Signature

Date



MERIT SYSTEMS PROTECTION BOARD APPEAL FORM (MSPB FORM 185)

INSTRUCTIONS FOR COMPLETING YOUR APPEAL

GENERAL: This form is intended to help you provide the Board with the information we need to process your appeal. We need this information to help us determine whether the Board has jurisdiction over your appeal, whether it has been filed within the applicable time limit, and what claims you are raising. You do not have to use this form to file an appeal with the Board. However, if you do not, your appeal must still comply with the Board's regulations. **See 5 C.F.R. Parts 1201, 1208 and 1209.** The Board will expect you to become familiar with these regulations, which are available on the MSPB website—www.mspb.gov—and in MSPB offices, many agency personnel offices and libraries, and most public libraries. The Board's website also contains electronic versions of this form, addresses and telephone numbers of the MSPB regional and field offices, and additional information that explains the Board's practices and procedures. Note, however, that if you complete one of the electronic versions of the appeal form at our website (<https://e-appeal.mspb.gov/>), you may not submit it via e-mail. If you want to file an appeal on-line, you must use the Board's e-Appeal site listed at the bottom of this page.

WHAT PARTS TO COMPLETE: You may use this form for any of the following matters over which the Board has jurisdiction:

- An appeal of a Federal agency personnel action or decision that is appealable to the Board under a law, rule, or regulation;
- An appeal of an administrative decision or action by the Office of Personnel Management (OPM) or a Federal agency affecting your retirement rights or benefits;
- An Individual Right of Action (IRA) appeal under the Whistleblower Protection Act (WPA);
- An appeal under the Uniformed Services Employment and Reemployment Rights Act (USERRA); or
- An appeal under the redress procedure of the Veterans Employment Opportunities Act (VEOA).

Complete **Part 1** of this form regardless of which type of appeal you are filing. **Your appeal must contain your signature, or the signature of your representative, in question 12 of Part 1. If it does not, your appeal will be rejected and returned to you.**

Complete **Part 2** if you are appealing a Federal agency personnel action or decision, other than an action or decision affecting your retirement rights or benefits. **See 5 C.F.R. 1201.24(a).**

Complete **Part 3** if you are appealing an administrative decision or action affecting your retirement rights or benefits. **See 5 C.F.R. 1201.24(a).**

Part 4 lists certain other claims you may raise in addition to an appeal of an agency personnel or retirement action or decision. If you wish to raise any of these claims at this time, check the appropriate box (or boxes) in **Part 4** and provide supporting information as an attachment to this form. You may raise such claims and provide the information later—but no later than the close of the conference(s) held to define the issues in your appeal. **See 5 C.F.R. 1201.24(b).**

Complete **Part 5** ONLY if you are filing one of the following types of appeals:

- An IRA appeal under the WPA. **See 5 C.F.R. 1209.6;**
- A USERRA appeal. **See 5 C.F.R. 1208.13;** or
- A VEOA appeal. **See 5 C.F.R. 1208.23.**

See **Part 5** for an explanation of these three types of appeals.

If you complete **Part 5**, you **must** provide the additional information required by the Board's regulations for the particular type of appeal as an attachment to this form. The Board may consider **ONLY** the claim that the agency violated the particular law involved and may **NOT** consider the merits of the underlying action or decision.

If you wish to designate someone to represent you in this appeal, also complete and **sign Part 6, Designation of Representative.** **See 5 C.F.R. 1201.31.**

**If you prefer to file your appeal electronically, please visit
MSPB e-Appeal Online—<https://e-appeal.mspb.gov>**

WHERE TO FILE AN APPEAL: You must file your appeal with the Board's **regional or field office** that is responsible for the geographic area where your duty station was located at the time the agency took the action or made the decision you are appealing. If you are appealing a nonselection under USERRA, VEOA, or in an IRA appeal, you should file with the regional or field office that is responsible for the location of the agency to which the application was made. If you are appealing a retirement or suitability decision by OPM, you must file your appeal with the Board's regional or field office that is responsible for the geographic area where you live. **See 5 C.F.R. Part 1201, Appendix II, 5 C.F.R. 1201.4(d), and 5 C.F.R. 1201.22(a).** If you have any questions, please contact the regional or field office with which you will file your appeal.

WHEN TO FILE AN APPEAL: Except as indicated below, you must file your appeal during the period that **begins on the day after the effective date**, if any, of the action or decision you are appealing, and **ends on the 30th calendar day after the effective date, or on the 30th calendar day after the date you received the agency's decision, whichever is later.** (You may not file your appeal **before** the effective date of the action or decision.) If your appeal is late, it may be dismissed as untimely.

The 30 calendar day filing time limit may be extended if you and the agency mutually agree **in writing** to try to resolve your dispute through an **alternative dispute resolution (ADR) process** before you file an appeal. If you and the agency reach such an agreement, you have an additional 30 calendar days—for a total of **60 calendar days**—to file your appeal with the Board if you are unable to resolve the dispute through the ADR process. This extension of the time for filing does not apply to appeals that are subject to a filing time limit established by law, e.g., IRA and VEOA appeals. **See 5 C.F.R. 1201.22(b) and (c).**

If you are filing an **IRA appeal**, you must file no later than **65 days** after the date of the Office of Special Counsel (OSC) notice advising you that the Special Counsel will not seek corrective action, or within **60 days** after the date you received the OSC notice, whichever is later. **See 5 C.F.R. 1209.5.**

If you are filing a **USERRA appeal**, there is **no time limit** for filing. **See 5 C.F.R. 1208.12.** If you file a USERRA complaint with the Department of Labor first, you must exhaust the procedures of the Department before you may file an appeal with the Board.

If you are filing a **VEOA appeal**, you must file it **within 15 days** after the date you received notice that the Department of Labor was unable to resolve the matter. **See 5 C.F.R. 1208.22. Note: Before filing with the Board, you must file a VEOA complaint with the Department of Labor, and the Department is allowed at least 60 days to try to resolve the matter.**

In all of the above instances, the date of filing is the date your appeal is postmarked, the date of the facsimile transmission, the date it is delivered to a commercial overnight delivery service, or the date of receipt in the regional or field office if you personally deliver it.

HOW TO FILE AN APPEAL: You may file your appeal by mail, by facsimile, by commercial overnight delivery, by personal delivery, or by electronic filing. **See 5 C.F.R. 1201.22(d).** You must submit **an original and one copy** of both your appeal **and** all attachments. You may supplement your response to any question on a separate sheet of paper, but if you do, please put your name and address at the top of each additional page. All of your submissions must be legible and on 8 1/2" x 11" paper.

PLEASE SUBMIT ONLY THE ATTACHMENTS REQUESTED IN THIS FORM. You will have an opportunity to submit other documentary evidence later in the proceeding.

Privacy Act Statement: *This form requests personal information that is relevant and necessary to reach a decision in your appeal. The Merit Systems Protection Board collects this information in order to process appeals under its statutory and regulatory authority. Because your appeal is a voluntary action, you are not required to provide any personal information in connection with it. However, failure to supply the Merit Systems Protection Board with all the information essential to reach a decision in your case could result in the rejection of your appeal.*

You should know that the decisions of the Merit Systems Protection Board on appeals are final administrative decisions and, as such, are available to the public under the provisions of the Freedom of Information Act. Additionally, it is possible that information contained in your appeal file may be released as required by the Freedom of Information Act. Some information about your appeal will also be used in depersonalized form as a database for program statistics.

Public Reporting Burden: *The public reporting burden for this collection of information is estimated to vary from 20 minutes to 4 hours, with an average of 60 minutes per response, including time for reviewing the form, searching existing data sources, gathering the data necessary, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of the collection of information, including suggestions for reducing this burden, to Office of the Clerk, Merit Systems Protection Board, 1615 M Street, N.W., Washington, DC 20419.*

PART 1—Appellant and Agency Information

Complete this part regardless of which type of appeal you are filing. Then proceed to Part 2 if you are appealing an agency personnel action or decision, to Part 3 if you are appealing an administrative decision or action affecting your retirement rights or benefits, or to Part 5 if you are filing an IRA appeal, USERRA appeal, or VEOA appeal.

Please type or print legibly.

1. Name (*last, first, middle*)

Please list your first name as it appears in your official personnel records. For example, if your first name is "William" on your official personnel records, please list it that way on the appeal form, not "Bill" or "Willy."

2. Present address (*number and street, city, State, and Zip code*)

You must promptly notify the Board in writing of any change in your mailing address while your appeal is pending.

Address:

City, State, Zip code:

3. Telephone Numbers (*include area code*) and E-Mail Address

You must promptly notify the Board in writing of any change in your telephone number(s) or e-mail address while your appeal is pending.

Home: ()

Work: ()

FAX: ()

Other: ()

E-mail Address:

4. Name and address of the agency that took the action or made the decision you are appealing (*include bureau or division, street address, city, State and Zip code*)

Agency Name:

Bureau:

Address:

City, State, Zip code:

5. Your Federal employment status at the time of the action or decision you are appealing:

- Permanent Temporary Term
 Seasonal Applicant Retired
 None

6. Type of appointment (if applicable):

- Competitive Excepted
 Postal Service SES
 Other *describe*:

7. Your position, title, grade, and duty station at the time of the action or decision you are appealing (if applicable):

Occupational Series or Cluster:

Position Title:

Grade or Pay Band:

Duty Station:

8. Are you **entitled** to veterans' preference?
See 5 U.S.C. 2108.

Yes

No

PART 1—Appellant and Agency Information (continued)

9. Length of Federal service (if applicable):

10. Were you serving a probationary, trial, or initial service period at the time of the action or decision you are appealing?

Yes

No

HEARING: You may have a right to a hearing before an administrative judge. If you choose to have a hearing, the administrative judge will notify you when and where it is to be held. If you do not want a hearing, the administrative judge will make a decision on the basis of the submissions of the parties.

11. Do you want a hearing? Yes

No

12. I certify that all of the statements made in this form and any attachments are true, complete, and correct to the best of my knowledge and belief.

Signature of Appellant or Representative:

Date:

PART 2—Agency Personnel Action or Decision (non-retirement)

Complete this part if you are appealing an agency personnel action or decision (other than a decision or action affecting your retirement rights or benefits) that is appealable to the Board under a law, rule, or regulation. See 5 C.F.R. 1201.3(a) for a list of appealable personnel actions and decisions. If the personnel action or decision is appealable to the Board, you should have received a final decision letter from the agency that informs you of your right to file an appeal with the Board.

13. Check the box that best describes the agency **personnel action or decision** you are appealing. (If you are appealing more than one action or decision, check each box that applies.)

Removal (termination after probationary or initial service period)

Involuntary resignation

Termination during probationary or initial service period

Involuntary retirement

Reduction in grade, pay, or band

Denial of within-grade increase

Suspension for more than 14 days

Furlough of 30 days or less

Failure to restore/reemploy/reinstate or improper restoration/reemployment/reinstatement

Separation, demotion or furlough for more than 30 days by reduction in force (RIF)

Negative suitability determination

Other action (describe):

13a. **It is important that you attach a copy** of the agency's proposal letter and decision letter (if any). **If** an SF-50 or its equivalent was issued and is available, attach it now. **DO NOT delay filing** your appeal because you currently do not have any of these documents. You may submit them when they become available. Check the box(es) below to show which documents are attached to this form. Also **DO NOT include other documentation not requested in this Appeal Form**. You will have other opportunities to submit evidence and argument after the appeal has been docketed.

Agency's proposal letter

Agency's decision letter

SF-50

14. Date you received the agency's proposal letter (if any) (month, day, year)

15. Date you received the agency's final decision letter (if any) (month, day, year)

16. Effective date (if any) of the agency action or decision (month, day, year):

17. Prior to filing this appeal, did you and the agency mutually agree in writing to try to resolve the matter through an alternative dispute resolution (ADR) process?

Yes (Attach a copy of the agreement)

No

PART 2—Agency Personnel Action or Decision (non-retirement) (continued)

18. Explain briefly why you think the agency was wrong in taking this action or making this decision.

19. What action would you like the Board to take in this case (i.e., what remedy are you asking for)?

20. **With respect to the agency personnel action or decision you are appealing**, have you, or has anyone on your behalf, filed a grievance under a negotiated grievance procedure provided by a collective bargaining agreement?

Yes No

If "Yes," **attach a copy of the grievance**, enter the date it was filed (*month, day, year*), and enter the place where it was filed **if different from your answer to question 4 in Part 1**:

Agency Name:

Date Filed:

Bureau:

Address:

City, State, Zip code:

If a decision on the grievance has been issued, **attach a copy of the decision** and enter the date it was issued (*month, day, year*):

PART 3—OPM or Agency Retirement Decision or Action

Complete this part if you are appealing an administrative decision or action by the Office of Personnel Management (OPM) or a Federal agency affecting your rights or benefits under the Civil Service Retirement System (CSRS) or the Federal Employees' Retirement System (FERS). See 5 C.F.R. 1201.3(a)(6). If the decision or action is appealable to the Board, you should have received a final decision from OPM or the agency that informs you of your right to file an appeal with the Board.

21. In which retirement system are you enrolled?

CSRS CSRS Offset FERS

Other, *describe*:

22. Are you a:

Current Employee Annuitant

Surviving Spouse

Other, *describe*:

PART 3—OPM or Agency Retirement Decision or Action (continued)

23. If retired, date of retirement, or if unknown, approximate date (month, day, year):

24. Are you appealing an action or decision concerning a retirement coverage error under the provisions of the Federal Erroneous Retirement Coverage Corrections Act (FERCCA)? See 5 CFR Part 839.

Yes

No

25. Describe the retirement decision or action you are appealing.

Answer either Question 26 OR Question 27, whichever applies to your appeal.

26. If you are appealing an OPM retirement decision, have you received a final or reconsideration decision from OPM?

Yes (*Attach a copy*)

No

If "Yes," on what date did you receive the OPM decision (month, day, year)?

Provide the OPM processing (CSA or CSF) number in your appeal:

27. If you are appealing a retirement decision or action by a Federal agency other than OPM, have you received a final decision from that agency?

Yes (*Attach a copy*)

No

If "Yes," on what date did you receive the agency decision (month, day, year)?

28. Why do you think the decision or action was wrong?

29. What action would you like the Board to take in this case (i.e., what remedy are you asking for)?

PART 4—Other Claims

If you completed Part 2 to appeal an agency personnel action or decision or Part 3 to appeal an administrative decision or action affecting your retirement rights or benefits, in most cases, you also may raise certain other claims in connection with that appeal. Such claims must be raised no later than the close of the conference(s) held to define the issues in your appeal. **See 5 C.F.R. 1201.24(b).** If you wish to raise any of these claims at this time, check the appropriate box (or boxes) in this part to indicate the claim(s) you are raising. Provide information supporting the claim(s), including any information required by the Board's regulations for the specific type of claim(s), on a separate sheet of paper and attach it to this form. If you prefer, you may raise such claims later—but no later than the close of the conference(s) on your appeal. **Remember that you are responsible for proving each claim you raise.**

PART 4—Other Claims (continued)

30. Check the appropriate box (or boxes) for any claim(s) that you wish to raise at this time **in connection with the action or decision you are appealing in Part 2 or Part 3**, and provide supporting information as an **attachment** to this form:

- A claim that the agency made errors in applying required procedures (harmful error), that the agency action or decision was the result of a prohibited personnel practice, or that the agency action or decision was not in accordance with law. **See 5 C.F.R. 1201.56(b) and (c)(3)**. For prohibited personnel practice claims, also **see 5 U.S.C. 2302(b)**.
- A claim that the agency action or decision was the result of prohibited discrimination (race, color, religion, sex, national origin, disability, age). **See 5 C.F.R. 1201.151 and 1201.153**. If you previously filed a **formal** discrimination complaint with the agency concerning the action or decision you are appealing, **attach a copy of the complaint**. If the agency has issued a final decision on your discrimination complaint, **attach a copy of the decision**.
- A claim that the agency action or decision was based on whistleblowing. **See 5 U.S.C. 2302(b)(8), 5 C.F.R. 1209.2(b)(2), and 5 C.F.R. 1209.6(a)**. If you previously sought corrective action from the Office of Special Counsel (OSC) concerning the same disclosure(s) and the same agency action or decision you are appealing, **attach a copy of your request to OSC** for corrective action. If you have received written notice from OSC of your right to appeal to the Board, **attach a copy of the OSC notice**. Also **see 5 C.F.R. 1209.8 and 1209.9** if you wish to request a **stay** of the agency action or decision.
- A claim that the agency violated your rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) (other than rights related to the Thrift Savings Plan for Federal employees) in taking the action or making the decision. **See 38 U.S.C. 4322 and 4324, 5 C.F.R. 1208.11, and 5 C.F.R. 1208.13**. If you previously filed a USERRA complaint with the Department of Labor (DOL) on this matter, **attach a copy of the complaint**. If you have received written notice from DOL that your USERRA complaint could not be resolved, **attach a copy of the DOL notice**.
- A claim that the agency violated a law or regulation relating to veterans' preference in taking the action or making the decision. **IMPORTANT:** If you choose to make your veterans' preference claim in connection with this appeal of an agency action or decision, you may NOT also pursue a complaint under the redress procedure of the Veterans Employment Opportunities Act (VEOA) with DOL at the same time as the appeal. **See 5 U.S.C. 3330a(e) and 5 C.F.R. 1208.26**.

PART 5—IRA Appeal, USERRA Appeal, or VEOA Appeal

Complete the applicable question in this part **ONLY** if you are filing an Individual Right of Action (IRA) appeal under the Whistleblower Protection Act, a Uniformed Services Employment and Reemployment Rights Act (USERRA) appeal, or a Veterans Employment Opportunities Act (VEOA) appeal.

VEOA Appeals under 5 U.S.C. 3330a: Preference eligibles (defined in 5 U.S.C. 2108) allege that a Federal agency violated their rights under any statute or regulation relating to veterans' preference. **See 5 C.F.R. 1208.21**. Before you may file a VEOA appeal with the Board, you must first file a VEOA complaint with DOL and allow DOL at least 60 days to try to resolve the matter. **See 5 C.F.R. 1208.21**.

USERRA Appeals under 38 U.S.C. 4324: Persons allege a violation of their rights and benefits under chapter 43 of title 38, U.S.C., e.g., by failure to reemploy them after a uniformed service period, or by discrimination based on that service or on their application or obligation to provide uniformed service. **See 5 C.F.R. Part 1208**. To pursue redress for a USERRA violation, you may either file a USERRA complaint with the Department of Labor (DOL) or file an appeal with the Board. However, if you first file a USERRA complaint with DOL, you must exhaust DOL procedures before you may file an appeal with the Board. **See 5 C.F.R. 1208.11**.

IRA Appeals: These are authorized by 5 U.S.C. 1221(a) with respect to personnel actions listed in 5 U.S.C. 2302(a)(2) that are allegedly threatened, proposed, taken or not taken because of the appellant's whistleblowing. Whistleblowing is the disclosure of information that the individual reasonably believes shows a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. **See 5 C.F.R. Part 1209**. If the action is not otherwise appealable to the Board, you must first file a whistleblower complaint with the Office of Special Counsel (OSC) and exhaust the procedures of that office, before you may file an IRA appeal with the Board. **See 5 C.F.R. 1209.2(b)(1)**.

Answer Question 31 ONLY if you are filing an IRA appeal.

31. Have you filed a complaint with OSC regarding the same disclosure(s) and the same agency action(s) or decision(s) underlying your IRA appeal?

Yes No

If "Yes," **attach a copy of your complaint to OSC**, provide the information required by the Board's regulations at 5 C.F.R. 1209.6(a) as an attachment to this form, and explain what action you would like the Board to take in this case. If you have received written notice from OSC of your right to file an IRA appeal with the Board, **attach a copy of the OSC notice**. Also see 5 C.F.R. 1209.8 and 1209.9 if you wish to request a **stay** of the agency action or decision.

Answer Question 32 ONLY if you are filing a USERRA appeal.

32. Have you previously filed a USERRA complaint with DOL on this matter? Yes No

If "Yes," **attach a copy of your USERRA complaint to DOL**, provide the information required by the Board's regulations at 5 C.F.R. 1208.13(a) as an attachment to this form, and explain what action you would like the Board to take in this case. If you have received written notice from DOL that your USERRA complaint could not be resolved, **attach a copy of the DOL notice**. If your USERRA complaint was referred to OSC and OSC declined to represent you, **attach a copy of the OSC notice**. If OSC is representing you in your USERRA appeal, at number 34 below, enter "Office of Special Counsel" as your designated representative.

If "No," provide the information required by the Board's regulations at 5 C.F.R. 1208.13(a) as an attachment to this form, and explain what action you would like the Board to take in this case.

Answer Question 33 ONLY if you are filing a VEOA appeal.

33. Have you filed a VEOA complaint with DOL and allowed DOL at least 60 days to try to resolve this matter? Yes No

If "Yes," **attach a copy of your VEOA complaint to DOL**, provide the information required by the Board's regulations at 5 C.F.R. 1208.23(a) as an attachment to this form, and explain what action you would like the Board to take in this case. If you have received written notice from DOL that your VEOA complaint could not be resolved, **attach a copy of the DOL notice** and provide the **date** you received it. If more than 60 days have passed since you filed your VEOA complaint with DOL and your complaint has not been resolved, **attach a copy of your notice to DOL** stating your intent to appeal to the Board and provide the **date** you sent it to DOL.

PART 6—Designation of Representative

Complete this part to designate an organization or a person who has agreed to represent you in your appeal before the Board. **If you are representing yourself, do NOT complete this part.** By designating a representative, you agree to allow the Board to give your representative all information concerning the appeal. **Any changes of this designation must promptly be sent in writing to the MSPB office handling the appeal and to the other party. See 5 C.F.R. 1201.31.**

34. Do you wish to designate an individual or organization to represent you in this proceeding before the Board? (You may designate a representative at any time. However, the processing of your appeal will not normally be delayed because of any difficulty you may have in obtaining a representative.)

Yes (*Complete the information below and sign*)

No

DESIGNATION:

"I hereby designate _____ to serve as my representative during the course of this appeal. I understand that my representative is authorized to act on my behalf. In addition, I specifically delegate to my representative the authority to settle this appeal on my behalf. **I understand that any limitation on this settlement authority must be filed in writing with the Board.**

Representative's address (*number and street, city, State and Zip code*).

Address:

City, State, Zip code:

Representative's telephone numbers (*include area code*) and e-mail address:

Office:

FAX:

E-mail address:

Other:

SIGN BELOW TO MAKE YOUR DESIGNATION OF REPRESENTATIVE EFFECTIVE

Appellant's Signature

Date