

**Response to the United States Department of Justice
Office of Professional Responsibility
Final Report**

**Submitted on Behalf of
Assistant United States Attorney Joseph W. Bottini**

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TABLE OF CONTENTS

	Page
I. INTRODUCTION AND EXECUTIVE SUMMARY.....	1
II. OPR’S DEFINITION OF RECKLESS DISREGARD REQUIRES PROOF OF KNOWLEDGE, AN UNAMBIGUOUSLY APPLICABLE OBLIGATION, AND UNREASONABLENESS UNDER ALL THE CIRCUMSTANCES.....	7
III. AUSA BOTTINI DID NOT RECKLESSLY DISREGARD AN OBLIGATION TO DISCLOSE STATEMENTS BY BILL ALLEN.....	8
A. AUSA Bottini Did Not Recklessly Disregard An Obligation To Disclose Statements Contained In The Pluta 302 And December 2006 MOI.....	8
B. AUSA Bottini Did Not Recklessly Disregard An Obligation To Disclose Bill Allen’s April 15, 2008 Statements.....	14
C. AUSA Bottini Did Not Recklessly Disregard An Obligation To Clarify Mr. Allen’s Cross-Examination Testimony.....	18
IV. AUSA BOTTINI DID NOT RECKLESSLY DISREGARD AN OBLIGATION— IF ONE EXISTED—TO DISCLOSE STATEMENTS BY ROCKY WILLIAMS	21
A. AUSA Bottini Did Not Recklessly Disregard An Obligation To Disclose Mr. Williams’ Unfounded Assumptions.....	21
B. AUSA Bottini Did Not Recklessly Disregard An Obligation To Disclose Other Statements By Mr. Williams.....	26
V. AUSA BOTTINI DID NOT EXHIBIT POOR JUDGMENT IN CONNECTION WITH THE BAMBI TYREE ALLEGATIONS.....	30
A. AUSA Bottini Pressed PIN To Disclose The Tyree Allegations.....	31
B. The Final Report Dismisses AUSA Bottini’s Persistent Good-Faith Efforts And Again Ignores The Context In Which His Conduct Occurred	34
VI. OPR’S MISCONDUCT ANALYSIS AND DETERMINATIONS CONTRAVENE THE PRINCIPLES OF FAIRNESS AND ACCOUNTABILITY THAT ARE FOUNDATIONAL TO THE DEPARTMENT OF JUSTICE.....	37
VII. CONCLUSION.....	38
 EXHIBITS	
Reference Letters	Ex. A
Terrence Berg Memorandum.....	Ex. B
AUSA Bottini’s Response to OPR’s Draft Report	Ex. C

I. INTRODUCTION AND EXECUTIVE SUMMARY

The facts of this investigation need little introduction: a team led by the Department's Public Integrity Section ("PIN") brought an undisclosed gifts case against Senator Ted Stevens in 2008, drew the sustained ire of Judge Emmet G. Sullivan, and saw its conviction vacated when the Department dismissed the case due to a series of discovery violations. The trial took place against the backdrop of a demanding judge, a scorched-earth defense strategy, a compressed pretrial schedule, and a prosecution team hobbled by dysfunctional management. Any one of those factors made mistakes likely; all of them together virtually guaranteed mistakes would be made.

Assistant United States Attorney ("AUSA") Joseph Bottini acknowledges that he played a role in the resulting discovery violations, and he will always live with a profound sense of personal regret for the effect those violations had on the integrity of the *Stevens* trial and on the Department he loves and has spent his entire career serving. Not all discovery violations are the product of prosecutorial misconduct, however, no matter how high-profile those violations are. AUSA Bottini made serious mistakes, but he did so while working in good faith to meet his disclosure obligations; they were mistakes made by a man trying to do the right thing. This good-faith effort, by definition, cannot be prosecutorial misconduct.

OPR provided a draft of its report documenting the *Stevens* prosecution to AUSA Bottini in November 2010. The Draft Report, a product of a nearly two-year investigation that took OPR many times longer to produce than the *Stevens* prosecutors had to prepare and present the case at trial, was flawed in numerous respects: it was results-driven; it applied a double-standard of professional conduct to line attorneys and supervisors; it deprived AUSA Bottini of the benefit of any doubt; it gave no weight to his exemplary record for integrity when evaluating his intent in the *Stevens* trial; it viewed his conduct through a lens of perfect hindsight divorced from the context in which the trial team operated; it misapplied OPR's own analytical framework; and it contained a variety of errors of law and fact. We carefully identified those flaws in a thorough, 44-page response; appended numerous letters, from prosecutors and defense attorneys alike, attesting to AUSA Bottini's reputation for integrity; and hoped OPR would issue a Final Report that reflected our comments and whose conclusions were grounded in objective and rigorous analysis.

OPR issued its Final Report nearly one year later. Three positive conclusions deserve mention: OPR's recognition that the government's introduction of an erroneous exhibit purporting to show costs incurred by VECO was the product of human error, its decision to downgrade an initial recklessness finding in connection with the Bambi Tyree allegations (though we vigorously contest even a finding of poor judgment), and its conclusion that AUSA Bottini did not act intentionally in any respect—a finding that forecloses discipline under the applicable bar rules and weighs heavily against the imposition of any penalty by the Department. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981) (factors relevant to imposition of discipline include "whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated"). Beyond those commendable points, however, the Final Report still falls woefully short. It contains all of the same overarching flaws as OPR's initial draft, presses the same erroneous conclusions about

nearly all the same substantive areas of inquiry as the Draft Report did, and leaves the vast majority of our comments unaddressed. Among other things:

OPR misapplies its own standards to reach unsupported conclusions about intent.

OPR must be guided by its Analytical Framework, which permits a finding of reckless disregard *only* if OPR proves by a preponderance of the evidence that an attorney knows or should know that an obligation unambiguously applies; that the attorney engages in conduct he knows or should know is substantially likely to cause a violation of that obligation; and that the conduct is objectively unreasonable under all the circumstances. OPR Analytical Framework ¶ B.4 (“Analytical Framework”). OPR misapplies those requirements throughout the Final Report. It finds unambiguous obligations where none exist, reaches conclusions about AUSA Bottini’s intent that are completely unsupported by the facts, and dismisses the very circumstances its own definition of recklessness compels it to consider.

OPR faults AUSA Bottini for team failures caused in large part by dysfunctional management.

The government’s disclosure violations were rooted largely in two failures of management: the absence of supervision by PIN leadership and the disruptive effect of management decisions that were made as the Criminal Division Front Office attempted to fill that leadership void. OPR does not meaningfully account for the impact of that poor management on AUSA Bottini, even though recklessness is a context-dependent state of mind. Analytical Framework ¶ B.4; *cf. Strickland v. Washington*, 466 U.S. 668, 689 (1984) (“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.”). Worse, it applies a double-standard of professional responsibility to fault AUSA Bottini for the government’s collective failure while absolving his superiors, even though it was their mismanagement that set the prosecution’s problems in motion.¹

OPR’s misconduct findings depend on a *post hoc* substitution of OPR’s preferred trial preparation model for the one AUSA Bottini’s superiors actually adopted—and upon which he reasonably relied.

A single rationale underpins each and every one of OPR’s misconduct findings: AUSA Bottini was assigned to present Bill Allen and Rocky Williams at trial and, as a result, bore sole responsibility for *Brady* disclosures related to those witnesses. The model of trial preparation where the attorney presenting a witness is responsible for all aspects of that witness, including *Brady* disclosures, may be the preferred model in practice—but it was not the model that PIN management adopted here. Instead, PIN leadership adopted a

¹ The sole instance in which OPR meaningfully considers the government’s management failures is in connection with its analysis of the VECO cost report, an exhibit the prosecution introduced without realizing its underlying data was incorrect. OPR has eliminated the Draft Report’s proposed finding of poor judgment, reasoning that “the accelerated pace of the trial, the lack of centralized supervision, the changes in the composition of the trial team, and the resulting dispersal of responsibility created a situation in which no single member of the prosecution team was assigned to compare the VECO records to [other evidence] to ensure that the VECO records were accurate.” Final Report (“FR”) at 368. Those exact same reasons should logically have compelled OPR to downgrade its other misconduct findings, too.

fragmented division of labor under which attorneys *other* than AUSA Bottini were tasked with preparing the government’s *Brady* letter and other disclosures to the defense. AUSA Bottini was a line member of the prosecution team and his prior efforts to assert views about a discovery issue had been met with a stern rebuke from PIN Chief William Welch: “you work for PIN.” Under those circumstances, his acceptance of the decision by his superiors to adopt a fragmented division of labor was hardly the “*gross deviation* from the standard of conduct that an objectively reasonable attorney would observe in the same situation” needed to support a finding of recklessness. Analytical Framework ¶ B.4 (emphasis added).

OPR views AUSA Bottini’s conduct in the most negative possible light. OPR acknowledges at the outset that this case presents “close questions.” FR at 21 n.39. Yet with few exceptions, the Final Report, like the Draft Report, dismisses AUSA Bottini’s explanations, withholds the benefit of any doubt, and draws the most negative possible inferences from his conduct. To take one example, AUSA Bottini told both OPR and Special Prosecutor Henry Schuelke that he carefully reviewed his witness files for *Brady* information, developed a checklist of likely *Giglio* material, and reviewed and annotated a treatise on D.C. Circuit *Brady* and *Giglio* caselaw during his witness preparation process—a textbook example of good-faith conduct under OPR’s Analytical Framework. He substantiated that testimony by showing OPR excerpts from his trial file, which contained the *Giglio* checklist he developed for Mr. Allen and the *Brady* treatise he reviewed. *See* Bottini Response to OPR Draft Report at 21 (“Bottini Response”) (citing CRM BOTTINI 061218-47 and OPR Tr. 167:10-168:5). Despite that testimony and evidence, OPR dismisses our argument that AUSA Bottini undertook a good-faith effort to comply with his disclosure obligations, complaining that “the list offers no evidence that Bottini *actually* searched for, or identified, any such material” with respect to Bill Allen. FR at 197 n.764 (emphasis added). A single conclusion can be drawn from OPR’s persistent refusal to credit AUSA Bottini’s testimony and the documentary evidence that supports it, and it is a baseless one: OPR believes AUSA Bottini is lying.

OPR ignores AUSA Bottini’s unassailable record for professionalism and integrity. OPR’s refusal to afford AUSA Bottini the benefit of the doubt is all the more indefensible given his universally acknowledged reputation for integrity.² We appended multiple letters of reference to our response to the Draft Report and drew OPR’s attention to a sampling of the praise they contained: AUSA Bottini is “ethical,” “honest,” “honorable,” “one of the very best human beings I have ever had the pleasure of knowing,” “a fine public servant and a good man,” “a man of high moral character.” We told OPR that much of this praise came from members of Alaska’s defense bar, whose clients AUSA Bottini prosecuted and who insist that “I know I can trust him absolutely,” that “I would go to the bank on AUSA Bottini’s word,” that “I would trust a client’s, or my future on [his] word and integrity,” that “I would accept Joe’s word and his hand shake on any matter knowing it is more reliable than any document that could be drafted,” and that “the manner in which AUSA Bottini has lived his life and practiced law over the past 25

² As a further example of AUSA Bottini’s professionalism and character, we note that, while the record is replete with complaints by trial team members upset at the late addition of Ms. Morris as lead counsel, Mr. Bottini went out of his way to let her know that he welcomed the prospect of working with her. (Email from Bottini to Morris (Aug. 7, 2008 8:39 PM) (CRM BOTTINI 051841) (“I am glad that you are part of the team and . . . really look forward to trial with you.”).)

years should militate in favor of giving him the benefit of every doubt.” These references and the stellar record they describe bear heavily on any assessment of AUSA Bottini’s credibility and conduct here, and we have appended them to this submission because the Final Report does not contain a single mention of them—let alone consider them when deciding the “close questions” about whether he acted with the intent needed to support a finding of reckless misconduct. (These letters are attached as Exhibit A.³)

OPR is wrong on the merits. In addition to these big-picture flaws, the Final Report reaches unsupportable conclusions on each of the specific issues that pertain to AUSA Bottini: that he committed reckless disregard in connection with statements made by Bill Allen and Rocky Williams and displayed poor judgment in connection with the Bambi Tyree allegations.

- *Bill Allen’s Statements.* The government’s belated disclosure of documents that contained statements by Mr. Allen that Senator Stevens would have paid a VECO bill (the “Pluta 302” and “December 2006 MOI”) was not the product of AUSA Bottini’s recklessness. OPR’s contrary finding rests on its erroneous assertion that he did not review his files for *Brady* material; its belief he should have supervised the agent-conducted *Brady* review even though his supervisors adopted a division of labor under which that was not his responsibility; and its failure to acknowledge the impact of the government’s dysfunctional management. OPR is also wrong that AUSA Bottini recklessly disregarded an obligation to disclose statements Mr. Allen made during an April 15, 2008 interview. AUSA Bottini did not locate his notes from that session because he misfiled them and because he did not recall Mr. Allen being interviewed on that date, not because he was reckless; indeed, not one attorney present at that interview remembered that Mr. Allen had discussed the Torricelli Note—including Mr. Allen’s attorney, former United States Attorney Robert Bundy.
- *Rocky Williams’ Statements.* OPR contends that AUSA Bottini recklessly disregarded an obligation to disclose Mr. Williams’ assumption that Mr. Allen would add his time to invoices prepared by VECO subcontractor Christensen Builders and paid by Senator Stevens. The assumption echoed an anticipated defense, but would have been exculpatory *only if* Mr. Williams had conveyed it to the senator, which he did not. OPR’s recklessness finding is colored by a fundamental misunderstanding of *Brady*, which does not compel disclosure where, as here, evidence is merely consistent with an anticipated defense but does not actually corroborate it. AUSA Bottini considered whether *Brady* obligated him to disclose the assumption and concluded for those reasons it didn’t, and that contemporaneous exercise of judgment is by definition not reckless. Nor did deficiencies in the government’s *Brady* letter related to Mr. Williams result from any recklessness by AUSA Bottini; PIN attorneys were responsible for the letter under the prosecution’s division of labor, and his belief

³ This compilation of letters includes one additional reference whose letter was not originally submitted to OPR: Jo Ann Farrington, the Appellate Chief of the U.S. Attorney’s Office for the District of Alaska and a longtime Department prosecutor whose tenure includes ten years of service as Deputy Chief of PIN.

that their seemingly thorough review would result in an accurate letter was more than reasonable under the circumstances.

- *The Bambi Tyree False Affidavit Allegations.* AUSA Bottini pressed PIN repeatedly to disclose allegations that Mr. Allen asked Bambi Tyree to sign an affidavit falsely exonerating him of sexual misconduct. He took the issue to his superiors at PIN and within the United States Attorney’s Office. And he persisted in advocating disclosure even *after* Mr. Welch admonished him to cease and desist because, due to the USAO’s recusal from cases arising from Operation Polar Pen, he “work[ed] for PIN.” OPR deems that conduct poor judgment, but the opposite is true: when confronted with difficult circumstances, AUSA Bottini displayed exactly the sort of conduct the Department should expect an attorney exercising good judgment to take.

We are not alone in our criticism of the Final Report. Terrence Berg, the Professional Misconduct Review Unit (“PMRU”) attorney assigned to review OPR’s findings and propose discipline, if any, found that the record “does not demonstrate by a preponderance of the evidence that [AUSA Bottini] engaged in professional misconduct by acting in reckless disregard of [his] professional responsibilities but rather exercised poor judgment.” Terrence Berg, Mem. to Joseph Bottini at 1 (“Berg Memorandum”) (attached as Exhibit B). His finding was based in large part on OPR’s “inconsistent application of the recklessness standard,” and its resulting decision to single out the “comparatively narrow mistakes” of AUSA Bottini and fellow Alaska AUSA James Goeke rather than recognizing the government’s disclosure violations for what they were: the product of a collective failure by line personnel *and* their supervisors. Mr. Berg stressed:

Conduct by the 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 the line attorneys were required to function. Proper consideration of those circumstances created by management undermines [OPR’s] conclusion that the line attorneys’ conduct was objectively unreasonable under all these circumstances, as is required for a finding of reckless misconduct. . . .

[T]he failures that led to the collapse of the *Stevens* prosecution were caused by team lapses rather than individual misdeeds, with origins in inept organizational and management decisions that led to a hyper-pressurized environment in which poor judgments, mistakes and errors compounded one another and made it almost inevitable that disclosure violations would occur.

Id. at 2-3, 80.

Mr. Berg’s findings should have been the end of the matter. Yet at the eleventh hour, the PMRU Chief determined that he disagreed with those findings, pressing to withdraw Mr. Berg’s authority as “proposing official” with no explanation save a single sentence: “I have concluded that [Mr. Berg] is mistaken in his reasoning and in his conclusions.” Kevin A. Ohlson, Mem. for

the Deputy Attorney General (Nov. 21, 2011) (“Ohlson Memorandum”). He then replaced Mr. Berg’s memorandum with his own memorandum, which devotes *fewer than four pages* to explaining its misconduct findings, merely restates OPR’s conclusions, omits any discussion of the legal errors we identified in the Final Report, and makes no effort to explain why Mr. Berg’s findings were purportedly wrong—an inexplicably weak basis for overriding the comprehensive and well-reasoned findings of an unbiased and highly regarded senior career prosecutor, whose conclusions were supported in painstaking detail by some 81 pages of analysis.⁴

We understand the pressure OPR faced with this investigation. Judge Sullivan voiced deep skepticism of OPR’s ability to investigate the *Stevens* allegations and pronounced the prosecutors guilty of intentional misconduct before OPR’s or his own investigation even began. Hr’g Tr. at 3, *United States v. Stevens* (Apr. 7, 2009) (“In nearly 25 years on the bench, I’ve never seen anything approaching the mishandling and misconduct that I’ve seen in this case.”); Hr’g Tr. at 10, *United States v. Stevens* (Oct. 2, 2008) (“It strikes me that [the belated disclosure of a Bill Allen 302] was probably intentional. I know I’m getting out there on a limb by saying that. I find it unbelievable this was just an error.”). The media and members of Congress called for retribution against the *Stevens* prosecutors before the results of any investigation were complete. *See, e.g.*, Editorial: *Case Closed? Not Yet*, Wash. Post, Nov. 29, 2011, at A20 (urging “the state bar associations that licensed these lawyers” to “consider disbarment or other punishments”); Sean Cockerham, *Justice Department Nears End Of Stevens Inquiry*, Anchorage Daily News, Nov. 9, 2011, at A3 (Senate Judiciary Committee Chairman Patrick Leahy accuses *Stevens* prosecutors of committing “serious misconduct” and Senator Orrin Hatch demands “serious corrections done because of what they did to a great U.S. Senator”). Those dynamics may help explain OPR’s results-oriented approach to this investigation, but they do not and cannot justify a decision by the Department to ignore explanatory and mitigating circumstances

⁴ That is particularly true where, as here, the career prosecutor vested with authority to review OPR’s conclusions is as well-respected as Mr. Berg. He has served both as a manager and as a line prosecutor and, over the course of his more than 20-year career, Mr. Berg has developed a reputation for fairness and integrity, earning the praise of one Michigan Supreme Court Justice for “always be[ing] a conscientious, hardworking, and, above all, a fair-minded prosecutor.” Jeffrey T. Rogg, *Terrence Berg: First Assistant U.S. Attorney*, Federal Bar Association of the Eastern District of Michigan Newsletter at 7 (Summer 2006), *available at* https://www.fbamich.org/Newsletters/Summer_2006_final_FBA_Newsletter.pdf.

Moreover, Mr. Berg has first-hand experience confronting management failures: the Department recently recognized him for providing “both outstanding leadership and management skills under challenging conditions” during a six-month detail where he developed and implemented a plan to address systemic management problems in the U.S. Attorney’s Office for the Middle District of Georgia. Department of Justice, News Release: Two Assistant United States Attorneys Recognized At Annual U.S. Attorney Awards Ceremony (Dec. 8, 2010), *available at* http://www.justice.gov/usao/mie/news/2010/2010_12_8_ag_awards.html. That experience makes him uniquely suited to review a case such as *Stevens*, and his analysis is entitled to far greater weight than the PMRU Chief afforded it.

and to sweep aside the well-reasoned findings of an unbiased reviewer. OPR’s findings must be rejected.⁵

II. OPR’S DEFINITION OF RECKLESS DISREGARD REQUIRES PROOF OF KNOWLEDGE, AN UNAMBIGUOUSLY APPLICABLE OBLIGATION, AND UNREASONABLENESS UNDER ALL THE CIRCUMSTANCES

To find that AUSA Bottini acted recklessly, OPR must prove by a preponderance of the evidence: (1) that he knew or should have known that an unambiguous professional obligation unambiguously applied in the circumstances; (2) that he knew or should have known that his conduct was substantially likely to cause a violation of that obligation; and (3) that his conduct was objectively unreasonable under all the circumstances—or, put differently, that his conduct represented a “gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation.” Analytical Framework ¶ B.4. A rigorous application of this standard is essential, particularly given the indiscriminate claims of misconduct asserted by defense counsel and the collective nature of the government’s discovery violations. *See* Berg Memorandum at 12 (OPR’s definition of recklessness “is a complicated standard with a number of distinct elements . . . there is a heightened need to parse the recklessness definition with care”).

The Analytical Framework also requires OPR to consider whether AUSA Bottini attempted in good faith to satisfy his disclosure obligations. Reckless disregard is a “state of mind in which a person does not care about the consequences of his or her action,” Black’s Law Dictionary 1277 (7th ed. 1999), and an attorney who takes affirmative, good-faith steps to comply with his obligations, by definition, cannot have recklessly disregarded them. For that reason, OPR’s Analytical Framework provides that “[a]n attorney who makes a good faith attempt to ascertain the obligations and standards imposed on the attorney and to comply with them in a given situation does not commit professional misconduct.” Analytical Framework ¶ B.4. Examples of good-faith conduct include reviewing materials that discuss applicable obligations, consulting with a supervisor or ethics advisor, or taking other affirmative steps that the attorney reasonably believes are required to comply with the obligation at issue. *Id.* If OPR meaningfully considered this good-faith exception, it would have to reject a finding of recklessness for that reason too: as discussed in greater detail below, AUSA Bottini reviewed his witness files for *Brady* material, read and annotated reference materials on governing *Brady* caselaw, and, in the case of the Bambi Tyree allegations, brought concerns about *Brady* and *Giglio* to his supervisors’ attention even after PIN Chief Welch admonished him to stop.⁶

⁵ The remainder of this submission focuses on the most egregious flaws in the Final Report, rather than attempting to repeat each and every point we made in our response to the Draft Report (attached as Exhibit C)—the majority of which OPR failed to meaningfully address. Nor have we included a detailed exposition of the facts underlying OPR’s investigation, which we addressed in full in our response to OPR’s draft.

⁶ OPR takes issue with our argument that Mr. Bottini displayed good-faith conduct by suggesting that we relied on an outdated version of OPR’s Analytical Framework. *See* FR at 196-97 n.763 (“Bottini’s counsel . . . cit[ed] the 1999 version of OPR’s Analytical Framework recognizing a defense to misconduct allegations for attorneys who made good-faith attempts to

As we explain in more detail below, if OPR engaged in the step-by-step analysis its Analytical Framework requires, it would have to reject a finding of recklessness—either because AUSA Bottini did not possess the requisite state of mind, because his conduct was not unreasonable in light of all the surrounding circumstances, because he acted in good faith, or because *Brady* did not unambiguously require disclosure in the first instance. Mr. Berg found as much after rigorously applying OPR’s definition of recklessness, from which OPR permitted itself significant deviation. We follow his lead in the analysis that follows, aligning our arguments with the requirements that the Analytical Framework imposes.

III. AUSA BOTTINI DID NOT RECKLESSLY DISREGARD AN OBLIGATION TO DISCLOSE STATEMENTS BY BILL ALLEN

The Final Report, like the Draft Report, holds AUSA Bottini responsible for the government’s failure to disclose two categories of statements made by Bill Allen: (1) statements about Mr. Allen’s belief that Senator Stevens would have paid a VECO bill (contained in an FBI 302 authored by Special Agent Michelle Pluta (the “Pluta 302”) and an IRS MOI documenting a December 11-12, 2006 interview (the “December 2006 MOI”)); and (2) a statement Mr. Allen made on April 15, 2008 that he recalled having seen the “Torricelli Note” but did not recall discussing it with Bob Persons. OPR is wrong on both scores.

A. AUSA Bottini Did Not Recklessly Disregard An Obligation To Disclose Statements Contained In The Pluta 302 And December 2006 MOI

We acknowledge that the government erred by not producing the Pluta 302 and the December 2006 MOI sooner, though its mid-trial production occurred in time for the defense to use the documents during Mr. Allen’s cross-examination. But that belated disclosure was not the product of AUSA Bottini’s recklessness. OPR presses two arguments in support of its finding otherwise: (1) that AUSA Bottini did not review Mr. Allen’s interview reports for *Brady* material; and (2) that he did not supervise or otherwise re-review the *Brady* review that PIN had delegated to FBI and IRS agents. Neither argument withstands scrutiny.

First, the gravamen of OPR’s recklessness finding is that AUSA Bottini “fail[ed] to review Allen’s interview reports for *Brady* material,” FR at 201—a contention that is flatly untrue. AUSA Bottini *did* review his files for *Brady* material: he created witness folders containing FBI 302s, grand jury transcripts, and his own handwritten notes, and reviewed the contents of those folders on a continuing basis with the dual purpose of preparing his witnesses to testify and identifying any *Brady* or *Giglio* material the government would need to disclose. (*E.g.*, OPR Tr. 161:1-162:11, 166:15-167:5; Schuelke Tr. 33:1-34:15.) He went a step further, developing a checklist of plea agreements, false statements, prior inconsistent statements, and other *Giglio* material the prosecution would be required to disclose that related to Mr. Allen. He

ascertain and comply with obligations and standards.”). To the extent OPR implies that good-faith conduct no longer forecloses a finding of recklessness, it is plainly wrong: the document we cited, which is the only version available on OPR’s website, is dated July 2005 and contains a verbatim recitation of the good-faith defense we discussed in our response to the Draft Report. Analytical Framework, *available at* <http://www.justice.gov/opt/framework.pdf> (last visited Jan. 18, 2012).

developed that list after reviewing a treatise on *Brady* caselaw, which he underlined, highlighted, annotated with notes about opinions from the D.C. Circuit—where, as an AUSA from Alaska, he had not previously tried a case. He placed the treatise in a “WITNESS IMPEACHMENT ISSUES” file along with the checklist on Mr. Allen. (CRM BOTTINI 061218-47.) The Final Report, like the Draft Report, fails to recognize that conduct for what it was: a good-faith attempt by AUSA Bottini to satisfy his disclosure obligations that forbids a finding of recklessness under OPR’s own standards. *See* Analytical Framework ¶ B.4 (“An attorney who makes a good faith attempt to ascertain the obligations and standards imposed on the attorney and to comply with them in a given situation does not commit professional misconduct. Evidence that an attorney made a good faith attempt to ascertain and comply with the obligations and standards can include, but is not limited to, the fact that the attorney reviewed materials that define or discuss one or more potentially applicable obligations and standards . . . or took affirmative steps the attorney reasonably believed were required to comply with an obligation or standard.”).

Because OPR cannot credibly dispute the fact that AUSA Bottini actually reviewed Mr. Allen’s files for *Brady* material, it takes issue with the manner in which he did so. In OPR’s view, AUSA Bottini should have reviewed Mr. Allen’s files twice: once for the purpose of preparing Mr. Allen for trial, and a second time for the purpose of identifying *Brady* material. The rule OPR insists on is divorced from reality. It is the norm for prosecutors to review their files with multiple purposes, just as AUSA Bottini did here, because it is impossible to fully separate trial preparation from a *Brady* review. In fact, it is sometimes only when a prosecutor considers the testimony he plans to elicit from a witness that he fully appreciates those aspects of the testimony that may tend to undermine the government’s case. AUSA Bottini’s dual-purpose review of Mr. Allen’s files was not a *gross deviation* from the standard of conduct an objectively reasonable attorney would observe in the same circumstances; it was *consistent* with that standard.

Mr. Berg agreed. Finding that “[t]he record does not support what is perhaps OPR’s core finding of recklessness on this point,” he emphasized that:

Although perhaps an admirable practice in an ideal world, this specific style of conducting a *Brady* review is not required either by the *Brady/Giglio* line of cases, by the USAM policy, or by any other law or policy. Furthermore, while the division of labor in many cases is for the attorney assigned to present a witness at trial to be responsible for gathering that witness’ *Brady* and *Giglio*, that division of labor did not occur in this case. Thus, for AUSA Bottini to conduct his own *Brady* review, which he was not tasked with doing, while simultaneously preparing his witness was clearly *not* objectively unreasonable or a gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation.

Berg Memorandum at 30. Mr. Berg is correct. And because AUSA Bottini did not act objectively unreasonably under all the circumstances, OPR’s recklessness finding must be rejected.

Second, the 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. OPR’s own definition of reckless disregard makes clear that an attorney acts recklessly only when he engages in conduct that is objectively unreasonable “*under all the circumstances*”—or, put differently, that his conduct is a “gross deviation from the conduct that an objectively reasonable attorney would observe *in the same situation.*” Analytical Framework ¶ B.4 (emphasis added). That requirement is consistent with general norms of professional conduct, under which attorney performance is judged not by after-the-fact second-guessing but based on its surrounding context at the time. *See, e.g.*, D.C. Rules of Prof’l Conduct, Scope, cmt. 3 (“[Rules] presuppose that disciplinary assessment of a lawyer’s conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation.”); *cf. Strickland v. Washington*, 466 U.S. 668, 689 (1984) (“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.”).

The starting point for OPR’s analysis, therefore, should have been the context in which AUSA Bottini acted, because OPR cannot possibly determine whether AUSA Bottini’s failure to unilaterally assume oversight of the agent-conducted *Brady* review was objectively unreasonable *under all the circumstances* without first considering what those circumstances were. They include:

- ***An unanticipated indictment.*** The prosecution was behind from the start. By the time Assistant Attorney General Matthew Friedrich summoned prosecutors to a July 2008 meeting, AUSA Bottini had become deeply skeptical that the *Stevens* case would be indicted: beginning in April 2007, the Alaska attorneys were told time after time to “be prepared” for an indictment, only to see the case placed on hold due to a tolling agreement. Despite repeatedly asking Mr. Marsh and Mr. Sullivan whether the case was moving forward, AUSA Bottini had little indication by the spring of 2008 of whether the Criminal Division would approve an indictment or not. He took PIN’s June 2008 directive to indict a different Polar Pen target as an indication that the *Stevens* case would *not* be indicted; spent most of July preparing to try a high-profile capital murder prosecution he was assigned as a result; grew more skeptical about the likelihood of an indictment as the senator’s reelection approached; and was “absolutely convinced,” as late as the third week of July, that the *Stevens* case would not be indicted. (Schuelke Tr. 312:6-319:2; *see also* Bottini Response at 8-9.)
- ***An accelerated trial preparation schedule.*** The *Stevens* case proceeded from indictment to trial in just over seven weeks, a compressed period of time caused by the defense’s request for a speedy trial and exacerbated by Ms. Morris’s announcement to the court that the government could “try this case on September 22”—more than two weeks sooner than October 9, the earliest trial date to which the defense was actually entitled. (July 31, 2008 Arraignment Tr. 3:23-25, 8:22, 11:3-3.) The speedy trial request took the entire prosecution by surprise, and PIN’s decision to volunteer an even earlier trial date than required by the Speedy Trial Act stunned

AUSA Bottini, who was never consulted by PIN management about the possibility of volunteering an earlier date and was unaware Ms. Morris sought one until he read about it in OPR's Draft Report. *See Bottini Response at 11-12.*

- ***Dysfunctional management.*** Ms. Morris was inserted as lead trial counsel just prior to indictment but eschewed the management responsibilities that came with the job. She adopted a deliberately hands-off approach; sought to make herself, in her own words, “as small as possible”; and made no attempt to supervise the government’s *Brady* review. Nor did PIN Chief William Welch, who initially deferred to Ms. Morris but then asserted himself mid-trial, in time to perform triage on the government’s problems but too late to avoid them. The Criminal Division’s Front Office, likely recognizing the inadequacy of the line-level supervision, made a series of significant management decisions that disrupted the trial team’s already frenetic preparation and placed additional burdens on AUSA Bottini: it limited the roles Mr. Goeke, Mr. Sullivan, and even Mr. Marsh were permitted to play; directed AUSA Bottini to prepare a complete draft of his closing argument before trial had even begun; and instructed him to focus much of his preparation of Mr. Allen on a theory of official acts that never materialized. *See Bottini Response at 10-13.*
- ***A compartmentalized division of labor.*** With little centralized supervision, each member of the trial team focused on completing his own assignments. AUSA Bottini worked with Mr. Goeke to compile the government’s exhibit list and prepare witnesses whom, in some cases, the government had not spoken to in more than a year; drafted the government’s August 2008 *Giglio* letter; and wrote a motion to limit cross-examination of certain government witnesses. Mr. Marsh and Mr. Sullivan drafted the government’s September 9, 2009 *Brady* letter. And Mr. Sullivan coordinated the government’s *Brady* review, responsibility for which was ultimately delegated to IRS and FBI agents. *See Berg Memorandum at 21* (“Although there was no clear direction from the team leader as to how the trial preparation duties should be assigned, a rough division of labor developed according to which the Alaska AUSAs re-engaged with the various witnesses located in Alaska, setting up witness preparation sessions, while the PIN attorneys handled the discovery production. . . . PIN attorneys Edward Sullivan and Nicholas Marsh were the primary drafters of the evolving versions of the *Brady* letter.”).
- ***Travel from Alaska as the Brady letter is finalized.*** AUSA Bottini traveled from Alaska to Washington, D.C. on September 8, 2008, as the PIN attorneys were finalizing the *Brady* letter and one day before it was sent to the defense. Upon his arrival he turned immediately to preparing for a motions hearing the following day, for which he had just been assigned to argue motions he had neither researched nor written. Thus, while he skimmed a final draft of the *Brady* letter, he did not review it in depth and for accuracy—tasks he understood the PIN attorneys and supervisors to have completed. *See Bottini Response at 32; see also Schuelke Tr. 45:9-20, 117:17-118:2* (“[M]y focus on September 9th was getting ready for those oral arguments. . . . that’s what I spent the bulk of the day doing.”).

Those conditions do not excuse the government’s discovery violations. But they explain why AUSA Bottini’s conduct was not unreasonable under all the circumstances. AUSA Bottini and his colleagues were playing catch-up from the prosecution’s inception, doubting until late July that the Front Office would approve an indictment at all and, in AUSA Bottini’s case, taking on an all-consuming capital case under the expectation that no indictment would issue until at least after the November election. The team then faced an unanticipated acceleration between indictment and trial, and its supervisors adopted a compartmentalized division of labor under which everyone understood that the PIN attorneys were responsible for the government’s *Brady* disclosures.

Under those circumstances, it was not unreasonable for AUSA Bottini to focus on completing those tasks he had been assigned, which did *not* include supervision of the agent-conducted *Brady* review. As Mr. Berg explained:

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. While OPR is correct, and AUSA Bottini does not deny, that he did not review the agent-prepared *Brady* spreadsheets, his explanation (that he understood at the time that these were being prepared specifically to be used by the drafters of the *Brady* letter, and that he did not believe that it was his responsibility to review them) is 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 Memorandum at 29-30.

The only time OPR acknowledges the circumstances surrounding AUSA Bottini’s conduct is to fault him for “defending” the delegation of the *Brady* review to agents on the basis of time compression. For starters, OPR misconstrues his testimony: AUSA Bottini did not “defend” the delegation to agents but rather explained *why* he believed PIN authorized it. *See* Berg Memorandum at 27 n.121 (“Bottini did not agree that the delegation of the *Brady* review to the agents was an *appropriate* delegation, but rather . . . agreed that, in fact, the review was delegated. When asked how it came to happen, Bottini answered: ‘I don’t recall how or who made the decision that the agents were going to review the stuff. I know time compression had to be a factor.’” (quoting OPR Tr. 128-29)).⁷

⁷ In full, Mr. Bottini’s testimony reads as follows:

Q: In your view, was this an appropriate delegation—first of all, was this a delegation of responsibility from the prosecutors to the agents, that is, the review of 302s and MOIs for Brady and Giglio material?

OPR's criticism is misplaced in any event. The extreme and unanticipated time compression is a circumstance OPR's own definition of recklessness compels it to consider, and, though it does not excuse the government's disclosure errors, it undoubtedly bears on the determination of the prosecutors' state of mind. Even the most conscientious lawyer will commit errors and oversights when confronted with the sort of extreme time pressure that occurred here. As explained by two well-respected former judges, former Attorney General Michael Mukasey and former Deputy Attorney General Mark Filip:

[W]hen one typically analyzes competence or negligence in the law, it is decidedly a context-dependent matter. As judges, we surely came to appreciate that when attorneys were given twelve hours to prepare a brief in the context of a TRO hearing, that brief was much more likely to contain citation errors, or misstatements of fact or law, than if an attorney was given thirty days to prepare that same brief in the context of a dispositive motion. Similarly, if a trial proceeded straight to closing argument one hour after the last witness was heard and the jury was dismissed for lunch, those closing arguments were surely going to have more misstatements of fact, and objectionable argument, than if the attorneys were given overnight or a weekend to prepare. This was true of all attorneys—including extraordinarily earnest and gifted DOJ attorneys—and it was true in cases whose subject matters were routine and even simplistic.

A: I think it was.

Q: All right. Would you agree that . . . the responsibility to do a Brady and Giglio review, even 302s and the MOIs, falls in the first case upon the prosecutors that are handling the case.

A: Always.

Q: In that case, the obvious question is, how did this come to happen?

A: You know, I don't recall how or who made the decision that the agents were going to review the stuff. I know that the time compression certainly had to be a factor here. . . . That has got to be part of the calculus here, I would guess, as to who made the decision that agents were going to perform this function.

(OPR Tr. 128:5-129:7.) Mr. Bottini acknowledged that the assignment of *Brady* responsibilities for his witnesses to other attorneys and agents differed from the practice he typically followed, but explained that he acquiesced to this division of labor because "I wasn't the lead attorney on the case. You know, and it wasn't something I thought was my decision to make, as to how this [was] going to be accomplished." (*Id.* at 131:22-132:4.)

Letter from Attorney General Michael Mukasey and Deputy Attorney General Mark Filip to OPR Counsel Marshall Jarrett at 4-5 (Jan. 19, 2009).

In short, the fact that AUSA Bottini did not supervise the *Brady* review was not objectively unreasonable under the circumstances, given the compressed pretrial period and fragmented division of labor adopted by PIN supervisors. OPR's contrary conclusion also lays bare the double standard of professional conduct it has applied throughout the course of its investigation. The Final Report, like the Draft Report, concedes that the delegation of the *Brady* review to agents was "the crux of the problem"—yet it deems AUSA Bottini to have acted recklessly while finding that Ms. Morris, who authorized the delegation and did not supervise it even when explicitly reminded to do so, demonstrated only poor judgment. FR at 193, 199; *see id.* at 116-17 (quoting email from Mr. Sullivan to Ms. Morris and others stressing that the redacted 302s and grand jury transcripts needed to be proofed before being sent to the defense); Berg Memorandum at 23-24 ("Despite this explicit articulation of the need for further diligence, Principal Deputy Chief Morris took no action to ensure that [Special Agent] Kepner's work was proofed."). Those conclusions cannot both be true: if it is not reckless for a supervisor to authorize a process fraught with risk and then make no effort to oversee it even when expressly reminded of the need to do so, then the fact a subordinate line attorney did not reach out to oversee that process cannot be reckless either.⁸

B. AUSA Bottini Did Not Recklessly Disregard An Obligation To Disclose Bill Allen's April 15, 2008 Statements

The Final Report also faults AUSA Bottini for the government's failure to disclose statements Mr. Allen made during an April 15, 2008 interview, during which he recalled having seen the Torricelli Note but not having spoken with Bob Persons about it. Judge Sullivan pronounced this "the most shocking and serious *Brady* violation[] of all," Hr'g Tr. at 6 (Apr. 7, 2009), and its discovery prompted the Department to dismiss the *Stevens* case. The notoriety of a violation does not automatically make it reckless, however. Recklessness turns on an attorney's state of mind, and requires proof that he knew or should have known that his conduct made it substantially likely that a discovery violation would occur. There is no such evidence here.

At the outset, a brief overview of the context surrounding the April 15 statement is helpful in understanding why OPR's findings are misplaced. That context includes:

- ***The uncertainty on April 15, 2008 that AUSA Bottini would ever present Mr. Allen at trial.*** Because OPR's misconduct finding rests in substantial part on the fact that Mr. Allen was AUSA Bottini's witness at trial, the Final Report persists in asserting that it was inevitable, by April 15, that Mr. Allen would ultimately become AUSA Bottini's witness. In fact, the opposite was true. The April 15 session occurred months before the decision to indict was made, when AUSA Bottini had little

⁸ We do not contend that the Department should find that Ms. Morris or any other prosecutor committed misconduct. Rather, we highlight this example to underscore OPR's inconsistent reasoning, its failure to uniformly apply its own standards, and its predisposition to find misconduct by AUSA Bottini.

indication whether he “was going to be part of a trial team . . . even if we indicted.” (OPR Tr. 386:4-288:5.) At most, AUSA Bottini has explained, responsibility for presenting Mr. Allen at trial would more likely have fallen to him than to another prosecutor *if* the Front Office approved an indictment and *if* AUSA Bottini were selected for the trial team. He was uncertain on April 15 if either contingency would come to pass, given the repeated tolling agreements entered by the Front Office, the lack of communication from PIN leadership about the likelihood of any indictment, and the possibility the Front Office would replace the Polar Pen prosecutors with its own handpicked, D.C.-based trial team if the case went to trial. *See* Bottini Response at 21-22. The fact that Mr. Allen was not yet AUSA Bottini’s witness for the purpose of any trial is borne out by the minimal role AUSA Bottini played on April 15: PIN initiated and led the meeting, the purpose of which was to show Mr. Allen a series of documents Senator Stevens’ attorneys had just produced and to inquire about the existence of evidence supporting a theory of official acts; Mr. Marsh conducted the questioning of Mr. Allen; and SA Kepner showed him documents. AUSA Bottini largely acted as scrivener, playing an active role only at the conclusion of the meeting when Mr. Allen lost his composure and AUSA Bottini attempted to calm him down. (OPR Tr. 277:18-278:1.)

- ***The absence of a 302 documenting the interview.*** Had there been a 302 documenting the April 15 interview, agents would likely have included it in their *Brady* spreadsheet, the PIN attorneys drafting the *Brady* letter would have been alerted to it, and AUSA Bottini—who had asked SA Kepner for a full complement of Mr. Allen’s 302s—would have been reminded that prosecutors questioned Mr. Allen about the Torricelli Note at that session. Whatever the reason, SA Kepner did not prepare a 302—contributing to the prosecution team’s collective failure of memory, as OPR itself concedes. *See* FR at 191 (“We found it plausible that, in the absence of an FBI 302 memorializing the interview and with the hectic pace of activity on other matters related to the case, the prosecutors could have forgotten Allen’s comments regarding Persons in the five-month interval between the two interviews.”).
- ***The mislabeling of AUSA Bottini’s folder.*** AUSA Bottini prepared for trial by creating a folder for each witness—or, in the case of Mr. Allen, multiple folders divided by topic due to the large volume of materials—that contained 302s, grand jury transcripts, and his own handwritten notes from interviews and trial preparation sessions. Because the April 15 interview occurred well before the indictment and amid such uncertainty, however, AUSA Bottini had not yet created any trial folders for Mr. Allen. He instead placed his April 15 notes in the same file folder that contained the documents prosecutors showed Mr. Allen at that session, which was labeled “Documents to Show BA on April 15.” He then put the file away; did not come across it when subsequently conducting a *Brady* review of Mr. Allen’s witness folders; and could not initially locate his notes even when asked by Paul O’Brien, the Department attorney who conducted an initial review of the government’s errors. *See* Bottini Response at 22-23; Schuelke Tr. 576:15-587:5.
- ***The insignificance of Mr. Allen’s statement at the time.*** It was not that significant on April 15 that Mr. Allen said he did not recall having discussed the Torricelli Note

with Bob Persons: the interview focused in large part on documents relating to a potential theory of official acts, and the Torricelli Note was only one of numerous documents prosecutors showed Mr. Allen. Nor was the note some bombshell that the prosecutors viewed as unequivocally harmful to their case; to the contrary, it was equally harmful to Senator Stevens, because it showed he knew of his liability to VECO. To the extent the Torricelli Note discussion was noteworthy at all, it was because Mr. Allen recalled having received the note and could therefore authenticate it at trial; the fact he did not recall having discussed it with Mr. Persons remained insignificant until September 14, when Mr. Allen's contrary recollection transformed the April 15 statement into *Giglio* material—making it unsurprising that AUSA Bottini did not recall Mr. Allen's prior statement when he heard the contradictory version on September 14.

It was against that backdrop that AUSA Bottini conducted a good-faith search of his files for *Brady* and *Giglio* material, though OPR fails to acknowledge it. As discussed above, he created multiple topical folders containing 302s, grand jury transcripts, and handwritten notes related to Mr. Allen; reviewed the contents of those folders on a continuing basis, with the dual purpose of preparing Mr. Allen for trial and identifying potential *Brady* and *Giglio* material; reviewed and annotated a treatise on *Brady* caselaw to ascertain what obligations would govern in the D.C. Circuit, where he had not previously litigated; and developed a checklist of potential *Giglio* material related to Mr. Allen. He was the *only* member of the prosecution team to conduct such a search of his files and handwritten notes. That search did not uncover his April 15 notes for all of the reasons described above: he misfiled them in a folder named “Documents to show BA on April 15,” there was no 302 to remind him to search for them, and the insignificance of Mr. Allen's statement at the time would not have prompted AUSA Bottini to recall them. In short, he made a mistake. That mistake does not negate his good-faith attempt to ascertain and comply with his disclosure obligations—an attempt that forecloses any finding of recklessness. Analytical Framework ¶ B.4.

OPR's only response is to complain that AUSA Bottini did not search his files even harder. The failure to conduct a sufficiently thorough search is not misconduct, however, unless accompanied by a reckless state of mind. To prove that AUSA Bottini's supposedly inadequate file-searching was reckless, OPR must show that he knew or should have known that it was substantially likely to cause a discovery violation. Analytical Framework ¶ B.4. OPR attempts to satisfy this requirement by reasoning that AUSA Bottini failed to conduct a search that resulted in the discovery of his April 15 notes, and that this search by definition created a substantial likelihood the government would not disclose those notes. That circular analysis guarantees a finding of misconduct, because *of course* the failure to conduct a search that results in the discovery of evidence makes it likely the government will not disclose that evidence. For that reason, the question OPR's definition of recklessness poses is not whether an attorney's ultimate *conduct* creates a substantial likelihood that he will violate a professional obligation; it is whether the attorney *knows or should know* that his conduct will do so. *Id.* OPR cannot show that AUSA Bottini's file-searching was reckless unless it introduces evidence that he knew or should have known it was inadequate and thus substantially likely to cause a discovery violation—and the evidence proffered by OPR supports no such showing.

OPR suggests, first, that the presence of “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] prompted Bottini to dig deeper, but he did not.” FR at 196. Not so. There is no evidence AUSA Bottini ever came across the folder during his trial preparation process in the first instance; indeed, he was initially unable to locate it even when he was asked during the O’Brien investigation specifically to search for notes from the April 15 interview. (Schuelke Tr. 576:15-587:5.) And even if AUSA Bottini *had* come across the folder at some point between April 15 and trial, it is plausible that its label would not have alerted him that it contained notes of an interview from April 15, let alone one in which Mr. Allen discussed the Torricelli Note. Indeed, even had he seen the file or recalled its existence, AUSA Bottini would have had little reason to review its contents, as the “Documents to Show Allen” it contained were nothing but printed versions of PDF documents available elsewhere: in an email the Alaska AUSAs had received from PIN, with SA Kepner, or on the Polar Pen drive.

OPR makes two further attempts to justify its recklessness finding, both of which are flawed to the point of speciousness. OPR first contends that, even assuming AUSA Bottini plausibly forgot the April 15 remark, he should have remembered it once Mr. Allen conveyed the “cover your ass” statement to prosecutors on September 14 and searched his files accordingly. Yet if AUSA Bottini had no memory of Mr. Allen’s being shown the Torricelli Note on April 15, he would not have known to search for notes from that interview—regardless of whether or not Mr. Allen made some subsequent remark about the Torricelli Note. *See* Berg Memorandum at 40 (“[I]f it is truly the case that an attorney has no memory of an event, I am dubious of the logic behind an argument that says a later occurring development, however dramatic, can reasonably be said to be likely to trigger in the mind of the attorney the need to look harder for notes from the event he did not remember.”).

The only support OPR offers for its conclusion is that AUSA Bottini “knew or should have known that a document as significant as the Torricelli Note was not shown to Allen for the first time a mere two weeks before the commencement of trial.” FR at 196. Yet OPR disproves its own argument, conceding that AUSA Bottini in fact did *not* recall that Mr. Allen had previously been shown the Torricelli Note when he discussed it on September 14. *Id.* at 192. OPR could hardly do otherwise; the notes AUSA Bottini took on September 14 exclaim “BA SEEN THIS!!” above a description of the Torricelli Note, making clear (1) that Mr. Allen could authenticate the note at trial, (2) that AUSA Bottini considered Mr. Allen’s recognition of the note an important piece of news, and (3) that he clearly did *not* recall that Mr. Allen had been shown the note several months earlier or that Mr. Allen had earlier told Mr. Bottini he recalled receiving the note. *See id.* (“We found corroboration for Bottini’s failed recollection of questioning Allen on the Torricelli Note on April 15 in his exclamatory note from the September 14 trial preparation session: ‘BA seen this!!’ The double exclamation marks signified to Bottini that he did not know (or recall) that Allen had been shown the document previously and recognized it.”). That AUSA Bottini simply forgot the April 15 discussion is corroborated by the fact that every single other attorney who attended that session did too, including former U.S. Attorney Robert Bundy. *See id.* at 190-91. And it is underscored by AUSA Bottini’s subsequent failure to recall the discussion even when interviewed by three federal prosecutors and an FBI agent during the O’Brien investigation, where any false statements would have risked liability under 18 U.S.C. § 1001. *See* Bottini Response at 22-23. In the end, OPR does not and cannot show that anything about Mr. Allen’s September 14 statement alerted AUSA Bottini about the

April 15 interview such that he knew, or should have known, that failing to search his files more diligently for notes from that session created a substantial likelihood of a disclosure violation.⁹

OPR's remaining argument borders on frivolous: that AUSA Bottini should have searched "the memories and notes of his colleagues and Kepner" and that "Kepner, in particular, was an obvious source of interview notes." FR at 196-97. First, responsibility for the government's *Brady* review—and any resulting obligation to search "the memories and notes" of the trial team—had been assigned to prosecutors *other* than AUSA Bottini under the division of labor his supervisors adopted, and he had no reason to doubt that those prosecutors would carry out that responsibility or that SA Kepner would not have a full recollection of the sessions she attended with Mr. Allen. *See* II.A, *supra*. And in any event, OPR cannot show how asking SA Kepner to search her notes would have made the disclosure violation any less likely: she prepared no 302 documenting the April 15 interview, and her notes from that session were not located by the Department until nearly a year into OPR's investigation. FR at 592 n.2585.

C. AUSA Bottini Did Not Recklessly Disregard An Obligation To Clarify Mr. Allen's Cross-Examination Testimony

Because OPR cannot show that AUSA Bottini's failure to recall the April 15 interview was anything other than a mistake, it advances one additional basis for its recklessness finding not present in the Draft Report: that AUSA Bottini failed to clarify the record during Mr. Allen's cross-examination. As an initial matter, we take issue with OPR's assertion that we "did not address this critical aspect of Bottini's conduct" when responding to the Draft Report. FR at 198 n.766. We did not address the issue in our prior response because it was not the basis for any of the Draft Report's misconduct findings; the Draft Report noted that AUSA Bottini "missed an opportunity" to remedy the earlier nondisclosure by clarifying Mr. Allen's testimony, but it did *not* find that his failure to do so was reckless. Draft Report at 282-83. We were asked to respond to a nearly 1,000-page draft that OPR took almost two years to complete, and we chose

⁹ OPR's argument, moreover, underscores its double standard yet again. The only attorney who recalled that the government questioned Mr. Allen about the Torricelli Note on April 15 was Ms. Morris, who, when informed about his "cover your ass" statement on September 14, apparently recalled that Allen had been asked about the Torricelli Note before and had "acknowledged the notes," FR at 166—but she made no effort to ascertain what Mr. Allen had said previously or to instruct her subordinates to do so either. As Mr. Berg stressed:

If it was *reasonable* for a high-level supervisor and lead attorney with knowledge of the fact that Allen was asked about [the] Torricelli Note previously not to take any action whatsoever in instructing the team to check to see what exactly Allen said on that previous occasion when he was shown the Note, it is inconceivable to me that it can be *objectively unreasonable* for an attorney who did not remember that Allen had been asked about the Note at a prior meeting to fail to double check and thoroughly search for his notes from that meeting. For both of these to be true would require applying a double standard.

Berg Memorandum at 41.

to focus our submission on OPR’s most significant errors. OPR’s introduction in its Final Report of this new basis for its misconduct finding has a troubling “gotcha” quality.¹⁰

OPR is wrong on the merits in any event. It is obvious that Mr. Allen’s testimony was the product of confusion: defense counsel attempted to elicit an admission that Mr. Allen had only “just recently” discussed the “cover your ass” comment with the *government*, but Mr. Allen, through a combination of defense counsel’s inartful questioning and Mr. Allen’s own cognitive difficulties, initially understood it as a suggestion that he had “just recently” discussed the comment with *Mr. Persons*. See Trial Tr. 79:21-81:10 (Oct. 6, 2008) (“Q: When did you first tell that story? When did you first say those words? . . . Was it since September 9th? A: It’s been so long that I can’t tell you how many days before I talked to *him*, but I did, and I asked him, hey, I got to get something done. I’ve got to get some invoices. And he said, hell, don’t worry about the invoices. Ted is just covering his ass.”) (emphasis added); see also OPR Tr. 341:3-18 (AUSA Bottini explains that “I think that was clear . . . to anybody listening to that who had sat through this trial knew that he was talking about Bob Persons at that point”). Mr. Allen remained confused when defense counsel asked “[w]hen did you first tell the government that Persons told you Ted was covering his ass . . . It was just recently, wasn’t it?” Trial Tr. 80:16-18 (Oct. 6, 2008). To be sure, defense counsel meant to ask “when did you first tell the government about what Mr. Persons said,” but it is equally plausible that Mr. Allen understood the question to mean “when you first told the government about what Mr. Persons said, did you tell them he made the statement to you recently?” Understood that way, his response—“no, no”—was correct. Despite his initial confusion, however, Mr. Allen ultimately did answer the question defense counsel was attempting to ask, testifying first that “I don’t know when I talked to *them*, but I did talk to *him*, and it’s been quite aback, quite a while back,” and then, when pressed to specify “[w]hen did you first tell a government agent,” responding “Hell, I don’t know. I don’t know what day it was.” *Id.* at 81:2-10. His answer—that he did not recall when he first told the government about his conversation with Mr. Persons—was accurate, though it may not have been the clear admission defense counsel sought.

No Unambiguously Applicable Standard. OPR concedes, correctly, that AUSA Bottini was not obligated to correct that testimony by *Napue v. Illinois*, which prohibits the introduction of knowingly false testimony but does not require a prosecutor to clarify testimony that “result[s] from confusion, mistake, or faulty memory.” *United States v. Monteleone*, 257 F.3d 210, 219 (2d Cir. 2001); see also FR at 198.¹¹ Lacking any basis to fault AUSA Bottini for a *Napue*

¹⁰ It was never our understanding that we would waive objections to flaws in the Draft Report if we did not cite them in our initial response. Given the number and seriousness of OPR’s legal and factual errors, we chose to be selective. We never suggested that OPR’s errors were limited to those examples highlighted in our response; rather, we hoped that our identification of the most fundamental errors would prompt OPR to reevaluate its findings in their entirety. That hope was apparently misplaced.

¹¹ See also *Hess v. Trombley*, No. 2:06-CV-14379, 2009 WL 1269631, at *6 (E.D. Mich. May 1, 2009) (“[A] prosecutor is not required to ensure that prosecution witness’ testimony be free from all confusion, inconsistency, and uncertainty.”); *United States v. Crockett*, 435 F.3d 1305, 1317 (10th Cir. 2006) (no *Napue* violation where “[t]here has been no showing of deliberate false testimony” and witness’s false testimony “could be attributed to . . . her possible

violation, OPR contends instead that “even if Bottini’s prior failure to identify the Brady material related to the Torricelli Note were considered to be a mistake, Bottini’s failure to correct Allen’s trial testimony, standing alone, constituted reckless disregard of his *Brady/Giglio* and USAM obligations.” FR at 198 n.766.

OPR supplies no basis for the conclusion underlying this serious charge. Nor can it: the corrected testimony would not have been *Brady*, as the bare fact that Mr. Allen first told the government about the “cover your ass” statement on September 14, standing alone, is not exculpatory. While knowing the specific date on which Mr. Allen first told the government about the “cover your ass” statement may have reinforced defense counsel’s argument that the statement was a recent fabrication, it was counsel’s own decision to end his line of questioning upon hearing the “Hell, I don’t know” response rather than pursue the issue further. *See* Tr. 81:11 (Oct. 6, 2008). Beyond *Brady*, *Giglio*, or *Napue*, OPR does not and cannot point to the source of any obligation requiring a prosecutor to assist a defense counsel whose inartful questioning proves ineffective in undermining the credibility of the government’s witnesses.

No Knowledge Of A Substantially Likely Violation. OPR also cannot show that AUSA Bottini had the state of mind necessary to support its finding of recklessness. AUSA Bottini would only have acted recklessly if he *knew or should have known* that clarifying the record was necessary to avoid a substantial likelihood of a *Brady* or *Giglio* violation, and if his failure to do so was unreasonable under the circumstances. In fact, it was objectively *reasonable* under the circumstances for AUSA Bottini to not clarify Mr. Allen’s responses, even though they were confused at the outset; he concluded in good faith that Mr. Allen had ultimately provided an accurate answer and, based on his familiarity with Mr. Allen, that attempting to clarify his testimony further would only sow more confusion. (Schuelke Tr. 636:12-637:1 (“[M]y experience with Mr. Allen is when he gets confused about things, unless you have had some opportunity to sit down with him, which you never do before redirect, to explain to him what it is you’re going to ask him, you’re just begging for more confusion. I thought that he had adequately explained himself.”).) OPR may believe it would have been preferable for AUSA Bottini to have attempted to clarify Mr. Allen’s testimony, but he had an objectively reasonable explanation for not doing so—and that explanation necessarily defeats the “objectively unreasonable under all the circumstances” element of reckless disregard.

No Objective Unreasonableness Under The Circumstances. Nor did AUSA Bottini grossly deviate from the course of conduct an objectively reasonable attorney would have

confusion answering questions on cross-examination”); *United States v. Are*, 590 F.3d 499, 509 (7th Cir. 2009) (“*Napue* does not require the government to recall [a witness] in its rebuttal case to clear up any possible confusion when the witness’s testimony was not perjurious.”); *Overdear v. United States*, 212 Fed. App’x 930, 931 (11th Cir. 2006) (no *Napue* violation where testimony results from confusion, mistake, or faulty memory); *United States v. Manzano-Excelente*, Nos. 95-1459, 95-1626, 1996 WL 414465, at *2 (2d Cir. July 25, 1996) (no *Napue* violation because defendant did not “establish the threshold element of his claim: that [the witness] committed perjury . . . confusion and inability to remember do not constitute perjury”); *United States v. Russell*, 532 F.2d 1063, 1067 (6th Cir. 1976) (*Napue* does not require prosecution to recall witness during rebuttal to clear up confusion).

observed in the same circumstances. To the contrary, Mr. Allen’s confusion and AUSA Bottini’s response are fairly typical. Eliciting confused, jumbled answers on cross-examination is a common aim of defense counsel, who often attempt to sow confusion in an effort to paint government witnesses as less than clear-thinking. Prosecutors confront this situation on an almost daily basis, and have to make the same calculation AUSA Bottini did: elucidate confused cross-examination testimony, or leave it to the jury to see the testimony for what it is. Because they cannot address every single line of cross-examination on redirect, prosecutors tend to be selective in practice, correcting only those aspects of a witness’s testimony that come across as clearly and materially false. That is particularly true where, as here, the witness was cross-examined for multiple days—and where his well-documented cognitive difficulties made confusion inevitable on even the most straightforward topics.¹² AUSA Bottini’s decision under these circumstances not to clarify Mr. Allen’s testimony was hardly the gross deviation from the conduct an objectively reasonable attorney would observe in the same situation needed to support OPR’s finding of recklessness. Analytical Framework ¶ B.4.

IV. AUSA BOTTINI DID NOT RECKLESSLY DISREGARD AN OBLIGATION—IF ONE EXISTED—TO DISCLOSE STATEMENTS BY ROCKY WILLIAMS

The Final Report holds AUSA Bottini responsible for the government’s failure to disclose three categories of statements made by VECO foreman Rocky Williams: (1) that Senator Stevens wanted to pay for the Girdwood renovations and, in particular, to have a contractor he could pay; (2) that Mr. Williams reviewed invoices prepared by VECO subcontractor Christensen Builders before taking them to Mr. Allen; and (3) that he assumed, incorrectly, that time he and Dave Anderson, another VECO employee, spent at the Girdwood project was added by Mr. Allen to the Christensen Builders invoices before forwarding them to Senator Stevens. OPR’s misconduct findings are meritless.

A. AUSA Bottini Did Not Recklessly Disregard An Obligation To Disclose Mr. Williams’ Unfounded Assumptions

OPR’s principal argument is that AUSA Bottini recklessly disregarded an obligation to disclose statements Mr. Williams made during trial preparation sessions, where he described his assumption that Mr. Allen combined time that he and Dave Anderson incurred for VECO with the Christensen Builders invoices that were sent to Senator Stevens. A straightforward application of its own definition of recklessness makes clear OPR’s argument is wrong.

No Unambiguous Disclosure Obligation. OPR’s definition of recklessness asks, as a starting point, whether an unambiguous obligation *unambiguously applies* in the circumstances. Analytical Framework ¶ B.4. Here, OPR must show that *Brady* or the USAM unambiguously required the government to disclose Mr. Williams’ assumption—in other words, that the assumption was exculpatory. OPR cannot make that threshold showing, because the assumption it deems *Brady* material was, in reality, not exculpatory at all. OPR maintains that Mr. Williams’ assumption “directly corroborated” the defense argument that, by paying the Christensen

¹² Mr. Allen suffered both from the effects of a stroke following a motorcycle accident and from a degenerative cognitive disease, and his speech and memory were impaired as a result. FR at 553.

Builders invoices, Senator Stevens and his wife assumed they were also paying for time incurred by VECO employees. *E.g.*, FR at 350, 351. OPR plays fast and loose with the notion of corroboration: as we explained in detail in our response to the Draft Report, the assumptions may have been *consistent* with an anticipated defense, but they did nothing to *corroborate* it. The defense would have been corroborated *if* Mr. Williams had conveyed his assumption to Senator Stevens or his wife, thereby providing a basis for their own claimed assumption. But the record is clear that Mr. Williams kept the assumption to himself and never discussed it with the senator or his wife. The assumption was nothing more than conjecture on his part: Mr. Williams did not review the actual bills that Mr. Allen sent to Senator Stevens and did not know whether they included VECO time (they did not).¹³

OPR blurs the distinction between evidence that is consistent with a defense theory and evidence that actually corroborates that theory, but the distinction is of critical importance to *Brady*, which requires the disclosure only of exculpatory evidence—not evidence that is merely favorable, helpful, or in some way consistent with a defense. *See United States v. Ruiz*, 536 U.S. 622, 629 (2002) (“[T]he Constitution does not require the prosecutor to share all useful information with the defendant.”). The same is true of the U.S. Attorneys’ Manual, whose broader disclosure obligation eliminates *Brady*’s “materiality” standard but which still requires evidence to be exculpatory. *See* USAM § 9-5.001 (USAM provisions are “intended to ensure timely disclosure of an appropriate scope of exculpatory and impeachment information”). “Exculpatory information is that which is ‘supportive of a claim of innocence’ to the crimes charged.” *United States v. Reyes*, 270 F.3d 1158, 1167 (7th Cir. 2001). It “goes to the heart of the defendant’s guilt or innocence,” *United States v. Starusko*, 729 F.2d 256, 260 (3d Cir. 1984), and includes information that “would tend to show freedom from fault, guilt, or blame,” *United States v. Blackley*, 986 F. Supp. 600, 603 (D.D.C. 1997); *see also* Black’s Law Dictionary 597 (8th ed. 2004). For that reason, *Brady* is not violated every time the government fails to disclose information that might prove helpful to the defendant in some sense. *See United States v. Meija*, 448 F.3d 436, 457 (D.C. Cir. 2006).

OPR posits a single theory of why Mr. Williams’ assumptions were exculpatory: that they were based on an understanding between Mr. Allen and Senator Stevens that VECO employees’ time would be added to the Christensen Builders invoices. OPR divines this understanding from the phrase “original agreement,” which appears in AUSA Bottini’s handwritten notes from an August 22, 2008 trial preparation session during which Mr. Williams described a 1999 meeting where Mr. Allen and Senator Stevens discussed an initial concept for the renovations. That concept was simply to “brighten up” the senator’s Girdwood residence by raising the property a small amount and adding a “daylight basement”—a modest project

¹³ Nor was Mr. Williams’ assumption surprising: because he was not part of Mr. Allen’s scheme to provide benefits to Senator Stevens, Mr. Williams would have no reason to believe the senator was *not* charged for VECO’s work. Any electrician, carpenter, or other VECO worker not part of Mr. Allen’s scheme would have likewise presumed that Senator Stevens would be charged for the work they performed on his house. (*See* Schuelke Tr. 182:6-11 (AUSA Bottini explains that “[t]o me, it’s no different from . . . Roy Dettmer, the electrician who is doing work on there . . . he probably assumed that, you know, his labor was being wrapped into some bill that was being paid by the owners of the house.”).)

compared to the renovations Senator Steven subsequently decided he wanted nearly one year later. *See* Bottini Response at 35-36. AUSA Bottini’s August 22 notes simply state:

It was understood that we were down there – and that any VECO time/labor would be added in – Part of the original agreement – As long as we got paid back – Rocky assumed that based on what TS had said in 1999.

See FR at 290. Based on that fragment, OPR contends, Senator Stevens and Mr. Allen must have specifically agreed at the outset that VECO employees’ time would be combined with the Christensen Builders invoices. *See id.* (contending that “Williams described that arrangement [the combining of invoices] as ‘the original agreement’”); *id.* at 291 (referring to “Williams’s belief that his and Anderson’s hours, and possibly all VECO costs, would be added to the Christensen Builders invoices . . . pursuant to the ‘original agreement’ between Allen and Senator Stevens”); *id.* at 354 (asserting that Williams assumed his time “would be added to the Christensen Builders invoices, pursuant to the ‘original agreement’ with Senator Stevens to add ‘any VECO time/labor’ to those invoices”). If there *had* been an invoice-combining agreement between Mr. Allen and Senator Stevens, it would have substantial exculpatory value: not only would it provide a foundation for Mr. Williams’ assumption, but, more importantly, it would also provide a basis for the senator’s own claimed assumption that the Christensen Builders invoices he paid reflected any VECO liabilities. There was no such agreement, however—and the record proves as much.

The only references the record contains to any “original agreement” are found in the handwritten notes AUSAs Bottini and Goeke took during their August 22 session with Mr. Williams, and only three people have been a source for elucidation of the meaning of those notes: the AUSAs and Mr. Williams himself.¹⁴ AUSA Bottini explained that he understood Mr. Williams to have stated he assumed Mr. Allen added VECO’s costs to the Christensen Builders invoices—not that there was an “original agreement” to do so. The “original agreement” Mr. Williams was referring to was simply that VECO would expand the Girdwood residence and Senator Stevens wanted to pay. *See generally* Schuelke Tr. 158-63. AUSA Bottini has consistently said that this understanding did *not* encompass an agreement to combine invoices. *E.g., id.* at 160:16-19 (Mr. Allen and Senator Stevens did not “hammer[] out any kind of understanding as to . . . what VECO was going to do, and how it was going to be paid for”).

Indeed, it would be *impossible* for an invoice-combining agreement to have been reached 1999: at that time, Mr. Allen and Senator Stevens only discussed having *VECO* handle the renovations ; the decision to hire an outside contractor was not made until much later. *See id.* at 181:4-7 (AUSA Bottini states that “I don’t know that having a contractor in there was part of the original agreement . . . the understanding was VECO was going to do the work”); *see also* Berg Memorandum at 68 n.271 (quoting AUSA Goeke testimony that “[t]he idea to bring [Augie] Paone didn’t come until late—much later. There was no discussion of bringing in Paone as a general contractor thing til much later. The original discussion was a small project that would be

¹⁴ SA Chad Joy was also present at the session, but there is nothing in the record that sheds light on his interpretation of Mr. Williams’ statement, let alone corroborates OPR’s erroneous assertion that an original invoice-combining agreement existed.

done by VECO”). As Mr. Berg explained, “both AUSAs testified that, in its earliest stages, the renovation project was originally conceived as a smaller construction job that would be handled entirely by VECO. If that understanding were considered as the ‘original agreement,’ then obviously there would be no combining of invoices because Christensen Builders was not even part of that concept at that time.” Berg Memorandum at 68 n.271.

AUSA Goeke’s testimony and handwritten notes from the August 22 session likewise provide no support for OPR’s assertion that there was an original invoice-combining agreement. His notes state, first, that Mr. Williams would “give to Bill to add time for Rocky and Dave.” After that mention of the invoice-combining assumption, his notes continue by stating that it was “understood that [Senator Stevens] was going to pay for everything” and that the “charge for work force, etc. – would come through VECO”—an arrangement that was “part of [the original agreement.” (CRM057193-96.) Because those notes contain more text than AUSA Bottini’s between their initial mention of invoice-combining and their subsequent reference to the “original agreement,” they underscore that Mr. Williams did *not* state that combining invoices was the original agreement. Rather, they prove the same point AUSA Bottini made in his testimony: the “original agreement” was simply that VECO would renovate the Girdwood residence and that Senator Stevens wanted to pay. *See* Berg Memorandum at 70 (AUSA Goeke’s notes “indicate that Williams apparently did not simply state, as Bottini’s notes might appear to reflect, that the combining of invoices was the original agreement”).

The absence of an original invoice-combining agreement is all the more evident given that Mr. Williams apparently did not describe one to defense counsel. The defense interviewed Mr. Williams in three telephone conversations on September 28, during which he voluntarily discussed a range of topics, including the number of hours he worked on the Girdwood project and the fact that he spent part of his time at the Girdwood residence doing work unrelated to the renovations. *See* Mot. to Dismiss Indictment or for a Mistrial at 1 (Sept. 28, 2008) (Dkt. 103); Decl. of Simon Latcovich (Sept. 28, 2008) (Dkt. 103-4). Had Senator Stevens and Mr. Allen reached an agreement to combine invoices, the senator would undoubtedly have told his attorneys—and they would undoubtedly have asked Mr. Williams about it. Had Mr. Williams acknowledged the existence of such an agreement, the defense would undoubtedly have told the court in Mr. Latcovich’s declaration or their motion. The defense’s failure to do so, coupled with their decision not to call Mr. Williams to testify, can mean only one thing: there was no invoice-combining agreement.

Only one conclusion can be drawn from OPR’s decision to credit its own interpretation of the “original agreement” despite AUSA Bottini’s testimony and other evidence to the contrary: OPR believes AUSA Bottini is lying. That is an audacious position for OPR to take. AUSA Bottini is a dedicated public servant whose integrity is universally seen as beyond reproach; the letters of reference attached to this submission provide only a small sampling of the praise he has received throughout the course of his career from prosecutors and defense attorneys alike. His testimony is entitled to more weight than OPR gives it. Mr. Berg agreed:

OPR’s conclusion that AUSAs Bottini and Goeke were reckless in failing to disclose Williams’ assumption about combining VECO’s costs into the Christensen Builders invoices relies heavily on its inference that Allen, Stevens, and Williams had agreed with one

another to add the VECO costs to the Christensen Builders invoices. This inference is premised on OPR's interpretation of the AUSAs' handwritten notes, but that was not the interpretation that the AUSAs had who were present for the interview, and who authored the notes in question. I do not agree that the record supports by a preponderance of the evidence the inference that an original agreement had been reached between Allen, Stevens, and Williams that VECO's costs would be rolled into the Christensen Builders invoices. Therefore, I do not agree that the AUSAs' failure to recognize the exculpatory nature of Williams' assumption was "objectively unreasonable" or a "gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation.

Berg Memorandum at 71. In short, OPR cannot show that there was an agreement that VECO expenses would be combined with the Christensen Builders invoices Senator Stevens ultimately paid. Absent such an agreement, the exculpatory value of Mr. Williams' assumptions was zero, and there was no unambiguous duty to disclose them. OPR's own guidelines thus forbid a finding of recklessness.

No Knowledge Of A Substantially Likely Violation. OPR's recklessness finding would fail even if there had been an unambiguous disclosure obligation, however, because OPR cannot show that AUSA Bottini possessed the requisite intent. To prove recklessness, OPR must show that an attorney *knew or should have known* that an obligation unambiguously applied, and *knew or should have known* that his conduct made a violation of that obligation substantially likely. Analytical Framework ¶ B.4. The principal basis for OPR's recklessness finding is that AUSA Bottini "missed the significance" of Mr. Williams' assumptions. FR at 359-60. In reality, AUSA Bottini did not press for the disclosure of Mr. Williams' assumptions because, after considering whether he had a disclosure obligation, he made a good-faith judgment the assumptions were not exculpatory—not because he missed their significance. (*See* Schuelke Tr. 348:9-22 ("Q: Did you consciously consider disclosing [the assumptions] as Brady material or did you not consciously consider it? A: I recall thinking at the time that Williams was making an assumption . . . that was not potentially disclosable. . . . Q: So the answer is yes, you consciously considered it? A: I believe I did.").) That contemporaneous, good-faith exercise of judgment is the opposite of reckless disregard: AUSA Bottini believed he was applying *Brady* correctly, and thus could not have known that his conduct caused a substantial likelihood *Brady* would be violated. *See* Berg Memorandum at 78 ("[E]xercising judgment, even flawed judgment, is not the same as being reckless."). To find otherwise would transform ordinary attorney error into professional misconduct.¹⁵

¹⁵ OPR also faults Mr. Bottini for not reviewing 302s or interview memoranda, managing the *Brady* review, or overseeing the resulting *Brady* letter. Those arguments are more pertinent to OPR's assertion that Mr. Bottini is to blame for two deficiencies in the *Brady* letter than they are to the issue of Mr. Williams' assumptions, and, as discussed below, they are baseless in any event. *See* III.B, *infra*.

OPR advances one additional argument, but it is easily dispensed with: AUSA Bottini cannot be heard to dispute that he recklessly disregarded an unambiguous obligation to disclose Mr. Williams' assumption because the government relied on assumptions in its own case-in-chief. In OPR's view, "whatever force [AUSA Bottini's] argument has is lessened by the prosecution team's willingness to endorse assumptions that favored the prosecution (Bob Persons's alleged assumption that Stevens was 'covering his ass' with the Torricelli note; Bill Allen's assumption that Stevens would not want to pay a large VECO bill)." FR at 356. That the government relied on assumptions in some other context does not mean AUSA Bottini's conduct was reckless here: it proves neither that *Brady* obligated the disclosure of this *different* assumption or that AUSA Bottini knew or should have known that his conduct was substantially likely to cause a violation of that obligation. See Analytical Framework ¶ B.4. We exposed the fallacy of this apples-to-oranges reasoning in our response to the Draft Report. Both of the assumptions OPR cites were independently probative of Mr. Allen's state of mind, a relevant issue that explained why he did not send Senator Stevens a bill when asked; in fact, that is precisely why the court admitted the "cover your ass" statement, which would otherwise have been excluded as speculation. See Trial Tr. 53:2-8 (Oct. 1, 2008). Mr. Allen's statements were also independently probative as statements of the senator's co-conspirator, and any statements he made during the course of that conspiracy would have been relevant and admissible at trial. See *id.* at 54:16-55:2. Mr. Williams' assumption, by contrast, was not probative of any issue: because it was incorrect, speculative, and never communicated to the senator or his wife, it provided no basis for or corroboration of their own supposed assumption. Nor was there any allegation Mr. Williams conspired with Senator Stevens. The only issue of which his assumption was probative was his own state of mind, which had no probative value in relation to the actions of Mr. Allen, Senator Stevens, or Mrs. Stevens.¹⁶

B. AUSA Bottini Did Not Recklessly Disregard An Obligation To Disclose Other Statements By Mr. Williams

The Final Report also faults AUSA Bottini for two deficiencies in the government's *Brady* letter related to Mr. Williams: its omission of Mr. Williams' statement that Senator Stevens wanted to pay for the Girdwood renovations and his statement that he reviewed the Christensen Builders invoices before delivering them to Mr. Allen. OPR cannot show that

¹⁶ The Draft Report, using language more characteristic of advocacy than objective analysis, complained that "the prosecutors were not finicky about using Bob Persons' statement . . . even though that, too, appears only to be an assumption." Draft Report at 496 n.1380. After we registered a strong objection to this unprofessional characterization of Department attorneys, OPR omits this rhetoric from the Final Report but retains the underlying analysis. This is not the only occasion on which OPR tempers its language in response to our comments but leaves its underlying conclusion intact—underscoring just how predetermined OPR's misconduct findings were. In another example, the Draft Report all but deemed Mr. Bottini's explanation for his failure to locate his April 15 notes a lie, pronouncing that "[i]t is not plausible that Bottini . . . would not review the file" containing those notes notwithstanding his testimony that the file was mislabeled and that he did not, in fact, locate it during his good-faith review of materials related to Mr. Allen. Draft Report at 280 (emphasis added). The Final Report jettisons the objectionable language but not its flawed underlying reasoning. See FR at 196.

AUSA Bottini had the state of mind necessary to support its finding of recklessness, that he acted unreasonably under all the circumstances, or even that *Brady* required disclosure in the first instance.

No Knowledge Of A Substantially Likely Disclosure Violation. OPR cannot show that AUSA Bottini had the state of mind necessary to support its finding of recklessness with respect to either of Mr. Williams’ statements. First, he did not know, nor should he have known, that the government was substantially likely to violate *Brady* when it omitted Mr. Williams’ statement about the senator’s desire to pay from the *Brady* letter. By the time PIN finalized the *Brady* letter, the statement that Senator Stevens wanted to pay for the Girdwood renovations and have a contractor he could pay repeated information the defense already had in its possession: an affidavit supporting the search warrant for the Girdwood residence, which recounted a statement by Mr. Williams that Senator Stevens did not want VECO to incur all the costs for the renovation and wanted a contractor he could pay instead. Aff. of Mary Beth Kepner ¶ 40 (July 27, 2007) (“Girdwood Affidavit”) CRM BOTTINI 036340-407, 036357).¹⁷ AUSA Bottini knew Mr. Williams’ grand jury transcript [REDACTED] would be disclosed to the defense as *Jencks* material prior to any testimony. He knew that the statement repeated one made by the senator himself, which would presumably already be known to the defense—a circumstance that the Department’s own training materials make clear does not give rise to a *Brady* obligation. See H. Marshall Jarrett & Michael W. Bailie, Office of Legal Education, *Federal Criminal Discovery* 221 (2011) (“*Brady* is concerned only with cases in which the government possesses information which the defendant does not.”) (quoting *Carter v. Bell*, 218 F.3d 581, 601 (6th Cir. 2000)); *id.* at 221-22 (compiling cases in which courts “rejected claims that the government suppressed favorable information where the defendant had direct personal knowledge of the events in question”); Daniel W. Gillogly, *USABook: Brady & Giglio Issues* 392 (Sept. 2011) (“*Brady* cannot be violated if the defendant has actual knowledge of relevant information.”); see also Berg Memorandum at 45 n.196 (“[T]here is case law holding that it is not a *Brady* violation if the government fails to disclose an exculpatory statement made by the defendant, which would already be known to the defendant . . . the Department of Justice *Brady* outline in the online resource ‘USABook’ contains a number of cases so holding.”). Under those circumstances, even

¹⁷ Nor did an unambiguous disclosure obligation exist in the first place. In addition to the Girdwood affidavit containing Mr. Williams’ statement, the government disclosed a near-identical statement before trial began when it produced a redacted 302 documenting a 2006 interview where Mr. Allen stated that “Ted wanted to pay for everything he got.” (Email from E. Sullivan to M. Kepner (Sept. 17, 2008 11:16 AM) (CRM BOTTINI 031655) (attaching Allen 302 (Aug. 30, 2006) (CRM BOTTINI 031742)). OPR fails to acknowledge it, but given the cumulative nature of those disclosures, *Brady* did not unambiguously require the government to also disclose that Mr. Williams had repeated the statement on some other occasion. See, e.g., *United States v. Brodie*, 524 F.3d 259, 268-69 (D.C. Cir. 2008) (no obligation to disclose cumulative evidence); *United States v. Zuazo*, 243 F.3d 428, 431 (8th Cir. 2001) (“[W]hen the government does not disclose a potential source of evidence but the evidence available from that source is cumulative of evidence already available to the defendant, it has committed no *Brady* violation.”). We made this point in our response to the Draft Report, citing the same caselaw and telling OPR that *Brady* does not unambiguously require the disclosure of cumulative evidence. Bottini Response at 38-39. The Final Report does not even acknowledge the argument.

if he bore some responsibility for the September 9 letter (and he did not), AUSA Bottini did not know, nor should he have known, that the government would violate *Brady* by omitting the statement from the letter.¹⁸ And, most importantly, he would have assumed based on the division of labor his superiors blessed that any *Brady* material contained in Mr. Williams' grand jury transcript would be flagged by the agents who reviewed it and disclosed in the letter PIN drafted.

AUSA Bottini also did not know, nor should he have known, that the government was likely to violate *Giglio* when it disclosed an inconsistent statement in the *Brady* letter but failed to explain the inconsistent nature of that statement. Mr. Williams stated on multiple occasions, [REDACTED] that he reviewed the Christensen Builders invoices. That consistent refrain, however, contradicted a single statement he made to IRS investigators on September 1, 2006, which is memorialized in an MOI stating that Mr. Williams "did not see or review the [Christensen Builders billing] statements." (CRM BOTTINI 002194.) The government disclosed the prior inconsistent statement as *Giglio* material in the September 9 letter, writing that Mr. Williams "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." See FR at 301. OPR deems that representation an "error," FR at 361, but the opposite is true: it accurately reflected a prior inconsistent statement Mr. Williams had made and which *Giglio* obligated the government to disclose. The problem was that the letter did not explain *why* the statement was *Giglio* material, and we do not dispute that the better practice would have been for the government to explain the conflict between the statement it cited and those it did not. But AUSA Bottini had no reason to know the *Brady* letter's inartful language would likely violate *Giglio*: he was not responsible for drafting the letter in the first instance and, even had he reviewed it with a fine-toothed comb, he would have understood the paragraph in question to be a *Giglio* disclosure—and would have known that the statement's impeachment value would become clear the moment the defense reviewed Mr. Williams' grand jury transcript, which would have been produced as *Jencks* material at least 24 hours prior to his testimony, and the Girdwood affidavit, which the defense already possessed. See Berg Memorandum at 64-65 ("Paragraph 15 of the *Brady* letter clearly contains those Rocky Williams statements from his September 1, 2006 IRS interview, which he subsequently contradicted. At the time when they reviewed the letter, it is understandable that [AUSA Bottini and Mr. Goeke] would have recognized this paragraph as a disclosure of *Brady/Giglio* material . . . [they also knew that *Jencks*] disclosure of the Grand Jury testimony would complete the picture for the defense, enabling them to see that paragraph 15 was intended to disclose prior inconsistent statements."). Because AUSA Bottini did not know, nor should he have known, that the letter's *Giglio* disclosure would be substantially likely to cause a *Giglio* violation, OPR's Analytical Framework forbids a finding of recklessness.

¹⁸ It is not even clear that Mr. Williams' statements were exculpatory. As we explained in our response to the Draft Report, the fact that Senator Stevens expressed a desire to pay for the renovations was equally *inculpatory*: like the Torricelli Note, it demonstrated the senator's awareness of VECO's involvement in the renovations and the benefits the company provided. The Torricelli Note underscored that knowledge, because it showed how the senator, who indicated his awareness of the impropriety of receiving benefits from VECO at the outset, knew in 2002 that he had still not paid for them. Those statements did not "tend to show freedom from fault, guilt, or blame," *Blackley*, 986 F. Supp. at 603; in fact, they did the opposite.

No Objective Unreasonableness Under The Circumstances. OPR also cannot show that AUSA Bottini acted unreasonably under all the circumstances, and its recklessness finding fails for that reason too. The Final Report offers a jumble of familiar arguments in support of its contention that AUSA Bottini’s conduct was the objectively unreasonable, gross deviation from accepted standards of conduct that OPR’s definition of recklessness requires. Analytical Framework ¶ B.4. Parse the arguments, and none withstands scrutiny.

1. *AUSA Bottini did not review his handwritten notes from the August 2008 trial preparation sessions and instead “relied on his memory that no Brady information had come up” during those sessions,* FR at 361—Wrong. AUSA Bottini *did* review his trial preparation notes for *Brady* purposes, including those involving Mr. Williams. *See* II.A, *supra*. While he did not recall specifically reviewing those notes in connection with the *Brady* letter as PIN drafted it, AUSA Bottini explained that, because the trial preparation sessions occurred so shortly before trial, Mr. Williams’ statements would have been fresh in his mind. (Schuelke Tr. 69:9-18.) Under those circumstances, it was objectively *reasonable* for him to rely on his memory that no *Brady* material arose during the trial preparation sessions, even if OPR believes his judgment on that score was mistaken.

2. *AUSA Bottini “did not review grand jury transcripts, FBI 302s or IRS MOIs for Brady material,”* FR at 363—Wrong again. AUSA Bottini *did* review those documents as he prepared for trial, looking specifically at 302s, grand jury transcripts, and other witness statements with a dual purpose of preparing Mr. Williams *and* identifying *Brady* material. (Schuelke Tr. 63:12-64:3.) The Final Report, like the Draft Report, dismisses those efforts as insufficient, contending that AUSA Bottini should have conducted two separate reviews: one for witness preparation, and one for *Brady* purposes. As discussed above, that criticism is devoid of any practical understanding of how prosecutors prepare a case for trial, and it was not unreasonable under all the circumstances for AUSA Bottini to review Mr. Williams’ files with multiple purposes here. *See* II.A, *supra*.

3. *AUSA Bottini was responsible for presenting Mr. Williams at trial, bore a heightened responsibility for ensuring that his Brady disclosures were correct, and acted unreasonably by not overseeing the Brady letter or the underlying Brady review,* FR at 361-64—Wrong. The argument, like so many others, requires OPR to substitute a different model of trial preparation from the one PIN supervisors actually implemented. Moreover, the PIN attorneys who drafted the *Brady* letter gave every indication that letter was the product of a thorough process, giving AUSA Bottini even less reason to question the division of labor his superiors approved. PIN attorneys led a thorough discussion of the *Brady* disclosures pertaining to Mr. Williams, with Mr. Sullivan advising IRS agents that “[w]e will need to see the notes for Rocky,” recommending that the team investigate a prior inconsistent statement Mr. Williams made regarding the percentage of work Christensen Builders performed, and “inform[ing] the team of this thoroughness by repeatedly directing the agents to review the underlying notes for the Rocky Williams interviews.” FR at 299; Berg Memorandum at 61. PIN attorneys were privy to the same source material as AUSA Bottini was as they drafted the letter: for example, OPR faults AUSA Bottini for the letter’s omission of Mr. Williams’ September 14, 2006 statement that “TS told RW he wants to hire a contractor he can pay,” FR at 361, but that 302 was just as available to the PIN attorneys as it was to AUSA Bottini. And PIN attorneys were equally privy to the agents’ *Brady* spreadsheet, the final version of which contained a notation regarding the

September 14, 2006 302 and was emailed to the trial team the evening of September 9—while AUSA Bottini was busy preparing for a motions hearing and as the PIN attorneys finalized the *Brady* letter. Under these circumstances, it was objectively reasonable for AUSA Bottini to assume that this seemingly thorough review would lead to complete and correct disclosure, and to rely on the PIN attorneys responsible for the *Brady* letter to ensure it did.

In sum, OPR cannot show that AUSA Bottini knew or should have known that his conduct made a disclosure violation substantially likely, that he acted unreasonably under all the circumstances, or even that *Brady* unambiguously required disclosure in the first instance. Its recklessness finding would fail for any one of those reasons; it cannot stand in the face of all of them together.

V. AUSA BOTTINI DID NOT EXHIBIT POOR JUDGMENT IN CONNECTION WITH THE BAMBI TYREE ALLEGATIONS

The Final Report contends, finally, that AUSA Bottini exhibited poor judgment in connection with the failure to adequately disclose allegations that Mr. Allen procured a false affidavit from Bambi Tyree. The elimination of OPR’s preliminary finding of reckless disregard on this issue is a welcome step, but it does not go far enough: AUSA Bottini should not be faulted even for poor judgment. A Department attorney exercises poor judgment when, “faced with alternative courses of action, he . . . chooses a course of action that is in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take. . . . For example, an attorney exercises poor judgment when, confronted with an obviously problematic set of circumstances, the attorney fails to seek advice or guidance from his or her supervisors.” Analytical Framework ¶ C. AUSA Bottini did not choose such a course of action here. To the complete contrary, he doggedly insisted on greater disclosure despite pressure from his superiors *not* to—exhibiting exactly the type of judgment the Department should expect from its prosecutors.

Indeed, if there is any aspect of this case that shows how at odds AUSA Bottini’s actions were with poor judgment, it is his repeated insistence that the government disclose allegations related to Ms. Tyree that cast significant doubt on Mr. Allen’s credibility. That insistence took place against the backdrop of near-continual opposition from PIN, whose attorneys resisted AUSA Bottini’s efforts and whose leader admonished him and Mr. Goeke to back off their insistence on disclosure because they “work[ed] for PIN.” (Email from Welch to Bottini et al. (Dec. 20, 2007, 5:18 PM) (CRM BOTTINI 081094).) Remarkably, the Draft Report contended that *AUSA Bottini* acted variously with reckless disregard and poor judgment, dismissing his persistent efforts to press for disclosure and faulting him for errors in the *Brady* letter that PIN attorneys drafted and whose language AUSA Bottini had every reason to believe was approved by his supervisors Ms. Morris and Mr. Welch.

OPR has now downgraded its reckless disregard finding to poor judgment. It could hardly do otherwise. Yet the poor judgment finding is itself indefensible: it is based, once again, on OPR’s erroneous contention that AUSA Bottini presented Mr. Allen at trial and thus bore a heightened obligation to ensure that the *Brady* letter correctly represented the Tyree issue—and ignores the fact that were it not for AUSA Bottini, the letter might not have disclosed the Tyree allegations at all. The letter was the responsibility of PIN attorneys, and AUSA Bottini had

every reason to believe, based on PIN’s longstanding resistance, that any further input from him on its text would prove fruitless. Those *exact same* factors compelled OPR to find that Jim Goeke did not exercise poor judgment. *See* FR at 268-59 (“Goeke had good reason to believe that any further airing of the issue by him might prove counter-productive.”). In reaching the opposite conclusion about AUSA Bottini, OPR applies a barely disguised double-standard of professional misconduct that casts doubt on the credibility of the entire Final Report.

A finding of poor judgment does not constitute professional misconduct, and OPR cannot recommend discipline on the basis of its finding here. *See generally* OPR Policies and Procedures. Had OPR accompanied the downward revision of its initial reckless disregard finding with a revised analysis that reflected our comments and properly credited AUSA Bottini’s resolute advocacy for disclosure, we would have forgone the detailed response that follows. It did not. The Final Report contains the same flawed reasoning as the Draft Report, employs the same double-standard of professional misconduct, and articulates a jaundiced view of AUSA Bottini’s good-faith efforts that does not befit a supposedly impartial analysis. Worse yet was the PMRU Chief’s perfunctory adoption of that analysis and his use of the poor judgment finding to enhance his disciplinary recommendation. *See* Ohlson Memorandum at 5 (deeming OPR’s poor judgment finding an aggravating factor).

Far from using the Tyree episode as an aggravating factor, OPR and the PMRU Chief should have considered AUSA Bottini’s dogged advocacy in favor of disclosing the Tyree allegations as an exculpatory and mitigating circumstance in its assessment whether he had the requisite intent to commit *any* of the misconduct OPR has alleged. They failed to do so, even though that is precisely the type of comprehensive, unblinking analysis we expect when Department lawyers are exercising prosecutorial discretion. Their analysis of AUSA Bottini’s handling of the Tyree allegations and perverse use of that conduct to enhance a disciplinary proposal undermines our confidence in the integrity of this investigation. OPR’s poor judgment finding must be set aside.

A. AUSA Bottini Pressed PIN To Disclose The Tyree Allegations

AUSA Bottini spent two years pressing PIN to disclose more information about allegations that Mr. Allen had asked Ms. Tyree to sign an affidavit falsely exonerating him of sexual misconduct. If OPR meaningfully considered those efforts, it would have to reject a finding of poor judgment—indeed, it would have to reconsider its decision to fault AUSA Bottini in other contexts, because his advocacy in favor of disclosing the Tyree allegations undermines any suggestion he took a careless approach to his *Brady* obligations. We described AUSA Bottini’s good-faith efforts in this regard at length in our response to the Draft Report, and OPR largely ignored them. Because those efforts are so central to a fair assessment of AUSA Bottini’s state of mind throughout the course of the *Stevens* prosecution, we repeat them in detail below.

The Tyree issue arose in the Josef Boehm prosecution, a drug trafficking and sexual misconduct case unrelated to Operation Polar Pen. An FBI 302 (the “SeaTac 302”) generated after Alaska AUSA Frank Russo and FBI Special Agent John Eckstein interviewed Ms. Tyree during the course of the *Boehm* investigation stated that Ms. Tyree had signed an affidavit falsely asserting that she did not have sexual relations with him while she was a juvenile, and did so at

Mr. Allen’s request. (Schuelke Tr. 672:5-673:12, 674:14-675:10.) Mr. Russo later discussed the affidavit in a sealed filing in the *Boehm* case. (Schuelke Tr. 674:5-13.)

The Tyree allegations first arose in *Stevens* in early 2007, when the government sought a warrant to search the Girdwood residence. Because the affidavit underlying the warrant application relied on information from Mr. Allen, AUSA Goeke—who served as co-counsel in *Boehm* and thus recalled Mr. Russo’s sealed filing—notified PIN about the allegation that Mr. Allen had procured a false affidavit from Ms. Tyree. (Schuelke Tr. 675:19-676:21; OPR Tr. 538:3-19.) He also explained that, contrary to Mr. Russo’s filings, Ms. Tyree herself later told prosecutors that she provided the false affidavit of her own volition. (Schuelke Tr. 679:13-18.) Because of the insistence of the Alaska AUSAs, PIN internally discussed whether the government should disclose the allegations in the text of the affidavit, with Ed Sullivan explaining that “[t]he only issue for us to decide is whether we should include something in the affidavit that flags the potential credibility of Allen as an informant. . . . Joe/Jim wanted me to flag it. . . .” (Email from Sullivan to Welch (Mar. 5, 2007 5:00 PM) (CRM BOTTINI 030459).) Mr. Welch considered whether to include the allegations in the affidavit but ultimately decided against it. (*See id.*; *see also* Schuelke Tr. 675:16-679:12.)

AUSA Bottini raised the Tyree allegations later that year when he and AUSA Goeke, both of whom had known about the *Boehm* filing but not the SeaTac 302, learned from SA Eckstein that this 302 also existed. AUSA Bottini believed the prosecution might have “an obligation at this point to make a post-trial disclosure in *Kott* and a pre-trial disclosure in *Kohring*,” (Schuelke Tr. 686:8-10), Polar Pen cases in which Mr. Allen had already testified and was planning to testify, respectively. He faxed the SeaTac 302—which clearly stated that Ms. Tyree executed the false affidavit at Mr. Allen’s request—to PIN attorney Marsh, along with pertinent sections of the *Boehm* briefing (Schuelke Tr. 683:7-17, 684:6-11); at PIN’s direction, he then scheduled an interview with Ms. Tyree. Mr. Marsh instructed him to show Ms. Tyree the SeaTac 302 and ask if it accurately reflected what she said. (OPR Tr. 615:2-8.) AUSA Bottini recalls pressing Ms. Tyree, asking follow-up questions and not simply taking her at her word. She disavowed the 302, stating that she did not give the false statement at Mr. Allen’s request and pointing to at least one other purported error it contained. Mr. Russo’s handwritten notes of the July 2004 interview were located and they apparently also contradicted the SeaTac 302, showing that Ms. Tyree may have said the affidavit was her idea—not Allen’s. (*See* CRM080943 (Russo initially wrote “at the request of,” crossed out the word “Bill,” and then wrote “Bambi’s idea.”).)

AUSA Bottini sought advice from his superiors in the U.S. Attorney’s Office, explaining the “full universe of facts” to U.S. Attorney Nelson Cohen and then-Criminal Division Chief Karen Loeffler, including the SeaTac 302 (OPR Tr. 610, 647)—conduct that is the opposite of poor judgment under OPR’s own definition. *See* Analytical Framework ¶ C (citing an attorney’s *failure* to consult supervisors when confronted with a problematic set of circumstances as an example of poor judgment). In a subsequent email to Mr. Marsh, AUSA Bottini urged PIN to consult the Department’s Professional Responsibility Advisory Office (“PRAO”) “as soon as possible,” noted that he had consulted with colleagues in the U.S. Attorney’s Office, and emphasized in particular that “*both Russo and John Eckstein now recall that Bambi told them that Allen asked her to give the sworn statement.*” (Email from Bottini to Marsh (Oct. 8, 2007 4:12 PM) (Ex. 27 to OPR Tr.) (emphasis added).) Mr. Marsh communicated with PRAO, and

later informed AUSA Bottini that PRAO concluded the prosecution had no disclosure obligation. (Schuelke Tr. 695:18-697:2.) AUSA Bottini did not know precisely what Mr. Marsh told PRAO—though he assumed whatever Mr. Marsh told PRAO was full and accurate—and he was never provided a written rendition of PRAO’s advice or the facts upon which that advice was predicated. It was not until later, during the course of this investigation, that AUSA Bottini saw PRAO’s recitation of the facts and learned that it was incomplete.

AUSA Bottini soon pressed PIN about the government’s disclosure obligations again. When a December 2007 newspaper article recounted Mr. Allen’s gifts to the Tyree family, AUSA Bottini worried that it implied Mr. Allen was “greasing the family to keep quiet about his relationship with Bambi”—and that PRAO, which reviewed the Tyree allegations before the press report was published, had not considered the issue. (Schuelke Tr. 697:1-698:19.) At AUSA Bottini’s urging, PIN agreed to approach PRAO a second time; for the second time, Mr. Marsh reported that PRAO concluded the prosecution had no disclosure obligation. (Schuelke Tr. 700:14-22.) AUSA Bottini did not receive a written copy of PRAO’s actual report until January 2008, a few weeks *after* Mr. Welch had admonished him to stop urging PIN to disclose the allegations: “We’ve done all that we are going to do on the matter. . . . Joe and Jim, per the recusal notice, you work for PIN, and so these are your marching orders until I talk to Nelson [Cohen, the interim United States Attorney].” (Email from Welch to Bottini et al. (Dec. 20, 2007, 5:18 PM) (CRM BOTTINI 081094).) AUSA Bottini filed the PRAO report away, rather than reviewing it with a “fine-toothed comb,” because he had been specifically told not to pursue it further. (*See* Schuelke Tr. 708:10-14.) He therefore did not realize that it omitted any mention of the SeaTac 302 and was based on the inaccurate predicate that SA Eckstein’s notes, which in reality were consistent with the 302, “reflect that at the time of the interview [Tyree] was adamant that the lie was her own idea.” (Schuelke Tr. 703:13-705:7, 708:12-14.)

AUSA Bottini revisited the issue, yet again, once the Criminal Division began weighing whether to indict Senator Stevens. He questioned whether a document prepared by Mr. Marsh setting out the government’s strengths and weaknesses should squarely address the Tyree allegations, instead of referring only to Mr. Allen’s “shady personal background.” (Email from Bottini to Marsh et al. (Apr. 7, 2008) (CRM BOTTINI 016214) (“do we need to say or should we say anything more about the Bambi Tyree issue that we have discussed ad naseum w/ PRAO and the current ‘re-opened’ APD investigation of Allen [?]”). PIN declined to follow his suggestion. (Email from Marsh to Bottini et al. (Apr. 7, 2008) (CRM016149) (Mr. Marsh responds that Mr. Welch would probably want to limit any mention of Tyree to the “shady personal background” reference).) Because of PIN’s resistance, AUSA Bottini determined that, along with Mr. Goeke, he would raise the Tyree allegations directly with the Criminal Division leadership in the July 2008 meeting without consulting PIN first. He explained:

In fact, the morning before we had that meeting, Goeke and I went and had breakfast, and I told him, you know, if they, they, the Public Integrity folks, don’t raise this issue about Bill Allen being under investigation for sexual misconduct, including these allegations that he may have procured a false statement from somebody, we have to. Because ironically, I told him, I don’t want to be sitting here down the road a year from now, having somebody ask me how come we didn’t know that?

(Schuelke Tr. 381:14-382:2.) In the end, PIN did omit the Tyree allegations from its presentation, so AUSA Bottini raised them himself, telling Mr. Friedrich and Ms. Glavin that “you need to know about this issue with Bill Allen and the sexual misconduct allegations” and describing the false affidavit, the SeaTac 302, and the Russo notes. (Schuelke Tr. 707:17-709:12 (“I fronted the issue. . . . I explained it to him, and I told him about the allegations involving the procurement of the false statement by Bambi Tyree, what had been done in relation to that as far as additional fact-gathering, that we had gone to PRAO twice with the issue, and the advice that we had obtained was that we didn’t have a disclosure obligation. . . . I recounted the facts and said [Tyree] was interviewed, a 302 exists that says this. She was interviewed after that, disavowed the accuracy of the 302 in that regard. . . . You know, I think I did run through all the facts for [Mr. Friedrich].”); *see also* Email from Bottini to Goeke (July 15, 2008 5:50 PM) (CRM 071953) (AUSA Bottini notes that “Matt and Rita. . . . were interested” in the Tyree allegations he raised during the meeting).)

As the *Stevens* trial drew closer, AUSA Bottini persisted in urging the government to disclose the Tyree false affidavit allegations to the defense and the court. For example, he noted with concern that the government’s draft motion *in limine* to exclude inflammatory cross-examination “obviously [did] not front out the rumored procurement of the false statement from Bambi by Bill.” (Email from Bottini to Ed Sullivan et al. (Aug. 14, 2008 2:24 AM) (CRM075442).) AUSA Bottini believed that the government should disclose the false affidavit allegations to the court even though PRAO had concluded that no disclosure obligation existed, because Judge Sullivan “may view it differently . . . we don’t know how the judge is ultimately going to rule on this.” (OPR Tr. 565:3-566:22.) Thus, he emphasized to PIN that while he was “[c]ompletely aware of what PRAO says,” he did not “want to run afoul of Emmet G. [Sullivan] over this.” (Email from Bottini to Ed Sullivan et al. (Aug. 14, 2008 2:24 AM) (CRM075442).) AUSA Bottini also pressed the trial team to address the allegations of Ms. Tyree’s false affidavit in the government’s August 25, 2008 *Giglio* letter (*see id.*; *see also* Email from Bottini to Morris et al. (Aug. 21, 2008 10:44PM) (CRM035906, CRM036032-33))—an approach that Ms. Morris, Mr. Marsh, and Mr. Sullivan collectively decided to reject in a series of communications that excluded the Alaska attorneys (*see* OPR Draft at 334 (recounting email traffic)). And he urged PIN, whose first draft of the September 9 *Brady* letter omitted the false affidavit allegations altogether (OPR Draft at 131-32), to address them in the letter, particularly because Mr. Allen’s involvement with other juveniles beyond Ms. Tyree had by then come to light (Schuelke Tr. 715:6-717:10; *see also* Email from Bottini to Goeke et al. (Sept. 8, 2008 9:52 AM) (CRM022047)).

B. The Final Report Dismisses AUSA Bottini’s Persistent Good-Faith Efforts And Again Ignores The Context In Which His Conduct Occurred

With certainty, AUSA Bottini’s actions are not those of an attorney who exercised poor judgment—indeed, they are the exact opposite. OPR’s contrary conclusion depends upon viewing AUSA Bottini’s good-faith conduct in the most negative light and ignoring the broader context in which it occurred. For multiple reasons, the poor judgment finding cannot stand.

First, in contending that AUSA Bottini acted with poor judgment by not reviewing the *Brady* letter closely enough to recognize its inaccuracies, OPR all but ignores the context in which he operated—even though its own guidelines make clear that the surrounding

circumstances matter when evaluating attorney performance. *See* Analytical Framework ¶ B.4. PIN dictated the government’s approach to the Tyree allegations from the inception of the *Stevens* prosecution. PIN resisted AUSA Bottini’s disclosure efforts beginning in early 2007, when Mr. Welch declined to mention the Tyree allegations in the government’s search warrant affidavit. PIN directed the process by which the government investigated the allegations, directing AUSA Bottini to interview Ms. Tyree and Mr. Allen in 2007 and 2008. PIN continued to resist disclosure as the *Stevens* trial approached, in some cases discussing their preference not to disclose the allegations internally, without including AUSAs Bottini or Goeke. (*E.g.*, Email from Morris to Marsh & Sullivan (Aug. 22, 2008 1:41 PM) (CRM BOTTINI 027428) (Mr. Marsh emails Ms. Morris and Mr. Sullivan that “the Bambi non-subornation of perjury stuff” should not be revisited because “[w]e have nothing to turn over . . . We have twice investigated this until the end of time and have been blessed by PRAO twice”; Ms. Morris responds, “I agree”).) And PIN bore responsibility for the *Brady* letter under the division of labor its supervisors adopted.

The Final Report acknowledges that AUSA Bottini was not responsible for drafting the *Brady* letter, but contends that he displayed poor judgment by failing to correct it because he reviewed the letter before it was sent and should have known it was inaccurate. FR at 267-68. Not so. It was Mr. Marsh who revised the letter to state that the government conducted a “thorough investigation” of a “suggestion” that Mr. Allen had asked Ms. Tyree to sign a false affidavit, but found “no evidence” to support it; he first circulated a version of the draft letter with that language at 8:53 PM on September 8, FR at 98, 267—fewer than 24 hours before PIN finalized the letter and while AUSA Bottini was traveling on a cross-country flight to Washington. (*See* Email from Morris to Goeke et al. (Sept. 8, 2008 12:37 PM) (CRM BOTTINI 030453) (Ms. Morris proposes 4:00 PM meeting about the Tyree language and acknowledges “I know Joe is traveling”).) And, as we explained in our response to the Draft Report, when he arrived in Washington on the evening of September 8, AUSA Bottini turned immediately to preparing for a September 10 motions hearing he had just been assigned. (Schuelke Tr. 45:9-20; *see id.* at 117:17-118:2 (“[M]y focus on September 9th was getting ready for those oral arguments. . . . that’s what I spent the bulk of the day doing.”).) Against that backdrop, it is wrong to assert that AUSA Bottini displayed poor judgment by skimming the final letter with the understanding that it was being handled by others, and not to review it closely enough to realize it contained errors.

Nor did AUSA Bottini bear a heightened responsibility for ensuring that the letter accurately described the Tyree allegations by virtue of the fact that he ultimately presented Mr. Allen at trial. We told OPR in our response to the Draft Report that both Mr. Welch and Ms. Morris—AUSA Bottini’s supervisors—discussed the Tyree issue at a September 8 meeting with the other PIN attorneys, and both had multiple opportunities to review the letter itself. Given their longstanding involvement in and familiarity with the Tyree issue, AUSA Bottini reasonably believed that Mr. Welch and Ms. Morris had vetted the *Brady* letter and given their blessing to the false affidavit language it contained. Indeed, as OPR concedes, Mr. Welch instructed Ms. Morris, Mr. Marsh, and Mr. Sullivan at the September 8 meeting to review SA Eckstein’s notes, “double-check” the SeaTac302, “make sure [the government] ha[s] it correct,” and memorialize the correct information in the *Brady* letter. FR at 98. OPR cannot credibly assert that AUSA Bottini, who was absent from that meeting and was assigned no responsibility for the *Brady* letter, displayed poor judgment when the other attorneys did not.

Second, OPR should credit AUSA Bottini’s persistent advocacy of disclosure, but it instead continues to belittle it. OPR acknowledges, for instance, that AUSA Bottini urged disclosure of the Tyree allegations in a government’s motion *in limine*, but then comments that he and Mr. Goeke “advocated that position based on strategic considerations—to ‘smoke out’ what the defense knew about the matter.” FR at 264. Similarly, OPR concedes that the Alaska attorneys pressed PIN to disclose the Tyree allegations in the *Brady* letter, but states that they did so “not because they believed there was a duty to do so but to preempt an anticipated claim from the defense that the government was withholding information.” *Id.* We took issue with that sanctimonious attitude in our response to OPR’s draft, exposing how it implied that an attorney’s good-faith efforts to comply with his obligations are entitled to no consideration by OPR if they are accompanied by even a hint of an interest in protecting himself, the trial team, or an eventual conviction from criticism or attack. And we told OPR that its Analytical Framework contains no such standard, for good reason: *of course* attorneys acting in good faith to comply with their ethical obligations do so in part to maintain their professional standing and avoid professional sanctions. Bottini Response at 32-33. OPR ignored us.

Regardless of his motivations, AUSA Bottini’s conduct in any event cannot be viewed in isolation from the backdrop against which it occurred: PIN’s enduring resistance to *any* disclosure. As we showed in our response to the Draft Report and as AUSA Bottini explained in detail to OPR, by the time the prosecution prepared to file its motion *in limine* and draft its *Brady* letter, he and Mr. Goeke had encountered so much resistance from PIN about disclosing the allegations at all that their goal became simply to ensure that the defense was, in some fashion, put on notice about them. (OPR Tr. 175:10-178:5, 662:10-664:17.) AUSA Bottini believed PIN would oppose full disclosure, so he strategically pushed for disclosure sufficient to allow the court to make further inquiries or the defense to conduct its own investigation. The language AUSA Bottini suggested was thus sometimes couched in terms calculated to persuade the skeptics at PIN—as he told OPR, for instance, his recommendation that PIN disclose the allegations to “smoke out what they [the defense] know” was a deliberate “sales pitch” to PIN. (OPR Tr. 662:10-664:17; *see also* Aug. 14, 2008 2:24 AM Email (CRM075442) (urging trial team to address allegations in August 25 *Giglio* letter and stating that “I worry that if we don’t make some mention of it—passing mention of it as a rumor which we investigated and disproved—they may respond to the MIL and raise it”).) Even those modest proposals met resistance at every turn. OPR cannot fairly dispute that, under the circumstances, AUSA Bottini displayed good-faith efforts to ensure the *Brady* letter put the defense on notice about the Tyree allegations—efforts that are incompatible with a finding of poor judgment.

Third, OPR’s passing assertion that AUSA Bottini also displayed poor judgment in connection with the government’s failure to disclose the SeaTac 302, Mr. Russo’s filings, and SA Eckstein’s and Mr. Russo’s recollection of those documents is meritless for many of the same reasons. Despite acknowledging that AUSA Bottini was entitled to and did rely on PRAO’s advice, the Final Report contends that AUSA Bottini nonetheless exhibited poor judgment because he did not “raise[] with his supervisors what he knew, or should have known, with respect to the misrepresentations in the *Brady* letter”—and that, had he done so, “he would have fulfilled his obligations on the disclosure issue as well.” FR at 276. Yet AUSA Bottini *had* informed PIN as early as October 2007 that Mr. Russo and SA Eckstein “now recall that Bambi told them that Allen asked her to give the sworn statement.” (*See* Oct. 8, 2007 4:12 PM Email from Bottini to Marsh.) As we explained in our response to the Draft Report, AUSA Bottini

viewed this email to Mr. Marsh as a notification to PIN management: the Alaska AUSAs rarely interacted directly with Mr. Welch and Ms. Morris during the investigation, instead communicating with (and effectively reporting to) Mr. Marsh and Mr. Sullivan. Bottini Response at 33-34 & n.18. In reality, therefore, and especially from AUSA Bottini's perspective, he *did* inform his supervisors about Mr. Russo's and SA Eckstein's present recollection when he emailed Mr. Marsh—shortly after which he was admonished by Mr. Welch that he and Mr. Goeke should desist from urging more disclosure and remember that they “work for PIN.”¹⁹

Finally, OPR's poor judgment finding is further undermined by its indefensible decision to fault AUSA Bottini for poor judgment while declining to make a similar finding regarding Mr. Goeke, even though both attorneys displayed exactly the same good-faith efforts and worked together to press PIN for disclosure. *See* FR at 268-69. AUSA Bottini persisted in pressing PIN to disclose the Tyree allegations and, based on PIN's longstanding resistance, had good reason to believe that further input from him would prove fruitless. Those *exact same* factors compelled OPR to find that Jim Goeke did not exercise poor judgment: “Goeke had good reason to believe that any further airing of the issue by him might prove counter-productive.” *Id.* We do not contend that OPR erred by declining to find that Mr. Goeke displayed poor judgment, because he did not. But neither did AUSA Bottini, and OPR cannot credibly justify its assertion otherwise. This troubling, disparate treatment of AUSA Bottini is one more reason why OPR's poor judgment finding must be set aside.

VI. OPR'S MISCONDUCT ANALYSIS AND DETERMINATIONS CONTRAVENE THE PRINCIPLES OF FAIRNESS AND ACCOUNTABILITY THAT ARE FOUNDATIONAL TO THE DEPARTMENT OF JUSTICE

The disclosure errors in *Stevens* were a collective failure, and any serious effort to understand why they occurred must consider the role played by the prosecution team's dysfunctional management. By failing to do so, OPR endorses a double-standard of professional responsibility that contradicts and, if not corrected, would undermine the principles of fairness and accountability that are important in any organization and essential to the Department of Justice.

The resulting perception that OPR will respond to high-profile allegations of misconduct with a results-oriented investigation may deter talented attorneys from prosecuting public corruption or other high-stakes cases that, by nature, attract the same sort of scorched-earth

¹⁹ Nor should AUSA Bottini be faulted for not taking additional steps to inquire about Mr. Russo's and SA Eckstein's recollection of the SeaTac interview, as OPR persists in contending. *See* FR at 261. First, given his admonishment by Mr. Welch, AUSA Bottini cannot fairly be blamed for not taking further investigative steps. And in any event, as we explained in our response to the Draft Report, further discussion with Mr. Russo and SA Eckstein would at most have confirmed what AUSA Bottini had already told Mr. Marsh: they now recalled Ms. Tyree saying that she provided the false statement at Mr. Allen's request. Bottini Response at 34 n.18. Given the prosecution's reporting structure, AUSA Bottini had every reason to believe that Mr. Marsh had conveyed Mr. Russo's and SA Eckstein's present recollection to Mr. Welch and Ms. Morris. *Id.* OPR's argument on this score is little more than criticism in search of a justification.

defense tactics that occurred here—in fact, it may deter them from becoming prosecutors at all. So will OPR’s apparent unwillingness to look beyond individual line prosecutors when assigning blame. It is plain that the prosecution’s errors were the product of management failures at every level; those management failures caused poor communication, burdensome shifting of roles and responsibilities, and a division of labor without any centralized supervision, all of which placed undue pressure on the line prosecutors and created an environment in which errors were likely to occur. Against that backdrop, it cannot be true that responsibility for the government’s collective failure rests largely upon a single line attorney—especially one with the character of AUSA Bottini.

As we told OPR in our response to the Draft Report, the law recognizes that supervisors bear some degree of responsibility for the conduct of their subordinates—a principle that should at the very least have compelled OPR, when revising its initial draft, to reconsider what role the prosecution’s management played in fostering its errors and to produce a Final Report that contained an unvarnished assessment of that role. *See* Restatement (Third) of the Law Governing Lawyers § 11(2) (2000) (discipline appropriate where supervisor fails to make reasonable efforts to ensure that subordinates conform to ethical requirements); A.B.A. Model Rules of Prof’l Conduct R. 5.1 (same); D.C. Rules of Prof’l Conduct R. 5.1(c) (supervisor may be disciplined for subordinate’s conduct where he “reasonably should know” of the conduct and fails to take steps to avoid consequences); *In re Cohen*, 847 A.2d 1162, 1166 (D.C. 2004) (under D.C. Rule 5.1, supervisors must “take reasonable steps to become knowledgeable about the actions” of subordinate attorneys and cannot assert “the ostrich-like excuse of saying, in effect, ‘I didn’t know and didn’t want to know’”); *see also* Bottini Response at 43-44. OPR’s failure to do so is all the more surprising given that the Analytical Framework itself encourages consideration of the very institutional problems that arose here. *See* Analytical Framework ¶ C (“OPR can identify for review and consideration by Department officials any issues relating to . . . possible management deficiencies raised in the investigation. OPR can also identify for review and consideration by an office’s managers possible systemic problems found in the office during OPR’s investigation.”).

A drumbeat of criticism from the defense, Judge Sullivan, the news media, and members of Congress has given rise to a presumption that misconduct occurred in the *Stevens* case. Under those circumstances, we understand how it may be easier to affix blame to an individual line attorney than to point to more systemic problems as the cause of the government’s disclosure errors. But the difficulty of confronting the thorny management issues that pervaded this case does not excuse OPR’s failure to do so; nor does it justify OPR’s contorted application of the professional responsibility standards to single AUSA Bottini out for what was, in reality, a collective failure.

VII. CONCLUSION

We do not dispute that the *Stevens* prosecution committed a series of errors that impacted the fairness of the government’s case against Senator Stevens, or that AUSA Bottini played a role in those errors. In retrospect, the errors were not surprising given the high-pressure context in which he and the trial team operated: a demanding judge, a combative defense, a fractured prosecution, and a tightly-compressed pretrial schedule. Any unbiased adjudicator with an appreciation for the challenge of complex trial practice would know that mistakes are bound to

happen under circumstances like these, and human error was just as likely as recklessness, if not more so, to be the cause of the government's errors in this case. *Cf.* David Margolis, Mem. for the Attorney General at 67 (Jan. 5, 2010) (“But as all that glitters is not gold, all flaws do not constitute professional misconduct.”).

The independent reviewer tasked with evaluating OPR's proposed findings agreed. He found that “the failures that led to the collapse of the *Stevens* prosecution were caused by team lapses rather than individual misdeeds, with origins in inept organizational and management decisions that led to a hyper-pressurized environment in which poor judgments, mistakes and errors compounded one another and made it almost inevitable that disclosure violations would occur.” Berg Memorandum at 80. He found that OPR reached misconduct conclusions that did not accurately reflect AUSA Bottini's state of mind, the surrounding circumstances, or even OPR's own requirement that an attorney *know* his conduct was likely to violate an unambiguous obligation. And he found, as we did, that OPR all too often applied its standards unevenly, reaching different conclusions about the conduct of supervisors and line attorneys that are both unfair and wrong as a matter of law.

We do not know why Mr. Ohlson overruled that unbiased review; his perfunctory explanation said nothing more than that Mr. Berg's analysis was “mistaken,” and we can only speculate about the reasons that motivated that unadorned conclusion. We do know, however, that AUSA Bottini has earned his reputation as an “honorable,” “honest,” and “ethical” prosecutor—“a genuinely good and decent person” and “as fair-minded as any prosecutor I have encountered,” in the words of one of the many members of Alaska's defense bar whose letters of reference are appended to this submission. We share that assessment of AUSA Bottini's character. And while AUSA Bottini made mistakes he greatly regrets during the course of the *Stevens* trial, he did not act recklessly. As a matter of fairness and justice, the Final Report's misconduct findings should be rejected and replaced with a finding that AUSA Bottini made mistakes and errors in judgment—a finding he readily admits, and the only one the evidence supports.

EXHIBIT A

INDEX OF REFERENCE LETTERS

Reference Letter of Jo Ann Farrington	Ex. A-1
Reference Letter of Mark H. Bonner	Ex. A-2
Reference Letter of Robert C. Bundy	Ex. A-3
Reference Letter of Robert G. Chadwell	Ex. A-4
Reference Letter of Nelson P. Cohen	Ex. A-5
Reference Letter of Allen N. Dayan	Ex. A-6
Reference Letter of Jeffrey M. Feldman.....	Ex. A-7
Reference Letter of James E. Torgerson.....	Ex. A-8
Reference Letter of Michael N. White.....	Ex. A-9
Reference Letter of Blaine H. Hollis	Ex. A-10

Kevin Ohlson, Chief
Prosecutorial Misconduct Review Unit
United States Department of Justice
Washington, DC

November 25, 2011

Dear Mr. Ohlson:

I write as a professional colleague of Joseph Bottini and James Goeke to provide a perspective that you might find helpful in your consideration of the report of the Office of Professional Responsibility with respect to allegations that members of the prosecution team originally responsible for the prosecution of former Senator Ted Stevens had engaged in prosecutorial misconduct. As you know, there have been leaks to the press indicating that the draft report finds misconduct on the part of two prosecutors whom I know well, while at the same time clearing other members of the prosecution team, including all of the supervisors of the case at the Public Integrity Section, of any misconduct. I write to you based on the assumption that those reports are accurate.

First of all, I wanted to lay out for you the reasons I believe my perspective might be of some value to you. I am the Appellate Chief for the United States Attorney's Office for the District of Alaska, the home office of these two prosecutors during the Polar Pen investigation. Although this Office was recused from the Polar Pen investigation during much of the time in question, we handled the initial stages of the investigation, and I was frequently consulted on legal and tactical issues during that period. During the recusal, this Office provided practical support for the ongoing investigation, and obviously continued to monitor the progress of the cases with intense interest, even though we were no longer aware of the daily investigative developments and decisionmaking. After this Office's recusal ended, and responsibility for the final cases was returned to us, I played an active role in reviewing the disclosures made to the defense, the defense of the convictions of former Alaska State Legislators Kott and Kohring, and their successful re-prosecutions, so I am intimately familiar with the details of this matter.

In addition, before coming to this Office, I served for 22 years in the Public Integrity Section of the Criminal Division at Main Justice, including ten years as a Deputy Chief of the Section, primarily responsible for the handling of Independent Counsel matters. As a result, I have considerable experience with the pressures of handling high-profile matters that are being closely supervised by the Front Office of the Criminal Division, the Deputy Attorney General's Office, and the Attorney General's Office. I also observed first-hand over many years the difficulties of trying cases away from home, under onslaught by capable and determined defense counsel, without the support systems and familiar routine that an AUSA comes to rely on in handling complex cases.

I make these points just to make it clear that I know the Polar Pen prosecutions well, including the disclosure issues involved; that I have substantial experience with the sort of prosecutions involved here; and that I have personal knowledge of the character and personal integrity of the two prosecutors involved. With that in mind, I hope you will consider my input to be of some value.

Joe Bottini was already a veteran member of the Office when I joined it in 2003. He had served as an AUSA for many years, including stints as the Criminal Chief and as the Acting United States Attorney during interregnum periods. I quickly came to learn that Joe's stellar reputation in the Office is well-deserved. He is always level-headed, always a source of wise counsel, always a voice of tempered reason. I have *never* known him to cut corners, or urge an unreasonable litigating position. Our district court judges have commented to me, expressing bewilderment at how this matter appears to be playing out, that he enjoys their complete trust and respect, earned over many years. At the same time, Joe recognizes the authority of those supervising him to resolve debatable issues, and will then do his best then to carry out his instructions. He is also a person who readily admits his mistakes (and we all make mistakes), and takes steps to remedy them. As a supervisor of prosecutors over many years, I have had the unhappy experience of trying to work with prosecutors who look at a prosecution as a competition, in which the goal is to win, usually with one eye toward a lucrative private practice in the future. Joe is not one of those. Instead, 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.

To the extent that Joe offered explanations for the events that occurred in the course of these investigations and prosecutions, I can offer you my personal belief, based on considerable experience with him as an individual and as a prosecutor, that you can accept his word without question. Assuming the reports are true that the draft report concludes he was guilty of prosecutorial misconduct, particularly if based on inferences concerning credibility, I can tell you that I would view that conclusion with the most extreme scepticism, because it is at odds with everything I know about the man. He might have made a mistake; he might have forgotten some fact that should have been disclosed; he might have concluded that some information need not be revealed that a court later concluded should have been, but under the extraordinary pressure of trying to bring the Stevens case to trial in record time in a city on the other side of the country, before a hostile judge and under the daily scrutiny of the Front Office, those are missteps that could, I believe, happen to even the most careful and cautious – and ethical – prosecutor. We AUSAs who do our best, day after day, to do our jobs well, responsibly and ethically, should not be put in the position of looking at a finding of misconduct by OPR, knowing we could have been in the same position in spite of our best efforts. We – and Joe and Jim – deserve better from our Department.

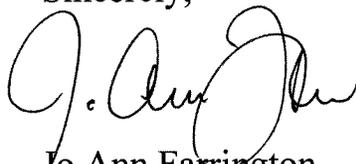
Jim Goeke joined the office not long after I did, coming from private practice to fulfill a long-held dream of public service. He, like Joe, has continued to do his job, day after day, throughout this long ordeal, because it is work that he loves and cares deeply about. Jim does not have the depth of experience that Joe has, and I have not worked with him for the last few years since he transferred to the United State's Attorney's Office for the Eastern District of Washington, but based on my experience working with him here, he is a man of the highest integrity, solid judgment and the best intentions. Like Joe, I would accept his word without question on any matter.

Finally, I would like to express a concern that I have heard repeated again and again during the long months of this investigation by AUSAs, a concern that I share. Whatever your ultimate conclusion, I urge the Department to make it clear exactly what these lawyers should have done differently in the course of their handling of discovery in order to avoid the problems that occurred, and identify the Departmental directive or training that would have made it clear what was expected of them. As I said, I do not know what specific issues OPR has focused on, but based on my own considerable familiarity with the record in this case, I

have seen nothing that occurred that could not be readily explained, in good faith and, I believe, accurately, by honest failures of memory, legitimate differences of opinion with respect to the limits of our disclosure obligations, and the extraordinary pressure brought to bear on these prosecutors leading up to the Stevens trial. If it is the obligation of each member of a prosecutorial team to personally review all hand-written notes by every investigator and prosecutor from the inception of an investigation, on pain of a finding of prosecutorial misconduct if it turns out there is any potentially exculpatory or impeaching information overlooked, AUSAs need to be instructed to that effect, because I do not believe it is the routine practice. (Here, I refer to Bill Allen's initial failure to remember having spoken to Robert Persons about the so-called Torricelli note). If a prosecutor is not permitted to rely on the decision of his or her supervisor that a particular piece of information is not *Giglio* and should not be turned over, we need to be told that. (Here, I refer to the decision not to disclose the allegations of sexual misconduct and solicitation of a false affidavit by Bill Allen.) Joe and Jim should not be held to a standard that is not – or was not at the time – the routine for a reasonable prosecutor.

I hope that my observations are of some assistance to you, and I trust you and the others who review this recommendation to do the right thing.

Sincerely,

A handwritten signature in black ink, appearing to read "Jo Ann Farrington". The signature is fluid and cursive, with a large initial "J" and "F".

Jo Ann Farrington
Appellate Chief
United States Attorney's Office
District of Alaska
Anchorage, Alaska



Ave Maria
SCHOOL OF LAW

March 24, 2010

Henry F. Schuelke, III, Esq.
Janis, Schuelke & Wechsler
1728 Massachusetts Avenue, N.W.
Washington, DC 20036-1903

Re: Joseph W. Bottini

Dear Mr. Schuelke:

Firstly, let me say that I know Joe Bottini, and I know others who know him: his 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. I would trust him to act lawfully and ethically in the most important case and even under the most extreme pressure. I would be happy to repeat this under oath. Both from what I know of him as colleague and as a human being, it is inconceivable to me that he would knowingly violate a known legal duty (including discovery and *Brady* duties). He is careful, honest, assiduous, possessed of sound judgment, learned in the law, and well-respected. He is also kind, generous, fair, and has an easy sense of humor. He is capable and accomplished, and notwithstanding that, he is self-effacing and modest. He's a credit to DOJ, the USAO, and to the Bar.

I have known Joe and his family continuously since 1991. I first met him professionally in September 1991, approximately one week after a mail bomb killed David Kerr and catastrophically injured his wife, Michelle near Anchorage. I was working as a trial attorney in the Terrorism & Violent Crime Section of the Criminal Division of DOJ at the time, and had been assigned from Washington, DC to handle the case. I worked daily with AUSA Bottini, whom I chose as my partner. We worked principally in Alaska, and then in Tacoma and Los Angeles where the trials ultimately were held, through 1996. We also worked on two interlocutory appeals together, on the appeal from the convictions, and on subsequent habeas petitions. I have seen him, his family, and colleagues on largely an annual basis since then during my visits to Anchorage to go fishing with him, federal agents, and other AUSAs, where I am usually the houseguest of the US Attorney. I speak with him regularly on the telephone. I also have seen Joe during some of his visits to Washington; most recently I saw him and spent some time with him during the Stevens trial. When he's available, I would like him and Cindy to visit me and my wife in Naples, where I would like him to address one of my classes.

Joe does not grasp for the spotlight or for self-promotion. An insight into Joe's character came to me when he was appointed US Attorney for the District of Alaska. This occurred in the middle of our working together on the mail bomb case. Prior to his appointment, we had listed my name first on the multitude of motions, briefs, and replies that we were producing, due to my seniority and assignment, followed by his name. In other words, he was billed as second chair in what was then the most notorious and publicized case in Alaska history. When Joe was appointed US Attorney during the case, it seemed right to me that his name should now be listed first on our documents. There's a difference between being an Assistant and in being the actual chief law enforcement officer in the District. I told Joe that we were going to do it this way and actually had to insist, despite his saying no. This had to come from me, and had to be implemented over Joe's objection.

Joe is sincere and polite. In cross-examining the co-defendant supplier of the explosives in the mail bomb case, Joe's demeanor and language toward the defendant gave me a further insight into his character. Joe was measured, professional, and addressed the defendant respectfully. One thing I noticed was that if Joe erred during his examination it was in being too polite to the defendant!

Joe doesn't cut corners or sail close to the wind in the discharge of his office. In years of close-quarters working together on what was then the State's most notorious case, I never perceived even a hint of even a consideration of not playing it straight from Joe. In dealing with the numerous defense counsel in the case, Joe was invariably on very good terms with them. And when we went into court before judicial officers in Alaska, Joe was regularly received there with the tokens of welcome and respect that litigators value from the bench. The Federal Public Defender, Richard Curtner, represented the principal defendant (Raymond D. Cheely, Jr.). In testimony to how he is regarded by his opponents, to Joe's credit the FPD was and remains a supporter of Joe. The same can be said concerning sitting U.S. District Judge Timothy Burgess (D. AK) who was previously Joe's colleague in the USAO for many years.

Joe treats victims with compassion and understanding. The surviving victim of the mail bombing (Michelle Kerr) is one of Joe's biggest fans; he treated her with concern, respect, and a gentleness that might be somewhat unexpected from Joe's physical size. She still sends him Christmas cards every year. Joe's marriage to a Japanese-American from California, and their healthy family life with their three children is an example of his being in a way like St. Nathaniel: a man in whom there is no guile.

I would be happy to provide this information and to speak with anyone concerned, either on the telephone or in person.

Sincerely,



Mark Healy Bonner (DC Bar #202036)
Associate Professor of Law
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March 23, 2010

Mr. Henry F. Schuelke, III
Janis, Schuelke & Wechsler
1728 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Re: Joseph Bottini

Dear Mr. Schuelke:

I have been requested by Joseph Bottini's attorneys to provide you with my impressions of his reputation for honesty and integrity in the Alaska legal community, as well as my experiences working with him during my tenure as United States Attorney for the District of Alaska.

I understand that you are in the process of considering Mr. Bottini's actions or omissions in the case of *United States v. Stevens*. You took my deposition in the course of your inquiry and I have nothing further to add to the information I provided you there about the activities of the Stevens prosecution team.

I have been acquainted with Mr. Bottini since the mid-1980s, but did not work with him until I became United States Attorney in 1994. At the time I took office, Mr. Bottini had served as the interim U.S. Attorney for nearly one year. It was clear from the beginning that Mr. 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. As an Assistant U.S. Attorney, Mr. Bottini performed his duties professionally and without complaint. He worked long hours on his own cases yet always seemed to be available to assist other lawyers in the office when asked. In many ways he was the "go to" person for difficult cases, be they long complex prosecutions, such as a multiple defendant mail bomb case, or simply sensitive cases, such as a misdemeanor prosecution of a locally well-known person. I never received a complaint about Mr. Bottini's performance as a Assistant United States Attorney, ethical or otherwise, from any judge, attorney, law enforcement agent or member of the public.

What I believe to be most remarkable about Mr. Bottini's tenure as an Assistant United States Attorney, is his unwillingness to seek personal status or attention. I asked Mr. Bottini to serve as criminal chief, and I understand that several of my successors in the office have asked him to assume supervisory positions as well. Except to take on supervisory duties on an interim basis, Mr. Bottini declined the opportunity to advance in the hierarchy. During my tenure, Mr. Bottini served as an informal leader of the office, while maintaining a full caseload, but showed no interest in the personal status and power that goes with a supervisory position.

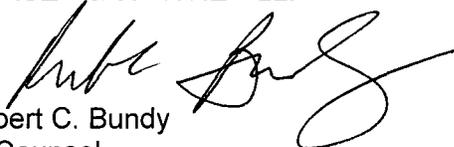
Mr. Henry F. Schuelke III
March 23, 2010
Page 2

Mr. Bottini is well known among lawyers practicing criminal law in the United States District Court in Alaska and is, to my knowledge, uniformly liked and respected. He is not seen as vindictive, overzealous, or uncompassionate. He is respected as a good trial lawyer, well versed in criminal law.

I hope my perspective is of some assistance to you in your difficult and important inquiry.

Very truly yours,

DORSEY & WHITNEY LLP


Robert C. Bundy
Of Counsel

cc: Paul Knight
Kenneth Wainstein

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Robert G. Chadwell
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rgc1@mckay-chadwell.com

March 25, 2010

Mr. Henry F. Schuelke
Janis, Schuelke & Wechsler
1728 Massachusetts Ave. NW
Washington, DC 20036

Re: AUSA Joe Bottini

Dear Mr. Schuelke,

The purpose of my letter is to give you both my personal perspective and a broader view of the character of Joe Bottini. Since we have never met, let me share some of my background as a means of giving you a basis for evaluating my comments. I have been a member of a small firm for the past 15 years. The senior members of the firm, including myself, have all served in the Department of Justice. We have two former presidentially appointed U.S. Attorneys, a former interim U.S. Attorney and U.S. Magistrate Judge, and I served as Criminal Chief in the U.S. Attorney's Office for the Western District of Washington. The bulk of my personal practice has been complex fraud and white collar criminal defense.

I first met Joe in approximately 1990, when I was assigned to serve as a Special AUSA in the U.S. Attorney's Office in Anchorage on an investigation which the Alaska office could not handle because of a conflict issue. Shortly thereafter, Joe and I worked together investigating and successfully prosecuting members of a Taiwanese based fishing operations who were illegally harvesting immature salmon on the high seas. In the course of this case, Joe and I became friends and our families are friends. We have remained in contact since then. We went on to work together on a number of other cases until I left the U. S. Attorney's Office in Seattle to start my present firm.

Because of the size of the defense bar in Alaska, attorneys from Seattle are often involved in representing clients in matters being investigated and prosecuted in Alaska. I have had occasion to work with Joe in cases in which we were in adversarial roles. And, we've also worked in cases in which we had shared interests. Regardless of our relative positions, I have always found Joe to be a true professional. He is hard working and thoughtful.

Joe has always shunned the spotlight. He is satisfied to know within himself that he has done a good job. He served as Criminal Chief and interim U.S. Attorney in the past but never sought those positions. Although he has been touted as a presidentially appointed candidate for U.S. Attorney in the past, he has studiously avoided nomination. He is happiest serving as a line

March 31, 2010

Page 2

Assistant and aspires to no greater position within the Department of Justice. In that capacity, the people of Alaska and the United States have been well served by Joe.

In his duties as an AUSA, there is no doubt that he is the advocate for the United States. Personal relationships are put aside. However, he does not see the defendant or defendants as the enemy. I've watched him both in private sessions and in Court and he treats all parties with respect. He does not take a personal stake, beyond doing his best job, in a case.

An attorney with Joe's skills and experience could command a prestigious income and an equally impressive position in private practice. However, Joe continues to live modestly and faces the same financial struggles of any middle class family with three children approaching college age. Simply, he is happy where he is doing the work he does. He is devoid of the ambitions for personal advancement within the Department, financial gain, or public fame that have led others to place themselves above their ethical obligation.

I am a member of a number of defense organizations and know most of the attorneys in Anchorage and Seattle that have come in professional contact with Joe, many of whom represented individuals involved in the investigation and prosecution of Senator Stevens. Of course the Senator's trial and the developments following the trial were a frequent topic of our conversations. The opinions voiced in those conversations were unanimously favorable to Joe. As each recounted a story of their individual encounter with him in a particular case, they concluded by saying, in their own fashion, that Joe was a fair man and a man of his word. We all agreed that he would not intentionally conceal or knowingly participate in concealing relevant evidence, especially exculpatory evidence. This came from a group of attorneys that are universally frustrated by the state of the law on criminal discovery in the federal system.

To sum up, 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, honesty and hard work is well deserved. His history of treating defendants with respect and doing his job without personal agenda is well known. On a personal note, I would accept Joe's word and his hand shake on any matter knowing that it was more reliable than any document that could be drafted.

While I know I am biased, I also have had the opportunity to see Joe from many perspectives. I trust my letter is helpful to you in carrying out your responsibilities. Thank you for taking on the task.

Very truly yours,

McKAY CHADWELL, PLLC

Robert G. Chadwell

March 29, 2010

Henry F. Schuelke, III, Esquire
c/o Jeffrey S. Nestler
O'Melveny & Myers LLP
1625 Eye Street N.W.
Washington DC 20006

RE: Assistant U.S. Attorney Joe Bottini

Dear Mr. Schuelke:

I am writing to provide you with information that may be of assistance to you in your analysis of a matter regarding Assistant U.S. Attorney Joe Bottini.

Please permit me to share with you my background. Twenty-six of my 35 years practicing law have been devoted to public service through the Department of Justice including several years as the Chief of the White Collar Crime Section in the U.S. Attorney's Office in the Western District of Pennsylvania, and 30 months as the United States Attorney for the District of Alaska.

One of my first undertakings after I was sworn in as U.S. Attorney in August 2006 was to meet individually with each member of the staff. That is when I met Mr. Bottini. For the following 30 months I had periodic but not daily contact with him. It was, however, through my conversations with others that I learned the most about Mr. Bottini. He is uniformly respected and considered one of the most ethical, professional, honest, knowledgeable, reliable and even tempered prosecutors in the office. 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, Mr. 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. Indeed, Mr. Bottini is unlikely to assert himself with his colleagues if he feels doing so would create hard feelings. For example, in the setting of a trial team deciding on a lead attorney for an upcoming trial (and this is not a reference to the Stevens case), if Mr. Bottini were the best choice for lead counsel by reason of ability and experience, but another team member less able made it known that he or she wanted to be lead, Mr. Bottini would most likely acquiesce. Similarly, he is reticent to supervise others preferring to interact as a peer rather than as a manager.

From what I saw and heard during all of my interactions with Joe Bottini, and what I know of him through others, I hold a doubt-free belief that Joe Bottini values doing what is right over doing whatever it takes to win. No matter how harmful information may be to his case, he is not the type of prosecutor to bury it. He is a man of conscience and honor who has devoted his life as a federal prosecutor to doing the right thing. As U.S. Attorney I was proud to call Joe Bottini my colleague and fortunate that he was on my staff.

By the end of your investigation I hope you will agree with me that Joe Bottini is a highly ethical, hard working, honest attorney who is a tremendous asset and exemplary employee of the Department of Justice.

Thank you for your consideration of my views.

Very truly yours,



NELSON P. COHEN

NPC/dls

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March 18, 2010

Henry F. Schuelke, III, Esq.
Janis, Schuelke & Wechsler
1728 Massachusetts Avenue, N.W.
Washington, D.C. 20036-1903

Dear Mr. Schuelke:

I have been a practicing criminal defense lawyer for 29 years. I have been practicing in Alaska's U.S. District Courts since 1988. Criminal law is 95% of my firm's practice. As a result, I have known Joe Bottini professionally for at least 16 or 17 years and I have litigated several criminal cases against him. We do not socialize outside of work. Mr. Bottini's practice has always been to let opposing counsel know of all evidence against the defendant that is required. On many occasions, Mr. 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. This approach has better served the government, the defendant and the court system. I have never known him to withhold evidence. He has always been candid, truthful and forthcoming. I certainly cannot say that about all prosecutors.

The Alaska federal criminal bar is relatively small. I certainly would have heard if Mr. Bottini was in the habit of withholding evidence. Joe Bottini's reputation for integrity in the Anchorage criminal law community is excellent. I have never heard any complaints from fellow defense lawyers regarding his conduct in cases, or otherwise. In my opinion, he is a fine public servant and a good man.

If it is shown that Mr. Bottini did commit any ethical breach, then I am sure it was a one-time aberration in an otherwise long and unblemished career of public service.

Sincerely,



Allen Dayan

FELDMAN ORLANSKY & SANDERS

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March 17, 2010

Henry Schuelke
JANIS, SCHUELKE & WECHSLER
1728 Massachusetts Avenue, NW
Washington, DC 20036

Re: Assistant U.S. Attorney Joseph W. Bottini

Dear Mr. Schuelke:

I am writing on behalf of Assistant U.S. Attorney Joseph Bottini. I have known Mr. Bottini for approximately twenty-five years, both as a respected colleague and as a skilled and able adversary. I understand that Mr. Bottini's actions in connection with the criminal prosecution of former U.S. Senator Ted Stevens are under review by the Department of Justice. This letter offers my assessment of Mr. Bottini's character and my observations of his approach toward his work as a prosecutor, with the hope that the information provided will be of assistance to you in reviewing this matter.

By way of background, I have practiced law for thirty-five years. I started my legal career as a law clerk for the Alaska Supreme Court and, since that time, have maintained an active trial and appellate practice in Alaska, consisting of both civil and criminal matters. Over the course of my career, I have devoted a significant amount of time to matters involving issues of professional ethics. I served two terms on the Board of Governors of the Alaska Bar Association, including one term as president of the Association. In Alaska, the Bar Association is responsible for enforcement of the Rules of Professional Conduct and the imposition of lawyer discipline. I also served as a member and chair of the Alaska Commission on Judicial Conduct for 13 years. The Commission is responsible for enforcement of the Code of Judicial Conduct and the imposition of judicial discipline in Alaska. As a result of twenty years of experience applying professional standards to Alaska lawyers and judges, I believe that I have a strong and respectful appreciation for the standards to which all lawyers properly are held.

Henry Schuelke
March 17, 2010
Page 2

I first met Mr. Bottini after he completed law school and returned to Alaska to serve as a law clerk to Superior Court Judge Seaborn J. Buckalew. From the outset, Mr. Bottini struck me as a bright and conscientious young lawyer, impressively committed to his professional responsibilities. As a law clerk, he was courteous and respectful of litigants and counsel, meticulous in his legal work, and devoted to serving Judge Buckalew, who was a much admired and beloved jurist in our state. Judge Buckalew had served as a respected state prosecutor before his appointment to the bench, and my impression is that he imprinted Mr. Bottini early on with his own high ethical standards and his commitment to public service. As a result, it was not surprising that, after he completed his clerkship, Mr. Bottini embarked on a career as a prosecutor, first for the State of Alaska and, thereafter, for the United States Attorney for the District of Alaska. A significant portion of my caseload over the years has consisted of the defense of criminal cases, so I encountered Mr. Bottini as an adversary with some regularity.

I can state, without any reservation, that Mr. 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.

As a prosecutor, Mr. Bottini plays by the rules. He does not cut corners. He is careful and disciplined. His word is his bond and he is completely trustworthy. More than once, I have made significant decisions in cases I have handled based solely on my confidence and trust in representations he made to me. I would do so again in a heartbeat, as he never gave me any reason to doubt his candor or trustworthiness. Mr. Bottini exemplifies all of the qualities, characteristics, and abilities that we want all individuals who do the important work of enforcing the law to display. He is as thoughtful, professional, and fair-minded as any prosecutor I have encountered.

Mr. Bottini couples these professional characteristics with equally impressive personal qualities. He is mature. He is unfailingly courteous. He exercises sound judgment and is able to display a deft sense of humor that oftentimes can defuse what otherwise would be a difficult moment. He is kind and thoughtful; there have been times, long after a case was concluded, when he took the time to ask me how someone that I represented (and that he prosecuted) was doing. He is a modest man, without ego, and incapable of saying or doing something that is self-aggrandizing. In sum, Mr. Bottini always has struck me as an exceptionally skilled prosecutor and a genuinely good and decent person, highly respected by his colleagues, his adversaries, and the judges before whom he appears.

Like many Alaskans, I read reports of the Stevens trial and the issues that arose. As a defense lawyer who regularly faces federal prosecutors, I take allegations of

Henry Schuelke
March 17, 2010
Page 3

prosecutorial misconduct seriously and I understand the damage that can result when rules are bent or violated. It is difficult to speak to the issues raised by the Stevens prosecution as they pertain to Mr. Bottini, since the underlying allegations and questions are so totally at odds with the person I have known for quite a long time. It is inconceivable to me that Mr. Bottini would knowingly fail to meet his obligations as a prosecutor or knowingly fail to comply with a court's rules or orders. I have encountered prosecutors who gave me pause to consider whether the discovery I was provided was complete, or reason to question whether statements they made were accurate. Suffice it to say that, based on a quarter century of experience, I firmly believe that Mr. Bottini is not such an individual. He has a steady and true moral compass, and he takes his obligations as a prosecutor seriously.

I do not know the details of the issues that are under review by the Department of Justice. What I do know is that Mr. Bottini is an exceptional person. If there is to be a post-mortem assessment of decisions and actions that were made during the course of the Stevens prosecution, the manner in which Mr. Bottini has lived his life and practiced law over the past 25 years should militate in favor of giving him the benefit of every doubt. I do not offer these assessments lightly or casually. I know the matter under review is important, both to the Department of Justice and to the individuals involved. I have given this letter serious consideration, and I share these comments with the importance of the task at hand very much in mind.

Please let me know if I can provide any additional information that would be of assistance to you.

Very truly yours,

FELDMAN ORLANSKY & SANDERS



Jeffrey M. Feldman

JMF:jaf



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JAMES E. TORGERSON
Direct (907) 263-8404

March 31, 2010

Henry F. Schuelke, III, Esq.
Janis, Schuelke & Wechkler
1728 Massachusetts Avenue, N.W.
Washington, DC 20036-1903

Re: Joe Bottini

Dear Mr. Schuelke:

I have practiced law in Alaska for 25 years. I have a litigation practice that includes federal white collar criminal defense. For the last couple of years, I have been the managing partner of Stoel Rives LLP's Anchorage office. Before that, I was the managing partner of Heller Ehrman's Anchorage office for 10 years. I worked in the Alaska United States Attorney's office for almost 8 years before I went into private practice, first as a line assistant, then as Chief of the Criminal Section and finally as Chief of the Civil Section.

I began working with Joe Bottini in 1991 when I joined the United States Attorneys' Office. I was his peer, when we were both Assistant United States Attorneys. I have been his supervisor, when I was Chief of the Criminal Section and he was a line assistant, and his subordinate, when he was the Acting U.S. Attorney for the District of Alaska for almost a year in 1993-1994. More recently, I have dealt with him as an "adversary," in the course of my white collar criminal defense work.

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.

My opinion of Joe has not changed now that I am a member of the defense bar. In my dealings with Joe, he always has been candid and forthright. If he makes a representation regarding the United State's interest in my client I know I can trust him absolutely. I also know that my perception of Joe, and experience of him, is neither unique nor a result of our long acquaintance. I have talked with other defense attorneys over the years who have the same experience of Joe, including out-of-town counsel who have no history of a relationship with him. I have heard



Henry F. Schuelke, III, Esq.

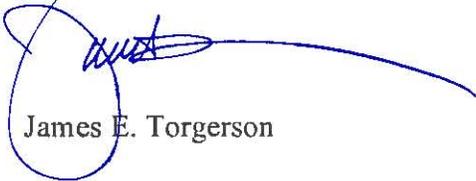
March 31, 2010

Page 2

more criminal defense lawyers say positive things about Joe, including before the events of the last couple of years, then I have heard them say about any other prosecutor.

In conclusion, while I do not know the specific circumstances of the concerns involving Joe arising from the *Stevens* case, I do have the privilege of knowing Joe. I have deep confidence that he would not knowingly fail to disclose exculpatory material to the defense or participate in misleading the court in any way.

Very truly yours,



James E. Torgerson

LAW OFFICE OF MICHAEL WHITE

Michael N. White, Admitted in Washington and Alaska

March 17, 2010

Henry F. Schuelke, III, Esq.
Janis, Schuelke & Wechsler
1728 Massachusetts Avenue, N.W.
Washington, D.C. 20036-1903

Dear Mr. Schulke:

I have represented many defendants charged by the United States with criminal offenses in Alaska. I write to provide you with my perspectives as to Joe Bottini. Before doing so, I will provide you with some information about myself.

Upon graduation from law school in 1979 I went to Alaska and became an assistant District Attorney in Anchorage, then District Attorney in two judicial districts in Alaska. In 1984 I was appointed to the state court bench. I left the judiciary and went into the private practice of law in 1987 and have been in practice since then. In my practice I have handled numerous state and federal serious commercial fishery offenses, and have had AUSA Bottini as the prosecutor in numerous cases. My best guess is that I have had between 5-10 cases against Mr. Bottini.

I can unequivocally state that AUSA Bottini is a breath of fresh air in the Alaska United States Attorney's office. I would go to the bank on Mr. Bottini's word. There isn't another prosecutor in that office about whom I would make that statement. In all of my cases with Mr. Bottini, I have never sensed a discovery violation, nor have I seen Mr. Bottini take any action that wasn't honorable and in accord with the highest standards of the Department of Justice.

I can give a recent example of Mr. Bottini taking the extra step to make sure that results obtained by the DOJ are fair. I represented a defendant twelve years ago that Mr. Bottini prosecuted. Although I forget many of the details, the case started as a criminal prosecution of a Canadian married couple for some type of commercial fishing violations. Ultimately the case resolved as a civil fine against the husband only. Years later the husband reported to me that every time that his wife enters the United States there is a problem with immigration, apparently related to the earlier criminal charges

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that were dismissed. On two separate occasions, based on complaints from me, Mr. Bottini took steps to make sure that it is clear in United State's computer systems that the criminal case was resolved with no adverse consequences for this woman.

When I heard that there would be an investigation based on misconduct by the DOJ, I wasn't completely surprised. I was shocked, however, that Joe Bottini's was part of the investigation. I can't think of another AUSA for whom I would write this letter. I would trust a client's, or my future on AUSA's Bottini's word and integrity. Mr. Bottini exemplifies the very best that we all hope for in the Department of Justice.

If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael N. White". The signature is stylized, with a large, sweeping flourish that extends to the right and then loops back down.

Michael N. White

BLAINE H. HOLLIS
3766 Glacier Highway
Juneau, Alaska 99801
(907)780-9988

January 28, 2011

Kenneth Wainstein
O'Melveny & Myers
1625 I street, N.W.
Washington, D.C. 20006

Re: Joe Bottini

Dear Mr. Wainstein,

I am an attorney and retired Coast Guard officer, having retired from the Coast Guard as a Commander in 1999. I am currently in private practice in Juneau, Alaska.

During my Coast Guard career, from 1991 to 1994, I was assigned to the U.S. Attorney's Office in Anchorage, Alaska, as a Special Assistant U.S. Attorney. During that time I came to know Joe Bottini very well.

Although I was impressed with all of the AUSAs I worked with at the U.S. Attorney's Office, I think I can safely say that Joe was the best of them. And I doubt that if you asked any of the other AUSAs, any of them would disagree with me on this. Joe was the consummate professional—extremely knowledgeable and skillful, and wholly dedicated to his work. Not surprisingly, Joe was the one everyone went to for advice or help on difficult cases, and he was always willing to lend a hand.

In addition to being one of the best lawyers I have ever worked with, Joe Bottini is also one of the very best human beings I have ever had the pleasure of knowing. Always friendly and approachable, and without even a hint of pride or arrogance, Joe was (and I'm sure still is) liked by everyone. There was simply no one who didn't like Joe Bottini.

Joe was also a "straight shooter." He didn't play games or try to sand bag his opponents. If he told you something, you could count on it. There is no deceit in Joe Bottini, and I trust him implicitly to this day.

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. So I am both shocked and very saddened to see him in the position in which he now finds himself.

Joe did not ask me to write this letter, but I nevertheless felt compelled to do so. I think it's very important that those who are looking into the Ted Stevens prosecution know what kind of a man Joe Bottini truly is, and I hope that you will share this letter with the Special Prosecutor and Department of Justice.

Please let me know if I can be of any further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Blaine H. Hollis". The signature is fluid and cursive, with a distinct loop at the end.

Blaine H. Hollis



U.S. Department of Justice

Office of the Deputy Attorney General

Professional Misconduct Review Unit
Terrence Berg
Attorney

Direct 313-226-9160
terrence.berg@usdoj.gov

CONFIDENTIAL AND PRIVACY ACT SENSITIVE

TO: Joseph A. Bottini
Assistant United States Attorney

CC: Karen L. Loeffler
United States Attorney
District of Alaska

FROM: Professional Misconduct Review Unit

THROUGH: Terrence Berg 
Professional Misconduct Review Unit Attorney

DATE: **INSERT**

SUBJECT: OPR Investigation of Joseph A. Bottini (August 15, 2011)
Memorandum in Support of Finding of Poor Judgment

Pursuant to a delegation of authority signed by the Deputy Attorney General on May 16, 2011 and consistent with the provisions of the memorandum entitled, "Revised Process for Handling Professional Misconduct Disciplinary Actions," which was signed by the Acting Deputy Attorney General on December 5, 2010, I have been designated to propose the appropriate discipline, if any, arising out of the Office of Professional Responsibility (OPR) Report of Investigation (ROI) captioned "Investigation of allegations of prosecutorial misconduct in *United States v. Theodore F. Stevens, Crim. No. 08-231 (D.D.C. 2009) (EGS)*" dated August 15, 2011. Based on the ROI, and supporting materials provided by OPR, I have concluded that the record does not demonstrate by a preponderance of the evidence that you acted in reckless disregard of your professional responsibilities but rather exercised poor judgment. As a result of this finding, I am not authorized to recommend discipline.

I. Executive Summary

OPR conducted an investigation into whether you committed professional misconduct in connection with your role as the second-chair trial attorney in the case of *United States v. Theodore F. Stevens*. OPR concluded that, although you did not engage in any intentional professional misconduct, you acted in reckless disregard of your disclosure obligations under constitutional *Brady* and *Giglio* principles and Department of Justice policy (USAM § 9-5.001) in three ways: (1) by failing to disclose certain statements made by government witness Bill

Allen contained in your notes from an April 15, 2008 interview of Allen; (2) by failing to disclose in a timely manner statements made by government witness Bill Allen contained in an FBI form FD-302 dated February 28, 2007 (“the Pluta 302”) and a Memorandum of Interview conducted by an IRS agent on December 11-12, 2006 (“the IRS MOI”); and (3) by failing to disclose certain prior statements made by government witness Rocky Williams.¹

OPR also concluded that you exercised poor judgment by failing to advise your supervisors of errors in the government’s *Brady* letter dated September 9, 2008, which inaccurately stated that the government had no evidence to support an allegation that government witness Bill Allen had requested a witness to make a false sworn statement.

OPR’s reckless misconduct and poor judgment findings relate to your actions pertaining to prior statements or actions by government witnesses Bill Allen and Rocky Williams that were helpful to the defense and should have been disclosed under *Brady* and *Giglio* and Department of Justice policy (USAM § 9-5.001). Although I agree with OPR’s general findings that the government committed disclosure violations, I do not agree that the evidence is sufficient to prove your individual culpability in acting “recklessly” in disregard of your professional obligations as an individual.² After carefully reviewing the evidence and documentation presented,³ I find that you exercised poor judgment rather than acted in reckless disregard of

¹ See ROI at 670-71.

² “An attorney acts in reckless disregard of an obligation or standard when: (1) the attorney knows or should know, based on his or her experience and the unambiguous nature of the obligation or standard, of an obligation or standard; (2) the attorney knows or should know, based on his or her experience and the unambiguous applicability of the obligation or standard, that the attorney’s conduct involves a substantial likelihood that he or she will violate, or cause a violation of, the obligation or standard; and (3) the attorney nonetheless engages in the conduct, which is objectively unreasonable under all the circumstances. Thus, an attorney’s disregard of an obligation is reckless when it represents a gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation.” ROI at 125.

³ The evidence and documentation that I reviewed included: the Office of Professional Responsibility (OPR) Report of Investigation (ROI) captioned “Investigation of allegations of prosecutorial misconduct in *United States v. Theodore F. Stevens, Crim. No. 08-231 (D.D.C. 2009) (EGS)*” dated August 15, 2011, with Appendices, which included Tab A: Feb. 8, 2011 letter from Kenneth L. Wainstein on behalf of Joseph Bottini; Tab B: Feb. 7, 2011 letter from Bonnie J. Brownell on behalf of James Goeke; Tab C: Dec. 7, 2010 and Jan. 31, 2011 letter from Michael A. Schwartz on Behalf of Mary Beth Kepner; Tab D: May 15, 2011 letter from Karen L. Loeffler, United States Attorney for the District of Alaska; Tab E: Feb. 7, 2011 letter from Amy Jo Lyons, Assistant Director, Inspection Division of the FBI; Tab F: Feb. 7, 2011 letter from Robert D. Luskin on behalf of Nicholas Marsh; Tab G: Jan. 23, 2011 letter from Brenda Morris; Tab H: Apr. 14, 2011 letter from Michael C. Ormsby, United States Attorney for the Eastern District of Washington; Tab I: Aug. 6, 2010, Sept. 8, 2010, Jan. 14, 2011, and Jan. 31, 2011 letters from Brian M. Heberlig on behalf of Edward Sullivan; Tab J: Jan. 31, 2011 letter from Mark H. Lynch on behalf of William Welch; Transcripts of OPR Interviews of AUSA Joseph Bottini dated March 10, 2010 (volume I) and March 11, 2010 (volume II); Transcripts of Schuelke Depositions of AUSA Joseph Bottini dated December 16, 2009 (volume I) and December 17, 2009 (volume II); and Transcript of Schuelke Deposition of AUSA James Goeke dated January 8, 2010. I have also reviewed the following sources: Handwritten notes of AUSA Bottini from the interview with Bill Allen on April 15, 2008, Handwritten notes of AUSA Bottini from the following prep sessions with Rocky Williams: August 20, 2008, August 22, 2008, August 31, 2008, September 20, 2008, and September 21, 2008; Handwritten notes of AUSA Goeke from the interview with Bill Allen on April 15, 2008, Handwritten notes of AUSA Goeke from the following prep sessions with Rocky Williams: August 20, 2008, August 22, 2008, and August 31, 2008; Handwritten notes of AUSA Edward Sullivan from the interview with Bill Allen on April 15, 2008; Handwritten notes of SA Kepner from the interview with Bill Allen on April 15, 2008; Handwritten notes of Attorney Robert Bundy from the interview with Bill Allen on April 15, 2008; Grand Jury Transcript of Rocky Williams dated November 7, 2006; FBI 302 of Rocky Williams dated September 14, 2006; FBI

your professional obligations. I do not address OPR's finding of poor judgment because I am limited to considering such findings only in conjunction with determining an appropriate penalty for a finding of professional misconduct. In the sections below I will discuss the Bill Allen and Rocky Williams disclosure violations separately and will focus particularly on the evidence bearing on OPR's finding of reckless misconduct.

As I will examine in more detail below, there are three primary reasons for my finding that OPR's conclusions as to your level of individual culpability for the disclosure violations is not supported by preponderant evidence. First, the *Stevens* case was prosecuted by a *team* of highly trained and experienced professional prosecutors. The team as a whole,⁴ and particularly the team's managers in the Department of Justice, should be held fully responsible in my view, both collectively and as individuals, for the disclosure violations and other failures and mistakes that occurred in this case. Although I appreciate OPR's meticulously investigated and carefully reasoned attempt to single out those individual acts that could be considered instances of professional misconduct by individual attorneys, this attempt resulted in inconsistent application of the recklessness standard that does not effectively 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.

The ROI makes a strong, almost irrefutable, case for holding the entire prosecution team accountable for the disclosure violations that occurred. In fact, the ROI meticulously recapitulates the many errors and mistakes by team members and their managers that contributed to causing the non-disclosures, compelling the conclusion that it was this series of compounding

302 of Rocky Williams dated September 28, 2006; IRS MOI of Rocky Williams dated September 1, 2006; Transcript of Cross-Examination of Bill Allen, *United States v. Stevens*, DDC No. 08-0231, (October 4, 6, and 7, 2008); September 9, 2008 "*Brady* Letter;" Email from Trial Attorney Nicholas Marsh to Bottini, Goeke, Sullivan and Kepner dated April 14, 2008 at 4:25:53. p m. I note that the OPR ROI in this matter is an extremely thorough, carefully documented, and well researched report which, at 672 pages, provides a detailed factual record of the many issues and problems that arose in the *Stevens* case and is a testament to OPR's determination and skill in sorting out and presenting the complex and important questions of professional misconduct raised in this prosecution.

⁴ In light of the impact that poor decisions by upper level management had in creating an environment in which disclosure violations were more likely to occur, I believe that the team responsible for the disclosure violations should properly include Matthew Friedrich, the former Assistant Attorney General for the Criminal Division, Rita Glavin, the former Principal Deputy Assistant Attorney General for the Criminal Division, William Welch, the former Chief of the Public Integrity Section of the Criminal Division, Brenda Morris, the Principal Deputy Chief of the Public Integrity Section, Assistant U.S. Attorney Joseph W. Bottini, Public Integrity Section (PIN) Trial Attorneys Nicholas Marsh (now deceased), and Edward Sullivan, and Assistant U.S. Attorney James A. Goeke. Although there is no question that these team members played different roles and had greater or lesser degrees of responsibility for causing or permitting the disclosure violations to occur, each member, at some point or another, was in a position to take actions that could have lessened the likelihood of the disclosure violations occurring, but they did not do so.

The Professional Responsibility Review Unit has a limited charter, under which I am assigned the duty of reviewing the professional misconduct findings contained in the OPR ROI to determine whether they are supported by a preponderance of evidence and then making a recommendation for discipline, if any. Consequently, if OPR finds *no* professional misconduct, it is not within the scope of the PMRU attorney's authority to alter this finding. Indeed, my conclusion that the entire team bore responsibility for the disclosure violations is not intended to suggest that any of the team members committed professional misconduct. An attorney or a supervisor can make a series of ill-advised decisions that contribute to a working atmosphere that makes a careful and thorough *Brady* review and an efficient and complete discovery disclosure process less likely to take place, which is what occurred in this case.

errors by all of the team members and supervisors that caused the disclosure violations. Rather than hold each team member responsible for his or her part in contributing to the disclosure violations, the ROI singles out the comparatively narrow mistakes of only two team members and concludes that only these two individuals committed reckless misconduct, which is not supported by a preponderance of the evidence.

Second, after carefully reviewing the report and the supporting evidence, I find that conduct by the 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 the line attorneys were required to function. Proper consideration of those circumstances created by management undermines the ROI's conclusion that the line attorneys' conduct was objectively unreasonable under all these circumstances, as is required for a finding of reckless misconduct. In reviewing the chain of events that led to the various disclosure violations, and considering their causes in the overall context in which they occurred, it is clear that the disclosure violations were the result of many interrelated actions or failures to act by different members and supervisors of the team. However, the following management failures were of great consequence in causing the disclosure violations: lack of communication; poor, counterproductive, or non-existent management and planning; failure to clearly assign responsibilities among the team members; unwise delegation of attorney responsibilities to investigating agents; inadequate supervision; inattention to detail and lack of oversight; disorganization; individual misjudgments; mistakes; and negligence. These supervisory failures in combination with a frantically short 57-day period between indictment and trial and with the high octane pressure and "scorched earth" defense tactics that accompanied the prosecution of one of the most senior members of the United States Senate created a context in which discovery violations were almost inevitable.

Finally, considered in the overall context of the case, although I find that clear failures of judgment occurred, amounting to negligence, the evidence does not show by a preponderance that you committed reckless misconduct. Applying OPR's definition of reckless misconduct, the record does not demonstrate 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 [it would] violate, or cause a violation of, the obligation or standard*; and that you nonetheless engaged in the conduct, which was objectively unreasonable *under all the circumstances*." I do not find that a preponderance of the evidence supports the conclusion, considering the particular circumstances and your specific state of mind, that your conduct represented a "*gross deviation* from the standard of conduct that an objectively reasonable attorney would observe in the same situation."⁵

Consequently, although I find that you exercised poor judgment in failing to disclose the Bill Allen and Rocky Williams prior statements, I do not agree that your conduct was the result of reckless disregard of your professional obligations. Because I find that you committed poor judgment rather than professional misconduct, I am not authorized to recommend any discipline.⁶

⁵ See ROI at 125 (detailing the recklessness standard).

⁶ For consistency with the numerous references in the ROI that refer to "AUSA Bottini" or "AUSA Goeke," I will refer to you in the third person as I discuss the factual background and analysis that supports this proposal.

II. Background Overview of OPR ROI

A. The *Stevens* Prosecution

A federal criminal investigation into political corruption in Alaska run by the FBI and the U.S. Attorney's Office for the District of Alaska began in 2003 under the name "Operation Polar Pen."⁷ The Public Integrity Section (PIN) of the Criminal Division began assisting in July 2004. Two recusal requests were approved, one in September of 2004 and the other in November of 2005, resulting eventually in the office-wide recusal of the U.S. Attorney's Office for the District of Alaska, with the exception of Assistant U.S. Attorneys Joseph Bottini and James Goeke.⁸ "Thereafter, PIN assumed full responsibility for the Polar Pen matters, with assistance from Alaska AUSAs Bottini and Goeke."⁹

In the course of the investigation, electronic surveillance revealed that "Bill Allen, VECO's Chief Executive Officer, and Richard (Rick) Smith, VECO's Vice President of Community and Government Affairs, promised and provided benefits to Alaska federal and state legislators in exchange for official acts."¹⁰ VECO was an oil services company operating in Alaska. As the ROI explains:

In October 2005, the government obtained information that Senator Stevens received significant benefits from VECO in the form of renovations to his Girdwood residence in 2000 and 2001, and had not reported such gifts on his United States Senate Public Financial Disclosure Reports for the corresponding years. On August 30, 2006, Bill Allen began cooperating with the government after FBI agents confronted Allen with evidence of his illegal activities. Information provided by Allen, as well as information obtained from Title III recordings and other sources, led to the investigation and prosecution of Senator Stevens. In the *Stevens* case, the government sought to prove that from 1999 to 2006, Senator Stevens knowingly and intentionally concealed his receipt of gifts by either falsely reporting them or omitting them from his United States Senate Public Financial Disclosure Reports.¹¹

In addition to the testimony of Bill Allen, the proof against Senator Stevens included testimony of various VECO workers who had done renovation work, evidence of the cost of labor and building materials, and some electronic surveillance, including a recorded conversation between Bill Allen and Senator Stevens in which "Stevens speculated that the worst case scenario would require them to pay some fines and spend some time in jail."¹²

⁷ ROI at 44.

⁸ ROI at 45-46.

⁹ ROI at 46.

¹⁰ ROI at 45.

¹¹ ROI at 45.

¹² ROI at 15.

B. Scope of Misconduct Allegations and OPR's Investigation

The ROI provides a thorough and detailed explication of the many short-sighted decisions and unwise approaches taken by the supervisors and prosecution team members that led to the disastrously embarrassing outcome of a voluntary dismissal by the government based on prosecutorial misconduct in this case. The sheer scope and breadth of the misconduct allegations that are recounted in the OPR ROI is staggering. The ROI is a monument inscribed with a myriad of admonitions as to “how not to prosecute a high-profile public corruption case.”

The first chapter of the ROI lists four separate sources of misconduct allegations, emanating from the Court, defense counsel, government witness David Anderson, and even one of the prosecution team's own investigating agents, Special Agent Chad Joy.¹³ The allegations include *Brady* violations, presenting false evidence, failing to provide material evidence to the defense, allowing a government witness to return to Alaska, 11 separate misconduct allegations the ROI lists as “additional Court criticisms,”¹⁴ a host of misconduct allegations lodged by

¹³ See ROI, Chapter 1, at 30-37.

¹⁴ ROI at 33-35. In its April 7, 2009 ruling dismissing the case, the Court catalogued 11 separate incidents of alleged government misconduct. Taken by themselves, these allegations are remarkably serious and detailed, and I quote them at length here to illustrate the large number of misconduct allegations that were leveled at the government in this case, and which OPR carefully examined. As the ROI states, “Judge Sullivan then referenced a number of incidents occurring during and after trial in which the government:

- failed to produce Rocky Williams's exculpatory grand jury testimony and claimed that the testimony was immaterial;
- sent Rocky Williams back to Alaska without advising the court or defense counsel and claimed to be acting in “good faith”;
- “affirmatively redacted exculpatory statements” from FBI 302s and claimed the action was “just a mistake”;
- falsely told the court that Bill Allen had not been reinterviewed the day before a hearing on its *Brady* disclosures and later claimed the incident was the result of a “mistaken understanding”;
- failed to disclose exculpatory statements from Dave Anderson and claimed that the statements were “immaterial”;
- failed to disclose a critical grand jury transcript (SA Kepner's April 25, 2007 testimony) containing exculpatory information and claimed the omission was “inadvertent”;
- used business records the government “undeniably knew were false” and claimed such use was “unintentional”;
- failed to produce bank records of Bill Allen and claimed that a check included in the bank records “was immaterial to the [d]efense”;
- sought to keep FBI SA Joy's Complaint alleging misconduct by the prosecutors a secret and claimed that the allegations had nothing to do with the verdict and no relevance to the defense, the allegations could be addressed by OPR, and any misconduct had already been addressed during the trial;
- claimed that its response to defendant's post-trial motions would resolve the need for further discovery regarding SA Joy's allegations as they related to the defendant;
- failed to comply with a post-trial court order to produce documents, resulting in contempt; and
- committed “what may well be the most shocking and serious” *Brady* violation by failing to tell the defense of a pre-trial interview with Bill Allen in which he did not recall a conversation with Bob Persons about sending Stevens a bill, and in which he estimated the VECO billing to be \$80,000 (“far less than the hundreds of thousands of dollars the [g]overnment had alleged at trial”). The defense could have used the information to discredit Allen's damaging trial testimony that Persons did talk to him, stating that Senator Stevens was “just covering his ass” by sending the note.”

defense counsel in four separate letters to the Attorney General after the verdict containing the core misconduct allegations investigated by OPR,¹⁵ accusations from prosecution witness Anderson that the government intentionally introduced false evidence and promised him immunity among other misconduct,¹⁶ and charges leveled by SA Joy that his co-case agent had failed to comply with a variety of FBI protocols and that the prosecutors had “introduced evidence at trial that had not been turned over to the defense; prevented defense access to [government witness] Rocky Williams, who could have testified favorably for the defense; attempted to conceal *Brady* information; and failed to follow FBI protocols for handling evidence.”¹⁷

Confronted with a large number of misconduct allegations from a variety of sources, OPR methodically reviewed thousands of pages of records and digitally stored data, including the entire trial record, all of the investigative materials, the prosecutors’ and the agents’ handwritten notes, “hundreds of boxes” of exhibits and other records, and conducted interviews of over 30 witnesses.¹⁸ OPR’s task was made more difficult by the disorganization and poor record keeping that it discovered in the PIN offices and the FBI field office in Anchorage, Alaska.¹⁹ In addition to its own investigation, OPR cooperated with the independent investigation being conducted by attorney Henry F. Schuelke, who was appointed by the court on April 9, 2008 to investigate whether the prosecution team should be held in contempt as a result of the various misconduct allegations.²⁰

OPR sorted the plethora of misconduct allegations into ten general subject areas involving the various misconduct claims.²¹ Two of these areas encompassed allegations of

¹⁵ ROI at 35-36.

¹⁶ ROI at 36.

¹⁷ ROI at 36-37.

¹⁸ ROI at 37-41. The ROI recounts its review of records as follows: “The Department’s Criminal Division, in conjunction with the Alaska U.S. Attorney’s Office, provided OPR with material for all *Stevens* prosecution team members including: Outlook data; computer hard drives (H: drive, C: drive, and S: drive); handwritten notes; boxes of information collected from the subjects and supervisory personnel containing handwritten notes and drafts of case documents; internal and external correspondence regarding the *Stevens* case; *Stevens*-related FBI 302s and IRS MOIs; related search warrants and corresponding affidavits; trial transcripts; grand jury transcripts; and court orders. The Criminal Division also provided OPR with access to hundreds of boxes of trial exhibits, materials received from defense counsel, Polar Pen-related material collected from the subject attorneys’ offices, and material collected in anticipation of litigation.” *Id.* at 37.

¹⁹ ROI at 38: “Due to the general record keeping disorganization of the *Stevens* case and the Polar Pen cases, the Criminal Division could not respond to OPR’s document request with a single production. Rather, it provided OPR with newly discovered boxes of documents throughout the pendency of our investigation, locating some additional boxes of relevant information more than one year after our original request for documents. For example, as late as May 6, 2010, the Criminal Division reported locating 11 boxes of VECO payroll records in the possession of the Anchorage FBI. Also, OPR located SA Kepner’s missing notes of the April 15, 2008 interview of Bill Allen regarding the Torricelli Note among 89 boxes of documents that had been removed from the FBI Anchorage Division Polar Pen ‘war room’ and stored in a closet in the FBI’s Anchorage office. The FBI did not produce these documents to the Criminal Division until January 2010.”

²⁰ ROI at 40-41.

²¹ The ten subject areas correspond with sections A-J of Chapter VIII of the ROI itemizing “OPR’s Conclusions.” The ten misconduct areas are: (1) the Torricelli Note; (2) Information Relating to Bambi Tyree; (3) Allegations Relating to Rocky Williams; (4) The VECO Spreadsheet and Records; (5) Allegations Relating to Dave Anderson; (6) The Land Rover Check; (7) The Missing Grand Jury Transcripts; (8) The Alleged Signaling to Allen

misconduct by individuals other than Department of Justice attorneys, that is: (1) the “alleged signaling” to government witness Bill Allen by his own attorney, Robert Bundy, and (2) the “analysis of FBI 302 issues,” which involves allegations primarily pertaining to FBI Special Agent Mary Beth Kepner’s preparation of FBI 302s.²²

C. General Findings of Disclosure Violations and Other Errors

The ROI examines eight separate subject matters containing allegations of misconduct directed at the government attorneys. OPR made both general findings, applicable to “the government” or “the prosecution team,” as well as specific findings relating to individual attorneys. With respect to individual attorneys, after its exhaustive investigation, OPR did not find a single instance of intentional professional misconduct by any member of the prosecution team or its supervisors.²³ To summarize its findings of “general” responsibility, OPR found that the “government” or the “prosecution team” violated its professional obligations in four of the eight misconduct areas.²⁴ Having carefully reviewed the ROI and all of the supporting materials, there is substantial evidence supporting OPR’s findings of “general” responsibility, which do not assign any individual culpability, against the team as a whole. The preponderance of the evidence does support OPR’s conclusions that the entire prosecution team was responsible for causing the disclosure violations described in Chapters Four (The Torricelli Note), Five (Information Relating to Bambi Tyree); and Six (Allegations Relating to Rocky Williams). The actions of AUSAs Bottini and Goeke contributed to these disclosure violations. However, in light of all the surrounding circumstances and with consistent application of the recklessness standard to the facts, I do not find that the evidence shows by a preponderance that AUSA Bottini and AUSA Goeke acted in reckless disregard of their professional obligations.

D. Specific Findings of Individual Culpability

Having found that the “team” was responsible for committing disclosure violations in the four areas described above, OPR also considered the individual roles of the team members. OPR found no professional misconduct by PIN Chief William M. Welch II, PIN Principal Deputy Chief Brenda K. Morris,²⁵ or PIN Trial Attorney Edward P. Sullivan. The only professional

by Attorney Bundy; (9) Analysis of FBI 302 Issues; and (10) Analysis of SA Chad Joy’s Allegations. *See* ROI at 24-30.

²² Although I have read and considered the facts relating to these areas because they constitute part of the surrounding circumstances of the case, I am only charged with reviewing the findings concerning the professional misconduct of Assistant United States Attorneys and Criminal Division attorneys.

²³ [REDACTED] OPR declined to make any findings of any kind with respect to the conduct of PIN Trial Attorney Nicholas Marsh, who died on September 26, 2010. *See* ROI at 47.

²⁴ Specifically, OPR found that “the prosecution team” or “the government” violated its disclosure obligations in connection with (1) the Torricelli Note; (2) Information Relating to Bambi Tyree; (3) Allegations Relating to Rocky Williams; and (4) The VECO Spreadsheet and Records. OPR also found that AUSA Bottini’s inadvertent failure to produce a check in discovery that was used to prove the value of a Land Rover vehicle traded by Bill Allen to Senator Stevens was a violation of Rule 16 of the Federal Rules of Criminal Procedure but was a mistake rather than professional misconduct. *See* ROI at 669.

²⁵ OPR did find that PIN Principal Deputy Chief Brenda Morris exercised poor judgment “by failing to supervise the *Brady* review, delegating the redaction of interview reports to SA Kepner, and failing to ensure that

misconduct – although reckless rather than intentional – that OPR found at the individual level was committed by the two AUSAs from the District of Alaska. OPR found that AUSA Joseph W. Bottini acted in reckless disregard of his professional obligations in connection with the Torricelli Note allegations and the allegations relating to Rocky Williams.²⁶ OPR found that AUSA James A. Goeke acted in reckless disregard of his professional obligations in connection with the allegations relating to Rocky Williams.²⁷ In applying OPR’s definition of reckless misconduct, I have concluded that these findings are not supported by a preponderance of the evidence. I will discuss my reasons for reaching this conclusion below.

III. Applicable Standards

A. Applicable Standards of Professional Conduct

The numerous allegations of professional misconduct alleged in this matter necessitated that OPR apply the standards and obligations set out in: the *Brady* and *Giglio* case law, the United States Attorney’s Manual (USAM), Rules 16 and 26.2 of the Federal Rules of Criminal Procedure, the *Jencks* Act, three discovery orders issued by the district court, and eight separate District of Columbia Bar Rules of Professional Conduct.²⁸ As indicated above, OPR in the end found no intentional violations of any professional standards by any individual attorneys. Although OPR found AUSA Bottini and AUSA Goeke to have acted in reckless disregard of their obligations under *Brady* and *Giglio* principles and the USAM standards, it did not find them to have committed violations of any other professional standards, including any bar rules.²⁹ The ROI contains a detailed discussion of the government’s obligations under *Brady* and *Giglio*, as well as under the policy set out in the USAM.³⁰ Because OPR found individual attorneys in reckless disregard of *Brady* and *Giglio* principles and U.S. Attorney’s Manual standards, these obligations are discussed briefly below.

1. *Brady* and *Giglio* Standards

The requirement that the government turn over exculpatory and impeachment information rests ultimately on the Fifth Amendment’s guarantee of a fair trial under the Due

the team attorneys reviewed Kepner’s redactions. However, OPR concluded “. . . she did not commit professional misconduct or exercise poor judgment with respect to any of the other disclosure violations identified in the report.” ROI at 670.

²⁶ ROI at 670-71. OPR also found that AUSA Bottini exercised poor judgment by “failing to inform his supervisors that the representations in the *Brady* letter regarding the Tyree issue were inaccurate and misleading.” ROI at 671.

²⁷ ROI at 671.

²⁸ ROI at 125-42.

²⁹ OPR did find that some D.C. Bar Rules were violated, but did not identify any individual attorneys as responsible for such violations. For example, OPR found that the September 9, 2008 *Brady* letter’s statements concerning Bill Allen’s involvement in securing a false sworn statement from Bambi Tyree “were clear misrepresentations of the facts, in violation of an attorney’s duty of truthfulness in statements to others under D.C. Rule of Professional Conduct 4.1(a).” ROI at 671. But OPR did not hold any particular attorney responsible for the this violation, finding only that AUSA Bottini exercised poor judgment by “failing to inform his supervisors that the representations in the *Brady* letter regarding the Tyree issue were inaccurate and misleading.”

Id.

³⁰ ROI at 126-28.

Process Clause. Thus, “the Constitution requires the government to disclose evidence that is both favorable and material to the defense as to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83 (1963). Encompassed within this requirement is ‘evidence affecting [the] credibility’ of a government witness when the ‘reliability of [the] witness may well be determinative of guilt or innocence.’ *Giglio v. United States*, 405 U.S. 150, 154 (1972).”³¹

There are three elements to finding that a violation of the *Brady* rule has occurred. As the ROI explained:

A *Brady* violation occurs when: (1) evidence that is material and favorable to the accused, either because it is exculpatory or because it is impeaching; (2) is suppressed by the government, either willfully or inadvertently; and (3) prejudice ensues. *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999). The good or bad faith of the prosecution is irrelevant. *Brady*, 373 U.S. at 87. In *Strickler*, the Supreme Court elaborated, “strictly speaking, there is never a real ‘*Brady* violation’ unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.” *Strickler*, 527 U.S. at 281.³²

In order to cause “prejudice,” the failure to disclose must involve information that is “material” in the sense that there must be a “reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *United States v. Andrews*, 532 F.3d 900, 905 (D.C. Cir. 2008). If the exculpatory evidence is disclosed to the defense “in time to make effective use” of the material at trial, then the prejudice element is not met and there is no *Brady* violation. *Andrews*, 532 F.3d at 908.³³

2. The U.S. Attorney’s Manual (USAM) Standard

The U.S. Attorney’s Manual, § 9-5.001, adopted in October 2006, imposes a broader standard than that required under the *Brady* line of cases. The policy directs federal prosecutors to take a broad view of materiality and “err on the side of disclosure.” USAM § 9-5.001(A)(1). Indeed, the policy “requires disclosure by prosecutors of information *beyond that which is ‘material’ to guilt . . .*” USAM § 9-5.001(C).³⁴

³¹ ROI at 126.

³² ROI at 126.

³³ In *Andrews*, the government had not disclosed the agent’s rough notes before trial, although the court had ordered the government to produce all *Brady* materials before trial. Defense counsel requested production of the rough notes after the agent, on cross examination, said she had used her notes to prepare the report of interview of the defendant. The Court ordered the government to review the rough notes for possible production and the government produced them the next day. The rough notes did not contain all of the incriminating statements that were contained in the agent’s final report of interview. Defense counsel could have cross-examined the agent using the rough notes, but chose not to do so. *See Andrews*, 532 F.3d at 904-05. Where the exculpatory or impeaching information is turned over late, “the defendant must show a reasonable probability that an earlier disclosure would have changed the trial result, and not just that the evidence is material.” *United States v. Dean*, 55 F.3d 640, 663 (D.C. Cir. 1995); *see also United States v. Wilson*, 160 F.3d 732, 742 (D.C. Cir. 1998).

³⁴ This standard is qualified. “The policy recognizes, however, that a trial should not involve the consideration of information which is irrelevant or not significantly probative of the issues before the court and should not involve spurious issues or arguments which serve to divert the trial process from examining the genuine

Information “beyond that which is material to guilt” is defined to include “information which is inconsistent with any element of the crime charged or that establishes an affirmative defense, regardless of whether the prosecutor believes the information will make the difference between conviction and acquittal,”³⁵ and also any information that “casts a substantial doubt upon the accuracy of any evidence – including but not limited to witness testimony – the prosecutor intends to rely on to prove an element of any crime charged,” or having “a significant bearing on the admissibility of prosecution evidence.”³⁶

With respect to the proper timing of disclosure, the USAM recognizes that Due Process only requires disclosure to “be made in sufficient time to permit the defendant to make efficient use of that information at trial.”³⁷ However, the USAM adopts a higher standard, requiring that exculpatory information “must be disclosed reasonably promptly after it is discovered”³⁸ and that impeachment information “will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently.”³⁹

B. OPR’s Definitions of Reckless Disregard and Poor Judgment.

OPR has adopted a multi-element definition of the meaning of “reckless disregard” in the context of a violation of a professional obligation or standard, as well as a definition for “poor judgment.”

1. Reckless Disregard

The definition for reckless disregard is set out in the ROI as follows:

An attorney acts in reckless disregard of an obligation or standard when:

- (1) the attorney knows or should know, based on his or her experience and the unambiguous nature of the obligation or standard, of an obligation or standard;
 - (2) the attorney knows or should know, based on his or her experience and the unambiguous applicability of the obligation or standard, that the attorney’s conduct involves a substantial likelihood that he or she will violate, or cause a violation of, the obligation or standard; and
 - (3) the attorney nonetheless engages in the conduct, which is objectively unreasonable under all the circumstances.
- Thus, an attorney’s disregard of an obligation is reckless when it represents a gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation.

issues. Information that goes only to such matters does not advance the purpose of the trial and is not subject to disclosure.” USAM § 9-5.001(C).

³⁵ USAM § 9-5.001(C)(1).

³⁶ USAM § 9-5.001(C)(2).

³⁷ USAM § 9-5.001(D).

³⁸ USAM § 9-5.001(D)(1).

³⁹ USAM § 9-5.001(D)(2).

2. Poor Judgment

The definition of poor judgment is set out in the ROI as follows:

If OPR determines that an attorney did not engage in professional misconduct, OPR determines whether the attorney exercised poor judgment, made a mistake, or acted appropriately under all the circumstances. An attorney exercises poor judgment when, faced with alternative courses of action, he or she chooses a course of action that is in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take. Poor judgment differs from professional misconduct in that an attorney may act inappropriately and thus exhibit poor judgment even though he or she may not have violated or acted in reckless disregard of a clear obligation or standard. In addition, an attorney may exhibit poor judgment even though an obligation or standard at issue is not sufficiently clear and unambiguous to support a professional misconduct finding. A mistake, on the other hand, results from an excusable human error despite an attorney's exercise of reasonable care under the circumstances.

3. Applying the Standards to the Facts in the ROI

The definition of reckless disregard fashioned by OPR is a complicated standard with a number of distinct elements. Given that OPR painstakingly reviewed a very large number of rather sweeping claims of misconduct and considered an equally large array of applicable professional standards and rules but found only three relatively discreet instances reckless (rather than intentional) misconduct, by only two members of the prosecution team, there is a heightened need to parse the recklessness definition with care. For clarity, I will break down the elements of reckless disregard into the questions that I believe must be answered in the affirmative by a preponderance in order for me to agree that the evidence is sufficient to support a finding of reckless disregard:

- a. Was there an unambiguous obligation or standard?
- b. Did the attorney either know, or should he have known, based on his experience and the unambiguous nature of the obligation or standard, of the obligation or standard?
- c. Did the attorney know, or should he have known, based on his experience and the unambiguous nature of the obligation or standard, that his conduct involved a substantial likelihood that he will violate, or cause a violation of, the obligation or standard?
- d. Did the attorney nonetheless engage in the conduct that involved a substantial likelihood that he will violate or cause a violation of the obligation or standard?

- e. Was the conduct engaged in objectively unreasonable under all the circumstances?
- f. Did the attorney's conduct represent a gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation?

In the sections below, I will discuss each of the findings of reckless misconduct and consider whether the record proves by a preponderance of the evidence that each of these questions can be answered in the affirmative.

IV. Analysis of OPR's Findings of Reckless Misconduct Regarding Failure to Disclose Prior Statements by Government Witness Bill Allen

- A. Failure to Make Timely Disclosure of Bill Allen's Prior Statements in the Pluta 302 and the IRS MOI of December 11-12, 2006.

Government witness Bill Allen's testimony was key to the prosecution's case against Senator Stevens. Allen was a long time friend and supporter of the Senator and an influential businessman and owner of the oil services company VECO. The government charged Senator Stevens with failing to report benefits that Allen had provided to Stevens in the form of construction work in renovating Stevens' cabin located in Girdwood, Alaska. Allen had been interviewed on numerous occasions by the FBI because he provided information not only relating to Senator Stevens, but also to a number of other public officials and their activities in Alaska, the investigation of which was called "Operation Polar Pen."

Among the many memoranda of interview generated memorializing statements of Bill Allen were an FBI form FD-302 dated February 28, 2007 of an interview conducted by FBI Special Agent Michelle Pluta ("the Pluta 302") and a Memorandum of Interview conducted by an IRS agent on December 11-12, 2006 ("the IRS MOI"). The Pluta 302 "contained an exculpatory statement that Allen believed Stevens would have paid John Hess's bill (Hess was the VECO engineer who drafted plans for the Girdwood renovations) had he been presented with the bill."⁴⁰ The IRS MOI contained the exculpatory statement by Allen that if VECO employees "Rocky Williams or Dave Anderson had invoiced Ted or Catherine Stevens for VECO's work, Bill Allen believes they would have paid the bill."⁴¹ These statements were helpful to the defense because Senator Stevens' defense was that he intended to pay for the renovations and that because he paid all the bills that he received, he did not knowingly fail to report receiving free construction services. Prior statements by Bill Allen that he believed Senator Stevens would have paid for drafting plans or paid for VECO's other work on the property if he had been billed were consistent with Stevens' defense that he intended to pay in full. Neither of these two interview memoranda were provided to the defense by the prosecution team until after the Court ordered production of all the 302s and MOIs.

⁴⁰ *Id.* at 116.

⁴¹ *Id.* at 118.

In order to assess whether an individual attorney acted recklessly “under all the circumstances,” it is instructive to first outline what the contributing factors (decisions, actions, failures to act) were that caused the late disclosure – or the failure to disclose – to happen. Examining these factors provides important context to the recklessness inquiry and must be undertaken in order to directly address the “under all the circumstances” prong. Once the surrounding circumstances are considered, one can then consider the other prongs, whether the attorney acted in a manner that he knew or should have known would create a substantial likelihood of violating his obligation, and whether such action was objectively unreasonable and a gross deviation from the standard of conduct of an objectively reasonable attorney in the same situation. Thus, the three-part inquiry is (1) what were the contributing factors (decisions, actions, failures to act) were that caused the late disclosure to occur; (2) did the attorney take an action or fail to take an action where he knew or should have known that such action or inaction would create a “substantial likelihood” that the disclosure violation would occur; and (3) was the action or inaction by the individual attorney “objectively unreasonable under all the circumstances” and a “gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation?”⁴²

The answer to the first of these questions, understanding the chain of events that caused the disclosure violation, provides answers that assist with the second and third inquiries’ attempt to take into account “all the circumstances” and “the same situation.” The following is a discussion of the contributing factors (decisions, actions, failures to act) that contributed to causing the late disclosure of the Pluta 302 and the IRS MOI.

1. Chain of Events Leading to Late Disclosure of Pluta 302 and IRS MOI

The exculpatory statements in the Pluta 302 and the IRS MOI were eventually produced to the defense, along with all of the other unredacted memoranda of interviews, pursuant to the Court’s Order of October 2, 2008.⁴³ The defense was in possession of this information and used the Pluta 302 and the IRS MOI to cross-examine Bill Allen on October 6, 2008.⁴⁴ Given that this information was clearly disclosed to the defense in time for effective use at trial, it is not clear how the late disclosure of the Pluta 302 and the IRS MOI could meet the prejudice element required to find a *Brady* violation. See *United States v. Andrews*, 532 F.3d 900, 905 (D.C. Cir. 2008).

However, there is no question that the exculpatory prior statements of Bill Allen from the Pluta 302 and the IRS MOI were not disclosed during the discovery process as they should have been and certainly not “reasonably promptly after [they were] discovered” as required under USAM § 9-5.001(D)(1). It is beyond dispute that this information was not produced to the defense in a manner consistent with the USAM’s directive. It is also clear that, although the defendant may not have been able to establish the prejudice needed to demonstrate that his due

⁴² The first prong of the recklessness standard is whether “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.” ROI at 125. All prosecutors know of the *Brady* doctrine and certainly the *Stevens* trial team knew of this obligation; therefore I find that this first prong is met in each instance in which I address the recklessness standard in this memorandum. The *Brady/Giglio* obligation and the USAM policy are known and unambiguous.

⁴³ ROI at 135-36.

⁴⁴ Transcript of *United States v. Stevens*, Crim. No. 08-0231, October 6, 2008, at 73-75.

process rights were violated by the late disclosure, the government's failure to produce such exculpatory information during the discovery process is clearly inconsistent with its professional obligations under *Brady*.

(a.) The *Brady* Letter's Inaccurate Summary of Bill Allen's Statements

The primary point at which the Pluta 302 and the IRS MOI should have been disclosed to the defense was when the prosecution summarized Bill Allen's prior statements and disclosed them to the defense in its *Brady* letter of September 9, 2008. Although the statements of Bill Allen that he believed Senator Stevens would have paid for the renovations and drawings were favorable to the defense and should have been disclosed, when the government made a *Brady* disclosure to the defense by letter on September 9, 2008, the letter did not contain these exculpatory statements. Rather, the *Brady* letter stated in relevant part:

Allen stated that on at least two occasions defendant asked Allen for invoices for VECO's work at the Girdwood residence. Allen stated that he never sent an invoice to defendant or caused an invoice to be sent to defendant. ***Allen stated that he believed that defendant would not have paid the actual costs incurred by VECO, even if Allen had sent defendant an invoice, because defendant would not have wanted to pay that high of a bill. Allen stated that defendant probably would have paid a reduced invoice if he had received one from Allen or VECO.*** Allen did not want to give Stevens a bill partly because he felt that VECO's costs were higher than they needed to be, and partly because he simply did not want defendant to have to pay.⁴⁵ (emphasis added).

It should be noted that this paragraph, "paragraph 17(c)" was one of *seven* subparagraphs detailing prior statements of Bill Allen contained in the *Brady* letter of September 9, 2008. Allen had been interviewed by the FBI over 50 times.⁴⁶ Regardless of the voluminous nature of this material, it was incomplete, inaccurate, and misleading for the government only to provide Allen's statement that "he believed that defendant would not have paid the actual costs incurred by VECO" when Allen had also told the government that he believed Senator Stevens *would have paid* for the costs of the drawings and for all of the work of two VECO's contractors (Rocky Williams and Dave Anderson) if he had been given a bill.

The *Brady* letter was drafted primarily by PIN Trial Attorneys Nicholas Marsh and Edward Sullivan though it was circulated to the entire prosecution team, including the supervisors.⁴⁷ The preparation of the *Brady* letter was the culmination of a very poorly organized, unmanaged, and risk-filled discovery process that the prosecution team and supervisors allowed to occur. The elements of this ill-considered discovery process constitute additional contributing factors that caused the late disclosure of the Pluta 302 and the IRS MOI. These elements will be considered in turn before returning to the issue of individual responsibility in connection with the *Brady* letter.

⁴⁵ *Id.* at 102-03; *see also* f.n. 410 (citing Sept. 9, 2008 6:50pm email from PIN attorney Marsh to AUSA Bottini, AUSA Goeke, PIN attorney Sullivan, PIN Principal Deputy Chief Morris, and PIN Chief Welch).

⁴⁶ *Id.* at 571 (referencing Special Agent Kepner's complete set of 56 Allen 302s).

⁴⁷ *See* ROI, Chapter X, The September 9, 2008 *Brady* Letter, at 90-104.

(b.) Disorganization and Lack of Management of the Discovery Process

The misstatements in paragraph 17(c) of the *Brady* letter were the product of an unmanaged and deeply flawed discovery process that had its roots in the decision by the then-Assistant Attorney General for the Criminal Division to radically reorganize the Stevens trial team the day before the indictment was returned (and, due to management's decision not to object to a defense request for an expedited trial date, just 39 week-days before the trial began).⁴⁸ Although this eleventh-hour decision to restructure the trial team was apparently motivated by upper management's perception that the team needed a more experienced lead attorney than PIN Trial Attorney Marsh,⁴⁹ the new lead attorney, PIN Principal Deputy Chief Brenda Morris, a supervisor in PIN, was unfamiliar with the details of the *Stevens* case and was never given clear direction or guidance by Department managers as to the type of leadership and management that was needed but perceived to be lacking.⁵⁰ For this reason, and because she did not want to ruffle the feathers of the pre-existing trial team, Morris did not exert strong leadership over the discovery process.⁵¹ Indeed, Morris indicated that she did not supervise the "*Brady* review," and

⁴⁸ The Stevens indictment was returned on July 29, 2008 and trial began on September 24, 2008 – 57 days later. The trial team members, consisting of PIN trial attorneys Nicholas Marsh and Edward Sullivan, and District of Alaska AUSAs Joseph Bottini and James Goeke, were informed on July 28, 2008 that Marsh was being removed as lead attorney and demoted to third chair, while PIN Principal Deputy Chief Brenda Morris and AUSA Joseph Bottini would be first and second chair respectively. Trial Attorney Sullivan and AUSA Goeke, previously full-fledged litigation team members, were told they could not participate in the trial but could provide support. ROI at 59-60.

⁴⁹ ROI at 58-59.

⁵⁰ Morris indicated that Department officials engaged in some micromanagement in reviewing correspondence and pleadings but had no involvement in supervising or guiding discovery procedures. They did, however, provide directives as to which "personnel could be present at counsel table, which attorneys would give the opening and closing, and which attorneys would examine key witnesses." ROI at 60-61. It should be noted that PIN Chief William Welch did not agree with the decision to appoint a new leader for the trial team on the eve of the indictment, and Morris herself did not want to take over the team but did so at the insistence of Assistant Attorney General Matthew Friedrich. ROI at 59.

⁵¹ Morris told OPR she wanted to "make herself as small as possible" in light of the way she had been inserted at the head of the team and further that "there was no way I was going to dictate to these guys." ROI at 64. OPR describes the situation as follows:

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

ROI at 2, f n. 5 (emphasis added). Morris stated that she did not see herself as exercising a "supervisory" role. ROI at 64. AUSA Bottini said he saw Trial Attorney Nick Marsh as his defacto supervisor. *Id.* The lack of management extended to the point that, even with the short time frame between indictment and trial, Trial Attorney Sullivan told PIN Chief William Welch that Morris continued to work on other cases rather than focusing full time on supervising the *Stevens* case. ROI at 64.

none of the other attorneys were assigned specific tasks or held accountable for their completion.⁵²

Although OPR's investigation details the serious consequences that such abdication of supervisory responsibility caused,⁵³ it does not hold any higher-level DOJ officials accountable for failing to provide guidance and direction to Morris. As lead counsel, and as a supervisor, even in the absence of such guidance, Morris was responsible and should have recognized the crucial importance of carefully supervising the *Brady* review and discovery process. Indeed, if any single act created a substantial likelihood that *Brady* violations would occur, it was the failure to supervise the *Brady* review and discovery process. However, OPR does not find any reckless misconduct by the chief trial counsel, Principal Deputy Morris, whose explicit responsibility on the team was to provide leadership and management for the attorneys, and whose position was that of a PIN supervisor.⁵⁴ As will be discussed in greater detail below, the non-existent management of the discovery process contributed significantly to causing the disclosure violations that occurred.

(c.) The Decision to Summarize *Brady* Statements in a Letter Rather Than Disclose the Statements Themselves.

As of September 5, 2008, only four days before the *Brady* letter was sent on September 9, 2008, the trial team was still apparently unsure as to whether they would simply produce 302s to the defense, produce them in redacted form, or attempt to summarize them in letter form.⁵⁵ Given the failure to provide any active supervision described above, such uncertainty is not surprising; but the decision on how to produce the *Brady* material was also influenced by Criminal Division management's lack of clarity regarding whether the trial team should "play it close to the vest"⁵⁶ or consider an "open file"⁵⁷ approach on discovery matters.⁵⁸

⁵² ROI at 65-66 ("*Morris agreed that there was a vacuum of leadership, stating that decisions and task assignments fell to different team members based on 'kind of a routine,' and that she should have 'stepped up' and provided more supervision.*") (emphasis added).

⁵³ See ROI at 67 ("The overall disorganization among the trial team resulted in poor file keeping and affected the team's ability to fulfill its disclosure obligations. . . . OPR was unable to locate many files that one would expect to find. We found no correspondence file, no pleadings file, and no file documenting discovery.")

⁵⁴ OPR found that Morris exercised poor judgment by failing to supervise the *Brady* review, delegating the duty of redacting the 302s to the agents and failing to ensure that attorneys reviewed the redactions. See ROI at 670.

⁵⁵ See ROI at 91. PIN Trial Attorney Ed Sullivan emailed SA Bateman, AUSA Bottini, litigation support manager [REDACTED], AUSA Goeke, SA Joy, SA Kepner, PIN attorney Marsh, PIN Principal Deputy Chief Morris, SA Roberts, and paralegal [REDACTED] stating: "[C]ollectively, the team needs to decide if we are producing the 302s/notes/transcripts in either: (1) full form; (2) redacted form; or (3) summary letter form." *Id.* However, as OPR pointed out, an earlier email from Attorney Marsh suggested that a summary letter was presumed to be the method of disclosure as of mid-August. See ROI at 84, f.n. 316 ("This appears contrary to Marsh's understanding as of August 14, 2008, when he sent an email to Sullivan, Bottini and Goeke saying 'we need to get cranking on our omnibus *Brady/Giglio* letter to defense counsel.' Aug. 14, 2008 1:49pm email from PIN attorney Marsh to PIN attorney Sullivan, AUSA Bottini, and AUSA Goeke.")

⁵⁶ Morris told OPR "during a conversation regarding not producing FBI 302s as *Jencks* material . . . that Friedrich was 'very much in favor of us being hardball' and 'playing close to the vest.'" Morris later told independent prosecutor Schuelke, however, that "she did not recall ever hearing Friedrich or Glavin say to play disclosure issues 'close to the vest.'" Friedrich told OPR that he did not recall being involved in "line item type decisions" on discovery, and that he did not remember any prohibition against "open file" discovery, but "Rita would know the answer to that." ROI at 62-63.

Despite OPR’s detailed investigation, which included interviewing all of the attorneys and supervisors, OPR could not nail down who made the decision to send a *Brady* letter rather than to simply produce the 302s, MOIs and Grand Jury testimony containing *Brady* material. As the ROI stated, “No one OPR interviewed recalled *anyone making a decision* to provide *Brady* disclosures via summary letters.”⁵⁹ (emphasis added). Principal Deputy Morris believed that “the trial team made the decision” to use a *Brady* letter because it had been the practice in other Polar Pen cases.⁶⁰ This assessment is justified by the evidence contained in the OPR report.⁶¹ At the same time, it is clear that Principal Deputy Chief Morris’ early decision, and advocacy for the position, *not* to turn over witness interview memoranda in the manner of *Jencks* statements left almost no alternative to the method of using a *Brady* letter.⁶² Indeed, one could view the decision not to turn over the witness interview memoranda themselves as tantamount to deciding that any *Brady* statements would need to be summarized in a separate letter.⁶³ In the absence of any clear decision by management, however, the entire trial team, all of the attorneys including the supervisors, simply acquiesced in the use of a summary *Brady* letter because it had been done before. Under these circumstances, the attorneys were jointly responsible for ensuring that the *Brady* letter was accurate.

(d.) The Decision to Direct Agents to Conduct the *Brady* Review.

The decision by upper management to indict the case four months from the election, and then require the trial team to agree to any defense request for an expedited trial date,⁶⁴ created an extremely compressed trial preparation schedule, requiring the trial team to complete production of discovery, review of all evidence to comply with *Brady* and *Giglio*, witness preparation,

⁵⁷ Former Principal Deputy Assistant Attorney General Rita Glavin said that Criminal Division management played no role in whether an “open file” discovery approach should be pursued. ROI at 62. However, PIN Chief Welch wrote in a post-trial email that “a week after indictment, Friedrich and Glavin endorsed the idea of non-open file discovery (not allowing the defense access to the government’s files for discovery purposes). I was surprised when it got raised, and pushed Brenda to be as open as possible.” *Id.*

⁵⁸ PIN Attorney Marsh said that he approached PIN Principal Deputy Chief Morris about taking an “open file” approach, but she was not supportive. Morris did not recall this conversation. ROI at 71. PIN Chief Welch even stated that he was not aware that a *Brady* letter approach was being used until the day before the letter was sent and that he was “not comfortable with the *Brady* letter format.” The PIN Chief did not apparently communicate this discomfort to the trial team, nor prohibit or limit this practice. *Id.*

⁵⁹ ROI at 70.

⁶⁰ *Id.* at 71.

⁶¹ *Id.* at 70-71.

⁶² As the ROI notes at 202:

Within days after joining the trial team, Morris recommended to AAG Friedrich and PDAAG Glavin that witness interview reports not be turned over to the defense as *Jencks* material. That approach, while within the government’s prerogative, increased significantly the burden on the prosecution to thoroughly review witness interview reports to ensure that any *Brady* or *Giglio* material would be culled from the interview reports and timely disclosed to the defense. After obtaining the Front Office’s approval for her approach, however, Morris deferred to the team attorneys and agents to implement it.

⁶³ Indeed, PIN Attorney Edward Sullivan stated that “around September 7th or 8th” either “Brenda Morris or Nick Marsh” asked him to assemble the *Brady* information received from the agents into a letter format. ROI at 92.

⁶⁴ Principal Deputy Chief Morris testified that “the Front Office” directed the team not to object to any request for a Speedy Trial date. ROI at 61.

exhibit organization and marking, argument and pretrial motion and response drafting, among many other trial preparation tasks, in 57 days, including weekends.

In the limited time available to prepare for trial, a well-designed division of labor among the trial team was crucial. Because the Criminal Division management inserted a new team leader without giving her any guidance or direction as to the need to be a hands-on manager and because she eschewed such supervision duties,⁶⁵ the vital job of assigning the numerous tasks, and ensuring the necessary oversight that they be accomplished, was never done by the managers.⁶⁶ Instead, with “no one in charge,”⁶⁷ the trial team members took up different assignments in an *ad hoc* and reactive manner,⁶⁸ with the Alaska attorneys focusing on preparing the witnesses located there while the PIN attorneys worked on discovery production and pretrial motions.

Although each of the attorneys, including the supervisors, recognized their individual professional responsibility to comply with the requirements of *Brady* and *Giglio*, specifically to review evidence in the government’s possession and to produce any evidence helpful to the defense or useful as impeachment, in this case the decision was made to assign *agents*, not attorneys, the responsibility for identifying *Brady* and *Giglio* material from the scores of 302s and interview memoranda, as well as Alaska Grand Jury transcripts. The agents assigned this responsibility were not trained by the attorneys in what to look for⁶⁹ and had received no prior specialized training on their own in the meaning and scope of the *Brady* and *Giglio* line of cases.⁷⁰ The agents worked diligently to review all of the memoranda and transcripts of witnesses and created detailed spreadsheets summarizing their findings. However, no attorney

⁶⁵ So extreme was Principal Deputy Chief Morris’ “hands-off” approach to managing the team that she stated that she refrained from offering her opinion during team meetings. ROI at 201.

⁶⁶ Although OPR did not make this finding, from the perspective of good management, Morris’ failure to exercise leadership in assigning tasks, ensuring that responsibilities were clearly understood, and holding people accountable appears to me to be an example of objectively unreasonable conduct that created a substantial likelihood that discovery obligations would be missed.

⁶⁷ The ROI notes at 23:

The void in leadership resulted in team members lacking clear assignments for certain tasks or accountability for the proper completion of such tasks. Nowhere was this more evident than in the *Brady* review process for FBI and IRS interview reports. No member of the team claimed responsibility for the decision to assign the *Brady* review of such statements to the agents and we were unable to determine who authorized it.

⁶⁸ “Marsh stated that the review was conducted in a ‘piecemeal’ fashion, with no one ‘specifically designated to be in charge.’” ROI at 79.

⁶⁹ PIN Attorney Edward Sullivan and AUSA James Goeke both admitted they gave no instructions to the agents for the *Brady/Giglio* review. ROI at 84.

⁷⁰ In addition to assigning agents to review the 302s, MOIs, and Alaska Grand Jury transcripts for *Brady* material, the decision was also made to parcel out District of Columbia Grand Jury transcripts to various PIN attorneys not assigned to, or otherwise familiar with, the Stevens case to review for *Brady* purposes. ROI at 5. The *Brady* review process thus used agents untrained in the law, as well as attorneys unfamiliar with the facts, to look for *Brady* material. OPR found that PIN Principal Deputy Chief Morris exercised poor judgment in failing to supervise the *Brady* review, delegating the redaction of interview reports to SA Kepner and failing to ensure that the prosecution team attorneys reviewed Kepner’s redactions. ROI at 25.

was assigned, or took, the responsibility to carefully review the work of the agents for accuracy and completeness.⁷¹

As a consequence of the decision to delegate the *Brady* review to agents, when PIN Trial Attorneys Nicholas Marsh and Edward Sullivan drafted the *Brady* letter, they used the agent-prepared spreadsheets of *Brady* material as the basis for their disclosures. Remarkably, despite OPR's careful investigation, it reported: "***No member of the team claimed responsibility for the decision to assign the Brady review of such statements to the agents and we were unable to determine who authorized it.***"⁷² PIN Principal Deputy Chief Morris indicated that she was aware that agents were doing a *Brady* review but "she was unaware that no attorneys reviewed the agents' work product."⁷³ All of the attorneys on the team were aware the agents were conducting a *Brady* review, but no one took responsibility for making the decision to direct agents to conduct the review, some of them suggesting that it developed from earlier requests that agents review their notes and compare them to the final 302s or memos for consistency.⁷⁴

PIN Principal Deputy Chief Morris was aware that the agents were conducting the *Brady* review. However, she told OPR that she believed that attorneys "were going to review the final product of whatever the FBI turned over."⁷⁵ Morris further stated that she was unaware that the FBI agents' *Brady* review was not reviewed by attorneys, and did not discover that until "stuff blew up in court."⁷⁶ Although Morris signed the *Brady* letter that relied on the agents' *Brady* review, she told OPR that "she assumed the information in the letter was accurate and she did not look at the supporting documentation."⁷⁷ The fact that Morris was "unaware" whether or not the

⁷¹ "Bottini told OPR that he did not review the spreadsheets for accuracy prior to execution of the September 9, 2008 *Brady* letter. Bottini OPR Tr. Mar. 10, 2010 at 161-163. Goeke acknowledged the same. Goeke (Schuelke) Tr. Jan. 8, 2010 at 444-446." ROI at 82, f n. 307.

⁷² ROI at 24 (emphasis added). In fact, the ROI reports that all of the attorneys were aware that the agents were conducting a *Brady* review. The failure to ensure that an attorney was assigned the specific responsibility to review the agents' work was a failure of supervision. Morris admitted that she did not supervise the *Brady* review and suggested that PIN Chief Welch was more involved in *Brady* issues. ROI at 65.

⁷³ ROI at 79. Welch told OPR that he did not become aware of the agents' *Brady* review and corresponding spreadsheet until December 2008 and January 2009. *Id.* During the *Brady* review process, PIN Trial Attorney Sullivan reminded the entire trial team, including Morris, that after the FBI agents completed their review of the 302s, everyone should "review all of this as a team for production purposes." ROI at 82, f n. 306 (citing Sept. 5, 2008 4:44pm email from PIN attorney Sullivan to SA Bateman, AUSA Bottini, litigation support manager [REDACTED], AUSA Goeke, SA Joy, SA Kepner, AUSA Marsh, Principal Deputy Morris, SA Roberts, and paralegal [REDACTED]).

⁷⁴ *Id.* at 79-80 (Attorneys Sullivan and Marsh recalled telling agents to compare their notes to their 302s; Sullivan suggested this request may have evolved into a full-fledged *Brady* review); *see also* ROI at 83 ("SA Kepner, the lead agent on the *Stevens* case, stated that she could not specifically remember who instructed her to begin the review, but she believed it was either PIN attorney Marsh or AUSA Bottini, and that Marsh made the decision that the FBI should conduct the review rather than the attorneys."). AUSA Bottini told OPR that in early September he was more focused on preparing Bill Allen as a witness and it was unclear to him how the discovery production was going to be done. OPR Bottini Interview I at 124. AUSA Bottini also did not recall who made the decision to write a *Brady* letter. *Id.* at 128. When asked why he was "comfortable that the *Brady* review was not something that was on his plate," Bottini responded: "Well, I wasn't the lead attorney on the case. You know, and it wasn't something that I thought was my decision to make, as to how was this going to be accomplished." *Id.* at 131-32. Bottini thought the "marching orders" for the agents to conduct the *Brady* review came from "someone in Public Integrity." *Id.* at 133.

⁷⁵ ROI at 83.

⁷⁶ *Id.*

⁷⁷ ROI at 105.

Brady review by the agents had in fact been reviewed by the attorneys, and that she “assumed” the information in the letter was accurate, demonstrates that no effort was made by Morris to conduct any oversight of the *Brady* review. Furthermore, even a review by the attorneys of the agents’ work as Morris thought had occurred, would not assure that the agents correctly interpreted *Brady* and *Giglio* when they reviewed the source material.

As the ROI points out in its discussion of culpability for the Bill Allen disclosure failures:

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. (emphasis added).⁷⁸

The team leader, as well as the other attorneys, either directed or stood by and allowed the *Brady* review to be conducted by agents with no formal training in *Brady* or *Giglio* principles. Then, the supervisors did nothing even to ensure that the attorneys exercised the necessary diligence to review the spreadsheets prepared by the agents. This lack of attorney supervision of the agents’ *Brady* review was a direct cause of many of the inaccuracies in the *Brady* letter, which was based on the un-checked *Brady* review.

(e.) Division of Labor: The Alaska AUSAs Begin Witness Prep While the PIN Trial Attorneys Produce Discovery and Draft the *Brady* Letter

Although there was no clear direction from the team leader as to how the trial preparation duties should be assigned, a rough division of labor developed according to which the Alaska AUSAs re-engaged with the various witnesses located in Alaska, setting up witness preparation sessions, while the PIN attorneys handled the discovery production.⁷⁹ AUSA Bottini believed the PIN attorneys were responsible for preparing the *Brady* letter.⁸⁰ Indeed, PIN attorneys Edward Sullivan and Nicholas Marsh were the primary drafters of the evolving versions of the *Brady* letter.

Prior to the PIN attorneys drafting the *Brady* letter, FBI and IRS agents reviewed their notes and interview memoranda and created spreadsheets summarizing their review findings and highlighting any statements that they believed needed to be disclosed as *Brady* information. Both the Pluta 302 and the IRS MOI of December 11-12, 2006 were listed on the spreadsheets presented to the attorneys as part of this *Brady* review.⁸¹ The Pluta 302 was not only listed on the *Brady* review spreadsheet, it was also highlighted as containing a statement that should be turned over as *Brady* information. In particular, the spreadsheet entry for February 28, 2007 (the

⁷⁸ ROI at 193.

⁷⁹ See OPR Bottini Interview I at 124 (“I really wasn’t focused on [*Brady* and *Giglio* production] . . . I was more concerned about getting Bill Allen ready and getting ready for trial”); Schuelke Bottini Interview I at 27-29 (discussing that he and AUSA Goeke took on the role of starting to prepare witnesses in Alaska and was not “in the loop” as far as how the *Brady* review was going to take place in Washington).

⁸⁰ OPR Bottini Interview I at 166.

⁸¹ ROI at 116, 118.

Pluta 302) stated that Allen “believed that T[e]d Stevens would have paid an invoice if he received one.”⁸² The IRS MOI was listed on the spreadsheet as having been reviewed but no notation as to *Brady* information was highlighted.⁸³ Because no attorney took the time to carefully review the spreadsheets prepared by the agents, and no supervisor made sure a review took place, the exculpatory statements in the IRS MOI were not discovered or disclosed in the *Brady* letter.

The exculpatory statement contained in the Pluta 302 was reviewed by PIN Attorney Nicholas Marsh. Rather than simply disclosing the *Brady* statement from the Pluta 302, PIN Attorney Marsh directed SA Kepner to re-interview Bill Allen about the issue of whether he believed Ted Stevens would have paid an invoice.⁸⁴ The statement provided by Bill Allen when re-interviewed was different from the statement contained in the Pluta 302, and this new statement, obtained by SA Kepner on September 9, 2008, was used in paragraph 17 of the discovery letter.⁸⁵ The new statement, rather than saying that Ted Stevens would have paid an invoice if he received one, said that “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.” (emphasis added).⁸⁶ The decision to re-interview Bill Allen and include his new statement in the discovery letter, rather than disclosing Allen’s statements from the Pluta 302, was made by PIN Attorney Nicholas Marsh.⁸⁷ This decision by one of the prosecution team’s attorneys was clearly a key factor in causing the failure to disclose the information from the Pluta 302 in a timely manner.

(f.) The Flawed Procedure for Producing Redacted Copies of Interview Memoranda to Defense

One week before trial, on September 16, 2008, the Court ordered the government to produce, by the following day, hard copies of all government exhibits, as well as copies of all 302s and interview memoranda redacted so as to contain only *Brady* or *Giglio* information.⁸⁸ Compliance with this order provided another opportunity when one might reasonably expect that the *Brady* material memorialized in the Pluta 302 and the IRS MOI would be produced.⁸⁹ With

⁸² ROI at 103.

⁸³ ROI at 192 f.n 757.

⁸⁴ ROI at 116.

⁸⁵ ROI at 184-86.

⁸⁶ ROI at 102-03.

⁸⁷ ROI at 186-88.

⁸⁸ The ROI’s review of the court proceedings makes it clear that the defense had requested to receive complete and unredacted copies of all the interview memoranda, but the government took the position that because they were not *Jencks* statements adopted by the witnesses, they should not be disclosed as prior witness statements. The government conceded that providing redacted reports that only contained any *Brady* material would not prejudice the government. The Court then ordered the government to produce the witness statements in redacted form. ROI at 111-13.

⁸⁹ Like the initial decision to use a summary *Brady* letter and to delegate the *Brady* review to agents, the decision to provide *redacted* interview memoranda only, rather than simply hand over the full versions, is difficult to understand in retrospect. In another example of non-interventionist management, PIN Chief Bill Welch raised questions about why the team was providing only redacted 302s, received an answer from Principal Deputy Chief Morris that “she thought the team wanted to do it that way,” and the issue was then dropped. See ROI at 115.

over a thousand exhibits to copy and mark, hundreds of 302s, and scores of Grand Jury transcripts to redact, the trial team spent almost all night trying to comply with the court's order. Principal Deputy Chief Morris assigned to the agents the duty of redacting the 302s,⁹⁰ and so Special Agent Kepner went through all of Bill Allen's 302s and redacted them to contain only the information contained in the *Brady* letter.⁹¹

The decision to produce redacted 302s and the manner in which Special Agent Kepner made the redactions were critical points in the chain of events that led to the late disclosure of the Pluta 302 – because the *Brady* letter did not contain the exculpatory statements from the Pluta 302, and because SA Kepner used the *Brady* letter to determine how to redact the 302s, she unintentionally redacted the exculpatory statement from the Pluta 302 (because it was not in the *Brady* letter) thereby ensuring that the exculpatory statement would not be disclosed in the redacted Pluta 302.⁹² As in the case of delegating the *Brady* review to the case agents, there was no attorney guidance, counseling, training, or review of the agents' work in redacting the 302s.⁹³ After SA Kepner completed her draft redactions, she left the redacted reports on PIN Attorney Edward Sullivan's chair. PIN Attorneys Sullivan and Marsh had spent the night copying and marking the trial exhibits,⁹⁴ while AUSAs Bottini and Goeke had been redacting Grand Jury transcripts.⁹⁵

At this late date, there was still a chance that the inadvertent redaction of the Pluta 302 would be caught, and the *Brady* violation avoided, because PIN Attorney Sullivan emailed Principal Deputy Chief Morris and the team at around 4:00 a.m. to tell her that “the redacted transcripts and 302s are done. They are on my chair, but *we need to proof them before they go out the door* to [the defense] tomorrow.”⁹⁶ (emphasis added). Despite this explicit articulation of

⁹⁰ ROI at 115 (“Morris stated that she initially asked SA Joy to “take the first crack at . . . the *Brady* in the 302s” but he refused, stating he was “not as familiar with the facts” as Kepner. SA Kepner volunteered to go through the FBI reports and redact them to remove all information not included in the September 9, 2008 *Brady* letter.”).

⁹¹ ROI at 114 (“Kepner redacted the Bill Allen 302s to include only the *Brady* information contained in the September 9, 2008 letter.”).

⁹² ROI at 116. In terms of the process SA Kepner followed, the ROI reports:

Kepner took the September 9, 2008 *Brady* letter and went through it point by point, locating the relevant reports that had provided the basis for each statement in the *Brady* letter. Kepner did not use the *Brady* spreadsheet for the review; rather, she gathered all the Allen 302s and reviewed them, looking for those relevant to the *Brady* letter. Once she located the relevant 302, Kepner redacted any statements that had not been referenced in the letter. With respect to the Bill Allen statements contained in the *Brady* letter, Kepner “had the Bill Allen reports in front of me, and would scan through the report to locate the section that was stated in the *Brady* letter.” According to Kepner, she did not review the 302s for *Brady* material; rather, she was simply trying to locate the material referenced in the *Brady* letters.

ROI at 115-16.

⁹³ ROI at 115. (“According to Kepner, she did not receive any guidance on how to redact the reports. Morris told OPR that she did not give, but should have given, Kepner guidance on how to redact the 302s.”).

⁹⁴ ROI at 116.

⁹⁵ ROI at 114.

⁹⁶ ROI at 116-17 (quoting Sept. 17, 2008 3:48am email from PIN attorney Sullivan to Principal Deputy Morris, Chief Welch, SA Bateman, AUSA Bottini, litigation support manager [REDACTED] AUSA Goeke, SA Joy, SA Kepner, PIN attorney Marsh, SA Roberts, and paralegal [REDACTED]).

the need for further diligence, Principal Deputy Chief Morris took no action to ensure that SA Kepner's work was proofed. She told OPR that she assumed it had been taken care of, but did not check.⁹⁷ Because no one was directed to review the agents' redactions, the redacted – but un-reviewed – 302s were sent out on September 17, 2008, and the last pretrial disclosure of *Brady* material was completed without ever correcting the omission of the Pluta 302 or the IRS MOI.⁹⁸

(g.) The Late Production of the Pluta 302 and the IRS MOI

As the trial progressed, and PIN Attorney Marsh was preparing SA Michelle Pluta for her possible testimony, he reviewed the Pluta 302 and realized that the redacted version provided to the defense had excised the exculpatory portions of the memo.⁹⁹ This discovery caused the team to review all of Bill Allen's interview memos, leading to the discovery of the *Brady* material in the IRS MOI of December 11-12, 2007 as well.¹⁰⁰ On October 1, 2008, the prosecution transmitted the Pluta 302 and the IRS MOI, still in redacted form, but disclosing the exculpatory statements, to the defense. The following day, the Court ordered the government to produce all witness interview memoranda, for every witness, in unredacted form.¹⁰¹ As mentioned above, the disclosure of the exculpatory statements in the Pluta 302 and the IRS MOI came in time for defense counsel to consider whether to use such statements in cross-examining Bill Allen, and defense counsel did so.¹⁰²

2. AUSA Bottini's Role in the Late Production of the Pluta 302 and the IRS MOI

Having recounted in some detail the contributing factors (decisions, actions, failures to act) that caused the late disclosure to happen (the first part of the three-part question¹⁰³ for

⁹⁷ ROI at 117. As a proposing official charged with determining whether AUSAs Bottini and Goeke committed reckless misconduct and recommending an appropriate discipline, I am compelled to note that OPR's decision not to define Principal Deputy Chief Morris' conduct as reckless is a factor in my conclusion that the conduct of the AUSAs does not fall within that category of misconduct either. It seems clear to me that delegating (or allowing) a *Brady* review to untrained agents, subsequently delegating the task of redacting interview memos for *Brady* information to untrained agents, and then not ensuring that that work is double-checked even when explicitly reminded to do so are actions that create a substantial likelihood that one's *Brady* obligations will be violated and that could be considered objectively unreasonable under all the circumstances and a gross deviation from what an objectively reasonable attorney supervisor would do. I recognize that OPR found PIN Principal Deputy Chief Morris's conduct in this area to be poor judgment rather than reckless disregard, however; and it is not within my authority to alter this conclusion. However, I want to be clear that my conclusions are influenced by what I consider my responsibility to ensure that the standards are applied in a manner consistent with fundamental fairness.

⁹⁸ ROI at 117.

⁹⁹ ROI at 117-18.

¹⁰⁰ ROI at 180.

¹⁰¹ ROI at 119-20.

¹⁰² Transcript of *United States v. Stevens*, Crim. No. 08-0231, October 6, 2008, at 73-75.

¹⁰³ As stated above in section IV. A., I am applying a three-part inquiry in considering whether reckless misconduct has been shown: (1) what were the contributing factors (decisions, actions, failures to act) that caused the late disclosure to happen; (2) did the attorney take an action or fail to take an action where he knew or should have known that such action or inaction would create a "substantial likelihood" that the disclosure violation would occur; and finally (3) was the action or inaction by the individual attorney "objectively unreasonable under all the

determining whether an individual attorney committed reckless misconduct), I will now address the second two questions, namely (2) did the attorney take an action or fail to take an action where he knew or should have known that such action or inaction would create a “substantial likelihood” that the disclosure violation would occur; and finally (3) was the action or inaction by the individual attorney “objectively unreasonable under all the circumstances” and a “gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation”?

(a.) OPR’s Findings Regarding AUSA Bottini’s Conduct Relating to the Pluta 302 and the IRS MOI

OPR combines its analysis of AUSA Bottini’s conduct relating to the Pluta 302 and the IRS MOI with its analysis of his conduct in connection with Bill Allen’s statements made on April 15, 2008, which were never disclosed to the defense because both situations involve Allen statements that were not properly disclosed. I treat the April 15, 2008 statements separately because the chain of events leading to the non-disclosure of those statements is completely different from that which caused the non-disclosure of the Pluta 302 and the IRS MOI.¹⁰⁴

Focusing then solely on OPR’s findings regarding the Pluta 302 and the IRS MOI, its first finding is that no prosecutor intentionally failed to disclose these statements.¹⁰⁵ In terms of “general” findings of responsibility, OPR concludes: “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.”¹⁰⁶ OPR finds this delegation to be “an abdication of the prosecutors’ duty,”¹⁰⁷ and I agree.

With respect to AUSA Bottini, OPR found that he acted in reckless disregard of his professional responsibilities for the following reasons: (1) He “defended” the delegation of the *Brady* review to the agents because of the time compression;¹⁰⁸ (2) He was the attorney responsible for examining Bill Allen, had numerous trial prep sessions with him, reviewed all of his prior statements “not specifically focusing on *Brady*,” while keeping *Brady* and *Giglio* obligations in mind, but he failed to identify “a single *Brady* statement” and did not identify the

circumstances” and a “gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation?”

¹⁰⁴ Unlike the Pluta 302 and the IRS MOI, the statements from the April 15, 2008 interview of Bill Allen were never reduced to writing in any official 302 or interview memorandum, so no 302 was available to be reviewed during the *Brady* review. Without such a document, no member of the team that interviewed Allen on April 15, 2008 recalled that interview having taken place during the *Brady* review process. Moreover, even if the team had remembered the April 15, 2008 interview having taken place at the time of the *Brady* review, the key statement from that interview (that Allen did not remember whether or not he spoke with Bob Persons about the Torricelli Note) would not yet have been recognizable as an inconsistent statement of Allen, because Allen had not yet made the new statement (that Bob Persons told him that the Torricelli Note was just Ted Stevens’ “covering his ass”) at the time when the *Brady* letter went out on September 9, 2008.

¹⁰⁵ ROI at 192, 199.

¹⁰⁶ ROI at 193.

¹⁰⁷ ROI at 194.

¹⁰⁸ ROI at 199.

Pluta 302 and the IRS MOI as *Brady* to be disclosed;¹⁰⁹ (3) He allowed the agents to do the *Brady* review and failed to give them guidance or to review their spreadsheets; and (4) He “abdicated his responsibility to perform a *Brady* review of materials relating to his witness.”¹¹⁰ OPR concludes that AUSA Bottini “should have known he bore the responsibility for reviewing interview reports relating to Allen to determine if there was *Brady* material contained therein” and that his “*failure to review Allen’s interview reports for Brady material information created a substantial likelihood that he would violate his obligations.*”¹¹¹ (emphasis added). Therefore, “under all the circumstances,” OPR concluded that AUSA Bottini’s “failure to review Allen’s interview reports for *Brady* material was objectively unreasonable.”¹¹²

I do not agree that these findings are supported by a preponderance of the evidence for several reasons, which I describe below, but the main reason is that the record does not support the foundational basis of OPR’s conclusion: that AUSA Bottini “*failed to review Allen’s interview reports for Brady material.*” Indeed, the ROI gives short shrift to AUSA Bottini’s testimony but does state, as follows, that he *did in fact review reports for Brady material*:

Nevertheless, he also told us that, while reviewing Allen 302s for trial preparation purposes, he had in mind to make note of any *Brady* or *Giglio* material, but nothing “leaped out” at him.¹¹³

It cannot be both ways: that AUSA Bottini’s conduct is objectively unreasonable for “failing to review Allen’s interview reports for *Brady* material” and at the same time AUSA Bottini’s conduct involved “reviewing Allen 302s . . . to make note of any *Brady* or *Giglio* material.” Likewise, if *failing* to review Allen’s 302s for *Brady* is objectively *unreasonable* conduct, then *reviewing* Allen’s 302s for *Brady* must be considered *reasonable* conduct, even if it is ultimately unsuccessful in correctly recognizing and producing such material in a timely manner to the defense. In the next section I address some of the other weaknesses in OPR’s conclusions and analyze the evidence relating to AUSA Bottini’s conduct.

- (b.) The Record Does Not Show by a Preponderance of the Evidence that AUSA Bottini’s Conduct Relating to the Pluta 302 and the IRS MOI was Unreasonable Under All the Circumstances and Created a Substantial Likelihood that a Disclosure Violation Would Occur.

AUSA Bottini gave sworn testimony to OPR and to the independent prosecutor, Henry F. Schuelke, consuming four days. In both settings, he was questioned in detail about the *Brady* review conducted by the agents and his own practices and actions regarding whatever *Brady* review that he did. A review of each of these transcripts reveals the following relevant facts:

¹⁰⁹ ROI at 200.

¹¹⁰ *Id.*

¹¹¹ ROI at 200-01.

¹¹² ROI at 201.

¹¹³ ROI at 201; Schuelke Bottini Interview I at 311(Bottini did not believe the case would be indicted prior to the election.).

- The Alaska AUSAs were not kept informed by the Criminal Division or PIN as to whether the *Stevens* case was likely to be indicted in July 2008; Bottini was assigned to take over a major capital murder case in June 2008 and had assumed the *Stevens* case would *not* be indicted that summer;¹¹⁴
- Bottini viewed the *Stevens* case as “Nick Marsh’s case,” and effectively saw Marsh as the lead attorney¹¹⁵ and as his supervisor¹¹⁶ up until the sudden decision by the Criminal Division to demote Marsh to third chair and make PIN Principal Deputy Chief Brenda Morris the lead attorney;
- Bottini understood that it was PIN’s responsibility to keep track of the discovery process and what was being disclosed;¹¹⁷
- Though Bottini testified that he normally conducted his own *Brady* review, he did not object to the delegation of the *Brady* review to the agents because he “wasn’t the lead attorney on the case, and it wasn’t something that I thought was my decision to make as to how this was going to be accomplished.”¹¹⁸
- Bottini saw the *Brady* review process as a task that PIN was taking on¹¹⁹ while he and AUSA Goeke prepared the witnesses and organized trial exhibits in the few weeks they had before the trial was set to begin;¹²⁰
- Bottini did not “defend” the delegation of the *Brady* review to the agents – he explained why he believed PIN chose that method: the time compression;¹²¹
- In terms of his personal *Brady* obligations as a prosecutor, Bottini stated that in preparing a witness to testify he would make a witness folder, review all 302s¹²² and Grand Jury testimony, as well as his own handwritten notes, in order to both prepare the witness and to look for any possible *Brady* or *Giglio* statements that should be disclosed;¹²³

¹¹⁴ Schuelke Bottini Interview I at 311-19; OPR Bottini Interview I at 84 (“I was of a mind that I’ll believe it when I see it.”).

¹¹⁵ OPR Bottini Interview I at 47.

¹¹⁶ OPR Bottini Interview I at 57.

¹¹⁷ OPR Bottini Interview I at 113-15.

¹¹⁸ OPR Bottini Interview I at 131.

¹¹⁹ OPR Bottini Interview I at 124; Schuelke Bottini Interview I at 27.

¹²⁰ OPR Bottini Interview I at 186-89; Schuelke Bottini Interview I at 29.

¹²¹ OPR Bottini Interview I at 128. A close reading of the question and answer on this point shows that Bottini did not agree that the delegation of the *Brady* review to the agents was an *appropriate* delegation, but rather that he agreed that, in fact, the review was delegated. When asked how it came to happen, Bottini answered: “I don’t recall how or who made the decision that the agents were going to review the stuff. I know time compression had to be a factor.” *Id.* at 128-29.

¹²² OPR Bottini Interview I at 138 (read through 302s as part of witness prep and would have turned over any important *Brady* if he found it); *Id.* at 233 (thought he had a complete set of 302s).

¹²³ Schuelke Bottini Interview I at 31-38, 62-64; II at 572-73. Because the reasonableness of Bottini’s review of *Brady* materials is at issue, it is helpful to quote his description of his process at length:

- Bottini understood that the *Brady* letter primarily was the responsibility of the PIN attorneys;¹²⁴
- Although OPR states that Bottini failed to identify “a single *Brady* statement,” Bottini testified regarding two *Brady* statements that he recalled coming up during his preparation of the witnesses that were turned over to the defense: one, a false statement Bill Allen admitted making; and second, a prior misstatement of Rocky Williams;¹²⁵
- Although OPR states that Bottini failed to give the agents any guidance or to review their spreadsheets, he testified that he recalled being asked by SA Chad Joy to review his *Brady* spreadsheet regarding witness Dave Anderson, and although he did not have a specific recollection of sitting down with him, he believed that he did so;¹²⁶
- Bottini admitted that, other than the instance above, he did not take action in response to the other FBI and IRS *Brady* spreadsheets because he believed they were being prepared to assist in the production of the *Brady* letter that he understood PIN was responsible for writing;¹²⁷

What I generally do is make up a witness folder that’s ultimately going to be my trial [sic] for that witness. Into that folder I put any handwritten notes, of any interviews that I attended with that witness, any 302s or other memorandums of interview, the witness’ criminal history if it’s not too lengthy, any grand jury transcripts, anything related to that particular witness that I would ordinarily review for particular witness that I would ordinarily review for the purpose of making a trial outline, or for the purpose of conducting a *Brady* review. With Allen, because he was going to cover so many different subject areas in this trial, and because I knew from my experience of working with him in preparation for the Kohring trial, it was going to take a long time, what I decided to do is rather than make one massive Bill Allen collection, was to make subject files. I made for him, for his trial prep purposes, somewhere between 15 and 20 different folders, to break them down into discrete topics so it was manageable for me. I could throw a 302 in there. If it was like “Bill and Ted’s Relationship,” I made one folder. Whatever 302s addressed that subject area, whatever notes we may have had or I may have had related to that, I put it in the file.

Schuelke Bottini Interview II at 572-73. This type of *Brady* review is considered reckless in OPR’s view because it was combined with the witness preparation process. Although conducting a separate, *Brady*-only, review of all 302s would arguably be more singularly focused than the process AUSA Bottini used, I cannot agree that Bottini’s process constituted a “failure to review for *Brady* material” or was so reckless that it created a substantial likelihood that *Brady* would be violated.

¹²⁴ OPR Bottini Interview I at 166, 457; Schuelke Bottini Interview II at 786.

¹²⁵ Schuelke Bottini Interview I at 39-42. Although AUSA Bottini’s testimony is unclear whether he personally “discovered” these two *Brady* statements, he does refer to them as examples of *Brady* material that he became aware of and that were disclosed during the his witness prep and review of materials.

¹²⁶ OPR Bottini Interview I at 135.

¹²⁷ OPR Bottini Interview I at 150-51 (“No, as I understood this process at the time, it was for the purpose of disclosure in the *Brady* letter. And I wasn’t writing the *Brady* letter, the September 9th letter. So, I didn’t, you know, I didn’t take that spreadsheet and do anything with it as far as converting it into some form of disclosure. My understanding is someone else was doing that at Public Integrity.”); OPR Bottini Interview I at 153-55 (“I thought [the *Brady* spreadsheet] 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.”).

- Bottini read the final draft of the *Brady* letter on the evening of September 9,¹²⁸ the day after he had traveled from Alaska to Washington, D.C., and following a day in which he was preparing for a motions hearing the next morning regarding motions he had not researched or written.¹²⁹ He testified that although he asked himself whether he had any *Brady* material that he came across during his witness preparation, he did not notice or realize that paragraph 17(c) was inaccurate regarding Bill Allen,¹³⁰
- Bottini said he did not go through the *Brady* letter with a fine toothed comb or say “where is the information” for that, but he did look at it;¹³¹ he read it for format not for accuracy;¹³² he “skimmed it.”¹³³

OPR found that AUSA Bottini “engaged in professional misconduct by acting in reckless disregard of his disclosure obligations with respect to . . . the Pluta 302, and the IRS MOI for December 11-12, 2006.”¹³⁴ I disagree, because I do not find that the elements of the reckless misconduct standard have been met by a preponderance regarding the specific conduct of AUSA Bottini.¹³⁵

First, as discussed above in Sections IV.A.1.(a)-(f), many significant factors, including decision and actions by others, not AUSA Bottini, were primarily responsible for this disclosure violation. As to the second part of my inquiry, “(2) did the attorney take an action or fail to take an action where he knew or should have known that such action or inaction would create a “substantial likelihood” that the disclosure violation would occur?”, the evidence simply does not support a conclusion that AUSA Bottini either took or failed to take any actions that he knew or should have known created a substantial likelihood that a disclosure violation would occur. AUSA Bottini’s conduct in carefully reviewing handwritten notes, interview memoranda, and Grand Jury testimony, both for witness preparation and for *Brady/Giglio* materials is unquestionably *not* the kind of conduct that he knew or should have known would create a substantial likelihood that a *Brady* violation would occur.

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 agents¹³⁶ and second, the PIN attorneys’ decision *not* to include all of the

¹²⁸ OPR Bottini Interview I at 448.

¹²⁹ OPR Bottini Interview I at 198-99. Bottini was tasked with arguing two motions that he had not written or researched, so he spent most of September 9, 2008 preparing for the motions hearing the next day.

¹³⁰ Schuelke Bottini Interview I at 67.

¹³¹ Schuelke Bottini Interview I at 242.

¹³² Schuelke Bottini Interview I at 246.

¹³³ Schuelke Bottini Interview II at 774.

¹³⁴ ROI at 25.

¹³⁵ As stated above, with regard to the OPR’s findings that “the government violated its disclosure obligations with respect to information contained in an FBI 302 of a February 28, 2007 interview of Bill Allen (the “Pluta 302”) and an IRS MOI of an Allen interview on December 11-12, 2006, ROI at 25, I agree that the preponderance of the evidence supports this finding of general culpability by the prosecution team.

¹³⁶ See ROI at 199 (“We concluded, further, that PIN Principal Deputy Chief Morris exercised poor judgment by authorizing the delegation of the *Brady* review of witness interview reports to case agents; by delegating the

items the agents identified as *Brady* in the *Brady* letter. While OPR is correct, and AUSA Bottini does not deny, that he did not review the agent-prepared *Brady* spreadsheets, his explanation (that he understood at the time that these were being prepared specifically to be used by the drafters of the *Brady* letter, and that he did not believe that it was his responsibility to review them) is 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.

AUSA Bottini, on the other hand, was diligent in gathering Allen's prior statements and his own notes and reviewing them for *Brady* as part of his witness preparation. This process cannot reasonably be considered reckless. Although OPR does not mention the examples AUSA Bottini referred to in his testimony, he recalled two items that he considered *Brady* or *Giglio* that did come up during his review and were disclosed, even if he personally did not identify them.

It is also true that AUSA Bottini, like all the other members of the trial team, read paragraph 17(a) of the *Brady* letter without realizing that it did not accurately represent Bill Allen's prior statements. For this inquiry, though, the question is whether AUSA Bottini's reading of the letter for form, or "skimming" it, was an action that he knew or should have known was creating a "substantial likelihood" of a *Brady* violation. 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,¹³⁷ 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.

Finally, as to the third question, "was the action or inaction by the individual attorney 'objectively unreasonable under all the circumstances' and a 'gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation,'" I do not find that the preponderance of the evidence supports such a conclusion. The record does not support what is perhaps OPR's core finding of recklessness on this point – that AUSA Bottini, as the attorney responsible for presenting Bill Allen at trial, failed "to review Allen's interview reports for *Brady* material." OPR's point is that AUSA Bottini failed to do a *Brady* review of Allen 302s that was separate and in addition to the review he did while preparing Allen. Although perhaps an admirable practice in an ideal world, this specific style of conducting a *Brady* review is not required either by the *Brady/Giglio* line of cases, by the USAM policy, or any other law or policy. Furthermore, while the division of labor in many cases is for the attorney assigned to present a witness at trial to be responsible for gathering that witness' *Brady* and *Giglio*, that division of labor did not occur in this case. Thus, for AUSA Bottini to conduct his own *Brady* review, which he was not tasked with doing, while simultaneously preparing his witness was clearly *not* objectively unreasonable or a gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation.

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.").

¹³⁷ 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.

As for AUSA Bottini's skimming of the *Brady* letter, considering "all the circumstances," the evidence does not show by a preponderance that doing so was objectively unreasonable or a "gross deviation" from the standard of conduct that an objectively reasonable attorney would observe." AUSA Bottini reliance on the care and professional judgment of co-counsel, particularly when a team of experienced attorneys is dividing different tasks, and the author of the *Brady* letter is the former lead attorney on the case and the lawyer with perhaps the firmest grasp of the evidence, was not objectively unreasonable conduct.

For these reasons, I believe the evidence supports a poor judgment¹³⁸ finding but not a reckless disregard finding. I reach this conclusion because I share OPR's concern that paragraph 17(c) of the *Brady* letter was not an accurate summary of Bill Allen's prior statements regarding Senator Steven's willingness to pay for the renovations. The evidence does support a conclusion that AUSA Bottini (and the entire trial team) should have caught this inaccuracy before the letter was sent, and I see these failures as exercising poor judgment: a course of action that is in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take. AUSA Bottini's failure here was akin to negligence, but the evidence in the record does not support by a preponderance a finding that the failure falls within OPR's definition of reckless misconduct.

B. Failure to Disclose Bill Allen's Prior Statements Contained in Notes from April 15, 2008 Interview.

The ROI discusses the untimely disclosure of the Pluta 302 and IRS MOI together with the separate failure to disclose Allen's April 15, 2008 interview statements, but because the causes of these two disclosure violations are completely distinct and unrelated, I address them separately. Unlike Allen's statements in the Pluta 302 and the IRS MOI concerning Senator Stevens' willingness to pay for certain services if he received an invoice, which were favorable to the defense at the time Allen made the statements, and that were ultimately turned over to the defense in time for effective use at trial, Allen's statements from April 15, 2008 were not exculpatory when made,¹³⁹ were not remembered by any of the prosecutors who heard them, were not memorialized in a 302, and were never turned over to the defense before or during the trial.¹⁴⁰

¹³⁸ OPR's standard for poor judgment is defined as: "An attorney exercises poor judgment when, faced with alternative courses of action, he or she chooses a course of action that is in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take. Poor judgment differs from professional misconduct in that an attorney may act inappropriately and thus exhibit poor judgment even though he or she may not have violated or acted in reckless disregard of a clear obligation or standard. In addition, an attorney may exhibit poor judgment even though an obligation or standard at issue is not sufficiently clear and unambiguous to support a professional misconduct finding. A mistake, on the other hand, results from an excusable human error despite an attorney's exercise of reasonable care under the circumstances." ROI at 125.

¹³⁹ As the ROI explained, "When Allen told the prosecution team on April 15, 2008, that he did not recall Bob Persons asking him, at the Senator's behest, about submitting a bill for VECO's work on the Girdwood residence, his statement was neither *Brady* nor *Giglio* information at that time. The statement was neutral then; it benefitted neither party. Allen did not deny talking to Persons; he simply had no recollection of doing so. That changed, however, on September 14, 2008, when Allen told Bottini and Kepner during a trial preparation session that he had in fact discussed the note with Persons, who told Allen that Stevens was "just covering his ass." ROI at 177.

¹⁴⁰ ROI at 143.

OPR concluded that the government violated its obligations, under constitutional *Brady* and *Giglio* principles and Department of Justice policy (USAM § 9-5.001), by failing to disclose Allen's April 15, 2008 statements that he did not recall discussing the Torricelli Note with Bob Persons and that the value of VECO's work on Girdwood was between \$80,000 - \$100,000.¹⁴¹ As with the other "general" findings of misconduct by OPR, I am in accord with the conclusion that the prosecution team as a whole violated its obligations to turn over the exculpatory statements made by Bill Allen on April 15, 2008.

1. The April 15, 2008 Interview of Bill Allen and his Statements Regarding the Torricelli Note and the Value of the VECO Work

The undisclosed statements from April 15, 2008 arose when Bill Allen was questioned by the prosecution team about a large number of documents the defense team produced a week earlier on April 8, 2008. At that stage, the government had not yet made the final decision whether or not to indict Senator Stevens. The defense documents, consisting of five boxes of materials, included two handwritten notes from Senator Stevens to Bill Allen in which the Senator requested that Allen send him a bill for the renovation work at the Girdwood cabin.¹⁴²

¹⁴¹ *Id.*

¹⁴² The two handwritten notes, as provided in the defense discovery, were dated October 6, 2002 and November 8, 2002. Their full texts, as reproduced in the ROI at 144-45, are:

Bates number 35:
10/6/02
Dear Bill -
When I think of the many ways in which you make my life easier and more enjoyable I lose count!
Thanks for all the work on the chalet. You owe me a bill - remember Torricelli, my friend. Friendship is one thing. Compliance with these ethics rules entirely different. I asked Bob P[ersons] to talk to you about this so don't get P.O.'d at him - it's [sic] just has to be done right.
Hope to see you soon.
My best,
Ted

And

Bates number 34:
11/8/02
Dear Bill:
Many thanks for all you've done to make our lives easier and our home more enjoyable. The Christmas lights top it all - our 60 foot tree lighted to the highest point! (Don't forget we need a bill for what's been done out at the chalet). I appreciate your willingness to "keep me company" - and have enjoyed our conversations. Above all, my thanks for all your efforts to help raise funds for our candidates. We got 8 out of 10 - not bad at all! And, plans are underway on both the gas pipeline and ANWR. As soon as things settle down I'll call you to brief you on our plans. Hope to see you again soon. You are a great and understanding friend.
My best
Ted

From the prosecution standpoint, the handwritten notes had both exculpatory and inculpatory evidentiary value: they undercut the notion that Senator Stevens was intending to benefit from the VECO work without paying for it, but at the same time they showed that the Senator had knowledge that he had in fact received a benefit for which he had not paid.¹⁴³ The October 6, 2002 handwritten note became known as “the Torricelli Note,” because in it, Senator Stevens had alluded to former New Jersey Senator Robert Torricelli’s ethics investigation problems, seemingly to emphasize the importance of Allen’s sending a bill.¹⁴⁴

The following are some key facts in the record pertaining to the interview with Bill Allen on April 15, 2008 that assist in understanding the conduct of the attorneys.

- The meeting marked the first time Bill Allen had been interviewed by the prosecution team in several months;¹⁴⁵
- All of the line attorneys participated in the meeting, which took place in Anchorage. AUSAs Bottini and Goeke, FBI SA Kepner and Allen’s attorney, Robert Bundy, participated in person, and PIN trial attorneys Nicholas Marsh and Edward Sullivan participated by phone;¹⁴⁶
- The purpose of the meeting was to show Bill Allen a large number of documents Stevens’ defense attorneys recently provided, including the handwritten notes from Senator Stevens;¹⁴⁷
- AUSA Bottini testified that he recalled that the focus of the session was not only to address the Torricelli Note but to go over documents relating to any possible “official acts” that Senator Stevens may have undertaken on behalf of VECO;¹⁴⁸
- The contemporaneous handwritten notes of the April 15, 2008 meeting by Bottini, Goeke, Sullivan, Kepner, and attorney Bundy all record that Allen was asked about the October 6, 2002 “Torricelli Note,” that he acknowledged that he probably received it, and that he had no recollection at the time as to whether he had, or had not, spoken to Bob Persons about the need to send a bill to Senator Stevens for VECO’s work at Girdwood;¹⁴⁹
- These handwritten notes (with the exception of Goeke’s notes – which do not mention the value of the renovations) also record that in connection with the issue of sending a bill to Senator Stevens, Allen was asked about the value of work VECO did on the Girdwood site, and that he stated that although VECO’s actual

¹⁴³ ROI at 148 (Torricelli Note both “harmful and helpful”).

¹⁴⁴ ROI at 143-44.

¹⁴⁵ ROI at 150, f n. 614 (“Bottini stated that he had not had contact with Allen since he had presented Allen as a witness in the *Kohring* trial. Bottini (Schuelke) Tr. Dec. 17, 2009 at 355-356.”).

¹⁴⁶ ROI at 150.

¹⁴⁷ *Id.*

¹⁴⁸ Schuelke Bottini Interview II at 398-400; OPR Bottini Interview I at 327-34 (noting that documents pertaining to official acts were reviewed on April 15 along with the Torricelli Note).

¹⁴⁹ ROI at 152-57 (quoting from notes of Bottini, Goeke, Sullivan, Kepner, and Bundy).

costs may have been as high as \$250,000, had the work been done correctly and efficiently the costs should have been as low as \$80,000 to \$100,000;¹⁵⁰

- The meeting took place over two days, April 15 and April 18, 2008. During the first meeting, on April 15, 2008, Allen got upset and angry when recalling what he considered to be the incompetence of Dave Anderson and had to be calmed down;¹⁵¹
- No 302 or memorandum of interview was ever written memorializing Bill Allen's statements on April 15 and 18, 2008;¹⁵²
- All of the participants from the government team, as well as Allen's attorney, told OPR that they failed to recall the April 15 interview and Allen's statement that he did not remember speaking with Bob Persons about Senator Stevens' note when Allen later stated, on September 14, 2008, that he *did* remember speaking with Persons, and that Persons had said not to worry about sending a bill and that Ted was just "covering his ass" with the note;¹⁵³
- Bottini testified that in preparing Allen for trial he collected and reviewed any handwritten notes he had for any interviews with Allen,¹⁵⁴ but that he did not succeed in locating any handwritten notes from the meeting on April 15-18, 2008 because they were filed in a file folder labeled: "Documents to Show BA on April 15";¹⁵⁵

¹⁵⁰ *Id.* The notes of Bottini, Sullivan, Kepner and Bundy are consistent that Allen stated that he thought \$80,000, or \$80,000-\$100,000 would have been a fair estimate of the correct value to place on the work that VECO did for Stevens, but Bottini's and Bundy's notes also suggest that Allen believed the actual expenses that VECO incurred in the project were much higher, approximately \$250,000. *Id.* at 153, 157. I have reviewed copies of the handwritten notes of Bottini and Bundy and both contain references to "\$250,000" in a context that suggests that this figure is either the *actual cost* (Bottini's notes – "cost something like \$250K!?", see 4/15/08 Bottini notes at CRM013707) or the *possible amount that VECO could have billed* Stevens for the work of the VECO employees (Bundy's notes – "if Bill would have got invoices from VECO empl. he would have cut back a lot on an invoice for Ted if the VECO invoices were \$250K or anything like it." 4/15/08 Bundy Interview notes at p. RB-AWP-OPR 000328).

¹⁵¹ ROI at 153-54. OPR Bottini Interview I at 279-82. Bottini stated: "... I stopped writing. Put my pen down, and jumped in, and tried to help defuse him." *Id.* at 279.

¹⁵² ROI at 151.

¹⁵³ ROI at 192 ("[W]e found no direct evidence that any of the prosecutors in fact recalled Bill Allen's failure of recollection on April 15. Each denied recalling Allen's statement, and we found no evidence that any of them mentioned or discussed, after the September 14 trial preparation session, that Allen had previously failed to recall discussing the Torricelli Note with Persons."). In fact, even after the trial, when Bottini was being questioned by the FBI about whether he recalled having shown Allen the Torricelli Note in April of 2008, he did not recall doing so, and thought Allen had been shown the note for the first time during the trial prep sessions. ROI at 152.

¹⁵⁴ OPR Bottini Interview I at 308 ("**Error! Main Document Only.** So, what I would do is take my notes of prep sessions, create sort of an initial handwritten outline, and then turn that into a typewritten outline that I can then continue to refine as I have got further prep sessions under my belt with a witness.").

¹⁵⁵ Bottini testified that he reviewed his notes of any interview sessions he had with Bill Allen, but that he did *not* find or review his notes from the April 15, 2008 meeting with Allen because he labeled the file "Documents to Show Allen on April 15th" and he did not realize this file contained handwritten notes as well. Schuelke Bottini Interview II at 564-72. Bottini's notes from the April 15, 2008 meeting consist of 23 pages and record that the team

- No other attorney on the prosecution team other than Bottini testified that they looked for or reviewed their handwritten notes pertaining to Bill Allen;¹⁵⁶ supervisor PIN Principal Deputy Chief Brenda Morris testified that it “would not have crossed her mind” to review any handwritten notes of Allen or to direct the attorneys to do so;¹⁵⁷
- Although none of the attorneys who participated in the April 15 interview recalled, when they heard Allen’s September 2008 statement about Persons saying the Torricelli Note was just Senator Stevens’ attempt to “cover his ass,” that Allen had been previously shown the Torricelli Note and had no recollection of speaking with Persons, PIN Principal Deputy Chief Morris testified that she *did* recall, upon learning of the “cover his ass” statement, that PIN Attorney Marsh had reported to her that Allen had been shown the Torricelli Note previously and that Allen had acknowledged receiving it.¹⁵⁸

2. OPR’s Findings of Individual Culpability for Failure to Disclose Bill Allen’s Inconsistent Statement Regarding the Torricelli Note and the Value of the VECO Renovations.

As indicated above, OPR found that the government violated its obligations, under constitutional *Brady* and *Giglio* principles and Department of Justice policy (USAM § 9-5.001), by failing to disclose Allen’s April 15, 2008 statements that he did not recall discussing the Torricelli Note with Persons, and that the value of VECO’s work on Girdwood was between \$80,000 - \$100,000.¹⁵⁹ At the same time, after painstakingly reviewing the evidence, OPR found that the failure to disclose these facts was not intentional.¹⁶⁰ The mitigating factors that OPR cited as bearing on the finding of no intentional misconduct were: (1) the fact that there was no 302 prepared of the April 15, 2008 interview; (2) the Torricelli Note was only one of a number

showed Allen approximately 20 documents or sets of documents. Bottini’s notes from the April 18, 2008 meeting, Bottini testified, were written on the outside cover of this same folder, and the inside flap. *Id.* at 499, 571.

¹⁵⁶ PIN Attorney Sullivan and AUSA Goeke testified that they did not review their notes because they were not asked to do so. ROI at 154-55.

¹⁵⁷ *Id.*

¹⁵⁸ ROI at 166 (“Morris recalled that when Marsh told her about Allen’s comment she remembered that Allen had been asked about the Torricelli Note before and ‘he acknowledged the notes, but I didn’t connect up that, well, why didn’t he say that earlier.’”). Morris testified to having a fairly detailed recollection of hearing from Marsh about the fact the Allen had been shown the Torricelli Note. The ROI states at 167, f n. 693:

Morris recalled that Allen had been shown the note prior to the September 2008 preparation session, but that **“he wasn’t really pinned down.”** Morris stated that she spoke to Marsh following the April 15, 2008 Allen interview and that Marsh was disappointed that Allen had received the note. Morris stated that she told Marsh he needed to **“ask the rest of the questions”** about the note such as how did Allen get the note, and where was he when he received the note. Morris stated that none of the attorneys on the prosecution team talked to her about their memory of what happened on April 15. Morris OPR Tr. Mar. 19, 2010 423-426. (emphasis added).

¹⁵⁹ ROI at 143.

¹⁶⁰ ROI at 189.

of documents shown to Allen at the time of the April 15 interview; and because the focus of the interview was not specifically on that document and because the statement that Allen did not recall speaking to Persons was not significant at the time, it was plausible that the prosecutors could have forgotten this statement; (3) Allen’s attorney, Robert Bundy, also failed to remember his own client’s April 15 statement that he did not recall whether he spoke with Persons when Allen later said in September 2008 that he had spoken to Persons and Persons made the “cover his ass” comment; (4) three of the four prosecutors located their notes of the April 15 meeting showing the prior inconsistent statement; and (5) no direct evidence was found supporting a conclusion that the prosecutors in fact remembered the April 15 statement; in fact, AUSA Bottini’s September 2008 notes corroborate that he did not remember that Allen had previously been shown the Torricelli Note.¹⁶¹

While finding no intentional misconduct, OPR did conclude that AUSA 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.”¹⁶² In particular, OPR found:

Here, Bottini participated in the April 15 Allen interview and took detailed notes of Allen’s responses to the questions regarding the Torricelli Note. Bottini was the only trial team attorney present during the September 14, 2008 pretrial preparation session in which Allen made the “covering his ass” statement. We found that Bottini failed to adequately search his own files for his notes of Allen interviews and took no steps to gather any notes taken by Kepner or his fellow prosecutors for any Allen interviews. Accordingly, we concluded that Bottini acted in reckless disregard of his obligation to learn of exculpatory and impeachment evidence in the government’s possession regarding Bill Allen.¹⁶³

To catalogue the specific bases that OPR relies on in finding AUSA Bottini to have committed reckless misconduct, the ROI cites the following:

- Even taking account of Bottini’s explanation that he mislabeled his file containing his notes of the April 15 interview as “Documents Shown to Allen on April 15,” given that the same documents that were shown to Allen on April 15 were also shown to him during the September prep sessions, “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;”¹⁶⁴

¹⁶¹ ROI 190-92.

¹⁶² ROI at 195.

¹⁶³ *Id.*

¹⁶⁴ ROI at 196.

- He failed to review the agent-generated *Brady* sheets and failed to find any other *Brady* material in the 302s that he reviewed.¹⁶⁵
- In light of the significance of Allen’s “cover his ass” statement and its damage to the defense, “Bottini knew or should have known that a document as significant as the Torricelli Note was not shown to Allen for the first time a mere two weeks before the commencement of trial. Under the circumstances, we found that Bottini’s failure to search his memory or his files, as well as the memories and notes of his colleagues and Kepner, pertaining to Allen interviews was objectively unreasonable under the circumstances;”¹⁶⁶
- Bottini never asked to see SA Kepner’s interview notes;¹⁶⁷
- Bottini failed to correct the record when defense counsel did not establish through cross-examining Allen that Allen had only recently made the “cover his ass” statement regarding the Torricelli Note. Bottini therefore “compounded his misconduct in failing to disclose Allen’s April 15 statements by failing to correct Allen’s inaccurate testimony on cross-examination.”¹⁶⁸
- We found that even if Bottini’s prior failure to identify the *Brady* material related to the Torricelli Note were considered to be a mistake, Bottini’s failure to correct Allen’s trial testimony, standing alone, constituted reckless disregard of his *Brady/Giglio* and USAM obligations.¹⁶⁹

OPR’s findings regarding AUSA Bottini’s reckless misconduct in this area boil down to three primary failings: (1) he failed to find his notes or ask for anyone else’s notes from April 15 because he did not conduct a thorough enough search; (2) the “smoking gun” or “bombshell” nature of the “cover his ass” comments by Allen concerning the Torricelli Note was so significant that it should have set off an alarm bell causing him to search more thoroughly and even to realize that the attorneys had to have shown Allen the Torricelli Note previously and therefore such notes would exist; and, finally (3) he failed to correct the record when he saw that defense counsel was trying to elicit an admission from Allen that the “cover his ass” statement was only recently told to the government, but Allen did not make such an admission. There is support in the ROI for these conclusions, but the question is whether these failings amount to reckless misconduct.

¹⁶⁵

Id.

¹⁶⁶

Id.

¹⁶⁷

ROI at 197.

¹⁶⁸

ROI at 198.

¹⁶⁹

Id. at f.n.766.

3. Analysis of OPR’s Reckless Misconduct Findings as to the April 15, 2008 Statements of Bill Allen.

In analyzing whether OPR’s findings are supported by a preponderance of the evidence, I will apply the same three-part inquiry I used in discussing the failure to disclose the Pluta 302 and the IRS MOI, namely: (1) what were the contributing factors (decisions, actions, failures to act) that caused the failure to disclose the information to happen; (2) did the attorney take an action or fail to take an action where he knew or should have known that such action or inaction would create a “substantial likelihood” that the disclosure violation would occur; and finally (3) was the action or inaction by the individual attorney “objectively unreasonable under all the circumstances” and a “gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation?”

(a.) Factors Contributing to Failure to Disclose April 15, 2008 Statements of Bill Allen

As the ROI makes clear, a number of factors caused the failure to disclose the statements Bill Allen made on April 15, 2008. Those factors include, first, the fact that there was no 302 memorializing the meeting. Without a 302, the prosecutors had no formal record of Bill Allen’s statements from that day. Moreover, when AUSA Bottini was gathering Allen’s prior statements and his notes to prepare Allen for his testimony, there was no 302 to trigger his memory that he had interviewed Allen on that day and that his notes should be reviewed.

Consequently, there was no 302 to be turned over on October 1, 2008, when the Court eventually ordered the government to produce all of the 302s. If there had been a 302, it would have been given to the defense while Bill Allen was still on the witness stand, and the defense could have used it to demonstrate the point they had already deduced – that Bill Allen had only recently told prosecutors about the “cover his ass” statement. And, more importantly, the defense could have used the 302 to impeach Allen by cross-examining him about whether he made a prior statement that he did not recall speaking with Persons about the Torricelli Note.

Second, none of the lawyers (including Allen’s defense attorney) who were at the April 15 debriefing remembered that Bill Allen had been shown the Torricelli Note, let alone the then-unimportant detail that Allen stated he did not recall whether Persons spoke with him about it. Therefore, when Allen related Persons’ comment regarding the Torricelli Note five months later, no one recalled Allen had made any previous statements about the document.¹⁷⁰

Third, given the lack of any record-keeping regarding the evidence in the case and what discovery the government had produced, it appears unlikely that the team kept a record or log of witnesses interviewed or 302s to be completed following interviews.¹⁷¹

¹⁷⁰ As mentioned above, only PIN Principal Deputy Chief Morris said she did in fact recall, upon hearing of Allen’s recollection that Persons said the Torricelli Note was just Senator Stevens’ covering his ass, that he had been asked about the note, recognized it, but was not pinned down about it. *See* ROI at 166-67.

¹⁷¹ *See* ROI at 513 (outlining the disorganization of the file-keeping as it pertained to the evidence and discovery in particular).

Fourth, with the exception of AUSA Bottini, none of the attorneys who attended the April 15 meeting gathered and reviewed their notes from the Allen interview sessions. AUSA Bottini testified that he did gather his notes of previous interview sessions, along with 302s, Grand Jury testimony, etc., put them into witness folders and used them to create his outline of questions.¹⁷²

Fifth, AUSA Bottini's notes were in a folder that was labeled "Documents to Show to BA on April 15th."¹⁷³

Sixth, the lead prosecutor and Principal Deputy Chief of the section prosecuting the case, who was the only attorney with any recollection that Bill Allen had previously been confronted with the Torricelli Note but "not been pinned down" on it, failed to direct the team to conduct any additional due diligence such as to search their own files for any notes of interviews with Bill Allen that they may have missed or forgotten about after learning that Bill Allen was now saying that the Torricelli Note was an attempt by Senator Stevens to "cover his ass."¹⁷⁴

- (b.) Should AUSA Bottini have known that his failure to conduct a more thorough search for his notes would create a "substantial likelihood" that a disclosure violation would occur, and was this conduct "objectively unreasonable under all the circumstances" and a "gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation?"

AUSA Bottini reviewed his notes of interviews with Bill Allen, as well as his Grand Jury testimony and the "universe" of 302s that he knew to exist at the time.¹⁷⁵ In doing so, AUSA Bottini did not know, nor should he have known, that this action would "create a substantial likelihood" of a disclosure violation. In this case, it is not what AUSA Bottini *did* (reviewing those notes, reports and testimony that he found) that created any likelihood of a disclosure violation, but rather what AUSA Bottini *failed to do* (did not conduct a search adequate to result in finding his notes from April 15). Of course, AUSA Bottini did not *know* that he failed to find his notes, and this element is grounded in the attorney's state of mind, requiring a showing that the attorney either knew, or should have known, that whatever action he is taking, that action is such that it is creating a "substantial likelihood" that a professional obligation will be violated.

¹⁷² Schuelke Bottini Interview II at 560-72 (describing practice of reviewing notes as part of witness preparation, including notes of Bill Allen); OPR Bottini Interview I at 34 (AUSA Bottini specifically requested copies of all of Bill Allen 302s that had been generated up until the point he was preparing him for trial).

¹⁷³ Schuelke Bottini Interview II at 571.

¹⁷⁴ See ROI at 166 (Morris recalled that Allen had been shown the Torricelli Note and acknowledged the notes), 154-55 (Morris did not ask prosecutors to review their notes). Bottini reviewed his prior notes of Allen but did not find those from the April 15th meeting because it was labeled as "Documents to Show to BA on April 15th" and he had forgotten that Bill Allen was interviewed that day. Both Sullivan and Goeke also forgot that the interview had occurred, but they also testified that they did not review any of their own handwritten notes of sessions with Bill Allen because they were not told to do so. See ROI at 155 (Goeke did not review his notes for *Brady* material because he was not told to do so.); 154 (Sullivan also did not review his notes because he was not asked to do so); 195 (OPR finds Sullivan and Goeke not to have committed reckless misconduct for failing to review their notes in part because they were not directed to do so.).

¹⁷⁵ OPR Bottini Interview I at 234.

In order to find this element met, there must be some proof that AUSA Bottini was aware, or should have been aware, that he was not searching adequately or thoroughly enough for his notes in light of the surrounding circumstances. While it may be logically correct to state that AUSA Bottini's *failure to find his notes* from the April 15 interview created a substantial likelihood that the information from *those notes would not be disclosed*, this statement says nothing about whether there were facts or circumstances that should have alerted AUSA Bottini to a duty to search more diligently for any possible notes of any kind. If such facts and circumstances existed, they would provide an evidentiary foundation for a conclusion that Bottini *should have known* that his file searching conduct was inadequate under the circumstances and created a likelihood of a disclosure violation. However, as will be seen in the discussion below, except for Allen's statement itself, there were no other facts or circumstances that would have alerted Bottini to a responsibility to re-check all of his files for any notes that he might have missed – there was no reason for him to suspect that he had missed anything. I will discuss those surrounding circumstances by considering the next element: whether AUSA Bottini's failure to find those notes was objectively unreasonable under the circumstances.

OPR found that it was plausible, in the absence of any 302 memorializing the meeting, that all of the attorneys who participated in the April 15, 2008 debriefing with Bill Allen could have forgotten that it ever happened. Can it be *objectively unreasonable* for an attorney who has *plausibly failed to remember* that a meeting occurred to fail to look for and find notes from that meeting? OPR argues that Allen's revelation on the eve of trial that Persons told him Senator Stevens did not really want any bill, as he asked for in the Torricelli Note, but that the note was merely an attempt to "cover his ass" was a "smoking gun" of such magnitude that it should have spurred Bottini to conduct a more vigilant search of his files, and even that he "knew or should have known that a document as significant as the Torricelli Note was not shown to Allen for the first time a mere two weeks before the commencement of trial."¹⁷⁶

Against this analysis of the evidence I weigh several other factors. The first is that if it is truly the case that an attorney has no memory of an event, I am dubious of the logic behind an argument that says a later occurring development, however dramatic, can reasonably be said to be likely to trigger in the mind of the attorney the need to look harder for notes from the event he did not remember.¹⁷⁷ Given that the record shows that AUSA Bottini generally was meticulous in preparing his witnesses and attempted to assemble all of the notes and prior statements of the witness into a single file or set of files, but he nevertheless missed his April 15 notes, there is strong evidence on both sides of the question of whether his actions were objectively reasonable

¹⁷⁶ ROI at 196. I note that, as discussed above in the analysis concerning the Pluta 302 and the IRS MOI, AUSA Bottini understood the division of labor to be that the PIN attorneys were gathering the prior reports and looking for *Brady* while he and AUSA Goeke were preparing witnesses. Consequently, I give considerably less weight to OPR's concern that Bottini did not review the *Brady* spreadsheets as an indicator of unreasonableness. Indeed, reviewing the *Brady* spreadsheets could not have led to the discovery of Allen's statements made on April 15th because, as stated, there was no 302.

¹⁷⁷ Given that AUSA Bottini still did not recall showing Allen the Torricelli Note until shortly before the trial when interviewed by the FBI in March of 2009, it seems clear that his lack of memory of the April 15, 2008 debriefing was very strong. Although OPR suggests that AUSA Bottini's memory should have been jogged when he saw the mislabeled file "Documents to Show to Allen on April 15th," which may be true, the label on that file is also innocuous enough so that an attorney looking for prior notes might well fail to look in such a file without being objectively unreasonable, assuming that it contained documents that were available elsewhere – which they were in this case.

under all the circumstances. Weighing heavily in Bottini's favor is the fact that no 302 was prepared of this meeting. The record shows that AUSA Bottini was diligent in collecting all of the extant Bill Allen 302s, but no 302 existed of the April 15th interview. In the absence of such a memorialization of the interview it is understandable that AUSA Bottini did not recall the meeting and search for his notes of the meeting.

In addition, given the remarkably compressed time period between indictment and trial in this case, and the somewhat frenetic pace involved in pulling everything together within such a short time frame, I do not share OPR's conviction that it should have seemed obvious to AUSA Bottini that the Torricelli Note would have been shown to Allen earlier than two weeks before trial. Indeed, Bottini's own notes record his apparent surprise that Allen recognized the Note.¹⁷⁸

I also heavily weigh the manner in which OPR applied its standard to the conduct of PIN Principal Deputy Chief Morris. Unlike AUSA Bottini and the other attorneys (who failed to recall confronting Allen with the Torricelli Note), Principal Deputy Chief Morris told OPR that when she heard about Allen's "cover his ass" statement concerning the Torricelli Note, she *did* recall that Allen had "acknowledged" receiving the note previously but recalled that "he wasn't really pinned down" concerning the note.¹⁷⁹ 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. OPR found it "reasonable" for Morris not to ask "why didn't he say that earlier" because she did not participate in the debriefing on April 15 or in the September 14, 2008 trial prep session when Allen made the "cover his ass" statement.¹⁸⁰ If it was *reasonable* for a high-level supervisor and lead attorney with knowledge of the fact that Allen was asked about Torricelli Note previously not to take any action whatsoever in instructing the team to check to see what exactly Allen said on that previous occasion when he was shown the Note, it is inconceivable to me that it can be *objectively unreasonable* for an attorney who did *not* remember that Allen had been asked about the Note at a prior meeting to fail to double check and thoroughly search for his notes from that meeting. For both of these to be true would require applying a double standard.

OPR notes, however, that even were it to find that AUSA Bottini's failure to find and turn over his notes from the April 15 interview was a mistake, it still would find independently that he acted recklessly in failing to correct the record during Bill Allen's cross-examination.¹⁸¹

¹⁷⁸ ROI at 164, f.n. 682 (Bottini wrote "BA seen this!!" in his notes of September 14, 2008, when he showed Allen the Torricelli Note).

¹⁷⁹ ROI at 160, 167 f.n. 693, 194.

¹⁸⁰ ROI at 194 f.n. 760:

Upon hearing of Allen's September 14, 2008 statement about the Torricelli Note, **Morris recalled that Allen had been asked about the Note at an earlier date** and that "he acknowledged the notes[.]" However, we found that Morris did not appreciate the significance of the earlier interview, stating that she "didn't connect up that, well, why didn't he say that earlier." **We found this explanation reasonable** given Morris's lack of involvement in, or responsibility for, any of the Allen preparation sessions or interviews. More importantly, Morris was not present for the April 15, April 18, and September 14 interviews of Allen. (emphasis added).

¹⁸¹ ROI at 198, f.n. 766.

Keeping in mind the definition's requirement that reckless conduct involve a "gross deviation" from the standard of conduct that an objectively reasonable attorney would observe in the same situation," and having carefully reviewed the cross-examination testimony of Bill Allen, I am not convinced that the evidence shows by a preponderance that AUSA Bottini's failure to correct the record was reckless under the circumstances.

I base my finding on the following reasons. First, AUSA Bottini testified that, as the attorney watching and listening to the actual cross-examination as it happened in court, he believed that Bill Allen was confused by the questioning,¹⁸² and did not intend to lie or falsely deny that the statement was recently made.¹⁸³ Second, in my own reading of the exchange it appears that Allen did ultimately answer the question of when he told the government about the "cover his ass" statement by saying "I don't know what day it was." This response was not the clear admission that defense counsel was seeking, but it appears to me that defense counsel lost patience with the witness and chose not to take the time and care needed to inquire into the matter further and nail down the issue. Although the better practice would have been to bring to the court's attention the fact that Allen had only recently told the government about the statement,¹⁸⁴ I do not agree that failing to do so under these circumstances constituted reckless disregard of AUSA Bottini's *Brady* obligations.¹⁸⁵ Finally, I am, again, disturbed at the uneven application of the standard to co-counsel.¹⁸⁶

¹⁸² See Tr. United States v. Stevens, Crim. No. 08-0231, October 6, 2008 at 80. In one relevant portion of the cross-examination, the questioning was:

Q.: When did you first tell the government that Persons told you Ted was covering his ass and these notes were meaningless? It was just recently, wasn't it?

A. No. No.

Although the defense attorney meant to ask "when did you first tell the government *about* what Persons said," the question as phrased could be easily understood to mean, when did you tell the government that it occurred, this statement from Persons, it was just recently, wasn't it? With the question being understood that way, the correct answer is "no." Allen did not tell the government that it was only just recently that Persons told him Ted was covering his ass.

¹⁸³ Schuelke Bottini Interview II at 626-45.

¹⁸⁴ I note that OPR "did not find that Bottini 'knowingly' offered evidence that he knew to be false, within the meaning of D.C. RPC 3.3(a)(4), or that he failed to correct perjured testimony." ROI at 198.

¹⁸⁵ The fact that Allen told the government just before trial, on September 14, 2008, that Persons said Senator Stevens was just "cover[ing] his ass" with the Torricelli Note is not *Brady* /exculpatory to the defendant. The late date only has impeachment value if it can be shown that Allen said something different at an earlier date. (Allen did in fact make an inconsistent statement on April 15, 2008, but no one, including AUSA Bottini remembered that fact during Allen's cross-examination.) It is true that an admission by Allen that he had just told the government about the "cover his ass" statement would have allowed the defense to argue that perhaps the statement was a recent fabrication, but it is not clear to me that it is objectively unreasonable for a government attorney not to assist defense counsel in undermining the credibility of a government witness provided that the government attorney does not knowingly allow the witness to commit perjury. Furthermore, the cross examination of Allen demonstrates that the defense had reviewed all of Allen's 302s and was well aware that the "cover his ass" statement was not in any of them; therefore, the defense was justified in assuming that the "cover his ass" statement was recently made by Allen. Indeed, the defense argued in its closing that the "cover his ass" statement was a recent fabrication. ROI at 17.

¹⁸⁶ See ROI at 198, f.n. 767. OPR indicates that lead counsel Brenda Morris was present in the court room when the cross-examination of Bill Allen occurred but finds nothing amiss with the fact that she was "not focused" on what was going on because she was exhausted. Because Morris was not paying attention, she was not in any

OPR also points out that in addition to Allen’s April 15 statements about not recalling having spoken to Bob Persons about the Torricelli Note, Allen also made statements valuing VECO’s work on the property at \$80,000 – if it had been done as well and efficiently as it should have been.¹⁸⁷ All of the same reasons recounted above in connection with Allen’s statement that he did not recall talking to Persons apply with equal force when analyzing whether AUSA Bottini was reckless in failing to remember and search for Allen’s statements about the valuation of the work.

A definitive \$80,000 valuation by Allen would have been favorable to the defense, and it should have been disclosed because Stevens paid more than that amount to Christensen Builders. However, as explained above, none of the participants were able to remember the interview occurring when this statement was made, and there was no 302 to remind them. Moreover, with respect to AUSA Bottini’s notes of the interview, it is not at all clear that a reasonable attorney would see Allen’s statements as clearly exculpatory, because his notes show that Allen’s point was that Rocky Williams and Dave Anderson were drunk, inefficient, incompetent, and that although “even if they had done it right – it would have cost \$80K . . . [it] cost something like \$250K!?”¹⁸⁸ Such a statement would definitely prompt further investigation into VECO’s actual costs versus the true market value of the work that was done, but in terms of the “gift” that Senator Stevens was receiving, these notes suggest that the gift could have been as much as \$250,000 worth [VECO’s costs] of inefficiently performed construction work. For this reason, as well as those identified in the above discussion pertaining to Allen’s statement that he did not recall speaking with Persons about the Torricelli Note, I do not find that AUSA Bottini’s conduct was objectively unreasonable.

position as lead counsel to guide or help co-counsel avoid engaging in what OPR found to be reckless behavior. Although Morris told OPR if she had been aware of what was happening she would have considered it “her obligation to correct the record,” OPR nevertheless concludes that Morris did not engage in reckless behavior by saying nothing because Allen was not her witness. An alternative approach might be to hold a lead attorney to a higher standard, as the chief trial counsel, responsible for overseeing and scrutinizing the presentation of evidence and questioning of witnesses being conducted by the members of the trial team to ensure that it met exacting professional standards.

¹⁸⁷ ROI at 152-57 (quoting from notes of Bottini, Goeke, Sullivan, Kepner, and Bundy).

¹⁸⁸ 4/15/08 Notes of Bottini at CRM 013707:

--- Dave Anderson never did any accounting, etc.

--- Dave & Rocky screwed this up –
→ cost so much \$ b/cuz of
their incompetence, bcuz drunk –
→ Not efficient.

--- Even if they had done it right –
→ it would have cost about 80K
→ cost something like 250K!?

--- Rocky/ Dave –
→ screw offs – not there to
Direct the VECO employees –
BA believes that this added
to the cost, etc.

For all of the reasons outlined above, although it is clear that the government team violated its *Brady* obligations and the USAM by not turning over the inconsistent and exculpatory statements contained in the attorney and agent notes recording Bill Allen’s interview of April 15, 2008, I do not find that the facts meet the standard of reckless misconduct by AUSA Bottini by a preponderance of the evidence. I nevertheless find that AUSA Bottini exercised poor judgment in failing to be as thorough as he should have been.

AUSA Bottini’s explanation for not finding his notes from the April 15, 2008 interview is that they were mislabeled as “Documents to Show to BA on April 15, 2008.” While I cannot agree that under all the surrounding circumstances it was objectively unreasonable and a gross deviation from the conduct of an objectively reasonable attorney to fail to search through a file so labeled when looking for *notes* of interviews with Bill Allen, I do find that, by not searching through that mislabeled file, or by not double-checking again after Allen made the “cover his ass” statement, AUSA Bottini took “a course of action that is in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take.” Good judgment here would have counseled looking through a file marked “Documents to Show BA on April 15, 2008” when preparing Bill Allen for trial, even in the absence of any knowledge that the file contained interview notes, or that the notes contained statements that would later turn out to be discloseable under *Giglio*.

V. Analysis of OPR’s Findings of Reckless Misconduct Regarding Failure to Disclose Prior Statements by Government Witness Rocky Williams

OPR found that the prosecution team violated its disclosure obligations under the *Brady* doctrine and Department of Justice policy (USAM § 9-5.001) by failing to disclose information provided by Rocky Williams relating to his work on the Girdwood renovations.¹⁸⁹

Rocky Williams was a construction worker who worked for Bill Allen’s oil services company, VECO, from approximately 1989-90 to 2004. During this period, Williams got to know Bill Allen, who came to rely on Williams for his construction skills, and he became Allen’s “go-to-guy” for various construction-related projects that Allen was doing.¹⁹⁰ When Senator Stevens and Bill Allen conceived of the idea to renovate the Senator’s Girdwood cabin, Allen chose Williams as the manager to oversee the work.¹⁹¹

Williams was a central government witness regarding the extent, nature, and cost of the renovation work that was performed at the Senator’s residence¹⁹² due to his deep involvement in

¹⁸⁹ ROI at 26.

¹⁹⁰ IRS MOI of Rocky Williams dated September 1, 2006 (9/1/06 Williams MOI) at 1-2; FBI 302 of Rocky Williams dated September 14, 2006 (9/14/06 Williams 302) at 1; FBI 302 of Rocky Williams dated September 28, 2006 (9/28/06 Williams 302); [REDACTED]

¹⁹¹ 9/1/06 Williams MOI at 2-5.

¹⁹² Bottini OPR Interview at 394 (Bottini considered Williams and his VECO co-worker Dave Anderson “good overall witnesses in the context of being able to explain the work that was done and really the delineating point between the work that Augie Paone and Christianson Builders did and the work VECO did. They were good witnesses in explaining the phases of construction. One thing that was, I thought, remarkable about both of them is they were really good at working with photographs.”). Williams was an alcoholic, however, and in ill-health by September of 2008. Due to this illness, although Williams had travelled to Washington, D.C. in order to appear as a

all of the phases of construction at the Girdwood residence, and because he had many direct conversations with Allen and a handful of conversations with Senator Stevens about the Girdwood project.¹⁹³ In September of 2006, federal law enforcement agents interviewed Williams on three occasions, and Williams testified before the Grand Jury in November of that year.¹⁹⁴ As the trial approached, AUSAs Bottini and Goeke held three trial preparation sessions with Williams in August 2008, and AUSA Bottini held two sessions with Williams in September 2008.¹⁹⁵

OPR identified four areas of information that Williams disclosed to AUSAs Bottini and Goeke during the trial preparation sessions in August and September of 2008 that were favorable to the defense and should have been disclosed. Specifically, Williams made statements concerning:

- Senator Stevens said he wanted to pay for all the Girdwood renovations;
- Senator Stevens wanted a contractor he could pay;
- Williams reviewed the Christensen Builders invoices and passed them along to Bill Allen (or a VECO employee); and
- Williams thought his and Dave Anderson's hours, and possibly all VECO costs, were added into the Christensen Builders bills.

Finding that this information was material and favorable to the defense, OPR concluded that the failure to disclose it violated the government's constitutional *Brady* obligations.¹⁹⁶ I agree that

witness, the government gave Williams permission to return to Alaska to seek medical care. The defense interviewed Williams telephonically but chose not to cause him to return under their subpoena for testimony. See generally, ROI, Chapter Six at 247-348.

¹⁹³

¹⁹⁴ See 9/1/06 Williams MOI; 9/14/06 Williams 302; 9/28/06 Williams 302; 11/7/06 Williams G.J. Tr.

¹⁹⁵ Other prosecutors and agents participated in some of these meetings, which took place on August 20, 22, 31, and September 20-21, 2008, but because OPR only finds reckless misconduct by AUSAs Bottini and Goeke, I will focus on their participation in these meetings.

¹⁹⁶ ROI at 667. Although OPR concluded that Senator Stevens' statements that he wanted to pay for everything were required to be disclosed under the *Brady* doctrine, I note that there is case law holding that it is not a *Brady* violation if the government fails to disclose an exculpatory statement made by the defendant, which would already be known to the defendant. A review of *Brady* cases on this issue from the Department of Justice *Brady* outline in the online resource "USABook" contains a number of cases so holding. I quote from that outline below. See *United States v. Mahalick*, 498 F.3d 475 (7th Cir. 2007) (Affirming trial court's refusal to order a new trial for the alleged *Brady* violation of failing to disclose to the felon-in-possession defendant the fact that he told an ATF agent that he had obtained the weapon to defend himself and his girlfriend from a home invader known as "the nightcrawler." Defendant claimed that he told the agent this - though she did not record it in a memorandum of interview and the tape of the interview was accidentally erased - and that the government's failure to disclose it to him until the agent testified "disrupted" his trial strategy. The panel rejected this "somewhat strange" argument in part because there is no "suppression" of information that is known to a defendant - his own statement - and even if he forgot what he told the agent, it is not the government's job to remind him.); *Pondexter v. Quarterman*, 537 F.3d 511 (5th Cir. 2008) (In *habeas* case, defendant claimed that state suppressed information from witness who had been defendant's cell mate and to whom defendant allegedly made exculpatory information. In *habeas* proceeding, defendant produced affidavit of cell mate-witness that defendant made the statements, but relief denied because cell mate-witness's affidavit held not exculpatory and: "[I]f Pondexter made these statements to [cell mate-witness], Pondexter, of course, was fully aware both of having done so and of [cell mate's] ability to verify they had been

this material 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.

In the discussion below, I will analyze whether the evidence supports OPR’s individual culpability findings that, while the violations were not intentional, AUSAs Bottini and Goeke engaged in professional misconduct by acting in reckless disregard of their disclosure obligations.

A. Williams’ Statements to Agents and the Grand Jury

Rocky Williams was interviewed by federal law enforcement agents on September 1, 14, and 28, 2006, and he then testified before the Grand Jury on November 7, 2006.¹⁹⁷ AUSA Bottini used these prior statements to prepare Williams for trial,¹⁹⁸ and they were also available to the prosecutors when they drafted the *Brady* letter of September 9, 2008.

Although Williams’ 14 pages of interview memoranda and 77 pages of Grand Jury testimony need not be fully summarized here, it is useful to identify and highlight certain statements Williams made that were either helpful to the defense or significant in that they provide the context for the prosecutors’ understanding of the statements Williams later made during the trial preparation sessions. Some of these statements describe what Williams understood the agreement was between Senator Stevens and Bill Allen, as to why Christensen Builders was brought in as a contractor, and regarding how the bills for the renovations would be paid. Below are some of these statements that Williams made to agents [REDACTED]

- [REDACTED]
- The original concept was only to build a “pony wall” that would raise the property four feet and VECO was going to do that work; but eventually the project grew to include

made. Accordingly, because he would have possessed the information at the time of trial, the state-court denial of his *Brady* claim was not unreasonable under AEDPA.”); *United States v. Graham*, 484 F.3d 413, 417 (6th Cir. 2007), *cert. denied*, 128 S.Ct. 1703 (2008) (no *Brady* violation if defendant knew or should have known the essential facts permitting him to take advantage of the information in question, or if the information was available to him from another source).

¹⁹⁷ See 9/1/06 Williams MOI; 9/14/06 Williams 302; 9/28/06 Williams 302; 11/7/06 Williams G.J. Tr.

¹⁹⁸ Schuelke Bottini Interview I at 63-64. (To prepare witnesses, AUSA Bottini stated he would “read through whatever memoranda of interview – 302s, if they exist, related to that witness; if that witness had testified before the grand jury, to review the grand jury transcript; to prepare a sort of a draft outline, if you will, in preparation for that person coming in for a pretrial interview. So, whatever source material that I would have had related to any prior statements the witness had given, I would have reviewed it, not only for the purpose of getting ready for them to come in, but also to look at it for content, to see if there was something in there that should have been disclosed.”).

¹⁹⁹ [REDACTED]

raising the structure to build an entire new first floor, a new garage, and many other improvements.²⁰⁰

- [REDACTED]
- Williams told the FBI that “STEVENS decided he wanted a contractor he could pay.”²⁰³
- Williams also told the FBI that “STEVENS liked the idea of having someone to pay because it was ‘over the limit.’”²⁰⁴
- [REDACTED]
- Williams told the IRS that he “submitted the hours he worked each week to VECO, including any overtime, and received a paycheck from VECO.”²⁰⁶
- Williams also told the IRS that “there were no formal plans for the addition” prepared, that “he did not really deal with the expenses associated with the project” and that “the billings for the work completed by PEONE [sic] were mailed to STEVENS in Washington, D.C. by PEONE” [sic] and that “PEONE [sic] mailed the billing statements directly to STEVENS and WILLIAMS *did not see or review the statements* before they were sent to STEVENS” (emphasis added).²⁰⁷
- [REDACTED]
- [REDACTED]

²⁰⁰ [REDACTED]; 9/14/06 Williams 302 at 1 (“ALLEN and STEVENS kept talking and the project continued to grow, which made STEVENS more concerned about VECO Corporation doing all of the work.”).

²⁰¹ *Id.* at 13, 17, 19.

²⁰² *Id.* at 19.

²⁰³ 9/14/06 Williams 302 at 1.

²⁰⁴ 9/28/06 Williams 302 at 1.

²⁰⁵ [REDACTED].

²⁰⁶ 9/1/06 Williams MOI at 2.

²⁰⁷ 9/1/06 Williams MOI at 2.

²⁰⁸ [REDACTED].

²⁰⁹ [REDACTED].

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

From the three interview memoranda and the [REDACTED] of Rocky Williams the following facts would have been known to AUSA Bottini and available to AUSA Goeke when they began preparing Rocky Williams for trial in August and September 2008.

First, Williams had not been consistent in his story regarding several issues, including the billing process and his role with the invoices. When Williams was interviewed for the very first time, by the IRS, he said there were no formal plans prepared, that he had no role in reviewing expenses, and that Christensen Builders sent their invoices directly to the Senator in Washington.

[REDACTED] Williams also stated in that first interview that Christensen Builders was responsible for doing 99% of the work on the renovations. This statement was included in paragraph 15 the *Brady* letter, apparently as *Giglio* – an inconsistent statement – that needed to be disclosed to the defense.²¹⁴

Second, in these prior statements, Williams made it clear that he was not present when Bill Allen and Senator Stevens engaged in whatever initial discussions they had concerning the renovations and how they would be funded. Williams’ “understanding” from talking with Bill Allen and Ted Stevens at the project site, as is revealed in the three interview memoranda and the [REDACTED], was that: (1) Due to the expansion of the construction project, it needed a “real” contractor rather than only VECO; (2) Senator Stevens “wanted a contractor he could pay,” and “liked the idea of having a contractor he could pay because it was ‘over the limit’”;

210
211
212
213
214

[REDACTED]

The *Brady* letter of September 9, 2008 failed to properly identify paragraph 15 as containing inconsistent *Giglio* statements, but AUSA Bottini testified that he thought the defense would eventually be given evidence, whether the John Hess drawings, or Williams’ Grand Jury testimony, that would make it clear to them that the statements in paragraph 15 were being disclosed as *Giglio*. OPR Bottini Interview II at 448-49. The *Brady* letter also omitted Williams’ statements that were favorable to the defense, namely, that Senator Steven wanted a contractor he could pay.

(3) Christensen Builders was brought in partly because it was a contractor who could be paid “directly” by Senator Stevens, who “liked that way”; (4) Williams received the monthly Christensen Builders invoices from Augie Paone, reviewed them, and turned them into VECO, assuming that they would be sent from there directly to Washington, D.C.; and, finally, (5) Williams did not know whether Senator Stevens ever reimbursed VECO, but he continued to be paid by VECO.

I note that, prior to Williams’ trial prep sessions in August and September 2008, Williams had not made any reference whatsoever in any interview [REDACTED] to a belief or assumption on his part that the VECO time and expenses were being somehow “added into” Christensen Builders’ invoices by Bill Allen.²¹⁵ In his statements to this point, Williams had related that he understood that Senator Stevens wanted a contractor that he could pay (because he was “under a microscope”) and Christensen Builders was that contractor. Williams had made it clear that he did not know how, or even whether, Bill Allen was finding a way to submit VECO’s bills and expenses to the Senator [REDACTED]

B. Williams’ Statements During Trial Preparation Sessions

As a general practice, no interview memoranda were prepared to memorialize statements Rocky Williams, or other witnesses, made during trial prep sessions,²¹⁶ but the handwritten notes of AUSAs Bottini and Goeke are available from Williams’ sessions. From the multiple pages of notes covering a variety of subjects, I summarize below the key statements contained in the notes that relate to the disclosure violations identified by OPR:

²¹⁵ [REDACTED]

[REDACTED]

FBI policy was that agents did not create a written report of trial prep sessions unless the witness provided new information. *See* ROI at 163, f.n. 679. However, AUSA Goeke asked SA Chad Joy to prepare a 302 to record Williams’ statement on August 22, 2008 to the effect that Williams did not ever communicate with Senator Stevens or with Catherine Stevens about his assumption that VECO invoices were being combined with Christensen Builders’ invoices. *See* ROI at 286, f.n. 1118; 291.

1. August 20, 2008 Trial Prep Session

From AUSA Bottini's notes:

"Ted wanted to pay himself²¹⁷ . . .

Ted – he wanted to pay himself.
Make sure he paid for it, etc.²¹⁸ . . .

Didn't add my time to Augie's bill²¹⁹ (emphasis added) . . .

Normally got the bill from Augie –
would review Augie's bills → take them to the main office review to make sure
that Augie was doing the right thing → gave them to Bill's sec'y²²⁰

Always a cover sheet –
would sign off on that; etc.

Columns of figures²²¹
That was the only billing I ever did; etc.²²²

Everyone else's time – would have been billed to Fab Shop, etc.²²³ (emphasis
added).

From AUSA Goeke's notes:

"TS said didn't want to spend a whole lot of \$\$²²⁴

→ When brainstorming session? → Down to Kenai fishing
Classic → 1999 / 2000

→ at Ted's place – walked around and
pointed out the water

→ Asked for a bottom line for material
Figures → never got one

→ At Chalet remember talking about improving the
Chalet – TS/ Rocky Williams / Bill Allen . . .²²⁵

²¹⁷ August 20, 2008 Bottini handwritten notes of trial prep session, CRM0557288-311 ("8/20/08 Bottini Notes") at CRM0557294.

²¹⁸ 8/20/08 Bottini Notes at CRM0557295.

²¹⁹ 8/20/08 Bottini Notes at CRM0557297.

²²⁰ *Id.*

²²¹ 8/20/08 Bottini Notes at CRM0557298.

²²² *Id.*

²²³ *Id.*

²²⁴ August 20, 2008 Goeke handwritten notes of trial prep session, CRM089063-69 ("8/20/08 Goeke Notes") at CRM089065.

²²⁵ 8/20/08 Goeke Notes at CRM089065.

. . . .
→ Bill called up and wanted to discuss
→ Bill familiar with Rocky's background

→ 1999 → first discussions

→ All a matter of \$\$

Bill had just stopped being a lobbyist and had to be careful.

TS said would pay the through his accts . . .²²⁶

. . . .
Stevens wanted to pay for it.

RW was VECO time

→ RW supposed to go through Augie's bills →
supposed to have RW's **time and Dave's time**
applied to the billing.²²⁷ (emphasis added).

2. August 22, 2008 Trial Prep Session

From AUSA Bottini's notes:

"Augie's bills –

→to Rocky ____.

Signed off on Augie's stuff –

Verified that Vern and Mike were there

→Check their time out

8-5 – 5x week –

After verified –

→took to VECO main
office –
showed to Bill.

²²⁶ 8/20/08 Goeke Notes at CRM089066.

²²⁷ 8/20/08 Goeke Notes at CRM089067.

- 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 – ²²⁸

**--- 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. ²²⁹**

*– 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. ²³⁰ (emphasis added).

I include above almost every relevant note from the portion of AUSA Bottini's August 22, 2008 notes devoted to the question of Rocky Williams' practices regarding the handling of Christensen Builders' bills. It is clear that Williams was asked to clarify the factual basis of his statement that "VECO time and labor would be added in," and that he explained he had no personal knowledge that it was occurring. Rather, Williams explained, and Bottini recorded in

²²⁸ August 22, 2008 Bottini handwritten notes of trial prep session, CRM057314-15 (8/22/08 Bottini Notes).

²²⁹ 8/22/08 Bottini Notes at CRM057316.

²³⁰ 8/22/08 Bottini Notes CRM057317.

his notes, that he “assumed this based on what TS had said in 1999” [based on Williams’ statements ██████████ and in the interview memoranda, the 1999 reference was to the fact that Stevens said from the beginning he wanted a contractor that he could pay], and because Williams “knew that Bill was under a microscope – didn’t think that he would do anything to hurt TS, etc.” The notes show that the AUSAs probed Williams on his basis of knowledge, including whether he ever told Senator Stevens or Catherine Stevens about his assumption that the VECO time and labor was added in [he never did], or whether he had any conversations with them about the bills to see if they understood that the bills “covered everything.” [He did not.]. It was clearly important to the prosecutors to know whether Williams’ assumption about the VECO bills being added to the Christensen Builders’ invoices was anything more than a supposition on his part, and, at least on August 22, 2008, Williams made it clear that it was his own assumption *rather* than based on some understanding of an agreement to handle the billing in that manner.

From AUSA Goeke’s notes:

“→How Augie’s bills handled.

(1) went to check time * checked off materials that Rocky bought on Augie’s accts, checked Vern’s and Luther’s time . . .

(2) Vern and Mike 8-5 everyday and 5 days a week

(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; →²³¹

→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**

²³¹ August 22, 2008 Goeke handwritten notes of trial prep session, (8/22/08 Goeke Notes) at CRM057193.

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

→ Subsequent conversations.²³²

Any conversations with –

TS
CAS
that bills were all inclusive?

--- NO

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

. . . .

→ Electricians – 2 days later here come
VECO guys
→ know if VECO paid for materials →
assumed ground rules were
VECO would bill TS.²³³ (emphasis added).

Although much more difficult to read, Goeke’s notes show Williams describing what he thought would happen once the Christensen Builders bills were handed in to Bill Allen. Just as Williams had told ██████████ the IRS that he “assumed” that the bills were being sent to the Senator in Washington (though he did not know for sure) because the Senator had wanted a contractor he could pay (Rocky Williams’ understanding of the “original agreement”), Williams reported to the AUSAs this assumption that VECO’s expenses must be being “added” by Bill Allen when he received the Christensen Builders’ invoices. In addition, when compared with Bottini’s notes, Goeke’s notes record more information regarding Williams’ understanding of the “original agreement,” which was that “TS was going to pay for everything.”

3. August 31, 2008 Trial Prep Session

From AUSA Bottini’s notes:

“– CB INVOICES
– Augie’s invoices. →
Rocky reviewed them – **Assumed that my time/Dave’s time added to it**

²³² 8/22/08 Goeke Notes at CRM057194.

²³³ 8/22/08 Goeke Notes at CRM057195.

- **Don't know whether that happened or not**
- **Never saw them after I turned them in.**

. . .

- Labor for electrical – Not accounted for
- Reasonable to assume – plumbing – electrical etc.
- Didn't want to use VECO accts
- wanted to use Augie – make sure TS paid directly, etc.²³⁴

. . .

Rocky's Time

- **Not asked to keep track of my time**
- would occasionally do other stuff
- knew if anyone at VECO keeping track of your time
- don't know that.
- Alot of time-spent more time @ road than @ actual job site; etc.
- Don't know if Dave's time acct'd for either

. . .

Rocky thought that anything that couldn't be documented.²³⁵

From AUSA Goeke's notes:

- “☆ →RW would go to Ofc once a month to discuss what was coming up
- TS says doesn't want to spend a small fortune
- no known budget for house.”²³⁶

It is relevant to note that, during this session, Williams was being shown the actual billings for the Girdwood project. Bottini's notes reflect that “NOTHING ON THESE – SHOWS THAT ROCKY OR DAVE'S TIME ACCOUNTED FOR, ETC.” Consequently, the AUSAs would have gone over documentary proof with Williams showing that his “assumption” that his time was “added in” to the billings was clearly unfounded.²³⁷

²³⁴ August 31, 2008 Bottini handwritten notes of trial prep session, (8/31/08 Bottini Notes) CRM057324-49 at 57327, 57335-36.

²³⁵ 8/31/08 Bottini Notes at CRM057339-40.

²³⁶ August 31, 2008 Goeke handwritten notes of trial prep session, CRM057197-201. From my examination of these notes, I do not see that they contain any statements from Williams regarding the adding of VECO time to the Christensen Builders invoices.

²³⁷ 8/31/08 Bottini Notes at CRM057337.

4. September 20 and 21, 2008 Trial Prep Sessions

Rocky Williams travelled to Washington, D.C. on September 15, 2008 in order to testify in the trial of Senator Stevens, which was set to begin on September 24, 2008.²³⁸ Once in D.C., Williams met twice with AUSA Bottini, who had prepared a detailed type-written outline of direct exam questions.²³⁹ At 24 pages, the outline covers a large number of topics that Bottini intended to ask Rocky Williams about on direct examination. As AUSA Bottini went through the outline with Williams, he noted the answers given by Williams on the outline, which therefore contains both typewritten questions and handwritten notes by AUSA Bottini. The following questions and answers are quoted from Bottini's outline dated September 20, 2008 for the trial prep session. I use different style bullet points to denote typewritten questions [•] and for handwritten notes [○].

- **“– How going to do it?”**
 - –VECO didn't have the people, etc.
 - – Pointed out to BA + TS – said that anything we do – has to be above bd – – under the microscope, etc.²⁴⁰
- **– You play some role in reviewing their billings?**
 - Yes, would go over CB bills each month, etc.
- **– What?**
 - Went over them with Augie – — Separate VECO invoice??
→to TS; etc.
- **– Why?**
 - – Part of the job –
 - – BA not there – Augie not there –
 - – Rocky on Augie accts –
 - – TS knew that I was working there the whole time –
 - – What about Dave? –
 - – Figured that TS was getting charged for % of my time –
 - – Didn't get added to Augie's bill –

²³⁸ ROI at 307-09.

²³⁹ AUSA Bottini prepared a detailed outline of his direct examination questions that he used in meeting with Rocky Williams on September 20 and 21, 2008. The outlines contain question areas and also AUSA Bottini's notes that he wrote during the prep session. *See* Rocky Williams Direct Outline, Updated 9/20/08 at 9:00 a.m, CRM057444/115117–115162; and Rocky Williams Direct Outline, Updated 9/21/08 at 8:30 a.m.

²⁴⁰ Rocky Williams Direct Outline, Updated 9/20/08 at CRM 115123.

- What do after you reviewed?
 - Went to VECO – assumed that my time + Dave’s time added on –
 - Nobody tell you that? – Assumed. –
- – Who paid for these bills – do you know?
 - No. Assumed, etc.”²⁴¹

When considering the question of AUSA Bottini’s state of mind in not thinking that he needed to disclose the “invoice combining” assumption, it is relevant to consider that he clearly had no intention to suppress it either. The section of AUSA Bottini’s direct exam outline above shows Bottini intended to present as part of Rocky Williams’ testimony Williams’ “assumption” that his and Dave Anderson’s VECO time was being added on to the Christensen Builders bills, while at the same time presenting the evidence that in fact it “Didn’t get added to Augie’s bill.” Although OPR’s finding is correct that Williams’ statements concerning his assumption that VECO time would be added to the Christensen Builders bills were never disclosed to the defense, AUSA Bottini’s outline is direct evidence that this information would have been disclosed, by the government, through Williams’ testimony, if he had in fact testified.

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. Williams’ assumption is mentioned again near the end of the outline, under the title “Impeachment Stuff.”²⁴² It is unclear whether this portion of the outline represented areas that AUSA Bottini intended to raise on direct, or whether it was only intended to prepare Williams for the possible impeachment areas. Included along with subjects like “criminal history” and “excessive alcohol use” is the handwritten note: “They will try to get you say that TS should have assumed that your time and Dave’s time – in CB bills, etc.” Again, AUSA Bottini was demonstrably operating under the expectation that Williams’ “assumption” would be disclosed on direct and then most likely used to impeach Williams.

The second direct exam outline, dated September 21, 2008, does not contain any handwritten notes by AUSA Bottini relating to the billing process with Christensen Builders, but the same type-written questions, including the question about the invoices, “**What do after you reviewed?**” that elicited Williams’ response regarding the assumption that VECO time was added into the Christensen Builders’ bills remains in the outline.²⁴³ The two direct exam outlines provide reliable evidence that, by asking Williams what he did with the invoices, AUSA Bottini intended to present Rocky Williams’ assumption about the “adding in” of VECO costs to the Christensen Builders’ invoices as part of the government’s case in chief.²⁴⁴

²⁴¹ Rocky Williams Direct Outline, Updated 9/20/08 at CRM 115139.

²⁴² Rocky Williams Direct Outline, Updated 9/20/08 at CRM 115151.

²⁴³ Rocky Williams Direct Outline, Updated 9/21/08 at CRM057494.

²⁴⁴ Williams did not testify, however, due to serious health problems, but he did make himself available for a telephonic interview with the defense attorneys.

Bottini's intent to present this evidence is relevant to the issue of recklessness because it is further support for Bottini's testimony that, in his judgment, he did not consider Williams' "assumption" to be *Brady* information. 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*. Although OPR may be correct that the better practice would have been to disclose Williams' statements before trial, it is clear that the government was not attempting to suppress this evidence, AUSA Bottini was expecting Williams to present it during his direct testimony, which would ensure its disclosure to the defense, and Bottini did not consider it to be *Brady* information.

C. OPR's Findings of Misconduct Regarding Rocky Williams' Pretrial Statements

1. Incomplete Disclosure of Favorable Statements by Rocky Williams in the *Brady* Letter of September 9, 2008.

As discussed above, there were a number of statements Rocky Williams made when he was interviewed by federal agents, [REDACTED], and during his trial prep sessions that were favorable to the defense and should have been disclosed by the prosecution team. Without listing each and every one, such statements generally included: that Senator Stevens "wanted to pay for everything," "wanted a contractor he could pay," "wanted to pay for it," and that Rocky Williams assumed that the VECO time was added into the Christensen Builder invoices.²⁴⁵

While the Alaska AUSAs were preparing witnesses, including Rocky Williams, in the weeks running up to the trial, the PIN attorneys were working on the *Brady* letter. As it related to Rocky Williams specifically, AUSAs Bottini and Goeke had reason to trust in the thoroughness of the *Brady* review going on in Washington.²⁴⁶ They 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

²⁴⁵ I note that there is an argument that these statements are not necessarily *Brady*. As to those statements by Williams recounting Senator Stevens' own statements about his willingness to pay the bill, those could be considered the sort of defendant's statements that have been held not to be *Brady* because they would already have been known to the defendant. *See* cases cited above at n. 196. Williams' "assumption" about combining invoices has arguably very little exculpatory value unless that very assumption – to combine VECO invoices into a single Christensen bill – was part of the expressed understanding or "original agreement" between Williams, Allen, and Stevens. Below I conclude that the evidence does not support OPR's conclusion that this invoice combining was part of any original understanding of the Senator, Allen and Williams. Therefore, the probative value of Williams' assumption – not conveyed to or received from any other person involved in the project – is close to nil. Nevertheless, it is clear that the ROI concludes that Senator Stevens' statements that he wanted to pay for everything and that he wanted a contractor he could pay are part of the expressed understanding between Allen, Williams and Stevens, and those statements are exculpatory and should have been disclosed. Finally, independently from *Brady*, there is a stronger case that the invoice-combining assumption should have been disclosed under the broader USAM policy, as being "information that is inconsistent with any element of the crime," even though it is not "significantly probative of issues before the court." USAM § 9-5.000(C). For purposes of this memorandum, therefore, I will assume that Williams' assumption should have been disclosed.

²⁴⁶ 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. OPR recognizes this fact to some extent as well. *See also* ROI at 275 (Sullivan entitled to rely on Marsh.).

the Rocky Williams memoranda of interviews, but also search for and review all of their handwritten notes for those interviews.²⁴⁷

As discussed above in Sections IV.A.1. (a.)-(g.), there were many factors that contributed to the inadequacy of the disclosures in the *Brady* letter, primary among them the decision, acquiesced in by PIN leadership, to allow the agents to conduct the *Brady* review. This decision was the first factor that contributed to causing the incomplete disclosure found in paragraph 15 of the *Brady* letter, concerning information from Rocky Williams.

Specifically, the agent-led *Brady* review firmly impacted the completeness of the disclosure made in the *Brady* letter²⁴⁸ pertaining to Rocky Williams because the IRS agents who prepared a spreadsheet of potential *Brady* information for the attorneys only identified Rocky Williams' inconsistent statements that he made in the September 1, 2006 IRS MOI as potential *Brady* information to be disclosed in the letter.²⁴⁹ Based on these inconsistent statements, identified by the IRS agents in their review of the interview memoranda, the Williams paragraph was drafted with the intent that it be a disclosure of inconsistent prior statements as required under *Giglio*. In drafting the *Brady* letter of September 9, 2008, Trial Attorney Sullivan reviewed the spreadsheets and correctly included Williams' inconsistent statements, as identified by the agents.

²⁴⁷ See ROI at 81 (“After reviewing the spreadsheets, Sullivan requested the underlying notes for interviews of Rocky Williams. In addition, Sullivan requested another MOI referenced in the spreadsheet as ‘possible *Giglio* #10 Hess.’ Sullivan ended his email by reminding the agents: ‘[W]e should err on the side of caution and, to the extent information it (sic) is potentially *Giglio* or *Brady*, we should produce it.’”) (citing Sept. 4, 2008 12:41am email from PIN attorney Sullivan to SA Bateman, SA Kepner, SA Roberts, SA Joy, AUSA Bottini, AUSA Goeke, PIN attorney Marsh, and Principal Deputy Morris).

²⁴⁸ As discussed in Section IV.A, addressing the Pluta 302 and the IRS MOI, no one on the trial team took responsibility for authorizing the agents to conduct the *Brady* review. However, as I discuss in that section, PIN Principal Deputy Chief Morris was the team leader and a high-level supervisor over the section prosecuting the case, but she failed to supervise the *Brady* review. In addition, her early decision not to turn over agent memoranda as *Jencks* material virtually guaranteed that the government would need to use a *Brady* letter rather than producing the memos. OPR found that Morris exercised poor judgment “by failing to supervise the *Brady* review, delegating the redaction of interview reports to SA Kepner, and failing to ensure that the prosecution team attorneys reviewed Kepner’s redactions.” ROI at 25.

²⁴⁹ As the ROI explains at 81-82: “SA Bateman emailed the *Stevens* prosecution team a finalized spreadsheet listing all of the IRS MOIs and notes, identifying whether they contained *Brady* or *Giglio* information or material differences between the notes and reports. Bateman told OPR that he identified **only one MOI** in his spreadsheet that he believed that prosecutors ‘should look at’: a September 1, 2006 MOI of Rocky Williams. In the spreadsheet, Bateman included the notation:

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

This notation was **the only *Brady/Giglio* information** flagged for the attorneys in the spreadsheet. SA Bateman told OPR that he discussed the Rocky Williams MOI that he identified with PIN attorney Sullivan and other members of the trial team, noting that **Williams’s statements conflicted with prior statements he had given** on the amount of work completed by Christensen Builders and the completion of plans for the renovations. According to SAs Bateman and Roberts, none of the other IRS interviews contained *Brady* or *Giglio* information.” (emphasis added, footnotes omitted). Thus, it is apparent that Sullivan and Marsh drafted the Williams paragraph in order to disclose statements Williams made early on that were inconsistent with what Williams consistently stated in later interview memoranda, [REDACTED] and, presumably, with what he would testify to at trial.

The second factor that impacted the incomplete disclosure in paragraph 15 of the *Brady* letter was the failure of the letter's drafters to include information gathered by the FBI agents and included in the spreadsheets they prepared. As discussed above, the FBI interviewed Williams and prepared two FBI 302s. One of these, the 302 dated September 14, 2006, was identified in the *Brady* spreadsheet. The ROI explained that "[t]he *Brady* spreadsheet also contained an entry indicating that Williams said at his September 14, 2006 [FBI] interview that 'TS told RW he wants to hire a contractor that he can pay.' That information was omitted from Paragraph 15."²⁵⁰ The ROI does not offer any explanation as to how the PIN attorneys who were reviewing the spreadsheets failed to include this information in the *Brady* letter.²⁵¹ But when PIN Attorney Sullivan drafted paragraph 15 of the *Brady* letter, it included strictly the inconsistent *Giglio* statements that Rocky Williams gave on September 1, 2006,²⁵² not the statements from the FBI 302 regarding the Senator's willingness to pay.

In addition to Williams' interviews, agents also reviewed Williams' Grand Jury testimony, but the ROI does not indicate that any of Williams' statements from his testimony was identified as *Brady*.²⁵³

²⁵⁰ ROI at 361; *see also* ROI at 301.

²⁵¹ However, the spreadsheet that referenced the FBI 302 of September 14, 2006 – with the statement that the Senator wanted a contractor he could pay – was not sent to the trial team until 5:55 p.m. on September 9, 2008, late in the day, and only "hours before" the letter was sent to defense counsel. ROI at 301. The final letter was sent to the defense attorneys at 8:37 p.m. ROI at 105, f.n. 465.

²⁵² ROI at 94-95. OPR explains in detail how the drafting of paragraph 15 was intended to disclose *Giglio* inconsistent statements:

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

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

The information in this paragraph came from the 302 of the September 1, 2006 Williams interview flagged by IRS agents during their *Brady* review. The statement about the Girdwood drawings was inconsistent with information the prosecutors had that the plans were drafted by VECO engineer John Hess. The information about Williams's statement that he did not deal with expenses was inconsistent with [REDACTED] that he reviewed the Christensen Builders bills. The information about Williams's statement that Christensen Builders completed 99 percent of the work at Girdwood was consistent with the defense theory that Stevens paid for all the renovations (by paying all the Christensen Builders bills), but it undercut the prosecution's case that VECO had performed more than \$188,000 worth of work on Girdwood. *Id.*

²⁵³ The Grand Jury testimony was reviewed not only by agents but also by random PIN attorneys, who had no connection to the case, who were assigned by PIN Principal Deputy Chief Morris. ROI at 83-87. OPR made no finding of reckless misconduct or poor judgment as to PIN Principal Deputy Chief Morris' decision to have PIN attorneys, who were unfamiliar with the case, perform the *Brady* review of Grand Jury materials.

PIN Attorney Sullivan was quite thorough, and he kept the team informed of this thoroughness by repeatedly directing the agents to review the underlying notes for the Rocky Williams' interviews.²⁵⁴ Nevertheless, the PIN attorneys drafting the *Brady* letter did not include the *Brady* information identified in the 302 dated September 14, 2006 to the effect that the Senator wanted a contractor he could pay, [REDACTED]. On September 9, 2008, the date the government sent the *Brady* letter, PIN Attorney Marsh sent an email to the team indicating that the letter was complete and "includes all of the 302 [*Brady/Giglio*] to date."²⁵⁵

AUSAs Bottini and Goeke were not the primary drafters of the *Brady* letter, but they did see the letter before it was sent, and neither attorney realized that paragraph 15 was inadequate in several ways. Although it contained Williams' inconsistent statements, required to be disclosed under *Giglio*, the letter failed to disclose (1) that Williams was aware that Senator Stevens wanted a contractor he could pay, and wanted to pay for it himself; (2) that Williams was aware of the architectural plans prepared by John Hess; (3) that Williams was involved in collecting and reviewing the Christensen Builders invoices, to which he assumed VECO's costs were being "added." OPR found AUSAs Bottini and Goeke's failure to "catch" the inadequacy of the *Brady* letter to be reckless misconduct.²⁵⁶ In Section D below, I will analyze whether the evidence supports this conclusion by a preponderance.

2. Failure to Disclose Rocky Williams' Assumption that the VECO Time Would Be Added to the Christensen Builders' Invoices.

Section V.B.1-4 summarizes in detail the statements that Rocky Williams made to AUSAs Bottini and Goeke during the trial prep sessions regarding Williams' assumption that his time, VECO co-worker Dave Anderson's time, and possibly all of the VECO employees' time was "added in" with the Christensen Builders' bills. Because Senator Stevens had actually paid the Christensen Builders' bills, the issue of whether VECO's work was either actually included as part of such bills, or whether Senator Stevens reasonably *thought* they were so included, was recognized by the prosecution team as a potentially important defense.

Indeed, on the same day, August 22, 2008, that Rocky Williams stated during a trial prep session with AUSAs Bottini and Goeke that he had assumed his time and Anderson's time would be added in with the Christensen Builders' bill to be sent to the Senator, Trial Attorney Sullivan sent an email to the trial team highlighting this possible defense.²⁵⁷ Sullivan's email said:

Based on the cancelled checks and the handwritten note from Rocky to CAS, it's fairly apparent that TS will say that CAS handled the bills, CAS coordinated with Rocky, and TS didn't know VECO wasn't paid b/c CAS never told him. **To further insulate TS, CAS will likely testify that Rocky told her the VECO costs were rolled into the large Christensen bills.** Alternatively, if CAS doesn't

²⁵⁴ ROI at 97, f n 390 (quoting Sullivan's second email to the agents, and the team, reminding the agents to check the underlying notes for the Rocky Williams' interviews).

²⁵⁵ ROI at 100.

²⁵⁶ ROI at 362.

²⁵⁷ ROI at 293.

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.²⁵⁸

This defense, that Senator Stevens would attempt to claim a lack of intent or knowledge to receive any gift due to his thinking that he had paid all of VECO's costs when he paid the Christensen Builders' bills, was also identified by the prosecution team several months before the indictment was returned and was discussed in the formal prosecution memorandum.²⁵⁹

An important aspect of OPR's finding regarding the exculpatory value of Williams' assumption is based upon OPR's conclusion that this assumption was based upon the original agreement between Allen and Senator Stevens to "add in" VECO's time to the Christensen Builders invoices. In reaching this conclusion, OPR relies almost exclusively on a reading of AUSA Bottini's notes from the August 22, 2008 prep session with Williams. The portion of Bottini's notes on which OPR relies is cited in the ROI as follows:

It was understood that we were down there – and that any VECO time/labor would be added in[.] – Part of the original agreement - as long as we got paid back – Rocky assumed that based on what TS had said in 1999.²⁶⁰

The ROI summarizes OPR's conclusion about the nature of the original agreement several times, as follows:

Furthermore, the import of Williams's statements could not be fully understood without the information that was never disclosed: **that Williams believed, pursuant to the "original agreement" between Senator Stevens and Bill Allen, that Williams's, Anderson's, and possibly all VECO's costs would be added**

²⁵⁸ *Id.* (citing Aug. 22, 2008 2:22pm email from PIN attorney Sullivan to AUSA Goeke, AUSA Bottini, PIN attorney Marsh, PIN Principal Deputy Chief Morris, PIN Chief Welch, SA Kepner, SA Joy, lit. support mgr. [REDACTED] and paralegal [REDACTED] (emphasis added).

²⁵⁹ ROI at 294.

²⁶⁰ ROI at 290 (citing AUSA Bottini's August 22, 2008 notes, as well as Bottini's reading of his handwriting during his interview with Mr. Schuelke). The ROI also cites Goeke's notes up to the point where his notes state: "Would give to Bill to add time for Rocky and Dave. Understood that TS was going to pay for everybody." ROI at 291 (citing AUSA Goeke's August 22, 2008 notes, as well as Goeke's reading of his handwriting during his interview with Mr. Schuelke). However, the ROI did not continue quoting Goeke's notes up to the point where his notes mention the original agreement. The notes then further read:

- 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 . . .

to the Christensen Builders invoices that were sent to the Senator.²⁶¹

... [Williams explained] that it was part of the “original understanding” with Senator Stevens that “any VECO time/labor would be added in.”²⁶²

[Williams] reviewed the Christensen Builders invoices, gave them to Bill Allen or a VECO employee, and believed that his hours, Anderson’s hours, and possibly all VECO costs would be added to the Christensen Builders invoices, **pursuant to the “original agreement”** with Senator Stevens *to add “any VECO time / labor” to those invoices.*²⁶³

These passages offer OPR’s support for its conclusion that Williams’ assumption was not pure speculation – it apparently had a foundation in his knowledge of the original agreement to combine the VECO costs into the Christensen Builders invoices.

Thus, OPR concludes that the conduct of AUSAs Bottini and Goeke was reckless because they should have recognized that Rocky Williams’ repeated statements that *he thought* VECO’s time was being added to the Christensen Builders invoices constituted evidence favorable to the defense that should have been disclosed under *Brady*.²⁶⁴ Indeed, both Bottini and Goeke recognized, in retrospect, how one could conclude that Williams’ speculation that Allen was aggregating the VECO costs together with the Christensen Builders invoices could have been useful to the defense and, out of an abundance of caution, should probably have been disclosed.²⁶⁵

As with the other findings of reckless misconduct that I have examined, however, the question to be addressed is not simply whether in retrospect it is clear that the information was *Brady* and should have been disclosed, the question is whether the attorney engaged in conduct he knew or should have known – at the time and in the context – created a substantial likelihood

²⁶¹ ROI at 353 (emphasis added).

²⁶² ROI at 353-54 (citing AUSA Bottini’s August 22, 2008 notes).

²⁶³ ROI at 354 (citing AUSA Bottini’s August 22, 2008 notes and AUSA Goeke’s August 22, 2008 notes) (emphasis added).

²⁶⁴ See ROI at 359.

²⁶⁵ Schuelke Bottini Interview I at 169 (Bottini agreed that, in retrospect, he should probably have turned over Williams’ assumption that VECO’s costs were being added in “out of an abundance of caution.” However, he maintains that, at the time, he did not believe that Williams’ assumption was required to be disclosed as an exculpatory *Brady* statement. See *id.* at 175-76 (“I don’t think it was something that should have been disclosed. . . . You know, today, out of an abundance of caution, I would probably err on the side of disclosure.”). At the time, AUSA Bottini had concluded that Williams’ assumption was not *Brady* and did not need to be disclosed. *Id.* at 347-48. AUSA Goeke testified that he could see arguments both ways, that Williams’ assumption regarding the adding of VECO’s costs either was or was not *Brady*. Although Goeke did not do a *Brady* analysis himself at the time, he did testify that today he would conclude that the statement should be turned over. Goeke Schuelke Interview at 98, 108-09.

that a *Brady* violation would occur, and that the conduct was objectively unreasonable under all the circumstances and a gross deviation from the standard of conduct that a reasonable attorney would observe in the same situation.

D. Did AUSAs Bottini and Goeke Act in Reckless Disregard of Their *Brady* Obligations by Failing to Correct the Omissions from the *Brady* Letter?

When I apply the three part test of (1) what were the contributing factors (decisions, actions, failures to act) that caused the non-disclosure to happen; (2) did the attorney take an action or fail to take an action where he knew or should have known that such action or inaction would create a “substantial likelihood” that the disclosure violation would occur; and finally (3) was the action or inaction by the individual attorney “objectively unreasonable under all the circumstances” and a “gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation,” I do not find that a preponderance of the evidence supports a conclusion of reckless misconduct.

With regard to the contributing factors, in my discussion of the *Brady* letter’s omission of the Pluta 302 and the IRS MOI, I detailed the reasons that supported my conclusion that AUSA Bottini was justified in relying on the division of labor that he understood to have been established for the drafting of the *Brady* letter. I adopt those reasons in concluding that AUSA Bottini’s and AUSA Goeke’s conduct in failing to recognize the inadequacy of the Rocky Williams paragraph of the *Brady* letter was not “objectively unreasonable under all the circumstances.” Before turning to the analysis, however, several salient points from the testimony of AUSAs Bottini and Goeke, as well as the ROI, warrant repeating:

- Both AUSAs saw the drafting of the *Brady* letter as principally the responsibility of the PIN attorneys; they were conducting witness prep while the PIN attorneys did the *Brady* review;
- With respect to Rocky Williams, they had received more than one email from PIN Attorney Sullivan indicating that he was going over Williams’ interview memoranda and even seeking to obtain the underlying handwritten notes, making it appear that the *Brady* review was thorough and reasonable;
- PIN Attorney Marsh’s email attaching the final draft of the *Brady* letter had represented that it contained all the *Brady* and *Giglio* information found in the *Brady* review;
- Paragraph 15 of the *Brady* letter clearly contains those Rocky Williams statements from his September 1, 2006 IRS interview, which he subsequently contradicted. At the time when they reviewed the letter, it is understandable that the AUSAs would have recognized this paragraph as a disclosure of *Brady/Giglio* material, and the ROI makes it clear that the paragraph was drafted as a disclosure of prior inconsistent statements;²⁶⁶

²⁶⁶ Given that the ROI’s own factual recitation makes it crystal clear that the purpose of paragraph 15 was to disclose prior inconsistent statements, I find OPR’s repeated characterization of this paragraph as “the complete

- AUSAs Bottini and Goeke were aware of Williams’ Grand Jury testimony [REDACTED]
- AUSAs Bottini and Goeke were operating under the assumption, on September 9, 2008, that Williams’ Grand Jury testimony would be disclosed to the defense as required by the *Jencks Act*, [REDACTED] enabling them to see that paragraph 15 was intended to disclose inconsistent prior statements.²⁶⁷

Having considered the factors and surrounding circumstances that led to the non-disclosure, the second question is what evidence supports the conclusion that, when AUSAs Bottini and Goeke failed to “catch” these omissions, they knew or should have known that their actions were creating a substantial likelihood that the *Brady* information would never be disclosed? AUSAs Bottini and Goeke skimmed and did not carefully read paragraph 15 of the *Brady* letter and notice that it was incomplete.²⁶⁸ Paragraph 15 did not include Williams’ statements about Senator Stevens’ wanting to pay the bills; it failed to explain that the statements regarding not reviewing invoices and there not being any plans were inconsistent prior statements; and it also failed to include anything about Williams’ assumption that the VECO costs would be billed in some way by Bill Allen when he sent the Christensen Builders bills. Bottini’s and Goeke’s actions were, at a minimum, negligent. However, both AUSAs relied on the drafters of the *Brady* letter to fully disclose the *Brady* material and reasonably thought that the thorough review that appeared to have taken place would lead to full and proper disclosure. Thus, they saw their role in reviewing the letter as perfunctory because their capable co-counsel would ensure all *Brady* material was disclosed. Neither AUSA viewed any risk that *Brady* material would not be disclosed if they themselves did not carefully review the *Brady* letter.

opposite” of Williams’ other statements to be unfair and somewhat misleading, as if to imply that the paragraph was false or intended to convey incorrect information. It should not have been surprising either to the AUSAs or to OPR that the statements in paragraph 15 were the “opposite” of other statements Williams had made: that’s what made them disclosable as *Giglio* in the first place. See ROI at 101, f n. 407; 357; 363.

²⁶⁷ I note that Williams’ Grand Jury testimony was produced to the defense on September 28, 2008 and all of his memoranda of interview were produced on October 1, 2008. Also, Rocky Williams himself submitted to a telephonic interview with the defense attorneys in the middle of the trial. Although Williams had returned to Alaska because of his health situation, he remained under subpoena and any of the arguably pro-defense statements that he made in the 302s, the Grand Jury testimony, or in the trial prep sessions (if they had asked, as they probably would have, about his practices in dealing with the invoices) could have been elicited by the defense had they chosen to compel Williams’ appearance. Indeed, as discussed above, the government’s direct exam outline showed that AUSA Bottini was planning to elicit Williams’ assumption about the adding in of VECO costs with the Christensen Builders invoices during his questioning.

²⁶⁸ See Schuelke Bottini Interview I at 246; Schuelke Bottini Interview II at 774; Goeke Schuelke Interview at 74-76.

Furthermore, the evidence does not demonstrate that the AUSAs saw themselves as primarily responsible for doing a *Brady* review for Williams in connection with the *Brady* letter; nor did they recognize Williams' statements in the trial prep sessions as *Brady* material at the time. The ROI points out that most of the exculpatory statements omitted from the *Brady* letter were indeed contained in the Grand Jury testimony and the interview memoranda, which were later disclosed to the defense.²⁶⁹ The only omission that would not have been cured by this later production was the omission of Williams' statements regarding the combining of VECO and Christensen Builders' invoices. This statement was only found in the trial prep sessions, which are discussed below.

Third, and finally, considering all of the circumstances, was it objectively unreasonable for the AUSAs to review a *Brady* letter disclosing Rocky Williams' prior inconsistent statements under *Giglio*, and assume that subsequent *Jencks* disclosures would make clear their relevance and also disclose other exculpatory statements? Was such a course of action a "gross deviation" from the standard of conduct that a reasonable attorney would observe in the same situation? For the following reasons, I believe the evidence does not prove by a preponderance an affirmative answer to these questions.

First, AUSAs Bottini and Goeke, as OPR concluded regarding PIN Principal Deputy Chief Morris, were entitled to rely on the professional judgment and diligence of the PIN attorneys whom they understood were primarily responsible for conducting the *Brady* review that was done for the *Brady* letter. In fact, the former lead attorney on the case, Trial Attorney Nicholas Marsh, who perhaps knew the evidence better than anyone, was one of the two drafters. Furthermore, due to decisions by the Criminal Division's Front Office which resulted in allowing the prosecutors a mere 57 days to produce discovery and prepare for trial, combined with a "hands-off" management style of the lead trial counsel which did not clearly delineate responsibilities, for the attorneys to rely on an ad-hoc division of labor was virtually unavoidable. Given these unusual and difficult circumstances, it was not unreasonable for AUSAs Bottini and Goeke to rely on their co-counsel.

Second, AUSAs Bottini and Goeke had good reason to believe that most of what Rocky Williams told them during their trial prep sessions was not new information, was contained in his prior statements and was being reviewed by the PIN team as they did the *Brady* review in preparing the letter.

Third, the only "new" information provided by Rocky Williams in the trial sessions that would not have been available to the attorneys drafting the *Brady* letter was Williams' assumption that the VECO costs were being added to the Christensen Builders invoices. However, given that this assumption was never communicated to anyone, was not part of any original agreement with Allen or Senator Stevens (contrary to OPR's assertions), and was not true, it was not objectively unreasonable for AUSAs Bottini and Goeke not to see this assumption as *Brady* material, or realize that it should have been included in the *Brady* letter.

Fourth, given that the Williams paragraph in the *Brady* letter contained inconsistent statements from Williams' interview with the IRS on September 1, 2006, it was not objectively

²⁶⁹ ROI at 353.

unreasonable for AUSAs Bottini and Goeke to read that paragraph as intended – as a *Giglio* disclosure.

Fifth, although AUSAs Goeke and Bottini should have realized that the Williams’ paragraph was incomplete, because it failed to include that Senator Stevens said he wanted a contractor he could pay, and that he wanted to pay for everything, (a) these were statements made by the defendant and therefore would already be known to the defendant, and (b) the AUSAs’ failure to recognize the shortcomings of the letter amounted to a negligent oversight rather than acting in reckless disregard of their discovery obligations.

Therefore, I do not find that a preponderance of the evidence supports the conclusion that AUSAs Bottini and Goeke acted in reckless disregard of their *Brady* and USAM obligations when they failed to recognize and correct the omissions from paragraph 15 of the *Brady* letter.

E. Did AUSAs Bottini and Goeke Act in Reckless Disregard of Their *Brady* Obligations by Failing to Disclose Williams’ Statements Made During the Trial Prep Sessions?

AUSAs Bottini and Goeke met with Rocky Williams three times prior to September 9, 2008 in order to prepare him for his testimony. Whatever exculpatory or favorable statements Williams made during these interviews could have been communicated to the principal drafters of the *Brady* letter and disclosed along with the prior inconsistent statements contained in paragraph 15. However, I am treating the failure to disclose these statements separately from the failure to correct the *Brady* letter because the obligation to disclose exculpatory information clearly persisted beyond the date that the *Brady* letter was sent and also because the attorneys offer specific explanations for their conduct that relate to these trial prep sessions.

During the trial prep sessions, Williams made two kinds of statements that were favorable to the defense: first, that Senator Stevens wanted to pay for the renovations; and second, that Williams assumed that after he collected, reviewed, and brought the Christensen Builders invoices into Bill Allen’s office, VECO’s time and costs would also be “added in” and sent to the Senator for payment. AUSAs Bottini and Goeke offer somewhat differing explanations as to why they did not take any actions to disclose these trial prep statements of Williams, and I will address the explanations of each attorney separately.

As a preliminary issue, however, I must discuss what I view as a significant flaw in OPR’s reading of the record: its assertion that Williams’ assumption that the VECO invoices would be added to the Christensen Builders invoices was part of an original agreement with Allen, Stevens, and Williams. If this assertion is incorrect, then the exculpatory value of Williams’ assumption is diminished substantially.

1. The Meaning and Scope of the Term “Original Agreement.”

As discussed above in Section V.C.2., OPR’s assessment of the exculpatory significance of Williams’ statements regarding the combining of VECO’s and Christensen Builders’ invoices hinges in large part on its belief that there was an “original agreement” or understanding between

Allen, Stevens, and Williams to add the VECO costs to the Christensen Builders bills.²⁷⁰ Also as discussed above, OPR reached this conclusion primarily from reading AUSA Bottini's handwritten notes. One can see how OPR would read these notes as reflecting that the original agreement was to combine invoices, however, a close reading of the testimony of AUSAs Bottini and Goeke, as well as of *both* of the AUSAs' understandings of their own handwritten notes of the trial prep meetings as reflected in their interview transcripts, shows that the "original agreement" referenced by Williams in the trial prep meetings was *not* understood by the AUSAs to be an *agreement* to combine invoices; and hence, OPR's conclusion regarding the nature of the original agreement is not supported by a preponderance of the evidence.

Rather, a careful review of each AUSA's testimony and their handwritten notes reveals that they saw the general outlines of the term "original agreement" to encompass at most the following:

- At the outset, the initial understanding was to undertake a smaller scale construction project²⁷¹ where VECO would do the work;²⁷²
- The overall understanding was that the Senator wanted to pay for it, and wanted a contractor he could pay;²⁷³

²⁷⁰ ROI at 290 ("Williams described that arrangement [the combining of invoices] as the 'original agreement' that stemmed from the early meetings with Allen and Senator Stevens in which Stevens said he wanted to pay for everything"); 291 ("Williams's belief that his and Anderson's hours, and possibly all VECO costs, would be added to the Christensen Builders invoices before they were sent to the Stevenses, pursuant to the 'original agreement' between Allen and Senator Stevens.").

²⁷¹ Indeed, both AUSAs testified that, in its earliest stages, the renovation project was originally conceived as a smaller construction job that would be handled entirely by VECO. If that understanding were considered as the "original agreement," then obviously there would be no combining of invoices because Christensen Builders was not even part of that concept at that time. See Schuelke Bottini Interview I at 181 ("Well, I don't know that having a contractor in there was part of the original agreement. You know, the understanding was VECO was going to do the work."); Goeke Schuelke Interview at 119:

A: The idea to bring Paone didn't come until late -- much later. There was no discussion of bringing in Paone as a general contractor thing til much later. The original discussion was a small project that would be done by VECO and that --

Q: And that Ted Stevens wanted to pay for everything.

A: Yeah.

²⁷² As AUSA Bottini explained: "If that word [in the notes of Williams' trial prep session from August 22, 2008] is 'agreement' -- and I think it probably is -- I think what that refers to is the **initial discussion about what the senator wants done, you know to expand the house**, Allen telling him VECO can do that, having Rocky out there to walk the site and figure out how they might be able to do that . . . Allen telling him that, and Rocky . . . Rocky recalling that the senator said he wanted to pay for it." Schuelke Bottini Interview I at 185.

²⁷³ See Schuelke Bottini Interview I at 161 ("I think what he is saying here is he is making the assumption that this is what's happening **because the senator said he wanted to pay for it**. That's what I think that means.") (emphasis added.); *id.* at 180 ("Rocky assumed this, based on what Ted Stevens had said in 1999. 'I want to pay for everything.'"); *id.* at 181-82.

Williams also was concerned that they were “under the microscope”²⁷⁴ and needed to be “careful” or avoid being “reckless.”²⁷⁵ It was *this* understanding that caused Williams to assume that when he dropped off the Christensen Builders’ invoices with Bill Allen, Allen would be adding in VECO’s costs.

As will be discussed in greater detail below, both AUSAs are consistent in their testimony that the “original agreement” did *not* encompass the issue of combining invoices. When questioned about his notes, AUSA Bottini testified that the original agreement was that the house would be expanded and that the Senator would pay for it; Williams statements about adding VECO’s invoices to the Christensen Builders invoices was only an assumption on his part.²⁷⁶

AUSA Bottini *did* understand Williams to mean that he assumed the VECO costs were being added to a Christensen Builders invoice, but he compared this belief to an assumption that the electrician might have that somehow his costs were going to be added to a bill that would go to the homeowner.²⁷⁷ Williams *did not know* how his VECO time was going to be billed. All he knew was that the Senator was supposed to pay for everything, and the only bills he was submitting to Allen were the Christensen Builders invoice packet and cover sheet.

AUSA Goeke testified that he understood Williams to be saying that he thought Allen would prepare a *separate VECO invoice* and “add” it to the Christensen Builders’ packet of invoices.²⁷⁸ This understanding would not ring much of an exculpatory alarm bell because it

²⁷⁴ See Goeke Schuelke Interview at 135 (“Yeah, Mr. Williams, as I understood it as I read it today, Mr. Williams said, you know, ‘Allen had to know this was going to be -- this could be under a microscope if people found out that we were building something for Ted.’ . . . That that’s why he is – that’s why Williams assumed that Allen would do it right.”). Both Bottini’s and Goeke’s notes from the August 22, 2008 session reference Williams’ concern about the project being “under a microscope.” See 8/22/08 Bottini Notes at CRM057316 (“Knew Bill was under a microscope – didn’t think he would do anything to hurt TS, etc.”); 8/22/08 Goeke Notes at CRM 057195 (“—Had to know under a microscope . . .”).

²⁷⁵ See Schuelke Bottini Interview I at 163 (“I think what Williams is saying that he assumed that that’s what they were going to do. And part of that, if I remember this correctly, was he didn’t think that Allen would be so reckless as to do anything to hurt Senator Stevens. So he was assuming that that was going to happen. . . . That the [sic] VECO – that his hours, Dave’s hours, VECO’s, you know, time and whatever else they put into the house was going to be wrapped into Paone’s bill.”); *id.* at 179, 183 (“[I]t’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.”). See also 8/20/08 Goeke Notes at CRM 089066 (“Bill had just stopped being a lobbyist and had to be careful.”).

²⁷⁶ See Schueke Bottini Interview at 158-163. Bottini consistently states that he understood Williams to be saying he was assuming that Allen was adding in the VECO costs – not that it was part of any original agreement. When asked directly whether the invoice combining was part of an original agreement, Bottini does not agree, and testifies that the original agreement was that they would expand the house and that the Senator would pay. *Id.* at 185. Bottini’s interpretation of his notes is not that there was an original agreement to combine invoices, but rather that Williams was saying he assumed it would be done. *Id.* at 186 (“He [Williams] then qualifies that right after that, and says it’s an assumption on his part.”).

²⁷⁷ Schuelke Bottini Interview I at 182 (“So -- but it’s -- you know, it’s just a raw assumption on Williams’s part. Williams is not complicit in Allen’s plan to just give financial benefits to Senator Stevens. To me, it’s no different from, you know, the Roy Dettmer, the electrician who is doing work on there, you know? I mean, he probably assumed that, you know, his labor was being wrapped into some bill that was being paid by the owners of the house. You know?”).

²⁷⁸ When AUSA Goeke is asked a question containing the premise “when the foreman of the job who works

would not support the defense theory that Senator Stevens thought the Christensen Builders' invoices, which he had paid, represented all of the work done.

In addition to a careful review of the testimony of the AUSAs, a comparison of AUSA Bottini's handwritten notes, which OPR relies on for its conclusion that Williams said there was an original agreement to combine invoices, with AUSA Goeke's notes from the same session reveals that Bottini did not notate the entire conversation at that portion of the interview. AUSA Bottini's notes from the August 22, 2008 session with Williams state: "It was understood that we were down there – and that any VECO time/labor would be added in," and then, on a separate line, "part of the original agreement – as long as we got paid back" and then, "Rocky assumed this based on what TS had said in 1999 --."²⁷⁹ Comparing Bottini's notes of this session to Goeke's shows that additional information is recorded in Goeke's notes regarding that portion of the interview during which Williams brought up the "original agreement." Between the portion of the interview where Williams talked about delivering the Christensen Builders' invoices for Allen to add his and Anderson's time (the combining of invoices) and the phrase "original agreement," Goeke's notes reflect that Williams said that it was "understood" that the Senator was going to pay for everything, "the charge for the work force – would come through VECO" and "[a]s long as paid back then everything would be fine," which was all "part of the original agreement."²⁸⁰ These additional notes following the mention of the combining of invoices indicate that Williams apparently did not simply state, as Bottini's notes might appear to reflect,

for VECO states to you that he believed that the VECO time and expenses were being absorbed into the Christensen bills—", he responds: "**That's not what he said.**" Goeke Schuelke Interview at 100 (emphasis added). When asked what Williams did say, Goeke goes on to explain that he understood Williams to be saying: "I thought – I had an impression that Allen was then going to add time to the Christensen Builders bills as a **separate invoice or a separate bill** at [sic] additional work and additional time. I thought that Allen was going to add that to the Christensen bills." *Id.* (emphasis added). AUSA Goeke goes so far as to again correct the false premise of the question, saying: "He did not -- you said he thought – isn't it true that if -- if Rocky thought that the Christensen bills included the VECO -- **he never said that.**" *Id.* at 101. (emphasis added). When he is again pressed to admit that Williams was saying the VECO charges were added to the Christensen Builders bills, Goeke is unwilling to go along: "I guess, but I always thought of it as it would be added to that total. You have the Christensen Builders bill for \$10,000 and then **VECO would then generate a separate statement** that would include, 'Here's our VECO time.' I don't know how the mechanics were going to work, but I know that **Rocky said that any time that I was present for it**, Rocky said, that's what I thought that additional -- some **additional invoice** was going to be generated." *Id.* (emphasis added).

²⁷⁹ 8/22/08 Bottini Notes at CRM057314-15. Bottini interpreted these notes to mean that the original agreement was that Senator Stevens would pay, and that the adding of any VECO time and labor was Williams' assumption.

²⁸⁰ August 22, 2008 Goeke handwritten notes of trial prep session, CRM057193-96. Specifically, Goeke's Notes at CRM057194 (emphasis added) provide:

- 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 . .**

that the combining of invoices was the original agreement. Thus, Goeke's notes from this session comport with both AUSAs' testimony regarding their understanding of what Williams meant about an original agreement.

OPR's conclusion that AUSAs Bottini and Goeke were reckless in failing to disclose Williams' assumption about combining VECO's costs into the Christensen Builders invoices relies heavily on its inference that Allen, Stevens and Williams had agreed with one another to add the VECO costs to the Christensen Builders' invoices.²⁸¹ This inference is premised on OPR's interpretation of the AUSAs' handwritten notes, but that was not the interpretation that the AUSAs had who were present for the interview, and who authored the notes in question.

I do not agree that the record supports by a preponderance of the evidence the inference that an original agreement had been reached between Allen, Stevens, and Williams that VECO's costs would be rolled into the Christensen Builders invoices. Therefore, I do not agree that the AUSAs' failure to recognize the exculpatory nature of Williams' assumption was "objectively unreasonable" or a "gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation."

2. Conduct by AUSA Goeke

AUSA Goeke admitted that he did not take efforts to "review his own notes" during the *Brady* review process because he "did not have time to," he "wasn't asked to," and because, although he "recognized the *Brady* material could exist in notes of prosecutors," he believed that for any witness interview he participated in, there was already "a 302 or an MOI that would go along with it."²⁸² With respect to Rocky Williams' statements that Senator Stevens wanted to pay for the renovations, AUSA Goeke stated that when he heard these statements, it was his impression that this statement was something Williams had said before, and that it would be disclosed in the course of discovery.²⁸³ AUSA Goeke did not see himself as responsible for

²⁸¹ ROI at 353-54:

Furthermore, the import of Williams's statements could not be fully understood without the information that was never disclosed: that Williams believed, pursuant to the "original agreement" between Senator Stevens and Bill Allen, that Williams's, Anderson's, and possibly all VECO's costs would be added to the Christensen Builders invoices that were sent to the Senator. In any event, no such argument could be made with respect to the far more exculpatory information that Williams believed his and Anderson's hours, and possibly all VECO's costs, would be rolled into the Christensen Builders invoices. That information was contained only in Bottini's, Goeke's, and Joy's handwritten notes of their trial preparation sessions with Williams. The same is true of Williams's explanation that it was part of the "original understanding" with Senator Stevens that "any VECO time/labor would be added in." Those notes were never disclosed to the defense. (footnotes omitted).

²⁸² Goeke Schuelke Interview at 19-20. AUSA Goeke testified that he was not aware that there were substantive witness statements that were not memorialized in 302s, but that he recognized his obligation to disclose *Brady* material wherever it may be found, and that "if [he] had believed that there was *Brady/Giglio* material in [his] notes, [he] absolutely would have reviewed them." *Id.* at 23, 447.

²⁸³ *Id.* at 63 (Goeke said, "I could tell you my impression as I sat there and listened to him was that this is stuff we've heard before. And there's going to be a *Brady* review. We were going to look at 302s and we were going to look at his grand jury testimony and disclosure will be made.").

reviewing all of Williams' prior 302s and Grand Jury testimony for *Brady* information. When he had been asked to do that for other witnesses, he did it.²⁸⁴ Nevertheless, it was Goeke's impression that Williams had made most of these same statements before, [REDACTED] or somewhere else.²⁸⁵

AUSA Goeke was correct that Williams had told the government previously that Senator Stevens wanted to pay for the renovations and wanted a contractor that he could pay. These statements in the interview memoranda [REDACTED] of Rocky Williams are set out in section V.A. above. Because AUSA Goeke had a reasonable basis for believing that Williams' statements concerning Senator Stevens' willingness to pay for the renovations were already part of the materials that he believed would be provided to the defense, I do not believe the evidence supports the conclusion that his failure to review and disclose his own attorney notes concerning this issue was objectively unreasonable.²⁸⁶

With respect to the second area of exculpatory statements, Rocky Williams' statements to the effect that he assumed that Bill Allen was "adding in" VECO time to Christensen Builders' invoices, OPR gives great weight to these statements because it concludes that this concept of combining invoices was part of an "original agreement" or "understanding" between Williams, Allen, and Senator Stevens.²⁸⁷ A close reading of the testimony of AUSAs Bottini and Goeke, as well as of their handwritten notes of the trial prep meetings, as discussed above, shows that the "original agreement" referenced by Williams in the trial prep meetings was *not* understood by the AUSAs to be an *agreement* to combine invoices. The original agreement was the initial understanding that Senator Stevens wanted to pay for the renovations, wanted a contractor he could pay, and wanted to do so in a discreet way.²⁸⁸ So understanding this original agreement, Williams then assumed that when he dropped off the Christensen Builders' invoices with Bill Allen, he would be adding in VECO's costs. OPR relies heavily on its reading of the handwritten notes of AUSAs Bottini²⁸⁹ to infer that the combining of invoices was part of an original agreement, while ignoring both attorneys' interpretation of those notes about what the term original agreement meant. Understanding the context in which Williams used the phrase "original agreement" is crucial in determining to what degree the statements at issue were clearly

²⁸⁴ *Id.* at 64. Indeed, AUSA Goeke was assigned to review the Grand Jury transcripts of Bob Persons and Augie Paone for *Brady*, and he found so much material to disclose that the team decided to turn over the entire transcripts of both witnesses. *Id.* at 442.

²⁸⁵ *Id.* at 65-66 (Goeke testified: "I -- as I sat there and listened to him prepare for trial, I had thought, this is stuff -- I've heard this before or I expected him to say this before. I didn't think this was -- any of this was new information."); *see also id.* at 113 (thought that "none of that stuff was new information.").

²⁸⁶ Moreover, as stated above, to the extent that Williams was reporting Senator Stevens' own statements of his willingness to pay for the renovations, there is case law supporting the position that such statements are not required to be disclosed under *Brady*.

²⁸⁷ ROI at 290 ("Williams described that arrangement [the combining of invoices] as the 'original agreement' that stemmed from the early meetings with Allen and Senator Stevens in which Stevens said he wanted to pay for everything"); 291 (Williams's belief that his and Anderson's hours, and possibly all VECO costs, would be added to the Christensen Builders invoices before they were sent to the Stevenses, pursuant to the "original agreement" between Allen and Senator Stevens.).

²⁸⁸ See f.n. 273, 274, and 275 above.

²⁸⁹ Goeke's notes, as discussed, more explicitly show that the original agreement was the understanding that Stevens would pay, rather than Williams' assumption that the Allen would combine the invoices.

exculpatory in nature, and hence the degree to which Bottini and Goeke are culpable for failing to recognize their exculpatory nature and disclose Williams' assumption.

AUSA Goeke makes the following points in his testimony that bear on his understanding of Williams' assumption regarding the combining of invoices:

- He acknowledges that Rocky Williams said he left the Christensen Builders invoices with Bill Allen to add VECO's time and that "it was [Williams'] impression" that that was going to happen;²⁹⁰
- He could see an argument that this statement was *Brady* or that it was not *Brady*, but he did not see it as his role at the time to conduct the *Brady* review as to Williams and he was not sure who did that review;²⁹¹
- He questioned whether it was *Brady* because Williams was saying that he did not know that such an adding together of invoices actually happened, he only thought it did;²⁹²
- He understood Williams to be saying that he thought Allen was going to "add" a separate VECO invoice in with the Christensen Builders' invoices and send the group of invoices on to Senator Stevens – not that VECO's charges were being added into a Christensen Builders' invoice;²⁹³

²⁹⁰ Goeke Schuelke Interview Tr. at 93.

²⁹¹ *Id.* at 96-98, 104-05.

²⁹² *Id.* at 100.

²⁹³ *Id.* at 101. I quote the exchange below in detail because it is clear to me that AUSA Goeke's interpretation of what he recalls Williams saying, and Goeke's interpretation of his notes, is materially different from the interpretation that I believe OPR has adopted. Specifically, OPR's interpretation seems to be that Rocky Williams assumed that Allen took the Christensen Builders' invoices and then somehow inserted or added in VECO's time right into the Christensen Builders' invoices. If Allen was doing that (and especially if Senator Stevens thought he was doing that), that would be especially good for Senator Stevens, because Stevens paid the Christensen Builders bills, and he would then have had reason to believe he had paid for all the work that was done. AUSA Goeke testified that he understood Rocky Williams to be saying that he assumed Allen "added" a separate VECO invoice together with the Christensen Builders' invoices to be sent to Senator Stevens for payment. If this concept was what Williams was saying, then its exculpatory value is far less clear because, as I understand the evidence, Senator Stevens did not pay any VECO invoices. If Williams meant that he thought the Senator received VECO's invoices together with Christensen Builders, but the proof showed the Senator only paid the ones from Christensen Builders, this situation would make it look as if the Senator knew it was supposed to be a gift. The relevant portion of AUSA Goeke's testimony, at 100-01, is:

A: He did not – you said he thought – isn't it true that if – if Rocky thought that the Christensen bills included the VECO – he never said that.

BY MR. SCHUELKE

Q: But if, as you just said, it was his understanding that the VECO time was going to be added to the Christensen bills, then the Christensen bill would include the VECO time, right?

- Though he thought that others on the team were determining what portions of Williams’ pre-indictment statements were *Brady* and he did not actually go through any analysis himself to decide whether or not Williams’ statements from the trial prep sessions should be disclosed,²⁹⁴ he did believe, looking back, that they should have been disclosed;²⁹⁵
- He was under the impression that the *Brady* review, including Grand Jury transcripts and 302s, was going on in DC;²⁹⁶
- He did not recall exactly what was meant by the phrase “original discussion” in his notes; it could have been between Williams and Allen or with both of them and the Senator.²⁹⁷ However, he pointed out that their original concept for the project did not involve Christensen Builders, it was a smaller project to be done entirely by VECO;²⁹⁸
- He adamantly did not agree with the questions that suggested part of the “original agreement” was that the VECO costs would be added into the Christensen Builders invoice; rather, “that VECO time would be billed in some form or capacity to Stevens;”²⁹⁹
- He thought Williams’ statements that he was not certain whether Bill Allen was adding VECO bills to the Christensen Builders’ invoice packet, and that Williams never told the Senator or his wife that he assumed they were being added together, would be favorable for the government.³⁰⁰

AUSA Goeke, like PIN Trial Attorney Ed Sullivan, had been removed from the official trial team by the Criminal Division leadership just before the indictment was returned. He

A: I guess, but I always thought of it as it would be added to that total. You have the Christensen Builders bill for \$10,000 and then VECO would then **generate a separate statement** that would include, “Here’s our VECO time.” I don’t know how the mechanics were going to work, but I know that Rocky said that any time that I was present for it, Rocky said, that’s what I thought that additional -- **some additional invoice was going to be generated.** (emphasis added).

See also id. at 141 (Goeke “understood the bills were going to be left there and then either an invoice was going to be **generated from VECO** where you add time to the – I didn’t know how that was going to happen, but, yeah, that concept . . .”) (emphasis added).

²⁹⁴ *Id.* at 108.

²⁹⁵ *Id.* at 109.

²⁹⁶ *Id.* at 115, 441 (“In my mind, PIN was in charge of the [*Brady*] review process.”); 451 (“what Joe Bottini and I were told from Alaska is the *Brady* review is being handled. We’re taking care of that here in D.C. You guys keep dealing with the witnesses that are coming in –.”).

²⁹⁷ *Id.* at 118.

²⁹⁸ *Id.* at 119.

²⁹⁹ *Id.* at 142.

³⁰⁰ *Id.* at 144-45.

continued to assist in any way he could, but he justifiably saw himself as responsible for specific tasks. When he participated in the trial prep session with Rocky Williams, he was operating under the impression that the *Brady* review process was being conducted by the PIN attorneys in Washington, and he did not believe that the information he was hearing from Williams was different from the statements he had given in the past. Goeke's belief was justified because most of what Williams said in his prep sessions was already memorialized in either interview memoranda or Grand Jury testimony. The new information, Williams' statement that he assumed the VECO costs were being added to the Christensen Builders invoices, was not contained in any of Williams' prior statements.

Rather than credit Goeke's interpretation of his own notes recording Williams' words, OPR divines from the notes its own reading of what Williams was saying: there was an "original agreement" to combine the invoices. The ROI does not even mention Goeke's testimony to the effect that he did *not* understand Williams to be saying that VECO costs were being subsumed within a general Christensen Builders invoice, but rather that Allen was generating a separate VECO bill and sending it together with the Christensen Builders invoices. This interpretation raises considerably less, if any, *Brady* red flags. The defense theory would *not* have been that Bill Allen sent Senator Stevens separate VECO bills along with the Christensen bills, but the Senator only paid the latter.

The record demonstrates that AUSA Goeke conducted scrupulous *Brady* reviews of evidence when he understood he was being asked to do so. He testified that he did not in fact make any attempt to analyze whether Williams' trial prep session statements were required to be disclosed under *Brady*. Under the circumstances, AUSA Goeke was justified in believing that Williams' statements about Senator Stevens wanting to pay were not new and would be reviewed and turned over by the attorneys doing the *Brady* review. As to Williams' statement regarding combining bills, Goeke understood this statement to mean sending two separate bills, which (a) would have been very similar to what Williams told ██████████ and (b) would not even have been particularly exculpatory, as he saw it, because receiving a VECO bill would have alerted Senator Stevens to the fact that VECO was doing work for which he did not pay. These facts do not show by a preponderance of evidence that he was acting in reckless disregard of his *Brady* obligations. I do not agree that such conduct is objectively unreasonable under all the circumstances or a gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation.

3. Conduct by AUSA Bottini

I discuss above my analysis of AUSA Bottini's conduct in relation to the *Brady* letter in section V.D. With regard to AUSA Bottini's conduct in relation to Williams' statements in the trial prep sessions, the focal point of the analysis is whether Bottini was reckless in not disclosing Williams' statements concerning his assumption that the VECO costs were combined with the Christensen Builders invoices. Unlike AUSA Goeke, who testified that he never attempted to make a conscious analysis of whether Williams' statements regarding adding in VECO time to the Christensen Builders invoices constituted *Brady* information, 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.³⁰¹

As mentioned, OPR's misconduct finding is based in significant part on its conclusion, based on a review of the handwritten notes of Bottini and Goeke from the trial prep sessions of Williams on August 20, 22, and 31, that there was an "original agreement" between Williams, Bill Allen, and Ted Stevens that the VECO costs would be subsumed within the Christensen Builders invoices; and the existence of this specific "original agreement" is cited as a key exculpatory fact that AUSAs Bottini and Goeke should have disclosed.³⁰² I discuss above that AUSA Goeke did not understand Williams even to be saying that the VECO costs were going to be consolidated in a single Christensen Builders invoice.³⁰³ From my examination of the record, I conclude that the preponderance of the evidence does not support OPR's conclusion that Williams' "original agreement" encompassed the combining of the two companies' invoices.

As discussed in greater detail above, an examination of the testimony of both AUSAs Goeke and Bottini reveals that their interpretation of their notes, as well as their memories of the statements Williams made during the prep sessions was that the "original agreement" between Williams, Allen and Stevens was *not* specifically that the VECO and Christensen Builders' invoices should be combined. While neither AUSA could clearly define what Williams meant by the phrase "original agreement," both AUSAs definitively denied that Williams indicated that the "original agreement" was to combine the invoices.

Rather, the "original agreement" referred to the early discussions of the nature of the renovations,³⁰⁴ which called for VECO to do the work³⁰⁵ and to Stevens' statement that he would pay for everything.³⁰⁶ Although not necessarily part of the "agreement," Williams also said his

³⁰¹ Bottini OPR Interview at 402; Schuelke Bottini Interview II at 347-48. AUSA Bottini's testimony in the Schuelke interview was, initially, that he "didn't think of this as *Brady* material at the time." *Id.* at 177. He did not recall it crossing his mind and making a calculated decision or debating the issue with anyone on the team. *Id.* at 178. Because it was only Williams' assumption, Bottini testified that he did not remember thinking much about the issue, because it "wasn't something that jumped out and grabbed me" as it would have **if Williams had said** that Allen told him he was "**wrapping my time and Dave's time into Augie's bill**" . . . That would have been something that **would have jumped out** at me, and you know, we would have disclosed that." *Id.* at 184 (emphasis added). Later, Bottini explains that he recalled "thinking at the time that Williams was making an assumption . . . that he assumed that 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 at the time." *Id.* at 348.

³⁰² ROI at 353-54; *see* quotation in full at n. 281.

³⁰³ Goeke Schuelke Interview at 101-02. Goeke's understanding may also explain AUSA Bottini's clear recollection that Williams "never" said that he, Williams, was supposed to go through Paone's bills and "take his time and Dave Anderson's time, and put it into Paone's bill . . . I'm pretty sure Williams never said that while I was there." Schuelke Bottini Interview I at 135. "I'm certain I never heard him say that, you know?" *Id.* at 144.

³⁰⁴ "If that word [in the notes of Williams' trial prep session from August 22, 2008] is 'agreement' – and I think it probably is – I think what that refers to is the initial discussion about what the senator wants done, you know to expand the house, Allen telling him VECO can do that, having Rocky out there to walk the site and figure out how they might be able to do that . . ." Schuelke Bottini Interview I at 185.

³⁰⁵ Schuelke Bottini Interview I at 181. ("Well, I don't know that having a contractor in there was part of the original agreement. You know, the understanding was VECO was going to do the work."); Goeke Schuelke Interview at 119 (idea for bringing in different general contractor came up later; original discussion was a small project to be done by VECO.).

³⁰⁶ Schuelke Bottini Interview I at 161 ("I think what he is saying here is he is making the assumption that this is what's happening **because the senator said he wanted to pay for it**. That's what I think that means.") (emphasis

early discussions with Allen addressed the fact that because they were under a microscope it needed to be done correctly so as not to arouse suspicion;³⁰⁷ and therefore he did not think Bill Allen would be reckless in the way he handled the billing.³⁰⁸ The “agreement” or “understanding,” that Stevens would pay for everything, combined with Williams’ knowledge that they needed to be careful, is what led Rocky Williams to assume that when he submitted the Christensen Builders’ invoices to Bill Allen, Allen would be adding in the VECO time. Although Bottini’s handwritten notes do contain the phrase “Part of the original agreement,” as an entry following the phrase “It was understood that we were down there – and that any VECO time/labor would be added in,” the testimony of Bottini and Goeke make it clear that they did not see the concept of “invoice-combining” as part of any original understanding among Williams, Allen and Stevens, but rather that this assumption that Williams made was *based on* the original understanding that Senator Stevens was going to pay for everything.³⁰⁹

Under the circumstances as AUSA Bottini understood them at the time, that (a) the “original agreement” primarily meant that Stevens would pay for everything in a discreet way, (b) Williams had no personal knowledge as to whether any invoices were actually being combined, (c) no one ever told him that invoices were combined, (d) he never told anyone, such as Catherine Stevens, that he assumed that invoices were combined, (e) he did not know whether Stevens was actually paying for VECO’s work, (f) Stevens was not in fact paying for VECO’s work, and (g) VECO’s costs were not in fact added to the Christensen Builders invoices, I do not consider these facts capable of supporting a finding by a preponderance of the evidence that AUSA Bottini’s decision not to disclose the “invoice-combining” assumption was in reckless disregard of his *Brady* obligation. Indeed, AUSA Bottini’s contemporaneous notes from the prep sessions record that Williams’ only assumed that the VECO time was being added to the Christensen Builders invoices. AUSA Bottini testified that because this belief was an assumption, he did not see it as triggering an obligation to disclose as exculpatory evidence. He further testified that in searching his memory, he believed he made a judgment at the time that it did not need to be disclosed under *Brady*.³¹⁰ I would have less difficulty agreeing with a finding

added.); *id.* at 180 (“Rocky assumed this, based on what Ted Stevens had said in 1999. ‘I want to pay for everything.’”); *see also id.* at 181-82.

³⁰⁷ Goeke Schuelke Interview at 135 (“Yeah, Mr. Williams, as I understood it as I read it today, Mr. Williams said, you know, ‘Allen had to know this was going to be -- this could be under a microscope if people found out that we were building something for Ted.’ . . . That that’s why he is – that’s why Williams assumed that Allen would do it right.”).

³⁰⁸ *See* Schuelke Bottini Interview I at 163 (“I think Williams is saying that he assumed that that’s what they were going to do. And part of that, if I remember this correctly, was he didn’t think that Allen would be so reckless as to do anything to hurt Senator Stevens. So he was assuming that that was going to happen. . . . That the [sic] VECO – that his hours, Dave’s hours, VECO’s, you know, time and whatever else they put into the house was going to be wrapped into Paone’s bill.”); *see also id.* at 179 (“He just assumed that, you know, based on his belief that Bill wouldn’t do anything reckless like this to hurt Ted Stevens.”); *id.* at 183 (“[I]t’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.”).

³⁰⁹ Moreover, a comparison of Bottini’s notes of August 22, 2008 with Goeke’s notes of the same session show that Goeke’s notes record the original agreement as falling under the general category that “TS was going to pay for everything,” suggesting, contrary to OPR’s interpretation of Bottini’s notes, that the original agreement pertained to an understanding that Stevens was going to pay rather than to combining invoices. Goeke’s Notes of August 22, 2008 at CRM057194 are quoted in full above at n.280.

³¹⁰ As noted above, Bottini’s direct examination outline notes demonstrate that he was in fact planning to elicit Rocky Williams’ assumption about the invoices during his testimony at trial. Consequently, although Rocky Williams never testified for health reasons, AUSA Bottini’s questions (and the answers he expected to receive)

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.

The standard for recklessness requires proof that an attorney knew or should have known that his conduct created a substantial likelihood that a professional obligation will be violated, but he nevertheless engaged in the conduct, which was objectively unreasonable under all the circumstances and a gross deviation from the standard of conduct that a reasonable attorney would observe in the same situation. Though questionable, AUSA Bottini’s conclusion that the “invoice-combining” assumption was not *Brady* was not objectively unreasonable under all the circumstances. AUSA Bottini clearly did not know that his conduct was creating a substantial likelihood of a *Brady* obligation; he thought he was applying *Brady* correctly at the time.

The ROI points to other shortcomings in AUSA Bottini’s conduct to support its finding of recklessness, but its proof for these conclusions is also lacking. For example, OPR finds that AUSA Bottini failed to review his notes in connection with the *Brady* review.³¹¹ In fact, the record shows that Bottini did review his handwritten notes for *Brady* purposes and recognized his obligation to do so.³¹²

Similarly, OPR finds that AUSA Bottini “did not review Grand Jury transcripts, FBI 302s, IRS MOIs *in connection with the Brady letter*.”³¹³ Again, although technically true because AUSAs Bottini and Goeke understood that the review being done in support of the *Brady* letter was primarily being handled by the PIN attorneys, this finding is misleading because it does not credit Bottini’s testimony that he *did* review Grand Jury transcripts, interview memoranda, and handwritten notes as part of his preparation of every witness and in doing so he conducted a *Brady* review of these materials.

Finally, the ROI also gives weight to its conclusion that AUSA Bottini had “responsibility for presenting” Williams as a witness at the time he made the exculpatory statements during the trial prep sessions and his “responsibility for presenting the witness raised

would have presented this evidence as part of the government’s case, and the defense would have been able to use it. *See* Bottini OPR Interview I at 423 (discussing Bottini’s expectation that Williams would testify regarding the combining of wages).

³¹¹ ROI at 357. OPR cites a portion of AUSA Bottini’s Schuelke interview in support of its finding that “neither Bottini nor Goeke reviewed their notes from the August 2008 trial preparation sessions to see if they contained *Brady* material.” ROI at 356-57. However, in this part of his interview, Bottini is referring to the PIN-directed *Brady* review process, and he reports that neither he nor Goeke were asked, as part of that *Brady* review process to review their notes. Schuelke Bottini Interview I at 26. That much may be true, because the PIN-directed *Brady* review process was poorly managed, but this statement does not support a finding that AUSA Bottini did not review his notes from the August 2008 trial preparation sessions for *Brady* material. Indeed, AUSA Bottini’s direct examination outline, which records Williams’ assumption regarding the combining of invoices, was prepared from Bottini’s notes, and he testified repeatedly during both his OPR interview and the Schuelke interview that he regularly reviewed his handwritten notes when preparing witnesses, both for content and to look for any *Brady* material. Bottini addresses his having reviewed his handwritten notes (and recognizing his responsibility to review handwritten notes) at least twice in his OPR interview, *see* Bottini OPR Interview at 308, 393, and 14 times during the Schuelke interview. *See* Schuelke Bottini Interview I at 32, 37, 38, 62, 63, 66; Schuelke Bottini Interview II at 564, 565, 566, 567, 568, 572, 575, and 587.

³¹² Schuelke Bottini Interview II at 587.

³¹³ ROI at 362.

his level of culpability.”³¹⁴ First, as discussed above, whether he understood Williams was *his* witness or not, AUSA Bottini said his practice when he prepared any witness included reviewing prior statements, testimony, and notes for both content and *Brady*. Second, while it may be standard for the attorney who is presenting a witness to be primarily responsible for the *Brady* review for that witness that was not the division of labor that occurred in the *Stevens* case, where the PIN attorneys were primarily responsible for the *Brady* review. Third, OPR dismisses Bottini’s detailed testimony to the effect that he did *not* understand that Williams was his witness during the August prep sessions. OPR relies on an email Bottini sent on August 21, 2008 in support of this conclusion, but because Bottini’s recollection adamantly contradicts this email, I consider the state of the evidence more inconclusive on this point.³¹⁵ Although I do not think the issue of whether Williams was Bottini’s witness at the time he made the exculpatory statements is dispositive of whether Bottini should have turned the statements over, I point out that the evidence is ambivalent on this issue because OPR relies so heavily on its conclusion that Williams was AUSA Bottini’s witness to support its finding that AUSA Bottini acted recklessly.

For all of the foregoing reasons, I do not find that the evidence is sufficient to prove by a preponderance of the evidence that AUSA Bottini acted in reckless disregard of his *Brady* obligation regarding Rocky Williams’ assumption about the combining of invoices. Even under the broader USAM standard, if the attorney does not consider the information to be “significantly probative of the issues before the court” there is no obligation to disclose it. AUSA Bottini saw Williams’ invoice-combining assumption as unfounded and irrelevant because it existed only in his mind. Even so, in light of the defense’s focus on the issue of Senator Stevens’ intent and argument that the Christensen Builders bills were seen as representing the entire cost of the project, I believe this statement should have been disclosed. AUSAs Bottini and Goeke also concluded, in retrospect, that this statement should have been disclosed. Though AUSA Bottini’s judgment may have been incorrect, it was not objectively unreasonable, under all of the circumstances, for him to make the decision that he did.

While his conduct did not amount to reckless disregard of his obligations, I do find that AUSA Bottini acted with poor judgment in failing to correct the omissions in the *Brady* letter and by not turning over Williams’ statement in the trial prep sessions. Failing to disclose this material was “a course of action that is in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take.”

³¹⁴ ROI at 357, f n. 1445.

³¹⁵ Bottini OPR Interview I at 389-91; and II at 456-58; Schuelke Bottini Interview I at 229. OPR finds that Bottini’s recollection is faulty because he stated in an email dated August 21, 2008 that Rocky Williams would be his witness with the caveat that Nick Marsh would take Williams if Dave Anderson became a witness. ROI at 72. OPR states that Bottini “erroneously believed” that Williams had been reassigned to Marsh after August 21, 2008. ROI at 355. Regardless of whether Bottini stated on August 21, 2008 in an email that he would handle Williams, Bottini gives very detailed testimony about asking that he be relieved of handling Williams and then later being “pissed off” that he was requested to take on Williams again just before the trial began. Bottini OPR Interview I at 390-92. I would credit that testimony, particularly because it is not necessarily inconsistent with the email because the plan could have changed, just as AUSA Bottini said it did. At a minimum, there is conflicting evidence on the point of whether Williams was Bottini’s witness at the time the *Brady* letter was sent and during the August trial prep sessions such that relying on this fact as a basis for concluding that Bottini had a higher obligation with respect to Williams is questionable.

VII. Conclusion

I am conscious and respectful of the truly remarkable and exceedingly thorough investigation that OPR conducted into the many problems and misconduct allegations that arose out of the *Stevens* prosecution. Although I criticize OPR's ROI in certain narrowly focused areas, I do not intend to convey anything but respect and admiration for the high quality of their investigation and report. It is possible to draw different sets of conclusions from the same facts, and I draw conclusions that differ from OPR in the level of intent associated with the violations that they uncovered.

After having labored and reflected on this record with every iota of concentration and judgment that I can muster, and reading and re-reading the ROI, the subjects' testimonies, and the many supporting original records, I come away with the conviction that the failures that led to the collapse of the *Stevens* prosecution were caused by team lapses rather than individual misdeeds, with origins in inept organizational and management decisions that led to a hyper-pressurized environment in which poor judgments, mistakes and errors compounded one another and made it almost inevitable that disclosure violations would occur.

I also recognize that some may see this result as insufficient because of a felt need that some federal prosecutor should be punished or castigated because of the many disclosure violations that occurred, or because the judge who presided over the case concluded that misconduct happened, or simply because a high profile prosecution of a U.S. Senator had to be dismissed due to *Brady* violations. Just as OPR did not give any heed to these sorts of concerns when it found not a single example of intentional misconduct by any prosecutor, and only three findings, against only two of the attorneys, of reckless misconduct, so I cannot and do not consider such pressures.

The punitive consequences that have affected the prosecution team from the *Stevens* case are visible enough for any unbiased observer to see. PIN Trial Attorney Nicholas Marsh committed suicide. PIN Chief William Welch and PIN Principal Deputy Chief Brenda Morris, along with several other Department attorneys were temporarily held in contempt of court. A separate contempt investigation, by Mr. Schuelke, is still pending against Welch, Morris, Marsh, Sullivan, Bottini and Goeke. The findings of the ROI, even though I may have found its conclusions regarding the level of intent unsupported by a preponderance, stand as a permanent and painful mark on the professional reputations of the entire team, even for those who were not found to have committed misconduct, poor judgment or mistake. I have no doubt that all of the prosecution team members have been chastened, schooled, and even scarred by this process to such an extent that their sensitivities to *Brady* disclosure issues have been honed to the finest point imaginable. Even if I had concluded that reckless misconduct had occurred, all of the same concerns that caused me to reduce the findings to poor judgment, along with the uniformly positive – if not outright lustrous – personnel records of AUSAs Bottini and Goeke, would have counseled in favor of a low level of discipline. In reviewing the performance records and character evidence submitted by the offices of AUSAs Bottini and Goeke, it is clear to me that no amount of “discipline,” such as a letter of reprimand, or a suspension, would be likely to

accomplish any further deterrence of future misconduct³¹⁶ than their involvement in this prosecution and this misconduct investigation has already done.

VII. Response(s) to _____

You have the right to respond to this notice orally and/or in writing and to submit affidavits or other documentary evidence in support of your response. PMRU Chief Kevin Ohlson will issue the decision. Your written response, if any, must be submitted within 30 calendar days from the date you receive this notice (exclusive of the date of delivery) and must be sent via electronic mail to Mr. Ohlson at Kevin.Ohlson@usdoj.gov.

If you wish to make an oral response, you must contact Mr. Ohlson *immediately*, via the email address above, to schedule a call or meeting, and the oral response must be made within the same 30 day period. Your [component head or USA] may join in your response, respond separately, or otherwise comment on this proposal within the same 30 day period by the procedures outlined above. If [component head or USA] does respond separately, or otherwise comment on the proposal, you will have an opportunity to respond to [his/her] comments to Mr. Ohlson prior to him issuing a decision.

You also have the right to have an attorney or other representative of your choice assist you in preparing and presenting your response. If the person selected as a representative is an employee of the Department, management may disallow the selection if the representative cannot be spared from his or her official duties, or if a conflict of interest exists between the representation functions and the employee's official duties. You and your representative, if a U.S. Department of Justice employee, will be allowed a reasonable amount of official time, not to exceed eight hours coordinated in advance with applicable supervisors, to review the documents relied upon to support this proposal, to secure affidavits, and to prepare a response.

Before a decision is reached on whether or not to suspend you from employment, the PMRU Chief will give full and impartial consideration to any response from you and/or _____ and will issue a decision within 45 days of receipt of your response or of the expiration of the response period. During this notice period, you will be retained in a paid duty status.

If you have questions about the procedures discussed in this notice you may contact Jane Reimus, Chief, Policy and Special Programs Division of the Executive Office for United States Attorneys at (202) 252-5315.

Please acknowledge receipt of this letter by signing in the space provided below, scanning the document and returning it to me via electronic mail at Terrence.Berg@usdoj.gov. Your signature does not constitute agreement or disagreement with the proposal but merely acknowledges your receipt.

³¹⁶ Indeed, the Stevens case has had a nationwide impact in deterring discovery lapses, as it has caused the Department to implement a national regimen of required discovery training on a yearly basis, as well as to impose a requirement on all U.S. Attorneys' Offices to adopt written discovery policies that meet certain baseline standards.

I acknowledge receipt of this proposed suspension.

[NAME]

DATE

EXHIBIT C

**Response to the United States Department of Justice
Office of Professional Responsibility
Draft Report**

**Submitted on Behalf of
Assistant United States Attorney Joseph W. Bottini**

February 8, 2011

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TABLE OF CONTENTS

	Page
I. INTRODUCTION AND EXECUTIVE SUMMARY	1
II. BACKGROUND	6
A. Mr. Bottini’s Legal Career And Reputation For Integrity	6
B. The <i>Stevens</i> Prosecution	8
1. PIN Takes Control Of The Investigation	8
2. Ms. Morris Is Installed As Lead Trial Counsel But Adopts A Hands-Off Approach To Management	10
3. The Trial Schedule Is Accelerated.....	11
4. Front Office Management Decisions Burden Mr. Bottini’s Trial Preparation	12
III. OPR MISINTERPRETS SEVERAL GOVERNING LEGAL STANDARDS	13
A. The Prosecution Was Not Bound By An “Implicit Directive” To Follow <i>United States v. Safavian</i>	13
B. The U.S. Attorneys’ Manual Did Not Require Disclosure Of All Evidence “Probative Of Issues Before the Court”	16
C. OPR Fails To Consider The Good-Faith Exception That Its Own Analytical Framework Recognizes And Which Forecloses Any Finding Of Misconduct.....	18
IV. MR. BOTTINI’S FAILURE TO DISCLOSE STATEMENTS BY BILL ALLEN WAS A MISTAKE, NOT RECKLESS DISREGARD	19
A. OPR’s Analysis Of The April 15 Statement Dismisses Mr. Bottini’s Good- Faith Efforts To Review His Files For <i>Brady</i> Material And Recasts His Mistake As Reckless Disregard	20
1. The Failure To Disclose The April 15, 2008 Notes Was A Mistake And Does Not Negate Mr. Bottini’s Good-Faith Efforts.....	21
2. The Failure To Disclose An Undated Note Does Not Undermine Mr. Bottini’s Good-Faith Efforts	23
B. OPR’s Analysis Of The Pluta 302 And December 2006 MOI Overlooks The Context In Which Mr. Bottini’s Conduct Occurred	25
C. The Draft Report Subjects Mr. Bottini To A Higher Standard Of Professional Responsibility Than Any Other Member Of The Prosecution.....	26
V. MR. BOTTINI DID NOT COMMIT MISCONDUCT OR EXHIBIT POOR JUDGMENT IN CONNECTION WITH THE BAMB TYREE ALLEGATIONS	28
A. Mr. Bottini Pressed PIN To Disclose The Tyree Allegations.....	28

TABLE OF CONTENTS
(continued)

	Page
B. The Draft Report Dismisses Mr. Bottini’s Persistent Good-Faith Efforts And Again Ignores The Context In Which His Conduct Occurred.....	31
VI. MR. BOTTINI DID NOT COMMIT MISCONDUCT IN CONNECTION WITH STATEMENTS BY ROCKY WILLIAMS	35
A. Measured Under Any Standard, The Government Did Not Have An Unambiguous Duty To Disclose Mr. Williams’ Statements	35
1. The Government Was Not Unambiguously Required To Disclose Mr. Williams’ Assumptions.....	35
2. The Government Was Not Unambiguously Required To Disclose Additional Statements By Mr. Williams.....	38
B. There Is No Legitimate Basis For The Draft Report’s Reckless Disregard Finding	40
VII. MR. BOTTINI DID NOT EXHIBIT POOR JUDGMENT BY FAILING TO RECOGNIZE INACCURACIES IN THE VECO RECORDS	41
VIII. ADOPTING THE DRAFT REPORT’S PROPOSED MISCONDUCT FINDINGS MAY HAVE HARMFUL INSTITUTIONAL CONSEQUENCES.....	43
IX. CONCLUSION.....	44
EXHIBITS	45

I. INTRODUCTION AND EXECUTIVE SUMMARY

In late July 2008, the leadership of the Department of Justice’s Criminal Division approved the indictment of Senator Ted Stevens. Senator Stevens had come under scrutiny during the course of Operation Polar Pen, an Alaska-based public corruption investigation that obtained evidence, in late 2005, that the senator had accepted sizeable benefits from VECO Corporation but failed to report them on his Senate financial disclosure forms. In a prosecution that evolved out of an investigation marked by fragmented responsibility, the Department’s Public Integrity Section (“PIN”), aided by Assistant United States Attorneys Joseph Bottini and Jim Goeke, developed an undisclosed gifts case against Stevens in the coming years. They obtained significant evidence from Bill Allen, the former CEO of VECO and a close friend of the senator’s who became a confidential human source for the government.

The case proceeded from indictment to trial in just over seven weeks. This unanticipated acceleration from indictment to trial produced a series of management problems that disrupted the coordination of an already disorganized team. PIN Deputy Chief Brenda Morris was inserted as lead trial counsel just prior to indictment but adopted a hands-off approach to the job, and the lack of centralized supervision that resulted caused the prosecution’s trial preparation to become increasingly compartmentalized. PIN Chief William Welch initially deferred to Ms. Morris but then asserted himself mid-trial, in time to perform triage on the prosecution’s problems but too late to avoid them. Meanwhile, the Criminal Division’s Front Office stepped into the leadership breach, making a series of significant management decisions in the late stages of the pretrial period that impacted the trial team’s preparation and interfered with Mr. Bottini’s ability to prepare Mr. Allen for trial. When trial began on September 22, 2008, that was the state of management of one of the Department’s most important public corruption prosecutions in decades.

The trial team ultimately made a series of errors, including the belated disclosure of certain evidence and the introduction of an exhibit containing inaccuracies. Mr. Bottini himself erred when he failed to recall that Mr. Allen had been questioned about the “Torricelli Note” on April 15, 2008 and to locate or disclose his notes from that session—a mistake he greatly regrets. The defense, well-known for alleging prosecutorial misconduct as a defense tactic, seized upon the government’s mistakes.¹ They argued that the prosecutors lied, maliciously elicited bombshell testimony known to be false, fabricated Mr. Allen’s testimony, suborned perjury, procured false testimony, sent a witness back to Alaska to prevent the defense from uncovering evidence, and obstructed the defense’s access to another witness.² Senator Stevens was

¹ See Jeffrey Toobin, *Casualties of Justice*, The New Yorker, Jan. 3, 2011, at 32 (“No one has made this tactic more of a signature than Brendan Sullivan, who has long worked at the Washington firm of Williams & Connolly.”); Kim Eisler, *Better Get Brendan*, Washingtonian, June 21, 2010 (“For years there had been a myth about Brendan Sullivan. . . . In any case he tries, there’s a greater chance the federal or state prosecutor will go to jail than his client will.”); *United States v. Forbes*, No. 3:02CR00264, 2006 WL 680562, at *1-2 (D. Conn. Mar. 16, 2006) (criticizing Brendan Sullivan and Robert Cary for a “pattern of unseemly tactics employed by counsel for defendant” and observing that “counsel for defendant Forbes had engaged in a pattern in this case of arguing, premised on speculation, that opposing counsel had engaged in improper conduct”).

² See generally Letter from Brendan Sullivan, Williams & Connolly, to Attorney General Michael Mukasey (Oct. 28, 2008); Letter from Brendan Sullivan, Williams & Connolly, to Attorney General Eric Holder (Apr. 28, 2009).

nevertheless convicted, but the Department later dismissed the case after learning that the government had mistakenly failed to disclose handwritten notes of Mr. Allen's April 15, 2008 interview.

After a lengthy investigation, the Office of Professional Responsibility ("OPR") has now completed its Draft Report. The report dispels some of the most spurious accusations made by defense counsel, including their allegations that the government fabricated Mr. Allen's testimony, sent Rocky Williams to Alaska to hide exculpatory evidence, and obstructed the defense's access to Dave Anderson. (OPR Draft at 251 n.722, 477, 593.) It also concludes that none of the attorneys, including Mr. Bottini, violated any obligations intentionally—a finding that should foreclose disciplinary proceedings under the applicable bar rules. Yet the Draft Report asserts that Mr. Bottini acted in reckless disregard of his professional obligations in three instances and displayed poor judgment two more. In so doing, OPR takes a jaundiced view of Mr. Bottini and effectively deems him a liar—a finding that is fundamentally at odds with the man we know, who has devoted 25 years to public service, and whose integrity is universally seen as beyond reproach. The Draft Report's proposed findings of misconduct are unsupportable for myriad reasons.

OPR's misconduct findings take little to no account of the management failures that pervaded the *Stevens* case and contributed to its ultimate downfall. The prosecution's disclosure errors cannot be fairly analyzed without serious consideration of two failures of management: the absence of centralized supervision by PIN leadership and the disruptive effect of management decisions by the Criminal Division Front Office, made in an apparent attempt to supply the leadership that PIN had not provided. Any fair analysis of Mr. Bottini's conduct must consider the impact those factors had on the prosecution and the burden they placed on Mr. Bottini in particular. For instance, haphazard and last-minute directives from PIN and the Front Office interfered with his preparation of Mr. Allen, first by requiring him to focus that preparation on an ultimately fruitless theory of official acts, and then by assigning the government's closing argument to him and ordering that he produce a comprehensive draft before trial began and while he was busy preparing a growing list of significant witnesses.

The Draft Report mentions some of these management failures, yet its misconduct analysis ignores or downplays their impact on Mr. Bottini. Instead, that analysis often faults Mr. Bottini based on an erroneous assertion that he was more "senior" than other members of the prosecution and thus bore a greater responsibility for its mistakes, while excusing Ms. Morris and Mr. Welch from that same heightened standard despite the fact they were supervisors. While the Department's supervisors are entitled to rely upon their subordinates, it cannot be true that responsibility for what was a collective failure by supervisors and line personnel rests largely upon a single line attorney. Any contrary conclusion would diminish the function of the Department's supervisors, allowing them to assert delegation as a defense to the consequences of their own management failures. The Department should demand more of its leaders than that.

OPR bases its misconduct findings in part on an erroneous analysis of the applicable legal standards. OPR's analysis must be guided by its Analytical Framework, which permits a finding of reckless disregard only where an attorney recklessly disregards a known and unambiguous obligation that unambiguously applies to the given circumstances. OPR's conclusion that Mr. Bottini was bound by (and recklessly disregarded) "an implicit directive" to

follow *United States v. Safavian*, 233 F.R.D. 12 (D.D.C. 2005), fails on that basis alone, because the application of that case in *Stevens* was anything but unambiguous. So does its assertion that the United States Attorneys' Manual required the government to disclose all "probative" evidence, because the Manual does not unambiguously impose that requirement at all.

OPR's Analytical Framework also makes clear that an attorney who makes a good-faith attempt to satisfy his obligations does not commit professional misconduct. Yet the Draft Report barely considers Mr. Bottini's good-faith effort to meet his disclosure obligations, which should likewise foreclose any finding of reckless disregard—particularly in connection with the Bambi Tyree allegations, where he sought advice from his superiors and repeatedly pressed for disclosure.

OPR views Mr. Bottini's actions in the most negative light, draws unsupported conclusions about his credibility, and misstates his testimony on key subjects. There are numerous instances in which OPR dismisses an explanation by Mr. Bottini or views his conduct in the most negative light—for instance, rejecting Mr. Bottini's explanation that he misfiled notes from his April 15, 2008 interview of Mr. Allen and all but dismissing his testimony that he reviewed his files for *Brady* purposes. (OPR Draft at 281 n.753.) Worse, the Draft Report mischaracterizes Mr. Bottini's testimony on multiple occasions, in some instances using those mischaracterizations as the basis for assertions that he lacks credibility. Such assertions are radically at odds with our experience with Mr. Bottini, and the misstatements underlying them cast doubt on the rigor of OPR's analysis. For example:

- OPR contends that Mr. Bottini "did [not] review his notes from trial preparation sessions" and that "neither [Mr. Bottini nor Mr. Goeke] reviewed their notes for *Brady* information." (OPR Draft at 125, 512.) Not so. OPR bases this assertion on Mr. Bottini's interview with the Special Prosecutor, but the cited excerpt does not support OPR's assertion. (*See* Schuelke Tr. at 26.) To the complete contrary, Mr. Bottini explained during that interview that he *did* review handwritten notes that he took during trial preparation sessions. (Schuelke Tr. 32:19-34:15.) Moreover, he developed a list of impeachment information that the government would need to disclose, and did so after consulting, photocopying, and annotating a reference guide to *Brady* and *Giglio* case law—good-faith conduct that forecloses a misconduct finding under OPR's own guidelines, and which the Draft Report altogether ignores.
- Describing a handwritten note Mr. Bottini took during a September 20, 2008 trial preparation session with Mr. Williams, OPR contends that Mr. Bottini "suggested that the handwriting might not have been his" and, before engaging in a lengthy discourse about his handwriting samples, asserts that "Bottini's disclaimer is not credible." (OPR Draft at 437 n.1188.) Mr. Bottini never disputed that the handwriting was his; indeed, he acknowledged that it was. (Schuelke Tr. 322:13-323:13.) He told the Special Prosecutor merely that he did not know whether he or Mr. Goeke made a certain statement to Mr. Williams, speculating that Mr. Goeke made the statement while Mr. Bottini transcribed it contemporaneously because "typically, I don't write down what I am saying." (*Id.*)

- OPR contends that the prosecution should have disclosed Mr. Williams' incorrect belief that his time and Mr. Anderson's was reflected in the Christensen Builders bills that Senator Stevens paid. In support of that argument, OPR asserts that Mr. Bottini himself "acknowledged . . . that it was fair to argue" that Mr. Williams' erroneous belief would have "undercut the government's proof." (OPR Draft at 494.) Wrong. Mr. Bottini agreed it would be "fair" to say that evidence that their time was *actually* incorporated into the Christensen Builders bills would undercut the government's case. (Schuelke Tr. 138:10-140:3.)

OPR's substantive analysis is flawed. In addition to these overarching flaws, the Draft Report reaches incorrect conclusions on each of its substantive areas of inquiry.

First, OPR's assertion that Mr. Bottini recklessly disregarded his disclosure obligations with respect to statements made by Mr. Allen dismisses his good-faith effort to review his files for *Brady* material, holds him to a higher standard than any other member of the prosecution, and recasts attorney error as professional misconduct. Mr. Bottini reviewed his files and the handwritten notes they contained as he prepared for trial, with the dual purpose of preparing witnesses and identifying *Brady* material. That he mistakenly failed to recall that Mr. Allen mentioned the Torricelli Note on April 15, 2008 or locate his notes from that session does not negate these good-faith steps to comply with *Brady*. Nor does the fact that Mr. Bottini did not independently review the results of the *Brady* review performed by IRS and FBI agents, which was handled by PIN and blessed by Ms. Morris. In finding otherwise, the Draft Report subjects Mr. Bottini to a standard akin to strict liability, faulting him because Mr. Allen ultimately became his witness while excusing every other attorney who made the same mistake. It cannot be the case that Mr. Bottini bears responsibility for failing to "search his memory . . . as well as the memories and notes of his colleagues" (OPR Draft at 281) while similarly situated members of the prosecution do not.

Second, OPR's reckless disregard finding with respect to Bambi Tyree is unsupportable. Mr. Bottini pressed PIN to disclose allegations that Mr. Allen had asked Ms. Tyree to make a false statement denying his sexual misconduct with minors. He did so repeatedly, seeking advice from his supervisors in the U.S. Attorney's Office, urging *ex parte* disclosures to the district judge presiding over earlier cases in which Mr. Allen testified, and pressing PIN to disclose the allegations in pretrial filings in the *Stevens* case. PIN repeatedly rebuffed him. With Mr. Goeke, Mr. Bottini also pressed for a more complete disclosure in the September 9, 2008 *Brady* letter PIN drafted. PIN added inaccurate language to that letter the evening before it was finalized and when Mr. Bottini was traveling from Anchorage to Washington; Mr. Bottini did not closely review those final drafts because of his travel, because he spent the following day preparing for a motions hearing he had been assigned at the last minute, and because the letter—which PIN's leadership had approved—was not one of his assigned responsibilities, and he was not asked to review it for accuracy or completeness. Together with his repeated good-faith efforts to press for disclosure, those circumstances foreclose any finding that Mr. Bottini acted with reckless disregard.

Third, OPR articulates no legitimate basis for its assertion that Mr. Bottini recklessly disregarded a duty to disclose certain statements by Rocky Williams, and in any event, the government was not unambiguously required to disclose those statements in the first instance.

Mr. Williams told prosecutors during August 2008 interviews that he “assumed” Mr. Allen incorporated his time and Mr. Anderson’s into bills prepared by Christensen Builders, the VECO subcontractor that performed carpentry work on Senator Stevens’ home and whose bills the senator paid. Mr. Williams never saw the bills Mr. Allen forwarded to Stevens, did not convey his assumption to the senator or his wife, and had no idea whether his time was actually reflected in the bills (it was not). His subjective belief may have been consistent with a potential defense theory, but would have done nothing to advance it—and there was accordingly no unambiguous duty to disclose it. Indeed, Mr. Williams’ incorrect assumption was equally consistent with the government’s case, which asserted that Senator Stevens participated in a scheme with *Mr. Allen*, not other VECO workers. Yet even if the government were subject to an unambiguous duty to disclose that assumption, OPR offers no basis for its conclusion that Mr. Bottini recklessly disregarded it. The Draft Report actually *concedes* that Mr. Bottini’s failure to disclose the belief was unintentional (OPR Draft at 509), and offers little support—apart from criticizing Mr. Bottini for missing the significance of that belief—for its assertion that he acted with reckless disregard.

Finally, OPR’s assertion that Mr. Bottini displayed poor judgment in connection with a VECO cost spreadsheet would establish an unworkable and overreaching rule of professional practice: each and every attorney must be intimately familiar with each and every piece of evidence the government uses at trial, no matter how complex and wide-ranging the case. At trial, Mr. Marsh presented VECO records showing that Mr. Williams and Mr. Anderson worked nearly full-time on Senator Stevens’ home; it is undisputed that those records were inaccurate. Mr. Bottini knew that the two workers were not present at the senator’s house full-time, but had no responsibility for the VECO records; Mr. Marsh was responsible for the records but apparently unfamiliar with grand jury testimony [REDACTED]

[REDACTED] The Draft Report acknowledges that neither attorney recognized the conflict, yet finds that Mr. Bottini displayed poor judgment by failing to review the VECO records. To the contrary, the government’s collective failure was simply a mistake.

Adopting the Draft Report’s conclusions could have profoundly harmful institutional effects. If adopted, the Draft Report’s misconduct findings may cause harmful repercussions within the Department. The double-standard of professional misconduct reflected in the Draft Report could have significant implications for morale, given OPR’s apparent willingness to limit the assignment of blame to line attorneys while excusing their supervisors from the consequences of errors to which their own leadership failures contributed. Wrestling with the big-picture management failures that beset the *Stevens* prosecution is undoubtedly more difficult than assigning blame to a line attorney—yet any fair investigation must necessarily do so.

* * *

We understand how OPR could have reached the conclusions it did. The Draft Report is the product of serious allegations of misconduct that arose from one of the Department’s highest-profile criminal trials, and it is undisputed that the prosecution made a series of errors impacting the fairness of that trial. Under those circumstances, it is unsurprising that OPR began with the

allegation that professional misconduct occurred and moved inexorably toward the conclusion it did, focusing on that evidence and drawing those inferences that support the allegation.

In so doing, however, the Draft Report adopts the very same blinkered approach it faults Mr. Bottini for following. (OPR Draft at 509 (criticizing the prosecutors for focusing on inculpatory evidence and discounting exculpatory evidence they believed was inaccurate).) Its misconduct findings depend on viewing Mr. Bottini's conduct in the most negative light, dismissing his explanations, ignoring the larger context in which his mistakes occurred, and discounting the good-faith efforts Mr. Bottini made to satisfy his disclosure obligations. OPR's repeated failure to give Mr. Bottini the benefit of the doubt may be unsurprising given the serious nature of the allegations, but it is also wrong—and all the more unjustified given what we know about Mr. Bottini's character. The Draft Report's proposed findings of misconduct should not be adopted.³

II. BACKGROUND

A. Mr. Bottini's Legal Career And Reputation For Integrity

Joe Bottini has practiced law for 25 years, and his career reflects his modesty, integrity, and deep commitment to public service. He graduated from California Western School of Law in 1984 and, upon completing a clerkship for a state judge, joined the United States Attorney's Office for the District of Alaska. Mr. Bottini has served there ever since. Throughout 25 years in the United States Attorney's Office and more than 50 jury trials, Mr. Bottini has not once been disciplined by any bar, held in contempt by any court, or subjected to any other court-imposed sanction. (Schuelke Tr. 6:19-7:8, 7:18-21.)

Mr. Bottini's colleagues attest to his unimpeachable character. They describe him as "ethical," "honest," "honorable," and "one of the very best human beings I have ever had the pleasure of knowing," and they routinely praise his "integrity" and "unwillingness to seek personal status or attention." So do his adversaries. Leaders of the Alaskan defense bar—whose clients Mr. Bottini prosecuted—extol him as "a lawyer of exceptional skill and commitment, keen intelligence, and a man of high moral character," "a modest man, without ego," "a fine public servant and a good man," and "a genuinely good and decent person, highly respected by his colleagues, his adversaries, and the judges before whom he appears." These defense attorneys maintain that "I know I can trust him absolutely," that "I would go to the bank on Mr. Bottini's word. There isn't another prosecutor in that office about whom I would make that statement," that "I would trust a client's, or my future on [his] word and integrity," and that "I would accept Joe's word and his hand shake on any matter knowing that it is more reliable than any document that could be drafted." Remarking that "the underlying allegations and questions"

³ The discussion that follows—of Mr. Bottini's background, the facts giving rise to the Stevens prosecution, and the circumstances of the prosecution itself—are based on our conversations with Mr. Bottini and our review of relevant documents, including the transcripts of his interviews with OPR and the Special Prosecutor. With the exception of excerpts of the Special Prosecutor's interviews of Mr. Allen and his attorney Robert Bundy to which we were given access, we did not review transcripts of other witnesses whom OPR and the Special Prosecutor interviewed—all of which were relied upon by OPR in preparing the Draft Report. Nor did we review email communications between members of the Criminal Division Front Office and PIN leadership, even though OPR likewise had access to and relied upon such communications. (*See, e.g.*, OPR Draft at 83 nn.153-54.)

raised by the *Stevens* prosecution “are so totally at odds with the person I have known for quite a long time,” one defense attorney insists that “the manner in which Mr. Bottini has lived his life and practiced law over the past 25 years should militate in favor of giving him the benefit of every doubt.”⁴

Mr. Bottini has displayed this integrity over the course of his 25-year career, regularly exercising his prosecutorial discretion in a manner that prioritizes fairness over any desire to secure convictions. A few recent examples prove the point:

- In one case, Mr. Bottini charged a refugee immigrant and her significant other for importing and possessing a 7-kilo package of opium with intent to distribute, based on facts that facially indicated that both co-defendants were jointly culpable. Mr. Bottini later became convinced—after speaking directly with the immigrant at her appointed counsel’s request—that she was unaware of the contents of the shipment, and he moved to dismiss the indictment against her. *See United States v. Saechao*, No. 3:04-cr-00108-JWS (D. Alaska).
- In another recent case, Mr. Bottini prosecuted a defendant named William Shuart for a firearms offense; he learned after indicting the case that, while serving a prior state prison sentence, Mr. Shuart had completed substance abuse rehabilitation, learned a good trade, and otherwise turned his life around. Mr. Shuart pled guilty and was subject to a then-mandatory Sentencing Guidelines range of roughly 63-78 months. The district court departed downward to a 6-12 month sentence based on his “extraordinary rehabilitation” prior to indictment, and Mr. Bottini successfully fought efforts by his superiors to appeal the low sentence. *See United States v. Shuart*, No. 3:03-cr-00142-JKS (D. Alaska). Mr. Bottini periodically inquires with the Assistant Federal Defender about Mr. Shuart, who has not re-offended and remains gainfully employed.

Nor is Mr. Bottini motivated by personal ambition, competitiveness, or a zeal to accumulate convictions. While he has assumed varying leadership roles when called upon—serving, for instance, as his district’s Criminal Chief and acting United States Attorney—Mr. Bottini has eschewed opportunities to hold those jobs permanently, preferring to remain a line prosecutor instead. He harbored substantial misgivings when it came to the *Stevens* prosecution itself, stemming in large part from the esteem that, to this day, Mr. Bottini has for the former senator. He has explained that “quite frankly, as odd as this may sound, Ted Stevens is still a man that I have a fair measure of respect for. Aside from what happened in this case, to me, you can’t set aside what he did for 40 years for the state of Alaska It’s a much better place to live because of this guy.” (Schuelke Tr. 408:12-20.) The case therefore gave Mr. Bottini pause, even though he believed that the evidence merited prosecution. (Schuelke Tr. 410:9-16; OPR Tr. at 5-18.) He would be prosecuting a man he respected and whom many Alaskans considered a hero—factors that would have made Mr. Bottini uneasy even had the government made no errors at all. (Schuelke Tr. 408:22-409:9 (“It’s never lost on me when I fly out of Anchorage, his name’s on the airport, Ted Stevens International Airport. . . . I mean[,] we could have come out

⁴ Each of these statements can be found in the letters of reference for Mr. Bottini attached as Exhibits A through I.

of this trial crystal clean, no errors. You know, I still ran the risk.”.) Thus, unlike other members of the prosecution who were eager to play lead roles on the government’s trial team, Mr. Bottini “desperately was hoping that either this thing was going to settle out, or they’d find someone else to do it.” (Schuelke Tr. 410:9-16.) He likewise felt little disappointment when the Criminal Division appointed Ms. Morris as lead counsel. That decision left other members of the prosecution feeling slighted, but not Mr. Bottini; contrary to OPR’s assertion that the addition of Ms. Morris “upset the existing Polar Pen trial team” (OPR Draft at 84), Mr. Bottini went out of his way to let Ms. Morris know that “I am glad that you are part of the team and that I really look forward to trial with you.” (Email from Bottini to Morris (Aug. 7, 2008 8:39 PM) (CRM BOTTINI 051841).)

B. The Stevens Prosecution

The *Stevens* prosecution was a case study in managerial dysfunction. The Criminal Division’s management belatedly decided to indict Senator Stevens after months of delay and well past the point that indictment seemed likely given the senator’s upcoming reelection; disrupted the trial team with its attempts to impose management; and installed as lead trial counsel an attorney with little background in the case or desire to assert leadership over its prosecution. The result was far more wide-reaching and pernicious than the Draft Report’s bland acknowledgement that “disorganization among the trial team . . . affected the team’s ability to fulfill its disclosure obligations.” (OPR Draft at 94.) To the contrary, those management problems created a prosecution that was behind from its inception, prone to compartmentalization, and poorly equipped to handle the rapid discovery process that Senator Stevens’ speedy trial request required. Under these circumstances, it was almost inevitable that the prosecution *would* make mistakes.

1. PIN Takes Control Of The Investigation

The government’s management difficulties had their genesis in late 2005. At the first hint that Senator Stevens was linked to Operation Polar Pen, the acting United States Attorney for the District of Alaska recused the entire office from cases arising from that investigation. (OPR Tr. 46:5-47:1.) Mr. Bottini and Jim Goeke alone were permitted to continue working on Polar Pen cases, but they reported directly to PIN. (Schuelke Tr. 315:10-15.) This arrangement left them disconnected from the prosecution’s management, unable to successfully push back against decisions with which they disagreed, and in the dark about whether the Criminal Division would approve indicting the *Stevens* case at all. (See OPR Tr. 56:19-58:21, 176:9-178:5.)

Mr. Bottini had little interaction with PIN’s leadership once the division assumed control. Ms. Morris and Mr. Welch rarely dealt directly with him and Mr. Goeke; on one of the few occasions Mr. Welch did, it was to brush back the Alaska attorneys—who had been unsuccessfully pressing PIN to disclose information about Mr. Allen and Ms. Tyree—by reminding them that they “work[ed] for PIN.” (Email from Welch to Bottini et al. (Dec. 20, 2007, 5:18 PM) (CRM BOTTINI 081094).) Apart from that direct admonishment, Ms. Morris and Mr. Welch typically communicated with Mr. Marsh and Mr. Sullivan, who would in turn communicate with Mr. Bottini and Mr. Goeke—and vice versa. (See Schuelke Tr. 314:10-14.) For instance, the Alaska attorneys pressed Mr. Sullivan to disclose the Tyree allegations in the affidavit supporting the government’s March 2007 search warrant for Senator Stevens’

Girdwood residence; Mr. Sullivan then communicated with Mr. Welch, who decided to omit the information. (OPR Draft at 304-05 & n.793; *see also* Email from Goeke to Sullivan, cc: Bottini (Mar. 5, 2007, 3:34 PM) (CRM BOTTINI 030460); Email from Sullivan to Welch (Mar. 5, 2007, 5:00 PM) (CRM BOTTINI 030459).)⁵

The Alaska lawyers were thus treated as subordinates, receiving instructions from and effectively reporting to Mr. Marsh and Mr. Sullivan. *See* Jeffrey Toobin, *Casualties of Justice*, *The New Yorker*, Jan. 3, 2011, at 40 (Alaska defense attorney notes that “[t]he lawyers in the U.S. Attorney’s office were a couple of decades older than Nick, but there was no doubt that he was the top dog. . . . He was making the decisions”); *see also* Schuelke Tr. 314:13-14 (Mr. Bottini explains that “I didn’t pick up the phone and call Bill Welch. It didn’t work that way.”). Mr. Bottini and Mr. Goeke were excluded from meetings and discussions between PIN management, Mr. Marsh, and Mr. Sullivan—including those about decisions as fundamental as the timing and content of a potential indictment.⁶

By the time Assistant Attorney General Matthew Friedrich summoned prosecutors to a July 2008 meeting, Mr. Bottini was deeply skeptical that Senator Stevens would be indicted. The Alaska attorneys had been told on numerous occasions, dating back to April 2007, to “get ready” and “be prepared” for an indictment because the statute of limitations was about to expire; a tolling agreement was reached each time, and no indictment ever resulted. (Schuelke Tr. 312:10-313:1.) Despite repeatedly asking Mr. Marsh and Mr. Sullivan whether the case was moving forward, Mr. Bottini had little indication—by the spring of 2008—whether the Criminal Division would decide to indict the senator or not. (Schuelke Tr. 312:6-313:4, 314:6-14.)

If anything, Mr. Bottini took PIN’s June 2008 directive to indict Alaska state senator John Cowdery, a different Polar Pen target, as an indication that the *Stevens* case would *not* be indicted. (Schuelke Tr. 314:15-315:10 (“I mean, they wouldn’t tell us to go indict Senator

⁵ Similarly, when the prosecution began assembling a summary of the strengths and weaknesses of a potential case for the Front Office, Mr. Bottini suggested to Mr. Sullivan and Mr. Marsh that the summary specifically mention the Tyree allegations. But, as Mr. Marsh reminded him, the decision was ultimately Mr. Welch’s. (Email from Marsh to Bottini, Goeke & Sullivan (April 7, 2008 9:09 PM) (CRM BOTTINI 016226).) Ultimately, the document simply made an oblique reference to Mr. Allen’s “shady personal background.” (Apr. 11, 2008 Memorandum to AAG Alice F. Fisher Re: Additional Information Concerning the Prosecution of Senator Ted Stevens, attached chart at 1 (cited by OPR Draft at 326).)

⁶ On April 15, 2008, for instance, Mr. Welch, Ms. Morris, Mr. Marsh, and Mr. Sullivan exchanged multiple emails regarding the status of the prosecution’s review of reciprocal discovery and the timing of a potential indictment. They did not copy Mr. Bottini or Mr. Goeke. (Email from Marsh to Morris, Sullivan & Welch (Apr. 15, 2008 9:48 AM) (CRM BOTTINI 016574).) A month later, the PIN attorneys exchanged another set of emails—again excluding Mr. Bottini and Mr. Goeke—discussing the Front Office’s anticipated reaction to a revised indictment that Mr. Marsh and Mr. Sullivan drafted after meeting with Mr. Welch and Ms. Morris. (Email from Welch to Marsh & Morris, cc: Sullivan (June 16, 2008 9:41 AM) (CRM BOTTINI 017895).) Numerous other communications likewise show Mr. Bottini’s exclusion from case strategy discussions involving PIN management, the Front Office, or both. (*E.g.*, Email from Welch to Marsh, Morris & Sullivan (July 15, 2008 3:52 PM) (CRM BOTTINI 051623) (PIN attorneys schedule meeting with Rita Glavin to discuss changes to indictment); Email from Marsh to Morris & Welch, cc: Sullivan (July 16, 2008 4:58 PM) (CRM BOTTINI 018652) (Mr. Marsh circulates a revised indictment to PIN attorneys based on Ms. Glavin’s comments).) While the lack of frequent in-person meetings between the Alaska and PIN attorneys is unsurprising given their disparate locations, the absence of meaningful email traffic between the Alaska attorneys and PIN management—contrasted with the voluminous traffic among PIN attorneys—underscores the subordinate role Mr. Bottini and Mr. Goeke played.

[Cowdery] if they think we're . . . dropping the hammer on the Ted Stevens indictment.”.) Believing the case would not move forward, Mr. Bottini eventually agreed to take on a high-profile capital murder prosecution in Alaska. (Schuelke Tr. 316:7-22.) He spent most of July 2008 preparing for that case, working on it even after the mid-July meeting with Mr. Friedrich. (Schuelke Tr. 317:17-19.) He took time off in late July to visit colleges in California with his son. (See Email from Marsh to Sullivan et al. (July 22, 2008 8:57 PM) (CRM BOTTINI 019202).) And he was “absolutely convinced,” as late as the third week of July, that the *Stevens* case would not be indicted. (Schuelke Tr. 318:22-319:2.)

2. Ms. Morris Is Installed As Lead Trial Counsel But Adopts A Hands-Off Approach To Management

Once the Criminal Division decided to indict Senator Stevens, it chose Ms. Morris to lead the trial team. The Draft Report repeatedly stresses Mr. Bottini’s experience relative to that of other trial team members; indeed, its misconduct findings rely in large part on OPR’s belief that he was more “senior” or “experienced” than other members of the prosecution. (See, e.g., OPR Draft at 378, 515.) At one point, the Draft Report even describes him as “*the senior attorney.*” (OPR Draft at 378 (emphasis added).) Ms. Morris had practiced law for 22 years to Mr. Bottini’s 24 (see OPR Draft at 65-66), but even if that two-year difference were remotely relevant to their *Brady* obligations—and it is not—it was undisputed that Ms. Morris, not Mr. Bottini, was lead trial counsel. (OPR Draft at 84; but see OPR Draft at 378 (erroneously contending that Mr. Bottini was “one of the two lead counsel on the case”).) Indeed, it was precisely because of her experience that the Criminal Division management selected Ms. Morris in the first instance. (OPR Draft at 82.)

As we understand it, the job of the lead trial counsel on a Department of Justice trial team is not only to direct and allocate responsibility among other team members, but also to ensure that all of the government’s trial and pre-trial responsibilities are being met. Yet Ms. Morris exerted little leadership over the trial team, despite being selected expressly for that purpose. (See, e.g., OPR Draft at 90-91 (Ms. Morris acknowledges that she tried to make herself “as small as possible” and “not to even give an opinion” during team meetings, refrained from “really [taking] a supervisory role,” and decided she would not “dictate to” the other prosecutors).) The same was true for Mr. Welch, who apparently deferred to Ms. Morris given the direct reporting relationship she enjoyed with the Criminal Division Front Office. (OPR Draft at 91-92.) In her defense, Ms. Morris was inserted as lead counsel fewer than two months before trial began, and it is understandable that she had difficulty attaining the level of familiarity with the case necessary to completely assert control over its conduct. But the practical effect of the resulting vacuum of leadership was that trial preparation became compartmentalized precisely when the need for coordination was greatest.

With little centralized supervision, each prosecutor focused on completing his individual assignments within the compressed period of time before trial began. Mr. Bottini spent August and early September preparing witnesses whom, in some cases, the prosecution had not spoken to in more than a year; he also drafted the government’s August 2008 *Giglio* letter and a motion to limit cross-examination of certain government witnesses. (Schuelke Tr. 27:1-17, 43:10-16.) And together with Mr. Goeke, he also spent a considerable amount of time in August and early September preparing the government’s extensive exhibit list. (Schuelke Tr. 27:6-9.) Mr. Marsh

and Mr. Sullivan drafted the government's September 9, 2009 *Brady* letter. (OPR Draft at 127.) And Mr. Sullivan organized the government's *Brady* review (OPR Draft at 112), responsibility for which was eventually delegated to FBI and IRS agents. While that *Brady* process was poorly designed and haphazardly implemented, it was undisputed that it was PIN's assigned responsibility.

Centralized leadership might also have prevented PIN's rampant disorganization, which affected the prosecution's ability to fulfill its disclosure obligations and contrasted sharply with the practice to which Mr. Bottini's own office typically adhered. The District of Alaska followed a regimented approach to discovery production; in typical cases, the office required defense attorneys to sign discovery receipts and kept duplicate copies of all productions. But the District of Alaska's only role in *Stevens* was to collect materials—*e.g.*, Title III intercepts and paper files—and forward them to PIN, which was responsible for producing discovery to the defense. (OPR Tr. 114:1-9.) Mr. Bottini specifically asked the PIN attorneys whether they were keeping track of the discovery they produced. Despite PIN's assurance to the contrary, the answer was no: the section required no discovery receipts and kept no discovery log. (OPR Draft at 95; OPR Tr. 114:20-115:8; *see also* Bottini Notes (Aug. 22, 2008) (CRM BOTTINI 061214) (during call with Mr. Sullivan and other prosecution team members, Mr. Bottini writes that "PIN is keeping score of what is turned over").⁷)

3. The Trial Schedule Is Accelerated

The defense requested a speedy trial shortly after the case was indicted. At Senator Stevens' July 31 arraignment, the defense requested "if at all possible that the trial be in October." (July 31, 2008 Arraignment Tr. 3:23-25.) Judge Sullivan determined that the 70-day speedy trial clock would require a trial by October 9, but acknowledged that the defense would extend that timeline by filing certain pretrial motions. (*Id.* 11:3-13.) Ms. Morris, however, announced that the government could "try this case on September 22" (*id.* 8:22)—a date that was more than two weeks sooner than the one to which the defense itself acknowledged it was entitled.

The speedy trial request came as a surprise to the government, which anticipated that the defense would seek to delay a trial for as long as possible. (OPR Draft at 80-81.) But it came as an even bigger surprise to Mr. Bottini that Ms. Morris accelerated that schedule even further, compressing what would have been a ten-week pretrial period into one that gave the prosecution just over seven weeks to prepare. Unlike Mr. Marsh and Mr. Sullivan, whose timing preferences were apparently solicited (OPR Draft at 86), Mr. Bottini was not asked by PIN whether he

⁷ While not bearing directly on the government's pretrial disclosures, another episode underscores the pervasive disorganization within PIN: the belated discovery of Mr. Bottini's handwritten notes of Bill Allen's April 15, 2008 interview. The Draft Report states that "FBI SA Ryan Zarfoss located Bottini's notes in April 2009, when reviewing, at OPR's direction, boxes of material sent from the PIN war room in Washington, D.C. to the Alaska USAO" (OPR Draft at 216-17), as if OPR found the notes with no assistance from Mr. Bottini (*see also* OPR Draft at 270). Not so. In reality, Mr. Bottini himself is responsible for the notes' discovery, which occurred only after he pressed PIN for three weeks to search for them. PIN maintained that the notes were no longer in Washington, despite repeated entreaties by Mr. Bottini, who knew based on his own extensive search of the U.S. Attorney's and FBI Field Offices that they were not in Anchorage. The notes were eventually found in five boxes of files that had been prematurely removed from the PIN war room without any notice to Mr. Bottini, were misplaced amid files from an unrelated case, and remained at PIN all along. (Schuelke Tr. 576:9-586:18.)

avored a September trial date or told after the arraignment that Ms. Morris requested an earlier date than the defense itself; indeed, he was unaware that Ms. Morris affirmatively sought a September 22 trial date until he read about it in the Draft Report. (See OPR Draft at 4.) The practical result of her request was to compress an already abbreviated schedule into an even shorter period of time, depriving Mr. Bottini and the other prosecutors of more than two weeks of preparation.

4. Front Office Management Decisions Burden Mr. Bottini's Trial Preparation

If PIN management provided too little centralized supervision during this period, the Criminal Division Front Office—in an apparent attempt to fill the prosecution's leadership void—did the opposite. Among other things, the Front Office exerted control over the substance of the prosecution's trial preparation, the content of their pretrial motions, the assignment of witnesses to trial team members, and even the questions prosecutors were permitted to ask certain witnesses. (OPR Tr. 329:3-331:15; Schuelke Tr. 808:5-810:15; OPR Draft at 86-90.) Those directives would have been burdensome under normal circumstances; their effect was amplified by the unusually fast pace at which the *Stevens* case proceeded to trial, and they interfered in particular Mr. Bottini's preparation of Mr. Allen.

The Front Office apparently hoped to frame the *Stevens* case as a corruption prosecution, even though it was based on undisclosed gifts. Thus, shortly after the government indicted Senator Stevens, Mr. Bottini was ordered by PIN leadership to focus his initial preparation of Mr. Allen on evidence supporting a potential theory of official acts. Mr. Bottini accordingly spent numerous hours, spanning multiple preparation sessions, reviewing emails, memoranda, and other correspondence with Mr. Allen to see if he recalled anything indicating that Senator Stevens had performed official acts on behalf of VECO. He continued doing so into September, even after his arrival in Washington. (Schuelke Tr. 511:9-513:1; see also Email from Morris to Bottini et al. (Sept. 1, 2008 4:55 PM) (CRM BOTTINI 028463) (“I think Joe is making good progress with Allen on the official acts stuff.”).) Mr. Allen progressed slowly through the documents, the majority of which the government had never previously shown him. (OPR Tr. 332:12-22.)

A subsequent Front Office edict further interfered with Mr. Bottini's preparation of Mr. Allen: its assignment of the closing argument. Three days after Mr. Bottini arrived in Washington, the Front Office decided that he would be delivering the government's summation; Mr. Bottini was directed to submit a draft by *the following week*, even though trial had not yet started, the government's summation was more than a month away, and Mr. Bottini was focused on preparing witnesses. (OPR Tr. 98:12-99:11; Schuelke Tr. 808:15-809:11.) He produced a comprehensive, 30-page draft by September 19, 2008, spending hours he had originally budgeted for preparing Mr. Allen drafting the summation instead. (See OPR Tr. 98:12-99:11; Email from Bottini to Morris et al. (Sept. 19, 2008 11:28 AM) (CRM BOTTINI 031914).) Meanwhile, Mr. Bottini was asked by Mr. Welch during this same period of time to present Mr. Williams—his on-again, off-again witness—at trial, requiring him to divert substantial attention to preparing Mr. Williams. Thus, in the final fourteen days before trial, Mr. Bottini was required to: (1) travel from Alaska to Washington; (2) prepare for and argue motions at a pretrial hearing; (3) prepare a growing number of significant witnesses for trial; (4) question Mr. Allen extensively about

official acts topics with marginal relevance; and (5) craft a summation for submission to the Assistant Attorney General.

Each of those Main Justice directives frustrated Mr. Bottini's ability to prepare Mr. Allen for trial. Together, their combined practical effect was that Mr. Bottini was forced to complete his assigned tasks at the last minute, and was unable to cover salient topics with Mr. Allen until much later than he otherwise would have. For instance, the Draft Report takes issue with Mr. Bottini's failure to recall that prosecutors discussed the Torricelli Note with Mr. Allen in April 2008, arguing that he "knew or should have known that a document [that] significant . . . was not shown to Allen for the first time a mere two weeks before the commencement of trial." (OPR Draft at 281.) Yet there is no reason the document would *not* have first been shown to Mr. Allen at that late date, given the time Mr. Bottini spent on other tasks at the Front Office's behest.

III. OPR MISINTERPRETS SEVERAL GOVERNING LEGAL STANDARDS

OPR's Analytical Framework establishes as a starting point that an attorney commits professional misconduct only when he intentionally violates or recklessly disregards an obligation or standard. *See* U.S. Dep't of Justice, Office of Professional Responsibility, *Analytical Framework* ¶ B.1 (2005), available at <http://www.justice.gov/opr/framework.pdf> ("Analytical Framework"). An attorney commits reckless disregard if he knows or should know of an unambiguous obligation; knows or should know, based on "the unambiguous applicability" of that obligation, that his conduct poses a substantial likelihood it will be violated, and; nevertheless engages in the conduct, which is objectively unreasonable "under all the circumstances." *Id.* ¶ B.4.

Thus, in addition to requiring the existence of a known, unambiguous obligation, a finding of reckless disregard also requires that the obligation unambiguously apply. *Id.* Yet on multiple occasions, the Draft Report asserts that Mr. Bottini was required to follow (and recklessly disregarded) an obligation that was not unambiguous at all. Similarly, the Draft Report frequently ignores or dismisses the affirmative steps Mr. Bottini took to comply with his disclosure obligations, even though the Analytical Framework makes clear that "an attorney who makes a good-faith attempt to ascertain the obligations and standards imposed on the attorney and to comply with them in a given situation does not commit professional misconduct." *Id.*

A. The Prosecution Was Not Bound By An "Implicit Directive" To Follow *United States v. Safavian*

OPR asserts at the outset that the prosecution was bound to follow *United States v. Safavian*, 233 F.R.D. 12 (D.D.C. 2005), and contends throughout the Draft Report that Mr. Bottini recklessly disregarded that obligation or exhibited poor judgment by failing to comply with it. (*E.g.*, OPR Draft at 269, 390-91, 497, 589.) To the contrary, the prosecution was not unambiguously obligated to follow *Safavian*—and, to the extent OPR's misconduct findings rest on a failure to comply with that case, they fail for that reason alone.

Brady requires the government to disclose "material" evidence that is favorable to the defense—*i.e.*, evidence whose suppression gives rise to a reasonable probability that the result at trial would have been different. *Kyles v. Whitley*, 514 U.S. 419, 433 (1995); *see also United*

States v. Agurs, 427 U.S. 97, 109-10 (1976) (“The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish ‘materiality’ in the constitutional sense.”). District Judge Paul Friedman departed from that well-settled doctrine in *Safavian*, holding that prosecutors are instead obligated to disclose all evidence that is “favorable to the accused,” regardless of whether the failure to do so would affect the outcome at trial. 233 F.R.D. at 16. Judge Sullivan referred favorably to *Safavian* during a pretrial hearing, observing that:

With respect to *Brady*, why shouldn’t the Court just say everyone knows, everyone has read, and everyone is well versed with respect to opinions from this Circuit and all opinions from my colleagues, including Judge Friedman in the *Safavian* case and other district court opinions that address *Brady* obligations and responsibilities. Everyone knows what the law is. Why shouldn’t the Court just say to the government you know what the law is, follow the law? . . . And abide by your *Brady* obligations period, because there’s no question as to what the law—what our Court of Appeals has said about *Brady* and the government’s responsibility. . . . So the government says we’re aware of our *Brady* obligations, and I say fine, then comply with your *Brady* obligations, and why should I do more than that?

(Sept. 10, 2008 Motions Hearing Tr. 59:25-60:16; *see also id.* 67:15-24 (“I can sit here and craft an order and lift the language from Judge Friedman’s excellent opinion . . . [but] he had the time to do it. I don’t have the time right now—he repeated what Chief Judge Sentelle said in *Marshall*, in *Poindexter*, and all my other colleagues who read it, so everyone knows what the law is.”).)

Despite favorably mentioning *Safavian*, Judge Sullivan never explicitly ordered the government to comply with it. After asking whether the court should “just issue an order and say everyone recognizes what *Marshall* says, *Safavian* says, *Poindexter* says, and a litany of other cases say, and so the government is directed to immediately—to forthwith provide to defense counsel any outstanding *Brady* material as defined by those cases” (*id.* 73:22-74:4), he concluded that he would simply “issue an order as a general reminder to the government to remind it of its daily ongoing obligation to produce that material” (*id.* 74:14-16). He subsequently emphasized his decision to not issue a written order, stating that “I’m convinced the government . . . is thoroughly familiar with the decisions from our Circuit and from my colleagues on this Court,” and explaining that “I’m *not* going to . . . draft another order saying, you know, follow *Marshall*, follow *Safavian*, follow *Poindexter*, follow all the opinions that my colleagues have issued.” (Sept. 10, 2008 Pretrial Conf. Tr. 14:15-15:11 (emphasis added).)

OPR refers alternately to these deliberations as an “implicit oral directive” (OPR Draft at 248), an “understanding” (OPR Draft at 249 n.721), and—despite acknowledging that Judge Sullivan never issued an order directing compliance with *Safavian* (*id.*)—a “court order” (OPR Draft at 589; *see also id.* at 9). No matter how characterized, Judge Sullivan’s remarks about *Safavian* cannot possibly be deemed unambiguous—indeed, they so are inherently contradictory that they provide little clarity at all.

It is true that Judge Sullivan mentioned *Safavian* favorably, but he did so while simultaneously urging the government to comply with “opinions from this Circuit” and “all the opinions that my colleagues have issued.” And the very “opinions from this Circuit” to which Judge Sullivan referred *contradict* Judge Friedman’s opinion: governing D.C. Circuit precedent provides that a prosecutor’s *Brady* obligation is measured by the “materiality” standard, not the “favorable evidence” rule that *Safavian* endorsed. *See United States v. Oruche*, 484 F.3d 590, 596 (D.C. Cir. 2007) (“Generally speaking, the Supreme Court’s holding in *Brady v. Maryland* requires the government to disclose, upon request, material evidence favorable to a criminal defendant, including evidence held by law enforcement officials. The materiality of the evidence is measured by the effect it would have [had] on the result of the trial, the focus being on fairness.” (citation omitted)).⁸

The *Safavian* approach does not even appear to have commanded a majority within the District Court for the District of Columbia, rendering Judge Sullivan’s exhortation to follow “other district court opinions that address *Brady*” similarly contradictory. Instead, other judges in the district applied a “materiality” standard in September 2008, and they continue to do so today. *See, e.g., United States v. Quinn*, 537 F. Supp. 2d 99, 107 (D.D.C. 2008) (“the government is required to disclose information in its possession that is material to an accused’s guilt or punishment”); *United States v. Wilson*, 720 F. Supp. 2d 51 (D.D.C. 2010) (same).⁹ Even *Poindexter*—the very opinion Judge Sullivan cited together with *Safavian*—contradicts Judge Friedman’s approach. *Compare United States v. Poindexter*, 727 F. Supp. 1470, 1485 (D.D.C. 1989) (“[T]he government is not required simply to turn all its files over to a defendant . . . [or] provide to the defendant evidence that is not exculpatory but is merely not inculpatory and might therefore form the groundwork for some argument in favor of the defense.”) *with Safavian*, 233

⁸ *See also United States v. Bailey*, 622 F.3d 1, 8 (D.C. Cir. 2010) (to establish *Brady* violation, “the withheld material must be ‘material,’ i.e., there must be a ‘reasonable probability’ that had the evidence been disclosed to the defense the result of the proceeding would have been different”); *United States v. Wilson*, 605 F.3d 985, 1005 (D.C. Cir. 2010) (to establish *Brady* violation, there must be a reasonable probability that, had the evidence been disclosed, it “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict” (quoting *Kyles*, 514 U.S. at 435)); *United States v. Emor*, 573 F.3d 778, 784 (D.C. Cir. 2009) (no *Brady* violation where withheld evidence did not undermine confidence in the verdict); *United States v. Brodie*, 524 F.3d 259, 268 n.6 (D.C. Cir. 2008) (*Brady* requires the government to disclose “material evidence favorable to a criminal defendant”); *United States v. Johnson*, 519 F.3d 478, 490 (D.C. Cir. 2008) (no *Brady* violation where there was not reasonable probability that outcome would have been different had information been disclosed); *United States v. Hemphill*, 514 F.3d 1350, 1360 (D.C. Cir. 2008) (“the government denies a defendant due process when it suppresses information . . . that is material to the defendant’s guilt or punishment”).

⁹ *See also United States v. Wilkerson*, 656 F. Supp. 2d 22, 32 (D.D.C. 2010) (“*Brady* requires the prosecution to disclose evidence to the accused only where . . . the accused is prejudiced as a result of the government’s suppression. . . . Under *Brady* and its progeny, withheld evidence is prejudicial only where it is material, i.e., where there is a reasonable probability that the evidence would have given rise to a different outcome at trial.”); *United States v. Suggs*, No. 07-cr-00152, 2008 WL 2782938, at *1 (D.D.C. July 17, 2008) (“The government has an affirmative duty to disclose material evidence favorable to a criminal defendant . . .”); *United States v. Cook*, 526 F. Supp. 2d 10, 14 (D.D.C. 2007) (“the government has an affirmative duty to disclose material evidence favorable to a criminal defendant . . . evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different”); *United States v. Harris*, No. 06-cr-00124, 2006 WL 2882711, at *2 (D.D.C. Oct. 5, 2006) (“Under *Brady*, the government is required to disclose all potentially exculpatory evidence ‘material either to guilt or punishment.’ Evidence is material if there is a ‘reasonable probability’ that its disclosure could affect the outcome of the case.”) (citation omitted).

F.R.D. at 16 (defining “favorable evidence” as “any information . . . that tends to help the defense by . . . bolstering the defense case”).

Nor did the prosecution “accede” to the application of *Safavian*, as the Draft Report contends. (OPR Draft at 249 n.721.) OPR bases this assertion on Mr. Sullivan’s failure to challenge the court’s statements, but there is no basis for concluding that the government understood the court to be ordering something different than the usual “materiality” standard and affirmatively declined to object. Given Judge Sullivan’s repeated references to “*Brady*” and opinions from “our Court of Appeals,” it is equally (if not more) plausible that the government believed him to be directing compliance with the same materiality standard that typically governs.

The inherent ambiguity in Judge Sullivan’s discussion of *Safavian* was compounded the fact that Mr. Bottini is from Alaska, and would therefore be more likely to follow governing D.C. Circuit precedent and the settled *Brady* doctrine it reflects. The Draft Report acknowledges in another context that Mr. Bottini was unfamiliar with the “unique parameters” of *Marshall*—a D.C. Circuit opinion that addresses Rule 16 and which Judge Sullivan mentioned together with *Safavian*—because it “was not the law in Alaska.” (OPR Draft at 746.) For the same reason, it makes little sense to assume that he “acceded” to the application of *Safavian*, which departs radically from established *Brady* doctrine. *See Boyd v. United States*, 908 A.2d 39, 61 n.32 (D.C. 2006) (“We would be inclined to follow *Safavian* if we considered ourselves to be at liberty to do so. We believe, however, that the opinion in *Safavian* cannot be reconciled with *Agurs*, *Bagley*, and *Kyles*. Indeed, the reasoning in *Safavian* parallels and expands upon that of Justice Marshall’s *dissenting* opinion in *Bagley*.”). Thus, even if *Safavian* unambiguously governed—and it did not—OPR cannot show that Mr. Bottini knew or should have known of its application. *See Analytical Framework* ¶ B.4 (attorney acts in reckless disregard only where he “knows, or should know” of the unambiguous applicability of a standard).

We take no position on whether *Safavian* should be the law. But it is clear that it was not the law here, and the Draft Report errs in finding that it was—let alone that Mr. Bottini recklessly disregarded an obligation to follow it. The court’s discussion of that case was contradictory and ambiguous, and accordingly falls far short of the standard that OPR’s own Analytical Framework requires.

B. The U.S. Attorneys’ Manual Did Not Require Disclosure Of All Evidence “Probative Of Issues Before the Court”

The Draft Report also errs in its recitation of the disclosure standard that § 9-5.001 of United States Attorneys’ Manual (“USAM”) imposed on the government. OPR contends throughout the Draft Report that § 9-5.001 broadly requires the disclosure of “information that is ‘probative of the issues before the court.’” (OPR Draft at 268, 497, 590.) While there is no dispute that § 9-5.001 unambiguously applied to Mr. Bottini, that standard did *not* unambiguously require the government to disclose all evidence as long as it was “probative” of some issue in the case. To the contrary, a straightforward reading of § 9-5.001 shows that the policy requires the disclosure of *exculpatory* and *impeachment* information—and does not require the disclosure of all “probative” information at all.

The Department added § 9.5-001 to the USAM in 2006 in an attempt to “establish[] broader standards for the disclosure of exculpatory and impeachment information” than *Brady* itself requires. See Mem. from the Deputy Attorney General of the U.S. Dep’t of Justice to the Holders of the U.S. Attorneys’ Manual, Title 9 1 (Oct. 19, 2006) (“McNulty Memorandum”). The section begins with a preamble explaining that “a fair trial will often include examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, result in an acquittal.” USAM § 9.5-001(C). “As a result,” the preamble continues, “this policy requires disclosure . . . of information beyond that which is ‘material’ to guilt as articulated in *Kyles v. Whitley* and *Strickler v. Greene*. The policy recognizes, however, that a trial should not involve the consideration of information which is irrelevant or not significantly probative of the issues before the court.” *Id.* (citations omitted).

After setting forth those general goals, § 9.5-001 then specifically describes the expanded disclosure it mandates: (1) exculpatory information that is inconsistent with any element of the crime or that establishes a recognized affirmative defense; and (2) impeachment information that casts a “substantial doubt” on the accuracy of any evidence on which the prosecutor intends to rely to prove an element of the offense, or that might have a significant bearing the admissibility of prosecution evidence. USAM § 9-5.001(C)(1)-(2). The provision requires prosecutors to disclose exculpatory and impeachment information falling within those two categories regardless of whether it would be admissible at trial or not. USAM § 9-5.001(C)(3).

OPR cites the policy’s preamble as if it requires prosecutors to disclose all “probative” information. (*E.g.*, OPR Draft at 497 & n.1381 (asserting that § 9.5-001 “requires disclosure of information that is ‘probative of issues before the court’ . . . the information provided by Williams was clearly ‘probative’ of an issue before the court”).) It does not. The only requirement the preamble contains is one of disclosure “beyond that which is ‘material’” in the constitutional sense; the fact that “a fair trial often involves the examination of exculpatory or impeachment information that is significantly probative of the issues before the court” underpins this requirement, but does not create a freestanding obligation to disclose all probative information. See Letter from Deputy Attorney General Paul McNulty to the Honorable David F. Levi 31 (June 5, 2007) (“McNulty Letter”) (§ 9.5-001 requires disclosure beyond the bare constitutional minimum, and “stresses that *this requirement is grounded in the fact* that a fair trial often includes ‘examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own . . . make the difference between guilt and innocence’”) (emphasis added). The text of § 9.5-001(C)(1)-(3) confirms that conclusion: by enumerating three categories of exculpatory and impeachment information prosecutors must disclose, those subsections make clear that the policy does *not* extend to the disclosure of all “probative” information.¹⁰

¹⁰ Even if the opening clause of § 9.5-001 created a binding obligation to disclose “probative” information—and it does not—OPR would still have erred in its recitation of the standard. That preamble explains that a fair trial may often involve the examination of “relevant exculpatory or impeachment information that is *significantly* probative of the issues before the court.” USAM § 9.5-001(C) (emphasis added). Thus, any requirement would extend only to exculpatory and impeachment information whose probative value is “significant”—not to *all* information that is “probative,” as OPR contends. See USAM § 9.5-001(C) (“The policy recognizes . . . that a trial should not involve the consideration of information which is . . . not significantly probative.”).

OPR's assertion to the contrary would upset the careful balance the Department struck when drafting § 9.5-001. The policy was meant to foster disclosure broader than *Brady's* constitutional requirements on the one hand while, on the other, taking interests such as witness security into account and allowing for the continued exercise of prosecutorial discretion. *See* McNulty Letter at 32. The Department accordingly made clear that § 9.5-001 "recognizes that other interests, such as witness security and national security, are also critically important," § 9.5-001(A); more generally, the Department also emphasized that the policy was "intended to be flexible" and to be applied through the exercise of an individual prosecutor's "judgment and discretion," McNulty Memorandum at 2. Indeed, it is precisely because of the discretion that the policy continues to vest in prosecutors that a member of the *Stevens* defense team has deemed it ambiguous. *See* Andrew Ramonas, *U.S. Attorney Touts Brady Reform*, Main Justice, Nov. 5, 2010, <http://www.mainjustice.com/2010/11/05/u-s-attorney-touts-Brady-reform> (Robert Cary criticizes "ambiguity" of § 9.5-001 and argues that Rule 16 should be amended to ensure that prosecutors are bound by a more "unambiguous" discovery rule).

Mr. Bottini was unambiguously required to follow § 9.5-001. But that policy did not unambiguously require him to disclose all information as long as it was "probative" of some issue before the court—indeed, it unambiguously did not. OPR advances its misinterpretation of § 9.5-001 in support of certain misconduct findings, such as its assertion that Mr. Bottini recklessly disregarded an obligation to disclose statements by Mr. Williams. To the extent those findings rest on OPR's misconstruction of § 9-5.001, they fail because the provision did not impose an unambiguous duty to disclose all "probative" information at all. *See* Analytical Framework ¶ B.4.

C. OPR Fails To Consider The Good-Faith Exception That Its Own Analytical Framework Recognizes And Which Forecloses Any Finding Of Misconduct

The Draft Report commits one final, overarching legal error: it all but ignores Mr. Bottini's good-faith efforts to meet his disclosure obligations, even though OPR's Analytical Framework provides that such efforts negate any finding of reckless disregard. Any fair assessment of Mr. Bottini's conduct must at least consider the possibility that it represented a good-faith attempt to satisfy those obligations; OPR's failure to do so further underscores that it viewed Mr. Bottini's conduct through a lens predisposed to find misconduct.

Because recklessness is a "state of mind in which a person does not care about the consequences of his or her action," Black's Law Dictionary 1277 (7th ed. 1999), it follows necessarily that an attorney who takes affirmative, good-faith steps to comply with his disclosure obligations cannot have recklessly disregarded them. OPR's Analytical Framework reflects this truism, making clear that an attorney who "makes a good faith attempt to ascertain the obligations and standards imposed on the attorney and to comply with them in a given situation does not commit professional misconduct." Analytical Framework ¶ B.4. Examples of good-faith conduct include reviewing materials that discuss applicable obligations, consulting with a supervisor or ethics advisor, or taking other affirmative steps that the attorney reasonably believes are required to comply with the particular obligation. *Id.*

Mr. Bottini undertook multiple good-faith efforts here. Those efforts, which we discuss in greater detail below, include the affirmative steps Mr. Bottini took to review his files,

including the handwritten notes they contained, for *Brady* material at the same time he was preparing witnesses for trial; his consultation with supervisors in the U.S. Attorney's Office regarding the obligation to disclose allegations related to Ms. Tyree; and the sustained effort he made to persuade PIN to disclose more information about the Tyree allegations. The Draft Report alternately ignores or dismisses those actions, not once considering whether they represented Mr. Bottini's good-faith attempt to satisfy his disclosure obligations.

IV. MR. BOTTINI'S FAILURE TO DISCLOSE STATEMENTS BY BILL ALLEN WAS A MISTAKE, NOT RECKLESS DISREGARD

The Draft Report faults Mr. Bottini for the government's failure to disclose three statements by Mr. Allen: a statement made on April 15, 2008 about the "Torricelli Note," and two additional statements—contained in an FBI 302 authored by Special Agent Michelle Pluta (the "Pluta 302") and an IRS MOI documenting a December 11-12, 2006 interview with Mr. Allen (the "December 2006 MOI")—regarding Mr. Allen's belief that Senator Stevens would have paid a VECO bill. OPR focuses principally on the Torricelli Note, a handwritten note in which Senator Stevens asked Mr. Allen for an invoice for VECO's work, urged him to "remember Torricelli," and noted that the senator had asked Bob Persons to discuss a bill with Mr. Allen. At a September 14, 2008 trial preparation session and again at trial, Mr. Allen explained that Mr. Persons told him the senator was "just covering his ass" and did not actually want a bill at all.¹¹ Those statements contradicted one that Mr. Allen made several months before Senator Stevens was indicted: in an April 15, 2008 interview, Mr. Allen told prosecutors he received the Torricelli Note but did not recall discussing it with Mr. Persons. Not one of the participants in that interview recalled Mr. Allen's statement by the time he first made the "covering his ass" remark months later: not SA Kepner, who showed Mr. Allen the Torricelli Note; not Mr. Marsh, who led the questioning; and not Mr. Bottini, Mr. Goeke, or Mr. Sullivan, who principally took notes. Not even Robert Bundy—Mr. Allen's attorney, and a former United States Attorney—remembered Mr. Allen's prior discussion of the Torricelli Note. (*See* OPR Draft at 273.)

That collective failure to recall is unsurprising. The Torricelli Note played an insignificant part in the April 15 meeting, whose purpose was to show Mr. Allen documents that the defense had voluntarily produced, with a focus on those related to a potential theory of official acts; the Torricelli Note was the thirteenth of seventeen documents that Mr. Allen was shown. (Schuelke Tr. 398:19-399:6); *see also* Bottini Notes (Apr. 15, 2008) (CRM013688-710) (reflecting substantial discussion of official-acts-related documents.) Moreover, because Mr. Allen ultimately launched into a heated tirade about how Mr. Williams and Mr. Anderson were

¹¹ The Draft Report states in passing that Mr. Allen subsequently indicated that Mr. Bottini and SA Kepner were "pushing him on the answer" during the September 14 session. (OPR Draft at 233.) While not integral to the Draft Report's proposed misconduct findings, OPR's casual treatment of the serious allegation that the government somehow planted the "covering his ass" statement illustrates its propensity to view Mr. Bottini's conduct in the most negative light. The Draft Report fails to reveal that Mr. Allen was unequivocal that (1) he recalled the "covering his ass" statement on his own, while on a plane, outside the presence of the prosecutors and agents, (2) no one from the government even hinted at such a thing, and (3) he testified truthfully at trial that Mr. Persons had in fact made that statement to him. (Allen (Schuelke) Tr., Mar. 6, 2010, at 25-40.) Nor does it mention that his attorney, a well-respected former United States Attorney, was adamant that, to the best of his knowledge, no government agent ever pushed or pressured Mr. Allen regarding his recollection of this statement. (Bundy (Schuelke) Tr., Nov. 4, 2009, at 99.)

incompetent, drunk, and “screwed up” the Girdwood renovation (OPR Draft at 272; Schuelke Tr. 487:22-489:22), Mr. Bottini’s principal memory of the meeting was that Mr. Allen lost his composure. For those reasons, Mr. Allen’s lack of recollection regarding Mr. Persons “was not significant at that time,” as OPR acknowledges. (OPR Draft at 272.)

Nevertheless, Mr. Allen’s prior inconsistent statement was *Giglio* material, and the government should have produced it. Mr. Bottini himself erred when he failed to recall the April 15 Torricelli Note discussion and when he failed to locate and disclose his notes from that session, yet the Draft Report is wrong to assert that this failure was the product of Mr. Bottini’s reckless disregard. That disclosure error occurred because Mr. Bottini misfiled his notes from the April 15 meeting and subsequently forgot about them, just as every other participant in that interview also failed to recall that Mr. Allen discussed the Torricelli Note. Mr. Bottini did not act recklessly for this reason alone.

Separately, while the government produced the Pluta 302 and December 2006 MOI in the middle of Mr. Allen’s direct examination at trial (and in time for the defense to make use of them during Mr. Allen’s cross-examination), it also erred by not producing those documents sooner. But those errors are no more the product of Mr. Bottini’s reckless disregard than the mistaken failure to disclose the April 15 statement was. OPR’s contrary finding rests on its belief that Mr. Bottini should have supervised or otherwise re-reviewed the *Brady* review that FBI and IRS agents conducted of interview memoranda, including those of Mr. Allen. (*See, e.g.*, OPR Draft at 285-86.) In so asserting, OPR overlooks both the practical realities of the work assignment process in any complex trial and the particularly chaotic conditions and management problems that plagued this trial. We readily acknowledge that the delegation of *Brady* responsibilities to agents led to a flawed process, but the creation and oversight of that process was never assigned to Mr. Bottini. But even though no other member of the trial team supervised the agents’ *Brady* review either—and even though Ms. Morris, the prosecution’s lead trial counsel, gave it her blessing—Mr. Bottini alone is blamed for the government’s faulty process because Mr. Allen was his witness at trial. (*See, e.g.*, OPR Draft at 279, 285.) In reality, Mr. Bottini’s conduct was not objectively unreasonable under the circumstances—and the Draft Report’s assertion otherwise should be rejected.

A. OPR’s Analysis Of The April 15 Statement Dismisses Mr. Bottini’s Good-Faith Efforts To Review His Files For *Brady* Material And Recasts His Mistake As Reckless Disregard

In faulting Mr. Bottini for failing to recall that Mr. Allen discussed the Torricelli Note on April 15 and to locate and disclose his notes from that interview, OPR dismisses—and in some cases outright ignores—Mr. Bottini’s good-faith efforts to review his handwritten notes and other files for *Brady* material. The Draft Report erroneously states that Mr. Bottini did not review his handwritten notes at all (OPR Draft at 125, 512); while OPR later concedes that Mr. Bottini did review his notes and other files, it takes issue with the manner in which he did so. But as set forth below, that review was both performed in good faith *and* objectively reasonable under the circumstances. Either one of those reasons is enough to foreclose a finding of reckless disregard, Analytical Framework ¶ B.4; both of them together underscore OPR’s predisposition to find misconduct, and its insistence on recasting Mr. Bottini’s mistake as reckless disregard.

Mr. Bottini prepared for trial by creating folders for each witness that would ultimately contain handwritten notes, FBI 302s, grand jury transcripts, and other materials related to that particular witness. (Schuelke Tr. 572:10-20.) Because Mr. Allen was such a significant witness, Mr. Bottini created multiple such folders for him, organizing them by topic and adding handwritten trial preparation notes to them in real time. (Schuelke Tr. 572:21-574:11.) He reviewed the contents of those folders on a continuing basis, with the dual purpose of preparing each witness to testify and identifying any *Brady* or *Giglio* material that the government would need to disclose. (OPR Tr. 161-162:11, 166:15-167:5; Schuelke Tr. 33:1-34:15.) And he developed a separate checklist of *Giglio* topics related to Mr. Allen that the prosecution would need to disclose, such as plea agreements, false statements, and prior inconsistent statements. (OPR Tr. 167:10-168:5.) He developed this checklist after reviewing a lengthy treatise on *Brady* and *Giglio* issues, which he placed with the checklist in a “WITNESS IMPEACHMENT ISSUES” file—annotating pertinent excerpts, underlining certain passages and highlighting others with exclamation points, and making notes of applicable D.C. Circuit decisions. (CRM BOTTINI 061218-47.)

The Draft Report fails to recognize this conduct for what it is: a good-faith attempt to satisfy Mr. Bottini’s disclosure obligations. OPR ignores altogether the fact that Mr. Bottini developed a *Giglio* checklist after carefully reviewing a reference guide to *Brady* and *Giglio* case law—conduct that falls squarely within OPR’s own definition of good faith. *See* Analytical Framework ¶ 4 (“[e]vidence that an attorney made a good faith attempt to ascertain and comply with the obligations and standards imposed can include . . . the fact that the attorney reviewed materials that define or discuss one or more potentially applicable obligations and standards”). And OPR dismisses Mr. Bottini’s good-faith efforts to review his files for *Brady* material by suggesting that it was somehow improper for him to review those files with the dual purpose of developing direct examination outlines for his witnesses and identifying *Brady* material. (*See, e.g.*, OPR Draft at 281 n.753 (Mr. Bottini did “not specifically [review] Allen 302s for *Brady* purposes”).) But it is not necessarily practical or prudent to insist on a rule that trial attorneys review their files once for trial preparation purposes and a second time for *Brady* purposes alone. Real-world prosecutors do not typically segregate those two tasks; rather, they review their files with multiple purposes, just as Mr. Bottini did here. They do so because it is impossible to fully separate the two tasks— indeed, it is only by thinking through the testimony a prosecutor seeks to elicit from a witness in support of the government’s case that he can truly recognize those facts and statements that are inconsistent with or otherwise undermine that case.

1. The Failure To Disclose The April 15, 2008 Notes Was A Mistake And Does Not Negate Mr. Bottini’s Good-Faith Efforts

The Draft Report brushes aside Mr. Bottini’s good-faith efforts to review his files for *Brady* material by focusing in part on his failure to locate his notes from the government’s April 15, 2008 interview of Mr. Allen. That argument depends on viewing Mr. Bottini’s conduct in the most negative light and overlooks the simple reason he failed to locate his those notes: *he misfiled them.*

As an initial matter, OPR errs by suggesting it was inevitable by April 15 that Mr. Allen would become Mr. Bottini’s witness, and that Mr. Bottini was thus somehow more responsible than any other prosecutor for recalling with Mr. Allen said. (OPR Draft at 213 n.604, 274 (Mr.

Bottini “was the prosecutor most likely to be charged with responsibility for handling Allen at trial (and, therefore, the one most responsible for *Brady* and *Giglio* disclosures).” That argument mischaracterizes Mr. Bottini’s testimony, overlooks the uncertainty surrounding a potential indictment that existed in April 2008, and ignores the fact that PIN, not Mr. Bottini, led the interview. In reality, Mr. Allen was not assigned to be Mr. Bottini’s witness until just prior to indictment, as Mr. Bottini explained during his interview with OPR. (OPR Tr. 92:3-19, 95:7-19.) Mr. Bottini further explained that, while “any one of” the prosecutors could have ended up handling Mr. Allen, that responsibility would more likely fall to Mr. Bottini *if* the case were indicted and *if* Mr. Bottini were selected for the trial team. (OPR Tr. 286:4-288:5.) Both of those contingencies were anything but certain on April 15. To the contrary, that session occurred “months before the decision to indict was ever made” and when Mr. Bottini had little indication whether he “was going to be part of a trial team . . . even if we indicted.” (*Id.*)¹² That uncertainty dated back to April 2007, when the prosecutors were first told to prepare for an indictment only to have it forestalled by a tolling agreement with the defense; no indictment had followed by April 15, 2008, despite subsequent and repeated admonishments to similar effect. *See* II.B, *supra*. Because he and Mr. Goeke were four time zones away from Washington and otherwise disconnected from PIN leadership, Mr. Bottini was especially uncertain of the prosecution’s future. And it was PIN who initiated and led the April 15 interview, not Mr. Bottini; indeed, Mr. Bottini played a comparably minimal role during the session, the majority of which he spent taking notes while Mr. Marsh asked Mr. Allen questions and Special Agent Mary Beth Kepner showed him documents. (Schuelke Tr. 483:12-484:19.) Against that backdrop, OPR cannot contend that Mr. Bottini bore a heightened responsibility for recalling Mr. Allen’s April 15 Torricelli Note statement because he was likely to present him at trial—particularly because that statement “was not significant” at the time, as OPR itself acknowledges. (OPR Draft at 272-73; *see also id.* at 249.)

Because the April 15 interview occurred so long before the *Stevens* case was indicted and at a time when so much uncertainty surrounded its prosecution, Mr. Bottini had not yet created any trial folders for Mr. Allen. Thus, he instead placed his notes from the April 15 session in the same file folder that contained the documents the prosecution team had shown to Mr. Allen during that meeting—which was labeled “Documents to Show BA on April 15.” (Schuelke Tr. 571:10-22.) Had that folder been labeled “notes from BA interview on April 15,” Mr. Bottini would in all likelihood have reviewed its contents once the case was indicted, placing the April 15 notes into the trial folders he ultimately created for Mr. Allen and which he reviewed for witness preparation and *Brady* purposes. But because it was not, Mr. Bottini did not recall that he had notes from an April 15 session, did not review them before trial, and could not initially locate them even when asked by Paul O’Brien, the Department attorney who conducted an initial investigation of the prosecution’s errors. (*See* Schuelke Tr. 576:15-587:5.) The fact that SA Kepner failed to prepare a 302 memorializing the interview compounded the problem; had a 302 been prepared, it would likely have prompted Mr. Bottini’s recollection that Mr. Allen had been

¹² Mr. Bottini had good reason to believe that, even if the Criminal Division decided to indict Senator Stevens, he would not play a role in the trial. First, the case would most likely be venued in Washington, not Alaska. Second, the case would have such a high profile that the Department’s senior management may have wanted to replace the existing Polar Pen team with their own hand-picked prosecutors. (*See* OPR Tr. 94:16-95:6.) Finally, while other members of the Polar Pen team may have been hoping to assume the role of lead trial counsel, Mr. Bottini most assuredly was not. *See* II.A, *supra*. Indeed, when Mr. Friedrich summoned Mr. Bottini and the other prosecutors to a July 2008 meeting, Mr. Bottini believed it was an audition.

shown the Torricelli Note on April 15. (OPR Tr. 228:12-229:16.) Mr. Bottini’s failure to recall the April 15 Torricelli Note discussion when formally interviewed by three federal prosecutors and an FBI agent during the O’Brien investigation—and facing liability under 18 U.S.C. § 1001 for any false statements made during that interview (*see* Mar. 23, 2009 Bottini 302 (CRM BOTTINI 000765))—underscores that, as a result of misfiling his notes, he simply forgot it.

The Draft Report rejects that explanation out of hand. (OPR Draft at 280 (“[W]e considered but rejected Bottini’s excuse that he ‘initially misplaced his notes from the April 15 and 18, 2008 interviews of Allen by putting them in a folder labeled ‘Documents to show BA on April 15th.’”).) Instead, OPR asserts, “[i]t is not plausible that Bottini . . . would not review the file containing the critical documents used during [those] Allen interviews.” (OPR Draft at 280.) OPR provides little basis for making this assessment of Mr. Bottini’s credibility other than the fact that Mr. Bottini was typically “organized and meticulous in trial preparation.” (OPR Draft at 280.) But it is entirely plausible—indeed, it is likely—that Mr. Bottini would not have occasion to review the documents in that folder. The documents were printed versions of PDFs that the Alaska prosecutors had received by email from PIN shortly before the April meeting (Email from Marsh to Bottini et al. (Apr. 10, 2008, 12:41 PM) (CRM BOTTINI 016348 - 016414); Email from Marsh to Bottini et al. (Apr. 14, 2008, 4:25 PM) (CRM BOTTINI 016492 - 016530)); in the lead-up to trial, Mr. Bottini could just as easily have obtained the documents by reviewing his email archives. Moreover, to the extent Mr. Bottini needed to review a document, he would have been much more likely to either ask SA Kepner to provide him a copy or to search the electronic Polar Pen shared drive himself, rather than search for a hard copy.

Mr. Bottini did not recklessly disregard a known duty by forgetting that his notes from the April 15 meeting were in the folder labeled “Documents to Show BA on April 15.” He made a mistaken, and even the most organized attorney is not immune from making mistakes. *See* ALI-ABA Committee On Continuing Professional Education, *A Model Peer Review System* (1980) (“The stresses, complexities, and uncertainties of law practice are such that from time to time the most competent attorneys will commit individual acts of professional negligence.”). The circumstances surrounding Mr. Bottini’s failure to locate his April 15 notes reflect attorney error, and nothing more—and OPR cannot show otherwise without directly accusing Mr. Bottini of lying. OPR should demand much more than mere speculation before it effectively brands a prosecutor an out-and-out liar, particularly when that prosecutor has the unblemished reputation for integrity Mr. Bottini does.

2. The Failure To Disclose An Undated Note Does Not Undermine Mr. Bottini’s Good-Faith Efforts

Because OPR cannot seriously dispute that Mr. Bottini’s conduct demonstrates a good-faith attempt to satisfy his disclosure obligations or that his failure to locate his April 15 notes was anything other than a mistake, the Draft Report implies that he did not actually conduct the careful review he described. The gist of OPR’s argument is that when asked by OPR, Mr. Bottini could not recall a specific example of *Brady* material he identified when reviewing his files some sixteen months earlier—and that he therefore must not have actually conducted the review, or have done so with sufficient diligence. (*See* OPR Draft at 125, 281 n.753.) Yet apart from his April 15, 2008 notes—which were misplaced and not contained in the trial preparation folders Mr. Bottini reviewed—the Draft Report provides only a single example of something

that, according to OPR, Mr. Bottini should have located during his review but did not. Asserting that “during the course of our investigation, we came across another statement made by Allen that was favorable to the defense but was not disclosed at any time,” the Draft Report points to a cryptic handwritten note by Mr. Bottini as “evidence bearing on Bottini’s general failure to review his own notes for *Brady/Giglio* material.” (OPR Draft at 256, 284 n.756.) OPR’s argument does not withstand even superficial scrutiny.¹³

An undated note by Mr. Bottini includes the following brief statement: “BA recall that when on plane – told TS could probably do it for 100k – Maybe why he got the loan in that amt., etc.” (OPR Draft at 235-36.) That succinct notation is similar to one made during a September 15, 2008 trial preparation session with Mr. Allen by Mr. Bundy, Mr. Allen’s attorney. Mr. Bundy’s notes state: “Brenda Question – When work started – re: loan for home – why \$100k – Bill told him would take ≈ 100k.” (OPR Draft at 235.) OPR asserts that these two notes “showed that Allen took out a \$100,000 loan to cover the estimate—provided by Allen to Stevens—of how much the total renovation would cost.” (OPR Draft at 267-68.) In so doing, OPR advances the most negative possible interpretation of Mr. Bottini’s handwritten note without pausing to consider whether it was subject to some alternate explanation. For instance, we located the handwritten note alongside several other notations aimed clearly at anticipating cross-examination topics and suggesting those for Mr. Allen’s redirect (*see* Bottini Notes (Undated) (CRM BOTTINI 062217-20)¹⁴), yet OPR did not consider whether Mr. Bottini likewise made a note about the \$100,000 loan in anticipation of the defense raising it, rather than as a contemporaneous memorialization of something Mr. Allen said. Nor did OPR explore any other potential explanation for the note, either.

To the complete contrary, OPR did not ask Mr. Bottini a single question about the note, despite using it as evidence of his purported carelessness in reviewing his files for *Brady* material. It did not question any other witness about the note, either: when we asked for any testimony bearing on the Draft Report’s assertion that Mr. Allen’s purported statement about the \$100,000 loan should have been disclosed, OPR responded that it did not question Mr. Allen, SA Kepner, or anyone else about it.¹⁵ OPR explained that it did not ask any witnesses about Mr. Bottini’s and Mr. Bundy’s handwritten notes because it did not identify the issue until late in the process of writing the Draft Report. Even if Mr. Bottini’s handwritten note were *Brady* material—and it is not—OPR’s belated failure to recognize its supposed significance only serves to underscore that any failure to disclose it was reasonable. If OPR itself missed the purported

¹³ The Draft Report also faults Mr. Bottini for not disclosing statements that Mr. Williams made about his incorrect belief that Mr. Allen incorporated his time and Mr. Anderson’s into the Christensen Builders bills. (OPR Draft at 512.) His failure to do so has no bearing on his good-faith efforts to search his files for *Brady* material, though, because the statements Mr. Williams made were not *Brady* material at all. *See* VI, *infra*.

¹⁴ Mr. Bottini’s “\$100k” notation is part of a set of four pages from OPR AK Box 1 of 2. (CRM BOTTINI 062217-062220.) That the document immediately preceding these pages is a portion of Mr. Bottini’s notes of Brendan Sullivan’s cross-examination of Mr. Allen and Mr. Bottini’s contemporaneous thoughts on “re-direct issues” (CRM BOTTINI 062191 - 062216), at least suggests that Mr. Bottini was not memorializing Mr. Allen’s statements when he made the “\$100k” notation.

¹⁵ OPR did not interview Mr. Bundy, but acknowledged that the subject of Mr. Allen’s purported comment about the \$100,000 loan was also never raised or discussed during Mr. Bundy’s interview with the Special Prosecutor.

significance of the issue until the close of its nearly two-year investigation, then it follows *a fortiori* that it was reasonable for Mr. Bottini to miss it, too.

B. OPR's Analysis Of The Pluta 302 And December 2006 MOI Overlooks The Context In Which Mr. Bottini's Conduct Occurred

Any fair assessment of Mr. Bottini's conduct must "be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation." D.C. Rules of Prof'l Conduct, Scope, cmt. 3; *cf. Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). The Draft Report's introductory section acknowledges some of the circumstances surrounding the prosecution's preparation for trial, including disorganization within PIN, fragmented trial preparation responsibilities, and micromanagement by the Front Office. But nowhere in its analysis of the Pluta 302 and December 2006 MOI does the Draft Report seriously consider how those factors impacted Mr. Bottini's ability to prepare Mr. Allen for trial—even though OPR is obligated to evaluate the reasonableness of an attorney's conduct "under all the circumstances" when making a determination of reckless disregard. Analytical Framework ¶ B.4.

First, OPR asserts that Mr. Bottini acted with reckless disregard in connection with the Pluta 302 and December 2006 MOI because he did not conduct an independent search for memoranda of Mr. Allen's interviews. In so doing, the Draft Report dismisses the very factors that caused him not to: the breakneck pretrial schedule, the absence of leadership within PIN, and the trial team's fragmented division of labor. Trial began some seven weeks after indictment, leaving the government with little time to prepare—particularly Mr. Bottini, who was skeptical the *Stevens* case would move forward and had spent the previous month preparing to try a high-profile capital case instead. *See* II.B, *supra*. Operating under that intense time pressure, each prosecutor bore down on his individual assignments. Under those circumstances, it was not objectively unreasonable for Mr. Bottini to focus on those specific tasks that had been assigned to him—*e.g.*, drafting the government's *Giglio* letter, preparing witnesses, drafting certain pretrial motions, and preparing the government's exhibit list—while relying on the PIN attorneys, who were drafting the September 9 *Brady* letter and coordinating the associated *Brady* review, to complete those tasks satisfactorily.

Any contrary conclusion would produce absurd results, divorced from any sense of how attorneys prepare a case for trial. Division of labor occurs in even the most well-managed cases—indeed, it must occur, or else prosecutions would grind to a halt. The problem here was not that Mr. Bottini focused on tasks that had been assigned to him through the government's division of labor; instead, it was that this division of labor lacked any semblance of centralized supervision. Ms. Morris was unenthusiastic about serving as lead trial counsel and adopted a deliberately hands-off approach once appointed to the job; Mr. Welch was in turn reluctant to take charge given the direct reporting relationship Ms. Morris enjoyed with the Front Office—even though Mr. Sullivan warned him about the "void of leadership" on the team. (OPR Draft at 90-92.) The result of that void was that while each prosecutor worked to complete his assignments, those individual pieces did not always form a coordinated whole.

Second, OPR’s analysis of Mr. Allen’s statements ignores how micromanagement of the trial team burdened Mr. Bottini’s ability to prepare Mr. Allen for trial. In faulting Mr. Bottini for not performing an independent review of documents generated and reviewed by agents, the Draft Report contends that he had ample time to do so notwithstanding the compressed pretrial schedule because he “spent numerous hours meeting with Allen to prepare his trial testimony.” (OPR Draft at 285-86 & n.758; *see also id.* at 281 (expressing skepticism, for similar reasons, about Mr. Bottini’s failure to realize on September 14, 2008 that the government had asked Mr. Allen about the Torricelli Note earlier).) In so doing, OPR fails to recognize why such extensive preparation was necessary: Mr. Bottini was ordered to focus his initial preparation on a potential theory of official acts, taking hours away from his planned preparation of Mr. Allen. The delay caused by that directive was compounded by the cognitive impairment Mr. Allen suffered as a result of a serious head injury. He read slowly, had difficulty hearing, and spoke haltingly, with a stutter that worsened as he became tired. (Schuelke Tr. 500:2-8; OPR Tr. 332:12-22.) For those reasons, Mr. Allen was a difficult and time-consuming witness to prepare, and became all the more so after the Front Office diverted his trial preparation toward official acts issues. (OPR Tr. 329:13-330:2, 332:12-333-2.) Mr. Bottini “spent numerous hours meeting with Allen” because he had to; their numerous witness preparation sessions did not reflect some abundance of time within which Mr. Bottini could also have been supervising a *Brady* review.

Even if supervising the *Brady* review were Mr. Bottini’s assignment—and it was not—any time he could have devoted to it was further diminished when the Front Office assigned the government’s closing argument to him. Mr. Bottini received that assignment on September 11, 2008, just after his arrival in Washington and two weeks before trial was scheduled to begin; even though the government would not deliver its summation until the close of what was projected to be a three-week trial, the Front Office instructed Mr. Bottini to prepare a comprehensive draft within one week. (OPR Tr. 98:12-99:11; Schuelke Tr. 808:15-809:11.) He produced that draft by September 19, spending hours that he had originally budgeted for preparing Mr. Allen. (*See* OPR Tr. 98:12-99:11; Email from Bottini to Morris et al. (Sept. 19, 2008 11:28 AM) (CRM BOTTINI 031914).)

None of these circumstances excuses completely the belated disclosure of the Pluta 302 and December 2006 IRS MOI, which the government produced during Mr. Allen’s direct examination. But taken together, they explain why that failure was *not* the product of objectively unreasonable conduct “under all the circumstances,” *see* Analytical Framework ¶ B.4, and make clear that the failure was instead a mistake made during the course of chaotic events—not reckless disregard.

C. The Draft Report Subjects Mr. Bottini To A Higher Standard Of Professional Responsibility Than Any Other Member Of The Prosecution

If there were any doubt about OPR’s determination to hold Mr. Bottini responsible for the government’s collective failures, the Draft Report’s analysis of Mr. Allen’s statements puts it to rest. That analysis holds Mr. Bottini to a higher standard of professional responsibility than any other member of the prosecution, even though the Draft Report concedes that he was not the only one to make mistakes. OPR provides little justification for this heightened standard beyond the fact that Mr. Allen ultimately became Mr. Bottini’s witness, subjecting Mr. Bottini to a

standard akin to strict liability while excusing each and every other prosecutor—regardless of the relative seriousness of their errors—because they did not present Mr. Allen at trial.

For example, OPR acknowledges that the “delegation of the *Brady* review responsibility to the agents was the crux of the problem”—concluding, for instance, that the late disclosure of the December 2006 MOI “was not the product of excusable mistake because it resulted from the prosecutors’ . . . decision to instead delegate [review of interview reports] to agents.” (OPR Draft at 276.) OPR also acknowledges that Ms. Morris played a significant role in approving that delegation, which is unsurprising given her role as lead trial counsel. Indeed, the Draft Report explains that she “was aware that agents were performing the *Brady* review but believed, without verifying, that attorneys would review the final product of whatever the FBI turned over.” (OPR Draft at 289.) Further, it was Ms. Morris who affirmatively “asked SA [Chad] Joy to ‘take the first crack at . . . the *Brady* in the 302s’” (OPR Draft at 162), who permitted SA Kepner to redact 302s before disclosing them to the defense, and who “provided no instruction to Kepner, did not supervise Kepner’s work, and failed to direct any of the team attorneys” to do so either (OPR Draft at 289). If that conduct—agreeing to a process fraught with risk—represents poor judgment (OPR Draft at 288-90), then it defies logic to find that Mr. Bottini acted with reckless disregard, when he played no part in designing that process and was given no responsibility for carrying it out.

Similarly, it makes little sense to find that Mr. Bottini alone acted recklessly by failing to locate his April 15 notes when three other prosecutors made that same error—yet that is precisely what the Draft Report concludes. OPR concedes that neither Mr. Sullivan nor Mr. Goeke recalled that they had discussed the Torricelli Note with Mr. Allen on April 15, located their notes from that session, or reviewed those notes for *Brady* purposes. (OPR Draft at 219-20, 273.) Yet while the Draft Report asserts that Mr. Bottini should have searched “his memory or his files,” and “the memories and notes of his colleagues and Kepner”¹⁶ (OPR Draft at 281), it excuses Mr. Sullivan and Mr. Goeke from that same requirement—even though compliance with *Brady* is the duty of each “individual prosecutor,” as OPR itself acknowledges. *Kyles*, 514 U.S. at 437 (“the individual prosecutor has duty to learn of any favorable evidence known to the others acting on the government’s behalf”); *see also* OPR Draft at 513 (citing *Kyles*). The Draft Report justifies this disparate treatment by asserting that Mr. Sullivan and Mr. Goeke “were relieved of trial duties after the realignment of the trial team following the indictment.” (OPR Draft at 279.) Not so. Both attorneys remained an integral part of the prosecution, even if they did not present witnesses at trial; Mr. Sullivan in particular retained responsibility for the government’s *Brady* disclosures, which he coordinated from an early date. *See* II.B.2, *supra*. Moreover, neither one of them had any less responsibility than Mr. Bottini for the April 15 interview itself—indeed, PIN orchestrated that interview and Mr. Bottini played a minimal role. *See* III.A, *supra*. And in the end, both Mr. Sullivan and Mr. Goeke failed to review their April 15 notes for the same reason Mr. Bottini did—they forgot about them, just as SA Kepner and Mr. Bundy did. Mr. Bottini’s error was no more reckless disregard than theirs was.

¹⁶ OPR’s assertion that Mr. Bottini acted recklessly by not asking SA Kepner for her interview notes (OPR Draft at 281-82) inexplicably discounts the fact that Mr. Bottini had asked SA Kepner for a complete set of the Allen 302s. (OPR Tr. 141:21-142:15.)

Ironically, the only attorney who apparently recalled that the government questioned Mr. Allen about the Torricelli Note on April 15 was Ms. Morris. According to the Draft Report, when Mr. Marsh informed Ms. Morris about the “covering his ass” statement Mr. Allen made on September 14, 2008, “she remembered that Allen had been asked about the Torricelli Note before” but “didn’t connect up that, well, why didn’t he say that earlier.” (OPR Draft at 234.) OPR offers no evidence that Ms. Morris instructed her subordinates to search their “memories and notes” for information about the April 15 interview, despite her apparent recollection on September 14 that Mr. Allen was asked about the Torricelli Note then. Yet the Draft Report is silent on this failure, even as it deems Mr. Bottini’s similar conduct reckless disregard.

V. MR. BOTTINI DID NOT COMMIT MISCONDUCT OR EXHIBIT POOR JUDGMENT IN CONNECTION WITH THE BAMBI TYREE ALLEGATIONS

If there is any part of this saga that shows how at odds Mr. Bottini’s actions were with professional misconduct, it is his repeated insistence that the government disclose allegations related to Ms. Tyree and that cast significant doubt on the credibility of Mr. Allen. That insistence was set against the backdrop of near-continual opposition from PIN, whose attorneys resisted Mr. Bottini’s efforts—even going so far as to admonish him and Mr. Goeke to cease and desist urging disclosure because they “work[ed] for PIN.” (Email from Welch to Bottini et al. (Dec. 20, 2007, 5:18 PM) (CRM BOTTINI 081094).) Remarkably, the Draft Report contends that *Mr. Bottini* acted variously with reckless disregard and poor judgment, all but dismissing his persistent good-faith efforts to press for disclosure and faulting him for errors in the *Brady* letter that PIN attorneys drafted and whose language Mr. Bottini had every reason to believe was approved by Ms. Morris and Ms. Welch. OPR’s analysis of the Bambi Tyree issue is unsupported.

A. Mr. Bottini Pressed PIN To Disclose The Tyree Allegations

Mr. Bottini spent the better part of two years pressing PIN to disclose more information about allegations that Mr. Allen had asked Ms. Tyree to sign an affidavit falsely clearing him of sexual misconduct. The Draft Report mentions these efforts, but does not consider whether they represented good-faith conduct under OPR’s Analytical Framework and reaches a misconduct finding that does not take them into account. Because Mr. Bottini’s good-faith efforts are so central to a fair assessment of his conduct, we describe them in detail here.

The Tyree issue arose in the Josef Boehm prosecution, a drug trafficking and sexual misconduct case unrelated to Operation Polar Pen. Ms. Tyree participated in a 2004 interview during the *Boehm* investigation; the FBI 302 (the “SeaTac 302”) memorializing that interview—at which Assistant United States Attorney Frank Russo and FBI Special Agent John Eckstein were present—stated that Ms. Tyree had signed an affidavit falsely asserting that she did not have sexual relations with him while she was a juvenile, and did so at Mr. Allen’s request. (Schuelke Tr. 672:5-673:12, 674:14-675:10.) Mr. Russo later discussed the affidavit in a sealed filing in the *Boehm* case. (Schuelke Tr. 674:5-13.)

Mr. Bottini urged the disclosure of the false affidavit allegations from early 2007 onward. The allegations first arose in the Stevens case in early 2007, when the government began developing a search warrant affidavit for Senator Stevens’ residence. Because the affidavit

relied heavily on information from Mr. Allen, Mr. Goeke—who served as co-counsel in the *Boehm* case—notified PIN about the false affidavit allegations. (Schuelke Tr. 675:19-676:21; OPR Tr. 550:20-551:9.) He also explained that, contrary to Mr. Russo’s filings, Ms. Tyree herself later told prosecutors that she provided the false affidavit of her own volition. (Schuelke Tr. 679:13-18.) Because of the insistence of Mr. Bottini and Mr. Goeke, Mr. Sullivan asked Mr. Welch whether the government should disclose the allegations in the affidavit, explaining that “[t]he only issue for us to decide is whether we should include something in the affidavit that flags the potential credibility of Allen as an informant. . . . Joe/Jim wanted me to flag it. . . .” (Email from Sullivan to Welch (Mar. 5, 2007 5:00 PM) (CRM BOTTINI 030459).) Mr. Bottini and Mr. Goeke were told that Mr. Welch was “thinking about the Bambi issue,” but the final affidavit omitted the allegations. (Schuelke Tr. 675:16-679:12.)

Mr. Bottini raised the Tyree allegations later in 2007 when he and Mr. Goeke, both of whom already knew about the *Boehm* filing, learned from SA Eckstein that the SeaTac 302 also existed. Mr. Bottini believed the prosecution might have “an obligation at this point to make a post-trial disclosure in *Kott* and a pre-trial disclosure in *Kohring*” (Schuelke Tr. 686:8-10), Polar Pen cases in which Mr. Allen had already testified and was planning to testify, respectively. He faxed the SeaTac 302—which clearly stated that Ms. Tyree executed the false affidavit at Mr. Allen’s request—to PIN, along with the pertinent sections of the *Boehm* briefing (Schuelke Tr. 683:7-17, 684:6-11); at PIN’s direction, he then scheduled an interview with Ms. Tyree. Mr. Marsh instructed him to show Ms. Tyree the SeaTac 302 and ask if it accurately reflected what she said. (OPR Tr. 615:2-8.) Mr. Bottini recalls pressing Ms. Tyree, asking follow-up questions and not simply taking her at her word. She nevertheless disavowed the 302, stating that she did not give the false statement at Mr. Allen’s request and pointing to at least one other purported error it contained.¹⁷ Mr. Russo’s handwritten notes of the July 2004 interview were located and they apparently also contradicted the SeaTac 302, showing that Ms. Tyree may have said the affidavit was her idea—not Allen’s. (CRM080943 (Russo initially wrote “at the request of,” crossed out the word “Bill,” and then wrote “Bambi’s idea.”).)

Mr. Bottini sought advice from his superiors in the U.S. Attorney’s Office, explaining the “full universe of facts” to U.S. Attorney Nelson Cohen and then-Criminal Division Chief Karen Loeffler, including the SeaTac 302 (OPR Tr. 610, 647)—conduct that falls squarely within the Analytical Framework’s definition of “good faith.” Analytical Framework ¶ B.4. In a subsequent email to Mr. Marsh, Mr. Bottini urged PIN to consult the Department’s Professional Responsibility Advisory Office (“PRAO”) “as soon as possible,” noted that he had consulted with colleagues in the U.S. Attorney’s Office, and emphasized in particular that “*both Russo and John Eckstein now recall that Bambi told them that Allen asked her to give the sworn statement.*” (Email from Bottini to Marsh (Oct. 8, 2007 4:12 PM) (OPR Ex. 27) (emphasis added).) Mr.

¹⁷ The Draft Report criticizes Mr. Bottini for focusing on the accuracy of the SeaTac 302 and not asking Ms. Tyree whether she actually had sexual relations with Mr. Allen; it likewise faults him for not asking Mr. Allen himself, during a September 7, 2008 interview, whether he engaged in sexual misconduct. (OPR Draft at 294, 296, 315-16.) OPR’s criticism misses the larger point: it was PIN who directed both interviews and dictated their narrow scope. Mr. Bottini did not ask Ms. Tyree or Mr. Allen about the alleged sexual misconduct because PIN directed him to question them about the SeaTac 302. Nor did he decline to question Mr. Allen “out of fear that [he] would lie,” as the Draft Report asserts. (OPR Draft at 296.) To the contrary, Mr. Bottini knew that Mr. Bundy—Mr. Allen’s attorney, who accompanied him to every session with the prosecution—would never permit Mr. Allen to answer the question. (Schuelke Tr. 727:1-5.)

Marsh communicated with PRAO, and later informed Mr. Bottini that PRAO concluded the prosecution had no disclosure obligation. (Schuelke Tr. 695:18-697:2.) Mr. Bottini did not know precisely what Mr. Marsh told PRAO—though he assumed whatever Mr. Marsh told PRAO was full and accurate—and Mr. Bottini was never provided a written rendition of PRAO’s advice or the facts upon which that advice was predicated.

It was not long before Mr. Bottini pressed PIN about the government’s disclosure obligations again. When a December 2007 newspaper article recounted Mr. Allen’s gifts to the Tyree family, Mr. Bottini worried that it implied Mr. Allen was “greasing the family to keep quiet about his relationship with Bambi”—and that PRAO, which reviewed the Tyree allegations before the press report was published, had not considered the issue. (Schuelke Tr. 697:1-698:19.) At Mr. Bottini’s urging, PIN agreed to approach PRAO a second time; for the second time, Mr. Marsh reported that PRAO concluded the prosecution had no disclosure obligation. (Schuelke Tr. 700:14-22.) Mr. Bottini did not receive a written copy of PRAO’s actual report until January 2008, a few weeks after Mr. Welch had admonished him for continuing to press PIN to make a disclosure. (Email from Welch to Bottini et al. (Dec. 20, 2007, 5:18 PM) (CRM BOTTINI 081094) (“We’ve done all that we are going to do on the matter. . . . Joe and Jim, per the recusal notice, you work for PIN, and so these are your marching orders until I talk to Nelson [Cohen, the interim United States Attorney].”).) Mr. Bottini filed the report away, rather than reviewing it with a “fine-toothed comb,” because he had been specifically told not to pursue it further. (See Schuelke Tr. 708:10-14.) He therefore did not immediately realize that the report omitted any mention of the SeaTac 302 and was based on the inaccurate predicate that SA Eckstein’s notes “reflect that at the time of the interview [Tyree] was adamant that the lie was her own idea.” (Schuelke Tr. 703:13-705:7, 708:12-14.)

Mr. Bottini revisited the issue once the Criminal Division began weighing whether to indict Senator Stevens. He questioned whether a document prepared by Mr. Marsh setting out the government’s strengths and weaknesses should squarely address the Tyree allegations, instead of referring only to Mr. Allen’s “shady personal background.” PIN declined to follow his suggestion. (Email from Marsh to Bottini et al. (Apr. 7, 2008) (CRM016149) (Mr. Marsh responds that Mr. Welch would probably want to limit any mention of Tyree to the “shady personal background” reference.)) Because of PIN’s resistance, Mr. Bottini determined that, along with Mr. Goeke, he would raise the Tyree allegations directly with the Criminal Division leadership in the July 2008 meeting without consulting PIN first. He explained:

In fact, the morning before we had that meeting, Goeke and I went and had breakfast, and I told him, you know, if they, they, the Public Integrity folks, don’t raise this issue about Bill Allen being under investigation for sexual misconduct, including these allegations that he may have procured a false statement from somebody, we have to. Because ironically, I told him, I don’t want to be sitting here down the road a year from now, having somebody ask me how come we didn’t know that?

(Schuelke Tr. 381:14-382:2.) In the end, PIN did omit the Tyree allegations from its presentation, so Mr. Bottini raised them himself, telling Mr. Friedrich and Ms. Glavin that “you need to know about this issue with Bill Allen and the sexual misconduct allegations” and

describing the false affidavit, the SeaTac 302, and the Russo notes. (Schuelke Tr. 707:17-709:12; *see also* Email from Bottini to Goeke (July 15, 2008 5:50 PM) (CRM MORRIS 058298) (Mr. Bottini notes that “Matt and Rita. . . were interested” in the Tyree allegations the Alaska attorneys raised).)

As the *Stevens* trial drew closer, Mr. Bottini persisted in urging the government to disclose the Tyree false affidavit allegations to the defense and the court. For example, he noted with concern that the government’s draft motion *in limine* to exclude inflammatory cross-examination “obviously [did] not front out the rumored procurement of the false statement from Bambi by Bill.” (Email from Bottini to Sullivan et al. (Aug. 14, 2008 2:24 AM) (CRM075442).) Mr. Bottini believed that the government should disclose the false affidavit allegations to the court even though PRAO had concluded that no disclosure obligation existed, because Judge Sullivan “may view it differently . . . we don’t know how the judge is ultimately going to rule on this.” (OPR Tr. 565:3-566:22.) Thus, he emphasized to PIN that while he was “[c]ompletely aware of what PRAO says,” he did not “want to run afoul of Emmet G. [Sullivan] over this.” (Email from Bottini to Sullivan et al. (Aug. 14, 2008 2:24 AM) (CRM075442).) Mr. Bottini also pressed the trial team to address the allegations of Ms. Tyree’s false affidavit in the government’s August 25, 2008 *Giglio* letter (*see id.*; *see also* Email from Bottini to Morris et al. (Aug. 21, 2008 10:44PM) (CRM035906, CRM036032-33))—an approach that Ms. Morris, Mr. Marsh, and Mr. Sullivan collectively decided to reject in a series of communications that excluded the Alaska attorneys (*see* OPR Draft at 334 (recounting email traffic)). And he urged PIN, whose first draft of the September 9 *Brady* letter omitted the false affidavit allegations altogether (OPR Draft at 131-32), to address them in the letter, particularly because Mr. Allen’s involvement with other juveniles beyond Ms. Tyree had by then come to light (Schuelke Tr. 715:6-717:10; *see also* Email from Bottini to Goeke et al. (Sept. 8, 2008 9:52 AM) (CRM022047).)

B. The Draft Report Dismisses Mr. Bottini’s Persistent Good-Faith Efforts And Again Ignores The Context In Which His Conduct Occurred

With certainty, Mr. Bottini’s actions are not those of an attorney who recklessly disregards his disclosure obligations—indeed, they are the exact opposite. Yet the Draft Report nevertheless asserts that Mr. Bottini recklessly disregarded an obligation to correct the September 9 *Brady* letter’s discussion of the Tyree allegations and exhibited poor judgment in connection with the disclosure of the allegations themselves. Those conclusions depend upon viewing Mr. Bottini’s good-faith conduct in the most negative light and ignoring the broader context in which it occurred. For multiple reasons, the Draft Report’s findings cannot stand.

First, in contending that Mr. Bottini acted with reckless disregard concerning the *Brady* letter, the Draft Report all but ignores the context in which he operated—even though OPR’s own guidelines provide that attorney conduct must be considered “under all the circumstances.” Analytical Framework ¶ B.4. For nearly two years, the government’s approach to the Tyree allegations was dictated by PIN—and the process of drafting the *Brady* letter was no different. PIN resisted Mr. Bottini’s disclosure efforts beginning in early 2007, when Mr. Welch declined to mention the Tyree allegations in the government’s search warrant affidavit. PIN directed the process by which the government investigated the allegations, directing Mr. Bottini to interview Ms. Tyree and Mr. Allen in 2007 and 2008. And PIN continued to resist disclosure as the

prosecution drafted its *Brady* and *Giglio* letters, in some cases discussing their preference not to disclose the allegations internally, without including Mr. Bottini and Mr. Goeke. (E.g., Email from Morris to Marsh & Sullivan (Aug. 22, 2008 1:41 PM) (CRM BOTTINI 027428) (Mr. Marsh emails Ms. Morris and Mr. Sullivan that “the Bambi non-subornation of perjury stuff” should not be revisited because “[w]e have nothing to turn over . . . We have twice investigated this until the end of time and have been blessed by PRAO twice”; Ms. Morris responds, “I agree”).) Most importantly, PIN attorneys—not Mr. Bottini—drafted the *Brady* letter, and PIN attorneys were ultimately responsible for inserting inaccurate language about the Tyree allegations.

The Draft Report acknowledges that Mr. Bottini was not responsible for drafting the *Brady* letter, but contends that he recklessly disregarded an obligation to correct it because he “reviewed the letter shortly before it was sent” and, “[a]s the senior attorney . . . Bottini knew that the representations in the letter mischaracterized the available evidence on the issue.” (OPR Draft at 378.) Not so. It was Mr. Marsh who revised the letter to state that the government conducted a “thorough investigation” of a “suggestion” that Mr. Allen had asked Ms. Tyree to sign a false affidavit, but found “no evidence” to support it; he first circulated a version of the draft letter with that language at 8:52 PM on September 8 (OPR Draft at 138-39)—fewer than 24 hours before PIN finalized the letter and while Mr. Bottini was traveling on a cross-country flight to Washington (*see* Email from Morris to Goeke et al. (Sept. 8, 2008 12:37 PM) (CRM BOTTINI 030453) (Ms. Morris proposes 4:00 PM meeting about the Tyree language and acknowledges “I know Joe is traveling”).) Upon arriving in Washington on the evening of September 8, Mr. Bottini turned immediately to preparing for a September 10 motions hearing he had just been assigned. (Schuelke Tr. 45:9-20; *id.* 117:17-118:2 (“[M]y focus on September 9th was getting ready for those oral arguments. . . . that’s what I spent the bulk of the day doing.”).) Against that backdrop, it is wrong to assert—as the Draft Report does—that Mr. Bottini acted unreasonably under the circumstances in skimming the final letter with the understanding that it was being handled by others, but not reviewing it closely enough to realize its errors.

Nor did Mr. Bottini bear some heightened responsibility for ensuring that the letter accurately described the false affidavit allegations, despite OPR’s characterization of him as “the senior attorney.” (OPR Draft at 378.) To the contrary, Mr. Bottini was a line attorney, and both Mr. Welch and Ms. Morris—his superiors—discussed the Tyree issue at a September 8 meeting with the other PIN attorneys (OPR Draft at 139), and both had multiple opportunities to review the letter itself. For those reasons, and given their longstanding involvement in the Tyree issue, Mr. Bottini reasonably believed that Mr. Welch and Ms. Morris had vetted the *Brady* letter and given their blessing to the false affidavit language. Indeed, as the Draft Report concedes, Mr. Welch instructed Ms. Morris, Mr. Marsh, and Mr. Sullivan at the September 8 meeting to review SA Eckstein’s notes, “double-check” the SeaTac302, “make sure [the government] ha[s] it correct,” and memorialize the correct information in the *Brady* letter. (OPR Draft at 345.) It strains credulity for OPR to assert that Mr. Bottini, who was absent from that meeting and was assigned no responsibility for the *Brady* letter, acted in reckless disregard when the other attorneys did not.

Second, the Draft Report does not merely dismiss Mr. Bottini’s good-faith efforts to press for disclosure—it belittles them. OPR acknowledges, for instance, that Mr. Bottini urged disclosure of the Tyree allegations in a government’s motion *in limine*, but then comments that

he and Mr. Goeke “advocated that position based on strategic considerations—to smoke out what the defense knew about the matter.” (OPR Draft at 372.) Similarly, the Draft Report concedes that the Alaska attorneys pressed PIN to disclose the Tyree allegations in the *Brady* letter, but states that they did so “not because they believed there was a duty to do so but to preempt an anticipated claim from the defense that the government was withholding information.” (OPR Draft at 372.) That dismissive attitude is beyond sanctimonious, and suggests that an attorney’s good-faith efforts to comply with his obligations are entitled to no consideration by OPR if they are accompanied by even a hint of an interest in protecting himself, the trial team, or an eventual conviction from criticism or attack. OPR’s Analytical Framework contains no such standard, and for good reason: just as politicians acting in the best interest of their constituents may also be motivated by a personal desire to secure reelection, attorneys acting in good faith to comply with their ethical obligations may do so in part to maintain their professional standing and avoid professional sanctions. Under OPR’s reasoning, Franklin Delano Roosevelt should not have his face on the dime, because his efforts to pull the country out of the Great Depression and make military progress in World War II were motivated at some level by a personal interest in ensuring he would be reelected to the presidency.

In any event, regardless of his motivations, Mr. Bottini’s conduct cannot be viewed in isolation from the backdrop against which it occurred—PIN’s longstanding resistance to *any* disclosure. As Mr. Bottini explained in detail during his interview with OPR, by the time the prosecution prepared to file its motion *in limine* and draft its *Brady* letter, he and Mr. Goeke had encountered so much resistance from PIN about disclosing the allegations at all that their goal became simply to ensure that the defense was, in some fashion, put on notice about them. (OPR Tr. 175:10-178:5, 662:10-664:17.) Mr. Bottini believed that PIN would not bless full disclosure, so he strategically pushed for sufficient disclosure to allow the court to make further inquiries or the defense to conduct its own investigation. The language Mr. Bottini suggested was therefore sometimes couched in terms that he believed would most likely persuade PIN—for instance, he explained that his recommendation that PIN disclose the allegations to “smoke out what they [the defense] know” was a deliberate “sales pitch” to PIN. (OPR Tr. 662:10-664:17; *see also* Aug. 14, 2008 2:24 AM Email (CRM075442) (urging trial team to address allegations in August 25 *Giglio* letter and stating that “I worry that if we don’t make some mention of it—passing mention of it as a rumor which we investigated and disproved—they may respond to the MIL and raise it”).) Even those modest proposals met resistance at every turn. (*E.g.*, Aug. 22, 2008 1:41 PM Email (CRM036166) (without copying Mr. Bottini or Mr. Goeke, Mr. Marsh and Ms. Morris agree that “the Bambi non-subordination of perjury stuff” should not be revisited).) OPR cannot fairly dispute that, under those circumstances, Mr. Bottini displayed good-faith efforts to ensure the *Brady* letter put the defense on notice about the Tyree allegations—efforts that foreclose any finding of reckless disregard. Analytical Framework ¶ B.4.

Finally, the Draft Report’s poor judgment finding—which faults Mr. Bottini for the government’s failure to disclose the SeaTac 302, Mr. Russo’s filings, and SA Eckstein’s and Mr. Russo’s recollection of those documents—is likewise divorced from its context. Despite acknowledging that Mr. Bottini was entitled to and did rely on PRAO’s advice, the Draft Report contends that Mr. Bottini exhibited poor judgment “by not informing his superiors . . . of critical information, specifically the recollections of Russo and Eckstein.” (OPR Draft at 390-91.) But Mr. Bottini *did* inform PIN of those very recollections, emailing Mr. Marsh in October 2007 that “both Russo and John Eckstein now recall that Bambi told them that Allen asked her to give the

sworn statement.” (Oct. 8, 2007 4:12 PM Email.) To the extent the Draft Report faults Mr. Bottini for not also specifically notifying Mr. Welch and Ms. Morris, it ignores the reality of the prosecution’s reporting structure: Mr. Bottini and Mr. Goeke rarely interacted directly with Mr. Welch and Ms. Morris during the investigation, instead communicating with (and effectively reporting to) Mr. Marsh and Mr. Sullivan. *See* II.B, *supra*. Mr. Bottini therefore *did* inform PIN leadership about Mr. Russo’s and Mr. Eckstein’s present recollection when he emailed Mr. Marsh—shortly after which he was admonished by Mr. Welch that he and Mr. Goeke should desist from urging more disclosure and remember that they “work for PIN.”¹⁸

The Draft Report’s poor judgment finding is further undermined by OPR’s inexplicable decision to fault Mr. Bottini for poor judgment while declining to make a similar finding regarding Mr. Goeke, even though both attorneys displayed exactly the same good-faith efforts and worked together to press PIN for disclosure. (*See* OPR Draft at 389-91). The Draft Report makes neither a professional misconduct nor a poor judgment finding against Mr. Goeke, noting that while he participated in a call in which PRAO was provided with incomplete information, he “was persistent . . . in urging disclosure of the information, notwithstanding PRAO’s advice, but he was overruled.” (OPR Draft at 389.) The Draft Report next acknowledges that Mr. Bottini, “did not participate in either conference call with PRAO,” was entitled to rely on PRAO’s advice, and “like Goeke, argued in favor of” disclosure—but then finds that he, unlike Mr. Goeke, displayed poor judgment. (OPR Draft at 391.) OPR offers no reason for its distinct treatment of Mr. Bottini on this one of many occasions where he is held to an apparently higher standard than his colleagues. We do not contend that OPR erred by declining to find that Mr. Goeke displayed poor judgment, because he did not. But neither did Mr. Bottini, and OPR cannot credibly justify its assertion otherwise. We find this disparate treatment of Mr. Bottini very troubling.

In sum, Mr. Bottini pressed the government—persistently, repeatedly—to disclose information about the Tyree allegations. That good-faith conduct is fundamentally inconsistent with reckless disregard; indeed, it forecloses a misconduct finding under OPR’s own Analytical Framework. The Draft Report’s contrary conclusion rests on OPR’s belief that Mr. Bottini should have more carefully reviewed the PIN-drafted *Brady* letter, but that analysis both takes too narrow a view of Mr. Bottini’s conduct and ignores the context in which that letter was finalized. OPR’s poor judgment finding is likewise unsupported, and both findings should be set aside.¹⁹

¹⁸ Nor should Mr. Bottini be faulted for not taking additional steps to inquire about Mr. Russo’s and SA Eckstein’s recollection of the SeaTac interview. (*See* OPR Draft at 367.) Further discussing the issue with Mr. Russo and SA Eckstein would at most only have served to confirm what Mr. Bottini had already told Mr. Marsh: that they now recalled Ms. Tyree saying that she provided the false statement at Mr. Allen’s request. Given the prosecution’s reporting structure, Mr. Bottini had every reason believe that Mr. Marsh had conveyed that information to Mr. Welch and Ms. Morris. *See* V.A, *supra*.

¹⁹ The Draft Report’s reckless disregard finding fails for an additional reason, too: it is untethered from D.C. Rule of Professional Conduct 4.1, which creates an unambiguous prohibition only against “knowingly” making false statements. The Draft Report concedes that Mr. Bottini did not violate that rule in connection with the *Brady* letter, because he did not knowingly make any misrepresentations. (OPR Draft at 377-78.) We do not dispute that a responsible prosecutor, aware of a misleading statement in a letter to the defense, should of course take steps to

VI. MR. BOTTINI DID NOT COMMIT MISCONDUCT IN CONNECTION WITH STATEMENTS BY ROCKY WILLIAMS

The Draft Report also asserts that Mr. Bottini recklessly disregarded an obligation to disclose statements Mr. Williams made during witness preparation sessions. During those August 2008 sessions, Mr. Williams explained that he took bills prepared by subcontractor Augie Paone’s company Christensen Builders to Mr. Allen, assuming—because Mr. Allen was by then “under the microscope” of Operation Polar Pen—that Mr. Allen would add Mr. Williams’ time and Mr. Anderson’s to those bills to avoid drawing further scrutiny to VECO. Mr. Williams never saw the bills that Mr. Allen sent to Senator Stevens, did not communicate his assumption to the senator or his wife, and had no idea whether his time and Mr. Anderson’s was actually reflected in the bills or not. The government did not disclose Mr. Williams’ statements about his belief, which were memorialized in notes that Mr. Bottini and Mr. Goeke took during those witness preparation sessions.

The Draft Report asserts both that the government was obligated to disclose Mr. Williams’ statements and that Mr. Bottini (and Mr. Goeke) recklessly disregarded that obligation. OPR is wrong on both scores. Mr. Williams’ statements about his unfounded belief were not exculpatory and thus not unambiguously subject to disclosure at all; to the extent he made additional statements during witness preparation that were not assumptions, those too were not unambiguously subject to disclosure. But even if the government did have an obligation to disclose Mr. Williams’ statements, Mr. Bottini did not recklessly disregard it—and OPR articulates no legitimate basis for its assertion to the contrary.

A. Measured Under Any Standard, The Government Did Not Have An Unambiguous Duty To Disclose Mr. Williams’ Statements

The Draft Report focuses principally on Mr. Williams’ statements indicating his assumption that Mr. Allen would add his time and Mr. Anderson’s to the Christensen Builders invoices he ultimately forwarded to Senator Stevens; it also discusses a handful of other statements Mr. Williams made, including Mr. Williams’ recollection that Senator Stevens wanted to pay for the work on his house and the fact that Mr. Williams reviewed the Christensen Builders invoices. The Draft Report contends that the failure to disclose those statements violated the government’s disclosure obligations, but that assertion rests on a misunderstanding of the exculpatory value of Mr. Williams’ statements, reflects an erroneous understanding of *Brady*, and ignores the fact that the government *had already disclosed* many of the statements OPR identifies.

1. The Government Was Not Unambiguously Required To Disclose Mr. Williams’ Assumptions

In August 2008, Mr. Williams explained that he became involved in the remodel of Senator Stevens’ home in 1999 when he, Stevens, and Mr. Allen discussed the possible project around the time of the Kenai River Classic event. (Schuelke Tr. 84:1-5.) According to Mr. Williams, the senator had indicated that he wanted to “brighten up” his Girdwood home, possibly

correct it. But only a knowing failure to do so will support a finding of misconduct under Rule 4.1, and there is no evidence that Mr. Bottini’s failure to discern the *Brady* letter errors was anything other than inadvertent.

by lifting the house up to create a “daylight basement” (*see* Bottini Notes (Aug. 20, 2009) (CRM057290-94))—a modest project compared to the renovations Senator Stevens ultimately decided he wanted, nearly a year after the 1999 conversation Mr. Williams described. Mr. Williams also told prosecutors that the senator indicated he wanted to pay for the renovations himself. (*See id.*) The three men did not reach some sort of “agreement” during their 1999 conversation, as the Draft Report implies. (OPR Draft at 503-04.) Their discussion was instead a preliminary one: beyond Senator Stevens indicating that he wanted to pay for the cost of the daylight basement himself, the three men did not “hammer[] out any kind of an understanding as to . . . what VECO was going to do, and how it was going to be paid for.” (Schuelke Tr. 160:16-19.)

Mr. Williams also told prosecutors that once work on the Girdwood residence commenced, he typically picked up the Christensen Builders bills from Mr. Paone, reviewed them, and then delivered them to the VECO office—at which point, he assumed, Mr. Allen would add his time and Mr. Anderson’s to those bills before sending them to Senator Stevens. (*See* Bottini Notes (Aug. 20, 2008) (CRM057297); Bottini Notes (Aug. 22, 2008) (CRM057316).) According to Mr. Bottini’s notes, Mr. Williams “assumed this based on what TS had said in 1999” (Bottini Notes (Aug. 22, 2008) (CRM057316))—presumably, that he wanted to pay for the renovation—and because Mr. Williams could not believe Mr. Allen would “do something as stupid” as have VECO pay for the renovations itself (Schuelke Tr. 172:1-3.) While Mr. Williams “assumed” that Mr. Allen added his time to the Christensen Builders bills, he “never saw” the bills that Mr. Allen actually sent to Senator Stevens, did not know whether Mr. Allen actually added his time to those bills (he did not), and never conveyed his assumption to the senator or his wife, or otherwise talked to them about what their bills included. (*See* Bottini Notes (Aug. 22, 2009) (CRM057315-17); *see also* Bottini Notes (Aug. 30, 2009) (CRM057327) (Mr. Williams tells prosecutors he “assumed that my time [and] Dave’s time [was] added to” the Christensen Builders bills but “didn’t know whether that happened or not” because he “never saw them after [he] turned them in”).)

Mr. Williams’ assumption echoed a defense that the government anticipated Senator Stevens would advance: that he and his wife assumed that VECO’s time was included in the Christensen Builders invoices they received and paid. (OPR Draft at 216.) That Mr. Williams shared their purported assumption is unsurprising; because he was not part of Mr. Allen’s scheme to provide benefits to Senator Stevens any more than other VECO workers were, there is no reason why Mr. Williams would *not* have assumed that Mr. Allen charged the senator for his time. (*See* Schuelke Tr. 182:3-11.) But while that assumption was consistent with a predicted defense, it would have done nothing to “corroborate” it, as the Draft Report contends. (OPR Draft at 494.) Evidence that the Christensen Builders bills paid by Senator Stevens *actually* included VECO’s costs would plainly corroborate the defense. So would evidence that Mr. Williams *told* the senator or his wife that he believed his time was reflected in the invoices they received. But the mere fact that Mr. Williams *assumed* the Christensen Builders invoices included his time would prove nothing, especially because Mr. Williams never saw the actual invoices or discussed them with Senator or Catherine Stevens. In a sense, it proves nothing more than a similar assumption by any other citizen; indeed, had the defense sought to call Mr. Williams as a witness on that sole point, the government could likely have precluded his testimony with the argument that it was no more probative or relevant than the testimony of any

other citizen, who would share the same assumption based on the “no such thing as a free lunch” maxim.²⁰

OPR’s argument to the contrary rests on the fundamentally mistaken premise that *Brady* requires the production of evidence merely because it is consistent with a possible defense. It does not. “[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense.” *Kyles*, 514 U.S. at 436-37; *see also United States v. Mejia*, 448 F.3d 436, 457 (D.C. Cir. 2006) (“information can be helpful without being ‘favorable’ in the *Brady* sense”); *Giglio v. United States*, 405 U.S. 150, 154 (1972) (no *Brady* violation simply because “a combing of the prosecutors’ files after the trial has disclosed evidence possibly useful to the defense”); *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (“[T]he Constitution does not require the prosecutor to share all useful information with the defendant.”). *Brady* (and the USAM) instead requires the disclosure of information that is exculpatory—a standard Mr. Williams’ unfounded and uncommunicated assumption does not meet. “Exculpatory information is that which is ‘supportive of a claim of innocence’ to the crimes charged.” *United States v. Reyes*, 270 F.3d 1158, 1167 (7th Cir. 2001). It “goes to the heart of the defendant’s guilt or innocence,” *United States v. Starusko*, 729 F.2d 256, 260 (3d Cir. 1984), and includes information that “would tend to show freedom from fault, guilt, or blame,” *United States v. Blackley*, 986 F. Supp. 600, 603 (D.D.C. 1997); *see also* Black’s Law Dictionary 597 (8th ed. 2004). Mr. Williams’ assumption falls short of that standard, despite the Draft Report’s repeated assertions that it was “exculpatory.” (*E.g.*, OPR Draft at 507.) Nor was it even “favorable to the defense” such that it would be subject to disclosure under *Safavian*, even if that case applied; because the assumption was untrue and, more importantly, never communicated to Senator Stevens, it would have done nothing to “bolster[] the defense.” *Safavian*, 233 F.R.D. at 16.

The government’s reliance on assumptions during its own case-in-chief does not prove otherwise. Using language more characteristic of advocacy than objective analysis, the Draft Report observes that “the prosecutors were not finicky about using Bob Persons’ statement about Senator Stevens’ ‘covering his ass,’ even though that, too, appears to be only an assumption”

²⁰ The Draft Report wrongly asserts that Mr. Bottini acknowledged “that it was fair to argue” that Mr. Williams’ incorrect assumption “undercut the government’s proof.” (OPR Draft at 494.) Mr. Bottini said nothing of the kind. Instead, he agreed to the undisputed proposition that it would be “fair” to say the government’s case would be undercut by evidence that Mr. Williams’ and Mr. Anderson’s time was *actually* incorporated into the Christensen Builders bills:

Q: *If that were true*, if Dave’s time and . . . Rocky’s time were being wrapped into Christensen bills, then at least insofar as Dave and [Rocky’s] expenses were concerned, there would be no crime. If that were all the VECO contribution to the effort.

A: Right. . . .

Q: And if you’re talking about the defendant’s state of mind . . . would it not have posed a significant problem for the government, with respect to the senator’s state of mind about whether he was paying for this job?

A: If Dave’s time and Rocky’s time *was* being folded into Augie’s bill? Sure, I think that’s fair.”

(Schuelke Tr. 138:10-140:3 (emphasis added).)

(OPR Draft at 496, n.1380); acknowledging that Mr. Williams' statements were only assumptions, the Draft Report further asserts that "[w]hatever force that argument has is lessened by the prosecution team's willingness to endorse assumptions that favored the prosecution (Bob Persons' assumption that Stevens was 'covering his ass'; Bill Allen's assumption that Stevens would not want to pay a large VECO bill)," (OPR Draft at 503). That apples-to-oranges comparison has no bearing at all on the exculpatory value Mr. Williams' assumption. Both of the assumptions OPR cites were independently probative of Mr. Allen's state of mind, a relevant issue that helped explain why he did not send Senator Stevens a bill when asked; indeed, that is precisely why the court admitted the "cover your ass" statement, which would otherwise have been excluded as speculation. (*See* Oct. 1, 2008 Tr. 53:2-8.) Mr. Allen's statements were also independently relevant as statements of the senator's co-conspirator; under the government's version of the evidence, Mr. Persons was a co-conspirator in the scheme to provide the senator with free services, and as such any statements he made relating to that conspiracy would have been legally relevant and admissible at trial. (*See* Oct. 1, 2008 Tr. 54:16-55:2.) By contrast, Mr. Williams' speculative assumption—never conveyed to the senator or his wife—was not probative of any relevant issue, and there was no allegation that he conspired with Senator Stevens. All the assumption explained was his own state of mind, which had no bearing on the actions of Senator Stevens, his wife, or Mr. Allen.

2. The Government Was Not Unambiguously Required To Disclose Additional Statements By Mr. Williams

The Draft Report also asserts that during witness preparation (and during an interview memorialized in a September 14, 2006 302), Mr. Williams "provided many pieces of information that were not assumptions, but still were not disclosed: Stevens wanted to pay for everything . . . ; Williams reviewed the Christensen Builders invoices; Williams passed the invoices along to Bill Allen . . . ; Stevens said he was happy to have Christensen Builders involved so he would have a contractor he could pay." (OPR Draft at 504.) The government was not unambiguously required to disclose those statements, either.

Two of Mr. Williams' statements—that Senator Stevens wanted to pay for everything and to engage a third-party contractor—repeated information that the defense had in its possession before trial began. For instance, on September 17, 2008, the government produced a redacted 302 of Mr. Allen noting that "Ted wanted to pay for everything he got," (*See* Email from Sullivan to Kepner (Sept. 17, 2008 11:16 AM) (CRM BOTTINI 031655) (attaching Allen 302 (Aug. 30, 2006) (CRM BOTTINI 031742)); it also produced, well before trial, an affidavit supporting the search warrant the government executed on the senator's Girdwood residence and which described Mr. Williams' recollection that the senator told Mr. Allen he did not want VECO to incur all of the costs for the renovation, (Aff. of Mary Beth Kepner ¶ 40 (July 27, 2007) (CRM BOTTINI 036340-407, 036357) ("Girdwood Affidavit").) The Girdwood Affidavit likewise revealed that Senator Stevens wanted to hire a third-party contractor, noting that "Williams recalled that ALLEN and STEVENS subsequently decided that a third-party builder should be hired to assist in completing the renovation. Williams remembered being a participant in that conversation, and that one of TED STEVENS' concerns was that STEVENS did not want VECO to pay for all of the costs incurred on such a large project." (*Id.*) It is well-settled that no *Brady* error occurs where, as here, the government fails to disclose evidence that is merely cumulative of other evidence it *has* disclosed. *See, e.g., United States v. Brodie*, 524 F.3d 259,

268-69 (D.C. Cir. 2008) (no *Brady* error where information disclosed after trial was cumulative); *United States v. Zuazo*, 243 F.3d 428, 431 (8th Cir. 2001) (“when the government does not disclose a potential source of evidence but the evidence available from that source is cumulative of evidence already available to the defendant, it has committed no *Brady* violation”).²¹

Finally, the Draft Report also errs by faulting the government for its purported failure to disclose the fact that “Williams reviewed the Christensen Builders invoices [and] . . . passed the invoices along to Bill Allen.” (Draft Report at 504.) Mr. Williams provided that information [REDACTED] and in his August 2008 trial preparation sessions, and it was reflected in the Girdwood search warrant affidavit. (*See* Girdwood Affidavit ¶ 44 (CRM BOTTINI 036360) (“According to Williams . . . Christensen Builders’ invoices and accompanying documentation were given to Anderson and/or Williams . . . [who] then gave each bill to a secretary at VECO.”).) But that information contradicted a statement Mr. Williams made to IRS investigators on September 1, 2006 and which is memorialized in an MOI stating that “WILLIAMS did not see or review the [billing] statements” prepared by Christensen Builders. (CRM BOTTINI 002193.) Because that prior inconsistent statement could be used to impeach Mr. Williams if he testified, the government disclosed it in the September 9 *Brady* letter. OPR takes issue with the government’s failure to explain the impeachment value of that statement in the *Brady* letter itself, implying that the government engaged in selective disclosure of only information that favored the government. (*See* OPR Draft at 427.) As an initial matter, OPR’s assertion ignores the fact that PIN attorneys—and not Mr. Bottini—were responsible for drafting the *Brady* letter, including its disclosures about Mr. Williams. Moreover, the *Brady* letter statement, standing alone, does not “support the prosecution case” as the Draft Report asserts (OPR Draft at 427); it was instead *Giglio* material whose impeachment value would become clear the moment the defense reviewed the Girdwood Affidavit (which was already in its possession) and Mr. Williams’ grand jury transcript (which would have been produced 24 hours prior to his testimony under an agreement the government made for early disclosure of Jencks material). The *Brady* letter itself made clear that it was not the exclusive source of information, explaining that “the information set forth in this letter . . . does not contain all potential impeachment material related to certain government witnesses. As you know, the government has produced substantial discovery to defendant which may contain *Brady/Giglio* material.” Letter from Brenda Morris to Alex Romain, Williams & Connolly at 1 (Sept. 9, 2008). The better practice would certainly have been for the *Brady* letter to explain the conflict between the statement it cited and those it did not, but its failure to do so was not a misrepresentation, let alone one that supports a finding of reckless disregard—especially not on the part of Mr. Bottini, who did not draft the government’s letter.

²¹ It is not evident that Mr. Williams’ statements were even exculpatory. Like the Torricelli Note, the fact that Senator Stevens in 1999 expressed a desire to pay a contractor was equally *inculpatory*, because it showed his awareness of the benefits he stood to receive from VECO; so did his related statement that he did not want VECO to incur all the costs for the renovations, which demonstrated his awareness of VECO’s involvement and desire to deflect attention from it. The Torricelli Note itself underscored this awareness, because it showed that the senator—who indicated his awareness of the impropriety of receiving benefits from VECO as early as 1999—knew in 2002 that he still had not paid for them. Far from “tend[ing] to show freedom from fault, guilt, or blame,” *Blackley*, 986 F. Supp. at 603, those statements were equally consistent with the government’s case.

B. There Is No Legitimate Basis For The Draft Report's Reckless Disregard Finding

Even if the government did have an unambiguous obligation to disclose Mr. Williams' assumptions and other statements (and it did not), OPR cannot show that Mr. Bottini recklessly disregarded it. The Draft Report advances essentially two arguments in support of its assertion that Mr. Bottini committed reckless disregard: that he failed to review his handwritten notes from Mr. Williams' trial preparation sessions, and did not independently review 302s and MOIs that agents had "flagged" during their *Brady* review. (OPR Draft at 512-13.) These arguments mischaracterize Mr. Bottini's conduct and ignore the relative responsibility each prosecutor had for drafting the *Brady* letter, and each of them is meritless.

First, the Draft Report contends that Mr. Bottini exhibited reckless disregard by failing to review his notes from the August 2008 trial preparation sessions and instead relying "on his memory that no *Brady* information had come up" during those sessions. (OPR Draft at 512.) But that assertion is disingenuous, because Mr. Bottini *did* review his handwritten notes from trial preparation sessions for *Brady* purposes, *see* IV.B, *supra*—including those with Mr. Williams. (Schuelke Tr. 65:5-66:22.) While he did not recall specifically reviewing those notes in connection with the September 9 *Brady* letter PIN was drafting, Mr. Bottini explained that, because the trial preparation sessions occurred so recently, Mr. Williams' statements would be fresh in his mind. (Schuelke Tr. 69:9-18.)

In any event, OPR's bootstrapping argument makes little sense. Mr. Bottini did not press for the disclosure of Mr. Williams' statements about his assumption regarding the Christensen Builders bills because he believed in good faith that they were not *Brady* material—not because he overlooked them. (*See* Schuelke Tr. 348:6-22.) The Draft Report suggests that Mr. Bottini committed reckless disregard by "miss[ing] the significance of those statements," and then posits that the reason he did so was because he relied only on his memory of the August 2008 sessions and did not review his handwritten notes. (OPR Draft at 509, 512.) But contemporaneously reviewing his notes as PIN drafted the *Brady* letter would have done nothing, because Mr. Bottini had already considered whether Mr. Williams' assumptions were *Brady* material and concluded in good faith that they were not.

Second, the Draft Report also asserts that Mr. Bottini acted recklessly because he "did not review grand jury transcripts, FBI 302s, or IRS MOIs" documenting statements by Mr. Williams. (OPR Draft at 513.) Wrong. Mr. Bottini *did* review those documents as he prepared for trial, looking specifically at 302s, grand jury transcripts, and other witness statements with a dual purpose of preparing witnesses and identifying *Brady* material. (Schuelke Tr. 63:12-64:3 ("whatever source material that I would have had related to any prior statements the witness had given, I would have reviewed it, not only for the purpose of getting ready for them to come in, but also . . . to see if there was something in there that should have been disclosed").) The Draft Report acknowledges then dismisses Mr. Bottini's efforts in a footnote, implying that they were insufficient because he did not conduct two separate reviews for witness preparation and *Brady* purposes (OPR Draft at 513 n.1423)—a criticism that is devoid of any practical understanding of how prosecutors prepare a case for trial. *See* IV.B, *supra*.

Moreover, in faulting Mr. Bottini for not conducting an independent review of 302s and MOIs, the Draft Report again ignores the relative roles and responsibilities of each government attorney and holds Mr. Bottini to an inexplicably higher standard than other members of the prosecution. The principal information OPR identifies that was contained in a 302 but not disclosed in the September 9 *Brady* letter was Mr. Williams' September 14, 2006 statement that Senator Stevens wanted to hire a contractor he could pay. (See OPR Draft at 514.) To the extent that information was *Brady* material, Mr. Bottini bore no more responsibility than any other prosecutor for ensuring that the government disclosed it; indeed, he bore far *less* responsibility than the PIN attorneys, who drafted the letter and were privy to the same 302 as Mr. Bottini was. Mr. Sullivan and Mr. Marsh were responsible for drafting the *Brady* letter paragraph addressing Mr. Williams (OPR Draft at 430); Mr. Sullivan actively discussed the government's disclosure regarding Mr. Williams with both the FBI and IRS agents and other members of the prosecution, advising Special Agent Larry Bateman that "[w]e will need to see the notes for Rocky" and recommending that the prosecutors investigate a prior inconsistent statement Mr. Williams had made regarding the percentage of work Christensen Builders performed (OPR Draft at 424-25.) And the PIN attorneys were equally privy to the agents' *Brady* spreadsheet, the final version of which contained a notation regarding the September 14, 2006 302 and was emailed to the prosecutors the evening of September 9—while Mr. Bottini was busy preparing for a motions hearing and as the PIN attorneys worked to finalize the *Brady* letter. (OPR Draft at 426.)

The government was not unambiguously required to disclose Mr. Williams' assumptions or other statements. But even if it were, there is no defensible reason for finding that Mr. Bottini acted recklessly in failing to do so while other members of the prosecution apparently did not. For all of these reasons, the Draft Report's reckless disregard findings with respect to Mr. Williams should not be adopted.

VII. MR. BOTTINI DID NOT EXHIBIT POOR JUDGMENT BY FAILING TO RECOGNIZE INACCURACIES IN THE VECO RECORDS

The Draft Report finally faults Mr. Bottini for the government's collective failure to recognize that Government Exhibit 177, a spreadsheet showing expenses VECO incurred during an eight-month period, contained inaccuracies. That failure was the result of mutual ignorance by multiple prosecutors, each of whom was responsible for a discrete portion of the government's case, and OPR is correct in finding that none of them acted recklessly or intentionally. But in recasting the prosecution team's collective failure (or mistake) as an individualized poor judgment finding against Mr. Bottini, the Draft Report creates a new rule of individual responsibility for joint errors—and then imposes that rule on Mr. Bottini but not on other members of the prosecution.

The government introduced the VECO spreadsheet with testimony by Cheryl Boomershine, a company bookkeeper Mr. Marsh examined at trial. The spreadsheet indicated that VECO incurred more than \$188,000 on the Girdwood residence—an amount that the government acknowledged during its opening statement was imprecise, both because it reflected possible inefficiencies by VECO and because it omitted significant amounts of work performed by the company outside the spreadsheet's eight-month window. (See OPR Draft at 553-54.) It became evident during trial that the spreadsheet was inaccurate in two respects: its underlying documentation attributed nearly full-time schedules to Mr. Williams and Mr. Anderson, even

acknowledges, no single prosecutor knew that the spreadsheet contained those inaccuracies, despite the government’s collective (and constructive) knowledge. (OPR Draft at 593.) Mr. Marsh presented Ms. Boomershine and the spreadsheet itself, but did not review Mr. Williams’ or Mr. Anderson’s grand jury testimony before trial; Mr. Bottini knew that Mr. Anderson worked in Oregon and Mr. Williams worked part-time but did not review the VECO spreadsheet’s supporting documentation, because the exhibit had always been assigned to Mr. Marsh. (OPR Draft at 593.)

We agree that the government erred by introducing the VECO records without discovering their inaccuracy—yet that collective violation cannot be attributed to Mr. Bottini in the form of a poor judgment finding. The gist of OPR’s assertion that Mr. Bottini displayed poor judgment is that he should have taken steps to review the records underlying the VECO spreadsheet, and then compared them to the grand jury testimony with which he was already familiar. (See OPR Draft at 605.) He should have done so even though responsibility for those records rested with Mr. Marsh, the Draft Report contends, because “[a] prosecutor is not excused from knowing about relevant information in the government’s possession simply because that information relates to a witness that a different prosecutor will present at trial.” (OPR Draft at 605.) Under OPR’s reasoning, each and every attorney must familiarize himself with each and every witness and government exhibit—along with the sometimes voluminous documentation supporting summary exhibits—as long as there is some “common evidence” with the attorney’s other assignments. (See OPR Draft at 606.)²²

That standard may represent the ideal, but it is sometimes not practical or possible. In reality, the “cabined approach” Mr. Bottini and the other prosecutors adopted is common—not “marked[ly] [in] contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take.” (OPR Draft at 608.) That approach resulted in an inadvertent error here, whose seriousness was undoubtedly magnified by the prosecution’s other mistakes. But division of labor occurs in even the most well-managed cases—indeed, it is a necessary fact of legal practice. See George M. Cohen, *The Multilayered Problems of Professional Responsibility*, U. Ill. L. Rev. 1409, 1415 (2003) (“multiple lawyers offer efficiencies resulting from . . . division of labor”). Division of labor among lawyers accordingly does not represent an exercise of poor judgment even where, as here, it results by happenstance in an error. OPR itself recognizes that problems may occur during trials that are not the result of professional misconduct or poor judgment, and identifies as examples “poor communication between attorneys” and “mismanagement of witnesses,” Analytical Framework ¶ C—factors that do not justify a disciplinary referral under OPR’s Analytical Framework, and which are similar to those at play here.

Finally, even if it were reasonable to require prosecutors to adhere to OPR’s implicit standard, the Draft Report offers no basis for its capricious application of that standard to some

²² This standard is fundamentally at odds with OPR’s analysis of the Torricelli Note, which faults Mr. Bottini for failing to locate and review notes that other prosecutors took during the government’s April 15 interview of Mr. Allen but does not impose a similar burden on any of those other attorneys. See IV.C, *supra*. In the end, it appears that only one consistent standard of professional responsibility can be gleaned from OPR’s conflicting analysis: one that results in blaming Mr. Bottini.

prosecutors but not others. For instance, the Draft Report observes that Mr. Sullivan was present when Mr. Anderson and Ms. Boomershine testified before the grand jury, was involved in compiling information from VECO and Ms. Boomershine during the investigative phase of the case, and participated in a trial preparation session where Mr. Williams stated that he did not work at the Girdwood site every day. (OPR Draft at 600.) Yet OPR finds that Mr. Sullivan did not exercise poor judgment because he “had no specific trial responsibilities” (OPR Draft at 608), even though he was privy to at least the same knowledge as Mr. Bottini and Mr. Goeke—a conclusion that is all the more arbitrary because Mr. Sullivan *was* an integral part of the prosecution. It also makes little sense to excuse Ms. Morris because “[n]either Boomershine, Williams, nor Anderson were assigned to her” when the premise of the Draft Report’s poor judgment finding against Mr. Bottini is that “a prosecutor is not excused from knowing about relevant information in the government’s possession simply because that information relates to a witness that a different prosecutor would present at trial.” (OPR Draft at 605, 609.) We do not contend that those other attorneys should be faulted for poor judgment; they should not. Rather, Mr. Bottini should not be held to a heightened standard that assigns blame for the government’s shared failure to him.

VIII. ADOPTING THE DRAFT REPORT’S PROPOSED MISCONDUCT FINDINGS MAY HAVE HARMFUL INSTITUTIONAL CONSEQUENCES

The government’s disclosure errors were a collective failure, and any serious effort to understand them must consider the role that the prosecution’s management played in causing them. By failing to do so, the Draft Report endorses a double-standard of professional responsibility whose long-term consequences could be profoundly harmful to the Department—and worse, it runs the risk that those errors will happen again.

Prosecutors around the country take notice when line Assistant United States Attorneys shoulder the blame for mistakes for which their superiors share responsibility. It is plain that the prosecution’s errors here were attributable in no small part to management failures within the Criminal Division and the PIN-led trial team itself. Those management failures caused poor communication, burdensome shifting of roles and responsibilities, and division of labor without any centralized supervision, placing undue pressure on Mr. Bottini and the other line prosecutors and creating an environment in which errors were likely to occur. Against that backdrop, it cannot be true that responsibility for the government’s collective failure rests largely upon a single line attorney—especially one with the character of Mr. Bottini.

The Draft Report’s allocation of responsibility cannot be justified. Just as the law recognizes that supervisors bear some degree of responsibility for the conduct of their subordinates, that same principle should at the very least have compelled OPR to consider what role the prosecution’s management played in fostering its errors. *See In re Cohen*, 847 A.2d 1162, 1166 (D.C. 2004) (under D.C. Rule 5.1, supervisors must “take reasonable steps to become knowledgeable about the actions” of subordinate attorneys and cannot assert “the ostrich-like excuse of saying, in effect, ‘I didn’t know and didn’t want to know’”). The Draft Report’s narrow-mindedness is all the more surprising because OPR’s Analytical Framework itself encourages consideration of the very institutional problems that arose here. *See Analytical Framework* ¶ C (“OPR can identify for review and consideration by Department officials any issues relating to . . . possible management deficiencies raised in the investigation. OPR can also

identify for review and consideration by an office’s managers possible systemic problems found in the office during OPR’s investigation.”).

Withering criticism from the defense, the presiding judge, and the news media all gave rise to a presumption that misconduct occurred in the *Stevens* case. Under those circumstances, we understand how it may be easier to affix blame to an individual line attorney than to point to more systemic problems as the cause of the government’s disclosure errors. But the difficulty of confronting the thorny management issues that pervaded the case does not excuse OPR’s failure to do so; nor does it justify the artificially heightened standard of professional responsibility that OPR applied to Mr. Bottini as a result.

IX. CONCLUSION

The *Stevens* prosecution committed a series of disclosure errors, and Mr. Bottini played a part in those mistakes. Given the context in which Mr. Bottini operated—a demanding judge, a combative defense, a fractured prosecution with dysfunctional management, and a tightly-compressed trial schedule—anyone with an appreciation for the challenge of complex trial practice would know that mistakes can happen under such circumstances, and that simple human error, rather than professional misconduct, was more likely than recklessness to be the cause of the government’s errors here.

The Draft Report largely lacks that appreciation. It faults Mr. Bottini while paying little heed to the impact the Department’s institutional failings, together with the rapid pretrial schedule, had on him. It views his conduct in the most negative light, ignores the context in which it occurred, and frequently depends on a misunderstanding of the governing legal standards. And it subjects Mr. Bottini to a heightened, often capricious standard of professional conduct, holding him responsible for the government’s collective failures while excusing other members of the prosecution whose conduct was indistinguishable from his.

Mr. Bottini is a dedicated public servant who is universally admired by the attorneys with whom he works, including leaders of the Alaskan defense bar; has a reputation as an “ethical,” “honest,” and “honorable” prosecutor; and has not been the subject of a single disciplinary complaint in his 25-year career. Along with other members of the *Stevens* prosecution, he undoubtedly made mistakes—mistakes that he greatly regrets. But in no way did Mr. Bottini act with reckless disregard or poor judgment, and the Draft Report’s contrary findings should not be adopted.