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January 23, 2012

James M. Cole
Deputy Attorney General
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SENT BY ELECTRONIC MAIL

Re: *Proposed Suspension of James A. Goeke Received December 9, 2011*

Dear Deputy Attorney General Cole:

Please accept this correspondence as our written response on behalf of AUSA Goeke to the proposed fifteen day suspension he received on December 9, 2011. As a preliminary matter, we recognize that this situation is extremely difficult for everyone involved and would welcome the opportunity to meet with you or your designee to discuss an appropriate resolution. We would prefer that you make our client available for these meetings (here in Washington, DC) but would be willing to initiate the discussions without his physical presence, if you so require. We also request that United States Attorney Michael C. Ormsby participate in any meeting where AUSA Goeke is present. It is our client's strong preference to resolve this matter confidentially.

I. There are no substantive issues left to resolve.

With respect to our substantive response to the allegations against our client, we submit that the only remaining issues are procedural. The Department of Justice's Professional Misconduct Review Unit ("PMRU") Chief Kevin Ohlson delegated to PMRU Attorney Terrence Berg the responsibility to undertake an independent evaluation of the OPR Report of

Investigation and independently determine whether our client engaged in misconduct. Once appointed as the independent adjudicator in this matter, PMRU Attorney Berg's determination that our client did not engage in misconduct is binding on the Department. PMRU Chief Ohlson, as a matter of law and equity, is not at liberty to discharge PMRU Attorney Berg. In addition, a conflict of interest disqualifies PMRU Chief Ohlson from taking action to remove PMRU Attorney Berg and from rendering any opinion on the merits. Based on this analysis, we believe that the Department of Justice is duty bound to withdraw the proposed discipline against our client and find, as PMRU Attorney Berg has already determined, that AUSA Goeke did not commit any professional misconduct.

As we understand it, by delegation of authority from the Attorney General, the Chief of the PMRU delegated to PMRU Attorney Berg the independent responsibility to determine whether The Office of Professional Responsibility (OPR) correctly determined whether our client engaged in misconduct and if so, what discipline was appropriate. Pursuant to the January 14, 2011, Memorandum from the Attorney General, PMRU Attorney Berg took his obligations seriously and without the influence of exogenous political factors, undertook this delegation in an "effort to facilitate timely, fair, and consistent resolution of disciplinary matters." (January 14, 2011 Memorandum attached as Exhibit 1)

Applying his significant subject matter expertise, PMRU Attorney Berg undertook an objective, independent, and thorough review of the Office of Professional Responsibility Report of Investigation in this matter. He reviewed the evidence, relevant case law, and Department of Justice guidelines. Based only on the evidence before him and without consideration of extraneous pressure and concerns, he concluded that our client did not act in reckless disregard or exercise poor judgment during the prosecution of *United States v. Stevens*. PMRU Attorney Berg's factual and legal analysis—in the form the extensively detailed 82-page Berg Report (Attached as Exhibit 2)—is exhaustive, accurate, correct, and most importantly fair. Accordingly, under PMRU's procedures, no discipline of any kind against AUSA Goeke is warranted and this matter should be concluded.

Unfortunately, PMRU Chief Ohlson inexplicably (and we assert without authority), rejected the comprehensive analysis in the Berg Report in favor of his own unsubstantiated conclusions of wrongdoing that merely recycle the OPR Report of Investigation findings without critical consideration of the numerous plain factual mistakes and misconceptions, exhaustively detailed and identified in the Berg Report, that undermine the OPR findings. While we have great respect for Chief Ohlson and his career, we respectfully submit that in addition to the systemic prohibitions of law and equity that preclude his authority to so act, he is also rendering an opinion in the face of a very real conflict of interest and contrary to the facts plainly established in the Berg Report.

Although we have not thoroughly investigated the matter, it appears to us that PMRU Chief Ohlson is seeking a judicial appointment before the United States Senate. It is well known that numerous members of the United States Senate have publicly and forcefully insisted upon severe punishment for our client. Attached hereto as Exhibit 3 is one of numerous articles reporting that senior members of the United States Senate have demanded that those involved in the prosecution of Senator Stevens face serious punishment or worse. It is obvious that such

public demands for retribution from senior members of the United States Senate both place pressure on the Department of Justice to punish and castigate someone and that such punishment would certainly please certain senior members of the Senate.

By upholding PMRU Attorney Berg's appropriate and well-reasoned conclusions, PMRU Chief Ohlson would have placed himself in opposition to such declarations against our client and the stated will of very powerful members of the United States Senate who will determine whether his next career aspiration is realized. By revoking his own delegation of authority to PMRU Attorney Berg and substituting a substantially harsher result of his own drafting, Chief Ohlson removes a potential threat to his judicial appointment while also pleasing many Senators who have been critical of Chief Ohlson and the Department of Justice for other matters and who will presumably vote on his appointment in the future. As is well known to any observer of United States Senate procedure, a "hold" placed on his appointment by only one Senator could prevent Chief Ohlson from becoming a judicial officer.

II. PMRU Attorney Berg was properly appointed the independent adjudicator in this matter and his opinion cannot in good conscience be rejected, or his authority to act revoked, without a finding of deficiency warranting such removal.

PMRU Chief Ohlson's actions to remove PMRU Attorney Berg and reject the Berg Report are arbitrary, capricious, and an abuse of authority because he substituted his own unsupported conclusion for the report's without explanation, without an explicit finding of deficiency, and without consideration as to whether PMRU Attorney Berg failed to meet a clearly articulated standard of review. His actions are capricious, unsupported by the evidentiary record in this case and contrary to the explicit procedures established by the Supplemental Guidance Regarding the Establishment of the Professional Misconduct Review Unit dated April 30, 2011 (the "PMRU Memo") (Attached as Exhibit 4). Under PMRU's binding procedures, no discipline of any kind against AUSA Goeke is warranted and this matter should be concluded.

The PMRU Memo plainly provides that:

[a]fter review of the Douglas factor information, the PMRUA will decide whether disciplinary action is warranted. If the PMRUA determines that no disciplinary action is warranted, the PMRUA will notify the subject attorney and the PMRUC who, in turn, will notify the DAG and the component head or USA.

PMRU Memo at 3 (emphasis added).

The PMRU Memo provides that the designated PMRU Attorney alone has authority to determine whether disciplinary action is warranted. Once the PMRU Attorney discharges his decision making authority, the PMRU Chief's authority to act is singular and ministerial. The Chief is authorized only to notify the DAG and the chain of command as to the determination made by the Attorney. PMRU Chief Ohlson—or anyone else for that matter—has no authority

to remove the PMRU Attorney assigned to independently decide whether disciplinary action is warranted for any reason.

Unfortunately, however, PMRU Chief Ohlson has attempted to remove PMRU Attorney Berg from the PMRU process and reject the comprehensive analysis in the Berg Report for no stated reason other than that PMRU Chief Ohlson disagrees with PMRU Attorney Berg's conclusion regarding AUSA Goeke's conduct. PMRU Chief Ohlson's substitution of his own unsupported conclusion—without any explanation whatsoever as to why the Berg Report is in any way wrong or deficient—is without authority, arbitrary, capricious and an abuse of discretion. His actions are contrary to both the actual evidence in this case and the explicit procedures established by the PMRU Memo.

III. As a matter of law and equity, the Berg Report constitutes an exhaustive, accurate, correct, and fair assessment of our client's actions.

Although we assert that it is PMRU Chief Ohlson who must rationalize or otherwise justify his findings only after he establishes that PMRU Attorney Berg's conclusions are legally insufficient or somehow without merit, we submit he did not do so because such an undertaking would be pointless and impossible in the face of the well reasoned and exhaustive analysis in the Berg Report. Again, and most important in any consideration of this matter, PMRU Attorney Berg's analysis of the factual record is accurate and his conclusion that AUSA Goeke did not commit any misconduct is correct.

Only PMRU Attorney Berg critically and objectively reviewed the OPR Report of Investigation, the contrary evidence, the applicable law, and relevant agency guidelines to reach a fully informed conclusion about AUSA Goeke's conduct without consideration of any extraneous influence or demand for retribution. Accordingly, as previously noted, the Berg Report is attached hereto and incorporated by reference in its entirety. (Attached as Exhibit 2). Also included as a sequentially numbered Addendum to this letter is a discussion of the Berg Report that highlights the reasonableness of the Berg Report's findings with respect to AUSA Goeke when considered against the brief and now demonstrably unsupported conclusory statements in the proposed discipline proposal against AUSA Goeke.

IV. We seek the Department's guidance as to how to appeal the decision of the Chief of PMRU to reject the Berg Report and substitute it with findings of his own.

In view of the above, we do not think it would be productive for us to continue to seek your review of this matter unless you are prepared to reinstate PMRU Attorney Berg as the designated adjudicator and reinstate his conclusions as set forth in the Berg Report. AUSA Goeke did not commit any act of misconduct and is very pleased that PMRU Attorney Berg exonerated him of all wrong doing. AUSA Goeke has been facing charges of criminal and ethical misconduct for nearly three years. Through counsel, he has submitted hundreds of pages of analysis and documentation to refute allegations of wrong doing. He has submitted responses to the allegations against him on the multiple occasions his input was sought. His chain of command, through United States Attorney Ormsby, has vouched for his character, judgment and

flawless record of service. In the course of his employment, and at the direction of the Attorney General that the Department of Justice would cooperate with Judge Sullivan's investigation, he provided a deposition in a criminal investigation in which he was the target. Now AUSA Goeke's assessment of the evidence and his arguments as previously submitted have been resolved to his satisfaction in the Berg Report.

We would therefore appreciate your guidance and instruction as to how to seek review of the PMRU's determination to remove PMRU Attorney Berg as the adjudicator in this matter. We believe that the decision was both procedurally and substantively objectionable, inconsistent with the PMRU's grant of authority, and violative of due process. Given the newness of the PMRU we have been unable to find any authority for how to appeal from the decision at issue. We note that we have yet to receive a response to our request for a copy of the PMRU policies and procedures as previously submitted (May 16, 2011 letter to Mr. Hurley, Senior Counsel for OPR, attached as Exhibit 5). We hope you will agree that it is incumbent upon the Agency to provide such guidance and we look forward to any assistance you might be able to provide in this regard.

As this time we have identified two potential forums: The Merits Systems Protection Board and United States District Court. If you are unwilling to reinstate the Berg Report as the final resolution of the OPR allegations against AUSA Goeke and find that AUSA Goeke did not commit any misconduct, we would appreciate your cooperation in proceeding as follows:

1. If you are of the opinion that the MSPB has authority to overrule PMRU Chief Ohlson's decision to remove PMRU Attorney Berg and reinstate the Berg Report as the Agency decision in this matter, we ask you to issue a final decision. We will thereafter seek the MSPB's review with the understanding that you will not contest the MSPB's jurisdiction to consider and resolve this issue.
2. If you are of the opinion that the MSPB does not have jurisdiction to consider and resolve the propriety of the actions taken by PMRU Chief Ohlson, we ask you not to issue a final decision in this matter at this time. We would appreciate your staying the final order pending our petition for review in United States District Court pursuant to the Administrative Procedures Act. We believe that Section 706 of the APA affords an appeal option in United States District Court authorizing that court to: 1) compel an agency to act when the agency action is "unlawfully withheld or unreasonably delayed"; or 2) set aside an agency action that is arbitrary and capricious, an abuse of discretion, contrary to constitutional mandate, in excess of statutory authority, without observance of procedural requirements, unsupported by substantial evidence or unwarranted by facts when the reviewing court may hold a trial de novo.

We would appreciate your guidance as to whether these or other forums have jurisdiction to review the determination of the Chief of the PMRU in this matter. We also continue to evaluate whether other avenues of appeal, relief, or protection apply to AUSA Goeke on the present record.

Deputy Attorney General James M. Cole

January 23, 2012

Page 6

As a final matter, we want to bring to your attention our repeatedly expressed concerns regarding the procedural processes and substantive review undertaken to date. We are extremely concerned that neither OPR nor PMRU has undertaken any investigation to address our previously raised concerns regarding the integrity of the investigation, repeated Privacy Act violations that were perhaps intentional, the denial of due process under the Administrative Procedure Act, and the increasing likelihood of Constitutional claims pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). We attach our prior correspondence in this regard as Exhibit 6.

We look forward to discussing this matter with you further. If you have any questions, please do not hesitate to contact our office at 202.822.1701.

Sincerely,

Handwritten signature of Bonnie J. Brownell in black ink, with the initials "(CRD)" written in parentheses to the right of the signature.

Bonnie J. Brownell, Esq.

cc: AUSA James A. Goeke
cc: U.S. Attorney Michael C. Ormsby

Addendum to Letter of January 23, 2012

Re: Proposed Suspension of James A. Goeke Received December 9, 2011

The Berg Report's Analysis of AUSA Goeke's Conduct

AUSA Goeke has reviewed the factual recitation set forth in the Berg Report and agrees with PMRU Attorney Berg's factual analysis and the evidence PMRU Attorney Berg relied upon to reach his conclusions. The particularly relevant excerpts of PMRU Attorney Berg's conclusions about AUSA Goeke's conduct are set forth below in their entirety (including footnotes, which to avoid confusion are numbered consistent with this submission rather than as numbered in the Berg Report with the corresponding footnote number in the Berg Report noted). The Berg Report's exhaustive and detailed analysis is in sharp contrast to the brief conclusory statement in PMRU Chief Ohlson's discipline proposal that simply restates the findings of the OPR Report of Investigation.

I. PMRU Chief Ohlson's December 9, 2011 conclusory proposed discipline of AUSA Goeke simply restates the findings of the OPR Report of Investigation and ignores PMRU Attorney Berg's detailed and compelling analysis.

PMRU Chief Ohlson's proposed discipline of AUSA Goeke is premised on the following brief factual statement simply recycled from the conclusions of the OPR Report of Investigation:

In August 2008, you and another prosecutor conducted trial preparation sessions with government witness Williams. Williams was a handyman at VECO and served as the foreman at Stevens' house during the renovation project. During these sessions, Williams told you: Stevens said he wanted to pay for all the renovations to his house; Stevens said he wanted a contractor working on the job that he could pay; he (Williams) had reviewed the invoices from the construction company and passed them along to Allen or another VECO employee before they were sent to Stevens; and he (Williams) thought that his hours and those of another VECO employee – and possibly all of VECO's costs – were added to the invoices prepared by the construction company and sent to Stevens and his wife.

Based on the prosecution memorandum, it is clear that the government recognized that the statements by Williams were consistent with the defense's theory of the case and were potentially exculpatory. And yet, you did not turn over this information to the defense in a timely manner. Moreover, you reviewed the *Brady* letter that was provided to the defense and it said: "Williams also stated that... [he] did not recall reviewing the [construction company's] invoices." This assertion was wrong and misleading, and yet you did not take any steps to correct it.

Suspension Proposal dated December 9, 2011 (“Suspension Proposal”), pp. 2-3. PMRU Chief Ohlson’s Suspension Proposal does not refute or even acknowledge the contrary findings and detailed analysis in the Berg Report, as if PMRU Attorney Berg’s 82 pages of detailed analysis were of no import and no consequence.

II. The Berg Report is a detailed and independent analysis of the conclusions of the OPR Report of Investigation and establishes that none of the issues restated by PMRU Chief Ohlson supports a finding of reckless disregard against AUSA Goeke.

In sharp contrast to the brief restatement of conclusions in the Suspension Proposal, the Berg Report accurately and persuasively details why each of the separate issues identified by PMRU Chief Ohlson above do not support any finding of professional misconduct against AUSA Goeke and certainly fail to establish that AUSA Goeke acted in reckless disregard of his professional duties. PMRU Chief Ohlson’s brief conclusory statement simply adopts the findings of the OPR Report of Investigation and fails to address in any way the critical factual points identified in the Berg Report establishing that the conclusions against AUSA Goeke in the OPR Report of Investigation are based on factual errors, faulty assumptions, and an incomplete consideration of the full import of the contrary evidence as well as a grossly uneven and unfair application of disciplinary standards.

Specifically, PMRU Chief Ohlson fails to credit, address, or acknowledge that AUSA Goeke reasonably believed Williams’ prior statements to the grand jury would be disclosed to the defense, understood the *Brady* letter at issue to supplement production of Williams’ prior statements to the government pursuant to the Jencks Act, fails to credit that AUSA Goeke saw the *Brady* letter as fulfilling a *Giglio* function as well as *Brady* function, fails to consider that AUSA Goeke was not presenting Williams as a witness, and fails to credit AUSA Goeke’s demonstrated and consistent understanding of his own notes. As noted in the Berg Report “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 . . . [and therefore] 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.” Berg Report, p. 72. The same analysis applies to the concept that Williams reviewed the contractor bills—this concept was previously reported and memorialized by the government and AUSA Goeke had a reasonable belief that this statement would be produced to the defense. “The [Report of Investigation] points out that most of the exculpatory statements omitted from the *Brady* letter were indeed contained [REDACTED] and the interview memoranda, which were later disclosed to the defense.” Berg Report, p. 66. “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.” Berg Report, p. 66.

Similarly, PMRU Chief Ohlson also fails to credit, address, or acknowledge AUSA Goeke’s demonstrated understanding, supported by AUSA Goeke’s notes, that he understood Williams to say during the August, 2008, trial preparation session at issue that Williams believed

VECO would prepare a separate invoice, not that any VECO time would be combined with the contractor invoices. Certainly AUSA Goeke's understanding of his own notes carries some weight as to their interpretation and meaning. Again, as noted in the Berg Report "[a]s 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 [REDACTED] 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." Berg Report, pp. 75-76.

Finally, PMRU Chief Ohlson asserts that AUSA Goeke failed to correct a statement in one of the *Brady* letters that "Williams also stated that... [he] did not recall reviewing the [construction company's] invoices" when stating "[t]his assertion was wrong and misleading" fails to appreciate AUSA Goeke's understanding of the purpose and context of the *Brady* letter. Suspension Proposal, p. 3. As PMRU Attorney Berg makes plain, "[g]iven that the [Report of Investigation]'s own factual recitation makes it crystal clear that the purpose of paragraph 15 [of the Brady letter containing the supposed misleading statement] was to disclose prior inconsistent statements, I find OPR's repeated characterization of this paragraph as 'the complete 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." Berg Report, p. 65, fn. 266. Critically, as the analysis in the Berg Report makes clear, in August and September 2008 when various versions of the *Brady* letters drafted by Public Integrity Trial Attorneys Marsh and Sullivan were sent to AUSA Goeke via email, AUSA Goeke understood that the purpose of the portions of the *Brady* letters concerning Williams were to disclose information that would not otherwise be available to the defense and that by operation of the Jencks Act (as well as by Williams' stated intention to meet with the defense prior to trial) AUSA Goeke fully and reasonably believed the information Williams provided the government in August and September 2008 would be available to the defense through the production of his grand jury testimony. Berg Report, p. 65, fn. 266 and fn. 267; p. 66; p. 72.

PMRU Chief Ohlson's findings against AUSA Goeke also implicitly hold AUSA Goeke to a different standard than the standard applied to trial Public Integrity Trial Attorney Sullivan. The OPR Report of Investigation, and by extension PMRU Chief Ohlson, did not find that Trial Attorney Sullivan committed misconduct with regard to Williams' statements despite the fact that Trial Attorney Sullivan participated telephonically in at least one August, 2008, trial preparation meeting with Williams when AUSA Goeke took notes but Trial Attorney Sullivan did not take notes (or did not maintain notes) of the meeting, and despite the fact the Trial Attorney Sullivan was privy to substantially more information about Williams given that Trial Attorney Sullivan was primarily responsible for actually drafting the *Brady* letters which included the subject matter of Williams' prior statements that were obviously derived from multiple sources. Moreover, Trial Attorney Sullivan was also drafting the *Brady* letters at a time when Trial Attorney Sullivan, unlike AUSA Goeke, was specifically focused on potential defense theories concerning Williams, as evidenced by Trial Attorney Sullivan's email about potential defenses. It is also well established that Williams' grand jury testimony was well

known to all of the attorneys involved in this matter, including Trial Attorney Sullivan. Accordingly, given that nearly all of the statements attributed to Williams, that PMRU Chief Ohlson asserts AUSA Goeke failed to ensure were disclosed to the defense, were included [REDACTED], certainly the actual drafter of the *Brady* letter who omitted those statements would be more culpable than AUSA Goeke for their omission. The same reasoning applies to the statement in the *Brady* letter PMRU Chief Ohlson claims is misleading. This is not to say that Trial Attorney Sullivan committed misconduct, but given the undisputed facts in the Berg Report, if Trial Attorney Sullivan did not commit misconduct when he actually drafted the *Brady* letter, AUSA Goeke certainly did not commit misconduct. AUSA Goeke's subordinate and peripheral support role was no different than Trial Attorney Sullivan's role in the case, except that Trial Attorney Sullivan actually had access to supervisors when AUSA Goeke did not. The Berg Report makes clear that AUSA Goeke was "entitled to rely on the professional judgment and diligence of the PIN attorneys whom they [AUSA Goeke and AUSA Bottini] understood were primarily responsible for conducting the *Brady* review that was done for the *Brady* letter." Berg Report, p. 66. "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 [and] [g]iven these unusual and difficult circumstances, it was not unreasonable for AUSAs Bottini and Goeke to rely on their co-counsel." Berg Report, p. 66.

Importantly, AUSA Goeke's understanding of the purpose and context of the *Brady* letters to make disclosures of information that would not otherwise be disclosed was also demonstrably and objectively reasonable because AUSA Goeke's detailed *Brady* analysis of Augie Paone's and Bob Persons' grand jury transcripts was initially included in a draft version of a *Brady* letter as a detailed list and then later omitted from the final version of the letter in favor of producing the grand jury transcripts in their entirety. Berg Report, p. 72, fn. 284 (noting AUSA Goeke's review of Persons' and Paone's grand jury transcripts—while not specifically noted in the Berg Report, a review of the record demonstrates that earlier versions of the *Brady* letter drafted by Trial Attorneys Marsh and Sullivan included AUSA Goeke's detailed *Brady* analysis of the Persons and Paone grand jury transcripts as a multi-page list of bullet points that were later omitted by the drafters of the *Brady* letter—not AUSA Goeke—in favor of disclosure of the entire grand jury transcripts). In other words, this sequence of events confirms that AUSA Goeke reasonably understood that the *Brady* letters were not meant to be the sole source of all *Brady* material disclosed to the defense and that *Brady* disclosures could be accomplished by disclosing the grand jury transcripts where the relevant statements existed. Therefore, AUSA Goeke's understanding that Williams' grand jury transcript would be disclosed to the defense in a timely fashion is critical when evaluating AUSA Goeke's understanding of the *Brady* letter at issue and whether that letter contained omissions based on AUSA Goeke's understanding at the time. Moreover, AUSA Goeke certainly could not be expected to have anticipated in August 2008 that Williams would later not be called as a government witness due to illness. To the contrary, AUSA Goeke was repeatedly advised in August and September 2008 that Williams would be a government trial witness and the government ultimately produced Williams' grand jury transcript to the defense in the immediate aftermath of the decision to allow Williams to return to Alaska. Berg Report, p. 65, fn. 267.

III. PMRU Attorney Berg's analysis of the OPR Report of Investigation is thorough, objective, complete, and accurate.

Again, in stark contrast to the perfunctory adoption of the OPR Report of Investigation findings in PMRU Chief Ohlson's Suspension Proposal, PMRU Attorney Berg conducted a detailed and critical analysis of the OPR Report of Investigation. The most relevant parts of the Berg Report specifically pertaining to AUSA Goeke that categorically establish that there is no basis to find AUSA Goeke committed any professional misconduct in this case are set forth below. **The following sections of the Berg Report exhaustively detail that each purported finding against AUSA Goeke in PMRU Chief Ohlson's Discipline Proposal of December 9, 2011 is not supported by the evidence or relevant authority:**

- 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;¹
- AUSAs Bottini and Goeke were aware of Williams' Grand Jury testimony in which Williams said that Senator Stevens wanted a contractor he could pay directly, that Williams had reviewed all the Christensen Builder invoices and that he submitted them to Bill Allen so that (Williams assumed) Allen would send them on to Senator Stevens;
- 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, which would provide the defense with Williams' statement that the Senator wanted a contractor he could pay directly and that disclosure of the Grand Jury testimony would complete the picture for the defense, enabling them to see that paragraph 15 was intended to disclose inconsistent prior statements.²

¹ [Berg Report fn. 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 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.

² [Berg Report fn. 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

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.³ 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.

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 [REDACTED] and the interview memoranda, which were later disclosed to the defense.⁴ 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.

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, [REDACTED], 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.

³ [Berg Report fn. 268] See Schuelke Bottini Interview I at 246; Schuelke Bottini Interview II at 774; Goeke Schuelke Interview at 74-76.

⁴ [Berg Report fn. 269] ROI at 353.

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 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.⁵ 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 project⁶ where VECO would do the work;⁷

⁵ [Berg Report fn. 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.").

⁶ [Berg Report fn. 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

- The overall understanding was that the Senator wanted to pay for it, and wanted a contractor he could pay;⁸

Williams also was concerned that they were “under the microscope”⁹ and needed to be “careful” or avoid being “reckless.”¹⁰ 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.

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.

⁷ [Berg Report fn. 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.

⁸ [Berg Report fn. 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.

⁹ [Berg Report fn. 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 . . .”).

¹⁰ [Berg Report fn. 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.”).

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.¹¹

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.¹² 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.¹³ This understanding would not ring much of an exculpatory alarm bell because it would not

¹¹ [Berg Report fn. 276] See Schuelke 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.”).

¹² [Berg Report fn. 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?”).

¹³ [Berg Report fn. 278] When AUSA Goeke is asked a question containing the premise “when the foreman of the job who works 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).

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 --." ¹⁴ 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." ¹⁵ 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, 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.

¹⁴ [Berg Report fn. 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.

¹⁵ [Berg Report fn. 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 . .**

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.¹⁶ 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."¹⁷ With respect to Rocky Williams' statements that Senator Stevens wanted to pay for the

¹⁶ [Berg Report fn. 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).

¹⁷ [Berg Report fn. 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.

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.¹⁸ AUSA Goeke did not see himself as responsible for 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.¹⁹ Nevertheless, it was Goeke's impression that Williams had made most of these same statements before, either [REDACTED] or somewhere else.²⁰

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 and the Grand Jury 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.²¹

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.²² 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

¹⁸ [Berg Report fn. 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.").

¹⁹ [Berg Report fn. 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.

²⁰ [Berg Report fn. 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.").

²¹ [Berg Report fn. 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*.

²² [Berg Report fn. 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.).

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.²³ 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 Bottini²⁴ 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 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,²⁵
- 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,²⁶
- 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;²⁷
- 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

²³ [Berg Report fn. 288] See f.n. 273, 274, and 275 above.

²⁴ [Berg Report fn. 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.

²⁵ [Berg Report fn. 290] Goeke Schuelke Interview Tr. at 93.

²⁶ [Berg Report fn. 291] *Id.* at 96-98, 104-05.

²⁷ [Berg Report fn. 292] *Id.* at 100.

invoices on to Senator Stevens – not that VECO’s charges were being added into a Christensen Builders’ invoice;²⁸

- 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,²⁹ he did believe, looking back, that they should have been disclosed;³⁰

²⁸ [Berg Report fn. 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?

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).

²⁹ [Berg Report fn. 294] *Id.* at 108.

³⁰ [Berg Report fn. 295] *Id.* at 109.

- He was under the impression that the *Brady* review, including Grand Jury transcripts and 302s, was going on in DC;³¹
- 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.³² 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;³³
- 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;”³⁴
- 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.³⁵

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 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 [REDACTED]. The new information, Williams’ statement that he assumed the VECO costs

³¹ [Berg Report fn. 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 –.”).

³² [Berg Report fn. 297] *Id.* at 118.

³³ [Berg Report fn. 298] *Id.* at 119.

³⁴ [Berg Report fn. 299] *Id.* at 142.

³⁵ [Berg Report fn. 300] *Id.* at 144-45.

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.

Berg Report, pp. 64-76.

PMRU Attorney Berg's ultimate conclusion in the Berg Report is also of particular importance in this matter:

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 misconduct³⁶ than their involvement in this prosecution and this misconduct investigation has already done.

Berg Report, pp. 80-81.

Again, AUSA Goeke could not agree more emphatically with PMRU Attorney Berg’s ultimate conclusion that AUSA Goeke did not act in reckless disregard or commit any other misconduct. As noted in the conclusion of the Berg Report set forth above “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 Report, p. 80 (emphasis added). Fundamental fairness dictates that AUSA Goeke should not be a scapegoat for “conduct by the supervisors [that] 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 . . . [including] 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.” Berg Report, p. 4. AUSA Goeke cannot be held individually responsible for management decisions he had no authority to make or countermand. Particularly when “[r]ather than hold[ing] each team member responsible for his or her part in contributing to the disclosure violations, the [OPR Report of Investigation] 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.” Berg Report, p. 4.

In sum, the Berg Report is factually accurate and PMRU Attorney Berg’s inferences and conclusions derived from those facts are objectively fair and reasonable. The Department of Justice cannot ignore the findings in the Berg Report simply because they are inconvenient or contrary to the stated desire of other powerful and vocal people for retribution and punishment. Independent considerations and predetermined outcomes requiring 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”

³⁶ [Berg Report fn. 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.

Deputy Attorney General James M. Cole

January 23, 2012

Page 28

fail to support any finding that AUSA Goeke acted in reckless disregard or committed any other misconduct on this record. Berg Report, p. 80. For the reasons set forth above and in the entirety of the Berg Report itself, the Berg Report is the final objective and fair word on this matter and should be reinstated as such.