Goeke Exhibits - Table of Contents

Description	Page
Exhibit 1. January 14, 2011, PMRU Memorandum	1
Exhibit 2. PMRU Attorney Berg Report	5
Exhibit 3. Sample News Story Regarding Senate Pressure	88
Exhibit 4. April 30, 2011, PMRU Memorandum	91
Exhibit 5. May 16, 2011, Letter to OPR	97
Exhibit 6. Prior Correspondence Regarding Concerns	100

Exhibit 1

Office of the Attorney General

Washington, D.C. 20530

January 14, 2011

MEMORANDUM FOR H. MARSHALL JARRETT
DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

LANNY A. BREUER
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

LEE J. LOFTHUS
ASSISTANT ATTORNEY GENERAL
JUSTICE MANAGEMENT DIVISION

RAYMOND C. (NEIL) HURLEY
ACTING COUNSEL
OFFICE OF PROFESSIONAL RESPONSIBILITY

LOUIS G. DEFALAISE
DIRECTOR
OFFICE OF ATTORNEY RECRUITMENT AND MANAGEMENT

ALL UNITED STATES ATTORNEYS

FROM: THE ATTORNEY GENERAL

SUBJECT: Creation of the Professional Misconduct Review Unit

This memorandum announces the creation of the Department's Professional Misconduct Review Unit (PMRU). In an effort to facilitate timely, fair, and consistent resolution of disciplinary matters arising out of findings of professional misconduct by the Office of Professional Responsibility (OPR), OPR along with the Executive Office for United States Attorneys (EOUSA), the Criminal Division the Justice Management Division, and the Office of Attorney Recruitment and Management (OARM) recommended creation of an adjudicatory unit to resolve such disciplinary matters for employees in those components. The Attorney General's Advisory Committee also concurred in the recommendation.

As I have consistently said, as a result of their commitment to the cause of justice and the hard work that results from that commitment, Department attorneys fully meet their ethical obligations in all except the rarest of cases. However, when allegations of misconduct do arise, timely, fair, and consistent resolution of those allegations is critical both to the attorneys who are

the subjects of the allegations and to the Department's obligation to address those rare instances when Department attorneys fail to meet ethical obligations. Because the proposed PMRU will be effective towards achieving its intended objectives and because those objectives are consistent with the Department's responsibilities, I have adopted the proposal. The PMRU initially will adjudicate only those cases involving employees of the recommending components. I anticipate, however, that the other litigating components will participate in this process over time. The PMRU will also assume responsibility for making referrals to state bar disciplinary authorities consistent with current Department policy. The PMRU process will be effective for OPR findings of professional misconduct occurring after the PMRU is fully staffed.

OPR has jurisdiction to investigate allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate, or provide legal advice, as well as allegations of misconduct by law enforcement personnel related to allegations of attorney misconduct within the jurisdiction of OPR. OPR investigations can result in a finding or findings of intentional professional misconduct, reckless professional misconduct, poor judgment, or excusable mistake, or OPR can conclude that an attorney acted appropriately under the circumstances.

Under the existing process, once OPR completes an investigation, it prepares a Report of Investigation (ROI) containing its findings and conclusions, and provides that report to the Office of the Deputy Attorney General (ODAG), as well as to the appropriate Assistant Attorney General, the Director of EOUSA, or other appropriate component head. If OPR finds professional misconduct, it recommends a range of disciplinary action for consideration by the attorney's supervisors or other appropriate disciplinary officials. In cases of poor judgment, OPR refers the matter to the attorney's supervisors for any appropriate action.

If management disagrees with OPR's professional misconduct findings and/or recommended range of discipline, it may submit to an Associate Deputy Attorney General (ADAG) a request to depart from either the findings or the disciplinary range. The ADAG then determines whether to authorize the requested departure, to reassign the matter to another component–frequently OARM–for imposition of discipline unconstrained by OPR's findings and recommendations, or to retain the matter for imposition of discipline by officials within ODAG.

Because the involved Department employees handle these matters as only one of many assigned responsibilities, the existing procedures have resulted in delays in completion of the disciplinary process. In addition, the current process creates the risk of inconsistent resolution of disciplinary actions involving similarly situated employees.

The creation of a PMRU exclusively dedicated to the resolution of disciplinary matters arising out of findings of professional misconduct within established time limitations will not only reduce delays but also permit consistent resolution of matters involving similarly situated employees. The PMRU Chief will administer procedures designed to provide Department

attorneys a fair opportunity to contest findings of professional misconduct, and to contest proposed disciplinary actions arising from those findings, that are fully consistent with the requirements of federal law and regulations governing adverse actions involving federal employees. The PMRU will administer these procedures within established deadlines and will periodically report to the Deputy Attorney General (DAG) regarding the PMRU's compliance with those deadlines. In addition, the PMRU will notify the DAG of its final determinations within established time frames. For those actions taken by the PMRU Chief that the subject may grieve, ODAG will hear and resolve the grievance likewise within established time frames.

I am firmly convinced that the new PMRU will result in consistent, fair, and timely resolution of disciplinary matters arising out of allegations of professional misconduct, and I appreciate the efforts of those components that worked so hard to develop a process that will serve the Department well as we continue to confront all of the challenges that we face. In the vast majority of cases, Department attorneys meet their professional obligations. When allegations of misconduct arise, however, both Department attorneys and complainants deserve a fair, consistent, and timely resolution of disciplinary matters arising out of those allegations, and the PMRU will facilitate each of those aims.

Exhibit 2

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 in 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 handing 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 for[69] 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

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 question[103] for

---

Joy, SA Kepner, PIN attorney Marsh, SA Roberts, and paralegal [redacted]).

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 attorney[115] and as his supervisor[116] 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 on[119] 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 302s[122] 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 agents[136] 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 Prinicpal 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 judgment[138] 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,

---

[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.

were not memorialized in a 302, and were never turned over to the defense before or during the trial.[140]

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]

---

140 ROI at 143.

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

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]

---

our plans. Hope to see you again soon. You are a great
and understanding friend.
My best
Ted

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).

- 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 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

---

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.").

because they were filed in a file folder labeled: "Documents to Show BA on April 15";[155]

- 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

---

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 showed Allen approximately 20 documents or sets or 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).

$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 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

---

159 ROI at 143.
160 ROI at 189.
161 ROI 190-92.
162 ROI at 195.
163 *Id.*

no FBI 302 memorializing the interview. That file alone should have prompted Bottini to dig deeper, but he did not;"[164]

- 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.

---

164 ROI at 196.
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]

[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.

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]

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

---

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

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.

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.

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

---

[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

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 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

---

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.

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).

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] 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]

---

181 ROI at 198, f.n. 766.

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

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

---

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 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.

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.

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]

---

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.

Williams was a central government witness regarding the extent, nature, and cost of the renovation work that was performed at the Senator's residence[192] due to his deep involvement in 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

---

[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 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] [redacted]

[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

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]:

- The idea to make some improvements to the Girdwood residence arose, according to Williams, as a result of conversations between Bill Allen and Senator Stevens when they were together at the Kenai River Classic. It does not appear that Williams was present

---

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 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.").

[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 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]

---

199 [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.

- [redacted][208]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

From the three interview memoranda and the Grand Jury testimony 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]

---

208 [redacted]

209 [redacted]

210 [redacted]

211 [redacted]

212 [redacted]

213 [redacted]

214 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

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'"; (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

---

also omitted Williams' statements that were favorable to the defense, namely, that Senator Steven wanted a contractor he could pay.

[215] [redacted]

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:

1. August 20, 2008 Trial Prep Session

From AUSA Bottini's notes:

> "Ted wanted to pay himself[217] . . .
>
> Ted – he wanted to pay himself.
> Make sure he paid for it, etc.[218] . . .
>
> **Didn't add my time to Augie's bill**[219] (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'y[220]
> Always a cover sheet –
> would sign off on that; etc.
> Columns of figures[221]
> 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

---

216 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.

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.

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]

. . . .

→ 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 Augies 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 –

---

225 8/20/08 Goeke Notes at CRM089065.
226 8/20/08 Goeke Notes at CRM089066.
227 8/20/08 Goeke Notes at CRM089067.

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.

-- 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 -- . . .

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.

--- 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 his notes, that he "assumed this based on what TS had said in 1999" [based on Williams' statements [redacted] 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 <u>left</u> to <u>add</u> →
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

---

230 8/22/08 Bottini Notes CRM057317.

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

for everything

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

→ part of original agreement

→ As long as paid back then everything would be fine

→ original discussion

→ assumption that was going on . . .

→Subsequent conversations.[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 [redacted] 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

232 8/22/08 Goeke Notes at CRM057194.
233 8/22/08 Goeke Notes at CRM057195.

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**
– 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]

---

[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.

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]

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?**

---

237 8/31/08 Bottini Notes at CRM057337.

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.

- – 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 –

- 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.

---

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

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

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]

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]

---

[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.

[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.

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 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* letter[248] 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,

---

[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.).

[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

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.

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.

---

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.

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

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]

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.

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.

[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.

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 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]

---

257 ROI at 293.

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 . . .

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 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

---

8/22/08 Goeke Notes at CRM089064.

[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.

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 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;

---

[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.

- 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]

- 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

---

[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.

[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.

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.

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.

---

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

[269] ROI at 353.

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.[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 project[271] where VECO would do the work; [272]

---

[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

- The overall understanding was that the Senator wanted to pay for it, and wanted a contractor he could pay; [273]

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]

---

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.

[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.").

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 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

---

[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 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.

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, 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."

---

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 <u>discussion</u>
→ assumption that was going on . .

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).

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 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

---

[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.").

[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

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 Bottini[289] 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;[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]

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.

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

- 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

---

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).

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.

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 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 [redacted] and (b) would not even have

298 *Id.* at 119.
299 *Id.* at 142.
300 *Id.* at 144-45.

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

---

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.

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 work[305] and to Stevens' statement that he would pay for everything.[306] Although not necessarily part of the "agreement," Williams also said his 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]

---

[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 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.

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 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

---

[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) 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

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 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.

---

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.

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.

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."

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 misconduct[316] 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

[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.

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.

I acknowledge receipt of this proposed suspension.

_____ _____

[NAME] DATE

Exhibit 3

Stevens prosecution probe is nearing its completion

By SEAN COCKERHAM
Anchorage Daily News
Published: November 8th, 2011 07:01 PM
Last Modified: November 8th, 2011 08:47 PM
The Justice Department is almost finished with its investigation into misconduct by prosecutors in the 2008 prosecution of Alaska Sen. Ted Stevens.

Story tools
14 Comments
E-mail a friend
Print
Share on Facebook
Digg this
Seed Newsvine
Send link via AIM
Tweet this
MY YAHOO!
Font size : A | A | A

The inquiry by the Justice Department's Office of Professional Responsibility is in its "last stages," Attorney General Eric Holder told the U.S. Senate Judiciary Committee on Tuesday. "There is a multi-hundred-page report that is just about finalized," he said.

Holder delivered the news as he was being grilled during a Justice Department oversight hearing by senators from both parties who were upset about the Stevens case and wanted to know what the repercussions for prosecutors would be.

"There should have been some real serious corrections done because of what they did to a great U.S. Senator... I've never seen a greater injustice to a member of Congress," Utah Republican Sen. Orrin Hatch told the attorney general.

The senators urged Holder to make public the upcoming report on prosecutorial misconduct in the case. Holder said it will be up to the Office of Professional Responsibility, but that he's inclined to make the details public.

"What I have indicated was that I want to share as much of that as we possibly can given the very public nature of that matter and the very public decision that I made to dismiss the case," Holder said.

Six Justice Department lawyers have been under investigation for their handling of Stevens' trial, which was part of a wider probe into corruption in Alaska politics. One of those lawyers, Nicholas Marsh, committed suicide last year.

A jury in Washington, D.C., found Stevens guilty in October 2008 of lying on financial disclosure forms covering six years in office.

But in 2009 the Justice Department moved to dismiss the charges against Stevens, admitting it failed to turn over evidence to the defense that would have helped Stevens. The prosecution team also faced misconduct allegations from an FBI whistleblower.

Stevens lost his re-election bid just days after the jury handed down the guilty verdict and died in a plane crash north of Dillingham on Aug. 9, 2010.

"The tragedy of the Stevens situation is that Sen. Stevens is no longer here to be able to see the result of your examination," said California Democratic Sen. Diane Feinstein. "This is very important that whatever happened be made fully public and never, never happen again."

Vermont Democratic Sen. Patrick Leahy said there was "serious misconduct" by prosecutors in the Stevens case.

Leahy, chairman of the Judiciary Committee, said he hopes the Office of Professional Responsibility will make an exception to its usual practice of not making its findings public.
"It doesn't right whatever wrongs were done then but let us hope it might preclude future wrongs," Leahy said.
A separate investigation into possible criminal charges against the prosecutors was ordered by the judge in Stevens' case, District Judge Emmet Sullivan.
Sullivan appointed a special prosecutor, former military judge Henry Schuelke III, to conduct the investigation. No results from that investigation have been announced and it may still be ongoing.

Read more: http://www.adn.com/2011/11/08/2161140/stevens-prosecution-probe-is-nearing.html#ixzz1dBchv6Z7

Exhibit 4

U. S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

April 30, 2011

MEMORANDUM FOR LANNY A. BREUER
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

H. MARSHALL JARRETT
DIRECTOR
EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

KEVIN A. OHLSON
CHIEF
PROFESSIONAL MISCONDUCT REVIEW UNIT

FROM: JAMES M. COLE
DEPUTY ATTORNEY GENERAL

SUBJECT: Supplemental Guidance Regarding the Establishment of the Professional Misconduct Review Unit

This memorandum supplements and clarifies the October 20, 2010, memorandum which, upon the signature of the then-Acting Deputy Attorney General on December 5, 2010, established the Professional Misconduct Review Unit (PMRU). This memorandum sets forth the time frames within which disciplinary actions will be resolved. All actions taken must be consistent with procedural rights afforded federal employees pursuant to 5 C.F.R. Part 752. The following deadlines apply:

Action	Time
The PMRU Chief (PMRUC) will review the Report of Investigation (ROI) of the Office of Professional Responsibility (OPR) and make a determination of whether a finding of professional misconduct is supported by the evidence and the applicable law.	The PMRUC will make the determination within 30 days of receipt of the ROI.

Action	Time
If the PMRUC determines that the finding(s) of misconduct is not supported by the evidence and the applicable law, the PMRUC will refer the matter either to the subject attorney's component head or, through the Executive Office for United States Attorneys, to the subject attorney's United States Attorney (USA), for whatever action deemed appropriate. The PMRUC will notify the DAG of this action.	• The PMRUC will refer the matter to the component head/USA within 10 days of the determination that no professional misconduct occurred, and will notify the DAG within 10 days of the referral to the component head/USA.
If the PMRUC preliminarily determines that a finding of misconduct is supported by the evidence and the applicable law, the PMRUC will refer the matter to a PMRU attorney (PMRUA) who will solicit Douglas[1] factor information from the component head or USA.[2]	• The PMRUC will refer a matter to a PMRUA within 30 days of the PMRU's receipt of the OPR ROI. • The PMRUA will request Douglas factor information within 5 days of the PMRUA's receipt of the referral from the PMRUC. • The component head/USA will submit Douglas factor information within 14 days of the request.

[1]*See Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981).

[2]Where the subject attorney is no longer a Department employee, and the PMRUC determines a finding(s) of professional misconduct is supported by the evidence and the law, the PMRUC will issue a letter within 30 days advising the subject attorney of the Department's professional misconduct findings, and informing the subject attorney that he or she may submit an objection to the findings. The letter will include a copy of the relevant portions of the ROI (with attachments). The PMRUC will provide a copy of the letter to the component head or USA. The PMRUC will also have discretion to provide to the subject attorney all or portions of the evidence obtained by OPR during the course of its investigation. The subject attorney will have the opportunity to respond to the findings of the PMRUC within 30 days of receipt of the letter.

Action	Time
After 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.	· The PMRUA will notify the PMRUC and the subject attorney(s) that no disciplinary action is being proposed within 30 days of the PMRUA's receipt of the referral from the PMRUC. The PMRUC will notify the DAG, as well as the component head or USA, within 5 days of receiving the PMRUA's notification.
If, after review of the Douglas factor information, the PMRUA determines that disciplinary action is warranted, the PMRUA will issue a letter of reprimand or a proposal for discipline (suspension or removal) to the subject attorney and provide a copy to the component head or USA.	· The PMRUA will issue a letter of reprimand or proposal for discipline within 45 days of the PMRUA's receipt of the referral from the PMRUC.
If the PMRUA issues a letter of reprimand, the letter will advise the subject attorney of the right to grieve the reprimand to the PMRUC, and of the deadline for doing so. Simultaneously, the PMRUA will provide a copy to the component head or USA and advise him or her of the ability to join in the subject attorney's grievance, or to otherwise comment on the letter of reprimand.	· If the subject attorney decides to file a grievance, he or she must do so within 30 days of receipt of the reprimand.[3] · If the component head or USA decides to join in the grievance or otherwise comment on the letter of reprimand, he or she must do so within 30 days of receipt of the reprimand.
If the subject attorney files a timely grievance, the PMRUC will resolve it. Otherwise, the action becomes final upon the expiration of the grievance period.	· The PMRUC will resolve the grievance within 45 days of receipt.

[3]DOJ Order 1200.1 affords an employee 15 days to grieve a covered action, but 30 days are granted in this context as a result of the complexity of the issues and to avoid requests for extensions.

Action	Time
If the PMRUA proposes suspension or removal, the proposal will advise the subject attorney of the right to respond orally and in writing to the PMRUC, and of the deadline for providing such a response. Simultaneously, the PMRUA will provide a copy of the proposal to the component head or USA, and advise him or her of the ability to join the subject attorney in the response, respond separately, or otherwise comment on the proposal.	· If the subject attorney decides to submit a response, he or she must do so within 30 days of receipt of the proposal. · If the component head or USA decides to join in the response, respond separately, or otherwise comment on the proposal, he or she must do so within 30 days of receipt of the proposal.
The PMRUC will issue a decision in the matter. The decision letter will inform the subject attorney of the right to grieve the disciplinary action to the Deputy Attorney General or his designee (for suspensions of 14 days or less), or to appeal the disciplinary action to the Merit Systems Protection Board (MSPB) (for suspensions of 15 days or more, or for removals). The PMRUC will simultaneously provide a copy of the decision to the component head or USA and notify them of their opportunity to join in the subject attorney's response, respond separately, or otherwise comment on the decision.	· The PMRUC will issue a decision within 45 days of receipt of the subject attorney's response or of the expiration of the response period. · If the subject attorney decides to file a grievance, he or she must do so within 30 days of receipt of the PMRUC's decision: · If the component head or USA decides to join in the grievance, respond separately, or otherwise comment on the decision, he or she must do so within 30 days of receipt of PMRUC's decision. · The time frames for submission of an appeal to the MSPB are set forth in 5 C.F.R. § 1201.22(b).
If the subject attorney grieves the PMRUC's decision to the DAG, the DAG or his designee will resolve the grievance. Otherwise, the action becomes final upon the expiration of the grievance period.	· The DAG or his designee will resolve the grievance within 30 days of receipt.
If the subject attorney appeals the disciplinary action to the MSPB, the MSPB will resolve the appeal.	· See 5 C.F.R. Part 1201.

Action	Time
When an action based on a finding of an intentional or reckless violation of a rule or rules of professional misconduct becomes final, the PMRUC will refer the matter to the appropriate state bar.	The PMRUC will refer the matter to the state bar within 30 days of the final disposition.

In extraordinary cases, the PMRU Chief may extend the time for grievances or responses to proposed discipline for 15 days without notification to the DAG. Otherwise, any extension of the above-referenced deadlines must be approved by the DAG or his designee. In addition, the PMRU will submit to the DAG a compliance report every six months beginning on October 1, 2011, establishing compliance with the above-referenced deadlines and describing any actions taken by the PMRU.

Exhibit 5

The Brownell Firm

Attorneys At Law

1050 17th Street, NW, Suite 700
Washington, DC 20036-5503
Voice: (202) 822-1701 Facsimile: (202) 822-1914
www.thebrownellfirm.com

Bonnie J. Brownell*
Christopher R. Landrigan+
D. Robert DePriest^

**Also Admitted in MD*
+Also Admitted in VA
^Only Admitted in NY

May 16, 2011

Raymond C. (Neil) Hurley
Senior Assistant Counsel
U.S. Department of Justice
Office of Professional Responsibility
950 Pennsylvania Ave., NW Room 3266
Washington, DC 20530
(202) 514-5050 (fax)

Re: OPR Investigation of AUSA James Goeke

SENT VIA ELECTRONIC MAIL AND US MAIL

Dear Mr. Hurley:

As you might expect, we do not agree with your characterizations of our ongoing concerns regarding the propriety of both OPR's authority and management of its investigation (report) into the Stevens matter. However, we appreciate your willingness to authorize us to provide U.S. Attorney Ormsby with the benefit of our comments. We do agree, indeed we argued rather vehemently in our last correspondence, that Mr. Ormsby's review of our comments is essential to his having, "some context in which to place the press reports concerning the proposed findings." As such, we will be providing Mr. Ormsby with our comments later this week unless we hear otherwise from you. We thank you for your allowing us to do so.

Likewise, we appreciate your apprising us of the procedural review process afforded by the Professional Misconduct Review Unit. Quite frankly, we are unfamiliar with this process and would appreciate your forwarding any information regarding the Unit's policies and procedures. Directing us to any third party would be appreciated as well.

We note that you have not specifically addressed many of our "contentions and demands." To the extent that your email of May 6th constitutes a comprehensive response and administrative denial, we respectfully note our continuing objection and ask that you advise us of any appeal options that might be available.

Again, we appreciate your willingness to resolve individual issues to our mutual satisfaction.

If you have any questions, please feel free to contact us directly.

Sincerely,

Bonnie Brownell (BJB)

Bonnie J. Brownell, Esq.

cc: James A. Goeke

Exhibit 6

Ermer & Brownell, PLLC

ATTORNEYS AT LAW

1828 L STREET, NW SUITE 640 WASHINGTON, DC 20036-5130

VOICE: (202) 833-3400 FACSIMILE (202) 223-0120

www.ERMERLAW.COM

David M. Ermer
Bonnie J. Brownell[1]

Of Counsel
Frank Petramalo, Jr.
Stuart H. Sorkin

Elizabeth A. Kearns[2]
Jason C. Suter[3]

[1]*Also Admitted in MD*
[2]*Also Admitted in CA*
[3]*Also Admitted in VA*

March 9, 2010

Mary Patrice Brown
Acting Counsel
U.S. Department of Justice
950 Pennsylvania Ave., NW, Room 3266
Washington, DC 20530

SENT VIA FACSIMILE AND US MAIL

Re: Request for OPR Interview of AUSA James A. Goeke

Dear Ms. Brown:

Thank you for your letter of March 2, 2010 inquiring as to whether our client, James A. Goeke, a subject of your investigation, is willing to be interviewed by the OPR on a "voluntary" basis. Please be advised that Mr. Goeke wishes to cooperate with the OPR investigation. Mr. Goeke believes that he has information that is relevant to the OPR inquiry. However, as his counsel, we have advised him to seek further clarification. We are hopeful that your response to this letter will allow us to advise Mr. Goeke to provide information to the OPR in an appropriate format at an appropriate time, consistent with customary OPR policies and procedures.

As an initial matter, we question whether the OPR has authority and/or jurisdiction to conduct this proposed "voluntary" criminal investigation at this time in view of the Attorney General's (AG) apparent de facto determination to allow the referral of this matter to a Special Prosecutor appointed by a federal judge and the AG's specific instructions to all DOJ employees to cooperate with the Special Prosecutor. In particular, as discussed below, it appears that any interview of Mr. Goeke by the OPR is necessarily administrative in nature and is therefore plainly compelled.

As you know, on April 8, 2009, U.S. District Court Judge Emmet G. Sullivan ordered the appointment of Henry R. Schuelke, III as Special Prosecutor to investigate

the potential for criminally actionable misconduct by my client, among others. Judge Sullivan apparently sought to appoint the Special Prosecutor pursuant to Rule 42 of the Federal Rules of Criminal Procedure. The government did not appoint a prosecutor pursuant to Rule 42(a)(2), which may have triggered the following provision:

> If the government declines the request [from the Judge to appoint a Special Prosecutor], the court must appoint another attorney to prosecute the contempt.

On July 28, 2009, Judge Sullivan then issued an order in In Re Special Proceedings, 1:09-mc-00198-EGS, granting Mr. Schuelke authority to interview my client through deposition testimony under oath and pursuant to a subpoena. As previously noted, the AG not only apparently consented to this arrangement, but also affirmatively directed all DOJ employees to cooperate with Mr. Schuelke's investigation. In compliance, my client provided deposition testimony to Mr. Schuelke in January 2010. Prior to the initiation of the Court's investigation, Mr. Goeke also provided information relevant to the OPR's current inquiry in the form of several written declarations and in an interview memorialized by an FBI Form 302, all at the direction of the Department.

Attorney General Order 1931-94 issued on November 8, 1994, in conjunction with implementing regulations, sets forth the jurisdictional authority for the OPR to conduct any and all of its investigations. Our concerns center on whether the OPR's grant of authority is negated by Judge Sullivan's apparent Rule 42 proceedings undertaken pursuant to a Federal Court Order and with the consent and cooperation of the AG. Please note that the OPR's grant of authority comes only from the AG and is subject to change even by a Deputy Attorney General without limitations as to form or substance. Regulatory language in this regard is clear. It provides:

> The Office of Professional Responsibility (DOJ-OPR) shall be headed by a Counsel, who shall be appointed by the Attorney General and subject to the general supervision and direction of the Attorney General or, whenever appropriate the Deputy Attorney General.

28 CRF Part O, Subpart G-2-Office of Professional Responsibility.

We are concerned that the OPR may not have authority to collaterally investigate any aspect of the events underlying or related to Mr. Schuelke's investigation at this time. We are further concerned that Mr. Goeke's participation in the OPR investigation would

be contrary to the Judge's Order and the instructions of the AG. We are concerned that his "voluntary" cooperation at this juncture might very well constitute interference with Mr. Schuelke's investigation. We have found case law authority on this issue lacking and ask for your position on this issue.

Likewise, we are concerned that the OPR lacks jurisdiction to conduct an independent, "voluntary" and tangentially criminal investigation. As previously noted AG Order 1931-94 provides the OPR has "jurisdiction" to engage in investigations as to the "misconduct [of DOJ] attorneys that relates to the exercise of their authority to investigate, litigate or provide legal advice." Importantly, the AG's Order as well as the implementing regulations (set forth at 28 CFR Parts 0 and 45) provides that the OPR will conduct criminal investigations in conjunction with the Office of the Inspector General. Both the Order and regulation devote extensive language to the "Coordination Among Offices" as between criminal and administrative investigations.

It appears therefore that the only interpretation of the OPR jurisdictional grant is that its independent investigative authority is limited to administrative investigations. Based on general principles of statutory construction (giving meaning to all language) the OPR's jurisdiction is so limited. Likewise, it appears that the OPR has historically conducted itself consistent with this interpretation. The OPR's annual reports set forth multiple independent administrative investigations. When conducting an investigation that is tangentially criminal, the investigations are conducted as joint with the Office of the Inspector General which has a separate statutory grant. Accordingly, since the OPR lacks jurisdiction to conduct an independent criminal investigation, then its current investigation must, by operation of law, be characterized as administrative. Without question then, my client's proposed interview is thereby compelled.

Finally, we are concerned that there may be an appearance of a conflict of interest that might require the OPR to recuse itself from further involvement at this time. Without going into extensive detail that serves no purpose herein, the OPR appears to be engaging in an investigation that is precipitated, in part, by a Federal Judge's criticism that the OPR is dilatory and that only a Special Prosecutor can act with sufficient dispatch. The OPR has thereafter initiated an investigation that appears inconsistent with its well established protocols and perhaps, is without authority. As Lee J. Lofthus stated in his memorandum for the Deputy Attorney General dated May 6, 2009 with respect to this matter:

> It is highly unusual to have an investigation by the court concurrent with an OPR investigation, and it raises jurisdictional

> issues, and questions concerning the authority of the special counsel and the proper relationship between OPR's investigation and that of the special counsel. These are important questions that affect the Department's institutional interests, are sensitive determinations, and may include questions of first impression. Such issues will require resolution by the leadership of the Department... (Memorandum attached at 2).

It appears to us that the criticism of the OPR combined with the unusual nature of your current investigation raises at least the perception of impropriety. It further appears that the OPR may be initiating an investigation contrary to its own protocols and in the context of serious jurisdictional concerns to prove to the Court and perhaps the AG that it can act efficiently and effectively.

In closing, we want to address a matter that should be the center of our discussion. Our client is a dedicated public servant who has devoted his career to public service. He has earned our respect and consideration. The underlying events require investigation and a capable Special Prosecutor is engaged. Let us allow the process to proceed in an orderly manner sensitive to the fact that my client is also a private citizen entitled to the protections afforded him under the Constitution of the United States that he is tasked to enforce. We would appreciate your assistance in answering our concerns set forth above with the understanding that we are both seeking to protect the integrity of the process, the interests of the DOJ, and my client's constitutional rights.

Accordingly, we want to advise you that Mr. Goeke is eager to assist OPR in its investigation and believes that he could be helpful. We would appreciate the opportunity to work with you in devising an investigative strategy that we can recommend to our client. We offer an alternative in the interim. If you would provide us with written notice of the allegations and/or written questions for which you seek Mr. Goeke's input, we will work with Mr. Goeke in providing a response.

Thank you for your consideration of our requests. .

Sincerely,

Bonnie J. Brownell (RWK)

Bonnie J. Brownell, Esq.

Enclosure

cc: James Goeke

The Brownell Firm, PC

Attorneys At Law

1050 17th STREET, NW, SUITE 700
WASHINGTON, DC 20036-5503
VOICE: (202) 822-1701 FACSIMILE: (202) 822-1914
www.thebrownellfirm.com

Bonnie J. Brownell*
Christopher R. Landrigan+
D. Robert DePriest^

*Also Admitted in MD
+Also Admitted in VA
^Only Admitted in NY

May 6, 2011

Raymond C. (Neil) Hurley
Senior Assistant Counsel
U.S. Department of Justice
Office of Professional Responsibility
950 Pennsylvania Ave., NW Room 3266
Washington, DC 20530
(202) 514-5050 (fax)

Re: OPR Investigation of AUSA James Goeke

SENT VIA ELECTRONIC MAIL AND U.S. MAIL

Dear Mr. Hurley:

As you are aware, we represent Assistant U.S. Attorney James A. Goeke in connection with the Office of Professional Responsibility ("OPR") investigation regarding the prosecution of *United States v. Stevens* ("*Stevens*"). We submit this correspondence to bring to your attention our concerns that your dissemination of your Draft Report to our client's chain of command without the benefit of our corrective comments threatens to unfairly damage his career and reputation and may constitute another privacy violation. This raises new issues with respect to whether your office should recuse itself from this investigation because of conflicts of interest.

We specifically authorized OPR to release its Draft Report and our response with attachments of February 7, 2011 ("Comments") to U.S. Attorney Michael Ormsby of the Eastern District of Washington. OPR's decision to release only its Draft Report appears to be inconsistent with our client's grant of consent. OPR should have provided both documents to Mr. Ormsby, and we believe it was irresponsible and misleading for OPR to do otherwise. We would appreciate the immediate referral of our February 7, 2011 Comments with attachments to Mr. Ormsby so that he can understand the disputed nature of your allegations against our client as well as the countervailing evidence and procedural irregularities that undermine OPR's investigative conclusions.

We also request that OPR immediately provide our Comments with attachments to all other senior officials who received a copy of the Draft Report.[1] The May 6, 2009, DOJ memorandum regarding conflict waivers for various senior DOJ personnel suggests that OPR's Draft Report has likely been distributed well beyond Mr. Ormsby, likely as high as the Office of the Attorney General. Without such broad distribution we believe there would be no reason for conflict waivers for such senior personages. Failing to alert these senior officials of facts and conclusions contrary to OPR's Draft Report, particularly facts highlighting serious procedural irregularities and jurisdictional questions, only compounds the damage caused to Mr. Goeke by the highly unusual way this investigation has been conducted outside all normal channels and contrary to past practices.[2]

As a summary, we believe that our Comments with attachments dated February 7, 2011, pointed out inaccuracies in the Draft Report and identified meritless conclusions about our client. The corrected inaccuracies included: (1) the clear demonstration that Mr. Goeke fully informed the Public Integrity Section (PIN) and repeatedly advocated for the relevant Tyree disclosures; and (2) that Mr. Goeke's role with respect to Mr. Williams was compartmentalized, and that Mr. Goeke played no role in the decision about which information should be disclosed to the defense. After receiving our Comments, OPR was on notice that its negative findings regarding Mr. Goeke were inaccurate and that the Draft Report contained various factual errors. We are concerned that OPR has continued to distribute the Draft Report with negligent disregard for the truth therein.

We believe that your release of the Draft Report to third parties without inclusion of our corrective Comments promotes an unfair portrayal of our client's actions based on fundamental inaccuracies and inadequate context. If you had provided Mr. Ormsby with our Comments as we requested, he would have known that our client had objected to the Draft Report and anticipated that you would be undertaking corrective edits. He would have known that it is our client's position that:

> As definitive evidence of the complexity of the underlying case, your one thousand page Draft Report is incomplete and contains factual errors which we anticipate you will be willing to correct.

---

[1] It is ironic that you have chosen to present your Draft Report to third parties and thereby justify your findings against Mr. Goeke's integrity and competence as a prosecutor by withholding facts, persuasive analysis and countervailing context. Mr. Goeke has not authorized the disclosure of the Draft Report and our Comments and attachments to anyone other than U.S. Attorney Ormsby. Accordingly, although unlikely to be totally curative, we ask that you provide Mr. Ormsby (and anyone else to which you have provided a copy of the draft report, except the other subjects of OPR's investigation or officials of PIN) a copy of our February 7, 2011 Comments.

[2] It is unclear why senior personnel outside Mr. Goeke's direct chain of command would have a need to review the Draft Report at this stage of the proceedings. Surely senior personnel do not regularly review draft OPR findings. We are concerned that such an unusual departure from OPR's normal procedures, particularly when contrary facts and opinion in the form of our Comments appears to have been withheld, may constitute a violation of The Privacy Act of 1974, 5 U.S.C. § 552(a).

> We also ask you to reconsider your proffered standard of strict liability for professional conduct that, in your application, requires absolute perfection based on post-litigation second guessing of innumerable litigation decisions, decisions Mr. Goeke did not make and had no authority to countermand. When a realistic standard is applied, Mr. Goeke must be found to have acted both reasonably and responsibly.

Comments at 13.

If you had provided our Comments as well as the Draft Report, Mr. Ormsby would have the benefit of our client's assessment that your report mischaracterized the chain of command in the *Stevens* matter. This assessment may have been very persuasive to his evaluation as to whether our client engaged in wrongdoing. We said:

> We find that your report evidences a fundamental misunderstanding of the absolutely essential chain of command within a federal prosecutorial team and thereby, your report does not accurately reflect Mr. Goeke's role in *United States v. Stevens*. We note our concerns that there is simply no factual basis for the Draft Report's tentative conclusion that Mr. Goeke was reckless in the discharge of his duties and exercised poor judgment. It appears that you have mistakenly attributed the actions and inactions of others to Mr. Goeke. We ask you to reconsider your factual findings with respect to Mr. Goeke in isolation and against OPR's own analytical framework. Since you cannot reasonably support your conclusions of wrong doing, we are hopeful you will agree with our comments, revise your report accordingly and conclude, as we have, that Mr. Goeke discharged his duties responsibly and appropriately.

Comments at 13.

We also pointed out serious flaws in your analysis and the potential for dire consequences for the DOJ in advancing your position that would be important for Mr. Ormsby to consider in evaluating your allegations of wrong doing against Mr. Goeke. We said:

> We also ask that you reconsider whether this report promotes your underlying duty to provide the DOJ with guidance and practical advice on how to discharge the duties of federal prosecutors in an effective and ethical manner. Left uncorrected your report puts all AUSAs on notice that their careers and livelihood may be at risk if they are assigned to provide litigation support to prosecutions managed by Main Justice. They cannot count on their chain of

> command through the United States Attorney to formulate a litigation plan with clearly defined lines of responsibility and appropriate delegation. They may be concerned that if the litigation becomes contentious as it is by its very nature, they may anticipate being disciplined for decisions made by their new superiors at Main Justice over their objections. The Department of Justice has historically attracted the best and the brightest from the most prestigious law schools in the country who zealously engage in public service, sacrificing personal wealth and opportunity for an opportunity to further the interests of justice. This will not continue if such attorneys are held to standards of inhuman flawlessness.

Comments at 14.

We also pointed out internal inconsistencies in the OPR Draft Report that would have been important to Mr. Ormsby's understanding of the lack of culpability of Mr. Goeke. We said:

> We ask you to consider that OPR's Draft Report does not properly consider the context of the alleged actions and omissions. Specifically, it gives no meaningful weight to its own conclusion that Mr. Goeke did not intentionally fail to disclose exculpatory evidence under *Brady v. Maryland, 373 U.S. 83 (1963)*. Instead, it attempts to impose an impossible standard of competence, endurance and responsibility on a line attorney who had no input in the management of the case. At no time did Mr. Goeke have more than a supporting role in the trial of Senator Stevens. His minimized and compartmentalized role in the case cannot support these findings of professional misconduct. In his role at the bottom of the prosecution hierarchy, Mr. Goeke did not have the authority to compel the actions he was apparently obligated to ensure. To the extent this litigation did not end well, it is unreasonable to conclude that Mr. Goeke's best efforts played any meaningful role in creating the problem identified in the draft report. And, as the Draft Report implicitly acknowledges, Mr. Goeke bears no responsibility for any of the issues of concern identified by the Court as the basis for the Court's criminal investigation.

Comments at 14.

Likewise, we are concerned that your determination not to disseminate our Comments to a United States Attorney and presumably other senior DOJ officials was, at least in part, because our Comments were critical of your investigation and ask for your

recusal. This is yet another instance that raises the appearance of impropriety and potential for conflict. Our Comments included the following:

> In addition to our substantive disagreement with the conclusions of the report, we have serious and ongoing concerns about the way OPR has handled this investigation. As we discussed in our March 9, 2010 letter, we question whether or not OPR has authority and/or jurisdiction to even conduct this concurrent investigation.[3] We also believe the Draft Report has unfairly prejudiced Mr. Goeke for his unwillingness to waive his Constitutional rights as a citizen. Finally, we are concerned that there may have been a conflict of interest, precipitated in part by Judge Sullivan's criticism of OPR which should have compelled OPR to stand down until the criminal investigation was concluded.

Comments at 14.

Finally, we raise concerns regarding whether your determination to release your Draft Report violated our client's privacy rights. We note that you appeared to have agreed that you required his permission to release the Draft Report to Mr. Ormsby. On March 7, 2011, we advised you of the following:

> It has come to our attention that you require the consent of our client, James A. Goeke, to release OPR's draft report concerning the prosecution of *United States v. Stevens* to U.S. Attorney Michael Ormsby of the Eastern District of Washington. Please accept this correspondence as Mr. Goeke's consent for OPR to forward to Mr. Ormsby OPR's November 8, 2010 Draft Report and our response with attachments dated February 7, 2011.

In conclusion, we ask that you take immediate steps to correct the improper and misleading disclosures of the Draft Report in isolation from our Comments and attachments. At a minimum, we ask that you provide our February 7, 2011, Comments to U.S. Attorney Ormsby and to the other senior DOJ officials who have seen the Draft Report. Similarly, we renew our request that OPR recuse itself from this investigation. As a final matter, we renew our request for updates regarding OPR's investigation into apparent intentional "leaks" of the Draft Report,[4] which we are concerned constitute a clear violation of Mr. Goeke's rights under The Privacy Act of 1974, 5 U.S.C. § 552(a).

---

[3] See March 9, 2010 letter (attached).

[4] Evidence of these leaks includes news stories in the national media such as the attached November 15, 2010, NPR article which specifically references the conclusions in the Draft Report. It is unclear how widely the Draft Report has been disseminated, and how extensive the Privacy Act violations may be.

To that end, we request a list of all individuals who have received a copy of the Draft Report to date.[5]

Please do not hesitate to contact my office with any questions.

Sincerely,

Bonnie Brownell (DFD)

Bonnie J. Brownell, Esq.

Enclosures

cc. James A. Goeke

[5] Presumably a comprehensive list exists of all individuals who received and/or requested the Draft Report from OPR, as suggested by the prior confidentiality agreements OPR has routinely required from Mr. Goeke. Surely similar safeguards have been required of all other recipients of the Draft Report.

The Brownell Firm, PC

Attorneys At Law

1050 17th STREET, NW, SUITE 700
WASHINGTON, DC 20036-5503
VOICE: (202) 822-1701 FACSIMILE: (202) 822-1914
www.thebrownellfirm.com

Bonnie J. Brownell*
Christopher R. Landrigan+
D. Robert DePriest^

*Also Admitted in MD
+Also Admitted in VA
^Also Admitted in NY

October 19, 2011

Terrence Berg, Esq.
Professional Misconduct Review Unit
U.S. Department of Justice
950 Pennsylvania Ave., NW Room 3266
Washington, DC 20530
terrence.berg@usdoj.gov

Re: OPR Investigation of AUSA James Goeke

SENT VIA ELECTRONIC MAIL AND U.S. MAIL

Dear Mr. Berg:

We would appreciate an opportunity to provide you with our concerns on behalf of our client, AUSA James Goeke, regarding the conclusions reached and procedural irregularities during OPR's investigation of the prosecution of *United States v. Stevens*. We appreciate your professionalism thus far and your willingness to keep us apprised. We assume you have a copy of our response to OPR's draft report but have attached an additional copy for your convenience. We believe we have information and perspective which would be helpful to your review.

We would also appreciate the opportunity to review a copy of OPR's final report, which we understand OPR has already provided to our private sector counterparts. Our goal is to help you better understand the underlying facts, our client's role in the *Stevens* prosecution, the reasons why the conclusions in OPR's final report regarding our client are erroneous, and why our client's career has been sufficiently impacted such that further discipline would be unfair and serve no productive purpose.

Please do not hesitate to contact me with any questions.

Sincerely,

Bonnie Brownell (RKD)

Bonnie J. Brownell, Esq.

cc. James A. Goeke

The Brownell Firm, PC

Attorneys At Law

1050 17th STREET, NW, SUITE 700
WASHINGTON, DC 20036-5503
VOICE: (202) 822-1701 FACSIMILE: (202) 822-1914
www.thebrownellfirm.com

Bonnie J. Brownell*
Christopher R. Landrigan+
D. Robert DePriest^

*Also Admitted in MD
+Also Admitted in VA
^Also Admitted in NY

November 11, 2011

Terrence Berg, Esq.
Professional Misconduct Review Unit
U.S. Department of Justice
950 Pennsylvania Ave., NW Room 3266
Washington, DC 20530
terrence.berg@usdoj.gov

Re: OPR Investigation of AUSA James Goeke

SENT VIA ELECTRONIC MAIL AND US MAIL

Dear Mr. Berg:

We write to ask you to exonerate our client of all wrongdoing and allow us to make a public statement to that effect as others have done. Mr. Goeke was accused of serious and intentional wrongdoing. After a two and a half year investigation and a thousand page report, OPR concluded that Mr. Goeke was not culpable in any way for the myriad of issues that led to Judge Sullivan's parallel criminal contempt investigation or that led the Attorney General to dismiss the Stevens case. OPR determined only that Mr. Goeke unintentionally failed to identify and report an arguably inconsistent statement by Rocky Williams while also acknowledging that he was not assigned to this task.[1]

[1] OPR's conclusion was based solely on Mr. Goeke's singularly conscientious note taking during a trial preparation session when Mr. Williams was not his witness and Mr. Goeke had no responsibility to take notes. In context (Mr. Goeke's exceptional reputation, voluminous case load, the passage of time and the routine nature of the event), a reasonable person would be compelled to conclude that, at most, Mr. Goeke made an unintentional and reasonable mistake.

Inexplicably, OPR rejected Mr. Goeke's representations that his limited responsibility and access to information reasonably led him to believe that when Mr. Williams stated he intended to meet with the defense prior to trial, Mr. Williams' statements did not conflict with his prior memorialized statements. Apparently applying a different standard, OPR exonerated Mr. Sullivan despite the fact that he did not take notes of relevant meetings, was privy to substantially more information and was primarily responsible for Brady disclosures which included the Rocky Williams statement. This is not to say that Mr. Sullivan committed misconduct, but given the undisputed facts, if Mr. Sullivan did not commit misconduct, neither did Mr. Goeke.

Throughout this ordeal, the serious and unsubstantiated charges against Mr. Goeke have been repeatedly leaked to the press, portraying Mr. Goeke in an extremely negative and false light. Most recently, Mr. Sullivan and Ms. Morris, through counsel, have fueled the adverse press portrayal of Mr. Goeke by publically proclaiming their complete exoneration.[2] As we read the final report, Ms. Morris's claims are erroneous. As we read the final report, if Mr. Sullivan did not commit misconduct, neither did Mr. Goeke.[3]

For your information, we declined to provide comments to the national media when contacted because we believed that we were prohibited from doing so by virtue of the strict confidentiality agreements OPR required us to execute before providing us with the Draft and Final OPR reports. We assume Mr. Sullivan, Ms. Morris and their counsel were required to execute the same agreement. We assume that you are aware of these public statements.

We also renew our concerns that OPR and other Agency officials have disregarded the Agency's well established procedural due processes and best practices thereby undermining a fair and equitable search for the truth. As we understand it:

- Judge Sullivan explicitly engaged a special prosecutor in lieu of OPR because he had found OPR's previous investigative efforts inadequate. Rather than defer to the Special Prosecutor as is the established norm, OPR engaged in an unprecedented and premature collateral investigation of ambiguous scope (criminal v. administrative) insisting that waiver of constitutional rights was a prerequisite to participation in the process.

- OPR refused to address several important questions of first impression many of which were included in Lee J. Lofthus' memorandum for the Deputy Attorney General dated May 6, 2009 which described the OPR collateral investigation as "highly unusual," "raising jurisdictional issues," and "questions concerning the authority of the special counsel and the proper relationship between OPR's investigation and that of the special counsel." [4]

- OPR summarily dismissed the serious jurisdictional and conflict issues we raised and adopted a peculiar jurisdictional test: the Special

[2] Examples of press reports are attached. In addition, senior criminal division officials have made public statement supportive of Mr. Welch. It would certainly be appropriate for those same officials to make public statements in support of Mr. Goeke. We understand that Mr. Goeke's current supervisor, the United States Attorney and the person most familiar with the quality of his work, would be pleased to make a statement of support for Mr. Goeke and return him to full duty. It is our understanding that this would serve the best interest of the public.

[3] See Footnote 1.

[4] The May 6, 2009 Memorandum, and our letter of March 9, 2010 is attached. Please note the Memorandum was discovered on the Department of Justice web site and was thus available to the public.

Prosecutor was aware of their investigation and had not, "voiced any concerns...." Rather ominously, OPR implicitly characterized our concerns as dilatory by prefacing its response with, "We note that your letter follows a three-month period during which OPR attempted to schedule, through multiple phone calls and one letter, a voluntary interview with your client." [5]

- We are concerned that counsel for other subjects of the investigation may have engaged in off the record conversations with OPR and may have been provided access, documents and information that we have been denied. We are concerned this disadvantaged our client, constituted prejudicial *ex parte* communications, and may have been afforded to private sector counsel because of their prior employment with the Department of Justice.

- OPR oversaw the drafting of a confidential and sensitive report critical of our client's actions which it then leaked (or allowed to be leaked) to the public. As we understand it, OPR does not even have a log of the individuals to whom it provided the draft report despite obvious privacy concerns and the severe restrictions OPR placed on our access as counsel. Accordingly, we have no meaningful way to determine who may have had input into the OPR investigative report.

- Although the OPR factual findings against attorneys in the Agency's executive offices are objectively more serious than the findings against Mr. Goeke, executive office attorneys were publically proclaimed as vindicated and returned to positions of critical responsibility in the Agency while Mr. Goeke was placed on what appears to be "double secret probation" and left to appear in the public eye as the primary target and one of the most culpable attorneys on the Stevens prosecution team.

It appears to us that the actions of OPR and other Agency officials may constitute serious violations of professional competence, ethics and/or law, clearly of more import than the singular and unintentional "mistake" of Mr. Goeke. And yet, as far as we know, the Agency has not initiated investigations or made any effort to hold those responsible accountable for their actions. The OPR's decidedly biased findings in favor of attorneys in the Agency's executive offices, combined with the Agency's very public statements of confidence for those objectively more responsible for the Stevens prosecution has seriously damaged Mr. Goeke's career and reputation. The Agency's repeated failures to honor their obligations to act objectively, consistently and confidentially are suggestive of an alternative agenda.

[5] The response letter dated March 18, 2010 as quoted herein is attached.

Our client's career and reputation have been severely and most likely irreparably damaged by OPR's (and others') reckless mismanagement of the investigative process. His privacy rights have been violated, perhaps intentionally, by Department employees or agents of Department employees. He remains portrayed in the public eye as culpable and unfit to serve in his former position as an Assistant United States Attorney.

Finally, as a testament to his character and professionalism, we want to bring to your attention the fact that Mr. Goeke has, on his own initiative, incorporated the "lessons learned" and has taken affirmative steps to assure his documentation with regard to the pretrial interview of witnesses is above reproach. Mr. Goeke now goes above and beyond the requirements of the U.S. Attorney's Manual and ensures that a written memorialization of any such interview is prepared by an appropriate law enforcement officer regardless of whether new information is discussed during the interview. Mr. Goeke is also a vocal advocate in the Eastern District of Washington for the United States for fully addressing discovery and related issues as early and transparently as possible. Mr. Goeke's perspective has positively impacted multiple cases in the District.

We submit that exoneration and a public statement to that effect would substantially mitigate the ongoing harm to our client. We submit that United States Attorney Ormsby should be allowed to return Mr. Goeke to full duty as an Assistant United States Attorney with his full confidence and support. We submit that Mr. Goeke should not continue to suffer because he and his counsel conducted themselves professionally, responsibly and in accordance with the Agency's instructions when others did not.

We recognize that it is likely that there is a substantial amount of information to which we are not privy and that competing interests might have compelled the Agency to make difficult decisions and take actions with unexpected and unintentional harm to our client. While we are hopeful that you will take our concerns seriously, we want to make it clear that we are not asking you to justify the Agency's actions to us and we are not seeking a public forum upon which to air our grievances. Our request is singular: allow our client to clear his name and return to serving the public as a capable Assistant United States Attorney because it is the right thing to do.

Please do not hesitate to contact me with any questions.

Sincerely,

Bonnie J. Brownell, Esq.

cc. James A. Goeke
USA Ormsby

The Brownell Firm

Attorneys At Law

1050 17th STREET, NW, SUITE 700
WASHINGTON, DC 20036-5503
VOICE: (202) 822-1701 FACSIMILE: (202) 822-1914
www.thebrownellfirm.com

Bonnie J. Brownell*
Christopher R. Landrigan+
D. Robert DePriest^

*Also Admitted in MD
+Also Admitted in VA
^Only Admitted in NY

February 7, 2010

Raymond C. (Neil) Hurley
Senior Assistant Counsel
U.S. Department of Justice
Office of Professional Responsibility
950 Pennsylvania Ave., NW Room 3266
Washington, DC 20530

Re: Response to draft OPR report on behalf of James A. Goeke

SENT VIA FACSIMILE, ELECTRONIC MAIL AND US MAIL

Dear Mr. Hurley:

On behalf of our client, James A. Goeke, please accept this correspondence as our response to the Office of Professional Responsibility's ("OPR") draft report ("Draft Report") concerning allegations of his prosecutorial misconduct related to the trial of United States v. Stevens, Criminal No. 08-231 (D.D.C.) (EGS). We appreciate the opportunity to comment and are hopeful that our submission will lead you to conclude that Mr. Goeke's actions do not demonstrate reckless disregard or poor judgment and that the only reasonable conclusion you can reach is that he acted professionally, responsibly and appropriately under difficult conditions. This response is focused on the three conclusions that require revision.

We also request that you reconsider the context in which you evaluated Mr. Goeke's actions as it appears that your report attributes the actions and inactions of others to Mr. Goeke. A detailed analysis of Mr. Goeke's actions, as prepared by his counsel, Kobre & Kim LLP for the benefit of the Special Prosecutor Schuelke, is attached as Exhibit 1. A digest of your findings as they relate to Mr. Goeke is attached as Exhibit 2.

In order to give effect to existing OPR Policies and Procedures that mandate your consideration of certain factors such as workload and external pressures when determining the severity of allegations of misconduct, we submit that the volume of information processed and considered in this case was staggering. Under intense time

pressures resulting from the government's decision to expedite the trial[1], the trial team managed and synthesized many thousands of documents and other material. These included hundreds of FBI "302" interviews, ten months of wire tap data from four different telephones, numerous Grand Jury transcripts and exhibits, and thousands of pages of additional documents and photos in the possession of the Alaska U.S. Attorney's Office, the Public Integrity Section offices in Washington, D.C., and/or the FBI. This frenetic preparation involved seven-day weeks and twenty-four hour work days and began suddenly with little meaningful advance notice to Mr. Goeke.

During this stressful and hectic trial preparation stage, Mr. Goeke suddenly had to spend extended periods of time away from his wife and infant daughter. Mr. Goeke relocated his wife and daughter to be with extended family in a remote part of southeast Alaska during the trial, which proved to be a necessary but tremendous personal and logistical burden. Mr. Goeke's relocation of his family consumed the better part of a week in August 2008 and required Mr. Goeke's travel to and from southeast Alaska with his family, a trip he repeated again in September on the eve of trial.[2]

The Draft Report is implicitly dismissive of the time pressures and other stresses endured by Mr. Goeke and the obvious effect of such time pressures on the trial preparation and trial. The government chose to indict, refused to seek a continuance and challenged the court to an even faster trial date than the one initially ordered. Certainly, concern over the wisdom of these decisions is a view shared by Judge Sullivan. However, it cannot be stressed enough that Mr. Goeke did not chart the course or make these decisions. Rather, Mr. Goeke was expected to adapt his life and trial preparation efforts to the course as set in Washington, D.C. Your draft report is fundamentally flawed in that it implicitly attributes such decisions to Mr. Goeke and does not evaluate his conduct under such trying conditions.

As a final matter, we renew our objection as to whether your investigation and draft report are consistent with your grant of authority. Attached for the record (as Exhibit 3), please find a copy of the Department of Justice's (hereinafter, "DOJ") memorandum dated May 6, 2009. It concludes that your undertaking this investigation at this time and concurrent with the investigation by the court "is highly unusual". It "raises jurisdictional issues, and questions concerning the authority of the special counsel and the proper relationship between OPR's investigation and that of the special counsel." As set forth in our letter to you of March 9, 2010 (Attached as Exhibit 4) we renew our request

---

[1] The Draft Report notes that the United States actually requested a trial date earlier than the date originally set by the Court (the United States through Brenda Morris requested September 22, 2008 after the district court set October 8, 2008). Draft Report, p. 4. Mr. Goeke does not recall that sequence of events and was not present for the hearing. Given the nearly panicked pace the government was working under after indictment, Mr. Goeke is stunned that the United States actually asked to accelerate the trial.

[2] The difficulty and expense of travel in southeast Alaska is significant. Mr. Goeke and his family traveled by air, both in commercial jets and a light plane, as well as by ferry, to reach Skagway, Alaska from Anchorage, Alaska in August 2008. Mr. Goeke's trip in September 2008 from Anchorage to Skagway was by road and took nearly 24 hours of straight driving, followed by a ferry trip to reach Juneau, Alaska for a flight to Washington, D.C. Nearly all of this travel was at Mr. Goeke's personal expense, except for the flight from Juneau to Washington.

that you suspend this investigation and follow the long standing precedent to stand down pending the resolution of the Special Prosecutor's investigation. In addition, since it is possible that your unprecedented determination to move forward may be precipitated by judicial criticism of your effectiveness, the most ethical path would be to admit to at least the appearance of a conflict of interest and defer this investigation until the results of the Special Prosecutor's investigation are made public.

I. Executive Summary of the Three Requested Report Revisions

A. Mr. Goeke appropriately advocated the disclosure of the Bambi Tyree information and thereafter, deferred to his chain of command.

The final report should reflect that Mr. Goeke acted responsibly and professionally in seeking the disclosure of potentially exculpatory information as required by Brady v. Maryland, 373 U.S. 83 (1963)(hereinafter "Brady") and that despite his best efforts, departmental lines of authority precluded full consideration of his advocacy for disclosure and denied him direct access to the Agency's ethics office. The dispositive facts are not in dispute. Mr. Goeke provided appropriate levels of information and materials to the Public Integrity Section, answering all of their inquiries accurately and fully. Disagreeing with their decision, he repeatedly and independently asked for reconsideration of their decision not to disclose and consistently advocated disclosure. He repeatedly offered to provide additional information to support disclosure, and he asked for further consultation with ethics attorneys and the Department's Professional Responsibility Advisory Office ("PRAO").

The Public Integrity Section ("PIN"), as his supervising entity, repeatedly advised Mr. Goeke that PRAO was fully informed and that PRAO had stated that disclosure was not required. In overruling his repeated requests to revisit the disclosure issue, he received, what was in effect, a verbal reprimand, when he was told to drop it and that he was "covered."[3] These dispositive "facts" are set forth in the OPR Draft Report and as such stand in stark contrast to the OPR conclusion that Mr. Goeke's actions were in any way improper. The Draft Report should be revised to reflect that Mr. Goeke appropriately advocated disclosure and thereafter appropriately deferred to his chain of command. Based on long-standing precedent, because Mr. Goeke reasonably believed that PRAO was fully informed and had stated that disclosure was not required regarding the Tyree issue, OPR is barred from making any finding of misconduct against Mr. Goeke regarding this topic.

It is important to note that the practical consequences of the OPR conclusions also compel the requested revision. An OPR finding that Mr. Goeke was obligated to

[3] This verbal reprimand followed an earlier unequivocal command from PIN Chief William Welch via email in December 2007 in the context of two other matters that utilized Bill Allen as a witness that the Tyree disclosure issue was a decision for PIN, that PRAO had been consulted, and that Mr. Goeke was to take no action unless authorized by PIN. See Ex. 1, p. 16 (Kobre & Kim LLP Schuelke submittal). Mr. Welch was emphatic that Mr. Goeke took is orders from PIN on this issue. Importantly, this email came following communications with PIN Trial Attorneys Nicholas Marsh and Edward Sullivan and plainly demonstrated to Mr. Goeke that the PIN Trial Attorneys were discussing the matter with their supervisors.

disregard direct and explicit instructions from his supervisors will effectively destroy the existing chain of command and create chaos in the management of litigation involving more than one attorney. Assistant U.S. Attorneys will not be able to rely on the decisions of the Division Chief or Deputy, who in turn would not be able to rely on the instructions they receive from the First Assistant or the U.S. Attorney. No one would be able to delegate case work, as every attorney would have to independently verify each decision made by the entire trial team. OPR sets forth an impossible standard that is inconsistent with OPR's prior decisions, OPR's analytical framework and most importantly undermines the mission of the Agency to undertake its prosecutorial mission in an effective and efficient manner.

B. Mr. Goeke appropriately and responsibly executed his assigned tasks with regard to witness Rocky Williams which did not include indentifying inconsistencies in witness statements.

Mr. Goeke is a capable and dedicated prosecutor who has earned the respect and confidence of each of the United States Attorneys for whom he has worked as well as his colleagues. It is his habit to execute all of his assigned tasks with detailed preparation and competence. He has demonstrated his willingness to provide prosecutorial teams with whatever assistance they might request. He is an effective and efficient member of the team. Successful complex litigation and prosecutorial teamwork requires this approach.

In this reality-based context, OPR cannot conclude that Mr. Goeke acted irresponsibly. Implicit in a finding of wrongdoing in this instance is the premise that to act responsibly, he should have abandoned his assigned tasks (thereby engaging in insubordination) to engage in an extremely time consuming and independent verification of the consistency of Mr. Williams' statements (thereby usurping the responsibilities of other team members and supervisors). At no time did the litigation team task Mr. Goeke to decide which information should be disclosed to the defense concerning Mr. Williams. Again, the dispositive facts are not in dispute. Mr. Goeke's role was compartmentalized, and with respect to Mr. Williams, was limited to participating in a few trial preparation sessions (the "Trial Prep Sessions"). Mr. Goeke reasonably believed that Mr. Williams was fully available to the defense, reasonably believed Mr. Williams' Grand Jury testimony would be provided to the defense as a prior witness statement and carried out his limited tasks efficiently and completely.

Again, the practical consequences of the OPR conclusions also compel this requested revision. An OPR finding that Mr. Goeke committed professional misconduct here would essentially require any line attorney who ever had any contact with a witness to be responsible for cross-checking all files, statement and document relating to that witness for even the subtlest inconsistencies. This would be an unworkable and impossible standard and would undermine the ability of DOJ attorneys to work in teams or delegate responsibility. With this standard in place, the Department of Justice would simply be unable to carry out its mission. This conclusion is inconsistent with OPR's

prior decisions, OPR's analytical framework and most importantly the Agency's mission to undertake its prosecutorial mission in an effective and efficient manner.

C. Mr. Goeke appropriately and responsibly executed his assigned tasks which did not include indentifying discrepancies between documents in the VECO records.

Regarding the VECO records issue, the Draft Report tentatively found that Mr. Goeke did not identify discrepancies between voluminous documents but the report does not indicate that OPR inquired as to whether it was Mr. Goeke's assigned task and whether it would have constituted an appropriate allocation of resources to request him to do so. The dispositive facts are again not is dispute. It was not Mr. Goeke's responsibility to review these documents for discrepancies. Rather, he was assigned many other responsibilities which often required seven day weeks and twenty four hour work days.

An OPR finding that Mr. Goeke exercised poor judgment in failing to identify discrepancies in the VECO documents creates an impossible standard for Mr. Goeke and all AUSAs. They are either required to engage in a time consuming and detailed review of hundreds of pages of documents which they have not been tasked to review for this purpose or possess super human powers of recollection. All DOJ attorneys under this standard must either cross-check every document they review or be able to remember every detail from every document reviewed over the course of a case. In a case like Stevens which spanned several years and involved many thousands of documents, hundreds of FBI 302 interviews, dozens of potential witnesses, and several related prosecutions involving some of the same witnesses, such a standard would be unworkable and impossible. With this standard in place, the Department of Justice would simply be unable to carry out its mission.

II. Response to tentative conclusions of professional misconduct and poor judgment.

OPR's Draft Report reaches the tentative conclusion that Mr. Goeke committed professional misconduct by failing to fully inform his supervisors regarding disclosure of the "Bambi Tyree issue" and by failing to ensure the disclosure of statements made by Rocky Williams. The Draft Report also concludes that Mr. Goeke exercised poor judgment by failing to detect discrepancies in the VECO records. These conclusions are incorrect and unfair.

By reaching the conclusions that Mr. Goeke engaged in misconduct by acting in reckless disregard of an obligation and exercised poor judgment, OPR did not consider the appropriate standards and instead imposes a duty of perfection on Mr. Goeke. Mr. Goeke was a secondary and subordinate attorney, did not have the primary responsibility for the case or the relevant decisions, and was being utilized on numerous concurrent but unrelated cases and investigations leading up to and during the Stevens trial such that he

was not, and could not have been, expected to dedicate the time and effort to the tasks in question.

A. Mr. Goeke did not commit professional misconduct with regard to the Bambi Tyree disclosure issue.

The issue being investigated here is the failure to disclose exculpatory information in the September 9, 2008 Brady letter. The Draft Report concludes that Mr. Goeke acted in reckless disregard of his duty to provide full and accurate information to his supervisors, and contributed to their misapprehension of the material underlying facts.[4] This conclusion is incorrect and unfair.

Mr. Goeke did not contribute to his supervisors' misapprehension of the underlying facts, and the Draft Report misinterprets Mr. Goeke's responsibilities. To meet the standard set forth by OPR, "full and accurate information," Mr. Goeke would have been required to ensure that both he and his supervisors undertook a line by line review of every document. This would be an impossible standard given the delegation of tasks necessary for an effective trial team. Mr. Goeke repeatedly took steps to ensure that his supervisors had in their possession all of the original source documents and was explicitly informed by the representations of intermediate Public Integrity attorneys that his supervisors were fully informed.

Mr. Goeke's supervisors implicitly represented to him that they were fully informed and repeatedly made decisions concerning the issue, dating back to 2007. Only after reviewing the Draft Report has Mr. Goeke learned that his supervisors did not thoroughly review the source material he repeatedly provided to them and the other PIN attorneys.[5] As the Draft Report repeatedly states, Mr. Goeke "was persistent – if not entirely forthcoming – in urging the disclosure of the information."[6] Mr. Goeke did so in the face of consistent, concerted, and uniform opposition from all of the Public Integrity attorneys as reflected in their own internal email traffic. In this case, Mr. Goeke's supervisors rejected his offers to do a thorough review for purposes of determining whether disclosure was required, and told him to drop it and that he was "covered" after he persisted in his efforts to recommend disclosure to the defense.[7] Despite the Draft Report's recognition of these facts, which can only support a finding that Mr. Goeke carried out the duties of his job thoroughly and effectively, it inexplicably reaches the opposite and incorrect conclusion.

In its analysis, the Draft Report subdivides this issue and reaches conclusions on each individual sub-part of Mr. Goeke's role in the decision not to disclose. For example, the Draft Report concludes that Goeke contributed to his supervisors' misapprehension of

---

[4] See Draft Report, p. 378.

[5] See Draft Report, p. 352, fn. 985. The Draft Report's acceptance without comment of Mr. Welch's assertion that he failed to read the 2004 FBI 302 concerning Tyree until well after trial was underway when by his own assertion he believed to document to be so critical is in stark contrast to the standard of perfection imposed on Mr. Goeke.

[6] See Draft Report, p. 389.

[7] See Draft Report, page 378.

the materials underlying facts.[8] The Draft Report also concludes in the context of its discussion of the PRAO telephone calls that Mr. Goeke did not commit professional misconduct.[9] This approach ignores the totality of the circumstances and it ignores the bottom line: as the Draft Report admits, had Mr. Goeke been successful in his persistent efforts, proper Brady disclosure would have resulted.[10]

The Draft Report appears to premise its entire finding of misconduct against Mr. Goeke on OPR's conclusion that Mr. Goeke had some contact with FBI Special Agent Eckstein and AUSA Russo which he did not then communicate to his supervisors.[11] This is an incorrect assumption apparently based on email traffic not authored by Mr. Goeke. Had OPR interviewed Mr. Goeke, he would have made them aware that he did not engage in any detailed discussions with AUSA Russo and SA Eckstein for the purpose suggested in the Draft Report. Mr. Goeke believed and appropriately advised the litigation team that it would be improper for him to be involved in the witness preparation of Eckstein and Russo precisely because of his prior involvement with these witnesses in the underlying case.[12] Mr. Goeke simply did not want to be accused of attempting to conform the recollections of other witnesses to his recollection of events concerning Tyree. To the extent either AUSA Russo or SA Eckstein volunteered any information in passing, Mr. Goeke merely relayed such information as he understood it.

The Draft Report's premise is also incorrect because it does not consider the chain of command and the organizational structure of the prosecution team. The transfer of information within the prosecution team was indisputably routed through PIN Attorneys Marsh and Sullivan. Based on the structure created by his supervisors, Mr. Goeke rarely communicated directly with Ms. Morris or Mr. Welch. Mr. Marsh was almost always the intermediary. The Draft Report, however, does not appear to understand this, as evidenced by its statement that "Goeke never told Morris or Welch that both Russo and

---

[8] See Draft Report, page 378.

[9] See Draft Report, page 389.

[10] See Draft Report, page 377. Notably, the relevant 2004 FBI 302 concerning the Tyree disclosure issue and other related materials were ultimately disclosed during trial when the entire Anchorage Police Department file concerning its investigation of Mr. Allen was provided to the defense. Despite the fact that the Alaska U.S. Attorney's Office was recused from this investigation of Mr. Allen, supervisors at PIN insisted that Mr. Goeke review the file during the Stevens trial. Mr. Goeke declined to do so.

[11] Apparently, Mr. Welch claims that the Tyree disclosure issue was decided in his mind after he finally read the 2004 FBI 302 concerning Tyree well after trial was underway in October 2008. Draft Report, p. 373, fn. 1017. Accordingly, regardless of what discussions Trial Attorney Marsh may have had with FBI SA Eckstein and AUSA Russo and what further discussions OPR believes should have occurred, Mr. Welch had possession of the relevant source documents well before trial, documents that had been transmitted to Public Integrity in October 2007 and again periodically thereafter, including at least one direct email transmission to Mr. Welch prior to trial in 2008. Draft Report, p. 352, fn. 985. That these documents were apparently not read by the PIN supervisors until well after trial was underway cannot be attributed to Mr. Goeke.

[12] For precisely this reason, Mr. Goeke refused to participate in the October 2007 interview of Ms. Tyree. Mr. Goeke did participate in a later September 2008 interview of Mr. Allen, but he was specifically directed to do so and time was exceedingly short. To the extent Mr. Goeke had any discussions with AUSA Russo and SA Eckstein it was in passing and he accurately reported the substance of those interactions. Mr. Goeke did not, however, undertake an interview of AUSA Russo and SA Eckstein as that would have been improper in his view given his own status as a witness.

Eckstein stood behind what they wrote about the SeaTac interview."[13] Similarly, the Draft Report's statement that Ms. Morris and Mr. Welch "relied on the three attorneys intimately familiar with the facts – Marsh, Bottini, and Goeke – to provide them with the essential information" does not evidence an understanding of the structure of the prosecution team. Ms. Morris and Mr. Welch did not rely on Mr. Goeke. They relied on PIN Attorney Marsh, and to a lesser extent, PIN Attorney Sullivan, because that was the hierarchy they established and maintained. The Draft Report makes this clear. On September 8, 2008, a day before the September Brady letter was sent, Mr. Welch met with "Marsh, Sullivan, and Morris", not Mr. Goeke or Mr. Bottini. Draft Report, p. 344. This was the pattern throughout Mr. Goeke's tenure on the case, going back to 2006.

Accordingly, to the extent Mr. Goeke's supervisors did not get the information necessary to make the correct determinations, Mr. Goeke submits that it was not because of any misconduct on his part.[14] After all, if Mr. Goeke were interested in obscuring or suppressing the Tyree information, he would not have continually raised the issue to the exasperation and frustration of the Public Integrity attorneys. The frustration at PIN regarding Mr. Goeke repeatedly raising the issue led Mr. Welch to explicitly command and reprimand Mr. Goeke and Mr. Bottini in December 2007 via email that no disclosure of the Tyree issue was required. The decision regarding disclosure was for Public Integrity and Mr. Goeke worked at the sole direction of Public Integrity. His attempts to seek clarification regarding disclosure led to the reprimand from Ms. Morris.

It is important to note that the Department of Justice requires its attorneys to undergo annual Brady training. The current Brady training requires attorneys to seek PRAO consultation and supervisory consultation on any disputed questions of ethics. In this case, Mr. Goeke was repeatedly advised that both PRAO and supervisory consultation had properly occurred. As the Draft Report implicitly acknowledges, Mr. Goeke did not participate in providing factual input to PRAO and therefore did not contribute to any factual misapprehensions underpinning PRAO's advice.[15] Based on long-standing precedent, since Mr. Goeke acted in conformity with the Department of Justice's training, he cannot be found to have acted in reckless disregard, regardless of whether OPR would have had him take additional actions.

---

[13] See Draft Report, page 378.

[14] To the extent the Draft Report appears to fault PIN Trial Attorney Marsh for allegedly failing to provide all material facts to PRAO concerning the Tyree issue, Mr. Goeke notes that he is no less a victim of any such conduct, if it occurred, than Mr. Marsh's supervisors. If such conduct did occur, it raises grave concerns on the part of Mr. Goeke, but he was not aware of any such allegations or concerns during the timeframe at issue in the Draft Report.

[15] The Draft Report on several occasions erroneously states the Mr. Goeke personally provided information to PRAO. Draft Report, p. 371, fn. 1015. The record does not support this assertion and rather establishes that only PIN Trial Attorney Marsh and PIN Trial Attorney Sullivan spoke directly to PRAO. Draft Report, p. 316, fn. 838 ("The PRAO attorney on the call (in October 2007) told OPR that she recalled only one person on the call with her . . . and the related PRAO Inquiry Summary Sheet indicates that Marsh was the caller."). Accordingly, the record establishes that apparently only Trial Attorney Marsh spoke to PRAO in October 2007 and further establishes that Mr. Goeke never saw corresponding written advice produced from PRAO regarding the October 2007 inquiry until 2010.

B. Mr. Goeke did not commit professional misconduct with regard to the Rocky Williams interviews in August 2008.

The Draft Report concludes that Mr. Goeke engaged in professional misconduct by acting in reckless disregard of his disclosure obligations. This conclusion is based entirely on OPR's assertion that Mr. Goeke "repeatedly missed the significance of [exculpatory] information."[16] OPR must amend this conclusion because it requires a superhuman intellect and nothing short of perfection by Department of Justice line attorneys.

Had OPR informed Mr. Goeke that the investigation was administrative and that his participation was not voluntary, he would have helped them understand his extremely limited role in the Brady review process.[17] The Draft Report does not consider Mr. Goeke's understanding that Mr. Williams' prior statements in his Grand Jury transcript would be provided to the defense and Mr. Goeke rationally believed Mr. Williams' August 2008 statements to be consistent with his Grand Jury testimony. As such, OPR's findings ignore Mr. Goeke's role in the case at the time of Mr. Williams' 2008 interviews, Mr. Goeke's reasonable assumptions about the role of others, the chaotic pace of the collateral trial preparation occurring simultaneously, and Mr. Williams' expressed intent to make himself available to the defense for an interview.

Mr. Goeke did not recklessly cause Brady material disclosed by Rocky Williams in the August 2008 trial preparation sessions ("the Trial Prep Sessions") to be concealed from the defense.[18] Mr. Goeke reasonably believed that Williams' statements during the Trial Prep Sessions (with the exception of one instance[19]) were simply rehashed prior Grand Jury testimony or statements made during investigative interviews. Mr. Goeke reasonably believed that Mr. Williams' Grand Jury testimony would be provided to the defense as a Jencks Act statement of the witness and under Rule 26.2. Further, there was no reason to believe that there were inconsistencies in the statement because the government had Mr. Williams review his Grand Jury testimony prior to trial and Mr. Williams did not identify any errors or make any corrections in his Grand Jury testimony to Mr. Goeke's knowledge. The Draft Report apparently does not consider that the purpose of the Brady letter, as understood by Mr. Goeke at the time, was to identify materials that would otherwise not be provided to the defense. Here, the defense would

---

[16] Draft Report, p. 508.

[17] The Draft Report is highly critical of the utilization of agents in the Brady review process. Mr Goeke did not establish this process and did not fully appreciate the extent to which agents were involved in the review of the information as opposed to identification of sources of potential Brady information. Mr. Goeke understood that the Brady review was coordinated from Washington, D.C.

[18] Notably, Mr. Goeke's initial presence during the first 2008 Trial Prep Session with Mr. Williams was actually for the purpose of interviewing Mr. Williams concerning another active case unrelated to Senator Stevens against former Alaska State Senator John Cowdery. At that time, the Cowdery case was under indictment with a pending trial date. Mr. Goeke attended the Trial Prep Session with Mr. Williams with an FBI agent for the purpose of having an FBI 302 completed regarding the Cowdery case and then happened to stay for the conclusion of the entire interview that extended to the Stevens case.

[19] With regard to the new information concerning Mr. Williams' communications with Senator Stevens and the Senator's wife that Mr. Goeke identified, he requested preparation of an FBI 302 consistent with DOJ policy.

automatically get a copy of the Grand Jury transcript, which Mr. Goeke had no reason to believe was not substantially similar to Williams' other statements.[20] Moreover, Mr. Goeke understood directly from Mr. Williams that he was available to the defense and intended to meet with the defense before trial.

Even if the Draft Report's apparent standard of strict liability is applied, Mr. Goeke was not responsible for reviewing Williams' source material for Brady purposes. He reasonably believed that the team member assigned such tasks would properly disclose exculpatory material. Mr. Goeke did not detect any failure to disclose in the Department's Brady letters, but rather understood that the defense would receive a copy of Mr. Williams' Grand Jury testimony. And, again, it cannot be over emphasized that Mr. Goeke's opportunity to review any materials, whether Brady letters, emails, or other documents, competed with innumerable other priorities for his time and attention.

C. Mr. Goeke did not exercise poor judgment with regard to the VECO record discrepancies.

The Draft Report again appears to require perfection of DOJ attorneys and essentially uses strict liability as its standard for identifying discrepancies in documentation. Mr. Goeke did not exercise poor judgment with regard to the VECO records, and this conclusion has no merit.

As the Draft Report readily acknowledges, Mr. Goeke was not responsible for presenting any of the evidence at issue during trial. Further, Mr. Goeke was not in a position to dictate his role in the trial or its preparation. Had his superiors chosen to assign him to review this evidence with the purpose of identifying discrepancies, Mr. Goeke would have done so and may have detected those discrepancies.

Mr. Goeke is being accused of poor judgment because he reviewed arguably conflicting documents without calling attention to the discrepancies sometime prior to trial. The draft report fails to consider that Mr. Goeke never reviewed these documents for the specific purpose of identifying discrepancies, and that he reviewed literally thousands of documents over the course of his roughly three years with this case and investigation. This essentially suggests that DOJ attorneys are required to be perfect.

III. OPR has improperly handled this investigation.

OPR's Draft Report is incomplete, incorrect and does not accurately reflect Mr. Goeke's role in United States v. Stevens. Further, the Draft Report does not properly consider the context of the case, does not apply a realistic standard for DOJ attorneys and

[20] Mr. Goeke's review of the Grand Jury transcripts of Robert Persons and Augie Paone for Brady material contemporaneous with the September Brady letter demonstrates the deliberate and meticulous way Mr. Goeke approaches Brady issues when assigned such tasks. Had he been assigned the task of reviewing all materials concerning Mr. Williams for Brady material, as someone evidently was undertaking with regard to the September Brady letter, Mr. Goeke would have approached the task in the same way he approached his review of the Persons and Paone Grand Jury transcripts.

relies on questionable jurisdiction and an incomplete factual record to reach conclusions which appear to be politically expedient.

A. The Draft Report does not apply realistic standards for DOJ attorneys.

In its analysis, OPR appears to suggest that nothing short of perfection is acceptable for its line attorneys. In the context of this massive and accelerated trial preparation, mistakes were inevitable. The report does not recognize that occasional mistakes and oversights were unavoidable, and labels routine (and certainly regrettable) mistakes, oversights and confusino resulting from the team's supervisory structure as reckless discharge of duties or poor judgment on the part of subordinate attorneys. This creates an impossible standard for DOJ attorneys.

B. OPR's authority and jurisdiction to conduct this investigation are questionable.

As OPR is aware, Mr. Goeke remains the subject of a nearly two year long criminal investigation into the discharge of his duties relating to the prosecution of United States v. Stevens. Ignoring the advice of the Department of Justice that "it is highly unusual to have an investigation by the court concurrent with an OPR investigation," and that "it raises jurisdictional issues," OPR still chose to proceed with this investigation and Draft Report.[21] We questioned in a March 9, 2010 letter whether OPR had jurisdiction to conduct this investigation, and we raise these concerns again.[22] OPR's failure to exercise its right to interview Mr. Goeke appears, by OPR's own admission, to be intentionally designed to allow OPR to avoid addressing OPR's jurisdictional and procedural hurdles given the Department's implicit acquiescence to the separate criminal investigation. OPR's desire to cooperate with ongoing criminal investigations of Department personnel should not cause OPR to abdicate its fact finding role.

C. The Draft Report unreasonably prejudices Mr. Goeke for failing to waive his constitutional rights.

OPR's website states clearly that OPR has the authority to conduct administrative investigations and compel testimony from government employees under investigation by OPR. There is no indication that OPR has authority to conduct non-administrative, voluntary and potentially criminal investigations. There is nothing to suggest that OPR is authorized to pressure federal employees such as Mr. Goeke to give a voluntary statement and thereby waive their constitutional rights. In fact the long standing structure of federal investigations suggests that this in not the case.

It is equally important to note that this is the second time that Mr. Goeke was asked to waive his constitutional rights and give a statement regarding his actions in the

[21] See May 6, 2009 Memorandum for the Deputy Attorney General (attached).
[22] See March 9, 2010 Letter to OPR (attached).

Stevens matter. He had already provided a lengthy statement to the Special Prosecutor, under oath, waiving his constitutional rights. It is beyond peradventure that federal prosecutors in cases involving the most heinous acts of violence (including terrorism) would suggest that they are entitled to a single statement from the defendant, let alone two. Mr. Goeke is not a terrorist but rather a skilled and dedicated federal prosecutor. He is also a citizen of the United States. That OPR would suggest that his federal employment deprives him of the most basic of constitutional rights is the most serious indictment of the OPR investigation herein.

OPR should explain what they believe justifies their insistence that Mr. Goeke's willingness to give a statement must be voluntary when they had the authority and historical practice to compel the interview with its investigators. OPR is breaking with established investigative processes that provide that it should stand down during the pendency of an ongoing criminal investigation, on the same matter for which the witness had already given an extensive statement. This raises realistic concerns as to whether OPR intended to pressure federal employees to waive their constitutional rights to assist the Special Prosecutor by providing a second statement that could be used against the witness in connection with the concurrent criminal investigation. This concern was well-founded given that OPR's refusal to compel an interview of Mr. Goeke may stem from OPR's unprecedented determination to move forward with a collateral voluntary investigation in order to supplement the findings of the Special Prosecutor's criminal investigation.[23] Evidently OPR places more importance on bullying federal employees into waiving their constitutional rights in order to act as an assistant to a capable Special Prosecutor than it does on using its authority to develop a complete and accurate, independent factual record at the right time and place.

When Mr. Goeke declined to participate in a voluntary interview, OPR assured him that it would draw no negative inference from his decision.[24] This has not proven to be the case. Through groundless tentative findings of professional misconduct and poor judgment on the part of Mr. Goeke, OPR clearly shows that its insistence on procedural irregularities have prejudiced against Mr. Goeke.

D. OPR is not interested in a full factual record.

In its November 8, 2010 letter transmitting the Draft Report, OPR asserted that this response is not an opportunity to present additional evidence. We are concerned about OPR's arbitrary closure of the evidentiary record, and believe this is inconsistent with a genuine fact-finding mission and OPR's own analytical framework.

---

[23] See Draft Report, page 32.

[24] OPR's insistence on a voluntary interview of Mr. Goeke begs the question whether any other Department employees were compelled during the course of OPR's investigation. If so, the fundamental unfairness of the situation is only compounded.

E. Publicly reported leaks have already irreparably damaged Mr. Goeke's reputation.

The findings in the Draft Report have been widely reported in the press as a result of persistent leaks. These leaks originated with individuals presently employed by the Department or third parties who we believe OPR required to sign nondisclosure agreements, including all private sector counsel. These leaks are likely to constitute Privacy Act violations and have caused irreparable damage to Mr. Goeke's reputation. They have virtually eliminated any opportunity for Mr. Goeke to provide a credible explanation and have it evaluated objectively. Likely, this was the precise intent of those individuals who leaked these matters to the press. These leaks are particularly troubling in the context of Mr. Goeke's decision not to participate in this investigation, as he could not possibly have consented to the release of this information.

Mr. Goeke on the other hand has followed the various protective orders and the requirements of the Privacy Act and has been unable to respond these allegations, either publicly or to colleagues and family. Given that OPR and the Department have given no indication that any investigation of these leaks is underway or even contemplated, despite the fact that such leaks constitute both actionable civil violations and prosecutable criminal acts under the Privacy Act, and certainly constitute intentional professional misconduct, Mr. Goeke must evaluate his own redress under the Privacy Act. To this end, we request that Mr. Goeke be permitted to retain a copy of the Draft Report to ensure his rights are protected and that any Privacy Act violations are resolved.

IV. Summary of the Requested Revisions to the Draft Report

As definitive evidence of the complexity of the underlying case, we note that your one thousand page Draft Report is incomplete and contains factual errors which we anticipate you will be willing to correct. We also ask you to reconsider your proffered standard of strict liability for professional conduct that, in your application, requires absolute perfection based on post-litigation second guessing of innumerable litigation decisions, decisions Mr. Goeke did not make and had no authority to countermand. When a realistic standard is applied, Mr. Goeke must be found to have acted both reasonably and responsibly.

We find that your report evidences a fundamental misunderstanding of the absolutely essential chain of command within a federal prosecutorial team and thereby, your report does not accurately reflect Mr. Goeke's role in United States v. Stevens. We note our concerns that there is simply no factual basis for the Draft Report's tentative conclusion that Mr. Goeke was reckless in the discharge of his duties and exercised poor judgment. It appears that you have mistakenly attributed the actions and inactions of others to Mr. Goeke. We ask you to reconsider your factual findings with respect to Mr. Goeke in isolation and against OPR's own analytical framework. Since you cannot reasonably support your conclusions of wrong doing, we are hopeful you will agree with our comments, revise your report accordingly and conclude, as we have, that Mr. Goeke discharged his duties responsibly and appropriately.

We also ask that you reconsider whether this report promotes your underlying duty to provide the DOJ with guidance and practical advice on how to discharge the duties of federal prosecutors in an effective and ethical manner. Left uncorrected your report puts all AUSAs on notice that their careers and livelihood may be at risk if they are assigned to provide litigation support to prosecutions managed by Main Justice. They cannot count on their chain of command through the United States Attorney to formulate a litigation plan with clearly defined lines of responsibility and appropriate delegation. They may be concerned that if the litigation becomes contentious as it is by its very nature, they may anticipate being disciplined for decisions made by their new superiors at Main Justice over their objections. The Department of Justice has historically attracted the best and the brightest from the most prestigious law schools in the country who zealously engage in public service, sacrificing personal wealth and opportunity for an opportunity to further the interests of justice. This will not continue if such attorneys are held to standards of inhuman flawlessness.

We ask you to consider that OPR's Draft Report does not properly consider the context of the alleged actions and omissions. Specifically, it gives no meaningful weight to its own conclusion that Mr. Goeke did not intentionally fail to disclose exculpatory evidence under Brady v. Maryland, 373 U.S. 83 (1963). Instead, it attempts to impose an impossible standard of competence, endurance and responsibility on a line attorney who had no input in the management of the case. At no time did Mr. Goeke have more than a supporting role in the trial of Senator Stevens. His minimized and compartmentalized role in the case cannot support these findings of professional misconduct. In his role at the bottom of the prosecution hierarchy, Mr. Goeke did not have the authority to compel the actions he was apparently obligated to ensure. To the extent this litigation did not end well, it is unreasonable to conclude that Mr. Goeke's best efforts played any meaningful role in creating the problem identified in the draft report. And, as the Draft Report implicitly acknowledges, Mr. Goeke bears no responsibility for any of the issues of concern identified by the Court as the basis for the Court's criminal investigation.

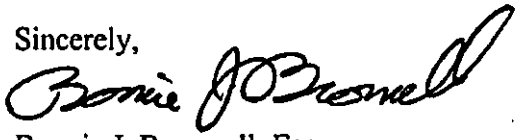
In addition to our substantive disagreement with the conclusions of the report, we have serious and ongoing concerns about the way OPR has handled this investigation. As we discussed in our March 9, 2010 letter, we question whether or not OPR has authority and/or jurisdiction to even conduct this concurrent investigation.[25] We also believe the Draft Report has unfairly prejudiced Mr. Goeke for his unwillingness to waive his Constitutional rights as a citizen. Finally, we are concerned that there may have been a conflict of interest, precipitated in part by Judge Sullivan's criticism of OPR which should have compelled OPR to stand down until the criminal investigation was concluded.

We appreciate the opportunity to review and comment on the Draft Report. For the above reasons, we respectfully request that you withdraw the tentative findings of professional misconduct and poor judgment against Mr. Goeke. We further request that

[25] See March 9, 2010 letter (attached).

you conduct an investigation into the repeated disclosure of the conclusions of the Draft Report to the press.

Sincerely,



Bonnie J. Brownell, Esq.

D. Robert DePriest, Esq.

cc. James A. Goeke

Exhibit 1

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

In re SPECIAL PROCEEDINGS	Misc. No. 09-mc-00198-EGS

Submission on Behalf of James A. Goeke
To the Special Prosecutor

Matthew I. Menchel
Danielle L. Rose
Daniel L. Rashbaum

KOBRE & KIM LLP
800 Third Avenue
New York, New York 10022
Tel +1 212 488 1200

Counsel for James A. Goeke

CONFIDENTIAL TREATMENT REQUESTED

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

BACKGROUND 6

A. James Goeke's Education and Experience 6

B. The Polar Pen Investigation 7

THE BRADY REVIEW 9

A. The Augie Paone and Robert Persons Disclosure 10

B. The Bambi Tyree Disclosure 11

C. Rocky Williams and the Kenai River Classic Disclosure 19

D. Bill Allen and the "Torricelli Note" 24

ARGUMENT 27

POINT I:

BECAUSE MR. GOEKE DID NOT INTENTIONALLY VIOLATE A COURT ORDER, HE SHOULD NOT BE HELD IN CRIMINAL CONTEMPT 27

A. Legal Standard 27

B. Mr. Goeke Acted in Good Faith Before, During and After the Stevens Trial And Should Not Be Held in Criminal Contempt 28

POINT II:

AS A MATTER OF BASIC FAIRNESS, MR. GOEKE SHOULD NOT BE REFERRED FOR CRIMINAL PROSECUTION 30

CONCLUSION 31

CONFIDENTIAL TREATMENT REQUESTED

TABLE OF AUTHORITIES

Cases

Brady v. Maryland, 373 U.S. 83 (1963) 1

Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003) 27, 28, 30

In re Holloway, 995 F.2d 1080 (D.C. Cir. 1993) 27

Landmark Legal Foundation v. E.P.A., 272 F. Supp. 2d 70 (D.C. Cir. 2003) 27

Traub v. United States, 232 F.2d 43 (D.C. Cir. 1955) 27

United States v. Beasley, 576 F.2d 626 (5th Cir. 1978) 28

United States v. Campagnuolo, 592 F.2d 852 (5th Cir. 1979) 28

United States v. Higgs, 713 F.2d 39 (3rd Cir. 1983) 28

United States v. Jones, --- F. Supp. 2d. ---, 2010 WL 565478 (D. Mass. Feb. 19, 2010) 27

Statutes

18 U.S.C. § 401(3) 28

Other Authorities

Memoranda from Deputy Attorney General David W. Ogden to all Dep't Prosecutors and United States Attorneys (Jan. 4, 2010) 10, 23, 29

CONFIDENTIAL TREATMENT REQUESTED

PRELIMINARY STATEMENT

James Goeke should not be held in criminal contempt.

As demonstrated herein, Mr. Goeke did not intentionally fail to disclose exculpatory material under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, and he did not intentionally violate any Court order. Rather, at all times, Mr. Goeke discharged his duties in good faith.

The Department of Justice's prosecution of Senator Theodore Stevens was rushed and disorganized. After a lengthy, deliberate and wide-ranging public corruption investigation dubbed Operation Polar Pen, the Government indicted Senator Stevens with almost no advance trial preparation. Concerned about the imminent expiration of an agreement preserving applicable statute of limitations and possibly driven by exogenous political factors, some of the Department of Justice's highest ranking officials rushed to indict Senator Stevens. Mr. Goeke, then a line attorney from the District of Alaska, did not make the decision to indict Senator Stevens. Nor was he consulted as to the timing of the indictment.

The Department bet that Senator Stevens' defense counsel would waive Stevens' right to a speedy trial, thereby extending the time for the Government to complete crucial pre-trial tasks. The Department was wrong. Senator Stevens' counsel pressed for a quick trial before the November 2008 elections. Ill-prepared but nonetheless determined not to oppose a speedy trial, the Department was therefore required to prosecute the Stevens case in an extremely short time.

To make matters worse, the Assistant Attorney General's Office decreed that Brenda Morris should lead the trial team. Ms. Morris was a highly experienced and talented prosecutor, but she was relatively unfamiliar with the Polar Pen Investigation. The Assistant Attorney General's Office simultaneously yanked Mr. Goeke and his colleague from the Public Integrity Section ("Public Integrity" or "PIN"), Ed Sullivan, from the trial team. Though the team welcomed Ms. Morris, the eleventh-hour reshuffling created new problems. Although crushed for time, the team had to devote scarce resources to educate Ms. Morris on the case while simultaneously responding to constant (and sometimes illogical) demands from the Assistant Attorney General's Office.

In short, the Department created conditions ripe for serious error. And there was error. But Mr. Goeke should not be referred for criminal prosecution because, as demonstrated below, Mr. Goeke acted in good faith and did not intentionally violate any court order.

At the time of these events, Mr. Goeke had virtually no complex trial experience and limited training on his *Brady* obligations. Mr. Goeke had tried only a handful of cases — almost all of which were routine drug cases and not discovery-intensive matters.

Mr. Goeke did not have a leadership role on the Stevens trial team. At the direction of the Assistant Attorney General's Office, Mr. Goeke did not examine any witnesses at trial. The Assistant Attorney General's Office even instructed Mr. Goeke not to sit at counsel's table. As a result, Mr. Goeke attended the proceedings only erratically and from the courtroom's gallery. Having not been present for most of the Court's discussion regarding *Brady* disclosures, Mr. Goeke received his marching orders

second-hand. As Mr. Sullivan observed during the trial, "Jim and I are totally in the dark re what's going on in court." Ex. A, CRM BOTTINI 033612. Mr. Goeke did not attend the testimony of various key witnesses. He was on an airplane back to his family in Alaska during closing arguments. He was not there for the jury's deliberation or verdict.

Mr. Goeke was not responsible for the Brady review. With respect to the *Brady* review, Mr. Goeke did not determine who was reviewing what issues. He did not sign the letters. He did not have primary drafting responsibility. Rather, consistent with his subordinate role, Mr. Goeke reviewed narrow issues and did his best, within the team confines (and subject to Public Integrity's direction), to be thorough and persistent. For example, Mr. Goeke made full disclosure regarding Robert Persons' and Augie Paone's grand jury testimony and pressed for disclosure on the Bambi Tyree-Bill Allen relationship.

Rather, Mr. Goeke had an anonymous supporting role on the Stevens team. Essentially, Mr. Goeke spent the trial completing discrete, one-off tasks in an extremely demanding and disorganized environment. Before the trial, Mr. Goeke was largely focused on assembling the vast exhibits. During trial, Mr. Goeke pitched in on whatever project required attention depending on the trial team's needs. And though the Senator Stevens prosecution was highly publicized, Mr. Goeke was not deriving any glory. Quite the opposite, Mr. Goeke was working grueling hours in the backrooms, basically un-noticed and far from his young family.

And, as demonstrated herein, the record reflects that Mr. Goeke at all times discharged his duties in good faith. With respect to the three specific issues raised by the

Special Prosecutor, the record shows that Mr. Goeke acted as a dedicated (if imperfect) public servant:

- Mr. Goeke did his best to cause the trial team to disclose fully Bambi Tyree's relationship with and sworn statement related to Bill Allen. Mr. Goeke hounded the trial team to evaluate and re-evaluate the appropriate disclosures and demanded that issues be vetted with the Department's Professional Responsibility Advisory Office ("PRAO"). Indeed, Mr. Goeke pressed this issue so often and so vociferously that an exasperated William Welch, who then headed Public Integrity and did not see the need to pursue the point further, eventually snapped, "Joe and Jim, per the recusal notice, you work for PIN, and so these are your marching orders until I talk to [the Alaska U.S. Attorney]" (Ex. B, CRM089170, Goeke Ex. 21);

- Mr. Goeke did not try to obscure from the defense Robert ("Rocky") Williams' assumption that his time working on Senator Stevens' Girdwood house would be included on the Christensen Builders' invoices; Mr. Williams' belief that Stevens intended to pay those bills; or Senator Stevens' statement that he wished to pay the bills. As Mr. Goeke testified, at the time of his August 2008 interview of Mr. Williams (where Mr. Williams made such statements), Mr. Goeke did not view such information as "new." Tr. 66. Rather, Mr. Goeke believed that Mr. Williams had already made these statements [redacted] in various 2006 Government debriefings. *Id.* at 53, 65. And, indeed, Mr. Goeke was correct. *See* Section C (1), below. Mr. Goeke reasonably assumed that, to the extent Mr.

Williams' views constituted *Brady* or *Giglio* material, the trial team member responsible for the Williams-specific *Brady* review would designate such statements for disclosure; and

- Likewise, Mr. Goeke did not intentionally fail to disclose that Bill Allen told the Government on April 15, 2008 that he did not remember discussing the "Torricelli Note" with Robert Persons. Mr. Goeke reasonably believed that, consistent with FBI standard policy, the FBI generated a 302 in connection with the Allen April 15, 2008 interview; and that the team member reviewing the Allen material for *Brady* or *Giglio* source material would disclose any exculpatory material. Moreover, at the time of the September 9, 2008 *Brady* letter (which, among other things addressed Allen's prior interviews), Allen had not yet informed the prosecution that he recalled Persons stating that the Torricelli Note was just Stevens' way of "covering his ass." Therefore, when Mr. Goeke reviewed the draft *Brady* letter section addressing Allen (for which he was not responsible), Mr. Allen's non-recollection of a discussion with Persons was not *Brady or Giglio* material; rather, Allen's lack of recollection did not *become Giglio* material until Allen developed an inconsistent recollection on the eve of trial. But Mr. Goeke was not at that trial preparation session; was not examining Allen at trial; and does not recall even being present at Allen's testimony. Rather, Mr. Goeke was focused on other urgent matters and did not review his notes of the April 15 interview in connection with the *Brady* review. In short, it did not occur to Mr. Goeke to flag the issue for the prosecutors responsible for Allen's preparation and

testimony. Moreover, Mr. Goeke saved his notes of the relevant interview (an act inconsistent with an effort to obscure what Allen said in April 2008), and when asked to locate his notes on this issue, Mr. Goeke promptly retrieved and shared them with the Department.

Ultimately, as all now well know, the Government's *Brady* disclosures were grievously flawed. But, in the case of Mr. Goeke, any oversights were not intentional. Faced with a lack of leadership, limited responsibility and timing-driven chaos, Mr. Goeke did the best he could. And, under established law, he cannot be held criminally liable for any misconduct of others. In short, Mr. Goeke should not be referred for criminal prosecution or any other censure.

BACKGROUND

A. James Goeke's Education and Experience

Mr. Goeke is a young prosecutor with limited courtroom experience. After graduating from U.C. Berkeley's Boalt Hall School of Law in 1997, Mr. Goeke clerked for a federal judge in the Eastern District of Washington and then practiced at the law firms of Washburn, Briscoe & McCarthy and Preston Gates & Ellis in San Francisco, California and Seattle, Washington, respectively. In private practice, Mr. Goeke focused on commercial litigation, with an emphasis on environmental law. During that time, Mr. Goeke had almost no criminal experience, except a six-week externship at the King County's District Attorney's Office in Seattle where he handled routine buy/bust drug cases.

In 2003, Mr. Goeke joined the U.S. Attorney's Office in Anchorage, Alaska. In Mr. Goeke's years at the Alaska U.S. Attorney's Office prior to the Polar Pen-related

trials, Mr. Goeke did not develop any complex trial experience. To the contrary, Mr. Goeke's docket was general; he worked primarily on drug and gun cases and some child-related matters, with a smattering of wildlife and immigration matters. Only five of those cases progressed to trial. Two were routine drug cases, one was a counterfeiting case with a prior confession, and one was a child enticement case. None involved any complex discovery issues, and all lasted no more than a few days.

B. The Polar Pen Investigation

In late 2005, Mr. Goeke was directed to join the so-called Polar Pen Investigation, an inquiry led by the Department's Public Integrity Section into Alaska federal and state public corruption. When Mr. Goeke joined the team, the Alaska U.S. Attorney's Office had been recused from the inquiry. As a result, Mr. Goeke and another Alaska-based line prosecutor, Joseph Bottini, reported directly to PIN.

When Mr. Goeke joined the Polar Pen team, the investigation was mid-stream and already far-flung. The scope of the investigation only grew. By August 2006, search warrants had been issued for more than 20 locations in Alaska. Eventually, in the Senator Stevens case alone, at least 65 witnesses testified before grand juries in Alaska and the District of Columbia. Over the course of the Stevens investigation, the FBI wrote nearly 300 Forms FD-302 (most of which were completed before Senator Stevens' indictment); and the Internal Revenue Service, for its part, wrote over 100 Memoranda of Interviews (or MOIs). The investigation tackled various potential sources of public corruption, including efforts to build a private prison, bribery, money laundering, illegal campaign contributions, and legislation regarding oil taxation, and fisheries. And there were many targets. By September 2009, 12 persons had been convicted, pled guilty or

were charged and awaiting trial or sentencing (and at least seven others have been investigated but not charged):

- Senator Theodore Stevens – Conviction overturned (U.S. Senator)
- Peter Kott – Convicted (Alaska House Speaker)
- Victor Kohring – Convicted (State Representative)
- Thomas Anderson – Convicted (State Representative)
- Bill Allen – Pled guilty (VECO Chief Executive Officer)
- Rick Smith – Pled guilty (VECO Vice-President)
- [redacted]
- [redacted]
- [redacted]
- James Clark – Pled guilty (Lawyer, lobbyist, Governor Murkowski's Chief of Staff)
- Beverly Masek – Pled guilty (State Representative)
- William Weimar – Pled guilty (Private prison advocate)
- William Bobrick – Pled guilty (City lobbyist)
- [redacted]
- John Cowdery – Pled guilty (State Senator)
- Bruce Weyhrauch – Indicted and awaiting trial (State Representative)
- [redacted]
- [redacted]
- [redacted]

Prior to the Stevens trial, Mr. Goeke was involved in only one Polar Pen trial. He tried the Alaska House Speaker, Peter Kott, with PIN Trial Attorney Nicholas Marsh. That trial lasted around two weeks and was under the direction of Public Integrity.

THE BRADY REVIEW

The Stevens trial team did not have sufficient resources, time, training, guidance or leadership to discharge its discovery obligations adequately. Although the Polar Pen Investigation had run for years, covered much terrain, and involved multiple grand juries and a huge number of witnesses — who, like Bill Allen, testified on issues germane to various investigation targets — the time between the ultimate decision to indict Senator Stevens to the actual trial was extremely tight — just weeks.

To make matters worse, apparently due to persistent uncertainty as to whether the case would be indicted and the press of other active matters, the FBI had not systemized all the information it and the IRS had memorialized or received during the investigation. Files had not been scanned. Boxes were reportedly everywhere. A preliminary *Brady* review had not been conducted. And the Department changed the Stevens prosecution team's leadership just around the time of the indictment, placing at the helm an attorney with less knowledge of the case. In short, the team's *Brady* review was rudderless.

At the time of the *Brady* review, Mr. Goeke was in Alaska and working on other matters in addition to the Senator Stevens case. He had limited *Brady* training — either in practice or on paper. When Mr. Goeke joined the Department, its *Brady* training was

spotty and uncoordinated.[1] Mr. Goeke attended a segment on *Brady* during a more comprehensive prosecutor training in 2005. But, as discussed above, Mr. Goeke had little opportunity to apply this training in practice.

The trial team assigned Mr. Goeke two discrete areas to review for the *Brady* letters: (i) the grand jury testimony of Augie Paone; and (ii) the grand jury testimony of Robert Persons. The record reflects that, in his assigned areas of responsibility and even outside those areas (Bambi Tyree), Mr. Goeke pushed the team to disclose to the defense all necessary information under *Brady* and its progeny.

A. The Augie Paone and Robert Persons Disclosure

With respect to the Paone and Persons disclosure, Mr. Goeke recommended a complete *Brady* disclosure. In Mr. Goeke's proposed disclosures circulated to the trial team, Mr. Goeke provided a meticulous list of every potentially exculpatory or impeaching nugget that he could locate in the grand jury transcripts. As Mr. Goeke noted in his email accompanying his proposed disclosure, Mr. Goeke had been, if anything, "overly inclusive" or "overly expansive" in an abundance of caution to provide the defense with all *Brady* material. Ex. D, CRM GOEKE 087276-77, 087276; Ex. E, CRM GOEKE 087461-64, 087461. Indeed, Mr. Goeke's proposed *Brady* disclosures for Paone

[1] Since the Senator Stevens trial and other public discovery failures, the Department, under Attorney General Eric Holder, has aimed to ameliorate the Department's *Brady*-related training. The Department's recent guidance makes clear that paramount to any effective disclosure of exculpatory information is sufficient resources, training and guidance. *See* Ex. C, Memoranda from Deputy Attorney General David W. Ogden to all Dep't Prosecutors and United States Attorneys, Guidance for Prosecutors Regarding Criminal Discovery, Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group for Prosecutors Regarding Criminal Discovery, Requirement for Office Discovery Policies in Criminal Matters (Jan. 4, 2010).

and Persons were so lengthy and so detailed — comprising approximately 4 of the 8-page September 9 draft *Brady* letter (*see* Ex. F, CRM BOTTINI 030581-90) — that at some point (shortly before the letter was produced to the defense), someone on the prosecution team removed Mr. Goeke's proposed *Brady* disclosures in favor of just turning over Paone's and Persons' entire grand jury transcripts to the defense. *See* Ex.G, Goeke Ex. 2.

B. <u>The Bambi Tyree Disclosure</u>

Mr. Goeke also pressed, on his own initiative, for disclosure regarding Bambi Tyree's relationship with and sworn statement related to Bill Allen. Mr. Goeke's pursuit of Tyree-related disclosure was dogged. His efforts spanned an 18-month period, involved multiple requests that PIN consult PRAO, and persistent follow-up with PIN thereafter. It was only because of Mr. Goeke's tenacity (along with Mr. Bottini) that any disclosure was made at all.

The tale of Mr. Goeke's efforts to disclose the Tyree issue is nearly as tangled as the story of Ms. Tyree's liaison with Bill Allen. Mr. Goeke attempted to disclose the Tyree issue four times during the Polar Pen Investigation and ensuing prosecutions:

1. *Mr. Goeke Learns of the Tyree-Allen Relationship*

Mr. Goeke first met Tyree in 2005 in connection with the sentencing of Josef Boehm, the President of Alaska Industrial Hardware. Tyree had been charged as a co-defendant in that case (which involved prostitution, underage sex, and drugs) and agreed to cooperate against Boehm.

In preparation for Boehm's spring 2005 sentencing (which was before the Hon. John W. Sedwick in the District of Alaska), the Department debriefed Tyree; Mr. Goeke was present. During that debriefing, Tyree admitted that she had previously made a false

statement under oath — that she had *not* had sex with Bill Allen when she was underage (when she had). Unprompted, Tyree stated that it was her idea alone to make this false statement.

At this time, as per above, Mr. Goeke was not involved in the Operation Polar Pen Investigation; was not investigating either Bill Allen or Senator Stevens; and had never heard of Allen prior to the Boehm case. Mr. Goeke also did not participate in every debrief of Tyree and was never assigned Tyree as a witness at trial or at sentencing.

2. *Mr. Goeke Seeks Disclosure in Connection with a Potential Search Warrant of Senator Stevens' House*

Mr. Goeke subsequently joined the Polar Pen Investigation. When Mr. Goeke joined the team, a Title III warrant ("wire") was in effect on several individuals' homes. This wire, along with Bill Allen's cooperation, caused the Government to consider applying for a search warrant for Senator Stevens' residence in early 2007.

Mr. Goeke reviewed the search warrant application. In the course of that review, Mr. Goeke remembered Tyree's statement that she had sex with Allen when she was underage. Mr. Goeke thought that this uncharged conduct might need to be disclosed in the search warrant application as the application was predicated, in part, on Allen's cooperation. At this time, Mr. Goeke was focused exclusively on the illicit underage sex, and not on the falsity of the Tyree sworn statement nor the provenance thereof.

In an effort to refresh his memory for purposes of disclosing the underage sex issue, Mr. Goeke retrieved and read the Government's sealed *in limine* briefing submitted in the Boehm case by Assistant U.S. Attorney Frank Russo. In that briefing, the Government stated that Tyree had signed a false affidavit concerning her sexual

relationship with Bill Allen at Allen's request. The Government sought a pre-trial ruling containing the issue solely to the fact of the false affidavit and barring the defense from delving into either (i) Tyree's illicit sexual relationship with Allen; or (ii) the fact that Allen had asked Tyree to swear to a false statement. (The Court granted the Government's *in limine* motion.)

Recognizing that such briefing contradicted Tyree's account to Mr. Goeke at the 2005 pre-sentencing debriefing (*i.e.*, Tyree had said she lied in the affidavit on her own accord and not at Allen's prompting), Mr. Goeke immediately flagged the issue for Public Integrity and sent pertinent excerpts from the Boehm briefing via email up to PIN. *See* Ex. H, CRM GOEKE 030460-63. Mr. Goeke suggested that Public Integrity consult with PRAO as to whether further disclosure was necessary (in the context of the search warrant). Subsequently, PIN informed Mr. Goeke that no disclosure was necessary. Mr. Goeke believed that PRAO had been involved in that decision. (It appears, however, that PRAO was not actually involved.)

3. *Mr. Goeke Seeks Disclosure in Connection with the Kott Trial*

<u>During the Kott Trial</u>

Within several months, the Tyree issue surfaced again. In summer 2007, Mr. Goeke, along with Public Integrity's Nicholas Marsh, were the trial attorneys prosecuting Alaska House Speaker Peter Kott in Alaska. As usual, Allen was a key witness, having apparent knowledge of Alaskan public corruption far and wide.

Because Allen was a key witness, Mr. Goeke along with Mr. Bottini raised their concerns with Trial Attorney Marsh again regarding the Tyree-Allen relationship and

affidavits related thereto. Mr. Goeke recalls that the team decided that Mr. Goeke would alert the Court to the issue during the Kott trial, which, like the Boehm proceeding, was before Judge Sedwick. When Mr. Goeke raised the issue of Tyree, however, Judge Sedwick — who had granted the Government's motion to preclude questioning on the false affidavit in the Boehm case — cut off Mr. Goeke, saying that he knew about Tyree and Allen and was not interested in delving into that matter again. Therefore, no disclosure was made during that proceeding. Kott was subsequently convicted.

After the Kott Trial

Thereafter, Mr. Goeke was on vacation and spoke to FBI Special Agent Eckstein on October 4, 2007. Mr. Goeke believed that Agent Eckstein may have been involved in the 2004 Russo interview of Tyree, which had resulted in the Government's briefing in Boehm (and which, in turn, stated that Tyree claimed that Allen asked her to lie). Still bothered by the Tyree issue, Mr. Goeke asked Eckstein for his recollection of the Tyree interview. Per Mr. Goeke, Eckstein responded that he did not have any specific memory. Mr. Goeke asked Eckstein to locate the 302 memorializing that meeting and report back. Later that day, Mr. Eckstein advised Mr. Goeke that the 302 stated, like the Boehm briefing, that Tyree said that Bill Allen directed her to lie in her sworn statement.

Concerned that additional disclosure would be necessary in the Kott matter or other pending Operation Polar Pen-related proceedings (such as the then-imminent trial of Victor Kohring), Mr. Goeke immediately directed Agent Eckstein to fax the 302 to Mr. Bottini at the Alaska U.S. Attorney's Office; called Mr. Bottini to discuss the 302 and the implications thereof; and decided, with Mr. Bottini, that the 302 should be faxed forthwith to Public Integrity for additional discussion.

Mr. Bottini faxed the materials to Public Integrity's Marsh that same day with a cover note making the issue explicit. *See* Ex. 1, CRM BOTTINI 059454-69, Goeke Ex. 24. "Looks like this interview took place on 7/22/04," Mr. Bottini wrote, "It says that she signed the *affidavit* @ Allen's request, but doesn't say he knew it was false – the inference may be made by the way it is written though. Let's talk early tomorrow a.m." *Id.* at CRM BOTTINI 059454 (emphasis in original). Two days later, Mr. Goeke and Mr. Bottini pursued the issue further. They sent PIN Trial Attorney Marsh the pertinent sections of the Boehm briefing (which were, again, consistent with the Eckstein 302 and inconsistent with Tyree's declaration to Mr. Goeke in connection with the Boehm sentencing). "NAM – this was in some of the briefing U.S., submitted in Boehm." *Id.* at CRM BOTTINI 059465-469. Though the fax was short, Mr. Bottini or Mr. Goeke nonetheless underscored the pertinent sections for Mr. Marsh's review in a section called "False Swearing." The fax highlighted the following information:

> When Tyree was 15 years old, she had sex with Bill Allen, president of VECO and publisher of the "Voice of the Times" section in the Anchorage Daily News . . . Based on this threat, Allen asked Tyree to meet with his attorney, James Gilmore, and give a sworn statement stating that she never had sex with Allen. Tyree did so.

Id. at CRM BOTTINI 059466 (emphasis in original). Mr. Goeke also retrieved Agent Eckstein's and Assistant U.S. Attorney Russo's notes from their Tyree interview and faxed those notes to PIN.

As a result of these communications, Public Integrity informed Mr. Goeke and Mr. Bottini that it would raise the issue with PRAO. Several days later, still in October 2007, Mr. Marsh reported back that he had spoken to PRAO, and that PRAO had advised

him that no disclosure was necessary. Mr. Goeke did not see any written opinion from PRAO regarding this call.

Again, After the Kott Trial

In late 2007, Mr. Goeke again raised the Tyree issue. This time, the Alaska U.S. Attorney's Office had learned that the Anchorage Daily News would be publishing an article alleging that Allen had provided various benefits to Tyree and her family. At the urging of the U.S. Attorney in Alaska, Mr. Goeke and Mr. Bottini asked Mr. Sullivan and Mr. Marsh to return to PRAO concerning these new allegations, again as part of determining whether disclosure would be appropriate.

Thereafter, Public Integrity informed Mr. Goeke that it had consulted again with PRAO and had been told that no disclosure was necessary. Undeterred, Mr. Goeke continued to press this issue — much to Public Integrity's irritation.

Ultimately, Public Integrity's then-head William Welch told Mr. Goeke and Mr. Bottini, in no uncertain terms, that the issue was dead and that they should cease pushing it: "We've done all that we are going to do on the matter," Mr. Welch wrote, "I'm off for vacation starting tomorrow, but will try to talk to Nelson [the Alaska U.S. Attorney] sometime next week. In the meantime, nothing will be filed in our case. *Joe and Jim, per the recusal notice, you work for PIN, and so these are your marching orders . . . .*" (Ex. B) (emphasis added).

Mr. Goeke did not see PRAO's December 2007 opinion until some weeks later. By that time, having already been directed to drop the issue, Mr. Goeke did not review the opinion carefully and did not notice inaccuracies therein. Mr. Goeke continued to

believe that PIN had faithfully supplied PRAO all of the relevant background information (which Mr. Goeke and Mr. Bottini had meticulously retrieved and sent to PIN).[2]

4. *Mr. Goeke Seeks Disclosure in Connection with the Stevens Trial*

Though Public Integrity had squelched additional discussion of the Tyree issue in late 2007, when Stevens was indicted six months later, Mr. Goeke again pressed the issue, again to the team's annoyance. As per above, Mr. Goeke was assigned two discrete issues for the *Brady* disclosure letters (related to Paone and Persons). Nonetheless, Mr. Goeke pushed the team to address Tyree.

For example:

- On August 14, 2008, Mr. Goeke emailed the entire Stevens trial team, while at the airport with his family, to urge disclosure of the procurement of the false statement from Tyree by Allen. *See* Ex. K, CRM030882-84, Goeke Ex. 22, 030882-83 ("I also vote to make some disclosure of the rumored procurement of a false statement from Bambi by Bill in our Giglio letter . . ."). That request was denied, as Trial Attorney Marsh insisted that the only issue was a "mistake in a brief that's inconsistent with the brief writer's notes" and, therefore, "I don't think we have any disclosure to make, much less a disclosure obligation." *Id* at CRM030882.
- Several days later, in response to a draft of the *Brady* letter, Mr. Goeke added a paragraph to the letter that made a stronger — albeit not perfect —

[2] Mr. Goeke's email circulated prior to the Stevens trial confirms his understanding that PRAO's opinion was the product of examining all relevant issues, including the Eckstein 302. *See* Ex. J, CRM GOEKE 078272-74, 078273 (September 7, 2008 email from James Goeke to the Stevens trial team).

disclosure on the Tyree issue in an effort to compromise with the trial team while still providing further disclosure to the defense. *See* Ex. L, CRM GOEKE 079582-87, 079584. As shown in emails among Ms. Morris, Mr. Marsh, and Mr. Sullivan on August 22, 2008, the trial team rejected Mr. Goeke's suggestion, and the paragraph was deleted from the August 25, 2008 *Brady* letter. *See* Ex. M, CRM BOTTINI 027428 (Mr. Marsh wrote, "I strongly believe that the highlighted paragraph should be deleted. We should not revisit the Bambi non-subornation of perjury stuff. We have nothing to turn over, we have neither evidence nor an allegation that Allen directed her to lie, we have investigated this till the end of time, and we have been blessed by PRAO twice.").

Despite these multiple rejections (over an 18-month period), when the time came for another *Brady* letter just weeks later, in September 2008, Mr. Goeke again beat the Tyree drum. Taking a slightly different tact (given his many-month futile effort on the Tyree issue), in a September 7, 2008 email, Mr. Goeke pressed to disclose that Allen was being blackmailed as a result of his relationship with Tyree and that Tyree spoke to Allen's lawyer. *See* Ex. N, CRM GOEKE 087255. Mr. Goeke told the team, "I realize that we have beaten this topic to death, but please bear with me . . . I am keen to make sure our disclosure is as accurate as possible." Ex. J at CRM GOEKE 076273.

The next day, the team convened a conference call to discuss, among other things, the Tyree issue, after Mr. Goeke yet again circulated the Boehm briefing dealing with the subornation issue and two days after FBI Agent Mary Beth Kepner had circulated *again* Eckstein's 302 — both of which reflected Tyree stating that Allen had asked her to lie.

See Ex. O, CRM GOEKE 087439-43 (email exchanges "RE: Tyree"); Ex. P, CRM GOEKE 087294-98 (same); Ex. J at CRM Goeke 078273 (September 7, 2008 email to team, "After the Kott trial, we found out about the 302 that MBK just sent around yesterday regarding Bambi from a 7/22/04 interview in Seattle."). Mr. Goeke recalls that he again questioned the lack of disclosure on the Tyree issue. *See* Goeke Tr. 201-203. In response, Ms. Morris, to whom Mr. Goeke reported, cut him off and said that the necessary disclosure had occurred and that he was "covered." *Id.*

On September 9, 2008, the Department sent its second *Brady* letter. While it flagged the issue of the Tyree/Allen liaison and the false affidavit, it did not discuss the Eckstein 302 or the Eckstein notes corroborating his 302. The Eckstein 302, filling out the Tyree story, was not produced until later in the trial, on October 16, 2008, as part of a production of the Anchorage Police Department file. The defense never made use of that 302.

In the end, the record is clear that Mr. Goeke tried, again and again, to persuade his colleagues to disclose the full story of the false Tyree affidavit.

C. Rocky Williams and the Kenai River Classic Disclosure

Mr. Goeke also did not intentionally conceal from the defense *Brady* material disclosed by Rocky Williams in an August 2008 trial preparation session (the "Trial Prep Session"). To the contrary, as demonstrated below, Mr. Goeke reasonably believed that, during the Trial Prep Session (with the exception of one instance), Williams rehashed prior grand jury testimony or statements made during investigative interviews. In these prior investigative sessions, as in the Trial Prep Session, Williams stated, in words or substance, that Williams assumed his time would be included on the Christensen

Builders' bills; that Williams thought Senator Stevens intended to pay those bills; and that Senator Stevens, in fact, indicated, during a conversation with Allen at the Kenai River Classic (where Williams was present), that Senator Stevens wished to pay for the work.

Further, Mr. Goeke was not responsible for reviewing Williams' source material for *Brady* purposes; reasonably believed that the team member assigned such task would properly disclose exculpatory material; and did not detect any failure to disclose in the Department's *Brady* letters.

1. *Prior to the Trial Prep Session, Williams Told the Government that Senator Stevens Wanted to Pay for VECO's Expenses*

Prior to the Trial Prep Session, Mr. Goeke participated in investigative sessions with Williams covering the billing procedures for construction work on Senator Stevens' chalet, including several September 2006 debriefings [redacted] appearance. In those investigative sessions (documented in 302s [redacted] Mr. Williams stated that VECO expenses would be included in the Christensen Builders' invoices; that, while he did not know whether Senator Stevens ever reimbursed VECO for the work, Williams believed Stevens intended to pay for the improvements to his home; and that Stevens said, in words or substance, that he wanted to pay for the work.

The Government documented these statements in 302s or [redacted] at least three times:

- [redacted]

- In a September 14, 2006 debriefing in Alaska, Williams described the meeting between Allen and Senator Stevens at the Kenai River Classic. He said that during this meeting, Senator Stevens decided he wanted to get a contractor who he could pay directly for the work. *See* Ex. R, CRM GOEKE 001846-48, 001846 ("Stevens decided that he wanted to get a contractor that Stevens could pay.").
- In a September 28, 2006 debriefing with Williams in Alaska, Williams described how Senator Stevens liked the idea of having to pay Christensen Builders directly because the amount was "over the limit," referring to the amount of gifts a public official can accept. *See* Ex. S, CRM GOEKE 001849-55, 001849 ("Stevens liked the idea of having someone to pay because it was 'over the limit.'").

2. *Mr. Goeke Handled the Trial Prep Session In Accordance with Department Policy*

With this background, Mr. Goeke, along with Mr. Bottini and FBI Special Agent Chad Joy, participated in the Trial Prep Session. Handwritten notes taken by Mr. Goeke and Mr. Bottini (*see* Ex. T, CRM089063-69, Goeke Ex. 3; Ex. U, CRM057288-311, Goeke Ex. 4) reflect that Williams stated that he was present at a meeting between Senator Stevens and Allen at the Kenai River Classic in either 1999 or 2000. At the meeting, the two men discussed that VECO would perform construction work on Senator Stevens' home. In return, the cost and time for that work would be included on the Christensen Builders' invoices, and those bills would then be submitted to Senator Stevens for payment. As shown above, these facts merely recapitulated Williams' prior testimony and recollection.

Mr. Williams did, however, reveal a new fact during this debriefing: Williams stated that he never personally spoke with either Senator Stevens or Stevens' wife about whether VECO's expenses were, in fact, included in the Christensen Builders' invoices, and that neither the Senator nor his wife ever asked Williams about the invoices. [redacted] the 302s documenting the Williams investigative interviews confirm that Williams had never before made these statements to the Government.

Given that this was new information, Mr. Goeke instructed FBI Special Agent Joy, in accordance with Department policy, to prepare a 302 documenting these points.

He did not tell Agent Joy to exclude other parts of the debriefing, but only to make sure these new statements were properly documented.[3]

3. *Mr. Goeke Did Not Review Williams' Grand Jury Transcripts and 302s for Brady Material*

Mr. Goeke did not review the Williams' grand jury transcripts or 302s for *Brady* and *Giglio* material. Rather, he reasonably believed that whoever was in charge of the Williams review would examine all relevant materials and disclose exculpatory evidence in accordance with the applicable rules.

When Mr. Goeke reviewed the draft *Brady* disclosure, he confirmed that it disclosed what Mr. Goeke believed to be the most important revelation for the Stevens defense — that some witnesses (including Allen) believed Senator Stevens intended to pay for the work on Stevens' home. For instance, the letter disclosed that Allen was "aware that defendant took out a loan to pay a contractor in connection with the renovations" at his house. Ex. G at ¶ 17b. The letter also disclosed that "Allen stated that on at least two occasions defendant asked Allen for invoices for VECO's work at the Girdwood residence." *Id.* at ¶ 17c. That Mr. Goeke failed to spot that the letter inaccurately stated that Mr. Williams "did not recall reviewing the Christensen Builders' invoices" (*id.* at ¶ 15) — when in fact, Mr. Goeke's notes from the August 22, 2008

[3] On January 4, 2010, the Deputy Attorney General, David W. Ogden, at the instruction of Attorney General Holder, issued a Memorandum for Department Prosecutors on "Guidance for Prosecutors Regarding Criminal Discovery." In that memorandum, the Department advised prosecutors that, "Trial preparation meetings with witnesses generally need not be memorialized. However, prosecutors should be particularly attuned to ***new*** or inconsistent information disclosed by a witness during a pre-trial witness preparation session. . . . [and] should consider whether memorialization and disclosure is necessary. . . ." (Ex. C at Sec.B ¶ 8b) (emphasis added).

debriefing reflect otherwise — does not demonstrate any intentional violation of Mr. Gocke's *Brady* obligations.

D. Bill Allen and the "Torricelli Note"

Likewise, the record does not demonstrate any intentional wrongdoing by Mr. Gocke related to the "Torricelli Note." To the contrary, the record shows that Mr. Goeke reasonably believed that, consistent with FBI standard policy, the FBI generated a 302 in connection with the Allen April 15, 2008 interview; that the team member reviewing the Allen material for *Brady* or *Giglio* disclosures would review, and had in fact identified, all exculpatory material for the defense; and that attorneys involved in any trial preparation session would take appropriate measures if any new or inconsistent information surfaced.

1. *The April 15, 2008 Interview and the Brady Disclosure*

On April 15, 2008, the Stevens trial team (except Ms. Morris) and FBI Special Agent Mary Beth Kepner interviewed Bill Allen. During that interview, among other things, the trial team questioned Allen about the Torricelli Note — in which Senator Stevens told Allen that he wanted to be billed for the construction on his chalet; reminded Allen about "certain ethical rules" and to "remember Torricelli"; and said that Bob Persons would contact Allen about these payments. Ex. U, CRM BOTTINI 016500.

At the April 15 interview, Mr. Goeke's notes reflect that Allen said he did not remember discussing the Torricelli Note with Persons. Pursuant to FBI policy, during the Polar Pen Investigation, an FBI special agent attended every investigative session and memorialized the witness' statement in a 302. Contrary to FBI practice, however, and

without Mr. Goeke's knowledge, in this instance, Special Agent Kepner inadvertently failed to prepare a 302.

Mr. Goeke was not responsible for the Allen *Brady* disclosure and did not review his notes prior to the September 9, 2008 *Brady* letter. But, at the time of the September 9 letter, Allen's non-recollection of discussing the Torricelli Note with Persons was not *Brady* or *Giglio* material. Therefore, it was understandable that, in reviewing the September 9 draft letter, Mr. Goeke would not flag the omission. Allen's memory lapse fundamentally did not *become Giglio* material until the following week, when (during a trial preparation session, for which Mr. Goeke was not present) Allen first recalled Persons stating that Senator Stevens wrote the Torricelli Note to "cover his ass."

2. *The "CYA" Statement*

A week after the Government sent out its second *Brady* letter and on the eve of trial, Allen told Assistant U.S. Attorney Bottini that Allen now recalled speaking to Persons about the Torricelli Note. During that trial preparation session, Allen said (and later testified at trial) that he recalled discussing the Torricelli Note with Persons and that Persons said it was Senator Stevens' way of "covering his ass." Mr. Goeke did not attend that trial preparation session and had not even yet flown to Washington, D.C. at that time.

Mr. Goeke believes that he may have heard of Allen's new recollection when he arrived in Washington just days before the trial. But, by that time, Mr. Goeke was busy on various other trial preparation projects. Moreover, Mr. Goeke had never focused on Allen's testimony — with the exception of the Bambi Tyree issue. Having not reviewed Bill Allen's source material for the *Brady* disclosures; having not independently reviewed his notes from the April 15 interview; having not been actively involved in preparing

Allen for his testimony at trial; and otherwise going flat-out on various pre-trial projects (until the wee hours of every night), the need to disclose Allen's April 15 statement did not jump out for Mr. Goeke. Simply put, Mr. Goeke did not focus on the discrepancy between what Allen said in April and September or the need to disclose it. And Mr. Goeke does not recall being in Court when the defense asked Allen whether his CYA recollection was new.

3. *The Prompt Production of Relevant Notes*

Mr. Goeke's April 15 note-taking and his efforts to find and produce those notes also belie any intent to conceal discrepancies in Allen's recollection of the Torricelli Note. Though the FBI had never systemized the attorney notes (meaning there was no independent record of Mr. Goeke's note-taking) and though Mr. Goeke's note-taking practices were erratic (meaning that a lack of notes from the April 15 session would not have been unusual), Mr. Goeke saved his notes. And Mr. Goeke promptly produced those notes to the Government when the issues as to Allen's April 2008 recollection arose.

Had Mr. Goeke wished to obscure Allen's April 2008 statements (and participate in some conspiracy to obstruct lawful *Brady* and *Giglio* disclosures), it would not have been sensible to take, preserve and produce those notes, especially where there was no independent record of those notes' existence.

ARGUMENT

POINT I

BECAUSE MR. GOEKE DID NOT INTENTIONALLY VIOLATE A COURT ORDER, HE SHOULD NOT BE HELD IN CRIMINAL CONTEMPT

A. Legal Standard

18 U.S.C. § 401(3) makes it illegal to "[d]isobe[y] or resist[ ] ... [the] lawful writ, process, order, rule, decree, or command" of the court. To obtain a conviction for criminal contempt, two elements must be proven beyond a reasonable doubt:

First, the relevant order or command must be sufficiently "'clear and unequivocal at the time it is issued.'" *In re Holloway*, 995 F.2d 1080, 1082 (D.C. Cir. 1993) (*quoting Traub v. United States*, 232 F.2d 43, 47 (D.C. Cir. 1955)).

Second, the disobedience must be willful — meaning a "'deliberate or intended violation, as distinguished from an accidental, inadvertent or negligent violation.'" *Landmark Legal Foundation v. E.P.A.*, 272 F. Supp. 2d 70, 76-77 (D.C. Cir. 2003) (citation omitted); *see also Cobell v. Norton*, 334 F.3d 1128, 1146 (D.C. Cir. 2003) (criminal contempt requires "both a contemptuous act and a wrongful state of mind"). If the wrongful conduct is unintentional, criminal contempt does not lie. *See United States v. Jones*, --- F. Supp. 2d. ---, 2010 WL 565478 (D. Mass. Feb. 19, 2010) (declining to find Assistant U.S. Attorney who failed to disclose exculpatory evidence in contempt because lapses were unintentional).

Criminal contempt is evaluated on an individual-by-individual basis, meaning that a specific act or omission by the individual must be shown. Thus, the D.C. Court of

Appeals has found it "elementary" that "subject to certain exceptions" (not applicable here) and absent respondent superior liability, "one person cannot be held criminally liable for the conduct of another." *See Cobell*, 334 F.3d at 1147 (refusing to hold public official in contempt where part of the alleged misconduct occurred before the public official took office).

B. Mr. Goeke Acted in Good Faith Before, During and After the Stevens Trial And Should Not Be Held in Criminal Contempt

The record demonstrates that Mr. Goeke consistently strove to be accurate and thorough in *Brady* disclosures.

On the two discrete issues he was assigned (Augie Paone and Robert Persons), Mr. Goeke tried to be "overly inclusive"; he produced a long list of disclosures, flagging anything that could possibly be deemed useful to the defense. Ultimately, the Government decided to turn over the entire Persons and Paone grand jury transcripts.

Mr. Goeke pressed the Department and his supervisors for some 18 months to disclose all the issues related to Bambi Tyree's illicit relationship with Bill Allen, the resulting false sworn statement, and the disputed provenance thereof.[4]

[4] And, ultimately, the defense knew, during the trial, of the Tyree-Allen relationship and the resulting false affidavit. On October 16, 2008, the Government produced the Anchorage Police Department file (which included Special Agent Eckstein's July 2004 Form 302). While Allen's testimony had concluded nine days earlier, the defense had not yet rested its case and could have re-called Allen to address this issue. Thus, there was arguably no *Brady* violation, given precedent that *Brady* "is not a discovery rule, but a rule of fairness and prosecutorial obligation." *United States v. Beasley*, 576 F.2d 626, 630 (5th Cir. 1978), *cert. denied*, 440 U.S. 947, 99 S.Ct. 1426, 59 L.Ed.2d 636 (1979)) — meaning that there can be no violation of *Brady* "if *Brady* material is disclosed in time for its effective use at trial." *United States v. Campagnuolo*, 592 F.2d 852, 861-62 (5th Cir. 1979); *see also United States v. Higgs*, 713 F.2d 39, 42-43 (3rd Cir. 1983).

Mr. Goeke did not try to obscure or intentionally fail to disclose exculpatory evidence from Rocky Williams. Mr. Goeke's direction to the Special Agent to memorialize the "new" information adhered to the Department's best practices for trial preparation sessions. *See* Ex. C, Guidance for Prosecutors Regarding Criminal Discovery at Sec.B ¶ 8b ("Trial preparation meetings with witnesses need not be memorialized. However, prosecutors should be particularly attuned to new or inconsistent information disclosed by the witness during a pre-trial witness preparation session."). Mr. Goeke reasonably believed that other team members responsible for the Williams *Brady* review would identify and disclose exculpatory material.

And the fact that Mr. Goeke failed to review his notes of the April 15, 2008 interview of Bill Allen — where he was not in charge of Allen's *Brady* review, where the entire team attended the April 15 interview, and where, at the time of the September 9, 2008 *Brady* letter, the pertinent "CYA" recollection had not yet been raised — does not demonstrate Mr. Goeke's intentional violation of any Court directive. To the contrary, even the Department's *new* discovery best practices do not require prosecutors to review their investigative notes where the prosecutor believes that the FBI agent has created a 302. Rather, those best practices state that a prosecutor's notes "should be *preserved*, and prosecutors should confirm with agents that substantive interviews should be memorialized." *Id.* at Sec.B ¶ 8 (emphasis added). Here, Mr. Goeke preserved his notes and understood that the FBI agents involved in the Polar Pen Investigation were generating 302s, consistent with FBI policy. And, indeed, Mr. Goeke's understanding was generally correct: the FBI and IRS generated over 400 interview memoranda collectively during the Senator Stevens investigation, consistent with that direction from

the prosecution team. And when the Allen issue arose following the trial, Mr. Goeke promptly located his notes and supplied them to the post-trial team — an effort that undermines any culpable intent.

Finally, to the extent that the Special Prosecutor determines that any other Stevens trial team member engaged in intentional misconduct, Mr. Goeke cannot, under clearly established law, be found guilty by association. *See Cobell*, 334 F.3d at 1147 ("one person cannot be held criminally liable for the conduct of another"). Here, Mr. Goeke was not responsible for any other member of the Stevens trial team; he did not control — but rather reported to — members of Public Integrity and was junior to Mr. Bottini in the Alaska U.S. Attorney's Office.

POINT II

AS A MATTER OF BASIC FAIRNESS, MR. GOEKE SHOULD NOT BE REFERRED FOR CRIMINAL PROSECUTION

As demonstrated above, Mr. Goeke did his best and worked as hard as he could. At every turn, Mr. Goeke discharged his *Brady* obligations in good faith. Therefore, any referral for criminal prosecution would be manifestly unjust.

But even if the Special Prosecutor believes that Mr. Goeke should have done more, no referral for criminal prosecution would be appropriate here. To be sure, various courts have expressed their opprobrium of the Department's failure, in a series of high-profile cases, to adhere to its discovery obligations. And there has been substantial associated public outrage. But holding Mr. Goeke accountable for the Department's mismanagement (for example, for indicting a case without sufficient preparation and not ensuring adequate leadership on a highly complex criminal prosecution) is unfair.

CONCLUSION

For the reasons set forth herein, we respectfully request that the Special Prosecutor decline to refer Mr. Goeke for criminal prosecution. We further respectfully request the opportunity to meet with the Special Prosecutor to discuss the substance of this submission should you have any further questions or concerns.

Dated: April 9, 2010
New York, New York

KOBRE & KIM LLP

By: _____

Matthew I. Menchel
(matthew.menchel@kobrekim.com)

Danielle L. Rose
(danielle.rose@kobrekim.com)

Daniel L. Rashbaum
(daniel.rashbaum@kobrekim.com)

800 Third Avenue
New York, New York 10022
Tel: +1 212 488 1200
Fax: +1 212 488 1220

Attorneys for James A. Goeke

Exhibit 2

Memorandum to File

Re: References to AUSA Goeke in OPR Draft Report

Page Number	Outline Reference	Transcript of excerpt
269	Ch. 4, III, D, 1	We found circumstantial evidence indicative of intentional misconduct. The April 15, 2008 interview of Bill Allen was clearly a significant event of investigation. By that time, the investigation was nearly complete and the statute of limitations was about to run. The prosecution team was recommending that charges be brought against Senator Stevens, but the Criminal Division Front Office put the decision on hold until the voluminous materials provided by the defense could be examined and evaluated. Among those materials were the Torricelli Note of October 6, 2002 and its companion note one month later. As the recipient of both notes, Allen held the key to whether the notes were genuine or fabricated. The significance of Allen's interview on April 15 is demonstrated by the participation of all four prosecutors then assigned to the investigation - Bottini, Goeke, Marsh, and Sullivan - and the lead FBI agent, Kepner. The interview was plainly substantive and pre-indictment, thus requiring, as everyone involved acknowledged, that Allen's interview be memorialized in an FBI 302 report. Yet, no such interview was ever prepared because, as Kepner told CDC Eric Gonzale:
279	Ch. 4, III, D, 2, a	We concluded, first, that neither PIN Chief Welch nor Principal Deputy Chief Morris committed professional misconduct with respect to the failure to disclose Allen's April 15 statements. Neither attended the April 15 interview, and neither knew that Allen had said he did not recall discussing the Torricelli Note with Persons, until the prosecutors' notes surfaced months after trial. We also concluded that neither Goeke nor Sullivan acted in reckless regard of their professional obligations in this regard. Although both Goeke and Sullivan took notes of the April 15 interview, both were relieved of trial duties after the realighnment of the trial team following the indictment. Neither had any duties or responsibilities with respect to Allen's preparation for trian, and no one asked them to review their notes of the April 15 meeting. We did not find it objectively unreasonable for the two junior members of the prosecution team to expect the senior attorneys, Bottini and Marsh, to fulfill the disclosure obligations relating to the key government witness that each of them, at varying times, was responsible for handling.
290	Ch. 4, III, D, 2, b	Finally, we concluded that Welch, Sullivan, and Goeke did not commit professional misconduct or exercise poor judgment with respect to the failure to disclose *Brady* material related to Bill Allen. Goeke plated no role in the matter, and Sullivan's role, for which he was given no guidance, was to gather the information compiled by the agents and provide that information to the trial attorneys. He bore no responsibility for reviewing Allen's interview reports. Welch, as the Chief of the section, had a right to rely on Morris and the experienced trial attorneys to fulfill their duties with respect to *Brady* disclosures. With Morris inserted on the trial team, and with the Front Office communicating directly with Morris and providing direction and oversight of the case, Welch's direct supervisory role was diminished. Welch told OPR that he did not become aware of the agent's *Brady* review and corresponding spreadsheet until after the trial, in December 2008 and January 2009. However, when the events of October 1 were brought to his attention, Welch stepped in and directed that the Pluta 302 be disclosed.
362	Ch. 5, III, A, 3	The prosecution team became aware of the issue in March 2007, when AUSA Goeke raised it in connection with drafting the search warrant affidavit for Stevens's Girdwood residence. Goeke shared with the prosecution team the pertinent excerpts of Russo's pleadings in the *Boehm* case. The ensuing investigation was limited to an interview of Bill Allen on Match 10, 2007, that resulted in a one-paragraph 302 essentially reporting that Allen said he had never lied under oath and had never encouraged anyone else to do so, either.

362	Ch. 5, III, A, 3	The issue surfaced again during the hiatus between the *Kott* and *Kohring* trails. During the *Kott* trial in September 2007, handled by Marsh and Goeke, the relationship between Allen and Tyree was alluded to but the defense was not aware of the Tyree interview at FCI SeaTac, or of any allegation that Allen may have suborned perjury by Tyree.
362	Ch. 5, III, A, 3	After the *Kott* trial, Goeke became concerned about whether he should have disclosed to the *Kott* defense Russo's representations in the *Boehm* pleadings. Because the issue was also germane to the impending *Kohring* trial, Goeke delved further into the matter. The pertinent representations in Russo's pleadings in July 2004 contradicted what Tyree had said to Goeke during witness preparation sessions before the *Boehm* sentence hearing in May 2005. Goeke called SA Eckstein to determine if Eckstein's recollection squared with his own, and to obtain any notes or documents prepared by Eckstein memorializing any Tyree interviews attended. Eckstein informed Goeke that he prepared a 302 of an interview of Tyree at FCI SeaTac in July 2004. Goeke asked Eckstein to fax the 302 to Bottini. who in turn faxed it to Marsh on October 4. 2007.
364	Ch. 5, III, A, 3	After learning of the existence of Eckstein's SeaTac 302, Goeke said he was instructed to search for Russo's notes in the *Boehm* files. He found Russo's July 22, 2004 interview notes, which ascribed to Tyree the idea of giving a false sworn statement to Allen's lawyer.
364	Ch. 5, III, A, 3	When confronted with his notes by Goeke and Marsh more than three years after the interview, and without the benefit of reviewing his pleadings or Eckstein's 302, Russo conceded that it appeared he made a mistake in his pleadings. According to Russo, the discussion with Marsh and Goeke was "very quick" - they "briefly questioned me abouyt the notes and then left." The cursory meeting left Russo feeling "a little bit uncomfortable . . . and it didn't sit well with me . . . I continued to stew about it over the weekend, about this whole idea of absolving Bill Allen for any responsibility with respect to this false statement." Russo thereafter expressed the view to Goeke, Bottini, and Marsh that, although Tyree may have claimed (at some point) that the idea was hers, "[t]here was no doubt in my mind that Bill Allen was complicit in this false swear[ing]." Russo urged the prosecutors to disclose the information from the sealed *Boehm* pleadings to the *Kott* defense. Russo expressed similar views in a meeting with Bottini, USA Nelson Cohen, and probably Goe
365	Ch. 5, III, A, 3	Where the prosecutors' meetings with Russo were brief, their contact with SA Eckstein was fleeting. According to Eckstein, the only *Stevens* prosecutor he ever spoke with regarding Tyree was Goeke. Goeke said he called Eckstein on October 4, 2007, while on leave, and had the following conversation: "By the way, what do you remember about Tyree[?] I remember her talking during . . . one of the prep sessions . . . that false statements she made that she had made it of her own volition." He goes, "I kind of remember that, too." "Is that memorialized anywhere? Is there a 302? Is there a record of that anywhere?" "I don't know. Let me check." According to Goeke, Eckstein called him back promptly after finding the SeaTac 302. The ensuing exchanged between the two, though brief, illustrates the prosecutors' concerned and was not a repudiation by Eckstein of the SeaTac 302: And then he calls me back a couple hours later and says, "I found a 302." "Well, what's it say?" And he read it to me. I go, "Oh," and I go -- I remember saying to him, "We may have a disclosure obligation in Kott. It seems like we -- we're gonna have to disclose something along those lines because we didn't make a disclosure ahead of time and that is a 302 that conflicts with my recollection." . . . Q: So you talked to Eckstein some time in 2007 is your best recollection, right? A: I am quite certain it would have been October 4, 2007. Q: *So he did not tell you that his 302 was wrong. A: No, and I'm not saying he did*. Q: *He just said, "It says what it says and I don't even remember."* A: *Yeah, exactly.*
366	Ch. 5, III, A, 3	Goeke asked Eckstein to fax the 302 to Bottini and immediately called Bottini to tell him to expect a fax from Eckstein with the 302. After receiving the 302 from Eckstein, Bottini promptly faxed it to Marsh. Neither Marsh nor Bottini, however, ever spoke with Eckstein about the accuracy of his 302. Eckstein told OPR that he stood behind the accuracy of his 302 and his notes and that he never wavered on that point.

367	Ch. 5, III, A, 3	The email exchange between Marsh and Bottini on October 8 and 9, 2007, is instructive. On October 8, Bottini informed Marsh that, according to Goeke, both Russo and Eckstein "now recall that Bambi told them that Allen asked her to give the sworn statement that she had not had sex" with Allen. In reply, Marsh expressed surprised "because this Russo/Eckstein version of the Bambi statement is different than what Jim [Goeke] and I knew prior to the Kott trial, and also doesn't square away with what Russo and Eckstein were saying at the end of last week." yet, rather than interview Russo and Eckstein about their allegedly conflicting versions of the "Bambi statement" in order to clarify what they recalled, neither Marsh nor Bottini made any further inquiry of either Russo or Eckstein on the subject - ever. Instead, on October 10, the day after Marsh's reply to Bottini's email, Bottini and SA Kepner interview Tyree. The resulting one-paragraph 302 recounts Tyree's statement that she "came up with an idea" to sign a "document" in order to prevent "further extortions by Lisa [Moore.]"
368	Ch. 5, III, A, 3	Aside from the Tyree interview on October 10, 2007, the only investigative step taken by the prosecution team was to interview Allen again shortly before the commencement of the *Stevens* trial. By that time, the alleged blackmailer, [redacted], had alleged that Allen, through his attorney, had offered her $5,000 on condition that she sign a confidentiality agreement denying their sexual relationship - an allegation strikingly similar to the allegation that Tyree signed a false sworn statement denying her sexual relationship with Allen. However, in his interview with Bottini, Goeke, and Kepner on September 7, 2008, two days before the issuance of the September 9 *Brady* letter, Allen disclaimed any role in soliciting Tyree to provide a false sworn statement about their relationship to his attorney. According to the FBI 302 of the September 7 interview, Allen said Tyree merely asked to speak with his lawyer about the blackmail attempt. Like the interview of Tyree on October 10, 2007, Allen was not asked probing questions about why Tyree wanted to speak to his lawyer or how his attorney could have accepted a sworn statement that Allen would have known was false.
371	Ch. 5, III, A, 4	Marsh knew that the full disclosure of Russo's and Eckstein's accounts posed problems for the prosecution not only in the *Stevens* case, but in the *Kott* and *Kohring* cases that were tried the previous year. In August, 2008, both Bottini and Goeke argued in favor of "fronting" the Tyree issue in the *Stevens* case through in the government's motion *in limine*. To be sure, both Goeke and Bottini advocated that position based on strategic considerations - to "smoke out" what the defense knew about the matter - but, had the government raised the issue in the proposed motion, it is likely that the full scope of the evidence surrounding the Tyree issue would have been placed before the court, where it belonged. Marsh, however, strongly opposed that approach, based on his assertion that there was "nothing to turn over - not even an independent allegation, just a mistake in a brief that's inconsistent with the brief writer's notes." and the issue was omitted from the motion *in limine*.
372	Ch. 5, III, A, 4	Goeke and Bottini raised the disclosure issue again in connection with the *Giglio* letter scheduled to be sent to the defense on August 25, 2008. Again, Goeke and Bottini urged limited disclosure - not because they believed there was a duty to do so but to pre-empt an anticipated claim from the defense that the government was withholding information. Marsh once again "strongly" opposed any disclosure at all: "We have nothing to turn over, we have neither evidence nor an allegation that Allen directed her to lie, we have investigated this til the end of time, and we have been blessed by PRAO twice. There is simply no reason to revisit it." Marsh sent his recommendation to PIN Principal Deputy Chief Morris, who agreed with omitting the proposed disclosure from the August 25 letter.
373	Ch. 5, III, A, 4	On September 8, 2008, the issue came to a head in connection with the *Brady* letter that was due to be sent the next day. Goeke, and to a lesser extent Bottini, again argued in favor of getting out in front on the issue by providing some factual recitation that would likely invite further defense inquiry, while Marsh persisted in his view that PRAO's dual opinions settled the matter. On this occasion, PIN Chief Welch joined the discussion and directed the prosecution team to disclose the Tyree issue. Rather than turn over the underlying documentation, however, Marsh drafted the language that appeared in the September 9 *Brady* letter.

377	Ch. 5, III, A, 4	We next considered Bottini's and Goeke's conduct in connection with the *Brady* letter's representations regarding the Tyree issue. On the one hand, both Bottini and Goeke counseled some limited disclosure of the Tyree issue in the motion *in limine* and, alternatively, in the *Giglio* and *Brady* letters. We recognize that, had their views prevailed, the motion *in limine* might well have resulted in the court directing the government to divulge whatever information it possessed on the issue. Assuming the government's compliance with such a directive, Russo's pleadings and Eckstein's SeaTac 302 would have been disclosed to the defense and the issue would have been properly joined for the court's resolution. Thus, the misrepresentations in the *Brady* letter might have been obviated if Bottini's and Goeke's position had been adopted.
377	Ch. 5, III, A, 4	On the other hand, no disclosure was made in the motion *in limine*; the only disclosure of the Tyree issue came through the *Brady* letter. Both Bottini and Goeke knew what Marsh knew about Russo's pleadings, Eckstein's 302, and most importantly, about Russo and Eckstein ratifying the representations in their respective documents. Yet, both Bottini and Goeke advocated to their supervisors that Russo's notes demonstrated that his pleadings were mistaken and that Allen and Tyree credibly denied that Allen asked Tyree to lie for him.
378	Ch. 5, III, A, 4	Although Goeke knew what Bottini knew, he occupied a different position in the hierarchy of the trial team. As a junior member of the team, he enjoyed neither status nor the responsibility of Marsh and Bottini. Moreover, he persisted in his efforts to recommend some disclosure to the defense until virtually the last minute, when Morris told him, essentially, to drop it and that he was "covered." Although Goeke, like Bottini, knew that the representations in the *Brady* letter were inaccurate, he had already been instructed that the issue was closed. Nevertheless, Goeke also endorsed the view that Russo made a mistake in his pleadings and that Eckstein's 302 was ambiguous. In his email to the trial team on September 8, 2008, attaching Eckstein's notes from the SeaTax interview of Tyree, Goeke asserted that the notes were "ambiguous" and further implied that Eckstein distanced himself from the notion that Tyree said Allen asked her to lie. Neither assertion was accurate. Moreover, Goeke never told Morros or Welch that both Russo and Eckstein stood behind what they wrote about the SeaTac interview. Thus, Goeke contributed to his supervisors' misapprehension of the material underlying facts. We concluded that, although Goeke did not intentionally mislead his supervisors, he acted in reckless disregard of his duty to provide full and accurate information to them.
379	Ch. 5, III, A, 4	We concluded further that Welch, Morris, and Sullivan did not commit professional misconduct or exercise poor judgment with respect to the *Brady* letter representations on the Tyree issue. None knew that Russo and Eckstein had ratified the representations made in their documents, and each was entitled to rely on representations made by Marsh, Bottini, and Goeke regarding critical facts.
379	Ch. 5, III, A, 4	Based on the results of our investigation, we concluded that the misrepresentations in the September 9, 2008 *Brady* letter violated the prosecutors' clear and unambiguous duty under D.C. Rule of Professional Conduct 4.1(a) to be truthful in their representations to defense counsel. We decline to make specific findings concerned PIN attorney Marsh. With respect to AUSAs Bottini and Goeke, we found it a very close call, but we concluded that they did not violate Rule 4.1 because the evidence did not establish that they "knowingly" made misrepresentations.
389	Ch. 5, III, B, 2	We considered the fact that other prosecutors joined Marsh on the calls to PRAO. According to Marsh, Goeke joined him on the phone from Alaska for the October 12 call; Sullivan participated in the December 21 call. We found that neither Goeke nor Sullivan, however, committed professional misconduct. Goeke, as we have discussed, was persistent - if not entirely forthcoming - in urging the disclosure of the information, notwithstanding PRAO's advice, but he was overruled. Sullivan, on the other hand, was reliant on Marsh for the basic facts surrounding the issue. He, like Morris and Welch, was not privy to the detailed knowledge that Marsh, Bottin, and Goeke possessed, particularly with respect to Russo's and Eckstein's recollections of what Tyree said during the SeaTac interview.

390	Ch. 5, III, B, 2	We concluded further that neither Morris nor Welch committed professional misconduct with respect to the Tyree issue. They relied on the three attorneys intimately familiar with the facts - Marsh, Bottini, and Goeke - to provide them with the essential information.
390	Ch. 5, III, B, 2	Finally, we considered Bottini's responsibility for the failure to disclose the Tyree information. On the one hand, Bottini knew what Marsh and Goeke knew about the critical facts. He also knew, or should have known, that the *Safavian* case and Department policy required disclosure under these circumstances. On the other hand, Bottini, like Goeke, argued in favor of some disclosure of the Tyree issue in the motion *in limine*. Had Bottini's position been adopted, it is likely that the full scope of the Tyree information would have emerged.
406	Ch. 6, II, C, 1	On August 20, 2008, Williams again met with AUSA Bottini at the Anchorage U.S. Attorney's Office; AUSA Goeke and FBI SAs Kepner, Joy, and Howland were also present. PIN attorneys Marsh and Sullivan participated by telephone from Washington, D.C. The evidence indicates that the prosecutors had some difficulty following Williams during this meeting, but were pleased with his ability to answer questions.
409	Ch. 6, II, C, 1	AUSA Goeke's notes from the trial preparation session are similar. They indicate that Williams recalled that Stevens said that he "wanted to pay" for the project; and that Williams was on "VECO time." Significantly, however, Goeke's notes indicate that Williams also said that he was "supposed to go through Augie [Paone]'s bills," and that Williams's hours and Dave Anderson's hours were supposed to be "applied to the billing"; "RW supposed to go through Augie's bills --> supposed to have RW's time and Dave's time applied to the billing." That conflicts with Bottini's notes, which reflected that Allen "[d]idn't add my time to Augie's bill."
410	Ch. 6, II, C, 2	On August 22, 2008, Williams met again with AUSAs Bottini and Goeke, and SA Joy. Although a witness preparation schedule indicated that Marsh would question Williams at this session, it had been agreed the prior day that Bottini would handle Williams's testimony at trial. Thus, the evidence supports Marsh's recollection that he did not participate in this trial preparation. Bottini took the lead in the meeting. Bottini's handwritten notes of the meeting indicated that Williams confirmed that he verified which workers were present at the Girdwood site, that he signed off on Augie Paone's bill, and that he took the bills to VECO's main office and presented them to Bill Allen.
412	Ch. 6, II, C, 2	Goeke's handwritten notes are similar: How Augie's bill handled. . . . Went to Rocky first - checked off materials that Rocky bought on Augie's acc[oun]ts, checked Vern's and Luther's time. . . . Vern and Mike 8-5 every day and 5 days a week. Then took to VECO main office --> left with Bill to add whatever VECO time etc. was <u>left</u> to <u>add</u> --> then sent down to TS. * * * Usually on front would signed and put date. Would give to Bill to add time for Rocky and Dave. Understood that TS was going to pay for everybody.
412	Ch. 6, II, C, 2	AUSA Goeke did not recall having previously heard Williams's comments regarding his communications with the Steven's. He therefore asked SA Joy, who was also present, to prepare a 302 memorializing Williams's remark. In an FBI 302 prepared the day after the trial preparation session, Joy wrote: WILLIAMS advised he never had any conversations with TED STEVENS or CATHERINE STEVENS in which WILLIAMS made any representation that VECO expenses were placed on CHRIST[E]NS[E]N Builders invoices. Williams further stated that neither TED STEVENS nor CATHERINE STEVENS ever asked WILLIAMS whether any of the VECO expenses, labor[,] or materials, were included in the CHRIST[E]NS[E]N bills.

413	Ch. 6, II, C, 2	Goeke was asked during his January 2010 interview whether he told SA Joy what to write in his 302, and whether he specificially told him not to include the potentially exculpatory information discussed during the trial preparation session. Goeke maintained that he did not tell joy what to write; rather, he "asked [Joy] to do a 302 about the general topic of Rocky's recollections of his discussions with Ted and Catherine." Goeke said that he asked Joy to write up that particular "concept" because he thought that it constituted something new that he had not heard before. Goeke stated that he did not tell Joy precisely what facts or language should be included in the 302. He acknowledged he did not ask Joy to memorialize the entire meeting because he thought that Williams's comment regarding his communications with the Senator and Mrs. Stevens was the only item that he had not heard before: [I recall asking him to do a 302 about the general topic of Rocky's recollections of his discussions with Ted and Catherine. And to be clear, the reason I was focused on that was because that's the part that I thought was new. The other stuff I didn't think - I thought it was stuff we'd heard before . . . . If I had thought that stuff was new, I'd have said, "Do a 302, the whole thing."] At his interview in January 2010, Goeke explained that he had an "impression" at the time that the other information provided by Williams was "not new information," but could not identify the basis for that impression. He acknowledged that he had not seen that information documented anywhere, other than in his own and Bottini's handwritten notes.
414	Ch. 6, II, C, 2	Williams's statements regarding his communications with the Stevenses apparently were new, thus it was appropriate to memorialize them in an FBI 302. Williams's information about his assumption that his and Anderson's hours were added to the Christensen Builders bills was not new on August 22, but it had been new just two days earlier, when, as reflected in Goeke's own notes, Williams said that during his August 20, 2008 trial preparation session. However, neither Goeke nor anyone else asked for that information to be memorialized.
415	Ch. 6, II, C, 2	Although it appears that the trial preparation session on August 20 and August 22 generated new exculpatory information, there was no indication that the prosecutors on the case appreciated the significance of the information. There was no email traffic regarding the August 22 preparation session that suggested that Bottin and Goeke believed they had uncovered new information from Williams that they considered damaging to the government's case.
418	Ch. 6, II, C, 2	SA Joy's recollection of the August 22 meeting and the FBI 302 he was asked to draft is consistent with Goeke's. According to Joy, he asked to prepare the 302 by either Bottini or Goeke, or both. Joy stated that because the meeting was for trial preparation purposes rather than investigatory purposes and was handled by attorneys, he did not take notes and did not even have a notepad with him. Because he had no notepad, Joy drafted the 302 on his Blackberry and emailed it to himself. According to SA Joy, the substance of the email was "essentially" dictated to him by one or both attorneys; however, Joy recalled that the substance of the 302 accurately reflected what the witness said. Joy did not recall the prosecutors reviewing what he drafted or editing the 302 before it was finalized.
419	Ch. 6, II, C, 3	Williams met with AUSA Bottini, AUSA Goeke, and SA Joy for another trial preparation session on August 31, 2008. According to Bottini's handwritten notes, Williams was again questioned about his review of Augie Paone's invoices for work done by Christensen Builders. Williams reiterated that he picked up the Christensen Builders invoices, reviewed them for accuracy, signed off on the documents, and assumed that his time and Dave Anderson's time would be added to the bills that ultimately were sent to Senator Stevens. Williams said he did not know whether his and Anderson's hours were added or not, and that he never saw the bills after he dropped them off at VECO corporate offices.
420	Ch. 6, II, C, 4	Following the trial preparation session on August 31, 2008, AUSA Goeke noted in an email to PIN attorneys Marsh and Sullivan: "[n]o big issues with Rocky yet but he is not looking good healthwise - worse than last week."
421	Ch. 6, II, C, 4	An FBI 302 of an interview of AUSA Goeke related that Goeke had similar views of Williams's deteriorating health: WILLIAMS had come to the USAO in Alaska and GOEKE was shcoekd at his appearance. GOEKE stated ["his color was yellow, his abdomen was obviously distended, and basically he looked like hell.["]

421	Ch. 6, II, C, 4	In a February 23, 2009 Declaration, Goeke described Williams's condition during the late August 2008 Alaska trial preparation sessions in more detail: During the 2008 meetings attended with Williams at the USAO, I noticed that Williams' health appeared to have significantly declined since 2006 so much that I did not immediately recognize Williams when I first met him again in 2008. Williams appeared frail, had a yellowish complexion, and had a noticeably distended abdomen. I also noticed that Williams had difficulty breathing and had a bad cough.
422	Ch. 6, II, D	During the same time period, the prosecution team was preparing letters describing potential Giglio and Brady information to disclose to the defense. A Giglio letter, drafted by AUSA Bottini and reviewed by Goeke, among others, detailing impeachment information was sent on August 25, 2008. On September 9, 2008, the government sent a Brady letter, which both Bottini and Goeke reviewed. With respect to Williams, the Giglio letter disclosed only that he had a 1984 felony conviction for negligent manslaughter; a 1986 felony conviction for Failure to Assist/Aid; and a 1999 misdemeanor conviction for Driving While Intoxicated. The letter added that "[t]he government is also aware of rumors concerning excessive alcohol use by Williams and it is possible that Williams may have an alcohol dependency issue."
425	Ch. 6, II, D	On September 6, 2008, SA Joy forwarded to PIN attorneys Morris, Marsh, and Sullivan, AUSAs Bottini and Goeke, and SA Kepner a spreadsheet review of [redacted]
433	Ch. 6, II, D	AUSA Goeke was present during the trial preparation sessions in August 2008. In Goeke's January 8, 2010 interview, he stated that he was not involved in drafting the Brady letter, and did not know who drafted Paragraph 15. He acknowledged reviewing the letter, but said he did not catch the inaccuracies in Paragraph 15. Goeke also stated that he did not consider whether Williams's statements during the trial preparations session constituted Brady material; no one asked him to report the substance of Williams's statements to Sullivan or Marsh for inclusion in the letter; it did not occur to Goeke to undertake this one his own; and he did not consider it his responsibility. Goeke stated that he did not review his own notes of the trial preparation sessions in connection with the preparation of the Brady letter.
434	Ch. 6, II, D	Goeke initially contested that the information was exculpatory, arguing that it was only Williams's "third-party impression" of whether his and Anderson's time was added to the Christensen Builders invoices. Ultimately, however, he agreed that it should have been disclosed to the defense. When Goeke was asked how the government could have provided information in the *Brady* letter that was the opposite of what a witness had repeatedly said just weeks before, Goeke replied that he did not know.
437	Ch. 6, II, E	The following day, Bottini continued preparing Williams for trial. Again, Bottini made handwritten notes on the outline reflecting the answers Williams provided. AUSA Goeke conducted the mock cross-examination of Williams later that day, and Bottini and SA Joy attended that session. Goeke could not recall whether he question Williams about his understanding of what the Christensen Builders invoices would include.
439	Ch. 6, II, E	AUSA Goeke's recollections were similar: I next met Williams in Washington D.C., in mid to late September 2008 at the offices of the Public Integrity Section. . . . Williams still appeared frail, still had a yellowish complexion, still had a noticeably distended abdomen, still had difficulty breathing and still had a bad cough. I felt that his overall condition was far worse than when I last saw him in Alaska.
441	Ch. 6, II, F	AUSAs Bottini and Goeke both recalled that someone asked Williams whether he wanted to return to Alaska to receive medical attention, or instead seek medical care in Washington, D.C. It was Goeke's understanding that SA Joy asked Williams his preference. Both attorneys recalled being told that Williams preferred to return to Alaska to receive medical attention from his own doctors.

442	Ch. 6, II, F	PIN Principal Deputy Chief Morris corroborated Bottini's and Goeke's version of events. According to Morris, SA Joy told her he was concerned about Williams's health, and did not want Williams "to die on his watch while he was in Washington D.C." Morris recalled Bottini and Goeke telling her that they were concerned about Williams's health, that he was missing doctor's appointments, and that Williams could not focus because of his sickness. She also learned, either from Bottini or others, that Williams could be easily led during cross-examination.
444	Ch. 6, II, F	Marsh's recollection generally is consistent with that of Bottini, Goeke, and Morris, though there is disagreement on one point: whether, after Williams returned to Alaska, the prosecution team still planned to have him return so that he could be called near the end of the government's case. As noted above, Morris considered Williams to be a valuable witness that the government might need to call, and Bottini planned on having Williams near the end of the case. In contrast, Marsh recalled that: After a number of discussions with myself, Mr. Bottini, Mr. Goeke, and Ms. Morris, we collectively decided two things: first, that Mr. Williams needed to return to Alaska to get medical treatment and to be diagnosed for his illness; and second, that we could successfully prosecute the Stevens case without Mr. Williams' testimony.
472	Ch. 6, II, N	In the months following the submission of Joy's Complaint, he was questioned about his recollection of the details of Marsh's alleged plan. During an interview on February 21, 2009, Joy recalled that Williams was easily led during a mock cross-examination conducted by AUSA Goeke during a trial preparation session in September 2008. Joy recalled that after Goeke's mock cross-examination, Goeke reported to Marsh and others that Williams generally did not hold up well on cross-examination.
474	Ch. 6, II, N	In Joy's February 2009 interview, he recalled that after the mock cross-examination, he and AUSA Goeke went to Marsh's office and Goeke told Marsh that Williams had not done well. Joy recalled that at this point Marsh came up with a "plan" to send Williams back to Alaska. In Joy's OPR interview, he stated that he believed that Marsh had suggested sending Williams back to Alaska for underhanded or devious reasons; however, Joy could not define, describe, or identify any such reason, despite repeated attempts. When Joy was asked what prompted Marsh to say that Rocky should go back to Alaska, Joy stated: My recollection is Goeke essentially briefed Mr. Marsh on what occurred during the mock cross examination, and Nick was the one that said, "I've got a great plan" - or a great idea - so he introed [sic] that. I don't remember any flow. It was just Goeke explaining to whatever level that I was there for and then Nick introing [sic] the plan.
475	Ch. 6, II, N	Joy corroborated Bottini, Goeke, Wlech, and Morris in recalling that there were several meetings in which the subject was discussed, that a collective decision to allow Williams to return back to Alaska was made, and that Welch ultimately approved it.
480	Ch. 6, II, O	In Febraury, 2008, Welch, Morris, Marsh, Sullivan, Bottini, Goeke, and Kepner all completed interviews and/or affidavits that addressed the issues raised in Joy's Complaint. All strongly disagreed with Joy's characterization of the decision to send Williams home as a "plan" or "scheme" put together by Marsh.
488	Ch. 6, III, A, 2	While still in Alaska, Williams advised Bottini, Goeke, and SA Joy that his doctors had diagnosed liver impairment, which caused fluid build-up in his abdomen that made it difficult to breathe. In addition, Williams advised them that it had been necessary for doctors to drain fluid from his abdomen to help him breathe. Bottini and Goeke each noticed that Williams had a yellowish complexion, a distended abdomen and had difficulty breathing, and Joy recalled that they advised Williams to consult a doctor to see if he was healthy enough to travel to Washington, D.C. Accordingly, Williams could "only with stand short [trial preparation] sessions."
489	Ch. 6, III, A, 2	When Williams arrived in Washington, D.C., SA Joy noticed that "it was apparent . . . Mr. Williams' health had deteriorated considerably. Joy noticed that Williams was "jaundiced," "gaunt," "had chronic coughing spells," and "was frequently short of breath." Bottini, Goeke, Marsh, and Welch made similar observations. it is also amply documented that the prosecution team was concerned that, at the same time Williams was visibly worsening, he was missing appointments with his doctors. In addition, Williams himself wanted to return to Alaska so he could be treated by his own physicians, who were familiar with his case.

495	Ch. 6, III, B	The information Williams provided, particularly during his trial preparation sessions in August 2008, was material because it went to the heart of the defense theory: Senator Stevens's belief that he paid for all the Girdwood renovations. In the course of this and Mr. Schuelke's investigations, members of the prosecution team conceded that the information was material. PIN attorney Marsh, when asked whether the information could have been "outcome determinative" said that "anything along these lines would have been construed as Brady. PIN Chief Welch agreed that it should have been disclosed, and PIN Principal Deputy Chief Morris said it was Brady information that should have been disclosed. AUSA Goeke, when asked whether he though the information in his notes from the August 2008 sessions should have been disclosed, replied, "Yes, I do." PIN attorney Sullivan described it as "new information that would be discoverable" as exculpatory "Brady" information. Only AUSA Bottini argued that it may not have been Brady information, relying on his argument that Williams only assumed (rather than knowing as a fact) that his and Anderson's hours would be added to tl information, and that it "probably" should have been disclosed "out of an abundance of caution."
499	Ch. 6, III, B	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 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." These notes were never disclosed to the defense.
500	Ch. 6, III, C, 1	There is circumstantial evidence that the prosecution team, and in particular AUSAs Bottini and Goeke, knew about Williams's exculpatory information and deliberately withheld it from the defense. The team knew that a central defense theory was that Senator Stevens reasonably believed that the VECO costs were incorporated in the Christensen Builders invoices that he paid.
502	Ch. 6, III, C, 1	Based on the results of our investigation, however, we concluded that the evidence did not demonstrate intentional misconduct. The attorneys principally responsible for the disclosure violations were AUSAs Bottini and Goeke. They had first-hand knowledge of Williams's exculpatory statements, and they reviewed the draft *Brady* letter that omitted all of that information and misrepresented some of it. AUSA Bottini conducted all three August 2008 preparation sessions with Williams, as well as the fourth session on September 20, 2008.
504	Ch. 6, III, C, 1	AUSA Goeke, who participated in the sessions, said he did not consider whether Williams's statements constituted *Brady* material. And neither Bottini nor Goeke reviewed their notes from the August 2008 trial preparation sessions to see if they contain *Brady* material.
504	Ch. 6, III, C, 1	Furthermore, both Bottini and Goeke reviewed the September 9, 2008 *Brady* letter before it was sent to the defense. Bottini said he reviewed the *Brady* letter but did not focus on it, in part because he had just arrived from Alaska on September 8 and was preparing for oral arguments on two pretrial motions. Thus, he did not realize that part of Paragraph 15 stated the opposite of what Williams had told him less than two weeks earlier. AUSA Goeke also reviewed the *Brady* letter before it was sent. Goeke, whose notes from the August 20 and 22, 2008 preparation sessions showed that Williams said he reviewed the Christensen Builders bills, said the same thing as Bottini: "I apparently did not catch it."
505	Ch. 6, III, C, 1	In the course of our investigation, we did not find any evidence indicating that Bottini or Goeke (or anyone else on the prosecution team) recognized the exculpatory import of Williams's statements. OPR reviewed thousands of emails sent and receive by the prosecution team, and none showed that the significance of Williams's statements was understood or discussed. Nor did any indicate an attempt to suppress the information. Furthermore, no such evidence was developed through any of the interviews of the prosecution team members, agents, supervisors, and support staff. Thus, we concluded that the evidence did not support a conclusion that Bottini or Goeke either appreciated the significance of Williams's statements or deliberately suppressed the statements.

507	Ch. 6, III, C, 1	The question whether AUSA Bottini and AUSA Goeke violated D.C. Rule of Professional Conduct 3.8(e) is a close question. That rule contains a *scienter* requirement, and is violated only when a prosecutor "intentionally" fails to disclose evidence or information the prosecutor "knows or reasonably should know tends to negate the guilt of the accused." In this case, both Bottini and Goeke knew, or reasonably should have known, that the non-disclosed information tended to negate the guilt of Senator Stevens, but the evidence did not show that they "intentionally" withheld it. Furthermore, we concluded that the prosecution team did not violate D.C. Rule of Professional Conduct 4.1(a) ("knowingly" make a false statement of material fact or law to a third person) because no one on the prosecution team "knowingly" made a misrepresentation to the defense concerning Williams's review of Christensen Builders invoices.
508	Ch. 6, III, C, 2	The facts detailed above demonstrate that AUSAa Bottini and Goeke engaged in professional misconduct by acting in reckless disregard of their disclosure obligations. They both knew of their disclosure obligations, and of the applicability of those obligations. They also both knew that a central theory of the defense was that Senator Stevens reasonably believed that VECO's costs were rolled into the Christensen Builders invoices. That point was repeated in the email sent to them by PIN attorney Sullivan the same day (August 22, 2008) as the second Williams trial preparation session. That day, Williams told Bottini and Goeke that he reviewed the Christensen Builders invoices, passed them along to Bill Allen (or a VECO employee), and believed the cost of his and Anderson's hours would be added to the Christensen Builders invoices, pursuant to the "original agreement" they had with Senator Stevens. Goeke's notes showed that Williams said he left the invoices with Bill Allen "to add whatever VECO time etc. was <u>left</u> to <u>add</u>." The exc Williams believed not only his and Anderson's hours were added to the Christensen Builders invoices, but perhaps all the VECO costs were. That was exactly the defense predicted in the prosecution memorandum, and reiterated in Sullivan's email on August 22, 2008. Bottini and Goeke should have realized that the information Williams had just told them fit that theory precisely. Furthermore, Williams told them the same thing nine days late, in a trial preparation session on August 31, 2008, and they apparently missed it again. And Bottini missed the significance of that information yet a fourth time, when he prepared Williams for trial on September 20, 2008.
509	Ch. 6, III, C, 2	For the reasons stated in the prior section, we did not conclude that Bottini or Goeke deliberately suppressed exculpatory information. The question remains, however, how they repeatedly missed the significance of the information. The evidence suggests that their focus on the evidence that inculpated Senator Stevens, and on what information they believed was accurate, may have made them oblivious to the exculpatory nature of information they did not believe was accurate. For example, Goeke directed SA Joy to memorialize in an FBI 302 the one piece of "new" information learned in the Williams trial preparation sessions that was helpful to the government's case, while the considerable amount of "new" exculpatory information went unremarked. AUSA Bottini later argued that the information was not exculpatory because it was just Williams's assumptions.
512	Ch. 6, III, C, 2	AUSAs Bottini and Goeke were also in the best position to identify the error in Paragraph 15 of the *Brady* letter, which stated that Williams did not recall reviewing the Christensen Builders invoices. Both reviewed the letter, but again, they somehow did not "catch it." They were also in the best position to avoid the disclosure violations by reviewing their own notes of the trial preparation sessions for *Brady* information. Bottini knew *Brady* material could be in handwritten notes. Goeke also said he "recognized that *Brady* material could exist in notes of prosecutors." Yet neither reviewed their notes for *Brady* information. Bottini explained that "no one directed" him to review his notes. He said he relied on his memory that no *Brady* information had come up during the trial preparation sessions. Goeke said that he would have reviewed his notes if he had believed they contained *Brady* information, but that no one directed him to, so he "relied on [his] memory," and he did not "recall recognizing anything that came up in an interview session I participated in that . . . was *Brady* material. We found no evidence suggesting that either Bottini or Goeke believed that someone else would review their handwritten notes from the trial preparation sessions for Brady information.

513	Ch. 6, III, C, 2	In addition, both Bottini and Goeke knew that agents were performing the *Brady* review, and both knew that it is the responsibility of prosecutors, not agents, to conduct a *Brady* review. It is settled doctrine that "the individual prosecutor has a duty to learn" of evidence favorable to the defense (*Kyles v. Whitley*, 514 U.S. at 437), and that duty extends to reviewing the prosecutors's [sic] own notes (*Andrew*, 532 F.3d at 906.) Goeke did not know if the FBI or IRS agents who conducted the *Brady* review had any knowledge of, or training in, the *Brady* doctrine.
513	Ch. 6, III, C, 2	The non-disclosed contents of Bottini's and Goeke's trial preparation notes are detailed above. But in addition, Bottini and Goeke did not review grand jury transcripts, FBI 302s, or IRS MOIs in connection with the *Brady* letter. Indeed, Bottini did not even review the documents which the agents had "flagged" in the agent-created *Brady* spreadsheet.
515	Ch. 6, III, C, 2	Goeke, too, admitted that "[i]t's an obligation of the attorney to get the *Brady* review - identify *Brady* material. I wouldn't trust an agent to do it." In summary, both Bottini and Goeke knew that the principal defense theory was that Senator Stevens reasonably believed he had paid all the Girdwood expenses, including the VECO costs, by paying the Christensen Builders invoices. In the weeks before trial, they each heard Williams make statements on three separate occasions (four for Bottini) directly supporting that theory, yet failed to recognize the exculpatory nature of the statements. Neither review their own notes for the September 9, 2008 *Brady* letter disclosures, despite their knowledge that attorney notes can contain *Brady* information. Furthermore, they reviewed the *Brady* letter before it was sent, and failed to realize that Paragraph 15 contained a representation that was the opposite of what Williams had repeatedly told them. Based on their level of experience, they knew, or should have known, that their conduct involved a substantial likelihood that the government's disclosure obligations would be violated, and was objectively unreasonable under the circumstances. /
		more experienced that [sic] Goeke and Williams was assigned to Bottini to handle at trial, we found Goeke's responsibilty to be sufficient to support a finding of professional misconduct.
525	Ch. 7, II, A, 2, a	On November 7, 2006, PIN attorney Marsh questioned Rocky Williams before the grand jury; PIN attorney Sullivan and AUSA Goeke were also present (the transcript indicates that Sullivan left room shortly after Williams's testimony began).
526	Ch. 7, II, A, 2, b	On December 6 and 7, 2006, AUSA Goeke questioned Anderson [redacted]; PIN attorneys Marsh and Sullivan were also present. During Anderson's [redacted], AUSA Goeke asked him if "there c[a]me a time about the time the garage was . . . Finished, as you were trying to beat the snow there in the fall, that you left the Girdwood work site to go do something else for Veco?" Anderson responded that after the "pad . . . for the garage" was set down, he went to Oregon to work on a different VECO project. AUSA Goeke asked a series of questions to clarify when Anderson was in Oregon, and Anderson ultimately agreed with Goeke's assessment that he left the Girdwood site in mid to late September, and returned "a little bit before Christmas, but after Thanksgiving." Anderson noted that much of the initial renovation work was completed by the time he returned. He went on to describe a number of projects at the residence that he undertook after he returned from Oregon.
528	Ch. 7, II, B	At a February 1, 2007 interview with AUSAs Bottini and Goeke, PIN attorney Sullivan, FBI SA Kepner, and others, Boomershine was asked to generate a spreadsheet of costs incurred in connection with the Girdwood project and to locate supporting documentation.
529	Ch. 7, II, B	On February 8, 2007, AUSA Goeke questioned Boomershine [redacted] PIN attorneys Marsh and Sullivan were also present.
531	Ch. 7, II, B	[redacted]. It appears that the government received the underlying VECO records on February 25, 2007. In an email of that date to Bottini, Marsh, Sullivan, and Kepner, AUSA Goeke related: "We received the lastest VECO docs late Friday. They are composed of the backup documentation for the two spreadsheets - Girdwood and [Allen's] house."

532	Ch. 7, II, B	In an April 2007 interview with FBI agents, Boomershine stated that, as requested by prosecutors, she had searched VECO records but was not able to locate payment(s) from Senator Stevens for the costs set forth on the spreadsheet. [redacted]
533	Ch. 7, II, B	On February 27, 2007, Goeke, IRS SA Roberts, and FBI SA Traven interviewed Ed Cabarles, a cost scheduler in VECO Alaska's Fabrication Shop ("Fab Shop"), where Dave Anderson worked. Cabarles recalled that time sheets with handwritten descriptions such as "Ted Stevens," "Bill Allen," and "Girdwood" were submitted so that the hours could be entered into the company's computerized payroll system.
534	Ch. 7, II, C	The prosecution team, which at this point consisted of AUSAs Bottini and Goeke and PIN attorneys Marsh and Sullivan, prepared a prosecution memorandum seeking authorization to indict Senator Stevens. The memorandum detailed the evidence against Senator Stevens, as well as anticipated defenses.
538	Ch. 7, II, D, 1	On August 20, 2008, Williams went to the U.S. Attorny's Office in Anchorage and met with AUSAs Bottini and Goeke, and FBI Sas Kepner, Joy, and Howland; PIN attorneys Marsh and Sullivan participated by telephone. The purpose of the meeting was to prepare him for his trial testimony. Both Bottini and Goeke took notes . . . . In another trial preparation session on August 31, 2008, with AUSAs Bottini and Goeke, Williams stated that he was not asked to keep track of his time, and that he "occasionally would do other stuff," apparently referring to non-Girdwood work.
540	Ch. 7, II, D, 1	These documents demonstrate that Bottini and Goeke (and probably Marsh), who had done most of the trial preparation regarding Williams, had information prior to the start of trial that Williams did not work full-time on the Girdwood project.
541	Ch. 7, II, D, 1	AUSA Goeke was not directly asked whether he ever compared Williams's grand jury testimony, or his notes from Williams's trial preparation session, with Williams's timesheetsor other VECO records introduced by Boomershine. Goeke did, however, state that he did not review his own handwritten notes, Williams's grand jury testimony, or Williams's FBI 302s for *Brady* material.
544	Ch. 7, II, D, 2	Prior to the post-indictment reshuffling of the trial team, it was anticipated that AUSA Goeke would present Boomershine at trial. He had questioned her in front of the grand jury, and had been involved in obtaining the underlying documentation that would be used at trial. Shortly before the return of the indictment, however, the composition of the trial team had changed, and the Criminal Division Front Office determined that neither Goeke nor Sullivan would handle witnesses at trial. Boomershine ultimately was assigned as Marsh's witness sometime in August 2008.
544	Ch. 7, II, D, 2	In Marsh's OPR interview, he also recalled that Goeke had significant involvement in reviewing and sorting the VECO records. Marsh said that he looked over the VECO records when they came in, but that he was not really familiar with them.
545	Ch. 7, II, D, 2	Although Marsh was responsible for presenting Boomershine's testimony, Goeke remained involved in assembling the exhibits . . .On September 1, 2008, Goeke sent an email to the group with a tentative list of trial exhibits.
547	Ch. 7, II, D, 2	By early September 2008, Goeke was regularly sending updated versions of the prosecution's growing exhibit list to the prosecution team. In a September 10, 208 email, Goeke stated: "I am adding all of the supporting materials for the [VECO] spreadsheet. According to Marsh, the original versions of at least some of the inter-company communications were not available until shortly before trial.
548	Ch. 7, II, D, 2	In his OPR interview, Bottini stated that Goeke and Marsh were the attorneys most heavily involved in putting together the VECO records early in the investigation.

580	Ch. 7, III, A, 1	On November 30, 2006, Anderson told investigators that he had been "out of town during part of the work in the [Girdwood] garage," and he identified that time frame as December 2000 to January 2001. We infer that Anderson discussed his absence from the Girdwood site with at least AUSA Goeke some time before his grand jury appearance on December 6, 2006, because Goeke used leading questions to specifically elicit from Anderson the time period during which he was in Oregon rather than working on Girdwood: Q: Did there come a time about the time the garage was skinned in and finished, as you were trying to beat the snow there in the fall, that you left the Girdwood work site to go do something else for Veco? The leading nature of the question, referring to the specific state of the work on the garage and to Anderson's personal motivations, suggests that Goeke was prompting Anderson with information Anderson had given him previously; they are not the kind of details Goeke would have invented and incorporated into a question. Anderson responded, "Yes," and related that he went to Oregon after some work on the garage had been completed. Goeke followed up: "So you were down in [Oregon] for quite a while then?" Anderson replied: "Yeah, a couple months." Goeke then asked additional questions to clarify when Anderson was in Oregon, and summarized the information in another question to Anderson.
598	Ch. 7, III, C, 1	The one attorney on the prosecution team who was personally involved in both the Williams/Anderson evidence and the VECO records evidence was AUSA Goeke. Goeke attended [redacted] As detailed above, Goeke asked Anderson a series of questions eliciting the time frame during which Anderson was in Oregon. Goeke was also present for the trial preparation sessions in which Williams said he was not at the Girdwood site everyday, and worked on non-Girdwood related things ("other stuff"). In addition, the evidence demonstrated that Goeke was involved in obtaining the underlying VECO records, and in putting those materials together as trial exhibits. Goeke's knowledge of the VECO records stemmed from the fact that, prior to the trial team re-shuffle immediately before the indictment, Boomershine had been his witness. Thus, when Boomershine was reassigned to PIN attorney Marsh, Marsh had Goeke "walk" him through the VECO records to explain what they meant.
599	Ch. 7, III, C, 1	Goeke declined to be interviewed by OPR, so we were not able to inquire whether he ever compared Williams's and Anderson's grand jury testimony (and interview statements) with the VECO records. In his January 2010 interview, however, Goeke acknowledged that he did not review Williams's grand jury transcript, FBI 302a, or notes for *Brady* material, because he assumed that was the responsibility of the attorney handling each witness.
599	Ch. 7, III, C, 1	Although Goeke had first-hand knowledge of both sides of the Williams/Anderson and VECO records equation, we could not conclude that he realized that the evidence was conflicting. We found no evidence that he actually analyzed the Williams time cards or the line items for Anderson's hours in the VECO Alaska invoices. Given the general understanding on the prosecution team that the VECO records established "$40,000 or $90,000 or $270,000" of uncompensated labor, such that proving the exact amont was not important, it is understandable that Goeke would not have added the time cards or studied the invoices closely, and that he would not have had reason to hide the conflicts if he had appreciated them. Further, we found no evidence of any communications among the prosecution team suggesting that anyone had compared the information about Williams's and Anderson's hours with the VECO records.
605	Ch. 7, III, C, 3	The attorneys principally responsible for failing to connect this information were PIN attorney Marsh and AUSAs Bottini and Goeke. In essence, Marsh and Bottini both asserted that they only knew one side of the equation because they were only responsible for their own witnesses' evidence. Thus, Marsh was familiar with the VECO records because he presented Boomershire, but no familiar with the statements of Williams and Anderson because they were assigned to Bottini. Bottini knew of Williams's part-time status and of Anderson's time in Oregon, but he never studied the VECO records because they would be introduced through Boomershine. Goeke had first-hand knowledge of both sides of the equation, but was not assigned to handle any witnesses, and likely never compared to Williams's and Anderson's statements with the VECO records.

608	Ch. 7, III, C, 3	We decline to make any specific finding with respect to the conduct of PIN attorney Marsh. With respect to AUSAs Bottini and Goeke, we concluded that their failures to review evidence, and to fully understand the evidence they did review, did not constitute professional misconduct in reckless disregard of their obligations, but only because their conduct did not involve the "substantial likelihood" that they would violate their obligations. Instead, we concluded that they exercised poor judgment, because their cabined approach to the evidence was in marked contrast to the action that the Department may reasonable expect an attorney exercising good judgment to take.
653	Ch. 8, II, E	Although the prosecution team planned to have AUSA Bottini condcut Anderson's direct examination at trial, AUSA Goeke assisted in preparing Anderson on various occasions during this time period. In a December 15, 2008 Declaration, Goeke stated that he and SA Joy met with Anderson several times in Washington to help him prepare for his testimony. Goeke stated that he showed Anderson documents and photographs that the prosecution team expected to use during his prospective testimony including invoices that Anderson had signed for materials that were delivered to the Girdwood residence. On at least one occasion, Anderson reaffirmed that his March affidavit was false. According to Goeke, each time he met with Anderson, he and the agent repeatedly told Anderson that if he was called to testify, he was expected "to simply tell the truth, no more no less." On each occasion, Anderson "reaffirmed that he was telling the truth and would continue to do so."
673	Ch. 8, II, H	Goeke's Declaration contains similar denials. Goeke estimated that he met with Anderson at least twice in Washington, D.C., and that each session lasted approximately one hour. Goeke stated that he never met with Anderson alone; an agent was always present. He stated further that, to his knowledge, no one showed Anderson any documents or photographs that were related to his potential testimony at trial, nor was Anderson ever provided with a "time line," or with a tabbed or highlighted copy of his grand jury testimony. Goeke said that Anderson was never told to re-read documents until he recalled something "correctly," nor was he instructed on how to "sugar coat" his testimony about the March Affidavit or otherwise have it "swept under the rug."
727	Ch. 9, IV	AUSA Goeke asserted in his February 23, 2009 Declaration that the first time he became aware of the Land Rover check was during trial when, while at the PIN offices working on motions, he received a call from an agent who was at the courthouse asking him to locate the check in a specific folder. AUSA Goeke did not recall who called to ask him to look for the check, but said that it was "clear to me at the time that the person calling me was simply relaying the request for someone else." AUSA Goeke said that SA Joy was with him when he was asked to look for the check. AUSA Goeke stated: "[u]ltimately, I located a photocopy of the check in the folder. AUSA Goeke also recalled that he noticed that he copy of the check he located did not have a Bates number on it and believed that he told the person who called "if [the check] was to be used at trial, a copy with a bates number needed to be located."
728	Ch. 9, IV	AUSA Goeke stated that he did not know why the check had not been produced in discovery, but was "unaware of any one on the government trial team making an affirmative decision to suppress the check at issue from the defense." Rather, he believed "the existence of the check for the Land Rover was forgotten or overlooked during the discovery process"; "otherwise [it] . . . would have been produced in discovery because the check was helpful to the government."
752	Ch. 10, II, B	According to Bottini, after the court's order, he and AUSA Goeke were asked by PIN Principal Deputy Chief Morris to go through the Polar Pen grand jury transcripts and produce those that were relevant to the *Stevens* case. In preparing the production, he and Goeke reviewed the transcripts in the PIN offices. The prosecution team had received electronic copies of the Alaska grand jury transcript directory. This allowed him to review the transcripts on screen, search for "Stevens" electronically, and print out the relevant transcripts at the PIN office.

752	Ch. 10, II, B	Bottini said that the D.C. grand jury transcripts were all in hard copy, and that he and Goeke had to read through them and decide whether they were relevant. However, because all of the D.C. grand jury transcripts related to the *Stevens* case (as opposed to other Polar Pen cases), he suspected they were all relevant. Bottini did not recall how he and Goeke obtained the D.C. grand jury transcripts that they reviewed, and did not recall a long for the D.C. grand jury transcripts. He did recall that the D.C. grand jury transcripts for the *Brady* material were "scattered around a little bit" and had not been collected in one spot. Bottini stated that this was because review of the grand jury transcripts for the *Brady* material had been assigned to PIN attorneys who were not on the *Stevens* trial team. He could not remember whether he and Goeke or a paralegal went around to the various PIN attorneys' offices to collect the transcripts.
753	Ch. 10, II, B	Although he did not recall that anyone was specifically in charge of complying with the court's October 2, 2008 order, AUSA Goeke remembered helping Bottini review several grand jury transcripts "to make sure we got all the grand jury transcripts handed off." He also recalled going through the PIN offices "scrambling" to find the transcripts and being told that they were "scattered around" and "could be in the offices of some of the people who are reviewing them." Goeke stated that he recalled "having a reaction" to learning that PIN attorneys who had no experience on the case had been asked to conduct some of the *Brady* and *Giglio* review.
776	Ch. 10, III	Kepner later told Sullivan that she had been unable to locate the April 25, 2007 transcript when preparing Allen for trial; thus, she had been aware it was missing, but did not communicate this fact to the prosecutors until Sullican specifically asked her to find the transcript. Our investigation revealed no evidence that the trial prosecutors were aware that the two transcripts were missing or that the USAO-DC had received them. The prosecution team's failure to maintain a log of the witnesses that testified before the grand jury contributed to the problem. Nevertheless, OPR concluded that the prosecutors' failure to comply with the courts' order to produce the grand jury minutes was not willful, but rather was inadvertent. Accordingly, we concluded that the prosecutors did not commit professional misconduct or exercise poor judgment in connection with the missing Kepner grand jury transcripts, but rather made an excusable mistake.
809	Ch. 11, V	Furthermore, we found no evidence that any members of the prosecution team were aware of, or witnessed, any attempt by Bundy to signal to Allen during Allen's testimony.
848	Ch. 12, V, B, 1	On September 20, 2006 SA Kepner, SA Joy, and AUSA Goeke interviewed Allen extensively about how the Girdwood project developed, who worked on it, and its costs. Allen also spoke about Dave Anderson, Anderson's work on the Girdwood project, Anderson's relationship with [redacted], and Anderson's alleged attempt to extort Allen. As we discuss in greater detail in Chapter Four, Allen spoke on some of the same subjects that he addressed in his April 15, 2008 interview. Significantly, no 302 was ever prepared for either interview.

Exhibit 3

U.S. Department of Justice

Justice Management Division

MAY - 6 2009

Washington, D.C. 20530

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

FROM: Lee J. Lofthus
Assistant Attorney General for Administration and
Designated Agency Ethics Official

SUBJECT: Waiver under E.O. 13490 and 18 U.S.C. § 208

The purpose of this memorandum is to waive the restriction in Executive Order 13490 of January 21, 2009, Ethics Commitments by Employees in the Executive Branch, and further to make a determination under the standard of conduct on impartiality, that you may participate in a particular matter in which your former firm, which also is your spouse's firm, represents a party, relating to *U.S. v. Stevens*, Criminal No. 08-231 (EGS), the prosecution of former United States Senator Ted Stevens.

On April 1, 2009, the Department asked the U.S. District Court for the District of Columbia, Judge Emmet Sullivan, to grant the defendant's motion to dismiss the charges in *U.S. v. Stevens*, the prosecution of former Alaska Senator Ted Stevens. On April 7, 2009, the Court announced that it was appointing a special counsel, Henry Schuelke III, to "investigate and prosecute such criminal contempt proceedings as may be appropriate" against six Department of Justice attorneys who handled the case. The Department's Office of Professional Responsibility (OPR) initiated an investigation into the conduct of the prosecutors when they self-reported the Court's findings of a Brady violation on October 2, 2008. Publicly available documents were gathered but a full investigation was held in abeyance based on OPR's general policy of not proceeding with an investigation during the pendency of active litigation. In addition, on February 13, 2009, the Judge held four DOJ attorneys in contempt. OPR has initiated an investigation in connection with this holding. There are eight DOJ attorneys who are the subject of the court's orders and investigations by OPR.

You are generally recused from participation in particular matters with parties in which your former firm is or represents a party, under the standards of conduct for employees in the executive branch, 5 C.F.R.§ 2635.502, and under E.O. 13490. Under the financial conflict of interest statute, 18 U.S.C. § 208, you are generally recused from participation in particular matters that could affect the financial interest of certain persons, including your spouse. [redacted]

[redacted] one of the DOJ attorneys held in contempt on February 13, 2009, and under investigation by OPR, is represented by your former firm and your spouse's current firm, WilmerHale. Therefore, absent a waiver from the restrictions in the Executive Order and the criminal conflict of interest statute, and a determination under the standards of conduct, you are recused from participating in the investigation of [redacted].[1]

In most OPR investigations, counsel for a DOJ attorney would communicate with OPR, but generally not with other DOJ officials. It also usually would not be necessary for the leadership of the Department to be involved in the early stages of an investigation. However, the particular circumstances surrounding these investigations are unusual, and present important issues even at this early stage of the process. As noted, the Court appointed a special counsel to conduct an investigation of six Department attorneys at the same time the Department's investigation, by OPR, is underway. Further, the status of the Court's contempt holding on February 13, 2009, which covered four Department attorneys including two who were not subject to the Court's April 7, 2009, order, is unclear. It is highly unusual to have an investigation by the court concurrent with an OPR investigation, and it raises jurisdictional issues, and questions concerning the authority of the special counsel and the proper relationship between OPR's investigation and that of the special counsel. These are important questions that affect the Department's institutional interests, are sensitive determinations, and may include questions of first impression. Such issues will require resolution by the leadership of the Department, including the Attorney General, yourself, and the Assistant Attorney General for the Criminal Division.

In order for you to participate in these decisions, it will be necessary for you to understand and be familiar with the individual investigations of all the Department attorneys who participated in the prosecution, and for to you make decisions concerning the investigation of [redacted] as well as the other investigations. It is not feasible or practical for you to remain recused from one investigation. This would interfere with your ability to make necessary decisions for the Department in connection with the Department's investigations and the special counsel's investigation. In order for you to be fully advised on the issues and facts as they arise, to enable you to make the legal, policy and strategic decisions necessary for the Department, you must be able to participate and freely receive information and advice on any and all of the individual investigations. Based on the advice from the Principal Associate Deputy Attorney General, I conclude that it is not necessary at this time that you meet or communicate with your former firm, should they make such a request. If direct contact with Department officials other than OPR is determined to be in the Department's interest, other officials in the leadership offices would be available to meet with your former firm.

---

[1] Decisions with respect to the approval of outside representation for [redacted] and the other Department employees are being made by the Civil Division through the standard procedure for these decisions.

Executive Order 13490, Ethics Commitments by Employees in the Executive Branch

The Executive Order provides that a political appointee will not, for a period of two years from the date of appointment, participate in any particular matter involving specific parties that is directly and substantially related to the appointee's former employer or former clients, including regulations and contracts. Sec. 1, paragraph 2. The Executive Order further provides that "particular matter involving specific parties" shall have the same meaning as set forth in the ethics regulations at 5 C.F.R. § 2641.201(h), except that it shall also include "any meeting or other communication relating to the performance of one's official duties with a former employer or former client, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties." E.O. 13490, Sec. 2(h).

E.O. 13490 references the following definition provided in the standards of conduct (however, the E.O. specifically includes regulations and contracts):

> 5 C.F.R. § 2641.201(h)(1): *Particular matter involving a specific party or parties* - (1) *Basic concept.* The prohibition applies only to communications or appearances made in connection with a "particular matter involving a specific party or parties." Although the statute defines "particular matter" broadly to include "any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding," 18 U.S.C. 207(i)(3), only those particular matters that involve a specific party or parties fall within the prohibition of section 207(a)(1). Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product application, enforcement action, administrative adjudication, or court case.

The E.O. provides for waiver of the recusal provisions by the Director of the Office of Management and Budget (OMB) or his designee, in consultation with the Counsel to the President or his designee. E.O. 13490, Sec. 3(a). The Director, OMB, has designated the Designated Agency Ethics Official (DAEO) of each executive branch agency to exercise the Sec. 3 waiver authority, in writing, and in consultation with the Counsel to the President.

Specific Waiver Request

The *Stevens* prosecution has raised important issues concerning how the Department conducts its operations, including questions of the Department's ability to investigate allegations of misconduct by its own attorneys. These issues have been raised and are being debated in a very public way, and they go to the heart of the Department's ability to achieve its mission of evenhanded enforcement of the law. Given the significant public interest involved in these proceedings, it is vital that you be able to exercise your leadership role in this matter.

The standard for waiving the restriction in the E.O. is that it be in the public interest. E.O. 13490, Sec. 3. I believe that it directly serves the public interest that the Department have the benefit of your participation in this case, given the institutional interest of the Department, the important legal, policy and strategic considerations, and your knowledge of the case. I certify that it is in the public interest that you be able to participate in the investigation of [redacted] relating to the prosecution in *U.S. v. Stevens*.

<u>18 U.S.C. § 208</u>

The financial conflict of interest statute, 18 U.S.C. § 208 (a), prohibits an official from participating personally and substantially in a particular matter that will have a direct and predictable effect on his financial interests, or those financial interests that are imputed to him, including those of a spouse. Your spouse is a partner at WilmerHale, and therefore any matter that directly and predictably affects her ownership interest in the firm falls within the scope of the statutory prohibition. Your spouse does not represent [redacted] in this matter. However, as a partner she shares in the fees received by the firm for its representation of [redacted] The firm has agreed to screen your spouse from sharing in fees received, which removes the financial interest.

In addition, you have an agreement with WilmerHale for the firm to make agreed-upon payments to you in the future, as part of your withdrawal from the firm. Given the firm's obligations to you, the statute requires that you not participate personally and substantially in any particular matter that would affect the firm's ability or willingness to meet its obligations to you under that agreement. The representation of [redacted] is not of such a nature or substantiality as to affect the ability or willingness of the firm to meet its obligations to you.

The standard of conduct on impartiality, 5 C.F.R. § 2635.502, requires an employee to take appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties. Under Section 502, where an employee knows that a person with whom he has a "covered relationship" is a party or represents a party to the matter, he should not participate in the matter without informing an agency official and receiving authorization to participate. Included in the definition of a "covered relationship" is any person for whom the employee served, within the preceding year, as officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee. 5 C.F.R. § 2635.502(b)(1)(iv).

You have a covered relationship with your former firm, WilmerHale. However, the firm undertook this representation after you left, so you had no involvement during the time you were a partner with the firm. Under the standard, I conclude that a reasonable person would not question the integrity of the Department's programs and operations based on your participation in the investigation of a Department attorney represented by your former firm, and that should such questions arise, the Department's interest in your participation outweighs any possible concern.

WAIVER: I hereby certify that it is in the public interest for you as Deputy Attorney General to participate in the investigation of a Department attorney who is represented by your former firm, in connection with *U.S. v. Stevens*, as discussed above, and pursuant to E.O. 13490 Sec. 3(a), I waive the restriction in Section 1 of E.O. 13490, on participation in a specific party matter that is directly and substantially related to your former employer, WilmerHale, except that you will not have any direct contact with WilmerHale. We have consulted with the Office of the Counsel to the President concerning this waiver. Further, I hereby determine under 5 C.F.R. § 2635.502, that the interest of the Department in your participation in this case outweighs any possible concern that a reasonable person may question the Department's programs and operations.

Ermer & Brownell, PLLC

ATTORNEYS AT LAW

1828 L STREET, NW SUITE 640 WASHINGTON, DC 20036-5130

VOICE: (202) 833-3400 FACSIMILE (202) 223-0120

WWW.ERMERLAW.COM

David M. Ermer
Bonnie J. Brownell*

Of Counsel
Frank Petramalo, Jr.
Stuart H. Sorkin

Elizabeth A. Kearns•
Jason C. Suter•

*Also Admitted in MD
*Also Admitted in CA
*Also Admitted in VA

March 9, 2010

Exhibit 4

Mary Patrice Brown
Acting Counsel
U.S. Department of Justice
950 Pennsylvania Ave., NW, Room 3266
Washington, DC 20530

SENT VIA FACSIMILE AND US MAIL

Re: Request for OPR Interview of AUSA James A. Goeke

Dear Ms. Brown:

Thank you for your letter of March 2, 2010 inquiring as to whether our client, James A. Goeke, a subject of your investigation, is willing to be interviewed by the OPR on a "voluntary" basis. Please be advised that Mr. Goeke wishes to cooperate with the OPR investigation. Mr. Goeke believes that he has information that is relevant to the OPR inquiry. However, as his counsel, we have advised him to seek further clarification. We are hopeful that your response to this letter will allow us to advise Mr. Goeke to provide information to the OPR in an appropriate format at an appropriate time, consistent with customary OPR policies and procedures.

As an initial matter, we question whether the OPR has authority and/or jurisdiction to conduct this proposed "voluntary" criminal investigation at this time in view of the Attorney General's (AG) apparent de facto determination to allow the referral of this matter to a Special Prosecutor appointed by a federal judge and the AG's specific instructions to all DOJ employees to cooperate with the Special Prosecutor. In particular, as discussed below, it appears that any interview of Mr. Goeke by the OPR is necessarily administrative in nature and is therefore plainly compelled.

As you know, on April 8, 2009, U.S. District Court Judge Emmet G. Sullivan ordered the appointment of Henry R. Schuelke, III as Special Prosecutor to investigate

the potential for criminally actionable misconduct by my client, among others. Judge Sullivan apparently sought to appoint the Special Prosecutor pursuant to Rule 42 of the Federal Rules of Criminal Procedure. The government did not appoint a prosecutor pursuant to Rule 42(a)(2), which may have triggered the following provision:

> If the government declines the request [from the Judge to appoint a Special Prosecutor], the court must appoint another attorney to prosecute the contempt.

On July 28, 2009, Judge Sullivan then issued an order in In Re Special Proceedings, 1:09-mc-00198-EGS, granting Mr. Schuelke authority to interview my client through deposition testimony under oath and pursuant to a subpoena. As previously noted, the AG not only apparently consented to this arrangement, but also affirmatively directed all DOJ employees to cooperate with Mr. Schuelke's investigation. In compliance, my client provided deposition testimony to Mr. Schuelke in January 2010. Prior to the initiation of the Court's investigation, Mr. Goeke also provided information relevant to the OPR's current inquiry in the form of several written declarations and in an interview memorialized by an FBI Form 302, all at the direction of the Department.

Attorney General Order 1931-94 issued on November 8, 1994, in conjunction with implementing regulations, sets forth the jurisdictional authority for the OPR to conduct any and all of its investigations. Our concerns center on whether the OPR's grant of authority is negated by Judge Sullivan's apparent Rule 42 proceedings undertaken pursuant to a Federal Court Order and with the consent and cooperation of the AG. Please note that the OPR's grant of authority comes only from the AG and is subject to change even by a Deputy Attorney General without limitations as to form or substance. Regulatory language in this regard is clear. It provides:

> The Office of Professional Responsibility (DOJ-OPR) shall be headed by a Counsel, who shall be appointed by the Attorney General and subject to the general supervision and direction of the Attorney General or, whenever appropriate the Deputy Attorney General.

28 CRF Part O, Subpart G-2-Office of Professional Responsibility.

We are concerned that the OPR may not have authority to collaterally investigate any aspect of the events underlying or related to Mr. Schuelke's investigation at this time. We are further concerned that Mr. Goeke's participation in the OPR investigation would

be contrary to the Judge's Order and the instructions of the AG. We are concerned that his "voluntary" cooperation at this juncture might very well constitute interference with Mr. Schuelke's investigation. We have found case law authority on this issue lacking and ask for your position on this issue.

Likewise, we are concerned that the OPR lacks jurisdiction to conduct an independent, "voluntary" and tangentially criminal investigation. As previously noted AG Order 1931-94 provides the OPR has "jurisdiction" to engage in investigations as to the "misconduct [of DOJ] attorneys that relates to the exercise of their authority to investigate, litigate or provide legal advice." Importantly, the AG's Order as well as the implementing regulations (set forth at 28 CFR Parts 0 and 45) provides that the OPR will conduct criminal investigations in conjunction with the Office of the Inspector General. Both the Order and regulation devote extensive language to the "Coordination Among Offices" as between criminal and administrative investigations.

It appears therefore that the only interpretation of the OPR jurisdictional grant is that its independent investigative authority is limited to administrative investigations. Based on general principles of statutory construction (giving meaning to all language) the OPR's jurisdiction is so limited. Likewise, it appears that the OPR has historically conducted itself consistent with this interpretation. The OPR's annual reports set forth multiple independent administrative investigations. When conducting an investigation that is tangentially criminal, the investigations are conducted as joint with the Office of the Inspector General which has a separate statutory grant. Accordingly, since the OPR lacks jurisdiction to conduct an independent criminal investigation, then its current investigation must, by operation of law, be characterized as administrative. Without question then, my client's proposed interview is thereby compelled.

Finally, we are concerned that there may be an appearance of a conflict of interest that might require the OPR to recuse itself from further involvement at this time. Without going into extensive detail that serves no purpose herein, the OPR appears to be engaging in an investigation that is precipitated, in part, by a Federal Judge's criticism that the OPR is dilatory and that only a Special Prosecutor can act with sufficient dispatch. The OPR has thereafter initiated an investigation that appears inconsistent with its well established protocols and perhaps, is without authority. As Lee J. Lofthus stated in his memorandum for the Deputy Attorney General dated May 6, 2009 with respect to this matter:

> It is highly unusual to have an investigation by the court concurrent with an OPR investigation, and it raises jurisdictional

> issues, and questions concerning the authority of the special counsel and the proper relationship between OPR's investigation and that of the special counsel. These are important questions that affect the Department's institutional interests, are sensitive determinations, and may include questions of first impression. Such issues will require resolution by the leadership of the Department... (Memorandum attached at 2).

It appears to us that the criticism of the OPR combined with the unusual nature of your current investigation raises at least the perception of impropriety. It further appears that the OPR may be initiating an investigation contrary to its own protocols and in the context of serious jurisdictional concerns to prove to the Court and perhaps the AG that it can act efficiently and effectively.

In closing, we want to address a matter that should be the center of our discussion. Our client is a dedicated public servant who has devoted his career to public service. He has earned our respect and consideration. The underlying events require investigation and a capable Special Prosecutor is engaged. Let us allow the process to proceed in an orderly manner sensitive to the fact that my client is also a private citizen entitled to the protections afforded him under the Constitution of the United States that he is tasked to enforce. We would appreciate your assistance in answering our concerns set forth above with the understanding that we are both seeking to protect the integrity of the process, the interests of the DOJ, and my client's constitutional rights.

Accordingly, we want to advise you that Mr. Goeke is eager to assist OPR in its investigation and believes that he could be helpful. We would appreciate the opportunity to work with you in devising an investigative strategy that we can recommend to our client. We offer an alternative in the interim. If you would provide us with written notice of the allegations and/or written questions for which you seek Mr. Goeke's input, we will work with Mr. Goeke in providing a response.

Thank you for your consideration of our requests. .

Sincerely,

Bonnie J. Brownell (RHC)

Bonnie J. Brownell, Esq.

Enclosure

cc: James Goeke