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

Professional Misconduct Review Unit
Kevin A. Ohlson
Chief

December 9, 2011
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CONFIDENTIAL AND PRIVACY ACT SENSITIVE

TO: Joseph Bottini
Assistant United States Attorney

CC: Karen Loeffler
United States Attorney
District of Alaska

FROM: Kevin Ohlson
Chief
Professional Misconduct Review Unit

SUBJECT: The Office of Professional Responsibility Report of Investigation
Pertaining to the Case of *United States v. Theodore F. Stevens*

Pursuant to a delegation of authority by the Deputy Attorney General, I have been designated to serve as the proposing official in the disciplinary matter arising out of an August 15, 2011, report of investigation by the Office of Professional Responsibility (OPR) captioned: "Investigation of Allegations of Prosecutorial Misconduct in *United States v. Theodore F. Stevens, Crim. No. 08-231 (D.D.C. 2009) (EGS).*" After analyzing the OPR report and related documents, I find by a preponderance of the evidence that you engaged in professional misconduct by acting in reckless disregard of your obligation to disclose to defense counsel certain statements made by government witnesses Bill Allen ("Allen") and Rocky Williams ("Williams"). Further, after careful consideration of your misconduct and the *Douglas* factor information provided by the United States Attorney's Office, I propose that you be suspended without pay from your position as an Assistant United States Attorney for forty-five (45) calendar days. This proposal is in accordance with 5 C.F.R. Part 752, and U.S. Department of

Justice ("Department of Justice" or "Department") Human Resources Order 1200.1, Part 3, Chapter 1, and is being made to promote the efficiency of the federal service.

I. BACKGROUND

In an August 15, 2011, report of investigation pertaining to this matter, OPR found that although you did not engage in intentional professional misconduct in the course of prosecuting the case of *United States v. Theodore F. Stevens* (the "*Stevens* case"), you did act in reckless disregard of your disclosure obligations. You have been provided with a copy of OPR's detailed report, and you therefore are knowledgeable about the facts and conclusions contained in it. I hereby adopt OPR's findings as reflected in that report. Specifically, I find that you engaged in professional misconduct by acting in reckless disregard of your disclosure obligations under *Brady* and *Giglio*, as well as in reckless disregard of your disclosure obligations under Department of Justice policy (*see* United States Attorneys' Manual 9-5.001), when you failed to disclose: (1) certain statements made by government witness Allen that were contained in your notes from an April 15, 2008, interview; (2) certain other statements made by Allen that were contained in an FBI Form FD-302 dated February 28, 2007, and an IRS Memorandum of Interview ("MOI") conducted by an IRS agent on December 11-12, 2006; and (3) certain prior statements made by government witness Williams. I also find that you, as the trial attorney responsible for government witness Allen, exercised poor judgment by failing to inform your supervisors that certain representations made by the government in the *Brady* letter regarding Bambi Tyree ("Tyree") were inaccurate and misleading.

II. CHARGE AND SPECIFICATIONS

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

Background to Specification 1: In 2003, prosecutors began investigating allegations that United States Senator Theodore F. Stevens had illegally accepted from VECO Corporation, an oil services company in Alaska, and its chief executive officer, Bill Allen, "things of value" worth hundreds of thousands of dollars. These "things of value" included major renovations to Stevens' home in Girdwood, Alaska, that were performed both by a local construction company and by VECO**.**

On April 15, 2008, you and other members of the prosecution team interviewed government witness Allen. You took notes during the meeting. During the interview, Allen was questioned about a note written to him by then U.S. Senator Theodore Stevens ("Stevens") that said in pertinent part: "Thanks for all the work on [my house.] You owe me a bill. . . . Friendship is one thing. Compliance with these ethics rules entirely different. I asked Bob

P[ersons] to talk to you about this…." Allen told you and the other members of the prosecution team that he had no recollection of talking to Bob Persons ("Persons") about that note.

On September 14, 2008, just days before trial and after being pressed by an FBI agent to think about the circumstances surrounding the note, Allen suddenly said that he had in fact discussed the note with Persons, and that Persons had told Allen to disregard the note because Stevens was "just covering his ass." Allen testified to the same effect at trial, and yet you did not disclose to defense counsel Allen's earlier statement that he did not recall talking to Persons about the note. Further, when defense counsel challenged Allen on the witness stand about this revelation, Allen denied that he only recently told the government about Person's alleged "just covering his ass" statement. And yet, you did not seek to correct Allen's testimony.

Also during the April 15, 2008, interview, Allen told you and other members of the prosecution team that the actual value of the renovation work performed on Stevens' house by VECO was approximately $80,000 to $100,000 rather than the $188,000 contained in VECO's accounts. This point was important because Stevens paid a construction company for work performed on his house, and one of the issues at trial was whether Stevens believed he had actually paid for *all* of the work done on his property, including the work done by VECO. In sum, the valuation of VECO's work was significant because the higher the value of the work performed on the Stevens' house, the less plausible it would be that when Stevens paid the construction company he truly believed he had paid for VECO's work as well. And yet, you did not disclose to defense counsel Allen's statement about the lower valuation of VECO's work.

Specification 1: I find that these two statements made by Allen at his April 15, 2008, interview were material and favorable to the defense. I further find that you had a clear and unambiguous duty to disclose them to defense counsel in a timely manner, and yet you failed to do so, which prejudiced the defendant's case. Accordingly, I find that you engaged in professional misconduct because your actions constituted reckless disregard of your disclosure obligations under *Brady*, *Giglio*, and Department of Justice Policy.

Background to Specification 2: On February 28, 2007, an FBI Special Agent interviewed government witness Allen and memorialized Allen's statements in an FBI Form FD-302 ("302"). This 302 contained a statement by Allen that he believed that Stevens would have paid a VECO bill if he had been presented with it. Similarly, on December 11 and 12, 2006, an IRS agent interviewed Allen and memorialized his statement in an IRS Memorandum of Interview ("MOI"). This IRS MOI contained a similar statement by Allen that if VECO employees had billed Stevens or his wife for VECO's work, he believed they would have paid the bill. These statements were important because it was the position of defense counsel that Stevens did not knowingly fail to pay VECO for its services. And yet, you did not provide copies of the FBI 302 and the IRS MOI to defense counsel until the middle of trial.

Moreover, a so-called "*Brady* letter" prepared by the government and presented to the defense on September 9, 2008, not only failed to disclose Allen's actual statements, it asserted the following: "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. (Emphasis added.) Allen stated that defendant probably would have paid a reduced invoice if he had received one from Allen or VECO."

This assertion of what Allen told the government is incomplete, inaccurate, and misleading. Although you did not write this *Brady* letter, you did review it. Further, you had a copy of the FBI 302 and the IRS MOI and knew what the documents said. And finally, Allen was your witness at trial. And yet, you did not disclose to defense counsel Allen's actual statements regarding this topic, or the relevant FBI 302 and IRS MOI, until October 1, 2008, in the middle of trial.

Specification 2: I find that the statements of Allen that were contained in the February 28, 2007, FBI 302 and in the December 2006 IRS MOI were material and favorable to the defense. I further find that you had a clear and unambiguous duty to disclose them to defense counsel in a timely manner, and yet you failed to do so, which prejudiced the defendant's case. Accordingly, I find that you engaged in professional misconduct because your failure to turn over the statements made by Allen that were contained in the FBI 302 and the IRS MOI constituted reckless disregard of your disclosure obligations under *Brady, Giglio,* and Department of Justice Policy.

Background to Specification 3: A May 21, 2008, prosecution memorandum explicitly noted the potential defenses that the defense might raise at trial. One of these potential defenses was that Stevens could claim that he thought that the invoices that were submitted to him for the construction work on his house included the costs incurred by VECO. Thus, the government was aware that Stevens might want to assert that when he paid the construction company based on the bills he received, he thought he was paying for VECO's work as well. The prosecution memorandum noted that this claim could be predicated on the fact that Allen reviewed the construction company's bills before they were sent to Stevens. The prosecution memo went on to opine that this defense would be objectively "incredible" because of the large amount of resources and time that VECO had expended on the construction project.

In August and September of 2008, you and another prosecutor conducted trial preparation sessions with government witness Williams. Williams was a handyman at VECO and served as the foreman at Stevens' house during the renovation project. During these sessions, Williams told you: Stevens said he wanted to pay for all the renovations to his house; Stevens said he wanted a contractor working on the job that he could pay; he (Williams) had

reviewed the invoices from the construction company and passed them along to Allen or another VECO employee before they were sent to Stevens; and he (Williams) thought that his hours and those of another VECO employee – and possibly all of VECO's costs – were added to the invoices prepared by the construction company and sent to Stevens and his wife.

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

Specification 3: I find that the information Williams provided to you at the trial preparation session was material and favorable to the defense. I further find that you had a clear and unambiguous duty to disclose this information to defense counsel in a timely manner, and yet you failed to do so, which prejudiced the defendant's case. Accordingly, I find that you engaged in professional misconduct because your failure to disclose to defense counsel in a timely manner certain prior statements made by government witness Williams constituted reckless disregard of your disclosure obligations under *Brady* and Department of Justice policy.

III. PENALTY

In determining the appropriate penalty for your misconduct, I have adopted and considered as an aggravating factor OPR's finding that you exercised poor judgment by failing to inform your supervisors that the representations made by the government in the *Brady* letter regarding Tyree were inaccurate and misleading. Moreover, in issuing this proposed suspension I have considered the factors enumerated in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). Specifically, I find that the following *Douglas* factors weigh in mitigation:

* OPR found that your misconduct was *not* intentional, and as noted below, I am required to give this factor great weight in determining the appropriate discipline in this case;

* You have been in public service for more than 25 years;

* You have an exemplary work record and have received numerous awards for your service, which weighs heavily in your favor;

* You have no prior disciplinary record;

* In an October 21, 2011, letter, United States Attorney ("USA") Loeffler stated that you have "an unassailable reputation for integrity, fairness, and honesty," which also weighs heavily in your favor;

* Your supervisors indicate that this incident will not affect their confidence in your ability to perform your assigned duties in the future;

* Your supervisors believe you have an outstanding potential for rehabilitation;

* You were required to go to trial in this complicated case on short notice before you felt you were ready;

* Shortly before this case went to trial, a new management team was imposed and a new trial team was created which caused disorganization and complicated your prosecutorial tasks;

* You received poor supervision from the new management team, which resulted in disjointed areas of responsibility and ineffective guidance; and

* During this prosecution, you were dealing with a voluminous number of documents and an aggressive defense team, both of which exacerbated the problems in this case.

I find that the following *Douglas* factors weigh in aggravation:

* Your misconduct was in violation of your constitutional obligations as a federal prosecutor, and it prejudiced the ability of the defendant to receive a fair trial. Thus, your misconduct was extremely serious, and this factor weighs very heavily against you;

* Your position as an Assistant United States Attorney is one of considerable power, authority, and prominence, and it was incumbent upon you to act with the utmost discretion and professionalism when handling this case;

* You recklessly disregarded your disclosure obligations not once but three times, and I give this factor great weight;

* Your disclosure obligations under *Brady*, *Giglio*, and Department of Justice policy were clear and well known;

* I have contemplated whether proposing a lesser penalty would suffice under the circumstances. After careful and thoughtful consideration, I have determined that proposing a lesser penalty would not be appropriate and would not serve to deter the above described conduct; and

* The serious mishandling of the *Steven*s case received substantial notoriety nation-wide, and thus your misconduct in this case has had a long-term damaging effect on federal prosecutors' reputations for fairness and professionalism, and has reflected poorly on the Department of Justice.

One final point needs to be made. The Merit Systems Protection Board requires proposing officials to consider the "consistency of the penalty with those imposed on other employees for the same or similar offenses." It is this single factor that weighs most heavily in your favor because I very seriously contemplated proposing that you be terminated from your position for your egregious misconduct. However, I am unaware of a single case within the Department of Justice where an employee with a record similar to yours was terminated after OPR *failed* to find that the employee engaged in *intentional* misconduct. Accordingly, I am compelled to ultimately conclude that a proposal that you be terminated would not be consistent with the penalty "imposed on other employees for the same or similar offenses."

Therefore, after weighing all the aggravating and mitigating factors in this case, I propose that you be suspended without pay for forty-five (45) days. I find that this penalty is fully warranted, is consistent with penalties imposed on other employees in the Executive Office for United States Attorneys for similar findings by OPR, and will promote the efficiency of the federal service.

IV. RESPONSE TO PROPOSAL

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. If you choose to respond to this proposed suspension, the Deputy Attorney General's designee 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 SeLena Powell at selena.powell@usdoj.gov. If you wish to make an oral response within the same 30 day period, you must contact Ms. Powell immediately, via the email address above, to schedule a call or meeting. Your United States Attorney may join in your response, respond separately, or otherwise comment on this proposal within the same 30-day period by the procedures outlined above.

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 Department of Justice employee, will be allowed a reasonable amount of official time, not to exceed eight hours coordinated in advance with applicable supervisors, to review the documents relied upon to support this proposal, to secure affidavits, and to prepare a response.

Before a decision is reached on whether or not to suspend you from employment, the Deputy Attorney General or his designee will give full and impartial consideration to any response from you and/ or USA Loeffler. 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 and returning it to me via electronic mail at kevin.ohlson@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.

Joseph A. Bottini
W. JWB

12/12/2011
Date