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The Honorable Eric H. Holder, Jr.
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Re: *Comments on the Special Prosecutor's Report on the Investigation of the Prosecution of Senator Ted Stevens*

Dear Mr. Attorney General:

We represent Assistant United States Attorney (AUSA) Joseph W. Bottini in connection with Special Prosecutor Henry Schuelke's investigation into potential criminal contempt stemming from the government's prosecution of Senator Ted Stevens. We write because today the District Court publicly released the Special Prosecutor's Report.

As you know, since April 2009 the Special Prosecutor has been investigating allegations of prosecutorial misconduct by AUSA Bottini and five other prosecutors. On November 21, 2011, Judge Emmet G. Sullivan issued an order announcing that the Special Prosecutor[1] had submitted to the Court a report of his investigation concluding that the government's prosecution of Senator Stevens was "permeated by the systematic concealment of significant exculpatory evidence." Nov. 21, 2011 Order[2] at 3 (quoting Report at 1). The subjects of the investigation were given no notice of the Report's findings and no opportunity to review or comment on its findings before the Court's announcement. In a subsequent order issued two months later, Judge

[1] Mr. Schuelke conducted his investigation with the assistance of his colleague William Shields, and this letter addresses the work of both attorneys. Unless otherwise noted, we will refer to them jointly throughout this letter as the "Special Prosecutor" for ease of understanding.

[2] The Clerk for the U.S. District Court for the District of Columbia assigned separate case numbers for the government's prosecution (*United States v. Stevens*, 08-cr-231-EGS) and for the Special Prosecutor's investigation (*In re Special Proceedings*, 09-mc-198-EGS). Aside from the Court's Orders of November 21, 2011 and February 8, 2012, which were entered on the miscellaneous docket, the remainder of the court documents cited herein were entered on the *Stevens* docket.

Sullivan permitted the subjects of this investigation to submit written comments or objections to be filed as attachments to the Report when it is made publicly available. Feb. 8, 2012 Order at 1.

We considered submitting complete written comments and objections to be attached to the Special Prosecutor's Report. Given the Court's November 21, 2011, announcement, however, it was apparent that any input by AUSA Bottini would have absolutely no impact on the content or fairness of the completed Report. As such, we saw no value in submitting comments or objections that would not be considered by the Special Prosecutor or the Court.

We do, however, see great value in explaining AUSA Bottini's view of the Special Prosecutor's findings to you, the leader of the Department that has been his professional home for 27 years. AUSA Bottini truly loves the Justice Department, and has devoted his career to serving the Department and its mission. He is very concerned that you and his Department colleagues might accept the Special Prosecutor's findings and believe that he intentionally subverted justice in the *Stevens* case. We send you this letter to explain why those findings are wrong and why AUSA Bottini would never consider committing the crimes alleged in the Special Prosecutor's Report.

Our objection to the Special Prosecutor's findings is very simple. We take no issue with the finding that the investigation and prosecution of Senator Stevens were marked by mistakes, miscalculations, and oversights that led to a series of discovery violations. AUSA Bottini acknowledges that he played a role in those violations, and he will always live with a profound sense of personal and professional regret for the effect they had on the *Stevens* trial and on the reputation of the Justice Department. However, we do take issue—very strong issue—with the finding that these missteps were intentional and were something more than simple human errors on the part of an AUSA who was working under extremely difficult circumstances. That finding of intentional misconduct is completely unsupported by the evidence, and is the product of an investigative process that was marked by selective fact-finding and faulty legal analysis.

We have the utmost respect for the Special Prosecutor's efforts and intentions in this case. He faced the enormous challenge of examining the subjects' conduct over literally thousands of hours of investigative and prosecutorial activity and drawing conclusions about their actions and intent based on a complicated and diffused factual record. This was a monumental task, and he deserves our gratitude for accepting the task and working so diligently to complete it.

While the Special Prosecutor's diligence has been impressive, it is clear that his investigation fell prey to the narrowing of perspective and target-fixation that can affect prosecutorial analysis and judgment in a high-profile case.[3] As a result, the investigation

[3] Every prosecutor—and especially one investigating a high-profile matter—must resist the temptation to conduct his or her investigation as an effort to "build a case" against the subject rather than as an effort to find the truth, no matter whether that truth is incriminating or exculpatory. Resisting that

footnote continued on next page

produced a flawed and unsupported set of findings that unfairly accused a very honorable man of intentionally trying to subvert justice.

The balance of this letter shows why and how the Report's allegation of intentional misconduct against AUSA Bottini is dead wrong. It does not attempt to entirely restate the factual and legal arguments contained in our April 2010 submission to the Special Prosecutor, which is appended to this letter. This letter focuses instead on isolating, identifying, and explaining the significance of each of the critical flaws in the Special Prosecutor's investigation and Report. Those flaws include, for example, the following:

- **The Report does not meaningfully consider the conditions and circumstances of the *Stevens* prosecution.** The Report ignores the circumstances—such as the extremely compressed pretrial schedule and the dysfunctional management of the prosecution team—that help to explain how any missteps were more likely the product of mistake than calculation. *Cf. Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.").

- **The Report ignores mitigating evidence, including evidence of AUSA Bottini's indisputably good character.** We provided the Special Prosecutor with multiple letters of reference, which praise AUSA Bottini as "ethical," "honest," "honorable," and "a man of high moral character," and "one of the very best human beings I have ever had the

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temptation is a constant struggle among the ranks of professional prosecutors, and, indeed, many features of a federal prosecutor's office—such as supervisory scrutiny of charging decisions, indictment review sessions, and Department of Justice guidelines stating that a prosecution should only be initiated if the government believes the subject "will probably will be found guilty by an unbiased trier of fact," *see* United States Attorney's Manual § 9-27.220 (Grounds for Commencing or Declining Prosecution)—are in place specifically to protect the criminal process from the effects of target-fixation. In fact, the lack of such protections is one of the primary critiques against the use of special prosecutors in the first place. *See* Joseph S. Hall et al., *Independent Counsel Investigations*, 36 Am. Crim. L. Rev. 809, 827 (1999) (noting that many investigations led by special prosecutors "have been criticized for . . . the zeal with which independent counsels pursued their target"); Julie O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 Am. Crim. L. Rev. 463, 489 (1996) (criticizing special prosecutors' tendency to "'selectively' target a person, set out to see if he or she ever did anything criminal in relation to a vaguely worded mandate, and then publish any results of this inquiry"); Gerald Lynch & Philip Howard, *Special Prosecutors: What's the Point?*, Wash. Post, May 28, 1995 ("The special prosecutor has . . . only one investigation to pursue, and the unnatural intensity skews the decision [of whether to prosecute]. The smallest infraction can take on a life of its own."); Amici Curiae Brief of Edward H. Levi, Griffin B. Bell, & William French Smith at 11, *Morrison v. Olson*, 487 U.S. 654 (1988), No. 87-1279, 1988 WL 1031601 (explaining that a special prosecutor's unique position "heighten[s] . . . all of the occupational hazards of the dedicated prosecutor[:] the danger of too narrow a focus, of the loss of perspective, of preoccupation with the pursuit of one alleged suspect to the exclusion of other interests").

pleasure of knowing." Much of the praise comes from members of Alaska's defense bar, whose clients AUSA Bottini prosecuted and who insist that "I know I can trust him absolutely." These character references bear heavily on an assessment of AUSA Bottini's credibility and intent, yet the Report does not consider them.

- **The Report omits exculpatory and mitigating evidence.** The Report omits mention of many relevant facts and circumstances that undercut the Report's findings.

- **The Report omits adverse legal authority.** Even though we provided the Special Prosecutor with citations to caselaw favorable to AUSA Bottini's positions on numerous issues, the Report makes no mention of legal authority that cuts against its findings.

- **The Special Prosecutor does not and cannot prove the central element of criminal contempt.** Criminal contempt requires proof than an attorney *intentionally* violated a court order; were it otherwise, negligence and even routine mistakes would be transformed into criminal conduct. Yet the Report, after spending some 500 pages recounting the facts of the investigation, devotes fewer than 6 pages to applying the law of contempt to those facts and offers virtually *no legal analysis* to support its contention that AUSA Bottini's conduct was intentional.

SUMMARY OF POINTS

This letter makes the following points:

I. BACKGROUND

The government indicted Senator Stevens on July 29, 2008. Two days later, the parties and the Court agreed to start trial less than two months later, on September 22—a dramatically truncated pretrial period for a complicated white-collar case. AUSA Bottini and his colleagues spent each of the next 53 days (including weekends) preparing for the trial.

Once trial began, the government committed a series of discovery errors, beginning with their mistaken use of a data-summary exhibit whose underlying figures were directly contradicted by information from two government witnesses and continuing with their belated disclosure of an exculpatory report of an interview with government witness Bill Allen. The prosecution team acknowledged the mistakes, represented to the Court that they were unintentional, and disclosed the mistakenly withheld evidence each and every time they learned of it.

The defense team complained early and often that the discovery errors were intentional. *See*, *e.g.*, Mot. to Dismiss the Indictment Due to the Government's Intentional and Repeated Misconduct (Doc. No. 130) at 1 (Oct. 5, 2008) ("Until today, defense counsel have refrained from alleging intentional misconduct by the government. We can no longer do so in good conscience. . . . The evidence is compelling that the government's misconduct was intentional."). The senator's attorneys would eventually send multiple letters to the Attorney General, arguing that the prosecutors lied, maliciously elicited bombshell testimony known to be false, fabricated Allen's testimony, suborned perjury, procured false testimony, sent a witness back to Alaska to prevent the defense from uncovering evidence, and obstructed the defense's access to another witness. *See generally* Letter from Brendan Sullivan, Williams & Connolly, to Attorney General Michael Mukasey (Oct. 28, 2008); Letter from Brendan Sullivan, Williams & Connolly, to Attorney General Eric Holder (Apr. 28, 2009). The senator's attorneys continued their drumbeat

of criticism in the press long after the trial concluded, characterizing the prosecution team as "hell-bent on ignoring the Constitution and willing to present false evidence" and alleging that the prosecutors "intentionally hid . . . and created false evidence." Press Release, Brendan V. Sullivan & Robert M. Cary (Apr. 1, 2009) at 1-2.[4]

Judge Sullivan initially rejected the defense team's allegations of misconduct, but eventually began voicing the opinion that the prosecutors had engaged in intentional misconduct. *See, e.g.*, Trial Tr. (Oct. 2, 2008 pm) at 10 ("It strikes me that [the belated disclosure of a Bill Allen 302] was probably intentional. I know I'm getting out there on a limb by saying that. I find it unbelievable that this was just an error."); *id.* at 28 (Judge Sullivan complains about redacted 302s produced by the government, insisting that "someone made a conscious effort to shade that information and keep defense counsel from learning of it"); *id.* at 29 ("How does the Court have any confidence that the Public Integrity Section has integrity?"). Following the lead of the Court and defense counsel, the press drew many of the same conclusions. *See, e.g.*, Mike Scarcella, *Williams & Connolly Wants to Put Lawyer on Witness Stand*, Blog of Legal Times, Oct. 9, 2008 ("Judge Sullivan admonished Public Integrity Lawyers yesterday and last week for, among other things, intentionally presenting false evidence and withholding discovery materials.").

After securing a conviction at trial, the government moved to dismiss the indictment against Senator Stevens with prejudice on April 1, 2009. Judge Sullivan convened a hearing and announced his appointment of the Special Prosecutor, a well-respected criminal defense attorney. Judge Sullivan made clear that his decision to appoint the Special Prosecutor was motivated by his unwillingness to rely on the Justice Department's Office of Professional Responsibility (OPR), whose own investigation was proceeding too slowly.[5] *See* Trial Tr. (Apr. 7, 2009) at 45 (Judge Sullivan stated that, since OPR's investigation began six months earlier, "the silence has been deafening"). While Judge Sullivan took pains to state for the record that he "ha[d] not, by any means, prejudged these attorneys or their culpability," he stated that their conduct had been "shocking and disturbing," faulted them for "making false representations," and announced that, "[i]n nearly 25 years on the bench, I've never seen anything approaching the mishandling and misconduct that I've seen in this case." *Id.* at 3-5, 47.

Notwithstanding AUSA Bottini's understandable concern that his culpability had been prejudged, he immediately had me contact the Special Prosecutor to emphasize his willingness to cooperate fully in every aspect of this investigation. He has completely cooperated with the investigation from its inception, authorizing me to conduct two lengthy attorney proffers with the Special Prosecutor; sitting through eighteen hours of deposition; abiding by the confidentiality

[4] *Available at* http://media.npr.org/documents/2009/apr/stevens_attorneys.pdf.

[5] Ironically, OPR completed its investigation before the Special Prosecutor did—even though OPR, unlike the Special Prosecutor, devoted additional time for the subjects to comment on its draft report and to revise its report in light of those comments.

agreements demanded by the Department, the Special Prosecutor, and the Court; and continuing to serve the ends of justice as a federal prosecutor without making a single public statement to defend his reputation (despite constant public maligning).

The Special Prosecutor's investigation into AUSA Bottini's conduct focused on three alleged instances of misconduct. To provide context for the following discussion, we will summarize each allegation at this point:

1. The government's failure to disclose allegations that government witness Bill Allen may have suborned perjury related to his sexual misconduct.

Bill Allen, the owner of VECO Corporation, arranged for his company to provide free construction services to Senator Stevens and served as the government's chief witness at trial. Every member of the prosecution team knew of allegations that Allen had asked a woman named Bambi Tyree to sign an affidavit falsely exonerating him of sexual misconduct with her while she was a minor. Because the allegations cast doubt on Allen's credibility, AUSA Bottini repeatedly pressed Public Integrity Section (PIN) management to disclose them to the defense, taking the issue to his superiors at PIN and within the United States Attorney's Office and urging disclosure even after his ultimate supervisor on the investigation, PIN Chief Welch, admonished him to cease and desist. The government ultimately disclosed the substance of the allegations in its *Brady* letter to the defense, but the letter, which was drafted by PIN attorneys under PIN supervision, contained a substantial inaccuracy: it stated that "no evidence" existed to support the allegation, even though three pieces of evidence did exist. PIN attorney Nick Marsh drafted this language in the letter, following a meeting on the topic with Mr. Sullivan, Ms. Morris, and Mr. Welch. AUSA Bottini was not involved in drafting the letter. While he acknowledges, and the record fully supports, that he "skimmed" the letter after Mr. Marsh completed it, he did not do so for purposes of approving or agreeing with the substance, and in the course of his cursory review he did not notice the "no evidence" reference.

The Report nonetheless concludes that AUSA Bottini—but not Mr. Sullivan, Ms. Morris, or Mr. Welch—intentionally withheld this allegation about Allen's attempted subornation of perjury.

2. AUSA Bottini's failure to disclose the assumption by Rocky Williams, a government witness who worked on the renovation of Senator Stevens' home, that the senator would be billed for his work on the house.

Rocky Williams, a VECO foreman who oversaw the company's renovations of Senator Stevens' residence, told prosecutors he assumed that VECO's expenses were added to the invoices submitted by Christensen Builders—a VECO subcontractor whose bills Senator Stevens paid—and that the combined bills were forwarded to Senator Stevens for payment. Williams made this assumption because Senator Stevens had previously told him that he (the senator) wanted to "pay for everything" and because Williams did not think that Allen, his employer and the senator's friend, would be so "stupid" as to not charge the senator when there was public

scrutiny on the project. Williams' erroneous assumption echoed an anticipated defense theory: that Senator Stevens and his wife believed they had paid any outstanding VECO liabilities when they paid the Christensen Builders bills. The Special Prosecutor's Report concluded that AUSA Bottini's decision not to disclose Williams' assumption to the defense was intentional criminal conduct.

3. AUSA Bottini's failure to clarify Bill Allen's trial testimony.

In 2002, Senator Stevens sent a handwritten note to Allen, cautioning him to "remember Torricelli" (a New Jersey senator then embroiled in ethics charges) and reminding him to send the senator a bill. The defense pointed to the "Torricelli Note" as evidence that Senator Stevens wanted to pay for the renovations VECO performed on his home. Allen undercut that defense argument when he testified at trial that the senator's close friend and sometimes business partner Bob Persons told Allen that the senator was just "covering his ass" when he wrote the note. Convinced that Allen must have fabricated the incriminating statement, defense counsel attempted during cross-examination to elicit that Allen had only "just recently" told prosecutors about the "covering his ass" statement for the first time (which was, in fact, the case) so as to establish that Allen had fabricated the statement, six years after the fact. Allen, who suffers from cognitive difficulties, initially misunderstood the question as a suggestion that he had "just recently" discussed the Torricelli Note with Persons. Allen ultimately gave a series of disjointed and internally inconsistent answers, which the Special Prosecutor interprets as a false denial that he had in fact "recently" told the prosecutors about the "covering his ass" statement for the first time.

Concluding that it was clear to all in the courtroom that Bill Allen was simply confused, AUSA Bottini opted not to try to clarify that point in his re-direct examination. The Special Prosecutor's Report concludes that that decision was an effort to seed the record with false testimony and was therefore the basis for a criminal contempt charge.

* * *

For the next two years, the Special Prosecutor undertook a process of investigation and analysis that produced his finding that AUSA Bottini "intentionally withheld and concealed significant exculpatory [and impeachment] information." Report at 28. It is evident that the process suffered from the outset from a number of specific flaws that significantly undermined its fairness and credibility. It is critical that you, AUSA Bottini's colleagues at the Justice Department, and the American public understand each of these flaws when you assess the legitimacy of this process and the validity of the Report's findings against AUSA Bottini. The balance of this letter will discuss each of those flaws and explain their impact on the fairness of the Special Prosecutor's judgment against AUSA Bottini.

II. THE SPECIAL PROSECUTOR'S INVESTIGATION

The Court directed the Special Prosecutor to conduct a probing investigation into whether

crimes had been committed by the prosecution team. Like any criminal investigation, this was a serious undertaking that required a searching look at the facts and the individuals involved. By their nature, criminal investigations often require energetic probing and strong measures to reveal the truth. Even by criminal investigation standards, however, this was a particularly aggressive and accusatory process.

That aggressiveness was noticeably apparent in the Special Prosecutor's two-day, eighteen-hour interview of AUSA Bottini.[6] Although he volunteered to be interviewed, the Special Prosecutor did not conduct the deposition like an interview, but rather like the cross-examination of an opposing party. During the course of the deposition, Mr. Schuelke and Mr. Shields asked over 170 leading questions that posited their version of the facts and concluded with "correct?" or "right?"—the quintessential cross-examiners' line. They lobbed compound questions;[7] cut AUSA Bottini off mid-answer;[8] and asked "gotcha" questions.[9] They also presented AUSA Bottini with unfamiliar documents and demanded immediate answers about

[6] AUSA Bottini voluntarily agreed to be interviewed or deposed by both the Special Prosecutor and OPR, who then shared materials with one another. We cite the respective transcripts as "S.P. Tr." and "OPR Tr." The transcripts from the *Stevens* trial and related hearings are cited as "Trial Tr.," with a reference to the date and whether it was an "am" or "pm" session.

[7] *See, e.g.*, S.P. Tr. at 512 ("**Q**: When you say 'forever,' meaning meeting after meeting after meeting? How [many] meetings about would you say it took? Were all of them until September 14th?").

[8] *See, e.g.*, S.P. Tr. at 629 ("**Q**: . . . Now [Allen] didn't mean when he heard that testimony, it had just been three weeks earlier? **A**: But he also says -- **Q**: Or does that -- can you answer my question? **MR. WAINSTEIN**: Let Joe [Bottini] answer your first question. Let him answer your question. He was going to the answer."). According to the notations in the transcript ("--"), more than 200 times the Special Prosecutor did not let AUSA Bottini completely finish his thought.

[9] For example, AUSA Bottini testified at the deposition that he was not aware of any sense of alarm or urgency after defense counsel provided in discovery a hand-written note (the "Torricelli Note") in which Senator Stevens professes a desire to pay for the improvements to his house. The Special Prosecutor possessed an email that AUSA Bottini had never seen, in which Agent Kepner appeared to express urgency to the PIN attorneys about contacting Bill Allen on April 8, 2008, immediately after Williams & Connolly produced the Torricelli Note to the government. Without mentioning the email, the Special Prosecutor asked AUSA Bottini, "So you don't remember any sense of urgency on April 8th, when these two new notes came in documenting that [Senator Stevens] had asked Allen for bills?" When AUSA Bottini answered in the negative, the Special Prosecutor introduced Agent Kepner's email and aggressively challenged his credibility: "So when you said a moment ago you don't remember a reaction like, '[O]h my God, we've got to get Bill up here,['] that's exactly what happened." S.P. Tr. at 393-95. AUSA Bottini stuck to his testimony that, from his vantage point, the Torricelli Note did not cause him to have a sense of alarm or urgency about the investigation (which makes sense, given that such a note is actually incriminating—and not exculpatory—in a case charging the senator with intentionally omitting financial liabilities on a financial disclosure form, as it shows that the senator knew he owed the contractors the payment that he never made).

them.[10]

In addition, although the Special Prosecutor declared that he practiced "'open file' discovery" during his investigation, *see* Declaration of Henry F. Schuelke, III (Feb. 8, 2012) ¶ 2 [Doc. No. 74] ("During the course of the investigation and with my consent, the six subject attorneys were provided by the Department of Justice with copies of and/or access to the same information that I received from the Department of Justice for use in conducting the investigation. I decided, as a matter of policy, that 'open file' discovery was appropriate."), the only documents we received from the Special Prosecutor or the Justice Department were AUSA Bottini's own documents, files, and emails.[11] Aside from the small number of documents he was shown during his deposition, we never received the other subjects' materials, nor were we provided access to the transcripts of the interviews the Special Prosecutor conducted with the other subjects and witnesses.[12]

While we recognize that it was certainly within the Special Prosecutor's prerogative to use these tactics—they are not uncommon in criminal investigations—they evinced an aggressive and adversarial attitude that sheds light on the thinking that went into the drafting of the Report that was issued today.

III. THE SPECIAL PROSECUTOR'S REPORT

After conducting an aggressive investigative process, the Special Prosecutor produced an investigative Report that contains a number of significant flaws and oversights in factual and legal analysis. We will identify these flaws and explain how each one affects the validity of the Report's findings against AUSA Bottini.

A. The Failure to Consider Explanatory Circumstances

Professional prosecutors understand that every misstep is not an intentional offense, and that in many cases the prosecutor's most critical job is distinguishing between mistake and misconduct. They recognize that before finding someone guilty of wrongdoing, they must look at all circumstances that shed light on whether that person's missteps were intentional or

[10] They did this with an email from Agent Kepner to her supervisor at the FBI, and with Mr. Goeke's handwritten notes of two August 2008 witness prep sessions with Rocky Williams. *See* Report at 117, 145. We objected during the deposition to the Special Prosecutor's approach of showing AUSA Bottini two or three year-old documents he had neither drafted nor seen and then demanding immediate answers about them. *See* S.P. Tr. at 167, 221.

[11] The one exception are the handwritten notes from the April 15 and 18, 2008, meetings with Bill Allen, for which we were provided all copies, not just AUSA Bottini's.

[12] To the extent we quote from other transcripts in this submission, we are simply repeating those excerpts that were included in the Special Prosecutor's Report or in OPR's draft report.

inadvertent —the same circumstances that we all use every day in assessing the motives and blameworthiness of people with whom we interact. Strangely, the Special Prosecutor's Report in this case chose to find that AUSA Bottini committed intentional violations of the law—and rejected the possibility that they were honest mistakes—without considering the context that helps to explain his missteps.

The *Stevens* prosecution was beset by a series of management failures and other challenges that would have made mistakes by line prosecutors like AUSA Bottini likely under even the best of circumstances. Those circumstances created a prosecution that was struggling from its inception and ill-equipped to handle the rapid discovery process required by the senator's speedy trial request. The prosecution was set against the backdrop of a demanding judge and a scorched-earth strategy by defense counsel who allege prosecutorial misconduct as a routine defense tactic. Any one of those factors made mistakes likely; all of these factors together virtually guaranteed them.

1. The Dysfunctional Management of the Prosecution

The management problems afflicting the prosecution were legion.

The recusal of the Alaska U.S. Attorney's Office: The government's management difficulties had their genesis in late 2005. At the first hint that Senator Stevens was linked to Operation Polar Pen, the Department of Justice recused the entire Alaska U.S. Attorney's Office from cases arising from that investigation. OPR Tr. at 46-47. Because of PIN's lack of resources and Alaska's remoteness from Washington, D.C., the Department instructed two Alaska line AUSAs, Mr. Bottini and Jim Goeke, that they would continue working on Polar Pen cases, but would report directly to PIN.[13] S.P. Tr. at 315; Email from EOUSA to the Office of the Deputy Attorney General, Nov. 3, 2005. This arrangement left the Alaska AUSAs disconnected from the prosecution's management and unable to successfully push back against decisions with which they disagreed. *See* OPR Tr. at 56-58, 176-78.

AUSA Bottini's lack of interaction with PIN management: AUSA Bottini had little interaction with PIN's leadership once the Criminal Division assumed control from the U.S. Attorney's Office. PIN itself was in disarray; it had five different Section Chiefs (including in acting capacities) over the course of the Polar Pen investigation. When Mr. Welch became Section Chief, neither he nor Ms. Morris (his principal deputy) actively communicated with the Alaska attorneys; on one of the few occasions Mr. Welch did, it was to brush back the Alaska attorneys—who had been unsuccessfully pressing PIN to disclose information to the court and defense counsel about Allen and Tyree—by chiding them that they "work[ed] for PIN." Email from Welch to Bottini et al. (Dec. 20, 2007 5:18 pm). Apart from that direct admonishment, Ms.

[13] Unlike some of the other prosecutors, who sought out opportunities to work on this potentially high-profile investigation, AUSA Bottini did not want, and did not request, this assignment. *See infra* at III.B.2 (explaining the lack of evidence as to AUSA Bottini's motive).

Morris and Mr. Welch typically communicated only with PIN attorneys Marsh and Sullivan, who would in turn communicate with Mr. Bottini and Mr. Goeke—and vice versa. *See* S.P. Tr. at 314.[14] As such, they operated effectively as subordinates, receiving instructions from and effectively reporting to Mr. Marsh and Mr. Sullivan.[15] *See* Jeffrey Toobin, *Casualties of Justice*, The New Yorker, Jan. 3, 2011, at 40 (Alaska defense attorney notes that "[t]he lawyers in the U.S. Attorney's office were a couple of decades older than Nick [Marsh], but there was no doubt that he was the top dog. . . . He was making the decisions"); *see also* S.P. Tr. at 314 (AUSA Bottini explains that "I didn't pick up the phone and call Bill Welch. It didn't work that way."). In addition, the Alaska prosecutors were excluded from meetings and discussions among PIN management, Mr. Marsh, and Mr. Sullivan—including those about decisions as fundamental as the timing and content of a potential indictment.[16]

2. Uncoordinated Division of Responsibilities

Once the Criminal Division decided to indict Senator Stevens, it chose Ms. Morris to lead

[14] For instance, the Alaska attorneys pressed Mr. Sullivan to disclose the Tyree allegations in the affidavit supporting the government's March 2007 search warrant for Senator Stevens' Girdwood residence; Mr. Sullivan then communicated with Mr. Welch, who decided not to make that disclosure. Email from Goeke to Sullivan (Mar. 5, 2007 3:34 pm); Email from Sullivan to Welch (Mar. 5, 2007 5:00 pm).

[15] The subordinate status of AUSAs Bottini and Goeke is apparent from a review of the emails among the prosecutors: there are numerous critically important email discussions from which they are excluded. On April 15, 2008, for instance, the four PIN attorneys, including PIN Chief Welch, exchanged multiple emails regarding the status of the prosecution's review of reciprocal discovery and the timing of a potential indictment. They did not copy Mr. Bottini or Mr. Goeke. Email from Marsh to Morris, Sullivan & Welch (Apr. 15, 2008 9:48 am). A month later, the four PIN attorneys exchanged another set of emails—again excluding Mr. Bottini and Mr. Goeke—discussing the Front Office's anticipated reaction to a revised indictment that Mr. Marsh and Mr. Sullivan drafted following a meeting with Mr. Welch and Ms. Morris. Email from Welch to Marsh & Morris (June 16, 2008 9:41 am).

[16] One symptom of this was that AUSA Bottini was not even aware that an indictment would be issued until he was on a college tour with his son around July 23—only days in advance of the indictment. By the time Assistant Attorney General Matthew Friedrich summoned prosecutors to a July 14, 2008, meeting, Mr. Bottini was deeply skeptical that the Department would indict Senator Stevens. PIN told the Alaska attorneys on numerous occasions, dating back to April 2007, to "get ready" and "be prepared" for an indictment because the statute of limitations was about to expire; a tolling agreement was reached each time, and no indictment ever resulted. S.P. Tr. at 312-13. Despite repeatedly asking Mr. Marsh and Mr. Sullivan whether the case was moving forward, AUSA Bottini had little indication—by the spring of 2008—whether an indictment would even issue. *Id.* at 312-14.

Believing the case would not move forward, AUSA Bottini eventually agreed to take on a high-profile capital murder prosecution in Alaska. *Id.* at 316. He spent most of July 2008 preparing for that case, working on it even after the mid-July meeting with Mr. Friedrich, and was "absolutely convinced," as late as the third week of July, that the *Stevens* case would not be indicted. *Id.* at 317-19.

the trial team. Report at 44. The job of lead trial counsel on a Department of Justice trial team is not only to direct and allocate responsibility among other team members, but also to ensure that all of the government's trial and pre-trial responsibilities are being met. Yet Ms. Morris exerted little leadership over the trial team, despite being selected expressly for that purpose. *See*, *e.g.*, Report at 74-76 (Ms. Morris acknowledges that she tried to make herself "as little as possible," refraining from "really [taking] a supervisory role"). The same was true for Mr. Welch, who apparently deferred to Ms. Morris because of the direct reporting relationship she enjoyed with the Criminal Division Front Office. Report at 4. In her defense, Ms. Morris was inserted as lead counsel less than two months before trial began, and it is understandable that she had difficulty attaining the level of familiarity with the case necessary to completely assert control over its conduct. But the practical effect of the resulting vacuum of leadership was that trial preparation became disjointed and compartmentalized precisely when the need for coordination was greatest.[17]

This disorganization had noticeable adverse effects on the government's discovery efforts and particularly on the process of reviewing the government's evidence for *Brady* material and deciding what needed to be disclosed to the defense. Although AUSA Bottini and the District of Alaska had a standard practice of requiring defense attorneys to sign discovery receipts and keeping duplicate copies of all discovery productions, PIN apparently did not follow these procedures in this case even though PIN assured AUSA Bottini it was managing and tracking discovery. OPR Tr. at 114-15; *see also* Bottini Notes (Aug. 22, 2008) (during call with Mr. Sullivan and other prosecution team members, AUSA Bottini writes that "PIN is keeping score of what is turned over").) PIN also organized the *Brady* review, opting to delegate document review responsibilities to agents and to bifurcate the functions of preparing a witness for trial and reviewing that witness' statements for *Brady* information—measures that PIN evidently believed necessary given the compressed pretrial preparation period. Report at 87-97. In AUSA Bottini's experience, the prosecutor who presents a witness at trial is almost always the prosecutor who conducts the *Brady* review for that witness, OPR Tr. at 128, and AUSA Bottini never employed FBI or IRS agents to assist (let alone conduct) a *Brady* review. S.P. Tr. at 789; OPR Tr. at 111.

[17] As it became clear that PIN was failing to provide sufficient supervision, the Criminal Division Front Office understandably stepped up its hands-on supervision in an apparent attempt to fill the prosecution's leadership void. Among other things, the Front Office exerted control over the substance of the prosecution's trial preparation, the content of their pretrial motions, the assignment of witnesses to trial team members, and even the questions prosecutors were to ask certain witnesses. *E.g.*, S.P. Tr. at 808-10. Those eleventh-hour directives would have burdened a prosecution team even under normal circumstances, and they were doubly burdensome here given the accelerated trial preparation schedule. For example, three days after he arrived in Washington, AUSA Bottini was told that he would deliver the government's summation and was directed to submit a comprehensive draft by the following week—even though trial had not begun and AUSA Bottini already had extremely limited time to prepare and argue a number of critical pre-trial motions and to meet with and prepare his approximately ten trial witnesses (including Rocky Williams, whom PIN Chief Welch had just assigned to him because Mr. Marsh did not have enough time). S.P. Tr. at 808-09.

But this case was not run by AUSA Bottini according to the District of Alaska's procedures; it was run by PIN according to PIN's procedures. *See* Report at 321 (quoting Ms. Morris: "I was relying on Bill Welch to take the lead on really focusing on the *Brady* issues." (alterations omitted)).

3. The Dramatically Compressed Preparation Time

This prosecution cannot be evaluated without acknowledging the impact that the compressed pretrial period had on the prosecutors. In the typical white-collar case—and especially in one involving a high-profile defendant—the prosecution has a fairly well-developed case by the time of indictment and then has many months and often over a year to prepare and refine it before trial starts. That was not the case in the Ted Stevens prosecution.

The *Stevens* prosecutors had only 55 days, including weekends, from the date of the indictment to the start of the trial. This compressed schedule was a function of the Criminal Division's decision to indict Senator Stevens only four months before the November election and also Ms. Morris' agreement, in open court, to a trial date even sooner than the defense requested or was entitled to.[18] And, as noted above, AUSA Bottini could not have begun his preparations much before the indictment, because he had no idea the indictment was forthcoming. During this frenzied time in August and early September, the prosecutors had to do literally everything to prepare for the trial, from meeting with witnesses to creating examination outlines to drafting opening and closing statements to drafting and arguing pretrial motions and responses to compiling and organizing the over 1000 trial exhibits. They also, of course, had to compile and produce the voluminous discovery (comprising some 750 gigabytes of data, *see* Report at 104) and conduct the extensive *Brady* and *Giglio* review that resulted in the government's August 25 and September 9 disclosure letters.[19]

[18] The Report contends that "[t]he prosecutors had anticipated the possibility of a speedy trial request . . . and decided in advance to consent if one was made." Report at 2. While Criminal Division management apparently made this decision, it was never communicated to AUSA Bottini, who continued to assume that the trial would not take place until after the election in November.

[19] The breakneck pretrial and trial pace, and sheer volume of material involved, compounded the likelihood that mistakes would happen. In fact, Williams & Connolly itself committed three significant mistakes during that same compressed time period. First, in early October 2008, it violated grand jury secrecy and the Court's confidentiality order when it disclosed grand jury transcripts to counsel for potential defense witnesses; this mistake drew the Court's ire. *See* Trial Tr. (Mar. 10, 2009) at 15 ("The Court had admonished the defendant not to disseminate grand jury transcripts that it received pursuant to this Court's order . . . ."). Then, on two separate occasions, Williams & Connolly publicly disclosed confidential information about prospective government witnesses. On August 25, 2008, it disclosed the Anchorage Police Department's investigation into Bill Allen for statutory rape, even though the government had provided that information in confidence. *See* Mem. in Opp'n to Mot. *in Limine* to Exclude Prior Criminal Convictions of Prospective Gov't Witnesses, Ex. 1 [Doc. No. 36-2]. And on October 2, 2008, when Williams & Connolly attached the highly confidential August 25 *Giglio* letter as an exhibit to a motion, it neglected to redact a footnote on page 6 about criminal conduct of potential

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4. The Confrontational Defense Strategy

When the prosecutors started trial, they then confronted another challenge—a calculated effort by defense counsel to keep them off balance with regular attacks on the prosecutors and their motives.[20] On a daily basis, the defense made motions that alleged gross misconduct and caused the prosecutors to scramble and respond to the attacks. To the extent that the prosecutors started the trial in a state of confusion, these attacks compounded the problem and made it impossible for the prosecutors to get their footing and settle into a normal mode of functioning. Instead, they were forced to act like a garrison under siege, constantly throwing themselves against the most recent frontal assault. They were playing defense from the start, and the operational and management defects inherent in the patch-work trial team only worsened as the trial progressed.

* * *

Each of these circumstances—dysfunctional management, uncoordinated division of responsibilities, a compressed time frame and combative defense tactics—created the conditions where mistakes were likely. While they are not excuses for the errors that took place, they are critical aspects of the story that must be considered when assessing whether those errors were the product of mistake or intentional misconduct. Yet, the Special Prosecutor's Report completely failed to take these factors into account before concluding that the prosecutors were guilty of intentional misconduct.

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government witness Justin Steifel. *See* Emerg. Mot. to Dismiss Indictment or for Mistrial, Ex. C [Doc. No. 126-4]. Before the public damage could be undone, the press picked up the story. *See* Lisa Demer & Richard Mauer, *New Name in federal corruption case; Justin Steifel: Agent interviewed him involving VECO payment scheme,* Anchorage Daily News (Oct. 3, 2008).

[20] Senator Stevens' counsel typically pursue a strategy that follows the common sports mantra: the best defense is a good offense. They routinely turn the tables on the government in criminal cases by accusing the prosecution of withholding evidence and generally violating their clients' rights. *See* Kim Eisler, *Better Get Brendan*, Washingtonian (June 2010), at 35 (the subtitle says it all: "When Brendan Sullivan is on your side, the prosecutor will probably go to jail before you do."); Andrew Longstreth, *Jersey Boys: A Pair of Young Prosecutors Finally Beat Brendan Sullivan in the Third Trial of Former Cendant Chairman Walter Forbes*, American Lawyer (Mar. 2007) (for Brendan Sullivan, "Every battle is nuclear warfare. Everything is prosecutorial misconduct.") *United States v. Forbes*, No. 3:02-cr-264, 2006 WL 680562, at *1-2 (D. Conn. Mar. 16, 2006) (explaining that these defense counsel "had engaged in a pattern in this case of arguing, premised on speculation, that opposing counsel had engaged in improper conduct"). Ironically, before the *Stevens* trial even began, a former Connecticut federal prosecutor who had litigated against Brendan Sullivan warned AUSA Bottini in a phone call that Brendan Sullivan would likely accuse the prosecutors of misconduct.

B. The Failure to Consider Mitigating Circumstances

It is also incumbent on a prosecutor examining the intentionality of a subject's errors to consider that person's record for good or bad character as well as any evidence that sheds light on his disposition or motive at the time of the questioned conduct. There was abundant evidence in each of these categories, but the Report does not give that evidence any weight.

1. Evidence of AUSA Bottini's Exemplary Character

In our federal judicial system, a defendant is explicitly permitted to introduce evidence of his favorable character, *see* Fed. R. Evid. 404(a)(2)(A),[21] so that a "jury may infer that he would not be likely to commit the offense charged." *Michelson v. United States*, 335 U.S. 469, 476 (1948). Despite this long-standing rule, the Report does not consider any evidence of AUSA Bottini's character.

We provided the Special Prosecutor with abundant character evidence demonstrating that AUSA Bottini is an exceptionally unlikely candidate to intentionally violate a defendant's rights. Six defense attorneys wrote letters to the Special Prosecutor attesting to AUSA Bottini's high moral character.[22] These defense attorneys maintain that "I know I can trust him absolutely"; that "I would go to the bank on Mr. Bottini's word. There isn't another prosecutor in that office about whom I would make that statement"; that "I would trust a client's, or my future on [his] word and integrity"; and that "I would accept Joe's word and his hand shake on any matter knowing that it is more reliable than any document that could be drafted."

Similarly, his past and present colleagues describe him as "ethical," "honest," "honorable," and "one of the very best human beings I have ever had the pleasure of knowing," and they routinely praise his "integrity" and "unwillingness to seek personal status or attention." Leaders of the Alaskan defense bar—whose clients AUSA Bottini prosecuted—extol him as "a man of high moral character," "a modest man, without ego," "a fine public servant and a good man," and "a genuinely good and decent person, highly respected by his colleagues, his adversaries, and the judges before whom he appears."

One defense attorney told the Special Prosecutor that "the manner in which Mr. Bottini has lived his life and practiced law over the past 25 years should militate in favor of giving him the benefit of every doubt." Yet the Report does precisely the opposite.

[21] Prior to a renumbering of Rule 404's internal paragraphs four months ago, this particular provision was at paragraph (a)(1).

[22] The character references were included in our April 9, 2010 submission to the Special Prosecutor, and are also attached to this letter.

2. Evidence of AUSA Bottini's Motive

Federal law is clear that evidence of motive is a relevant consideration in a criminal case. Fed. R. Evid. 404(b); *see United States v. Hill*, 643 F.3d 807, 843 (11th Cir. 2011) ("Motive is always relevant in a criminal case, even if it is not an element of the crime.") (internal citation and alteration omitted). The law is also clear that just as the *existence* of a motive on a defendant's part can be incriminating, the *absence* of a motive can be exculpatory. *See Martin v. United States*, 606 A.2d 120, 128 (D.C. 1991) ("Evidence of a lack of motive is quintessentially exculpatory."). In this case, there was abundant evidence that AUSA Bottini had absolutely no motive to violate the rules to convict Senator Stevens. The Report completely ignored that evidence.

While one can posit a variety of different potential motives, there are two primary motives that would most likely explain why a prosecutor would go to the extent of violating the law to convict a defendant at trial. One of those motives is rooted in personal ambition that might tempt a prosecutor to bend the rules for the glory of getting a conviction. While I concede that one can certainly find the occasional prosecutor with an ego, AUSA Bottini is decidedly not one of them. As the above-mentioned reference letters explain, AUSA Bottini has consistently shunned the spotlight throughout his career and has rejected numerous entreaties from supervisors in the U.S. Attorney's Office to take on higher-profile roles, preferring instead to do the work of a line prosecutor. United States Attorneys he has worked for attest that AUSA Bottini is the first to volunteer to take on the tough but righteous prosecution, and the last to demand that he receive the glory case or the credit for his office's work—the hallmarks of a team player and true professional.[23]

That selfless approach was clearly evident in the way AUSA Bottini conducted himself as a member of the *Stevens* trial team. Other prosecutors on the team often demonstrated concern about their own status and opportunities in the trial, at times sending emails expressing their desires—or demands—that they be assigned more prominent roles in the trial. For example, some were upset when management installed Ms. Morris as lead counsel, complaining that it meant a diminished trial role for them.[24] AUSA Bottini, by contrast, never pushed for a

[23] Two former U.S. Attorneys wrote character letters to the Special Prosecutor on AUSA Bottini's behalf; they are attached. His current U.S. Attorney has attested to his exemplary character in communications to Department management.

[24] *See, e.g.*, Ed Sullivan OPR Tr. at 176-77 (he testified that he felt "anger and frustration" about the Criminal Division's staffing decisions); Email from Marsh to Morris (July 28, 2008 12:36 pm) ("I'm not taking it very well. The section will lose people over this."); Email from Marsh to Sullivan (Aug. 6, 2008 7:37 pm) ("If all of this is true, it means that the front office isn't just trying to put together a trial team, they're actively trying to marginalize people for no justifiable reason whatsoever. It is unbelievably wrong."); Email from Marsh to Morris (Aug. 6, 2008 12:19 pm) ("I cannot overstate how much of a negative impact these front office decisions are having on the rest of the trial team."); Email from Marsh

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higher-profile role and actively encouraged his supervisors to give his colleagues more in-court opportunities.[25] He also welcomed Ms. Morris' appointment as lead counsel and went out of his way to ease her transition onto the team. *See* Email from Bottini to Morris (Aug. 7, 2008 8:39 pm) ("I want you to know that I am glad that you are part of the team and that I really look forward to working with you."); *see also* OPR Tr. at 182 ("[I]n my view, the decision to make, to bring Brenda on the team and make her the lead attorney, I thought was brilliant, quite frankly. I was happy with that personally.").

A review of the emails also demonstrates that there were personal tensions among other prosecutors and agents on the trial team.[26] AUSA Bottini stayed above those frays and never expressed a caustic or petty thought to anyone on the team.[27] Instead, he treated his colleagues with complete dignity and always put the prosecution team's interests before his own—not the character traits that one typically finds in a person who would be tempted to violate the law to enhance his personal glory.

The second possible motive that could possibly have impelled AUSA Bottini to cheat would be that he harbored a particular animus against Senator Stevens himself. Again, the record demonstrates just the opposite. AUSA Bottini made it clear that he was quite ambivalent about going forward with the prosecution against his senator.

AUSA Bottini specifically told the Special Prosecutor, "quite frankly, as odd as this may sound, Ted Stevens is still a man that I have a fair measure of respect for. Aside from what happened in this case, to me, you can't set aside what he did for 40 years for the state of Alaska . . . . It's a much better place to live because of this guy." S.P. Tr. at 408. The case therefore gave

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to Matthew Stennes (July 29, 2008) ("Ed and I were displaced yesterday by new lead trial counsel Brenda Morris. There is no joy in Mudville right now with Team Polar Pen.").

[25] *See, e.g.*, Email from Morris to Welch (Sept. 27, 2008) (stating that AUSA Bottini, among others, "ask[ed] if Jim and Ed could do the worker bees [the VECO construction workers] on Monday."); Email from Bottini to Morris (Aug. 7, 2008) ("None of us like to see Jim and Ed on the sidelines, but we are over it and are fully focused to win this thing—as a team.").

[26] *See, e.g.*, Bottini Decl. (Feb. 20, 2009) ¶ 42 ("[A]gent Joy did not like taking direction from Marsh or certain other attorneys with the Public Integrity Section."); Morris Decl. (Feb. 21, 2009) ¶ 11 ("Joy was not pleased that Kepner would be allowed to sit at the table and not him."); Welch 302 (Feb. 26, 2009) at 8 (Welch recounts that IRS agents were "not happy with Marsh's personality, especially how he dealt with them."); Email from Morris to Welch (Oct. 21, 2008) ("Nick had a temper tantrum in front of the defense yesterday."); Email from Morris to Welch (July 29, 2008 10:37 am) ("GET OVER HERE! Nick is tanking!"); Email from Morris to Welch (July 28, 2009) (forwarding an email from Marsh's colleague—"I love Nicky, but he will need you if this goes to trial"—and sarcastically commenting, "[t]his is coming from his 'friend'").

[27] We have reviewed every relevant email from AUSA Bottini through the whole investigation and prosecution, and he **never** said anything to his colleagues that was not supportive and team-focused.

AUSA Bottini pause, even though he believed that the evidence merited prosecution. S.P. Tr. at 410; OPR Tr. at 5-18. He would be prosecuting a man he respected and who many Alaskans, himself included, considered a hero. *See* S.P. Tr. at 408-09 ("It's never lost on me when I fly out of Anchorage, his name's on the airport, Ted Stevens International Airport…."). Thus, unlike other members of the prosecution who were eager to play lead roles on the government's trial team, AUSA Bottini "desperately was hoping that either this thing was going to settle out, or they'd find someone else to do it." *Id.* at 410.

3. AUSA Bottini's Good-Faith Actions During the *Stevens* Prosecution

The standard for criminal contempt requires an examination of the alleged contemnor's good-faith actions that are inconsistent with contemptuous behavior. *See In re Brown*, 454 F.2d 999, 1007 (D.C. Cir. 1971) (good faith "is antithetical to contumacious intent"); *see also United States v. Crowe*, No. 94-5690, 1996 U.S. App. LEXIS 2439, at *4 (4th Cir. Feb. 16, 1995) (non-precedential) ("If the defendant makes a good faith effort to comply with a court order, he may not be convicted of criminal contempt."). Yet the Report does not even mention this standard or include a section on good-faith efforts.

AUSA Bottini's actions in prosecuting Senator Stevens demonstrate his good faith. Take three examples:

First, AUSA Bottini was the only prosecutor we know of in this investigation who reviewed his handwritten notes for *Brady* material. *See* S.P. Tr. at 567; *see also* Report at 440. None of the other prosecutors reviewed their attorney notes. *See* Report at 445 (Ed Sullivan admits to not reviewing attorney notes); *id.* at 460 (Brenda Morris says that "reviewing prosecutors' notes for *Brady* material 'would never even cross my mind'"); *id.* at 448 (Jim Goeke admits to not reviewing attorney notes); *id.* at 449 (Nick Marsh "didn't specifically remember" if he reviewed his notes for *Brady*).

Second, AUSA Bottini did, in fact, conduct a *Brady*/*Giglio* review of the materials in his possession relating to each of his witnesses. OPR Tr. at 162. He even developed a *Giglio* checklist, by which he ensured that he had checked for all relevant types of *Giglio* material. *See* OPR Tr. at 167-68.[28]

Third, regarding the Special Prosecutor's accusation that he suppressed the evidence that Bill Allen had induced Bambi Tyree to sign a false affidavit, the reality is that AUSA Bottini[29]

[28] He titled the list "Witness Impeachment Issues," listed eight non-exclusive categories (sexual misconduct, alcohol use, criminal history, bias, prior inconsistent statements, false statements to government, reputation/opinion, and prior convictions), and included with it 30 hand-annotated pages of a handbook on *Brady* and *Giglio* issues, focusing on D.C. Circuit law (with which he was unfamiliar). CRM BOTTINI 061218-47.

[29] Mr. Goeke was also involved in several of these attempts to convince PIN to allow disclosure.

on seven separate occasions pressed his superiors at the Public Integrity Section to do the exact opposite—to voluntarily make a disclosure of that information to the defense, to the court, to higher-level management, and/or to the Department's Professional Responsibility Advisory Office (PRAO). AUSA Bottini was rebuffed by the PIN supervisors at each turn. Specifically:

- In March 2007, he sought to disclose the information to the judge in relation to the government's search warrant application for Senator Stevens' house. The affidavit was based in part on information from Bill Allen, and AUSA Bottini believed the judge considering whether to authorize the search warrant should know about the suborning-perjury allegation and consider it when assessing the credibility of Allen's information and the strength of the evidentiary showing in the affidavit. Email from Goeke to Sullivan (Mar. 5, 2007 3:34 pm). PIN Chief Welch decided against disclosure. Email from Sullivan to Welch (Mar. 5, 2007 5:00 pm); *see* Welch OPR Tr. at 232 ("I didn't think we had to get into every *Giglio* issue for a particular witness we were relying upon.").

- In October 2007, AUSA Bottini pushed PIN to seek PRAO's guidance "as soon as possible" on whether a post-trial disclosure in *Kott* or a pretrial disclosure in *Kohring*, or perhaps an ex parte disclosure to Judge Sedwick, was required. Email from Bottini to Marsh (Oct. 8, 2007 4:12 pm). At the same time, he raised the disclosure issue with his superiors at the Alaska U.S. Attorney's Office, including the U.S. Attorney and the Criminal Division Chief, who supported his disclosure efforts. OPR Tr. at 610, 647. Mr. Marsh reported back that PRAO said no disclosure was required.

- In December 2007, he again pushed PIN to seek PRAO's guidance, after he saw a newspaper article that he thought might change PRAO's original calculus. S.P. Tr. at 697-98. Again, Mr. Marsh reported back that PRAO said no disclosure was required. *Id.* at 700. When AUSAs Bottini and Goeke continued to push PIN to disclose the information to Judge Sedwick, PIN Chief Welch admonished them to stop: "We've done all that we are going to do on the matter. . . . Joe and Jim, per the recusal notice, **you work for PIN, and so these are your marching orders** until I talk to Nelson [Cohen, the interim United States Attorney]." Email from Welch to Bottini et al. (Dec. 20, 2007 5:18 pm).[30]

- In April 2008, he pushed PIN to alert Criminal Division management to the issue, because he questioned the sufficiency of a document Mr. Marsh was drafting on

[30] This "stand down" email from PIN Chief Welch is inconsistent with Mr. Welch's memory at his deposition that "none of them were pushing for disclosure" around this time. Report at 255. That's precisely why Mr. Welch sent the email—because AUSA Bottini (and Mr. Goeke) continued to press for disclosure, including with their own U.S. Attorney, after hearing about PRAO's advice.

the case's weaknesses that listed only Allen's "shady personal background" without elaborating on Bambi Tyree and the subornation of perjury issue. Email from Bottini to Marsh et al. (Apr. 7, 2008 6:47 pm). PIN declined.

- At a July 14, 2008 meeting, he personally informed Criminal Division management, including the Assistant Attorney General and Principal Deputy Assistant Attorney, about the Bambi Tyree situation after his PIN colleagues neglected to do so. S.P. Tr. at 707-09; *see also* Email from Bottini to Goeke (July 15, 2008 5:50 pm) ("Group updated about our meeting with Matt and Rita. I pointed out the issue about [B]ambi [Tyree] coming up and how they were interested in that . . . .") (ellipsis in original).

- On August 14, 2008, when he was drafting the government's motion in limine to exclude inflammatory cross-examination, AUSA Bottini told his PIN superiors that although PRAO had concluded there was no disclosure obligation, he believed the motion should nevertheless explain the false subornation of perjury issue.[31] Email from Bottini to Sullivan et al. (Aug. 14, 2008 2:32 am) ("The big question: This [draft] obviously does not front out the rumored procurement of the false statement from Bambi by Bill. . . . I worry that if we don't make some mention of it—passing mention of it as a rumor which we investigated and disproved—they may respond to the [motion in limine] and raise it—thus possibly making it look like we potentially tried to hide something. Completely aware of what PRAO says, but do we run that risk?"). PIN declined.

- When he was drafting the August 25, 2008, *Giglio* letter, he again sought permission from PIN to make the defense aware of the issue. Email from Bottini to Morris et al. (Aug. 21, 2008 10:44 pm). Not only did PIN decline, but Ms. Morris, Mr. Marsh, and Mr. Sullivan discussed and rejected AUSA Bottini's suggestion in a series of emails from which he was excluded. *See* Emails among Marsh, Morris, and Sullivan (Aug. 22, 2008 1:40 pm and 1:41 pm).

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Each one of these mitigating circumstances sheds important light on the central question that the Special Prosecutor was supposed to investigate: did AUSA Bottini *intentionally* try to subvert the law? Did a veteran prosecutor with a quarter-century of experience and no desire for

[31] As a last-ditch effort to convince PIN to make some type of disclosure, AUSA Bottini resorted to making strategic "sales pitches" that were designed to appeal to his PIN colleagues—like arguing that they should give notice of the Bambi Tyree subornation of perjury issue so they could "smoke out" what the defense might already know. AUSA Bottini fully explained this strategy in his deposition. OPR Tr. at 662-64.

the spotlight risk his career by intentionally withholding evidence? Did a man who is universally praised as having the utmost integrity intentionally conceal exculpatory information from Court and counsel? Did a lifelong Alaskan who had great respect for Senator Stevens and mixed feelings about prosecuting him undertake to violate the law in some sort of vendetta against the senator? Did a prosecutor who repeatedly pushed and cajoled his colleagues and superiors to provide disclosure on an issue suddenly turn around and decide to intentionally conceal that issue from the defense?

None of these questions was addressed in the Special Prosecutor's Report.

C. The Failure to Consider AUSA Bottini's 48-Page Submission

In April 2010, we provided the Special Prosecutor with a 48-page submission explaining why, on both the facts and the law, AUSA Bottini did not commit intentional misconduct.[32] For each of the three eventual "counts" the Special Prosecutor leveled against AUSA Bottini, we methodically explained how they were not legally or factually supported. The Report does not even mention the fact of our submission, let alone reference our ample caselaw regarding the question of whether AUSA Bottini's conduct amounted to a violation in the first place. It is as though we never submitted anything at all.

D. The Failure to Accurately Recite Certain Critical Facts

Three of the material "facts" asserted in the Report are wrong and are misconstrued in a way that provides unwarranted support for the Report's conclusion that AUSA Bottini acted maliciously and intentionally.[33]

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[32] A copy of this document is appended to this letter.

[33] In addition to these misstatements of material facts, the Report also uses loaded language. In one example, the Report finds it "difficult to believe" that at the time of trial the prosecutors did not recall having shown the Torricelli Note to Bill Allen five months earlier, and asserts that this "collective memory failure strains credulity," Report at 22, 512; *see also* Report at 505 ("suspicious pattern of forgetfulness"). The clear import of these passages is to suggest that AUSA Bottini and the others lied about failing to recall the April meeting.

There are two reasons why it is clear that this suggestion is wrong and grossly unfair. First, if AUSA Bottini really is lying about this point, then that means there is quite a large conspiracy among four federal prosecutors, an FBI agent, a federal witness, and a former United States Attorney who represented Bill Allen at that interview and similarly forgot that this client had been shown the Torricelli Note. This is an astonishing accusation to level, given that there literally is no evidence—other than the Special Prosecutor's unfounded suspicion—that all seven of these individuals lied to him when they testified that they could not recall the Torricelli Note being shown during the April 15, 2008, meeting.

Second, AUSA Bottini's notes from a pretrial preparation session with Bill Allen on September 14—five months later—demonstrate that, when he showed Allen the Torricelli Note that day, he believed it was the first time he had done so; he wrote "BA SEEN THIS!!" with two exclamation points, to

footnote continued on next page

1. The Report's assertion that Williams' time was "supposed" to be added to the bills

The Report accuses AUSA Bottini of illegally suppressing witness Rocky Williams' statement that the charges for his work and that of the other VECO employees on the job were "supposed" to be combined with the invoices from subcontractor Christensen Builders and then transmitted by VECO owner Bill Allen to Senator and Mrs. Stevens:

> In August 2008, as Mr. Bottini drafted the first *Brady* disclosure letter to Williams & Connolly, Mr. Williams told him several times that VECO employees' time ***was supposed to*** be added by Mr. Allen to the Christensen Builders' bills to Senator Stevens. Mr. Bottini made notes of those statements, which supported Senator Stevens's defense, but that *Brady* information was never disclosed to Williams & Connolly.

Report at 71 (emphasis added). The Report then uses the word "*supposed*" (or the synonymous phrase "*were to be*") 20 times in describing what Williams allegedly told AUSA Bottini about the combining of the VECO and Christensen Builders invoices. The record is clear, however, that Williams **never** made that statement to AUSA Bottini (or, apparently, to anyone else on the prosecution team).

Although the Special Prosecutor spent over 100 transcript pages pushing this interpretation, AUSA Bottini was absolutely clear and emphatic in his deposition that Williams *never* said that the invoices were "supposed" to be combined, *see* S.P. Tr. at 136-37 ("**Q**: … Did you ever hear him say anything like that [that his time was supposed to be added to the Christensen bills]? **A**: I did not. **Q**: Ever? **A**: Ever. **Q**: Not just at this meeting[?] **A**: Ever, yes."), and the term "supposed" is nowhere to be found in AUSA Bottini's notes of his meetings with Rocky Williams. Nor apparently did Mr. Goeke and Agent Joy—the only other two participants in the meetings with Rocky Williams—indicate that there was an agreement whereby Allen was "supposed to" add Williams' time to the Christensen Builders bills.[34]

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underscore a fact that was obviously new to him. *See* Report at 437 (reprinting the note). He would not have written that note on September 14 if he actually recalled that Bill Allen had told him the same thing in April. The Report's loaded language about this incident was misplaced, and should have no place in a Court-sanctioned official report, especially one that will be publicly released and have an impact on personal reputations.

[34] The Report cites no deposition from those two men to support its interpretation. Not having received the Special Prosecutor or OPR deposition transcripts of any other witness or subject, we do not know the full extent of Agent Joy's or Mr. Goeke's questioning on this topic.

What Williams *did* tell AUSA Bottini was that he "*assumed*" that the VECO expenses would be added to the subcontractor's bills and submitted to Senator Stevens for payment. AUSA Bottini told the Special Prosecutor that Williams said the same thing in three different interview sessions, and his notes from all three of those meetings confirm that Williams used the term "*assume*."

This is more than just semantics; *assuming* that something will occur is quite different from saying something was *supposed* to occur. The latter requires a factual basis, while the former does not. Surprisingly, the Special Prosecutor's Report simply substitutes "supposed" for "assumed" in its discussion of this issue and then uses the stronger term as the factual predicate for its finding that AUSA Bottini violated *Brady* by failing to disclose Williams' statement to the defense. As explained below, *see* Section III.H.1, that finding is as flawed as the Report's creative terminology on this point.

2. The Report's assertion that AUSA Bottini used false testimony from Bill Allen during his closing argument.

The Report states that AUSA Bottini "endorsed and capitalized on Mr. Allen's false denial during his summation," Report at 20, presumably in furtherance of its suggestion that AUSA Bottini was unfairly exploiting defense counsel's inability to pin Bill Allen down as to when Allen first told the prosecutors about the statement by Bob Persons that "Ted is just covering his ass." The record is clear that AUSA Bottini did no such thing.

AUSA Bottini argued in his summation, in relevant part: "Now the defendant says, well, Allen just made that up, that's a lie, that never happened. Again, you saw and you heard from Bill Allen and you saw and you heard from Bob Persons. You can judge yourself the credibility of those two individuals. Again, if that were so, if Allen just made that up, wouldn't the story be better about that?" Trial Tr. (Oct. 21, 2008 am) at 54.[35] AUSA Bottini's argument is solely directed against defense counsel's contention that Bill Allen "made up" the story about Persons telling him the senator was "covering his ass"; that argument says and implies nothing about *when* Allen first allegedly made that story up. By injecting a temporal element into AUSA Bottini's argument, the Report is then able to draw a sinister interpretation of his argument—i.e., that AUSA Bottini was suggesting that Allen had not just recently told the government about the "covering his ass" statement, when he knew that that was the case. It is plainly evident from the trial transcript that AUSA Bottini was saying nothing about when Allen first mentioned the "covering his ass" statement. The point he is addressing is the defense contention that this was a fabrication (regardless of *when* it was allegedly fabricated), and that is apparent from his

[35] It is worth noting that the Special Prosecutor deposed Allen about his "covering his ass" testimony, and Allen was emphatic that he was telling the truth about his conversation with Persons in 2002. *See* Allen S.P. Tr. at 21-25, 45-46. Allen's testimony to the Special Prosecutor on this point is not mentioned in the Special Prosecutor's Report, but we know about it because it was in the OPR draft report.

response to the contention—"[I]f that were so, if Allen just made that up, wouldn't the story be better about that?"—which counters the defense's fabrication theory[36] without any reference to the timing of the alleged fabrication.[37]

3. The Report's assertion that AUSA Bottini "assisted" in drafting the inaccurate paragraph in the September 9 *Brady* letter.

The Report accuses two prosecutors—AUSA Bottini and AUSA Goeke—of falsely informing the defense in the September 9, 2008 *Brady* letter that "no evidence" existed to support the suggestion that Allen asked Tyree to sign a false affidavit, when, in fact, three pieces of such evidence did exist. Report at 28. To support this accusation, the Report repeatedly states or suggests that AUSA Bottini wrote or somehow had a hand in the creation or ratification of this language in the *Brady* letter. For example:

- "Mr. Marsh, *assisted by Mr. Bottini*, Mr. Goeke and Mr. E. Sullivan, wrote [the *Brady* letter's] penultimate paragraph which falsely stated that 'the government is aware of no evidence to support any suggestion that Allen asked [Ms. Tyree] to make a false statement.'" Report at 15 (second alteration in original) (emphasis added).

- "Instead of disclosing information that was on its face, and in fact, *Giglio* material, *Mr. Bottini*, Mr. Goeke and Mr. Marsh told Williams & Connolly that no such evidence existed." Report at 502 (emphasis added).

- "*Mr. Bottini*, Mr. Goeke and Mr. Marsh falsely represented

[36] This is a common prosecution argument to the jury. When the defense asserts that a government witness has embellished his testimony with a particular fabricated fact that is helpful to the government, the prosecutor will often cite other facts in that witness' testimony that are not helpful to the government. The prosecutor then asks the jury to assess the defense contention by asking themselves the following questions: "If that witness is willing to lie about that one point to make it more helpful to the government, why didn't he or she just lie about the other points and make them all helpful to the government? If the witness really was lying to you, why didn't he make the whole story a lot better for the government?" That is the argument AUSA Bottini is making in this passage, and it is an argument that goes solely to the defense counsel's suggestion of fabrication and not to the timing of the alleged fabrication.

[37] There is a suggestion in the Report that AUSA Bottini's use of the word "just" in his closing argument was intended to convey that Allen had not *recently* told the government about the "covering his ass" statement. *See* Report at 476. Read in context, it is obvious that AUSA Bottini is using the word "just" to mean *simply*, not *recently*. He says, in essence, that Allen did not fabricate that statement; not that he did not fabricate it recently.

> that there was 'no evidence' that Mr. Allen asked Ms. Tyree to lie." Report at 503 (emphasis added).

It is inaccurate for the Report to claim that AUSA Bottini in any way "assisted" Mr. Marsh in drafting the letter. The record is clear that AUSA Bottini simply saw a copy of the completed letter on the evening it was sent. As AUSA Bottini testified, he just "skimmed it"; he "didn't read it in any detail for accuracy" and "do[es]n't recall reading that section about this issue [subornation of perjury], and looking at it and going this isn't right." S.P. Tr. at 774. It is therefore inaccurate for the Report to assert that AUSA Bottini "told" or "represented" anything to Williams & Connolly about this issue.

E. The Failure to Cite Exculpatory Facts

The Model Rules of Professional Conduct require an attorney, in an ex parte proceeding,[38] to disclose to a tribunal adverse facts that are known to the attorney. Mod. R. Prof'l Cond. 3.3(e). This maxim is so important in ex parte proceedings because the tribunal (here, Judge Sullivan) does not have the benefit of an adverse attorney to point out those facts that contradict or rebut the positions put forward by the unopposed attorney. *See id.* cmt. 14 ("The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.").

Based in part on this maxim that the decision-maker should be aware of the absent party's "good facts," the Department of Justice requires its prosecutors to present substantial exculpatory information to grand juries. United States Attorneys' Manual § 9-11.233 (Presentation of Exculpatory Evidence). Here, Judge Sullivan is functioning like a grand jury, absorbing all of the information provided to him by the Special Prosecutor and then deciding, pursuant to Rule 42, whether sufficient evidence exists to institute contempt proceedings.

The Special Prosecutor omitted several critical adverse facts:

First, the Report faults AUSA Bottini for the inaccurate language in the September 9 *Brady* letter that there was "no evidence" to support the allegation that Allen asked Tyree to sign a false affidavit. The offending language was drafted by Mr. Marsh on September 8, immediately following a meeting among the PIN attorneys (and not AUSA Bottini). *See* Report at 324, 330. The Report never mentions that, on the day that language was drafted, AUSA

[38] "A judicial proceeding, order, injunction, etc., is said to be ex parte when it is taken or granted at the instance of and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested." Black's Law Dictionary 661-62 (6th ed. 1968). This Report was "ex parte" because it was provided to the Court without providing AUSA Bottini (the party adversely interested) with notice or the opportunity for contestation.

Bottini spent that entire day travelling from Alaska to Washington, and that when he arrived PIN assigned him to argue two motions on September 10 that he had neither drafted nor researched. S.P. Tr. at 117-18, 241. There is no mention of how AUSA Bottini was otherwise fully occupied while others were composing the disclosure language for which the Report holds AUSA Bottini responsible.[39]

Second, as explained above, the Report faults AUSA Bottini for failing to correct Allen's testimony suggesting he had not "just recently" told the government about Persons' "covering his ass" statement for the first time. In his deposition, AUSA Bottini explained at length to the Special Prosecutor that Allen had some serious impairments, was easily confused and had a hard time hearing—facts that directly support AUSA Bottini's understanding that everyone in the courtroom (including the jury and defense counsel) would recognize that Allen was simply confused by the cross-examination. *See* OPR Tr. at 341. During his depositions, AUSA Bottini discussed Allen's serious cognitive, speech, and auditory difficulties—the effects of a head injury following a motorcycle accident and a degenerative cognitive disease. S.P. Tr. at 500, 558; OPR Tr. at 283, 345. In addition, Allen's hearing was so poor he had to wear headphones during the trial,[40] and the transcript of his trial testimony reflects countless verbal stumbles and a repeated disconnect between Allen's testimony and the questions put to him. These facts have a direct bearing on the reasonableness of AUSA Bottini's assessment that Allen's testimony about the "covering his ass" statement was simply confused,[41] that that confusion was apparent to the jurors who were already aware of Allen's deficiencies,[42] and that because of these deficiencies it would likely have been fruitless to try to clarify Allen's confusion on re-direct examination. Despite their direct relevance, the Report does not reference Allen's cognitive difficulties when discussing Allen's cross-examination testimony.

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[39] Even more jarring is the fact that the Report gives Ed Sullivan a free pass for the inaccurate language in the September 9 *Brady* letter, because he was preparing to argue a case before the D.C. Circuit on September 12, s*e*e Report at 342 ("Around the time the *Brady* letter was drafted, Mr. E. Sullivan was preparing for oral arguments that week in *Stevens* and in the D.C. Circuit Court of Appeals in *United States v. Turner*."), even though Mr. Sullivan—unlike AUSA Bottini—was directly involved in drafting the letter. It is difficult to see why the same reasoning did not apply to AUSA Bottini.

[40] To add to Allen's confusion, the transcript reflects that his headphone technology failed repeatedly, including on two occasions during the afternoon of his cross-examination when defense counsel focused on his account of the "covering his ass" statement. Trial Tr. (Oct. 6, 2008 pm) at 28, 78.

[41] Indeed, Allen testified to the Special Prosecutor that he merely "misunderstood the question"; he did not "intentionally lie." Report at 492 (quoting Allen deposition testimony).

[42] AUSA Bottini had elicited from Bill Allen on direct examination that he had these impairments. *See* Trial Tr. (Sept. 30, 2008 pm) at 53-54 (**Q**: Now as a result of the accident, did you sustain a brain injury? **A**: Yes. . . . **Q**: And you said that it is in an area of your brain that affects your speech; is that correct? **A**: Yes. **Q**: How does that brain injury actually affect your ability to speak? **A**: It does. It was pretty bad there for three to four months, and then as you go along, I guess your brain rewires itself. **Q**: Okay. Do you still have trouble expressing yourself sometimes? **A**: Sometimes, I can see the word or the picture and sometimes it won't go through my lips.").

Third, the Report accuses AUSA Bottini of subverting justice by intentionally suppressing Williams' statement that he assumed Allen was adding his time to the Christensen Builders' bills. However, the Report omits a directly inconsistent and exculpatory fact—that AUSA Bottini was planning to elicit that very statement during William's direct examination at trial (that testimony never happened, as Williams fell ill right before trial and returned to Alaska for treatment, where he died shortly thereafter). *See* S.P. Tr. at 299. In fact, AUSA Bottini's written outline for Williams' testimony—which the Special Prosecutor has in his possession and used to question AUSA Bottini during the deposition—includes two questions to Williams about that assumption:

> [Q] What [did you] do after you reviewed [Christensen Builders' bills]?
> [A] Went to VECO, assumed that my time and Dave's time added on
> [Q] Nobody tell you that?
> [A] I assumed.

Id. (AUSA Bottini reading from his outline (deposition exhibit 21, page 139)). If AUSA Bottini intended to violate the law by withholding the fact of this assumption from the defense, it is hard to explain why he was planning to elicit it during his direct examination of Williams. The Report makes no mention of this very salient fact.

F. The Failure to Cite Legal Authority Adverse to the Special Prosecutor's Positions

The Model Rules of Professional Conduct also prohibit a lawyer from knowingly failing to disclose "legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client." Rule 3.3(a)(2). This requirement applies in proceedings where the lawyer is facing an adversary arguing the contrary position, and its application is even *more important* in an ex parte proceeding like the Special Prosecutor's Report to the Court where there is no other party to point out the adverse authority. In our submission to the Special Prosecutor on April 9, 2010, we provided legal authority that clearly militated against a finding that AUSA Bottini committed a *Brady* or *Napue* violation, but none of that caselaw made it into the Report.

1. Legal authority indicating that *Brady* did not require the disclosure of Williams' assumptions

Williams told the government that he assumed that Allen would add the time spent by Williams and another VECO employee to Christensen Builders' bills before sending the bills to Senator Stevens for payment. Williams based this assumption on the fact that Senator Stevens had told him and Allen in 1999, before Christensen was hired or any plans were drawn up, that

he wanted to pay for everything.[43] S.P. Tr. at 172.

The Report repeatedly asserts that Williams' assumption (which it inaccurately characterizes, *see supra* Section III.D.1) was *Brady* material because it would have "supported" and "corroborated" the defense theory that Senator and Mrs. Stevens thought that they were also paying VECO when they paid the Christensen Builders invoices. *See* Report at 1, 5, 6, 8, 38, 107, 175, 192-93, 500. While that may, in fact be true, the law—which the Report ignores on this issue—clearly shows that more than an assumption is required to establish a *Brady* violation.

For information to be "*Brady*," it must either (1) be admissible or (2) directly lead to admissible evidence. *United States v. Johnson*, 592 F.3d 164, 171 (D.C. Cir. 2010). The Williams assumption fails both prongs of that test. First, it is black-letter law that an assumption is not admissible evidence because an assumption, by definition, is based on something short of first-hand knowledge—which is the strike zone of witness testimony at trial. *See United States v. Burnett*, 890 F.2d 1233, 1240 (D.C. Cir. 1989) ("[T]he admissibility of a witness' testimony depends on proof of the witness' firsthand knowledge of the events he will describe.") (citing Fed. R. Evid. 602).[44] Second, the Report fails to explain what "admissible evidence" would have been uncovered had the defense been made aware of Williams' assumption. In fact, it is impossible to come up with any such evidence, in large part due to the following line of legal authority that the Report also completely overlooks.

The source of Williams' assumption was the 1999 conversation in which Senator Stevens told Allen and Williams that he wanted to pay for everything (which led Williams to assume—incorrectly, it turned out—that his and all of VECO's time was added to the bills submitted to and paid by Senator Stevens and his wife). The law is clear that Williams' description of that conversation would not be *Brady* material, because the defendant himself was a participant in the conversation. It is black-letter law that information is not *Brady* material if the defense is aware of the information. *See United States v. Derr*, 990 F.2d 1330, 1335 (D.C. Cir. 1993) ("*Brady* only requires disclosure of information unknown to the defendant …."); *United States v. O'Hara*, 301 F.3d 563, 569 (7th Cir. 2002). And a statement made by the defendant himself is quintessentially information that the defendant knows. *See United States v. Mahalick*, 498 F.3d 475, 478-79 (7th Cir. 2007) (explaining that, by definition, the government cannot "suppress[]" a defendant's statements in violation of *Brady* because that information is known to the defendant, and even if the defendant forgot what he said, "it [i]s not the government's job to remind him"); *United States v. Phillips*, 596 F.3d 414, 419 (7th Cir. 2010) ("[T]here was no *Brady* violation

[43] Williams also explained that he made that assumption because he did not think that Allen would "do something as stupid" as not to charge Senator Stevens for VECO's work. S.P. Tr. at 172.

[44] Indeed, in *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995) (per curiam), when a defendant challenged the prosecution's suppression of a prosecution witness's failed polygraph test, the Supreme Court held that such information is not even "evidence" for the purpose of *Brady* because it is inadmissible.

because [the defendant] was a party to the [suppressed] recorded conversation and would have been aware of any exculpatory statements made."); *United States v. Faris*, 388 F.3d 452, 461-62 (4th Cir. 2004) ("The FBI 302 was nothing more than a summary of [the defendant's] own statements. . . . Because the contents of the FBI 302 were already known to [the defendant], the failure to disclose this report did not violate *Brady*."), *vacated on other grounds*, 544 U.S. 916 (2005).

2. Legal authority directing that claims under *Napue v. Illinois* must be considered in context

The Report also fails to cite the caselaw advising courts how to analyze allegations that a prosecutor violated the rule laid out in *Napue v. Illinois*, 360 U.S. 264 (1959), by eliciting or failing to correct false testimony. It overlooks the controlling caselaw instructing that witness statements on the stand should not be viewed in isolation, but must be analyzed "in context." *United States v. Mejia*, 597 F.3d 1329, 1339 (D.C. Cir. 2010).[45] Nor does the Report reference the law holding that confused testimony[46] does not impose a *Napue* duty for the prosecutor to correct it. *United States v. Crockett*, 435 F.3d 1305, 1317 (10th Cir. 2006).[47] Finally, the Report makes no mention of the many opinions holding that a *Napue* claim will lie only if the uncorrected witness testimony can be shown to be intentionally perjurious, as opposed to simply mistaken or confused.[48]

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[45] The Report does cite *Meija*, *see* Report at 470, but not for this proposition.

[46] Bill Allen told the Special Prosecutor that, just as AUSA Bottini believed, he was simply confused by the cross-examination when he answered "No." to the question "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?" *See* Report at 491-92.

[47] In *Crockett*, the prosecution witness falsely but mistakenly answered "no" to defense counsel's question about whether she would receive a benefit in exchange for her testimony. *Id.* After viewing that response in the context of her entire direct and cross-examinations, the court found that the witness was "confused about her obligation to testify against [the] Defendant," and therefore found no *Napue* violation because "[t]here has been no showing of deliberate false testimony." *Id.*

[48] Many courts require *perjured* testimony—as opposed to simply false testimony—to make out a claim for *Napue*. *See United States v. Agurs*, 427 U.S. 97, 103 (1976) (explaining that the government violates *Brady* if "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury"); *United States v. Clarke*, 767 F. Supp. 2d 12, 66-67 (D.D.C. 2011) (explaining that, to make out a *Napue* violation, the defendant "must first establish that the testimony at issue was, in fact, perjured"); *see also United States v. Are*, 590 F.3d 499, 509 (7th Cir. 2009); *Crockett*, 435 F.3d at 1317. In fact, the Special Prosecutor appeared to accept this proposition in his questioning of AUSA Bottini in December 2009 when the Special Prosecutor specifically equated a *Napue* violation with perjurious testimony. *See* S.P. Tr. at 653:1-4 ("**Q**: You were aware of your obligations under [*Napue*] *v. Illinois*? Are you familiar with that case, that the government's not allowed the use perjury as testimony in its case?"). The Report should have at least mentioned that many courts—and the Special Prosecutor himself—require a showing of intentional

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The Report's failure to include all of this case law was a serious oversight. It denied the Court—and now the public—the knowledge that the law provided two strong refutations of the Report's conclusions: (1) that the Report's finding that Williams' statements would have "corroborated the defense theory" is not enough to establish an actionable violation of the *Brady* disclosure rules and (2) that Allen's discrete cross-examination testimony did not rise to the level of a *Napue* false-testimony violation. Without any discussion of the relevant legal authority, these two glaring weaknesses in the Report's findings remained hidden.

G. The Failure to Cite the Applicable Legal Standard

Judge Sullivan appointed Mr. Schuelke to investigate the prosecutors for committing criminal contempt. Trial Tr. (Apr. 7, 2009) at 46. Yet while the Report lists three elements required to prove criminal contempt, *see* Report at 507-09, it never even recites the applicable mens rea standard.

Criminal contempt is a specific intent crime. *See United States v. Cutler*, 58 F.3d 825, 837 (2d Cir. 1995) ("Criminal contempt generally requires a specific intent to consciously disregard an order of the court." (internal citation omitted)); *Waste Conversion, Inc. v. Rollins Envtl. Servs. (NJ), Inc.*, 893 F.2d 605, 610 (3d Cir. 1990) (en banc) (similar). Acting with "specific intent" requires that the individual have a wrongful "purpose," rather than simply "knowledge" (which is the general intent standard). *United States v. Bailey*, 444 U.S. 394, 405 (1980). The pattern jury instruction provides:

> In order to be guilty of criminal contempt, therefore, it is essential that the defendant acted knowingly and with the specific intent to disobey or disregard the order of the court. A person acts knowingly if he acts intentionally and voluntarily and not because of ignorance, mistake, accident, or carelessness. I instruct you that if you find beyond a reasonable doubt that the defendant understood [the Court's] order and consciously refused to obey that order, the defendant's conduct would then be knowing and willful, and this element of the offense would be satisfied.

1-20 Modern Federal Jury Instructions: Criminal ¶ 20.02, Instruction No. 20-15.

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perjury to make out a *Napue* violation. This is especially true here, where Allen told the Special Prosecutor, under oath, that his cross-examination testimony was innocently mistaken rather than intentionally false. Report at 491-92.

When he deposed AUSA Bottini, the Special Prosecutor indicated he was aware of the specific intent standard. In reference to the *Stevens* prosecution, he specifically reminded AUSA Bottini that "the defendant's state of mind … is what the [*Stevens*] case was all about—this was a specific intent crime alleged." S.P. Tr. at 139. Yet, the Report never mentions that specific intent is equally required for a contempt case like this one, and should therefore have been established before the Special Prosecutor concluded that "the evidence . . . compels the conclusion, and would prove beyond a reasonable doubt, that . . . *Brady* information was intentionally withheld from the attorneys for Senator Stevens." Report at 28.

H. The Failure to Follow the Applicable Legal Standard in the Analysis of AUSA Bottini's Culpability

Predictably enough, the failures cited above—and particularly the failure to recognize the relevant legal standard for criminal contempt (specific intent)—result in a legal analysis of AUSA Bottini's culpability that falls far short of the rigorous balancing of law and facts that should underlie any determination of guilt or innocence. In fact, it is fair to say there is almost no legal analysis at all in this Report.

When we submitted our 48-page argument to the Special Prosecutor in early 2010, we devoted approximately 15 pages of that document to legal analysis—i.e., to applying the facts of this case to the rules and caselaw that define the boundaries between culpability and non-culpability for each allegation against AUSA Bottini. In the Special Prosecutor's 514-page Report, there are about eight pages of general description of *Brady* material and the prosecutor's *Brady* obligations. Then as to each allegation, the Report devotes barely a paragraph to a discussion of the relevant rules before finding AUSA Bottini in violation of those rules.

The paucity of legal discussion is but a symptom of the fundamental problem in the Special Prosecutor's Report—the absence of fair legal reasoning behind its findings against AUSA Bottini. A cursory examination of each of the Report's findings demonstrates the shallowness of its legal reasoning.

1. The Rocky Williams Statements

The following paragraph is the sum total of the Report's analysis of the *Brady* allegations relating to Rocky Williams' statements:

> By any [articulation of the *Brady*] standard, the information provided to the prosecutors by Rocky Williams and Bambi Tyree was *Brady* material. Mr. Williams's statements to Mr. Bottini, Mr. Goeke and Agent Joy during trial preparation interviews in August and September 2008, days before the trial began, that he understood, based on conversations with Mr. Allen and Senator Stevens, that VECO expenses were to be included in the Christensen Builders' bills, directly supported and corroborated

> Senator Steven's [*sic*] principal defense and his and Catherine Stevens's testimony at trial. Mr. Williams's statements constituted quintessential *Brady* information which Mr. Bottini and Mr. Goeke withheld and concealed from Senator Stevens and Williams & Connolly.

Report at 500.

In that one paragraph, the Report purports to demonstrate that the Special Prosecutor has a prosecutable case regarding AUSA Bottini's failure to disclose Williams' statements—i.e. that he has proof beyond reasonable doubt that: (1) AUSA Bottini violated a court order;[49] (2) that he did so knowingly, and (3) that he did so intentionally. A less superficial discussion of those elements as to each allegation shows that the Report utterly failed to satisfy them.

Violation: AUSA Bottini's uncontradicted deposition testimony was that Williams said that he (Williams) "assumed" that the VECO bills were being combined with the Christensen Builders bills. As explained above, assumptions are typically not considered relevant and admissible at trial. The fact that a contractor assumed that a United States Senator would pay for the work the contractor was doing on the senator's house is probative of nothing. Most contractors working on a job would assume that the homeowner would be billed and pay for their work. If that were considered relevant and admissible, then every worker who appeared on that job site could be called to testify about their assumption. Given that reasoning, it is hard to see how AUSA Bottini's failure to disclose the fact of Williams' assumption to the defense constitutes a *Brady* violation in the first place.

Knowledge: As AUSA Bottini explained at his deposition, he considered whether this assumption was exculpatory *Brady* information. He went through the analysis summarized above and concluded that it was not *Brady* material. Given his reasonable determination that it ***was not*** *Brady* information, it is difficult to see how the Special Prosecutor concluded that AUSA Bottini knew that it ***was*** and thereby knowingly violated the *Brady* requirement to disclose it to the defense.

Intent: Even if AUSA Bottini were wrong with his analysis—and Williams' statement was, in fact, disclosable *Brady* information—his resulting decision not to disclose it could not be deemed an *intentional* suppression of exculpatory material.[50] At worst, that would have been a mistake—and not intentional misconduct. Lest there was any question on this point, the uncontroverted fact that AUSA Bottini planned to elicit this assumption during Williams' direct

[49] For purposes of this discussion, we will assume that there was an order requiring the government to comply with it *Brady* obligations.

[50] And, having worked alongside Mr. Goeke for several years, AUSA Bottini believes it is inconceivable that Mr. Goeke would have intentionally committed misconduct on this issue or any other issue in this or any other case.

examination, *see supra* Section III.E (explaining this exculpatory fact), definitively demonstrates that he did not *intend* to withhold the information from the defense.

2. The Bambi Tyree Information

The government has an obligation under *Brady* and *Giglio* to give the defense information that undercuts the credibility of its witnesses. The prosecution team clearly violated that obligation when it sent a letter saying that "the government is aware of no evidence to support any suggestion that Allen asked [Tyree] to make a false statement." Letter from Morris to Williams & Connolly (Sept. 9, 2008). The question for the Special Prosecutor, however, was whether AUSA Bottini—as opposed to others on the prosecution team—was personally responsible for that statement. The following is the Report's legal analysis relating to AUSA Bottini's liability on that point:

> Instead of disclosing information that was on its face, and in fact, *Giglio* material, Mr. Bottini, Mr. Goeke and Mr. Marsh told Williams & Connolly that no such evidence existed.
>
> * * *
>
> The *Brady* disclosure in *Stevens* was not just incomplete. Mr. Bottini, Mr. Goeke and Mr. Marsh falsely represented that there was "no evidence" that Mr. Allen asked Ms. Tyree to lie.

Report at 501-02.

The analysis—if one can call it that—simply groups AUSA Bottini together with Mr. Goeke and Mr. Marsh in assigning guilt for the *Giglio* violation. In doing that, the Report completely overlooks a highly-relevant and uncontroverted fact—that AUSA Bottini simply did not know or see that the "no evidence" reference was in the letter. *See* S.P. Tr. at 774 ("I don't recall reading that section [in the *Brady* letter] about this issue [of 'no evidence'], and looking at it and going[,] this isn't right…."); *see also id.* at 740 ("**Q**: So it may well be today, the first time that you have realized the shortcomings of this paragraph [of the *Brady* letter about 'no evidence']? **A**: Yeah.").

The following is the analysis of the elements that was absent from the Report:

Violation: A violation of *Brady* occurred when the government sent its September 9, 2008, letter saying that there was "no evidence" that Bill Allen asked Bambi Tyree to sign a perjurious affidavit. The question, however, is whether AUSA Bottini committed that violation. The record is clear that he did not: he had no role in drafting that part of the letter; he was on travel as it was being finalized; he simply skimmed it after it was completed; and he did not see that the letter was inaccurate.

Knowledge: Given the evidence that AUSA Bottini simply did not see the "no evidence" reference when he skimmed the letter, it is impossible to understand how he could be held responsible for *knowingly* committing a *Brady* violation.

Intent: Without knowledge that the letter was inaccurate, he logically cannot be held responsible for *intentionally* misleading the defense.

3. Bill Allen's Testimony

Again, the Report provides no more than a single paragraph of analysis before accusing AUSA Bottini of violating *Napue*:

> Mr. Bottini had not forgotten during Mr. Allen's cross-examination on Oct. 6, 2008, when Mr. Sullivan attempted to demonstrate that his CYA testimony [Allen's testimony that Bob Persons had told him Senator Stevens was just "covering his ass" with the Torricelli Note] was a recent fabrication, that Mr. Allen told him about that CYA conversation for the first time on Sept. 14, 2008. He failed to correct Mr. Allen's false testimony that he had not told the prosecutors "just recently" about his CYA conversation with Mr. Persons. Mr. Bottini knew that he was obliged by *Brady*, *Giglio* and *Napue* to correct that false testimony and/or disclose the truth to Williams & Connolly and the Court, and he chose not to. Mr. Bottini's explanation, that he knew from his experience with Mr. Allen that he was confused and misunderstood Mr. Sullivan's question, does not excuse his failure to correct testimony which he knew was false.

Report at 505 (internal citations and parentheticals omitted).

Here, the Report at least attempts a cursory analysis under the elements of criminal contempt, but its recitation of the facts is flat wrong.

Violation: The government violates *Napue* when a witness's false testimony goes uncorrected and the government does not notify defense counsel or the court. *United States v. Crockett*, 435 F.3d 1305, 1317 (10th Cir. 2006); *see also* Report at 505. Here, there was no violation, because after finally grasping that defense counsel was asking when Allen told the government about the CYA comment (rather than when Persons told Allen about it), Allen testified truthfully to the best of his ability: "Hell, I don't know[.] I don't know what day it was." Trial Tr. (Oct. 6, 2008 pm) at 81; *see also United States v. Mejia*, 597 F.3d 1329, 1339 (D.C. Cir. 2010) (in *Napue*

analysis, testimony must be evaluated "in context").[51]

Knowledge: The Report claims that "Mr. Bottini knew that he was obliged by *Brady*, *Giglio* and *Napue* to correct ***that*** false testimony." Report at 505 (emphasis added). Wrong. He did not know (and did not believe) that *Napue* or any other doctrine obliged him to correct what he perceived to be Allen's innocently confused testimony that Allen then sufficiently cleared up on his own. *See also Hess v. Trombley*, No. 2:06-cv-14379, 2009 WL 1269631, at *6 (E.D. Mich. May 1, 2009) ("While a prosecutor may not knowingly use perjured testimony, a prosecutor is not required to ensure that prosecution witnesses' testimony be free from all confusion, inconsistency, and uncertainty.").

Intent: Because he did not think he had a duty to correct Allen's testimony, AUSA Bottini could not have intentionally decided to violate *Napue* by remaining silent.

I. The Failure to Afford the Subjects the Opportunity to Review and Comment on the Report Before Finalizing and Submitting It to the Court

The Special Prosecutor spent almost two years drafting a 500-page, fact-intensive report. As we explain here, he got critical facts wrong, and came to a number of incorrect conclusions. If he had given us an opportunity to comment on a draft of the report and then fairly considered those comments before finalizing it, the Report could have been much more analytically sound and factually accurate.

Indeed, the federal offices that conduct similar such investigations routinely afford subjects the opportunity to review and comment on a draft report. The Department's Office of Professional Responsibility, for example, afforded us that opportunity with its own report on the *Stevens* case. The Department's Inspector General also frequently takes this approach. There is good reason for such a practice, as it strengthens the integrity of the final report and serves as an important measure of fairness for the subjects. Here, the Special Prosecutor disregarded this common and critical practice. We did not learn about his findings and conclusions until after he issued his Report to the Court and the Court made its announcement on November 21, 2011.

It is true that on February 8, 2012, three months after the Report was finalized, Judge Sullivan permitted subjects the opportunity to draft written comments that would be appended to the public version of the Report. While this may have afforded a good opportunity to vent, it did nothing to address the substance of the Report. Unlike the processes described above, where subjects submit comments on a *draft* report with the hope and intention of shaping the final report, here there has been no such possibility: the Report has been finalized, and nothing in our appended comments will alter its analysis or conclusions.

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[51] Many courts require testimony to be intentionally false (rather than simply confused) before finding a *Napue* violation, *see supra* note 48, but one does not even need to reach that legal argument here to see that there was no *Napue* violation.

IV. THE SPECIAL PROSECUTOR'S RECOMMENDATION TO THE COURT

Internal Department of Justice guidance permits a federal prosecutor to institute criminal charges against the subject of an investigation only if he "believes that the person's conduct constitutes a Federal Offense and that the admissible evidence probably will be sufficient to obtain and sustain a conviction." United States Attorneys' Manual § 9-27.220 (Grounds for Commencing or Declining Prosecution). "Moreover, both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact." *Id.* The Special Prosecutor's Report, for all of the reasons discussed above, falls dramatically short of meeting that standard—particularly when it comes to proving that AUSA Bottini acted with the intent necessary to sustain a prosecution for criminal contempt.

Rather than concede the lack of evidence to prove an intentional violation beyond a reasonable doubt, however, the Report relies on a technicality to justify its decision not to recommend criminal charges: that a contempt prosecution for *Brady* violations cannot be established because the Court failed to "issue a clear, specific and unequivocal order" directing the prosecution team to comply with *Brady*. Report at 513. In the absence of such an order, the Report concluded, it could not recommend that a prosecution be undertaken. After stating its recommendation against prosecution, the Report then pointedly explains that "[w]ere there a clear, specific and unequivocal order of the Court which commanded the disclosure of [the alleged *Brady* information], we are satisfied that a criminal contempt prosecution would lie." Report at 513.

This tactic may have seemed an elegant solution to the Special Prosecutor. But, it did not seem so elegant to AUSA Bottini. While he was gratified that he would not face criminal prosecution, he was horrified to see that the declination of prosecution was accompanied by a full-throated accusation that he had intentionally subverted justice in the pursuit of his duties for the Justice Department.

This device for declining the case without addressing the prosecutability of the alleged misconduct raises a couple of interesting questions. First, a cursory reading of the trial transcript shows that the Court *did*, in fact, issue a clear and unequivocal order to the government to produce *Brady* material, despite the Report's assertion otherwise.[52] On September 10, 2008, when the defense was complaining about the government's *Brady* practices, the Court said:

[52] While there is indeed no *written* order, it is well established that a written order is not required for a contempt proceeding; an oral order will suffice. *See United States v. Turner*, 812 F.2d 1552, 1564 (11th Cir. 1987) (assuming that oral orders could give rise to contempt); *In re Hipp, Inc.*, 5 F.3d 109, 112 n.4 (5th Cir. 1993) ("[An] order entered in open court in presence of [the] defendant may be enforced by criminal contempt.").

> So the government says[,] ["]we're aware of our *Brady* obligations,["] and I say[,] ["]fine, then comply with your *Brady* obligations,["] and why should I do more than that?

Trial Tr. (Sept. 10, 2008 am) at 60. The defense responded by exhorting the Court to issue the sort of comply-with-*Brady* order it had just described. *Id.* The Court agreed, telling all attorneys present that "I just did it. I just did it." *Id.* Later during the same hearing, the Court re-iterated its order that the government must comply with *Brady*: "I'll just issue an order as a general reminder to the government to remind it of its daily ongoing obligation to produce that material [*Brady* material]." *Id.* at 74. The Court's oral ruling was plain and unequivocal: the government was ordered to "comply with [its] *Brady* obligations."[53]

The second peculiar aspect of this declination rationale lies in the fact that the "absence of a clear order" should have been apparent from the very inception of this investigation. The Special Prosecutor understood from the date of his appointment that his mandate was to investigate contempt charges specifically, and within a short time he had the trial transcripts and knew that no "clear order" existed. If the absence of such an order were truly the impediment to a contempt prosecution, it is difficult to understand why the Special Prosecutor spent an additional two and-a-half years (and cost the government unknown thousands of dollars) to conduct an investigation into conduct he knew could never be prosecuted.

We do not raise those questions to quibble with the Report's legal conclusion that a "clear, specific and unequivocal order" is necessary for contempt. Rather, we do so because the Report leveled the unsupported accusation that AUSA Bottini committed federal crimes and then used that legal conclusion in a way that avoided any responsibility for backing up that accusation with actual proof.

V. THE COURT'S ANNOUNCEMENT OF INTENTIONAL MISCONDUCT FINDINGS

On November 21, 2011, the Court entered a public order stating that the Special Prosecutor "concluded that the investigation and prosecution of Senator Stevens were 'permeated by the systematic concealment of significant exculpatory evidence which would have independently corroborated his defense and his testimony, and seriously damaged the testimony and credibility of the government's key witness.'" Nov. 21, 2011 Order at 3 (quoting Report at 1). In the same order, the Court indicated its desire to publicly release the Report. *See id.* at 11 ("[T]he Court has already expressed its intent to make the results of Mr. Schuelke's Report public to the greatest extent possible.").

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[53] If the *Brady* violations are as clear-cut as the Report suggests, then it is impossible to see how an order to "comply with your *Brady* obligations" can be deemed insufficiently "clear, specific and unequivocal" to cover those violations.

This process has led inevitably to the public concluding that our client is guilty of gross intentional misconduct. *See* Editorial, *Release the Stevens Report*, N.Y. Times (Feb. 7, 2012) (quoting from Judge Sullivan's November 21 order and contending that prosecutors engaged in "illegal concealment"). This has led, in turn, to calls for retribution and punitive action against AUSA Bottini that would mean the ruin of his career. *See Oversight of the U.S. Dep't of Justice: Hearing Before the Senate Judiciary Comm.*, Webcast at 64:20-65:15 (Nov. 8, 2011) (Senator Hatch is "bother[ed]" by "really offensive approaches" of *Stevens* prosecutors; "I don't see anything being done about it."); Jordy Yager, *Senators to Justice Department: Sack Prosecutors, Apologize to Stevens Family*, The Hill (Dec. 14, 2011) ("A bipartisan group of senators is calling on the Justice Department to . . . fire the attorneys accused of the withholding of evidence that contributed to [Senator Stevens'] criminal conviction."); Mike Scarcella, *AG Holder: Ted Stevens Report Has "Disturbing" Findings*, Blog of Legal Times (Mar. 8, 2012) (quoting Senator Feinstein: "I think that actions have to be taken [against the *Stevens* prosecutors]."); Statement of Senator Hutchinson on Prosecutorial Misconduct in the Investigation of Senator Ted Stevens (Mar. 12, 2012)[54] ("I have further asked the Attorney General what action he will take to remove the prosecutors from the Justice Department."); Editorial, *Case Closed? Not Yet*, Wash. Post (Nov. 29, 2011) ("Mr. Holder should ask for an independent assessment of whether the culpable attorneys should be prosecuted for obstruction of justice…. The Justice Department should refer the report to the state bar associations that licensed these lawyers, so that they may consider disbarment or other punishments.").

This process is an object lesson in the dangers that arise when there is a deviation from the standard rules of criminal prosecution. It demonstrates with absolute clarity why our federal prosecutors are prohibited from publicly issuing accusations against subjects they choose not to prosecute. *See* United States Attorneys' Manual § 9-27.760 (Limitation on Identifying Uncharged Third-Parties Publicly). In our criminal justice system, the government has only one means of leveling an accusation against an individual—through the official filing of criminal charges. At the end of an investigation, the prosecutor either seeks charges against a subject or he does not. There is no middle ground. He cannot decline to bring criminal charges but then turn around and level public accusations against the subject—accusations that the subject cannot rebut through the truth-finding process of litigation.

That is exactly what happened here. And the result is that AUSA Bottini is now the subject of criminal accusations—accusations issued with the imprimatur of a federal court—that he will never have the opportunity to confront and rebut in court. This letter is AUSA Bottini's rebuttal—the rebuttal he was denied by this flawed process.

[54] *Available at* http://hutchison.senate.gov/?p=press_release&id=1015.

VI. CONCLUSION

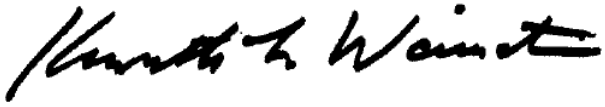
As you can see, AUSA Bottini feels very strongly about the conclusions in the Special Prosecutor's Report. He believes that federal prosecutors must be above reproach in every aspect of their work, and he has held himself to that high standard throughout his long career of service to the United States. While he readily admits that he made mistakes during the *Stevens* prosecution, he cannot accept the Report's finding that he intentionally violated the rules—a finding that runs completely counter to the principles of honor and public trust that he holds dear as a federal prosecutor.

I also reject those findings, and I do so in large part because I have come to know Joe Bottini as a very good and honest man who would never do the things charged in the Report. For those who do not know Joe—like you and most of your colleagues at the Department—it will take more than that to see through the Report's findings. It will require doing what we did in this letter—going behind the conclusory statements and scrutinizing the evidence and analysis underlying those findings. If you do that, I am absolutely confident you will see that the Special Prosecutor's charges are completely unsupported by hard facts or sound legal analysis, and that Joe acted in good faith in the *Stevens* trial and never intentionally violated the rules and principles to which he has devoted his entire career as a federal prosecutor.

Once you and your colleagues come to that realization, Joe will once again be seen within the Department as the honest and upright public servant that he is. That will mean more to Joe than you can possibly imagine.

On Joe's behalf, I want to thank you for reading this letter and considering his views about the Special Prosecutor's Report.

Sincerely,



Kenneth L. Wainstein

Enclosure

ENCLOSURE:

AUSA Bottini's Submission to the Special Prosecutor

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Re: *Comments to Special Prosecutor Report*

Dear Mr. Schuelke:

We have reviewed your November 14, 2011 Report on your investigation, as Special Prosecutor, of possible criminal contempt arising from the prosecution of Senator Ted Stevens. We write because, by his February 8, 2012 Order, Judge Sullivan provided us permission to submit comments to your Report.

We appreciate and agree with your conclusion that District of Alaska Assistant United States Attorney Joseph W. Bottini should not be prosecuted for criminal contempt and Judge Sullivan's decision to "accept [your] . . . conclusion[]" and not institute contempt proceedings. (Feb. 8, 2012 Opinion at 23-24.)

On April 9, 2010, we provided you with a 48-page submission, explaining why AUSA Bottini did not intentionally commit any misconduct in the course of prosecuting Senator Stevens. At a general level, it acknowledged that AUSA Bottini made mistakes that he very much regrets during the *Stevens* prosecution, but demonstrates that he never intentionally did anything to subvert justice or violate the rules. Specifically, it addressed each of the allegations and explained the following:

- That AUSA Bottini acted responsibly — and certainly not criminally — in assessing and determining that Rocky Williams' statements that he "*assumed*" Bill Allen would invoice Senator Stevens for Williams' work was not *Brady* information that needed to be disclosed;

- That AUSA Bottini was not responsible for the misstatement in the September 9, 2008 *Brady* letter — that there was "no evidence" that Bill Allen asked Bambi Tyree to sign a false affidavit — given that he did not draft the letter, only

glanced over it once it was completed, and did not notice the inaccuracy in that passage; and

- That AUSA Bottini was completely justified in not attempting to clarify the confused testimony elicited by defense counsel's cross-examination of Bill Allen.

In the course of those arguments, we highlighted a number of critical facts and considerations — such as AUSA Bottini's extensive, and ultimately unsuccessful, efforts to persuade his Public Integrity Section superiors to disclose to the court and defense that information about Bill Allen's alleged subornation of perjury that your Report accuses him of intentionally trying to suppress. We also provided with you citations to extensive caselaw that undercuts your legal analysis and findings, including court opinions that that demonstrate why Williams' statement was not *Brady* and why Allen's testimony did not violate *Napue*. In addition to those arguments and points, we included with that submission eight character reference letters — including several from defense lawyers whose clients AUSA Bottini prosecuted — that depict AUSA Bottini as an upstanding and ethical prosecutor who would never even consider intentionally violating a defendant's constitutional rights.

We were saddened that your Report did not acknowledge any of this information, especially because the Report appears to go out of its way to accuse AUSA Bottini of engaging in intentional misconduct. We are therefore attaching our April 2010 submission, with the hope that you, Judge Sullivan, and the public will read it and better understand how AUSA Bottini's conduct throughout the *Stevens* prosecution was ethical, proper, and in keeping with his reputation for unimpeachable integrity and fairness.

Sincerely,

s/ Kenneth L. Wainstein

Kenneth L. Wainstein

Attachment

United States District Court for the District of Columbia

***In Re: Special Proceedings,* No. 09-MC-0198 (EGS)**

Submission of Joseph W. Bottini to the Special Prosecutor

CONFIDENTIAL – UNDER SEAL

Dated: April 9, 2010

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INTRODUCTION

Assistant United States Attorney Joseph W. Bottini makes this submission to show why punishing his conduct during the prosecution of former Senator Ted Stevens as criminal contempt would be unjustified, virtually unprecedented, and profoundly harmful to the responsible prosecution of crime. Mistakes were undoubtedly made during the *Stevens* trial, including by Mr. Bottini. But the crime of contempt requires more than mistakes: because it "is a dark stain on an attorney's record," prosecution for criminal contempt requires proof of willful misconduct. *United States v. Mottweiler*, 82 F.3d 769, 770 (7th Cir. 1996).

This submission details Mr. Bottini's conduct in four areas and shows how it does not come close to meeting that standard:

1. ***Allegations Regarding Bambi Tyree***. From the outset, Mr. Bottini pressed the trial team and its leadership at the Department of Justice's Public Integrity Section ("PIN") to disclose allegations that Bill Allen—the government's principal witness—had engaged in sexual misconduct with minors and had asked Bambi Tyree to make a false statement clearing him of that misconduct. Mr. Bottini pressed that point repeatedly and for more than a year prior to the *Stevens* trial, urging *ex parte* disclosures to the district judge who presided over earlier cases in which Allen testified and pressing for more complete disclosures in the government's *Brady* letters and pretrial filings in the *Stevens* case—despite being rebuffed on multiple occasions by PIN. The government ultimately disclosed the substance of the allegations against Allen in its *Brady* letter, and subsequently provided the Anchorage Police Department's entire investigative file to the defense with enough time for Allen's cross-examination to be reopened.

2. ***Pretrial Statements of Robert "Rocky" Williams***. During pretrial interviews in August 2008, Rocky Williams told prosecutors that he "assumed" Bill Allen added his time and

Dave Anderson's time to bills prepared by Christensen Builders, the subcontractor hired by VECO Corporation to perform carpentry work on Senator Stevens' home. Williams based that assumption on his belief that Allen, who "was under a microscope," would not do anything to draw further scrutiny to himself or Stevens; Williams conceded that he never saw the actual bills that Allen forwarded to the senator, does not know whether Allen actually added his time and Anderson's to those bills (he did not), and did not have a single conversation with Stevens or his wife about whether the bills Allen sent Stevens reflected VECO's time.

3. ***Disclosure of Bill Allen's April 15 Statement***. At a September 14, 2008 witness preparation session, Mr. Bottini and other prosecutors showed Bill Allen a handwritten note from Senator Stevens, asking Allen for an invoice for VECO's work, cautioning him to "remember Torricelli," and telling him that he had asked Bob Persons to discuss a bill with Allen. Allen responded that he believed "Ted is covering his ass here," and that he thought Persons likewise told him that Allen was "just covering his ass." That response, which he repeated in his testimony at trial, contradicted Allen's statement on April 15—months before the case was indicted and long before Allen became Mr. Bottini's witness—that he did not recall talking to Persons about the Torricelli note. Allen's April 15 statement should have been disclosed to the defense; it was not. But Mr. Bottini's sworn testimony, his recollection of the purpose of the April 15 meeting, his notes from the September 14 meeting, and his failure to recall that Allen was shown the Torricelli note on April 15 even after that interview became a point of contention point to a single conclusion: Mr. Bottini's failure to locate his handwritten notes from the April 15 meeting, and the government's failure to disclose their substance, was an inadvertent mistake—not a willful violation of his obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972).

4. ***Bill Allen's Testimony During Cross-Examination.*** During cross-examination, the defense asked Allen when he first told the government that he had discussed the Torricelli note with Persons, in essence accusing him of "just recently" concocting that testimony. The responses Allen gave, however, make clear that he misunderstood the question—and believed that defense counsel was asking when he first discussed the Torricelli note with ***Persons***, not when he first discussed it with the government. And when responding to the question he believed defense counsel was asking, Allen provided a truthful answer, testifying that it was not "just recently" that he discussed the Torricelli note with Persons. That Allen would become flummoxed is unsurprising and in keeping with his typical speaking style and thought process and, indeed, is consistent with one of the principal goals of cross-examination: to confuse the witness. Mr. Bottini was not obligated, under *Napue v. Illinois*, 360 U.S. 264 (1959), to aid the defense in elucidating that confusion.

* * *

Even if this conduct ran afoul of the government's obligations under *Brady*, *Giglio*, *Napue*, and the Court's discovery orders, Mr. Bottini would have needed to violate those obligations willfully in order for his conduct to be punishable as criminal contempt. He did not remotely do so. It is clear that Mr. Bottini's mistakes were made in the context of a complex case, made more difficult by an extraordinary time crunch that resulted from the mishandled management of the prosecution and Senator Stevens' decision to invoke his right to a speedy trial. Those mistakes were amplified and, in many cases, distorted by attorneys whose zeal to secure acquittals has led them to use the allegation of prosecutorial misconduct as a regular defense tactic.

But if the criticism leveled at the government as a result of the *Stevens* prosecution has created misconceptions, the reality is this: Mr. Bottini is a dedicated, career prosecutor without a single disciplinary complaint in 25 years of practice and after more than 50 jury trials. He is universally admired by the judges, defense attorneys, and prosecutors with whom he has worked most closely, and who consider him "a man of conscience and honor who has devoted his life as a federal prosecutor to doing the right thing" and someone who "does not grasp for the spotlight or for self-promotion." (*See* Letters from Nelson Cohen (Ex. D), Mark Bonner (Ex. B).) He went above and beyond his *Brady* obligations on multiple occasions during the *Stevens* prosecution itself, pressing the trial team—sometimes repeatedly—to disclose additional information bearing on the credibility of the government's principal witness. He has acknowledged his mistakes, has cooperated with this investigation readily and voluntarily, and has already been punished enough. Criminal sanctions would be entirely unwarranted.

I. BACKGROUND

A. Mr. Bottini's Background

Joe Bottini has practiced law for 25 years, and for almost that entire period he has served as an Assistant United States Attorney in the District of Alaska. (Deposition of Joseph Bottini 7:12-17, Dec. 16-17, 2009 ("Dep.").) Colleagues with whom he has worked during this time describe him as "ethical" and "honest" and routinely praise his "integrity" and "unwillingness to seek personal status or attention"; defense attorneys who litigate against him have said that "I would trust a client's, or my future on [his] word and integrity" and "I would accept Joe's word and his hand shake on any matter knowing that it was more reliable than any document that could be drafted." (*See* Letters from Nelson Cohen (Ex. D), Robert Bundy (Ex. B), Michael White (Ex. H), Robert Chadwell (Ex. C).) Throughout more than 24 years in the United States Attorney's Office and in excess of 50 jury trials (Dep. 7:18-21), Mr. Bottini has not been the

subject of a single disciplinary action by a bar, has not been held in contempt by a single court, and has never been the subject of any court-imposed sanction (*id.* 6:19-7:8). And, save for the *Stevens* case, he has never been involved in a proceeding where a court found that the government committed a *Brady* violation—let alone reversed a verdict on that basis. (*Id.* 12:7-13.)

In short, Mr. Bottini understands the constitutional requirements that *Brady* imposes on prosecutors, and he takes those obligations seriously. He served for 13 years, for instance, as his district's *Henthorn* coordinator, advising attorneys about their duty under *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991), to review the personnel files of agents for impeachment evidence (Dep. 19:21-20:8); he also served as the district's professional responsibility officer, coordinating with the Justice Department's Professional Responsibility Advisory Office ("PRAO") to provide guidance to other attorneys on a range of ethics topics—including *Brady* and *Giglio* (*id.* 10:7-11:14).

When it comes to carrying out the government's *Brady* and *Giglio* obligations in his own right, Mr. Bottini follows a standard practice: he reads through handwritten notes, Memoranda of Interviews, and FBI 302s; examines pertinent grand jury transcripts; and reviews not just his own notes, but those prepared by agents. (*Id.* 63:11-64:11; 74:14-75:1.) In fact, the only case with which Mr. Bottini has been involved that did ***not*** follow this practice was the one whose *Brady* review he was not charged with administering: the *Stevens* prosecution. (*See id.* 74:14-75:1 (*Stevens* is "the only case I have ever worked on where the attorneys weren't doing the entirety of the *Brady* review"), 789:15-20 ("Q: Is that the way grand jury transcripts are reviewed in Alaska for purposes of *Brady*, having the agent do the review? A: That's the first time I ever

heard of it. Q: Who usually does it in the [District of] Alaska? A: The attorneys do it. I do it if it's my case.").)

Throughout the *Stevens* trial and the months that followed, the defense depicted the government's trial team, including Mr. Bottini, as overly eager prosecutors whose "zeal to convict this 84-year old-man who has served his country in the Senate for 40 years" led them to deliberately cast their *Brady* obligations aside. *See* Letter from Brendan Sullivan, Williams & Connolly, to Attorney General Michael Mukasey (Oct. 28, 2008) (CRM BOTTINI 051465). That caricature could not be farther from the truth. To the contrary, Mr. Bottini—an Alaska native since age 13—harbored substantial misgivings about the prospect of indicting and, ultimately, trying Senator Stevens. His reluctance stemmed in large part from the esteem that, to this day, Mr. Bottini has for the former senator: "[Q]uite frankly, as odd as this may sound, Ted Stevens is still a man that I still have a fair measure of respect for. Aside from what happened in this case, to me . . . you can't set aside what he did for 40 years for the state of Alaska . . . . It's a much better place to live because of this guy." (Dep. 408:12-20.)

Political realities also gave Mr. Bottini pause. He was well aware that, because of Senator Stevens' popularity in Alaska, his job and his reputation stood to suffer if prosecutors indicted and tried the senator—even if they had made no errors at all. (*Id.* 408:21-409:9 ("Part of it was, I don't know who the U.S. Attorney is going to be four years from now. It's never lost on me when I fly out of Anchorage, his name's on the airport, Ted Stevens International Airport. . . . I mean, we could have come out of this trial crystal clean, no errors. You know, I still ran the risk.").) Thus, unlike other members of the prosecution who were eager to play lead roles on the trial team and disappointed when they did not (*see* Interview of Joseph Bottini 181:20-184:21, Mar. 10-11, 2010 ("OPR Interview")), Mr. Bottini "desperately was hoping that either this thing

was going to settle out, or they'd find somebody else to do it" (Dep. 410:9-16). Nevertheless, he believed "[t]he facts were there . . . . [t]o merit going forward" (*id.*), and did not object when he was told that the Criminal Division had decided that he would be part of the trial team (*see id.* ("At the end of the day, I didn't see how I could just punch out of this thing, without it looking like an act of cowardice."); *see also* OPR Interview 5-18).

B. The *Stevens* Prosecution

To understand how the prosecution came to make errors during the *Stevens* case requires an appreciation of how the case was managed—and how that often dysfunctional management made it almost inevitable that the trial team ***would*** make mistakes. The Criminal Division's belated decision to indict Senator Stevens, combined with its subsequent micromanagement of the case, led to a prosecution that was behind from its inception and poorly equipped to handle a rigorous discovery process.

The genesis of the prosecution's anomalous management came in late 2005, when, at the first hint that Senator Stevens was linked to the larger "Polar Pen" corruption investigation, the acting United States Attorney for the District of Alaska recused the entire office from cases arising from that operation. (*See* OPR Interview 46:5-47:1.) Mr. Bottini and Jim Goeke alone were permitted to continue working on Polar Pen cases, but they reported directly to PIN (Dep. 315:10-15)—an arrangement that left them disconnected from the operation's management, unable to successfully push back against decisions with which they disagreed, and in the dark about whether the Criminal Division would approve indicting the *Stevens* case at all. (*See* OPR Interview 56:19-58:21, 176:9-178:5 (describing tension between PIN and the District of Alaska).)

Over time, Mr. Bottini became skeptical that Senator Stevens would be indicted. Despite repeatedly asking PIN attorneys Ed Sullivan and Nick Marsh whether the case was moving

forward, Mr. Bottini still had no indication, by late spring 2008, whether the Criminal Division would decide to indict Senator Stevens or not. (Dep. 314:6-8, 312:6-313:4.) If anything, he took PIN's June 2008 directive to indict state senator John Cowdery, a different Polar Pen target, as an indication that the *Stevens* case would ***not*** be indicted. (*Id.* 314:15-19 ("I mean, they wouldn't tell us to go indict Senator [Cowdery] if they think we're . . . dropping the hammer on the Ted Stevens indictment.").) Believing that the *Stevens* case would not move forward, Mr. Bottini agreed to take on a high-profile, capital murder case in Alaska (*id.* 316:7-22)—and was "absolutely convinced . . . going into the third week of July, that [a Stevens indictment] is not going to happen" (*id.* 318:22-319:2).

Once the Criminal Division decided to indict Senator Stevens, control over the prosecution's decision-making became increasingly centralized. That process began with the makeup of the government's trial team, which the Criminal Division determined would be led by Brenda Morris—despite her lack of involvement in the Stevens investigation or the previous cases arising out of the government's Polar Pen operation (OPR Interview 93:5-18)—and would exclude Ed Sullivan and Jim Goeke from counsel table altogether (*see* Dep. 78:20-29:2). That control extended to the substance of the prosecution's trial preparation (for example, the Criminal Division ordered the trial team to focus its initial preparation of Allen on evidence supporting a theory of official acts (OPR Interview 329:3-331:15 ("we wasted hours on [official acts] during the trial prep sessions with Bill Allen"))) and the minutest detail of the government's case, including where in the courtroom members of the prosecution could sit and what member of the trial team would be responsible for particular witnesses. (*E.g.*, Dep. 809:12-20.) The Criminal Division ordered, for instance, that Ms. Morris could ask three specific questions—and

only those questions—of General (Ret.) Colin Powell, whom Senator Stevens had called as a character witness.

This micromanagement had a palpable effect on Mr. Bottini. At a meeting shortly after Mr. Bottini arrived in Washington, for example, the Criminal Division informed him that he would be delivering the government's closing argument; they also directed him to submit a draft by the following week, even though the government's summation was several weeks away and Mr. Bottini was focused on preparing witnesses, including Bill Allen. (Dep. 808:15-809:11 ("That just increased the burden on me that much more, particularly since I had to produce a draft."); OPR Interview 98:12-99:11 (directive to prepare draft summation "was time . . . that was taken away from me, that I couldn't afford to lose, in my view").) And just days before jury selection began, Bill Welch then asked Mr. Bottini, who was already charged with presenting Bill Allen and Dave Anderson, to take on the additional responsibility of preparing and presenting Rocky Williams—who had previously been assigned to Mr. Marsh. (*See* Dep. 153:3-154:7.)

Despite the intensive oversight of these issues, there was little attention paid to the *Brady* review in this case. (*See* OPR Interview 100:2-8.) While that process fell to PIN (Dep. 786:3-7), nobody in the Criminal Division assigned anyone to serve as an "intermeshing gear" linking the many attorneys and agents who were involved in the case (*id.* 810:13-15). "What we needed," Mr. Bottini explained, "was someone cut loose specifically to deal with a project manager type role for this thing, and we didn't have that." (*Id.* 812:16-18.) Without a single person charged with overseeing the *Brady* review, the *ad hoc* process that PIN put in place was, by its very nature, doomed to result in mistakes—no matter how diligently Mr. Bottini and the rest of the trial team worked to fulfill their disclosure obligations.

II. MR. BOTTINI DID NOT COMMIT WILLFUL MISCONDUCT.

The mission of this proceeding is a limited one: to investigate whether the actions of the *Stevens* trial team rose to the level of criminal contempt, and to file an order to show cause only "if appropriate." (Mot. Hr'g Tr. 46:12-15, Apr. 7, 2009 (CRM BOTTINI 013319); *see also id.* 47:16-17 (Judge Sullivan emphasizes, "[l]et me stress that I have not, by any means, prejudged these attorneys or their culpability.").) That decision must be guided by the likelihood that the prosecutors would be found guilty of contempt beyond a reasonable doubt, because "as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact." United States Attorneys' Manual § 9-27.220(B). This case does not come close to meeting that standard because, despite his mistakes, there is not a shred of proof that Mr. Bottini willfully violated *Brady*, *Giglio*, or the court's orders implementing those obligations. Instead, all evidence points to the contrary conclusion: any errors by Mr. Bottini were honest mistakes.

An attorney may only be punished for contempt under 18 U.S.C. § 401(3) if he willfully violated a clear and reasonably specific court order. *United States v. NYNEX Corp.*, 8 F.3d 52, 54 (D.C. Cir. 1993). Thus, while a prosecutor may run afoul of *Brady* if he acted inadvertently or even with good faith, *United States v. Agurs*, 427 U.S. 97, 110 (1976), he cannot be convicted of criminal contempt without proof that his misconduct was willful. *In re Holloway*, 995 F.2d 1080, 1082 (D.C. Cir. 1993); *Mottweiler*, 82 F.3d at 770 ("Criminal contempt of court is a dark stain on an attorney's record, even when it does not lead to imprisonment or a substantial fine. That is among the reasons why a conviction under 18 U.S.C. § 401 depends on proof of willful misconduct."). And although the willfulness element of criminal contempt may be satisfied by a showing that an attorney acted recklessly, *Holloway*, 955 F.2d at 1082, criminal recklessness

imposes an exacting standard in its own right: an attorney does not act recklessly unless he knows of a substantial risk of harm and disregards it anyway. *See Farmer v. Brennan*, 511 U.S. 825, 836-37 (1994) ("The civil law generally calls a person reckless who acts . . . in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known. The criminal law, however, generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware.") (citations and quotation marks omitted); *Mottweiler*, 82 F.3d at 771 ("[C]riminal recklessness is present only if the actor is conscious of a substantial risk that the prohibited events will come to pass."); Model Penal Code § 2.02(2)(c) (1962) ("A person acts recklessly . . . when he consciously disregards a substantial and unjustifiable risk that a material element exists or will result from his conduct.").

It comes as little surprise, given the high burden of showing that an attorney committed willful misconduct, that the use of criminal contempt to punish *Brady* violations and other alleged prosecutorial misconduct is virtually unprecedented. *See* Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 Tex. L. Rev. 629, 674 (1972); Maurice Possley & Ken Armstrong, *Prosecution on Trial in Du Page*, Chi. Trib., Jan 12, 1999, at 1; Richard Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 703 n.56 (1987) (finding "[n]o cases . . . in which a prosecutor was found in contempt for *Brady*-type misconduct").[1] That punitive sanction should not be imposed here.

[1] A state court in North Carolina did convict former Durham District Attorney Mike Nifong of criminal contempt after finding that he deliberately suppressed DNA evidence that not only exonerated the defendants of rape but showed the presence of someone ***else's*** DNA on the alleged rape victim. *See* Anne Blythe, *Nifong Gets 24 Hours in Jail for Contempt*, News & Observer (Raleigh), Sept. 1, 2007, at A1. But that high-profile example is the exception. Courts routinely refuse to refer prosecutors for investigation for criminal contempt, let alone impose criminal sanctions, even in the face of significant and repeated *Brady* violations. *See, e.g.*, *United States v. Jones*, 620 F. Supp. 2d 163, 181-83 (D. Mass. 2009) (declining to impose criminal contempt sanctions on Assistant United States Attorney despite "serious and repeated" *Brady* violations); *United States v. Shaygan*, 661 F. Supp. 2d 1289, 1324 (D. Mass. 2009) (using public reprimand, not criminal contempt charges, to punish prosecutor who committed

A. Mr. Bottini's Repeated Insistence On Disclosing The Bambi Tyree Allegations Is Fundamentally Inconsistent With Willful Misconduct.

If there is anything that shows how at odds Mr. Bottini's conduct was with willful misconduct, it is his repeated insistence that the government disclose allegations casting doubt on the credibility of Bill Allen. Allen had been under investigation by the Anchorage Police Department ("APD") for sexual misconduct with minors, one of whom—Bambi Tyree—was at one point believed to have created a false affidavit, at Allen's request, stating that she never had sexual relations with him while underage. Mr. Bottini pressed PIN to disclose those allegations at every turn, arguing, for example, that the government should make post-trial disclosures to the judge who presided over the *Kott* and *Kohring* cases, disclose the allegations to the *Stevens* court and the defense in a motion *in limine*, and provide more details about Allen's alleged misconduct in the government's *Giglio* and *Brady* letters. The prosecution disclosed the allegations before trial, and ultimately turned over the entire APD investigative file to the defense with time enough to reopen Allen's cross-examination. One district judge has already concluded that the failure to disclose those items until well ***after*** the *Kott* trial did not violate *Brady* in that case, *United States v. Kott*, No. 3:07-CR-056 JWS, 2010 WL 148447, at *9 (D. Alaska Jan. 13, 2010), and the government's belated disclosure did not violate *Brady* here. But even it if did, Mr. Bottini's insistence on disclosure is fundamentally inconsistent with the willful misconduct required to prosecute him for criminal contempt.

1. Factual Background

The Bambi Tyree allegations arose in 2004 and their connection to the Polar Pen operation spanned over several years. Any fair understanding of Mr. Bottini's actions in the

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multiple *Brady* violations); *United States v. Lyons*, 352 F. Supp. 2d 1231, 1251 (M.D. Fla. 2004) (remedying prosecution's failure to disclose "a raft of evidence material to an adequate defense" by dismissing the government's case, not imposing criminal contempt sanctions).

Stevens case, and how they are antithetical to willful misconduct, requires consideration of the Tyree allegations' protracted history.

The Tyree issue had its origin in a case that was entirely unrelated to the Polar Pen investigation: the drug trafficking and sexual misconduct prosecution of Josef Boehm. (Dep. 671:10-672:10.) During the investigation of that case, Tyree participated in a 2004 interview with Assistant United States Attorney Frank Russo and FBI Special Agent John Eckstein, and the Form 302 memorializing her interview stated that Tyree signed an affidavit, at Allen's request, falsely asserting that she did not have sexual relations with him while she was a juvenile. (*Id.* 672:5-673:12, 674:14-675:10.) Russo later moved, in a sealed filing, to preclude the *Boehm* defense from cross-examining Tyree about who directed her to make the false statement. (*Id.* 674:5-13.)[2]

The allegations resurfaced in early 2007, when the government began developing a search warrant affidavit for Senator Stevens' residence—and from that point forward, Mr. Bottini repeatedly urged their disclosure. Because the search warrant affidavit relied heavily on information from Allen (*id.* 675:19-676:2), Mr. Goeke—who was particularly concerned about the government's disclosure obligations because he served as co-counsel in the *Boehm* case (OPR Interview 550:20-551:9)—notified PIN about the false affidavit allegations (Dep. 676:15-21). Mr. Goeke also conveyed that, contrary to Russo's *Boehm* filings, Tyree herself told prosecutors during preparation for a sentencing hearing in the *Boehm* case that she provided the false affidavit of her own volition—not at Allen's request. (*Id.* 679:13-18.) While he and Mr.

[2] It is Mr. Bottini's understanding that Russo filed this motion, pursuant to Federal Rule of Evidence 403, to prevent the sideshow that would likely have occurred had Allen—a prominent figure in Anchorage—been linked to the *Boehm* trial's salacious details. (*See* Dep. Ex. 66 (CRM088473-74) (excerpt from *Boehm* brief forwarded by Mr. Goeke notes that Allen is "president of VECO and publisher of the 'Voice of the Times' section in the Anchorage Daily News").) As far as Mr. Bottini is aware, Allen was not involved in any federal investigations in the summer of 2004, the time that briefing was filed.

Bottini were told that Bill Welch was "thinking about the Bambi issue," the final search warrant affidavit omitted the allegations. (*See id.* 675:16-679:12.) In fact, it was the insistence of Mr. Bottini and Mr. Goeke that caused Mr. Sullivan to ask Mr. Welch whether the government should make such a disclosure. (*See* Email from E. Sullivan to Welch (Mar. 5, 2007) (CRM BOTTINI 030459 ("The only issue for us to decide is whether we should include something in the affidavit that flags the potential credibility of Allen as an informant. . . . Joe/Jim wanted me to flag it . . . .").)

In October 2007, Mr. Bottini raised the Tyree allegations himself when he and Mr. Goeke learned from Eckstein that, in addition to the Russo *Boehm* filing, a 302 stating that Allen had asked Tyree to sign a false affidavit also existed. Because the *Kott* trial had by then concluded, Mr. Bottini became concerned that the prosecution might have "an obligation at this point to make a post-trial disclosure in *Kott* and a pre-trial disclosure in *Kohring*." (Dep. 686:8-10.) He faxed the Eckstein 302 and the pertinent sections of the *Boehm* briefing to PIN (*id.* 683:7-17; 684:6-11) and scheduled an interview with Tyree. Tyree told prosecutors that she did not sign the false affidavit at Allen's request, and both Tyree and her attorney emphasized that she never told Eckstein she did. (*Id.* 692:17-22; 694:11-18 (when shown the Eckstein 302, Tyree "immediately disavows the part about Bill Allen asking me to do this. She said that's not what I said.").) Russo's handwritten notes of the July 2004 interview were located and they likewise contradicted the 302, appearing to reflect that Tyree said the affidavit was her idea—not Allen's. (*Id.* 693:5-12; *see also* CRM080943 (Russo initially wrote "at the request of," crossed out the next word, and then wrote "Bambi's idea.").) Mr. Marsh communicated with PRAO and informed Mr. Bottini that PRAO concluded that the prosecution had no disclosure obligation. (Dep. 695:18-697:2.) Mr. Bottini did not know precisely what Mr. Marsh told PRAO—though

he assumed whatever Mr. Marsh told PRAO was full and accurate—and Mr. Bottini was never provided a written rendition of PRAO's advice or the facts upon which that advice was predicated.

Before long, Mr. Bottini pressed PIN about the government's disclosure obligations again. He worried that the implication of a December 2007 article recounting Allen's gifts to the Tyree family was that Allen was "greasing the family to keep quiet about his relationship with Bambi"—and that PRAO, which reviewed the Tyree allegations before the press report was published, had not considered the issue. (*Id.* 697:1-698:19.) PIN agreed to approach PRAO a second time, and for the second time Mr. Marsh reported that PRAO concluded the prosecution had no obligation to disclose the Tyree allegations. (*Id.* 700:14-22; *see also* Dep. Ex. 69 (Email from PRAO to N. Marsh and E. Sullivan).) Mr. Bottini did not receive a written copy of PRAO's actual report until January 2008, a few weeks after he had been scolded by Mr. Welch for continuing to press PIN to make a disclosure.[3] (*See* Email from Welch to Bottini and Goeke (Dec. 20, 2007) (CRM BOTTINI 081094) ("We've done all that we are going to do on the matter . . . Joe and Jim, per the recusal notice, you work for PIN, and so these are your marching orders until I talk to Nelson [Cohen, the interim United States Attorney].").) When he did finally receive the written PRAO report, he filed it away—rather than reviewing it with a "fine-toothed comb" (Dep. 708:10-14)—because he had been specifically told to not pursue the issue any further. As a result, he did not immediately realize that the report omitted any mention of the Eckstein 302 and was based on the inaccurate predicate that the agent's notes "reflect that at the

[3] Indeed, Mr. Bottini continued pressing the issue with PIN even though PRAO had by then issued two opinions. In particular, he asked whether the government should make an *ex parte* disclosure to Judge John Sedwick, who had presided over both the *Kott* and *Kohring* trials, regardless of PRAO's advice—and he noted that colleagues in the Alaska United States Attorney's Office strongly supported that course of action. (Dep. 701:3-14; *see also* OPR Interview 645:8-646:7 (Mr. Bottini explains that "I would have [gone] to the Court *ex parte* . . . I would have filed something with Judge Sewick [*sic*] under seal and would have said 'here's what we know.'").)

time of the interview [Tyree] was adamant that the lie was her own idea." (*See* Dep. 703:13-705:7; 708:12-14; Dep. Ex. 69.)[4]

By the time the Criminal Division began weighing whether to indict Senator Stevens, Mr. Bottini's insistence on disclosing the Tyree allegations—and PIN's rejoinder—had become a persistent refrain. He questioned whether a document summarizing the prosecution's strengths and weaknesses, prepared by Mr. Marsh at the Criminal Division's request, contained enough detail about Allen's background—or whether, instead of referring only to Allen's "shady personal background," the document should squarely address the Tyree allegations. PIN declined to follow his suggestion. (Dep. Ex. 30 (CRM016149) (Mr. Marsh responds that Mr. Welch would probably want to limit any mention of Tyree to the "shady personal background" reference.).) It was because of PIN's resistance that Mr. Bottini determined that, along with Mr. Goeke, he would raise the Tyree allegations directly with the Criminal Division leadership in a July 2008 meeting without consulting PIN first. He explained:

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

(Dep. 381:14-382:2.) In the end, PIN did fail to mention the Tyree allegations during the meeting, so Mr. Bottini raised them himself, telling Matt Friedrich and Rita Glavin that "you need to know about this issue with Bill Allen and the sexual misconduct allegations" and describing the false affidavit, the Eckstein 302, and the Russo notes. (*Id.* 707:17-709:12; *see*

[4] In reality, the handwritten notes Eckstein took were consistent with the 302 that was based on the notes. (*See* Dep. Ex. 86 (CRM081267).) On the other hand, Eckstein himself later told Mr. Goeke that "he could have gotten it wrong," and that both the 302 and his underlying notes could have been incorrect. (Dep. 731:20-732:11.)

also Dep. Ex. 73 (CRM071953 (Mr. Bottini remarks in an email that Friedrich and Glavin were "interested" when "Bambi [came] up" during the July 2008 meeting).)

As the *Stevens* trial drew closer, Mr. Bottini persisted in urging the government to disclose the Tyree false affidavit allegations to the defense and the court. In particular:

- He noted with concern that the government's draft motion *in limine* to exclude inflammatory cross-examination did "not front out the rumored procurement of the false statement from Bambi by Bill." (Dep. Ex. 74 (CRM075442).) Mr. Bottini believed that the government should disclose the false affidavit allegations to the court even though PRAO had concluded that no disclosure obligation existed, because Judge Sullivan "may view it differently . . . we don't know how the judge is ultimately going to rule on this." (OPR Interview 565:3-566:22.) Thus, he emphasized to PIN that while he was "[c]ompletely aware of what PRAO says," he did not "want to run afoul of Emmet G. [Sullivan] over this." (Dep. Ex. 74 (CRM075442).)

- He pressed the trial team to address the allegations of Tyree's false affidavit in the government's August 25, 2008 *Giglio* letter. (*See id.*; *see also* Dep. Ex. 79 (CRM035906, CRM036032-33).)

- He urged the government to include a more robust description of the false affidavit allegations in the September 9, 2008 *Brady* letter, particularly because Allen's involvement with other juveniles beyond Tyree had by then come to light. (Dep. 715:6-717:10; *see also* Dep. Ex. 81 (CRM022047).)

By this point, Mr. Bottini and Mr. Goeke had received so much push-back from PIN about disclosing the allegations at all that their goal became simply to ensure that the defense was, in some fashion, put on notice about them. (*See* Dep. Ex. 81 (Email from Goeke to Team (Sept. 8, 2008) (CRM022049-50).) Mr. Bottini believed that PIN would not bless full disclosure, so he strategically pushed for sufficient disclosure to allow the court to make further inquiries or the defense to conduct its own investigation. Thus, the language Mr. Bottini suggested was in some cases modest and did not fully detail the allegations or the evidence supporting them. (*See, e.g.*, Dep. Ex. 74 (CRM075442) (urging trial team to address allegations in August 25 *Giglio* letter and stating that "I worry that if we don't make some mention of it—passing mention of it as a rumor which we investigated and disproved—they may respond to the MIL and raise it").) Mr.

Bottini's efforts nevertheless met resistance from PIN at every turn. (*See, e.g.*, Dep. Ex. 80 (CRM036166) (Mr. Marsh states that "[w]e should not revisit the Bambi non-subornation of perjury stuff [in the government's *Giglio* letter]. We have nothing to turn over . . . We have twice investigated this until the end of time and have been blessed by PRAO twice"); Ex. 82 (CRM022050-52) (Mr. Marsh's revised *Brady* letter excerpt omits false affidavit allegations altogether).)

After repeated prodding by Mr. Bottini and Mr. Goeke, PIN ultimately included a paragraph in the government's *Brady* letter disclosing the Tyree false affidavit allegations. (Dep. Ex. 2 at 5).) Mr. Bottini did not draft the actual language. (OPR Interview 530:6-531:6.) Instead, the letter was finalized over a two-day period during which he was traveling to Washington (Dep. 45:9-20) and preparing to argue two pre-trial motions at a September 10 hearing (*id.* 117:17-118:2 ("my focus on September 9th was getting ready for those oral arguments . . . that's what I spent the bulk of the day doing").) In response to an early draft of the letter that omitted any mention of the false affidavit allegations (*see* CRM BOTTINI 030185-90), Mr. Goeke emailed the trial team, on his and Mr. Bottini's behalf, urging them to in some form address the false affidavit allegations and to "put W&C on effective notice that both Allen and Bambi deny that Allen asked Bambi to make a false statement" (Dep. Ex. 81 (CRM022049-50)). Mr. Bottini echoed that sentiment, emphasizing that the trial team "ha[s] to approach this assuming they have access to everything from *Boehm*, including the under seal filings." (*Id.* (CRM022047).) Mr. Marsh then circulated a new draft of the letter, which mentioned the false affidavit allegations but stated that there was "no evidence" to support them. (CRM BOTTINI 030563.) This "no evidence" language was thus first generated and circulated fewer than 24 hours before the government finalized the *Brady* letter and sent it to the defense (September 8 at

8:52 pm to September 9 at 8:36 pm (*see* CRM BOTTINI 030723))—and while Mr. Bottini was still en route to Washington. Therefore, while Mr. Bottini "skimmed" the final version of the *Brady* letter, he "didn't read it in any detail for accuracy" (Dep. 774:10-17), especially because he trusted that his fellow prosecutors had accurately portrayed the evidence. For these reasons, he did not realize at the time that the letter omitted any mention of the Eckstein 302 or the Russo *Boehm* filing or that it asserted that there was "no evidence" to support the false affidavit allegations.

Once trial was underway, Mr. Bottini learned that "[s]omebody at Main Justice" decided to disclose the APD's entire investigative file on Allen to the defense and to Judge Sullivan (Dep. 718:13-719:1); the file was produced on October 16, 2008 and it contained the Eckstein 302.[5] Anticipating that the defense would reopen its cross-examination of Allen, Mr. Bottini and the trial team summoned Allen and Tyree to Washington (*id.* 720:1-14). The defense never moved to reopen Allen's cross-examination. (*Id.* 720:14-17.)[6]

2. **Mr. Bottini Did Not Commit Willful Misconduct.**

With little conception of what Mr. Bottini actually did to urge the disclosure of the Tyree allegations, the defense assumed that he must have committed misconduct, accusing him and the trial team, for instance, of creating "fabrication[s]," "manufactur[ing] and conceal[ing]

[5] Because Mr. Bottini never saw the contents of the APD file (*see* OPR Interview 653:6-10), he does not know whether that file also contained the sealed *Boehm* filing or the handwritten notes upon which Special Agent Eckstein based his 302. But because those two documents merely reflected the same statement that the Eckstein 302 contained, they would have been cumulative—and any failure to disclose them along with the 302 would not violate *Brady*. *See United States v. Pollack*, 534 F.2d 964, 975 (D.C. Cir. 1976) (no *Brady* violation where "newly discovered evidence was at best cumulative").

[6] The defense has subsequently asserted that, because it did not receive the entire APD investigative file—including the Eckstein 302—until after Allen's testimony concluded, "[w]e were never able to use this information during trial." Letter from Brendan Sullivan, Williams & Connolly, to Attorney General Eric Holder, at 15 (Apr. 28, 2009) (CRM BOTTINI 051449). Not so. The defense could have moved to reopen Allen's cross-examination for the purpose of asking him about information contained in the APD file; it simply chose not to. *See United States v. O'Hara*, 301 F.3d 563, 569 (7th Cir. 2002) ("The evidence at issue here was not suppressed at all. Though discovered during trial, [the defendant] had sufficient time to make use of the material disclosed. Delayed disclosure of evidence does not in and of itself constitute a *Brady* violation.").

evidence," and "paper[ing] the trail and conceal[ing] information." *See* Letter from Brendan Sullivan, Williams & Connolly, to Attorney General Eric Holder (Apr. 28, 2009) (CRM BOTTINI 051444-49). That invective bears little resemblance to reality. To the complete contrary, a closer look at the government's disclosures and Mr. Bottini's actions shows that he did not commit willful or criminally reckless misconduct—and indeed, that a *Brady* violation did not occur at all.

First, even if the government did violate *Brady*, *Giglio*, or the court's orders, Mr. Bottini did not remotely violate those obligations willfully. As described in detail above, *see supra* pages 12-19, Mr. Bottini pressed PIN and the trial team, at every turn, to consider the government's *Brady* and *Giglio* obligations and to err on the side of disclosing the false affidavit allegations, even though the Department of Justice's own ethics advisory office twice concluded that their disclosure was unwarranted. He ensured that the Criminal Division leadership was aware of the allegations; urged the prosecution to address them in a motion *in limine*, which would have disclosed them not just to the defense, but to the court; and pressed the trial team to include a more robust discussion of the allegations in its *Brady* and *Giglio* letters. With certainty, those are not the actions of an attorney who willfully or with criminal recklessness violates his disclosure obligations—in fact, they are exactly the opposite.

If Mr. Bottini can be faulted for anything, it is his failure to closely review the final September 9, 2008 letter, which did not mention the Eckstein 302 or *Boehm* filings and asserted that "no evidence" existed to support the false affidavit allegations. But his passing attention to the final draft of that letter—which was drafted by PIN, not Mr. Bottini (OPR Interview 530:6-531:6)—was hardly a willful or criminally reckless violation of his disclosure obligations. Instead, it was the natural consequence of the facts that the *Brady* disclosures were being handled

by another prosecutor, that Mr. Bottini was traveling from Alaska the day Mr. Marsh first proposed the "no evidence" language, and that, once in Washington, Mr. Bottini "spent the bulk of the day" on September 9, 2008—the day Mr. Marsh's draft was finalized and sent to the defense—preparing to argue multiple pre-trial motions. *See supra* page 18; (Dep. 117:18-19). In any event, Mr. Bottini's unrelenting efforts to disclose the Tyree false affidavit allegations demonstrate his good faith, which negates any finding that his failure to closely review the *Brady* letter was somehow willful or criminally reckless. *See United States v. Crowe*, No. 94-5690, 1996 U.S. App. LEXIS 2439 (4th Cir. Feb. 16, 1995) (non-precedential) ("To support a conviction for criminal contempt, the government must establish beyond a reasonable doubt that the defendant willfully, contumaciously, intentionally, with a wrongful state of mind, violated a decree . . . If the defendant makes a good faith effort to comply with a court order, he may not be convicted of criminal contempt.") (citation and quotation marks omitted).[7]

Second, not only did Mr. Bottini not commit willful misconduct, but any argument that the prosecution violated *Brady* or *Giglio* in the first place founders because there is no indication that it withheld documents that were "material" in the constitutional sense—*i.e.*, whose suppression would undermine confidence in the unanimous guilty verdict against Senator Stevens. To begin, it bears emphasizing that the government ultimately ***did*** disclose, on a timely basis, the substance of all allegations that were relevant to Allen's character for truthfulness and motive to testify for the government. It disclosed the substance of Allen's sexual misconduct

[7] *See also United States v. Ray*, 683 F.2d 1116, 1126 (7th Cir. 1982) ("A good faith effort to comply with a court order tends to negate willfulness, an element of criminal contempt which must be proven beyond a reasonable doubt."); *Richmond Black Police Officers Ass'n v. City of Richmond*, 548 F.2d 123, 129 (4th Cir. 1977) ("While the appellants might well have misinterpreted and, thus, violated the requirements of the consent decree under the facts with which they were faced, such conduct does not amount to criminal contempt . . . appellants' conduct indicates a good faith effort toward compliance, and, even though the alternative conduct adopted was mistaken, this alone does not constitute criminal contempt."); *In re Brown*, 454 F.2d 999, 1007 (D.C. Cir. 1971) ("Knowledge that one's act is wrongful and a purpose to nevertheless do the act are prerequisites to criminal contempt, as to most other crimes. Good faith pursuit of a plausible though mistaken alternative is antithetical to contumacious intent.").

allegations multiple times beginning with the August 14, 2008 motion *in limine* to exclude inflammatory cross-examination (Government's Motion *in Limine* to Exclude Inflammatory, Impermissible Cross-Examination 2-3 (Aug. 14, 2008) (CRM BOTTINI 104994-95)); it reiterated those allegations in the August 25, 2008 *Giglio* letter and September 9, 2008 *Brady* letter (Dep. Exs. 1, 2). The government likewise disclosed, in the motion *in limine* and *Giglio* letter, allegations that the Alaska United States Attorney's Office played a role in ending the APD investigation into Allen's misconduct. (CRM BOTTINI 104995; Dep. Ex. 1.) Finally, in the September 9 *Brady* letter, the government disclosed the existence of allegations that Allen had asked both Tyree and another minor to sign false affidavits stating they never had sex with him. (Dep. Ex. 2.)

It is true that the prosecution belatedly disclosed the Eckstein 302 and that the prosecution omitted any mention of that document from the September 9, 2008 *Brady* letter, writing instead that "the government is aware of no evidence to support any suggestion that Allen asked" Tyree to make a false statement. (*See* Dep. Ex. 2, at 5.) To the extent the Eckstein 302 was tantamount to evidence, that statement—that there was "no evidence" to support the false affidavit allegations—was inaccurate, and the prosecution erred by including it. But the prosecution's failure to ***affirmatively*** mention the Eckstein 302 (and its belated disclosure of the document itself) was not improper at all, because the mere fact that evidence is exculpatory or would help defense counsel impeach a witness does not make it *Brady* or *Giglio* material. Indeed, it is well-settled that "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Agurs*, 427 U.S. at 109-10 (citation omitted). Instead, information is material, and the failure to disclose it violates *Brady* or *Giglio*, "only if the

evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *United States v. Bagley*, 473 U.S. 667, 678 (1985).

The Eckstein 302 does not satisfy that requirement. Indeed, Judge Sedwick recently denied the *Kott* defendant's motion for a new trial for precisely that reason, emphasizing that—while the Eckstein 302 cast doubt on Allen's character for truthfulness—it was inadmissible under Federal Rule of Evidence 608(b) and, as a result, would not have aided the defendant. He explained:

> Kott also cites to an FBI 302 dated October 28, 2004, indicating that Allen's lawyer provided "CHILD VICTIM 1" an affidavit containing false statements indicating that she had not had sex with Allen and that she had signed the affidavit at Allen's request . . . These materials clearly suggest that Allen's character for truthfulness was doubtful. However, under Rule 608 Kott would have been prohibited from attempting to prove this by extrinsic evidence. He would have been left to inquire about the matter (assuming the court would permit the inquiry—as it would have) in cross-examination of Allen himself. It is known that Allen had previously denied the conduct, so he surely would have repeated the denial. The result is that this line of inquiry would not be of significant assistance to Kott. In the view of this court, ***the evidence regarding the alleged subornation of perjury is not material in the context of all the evidence, and the failure to disclose it did not prejudice Kott***.

United States v. Kott, No. 3:07-CR-056 JWS, 2010 WL 148447, at *9 (D. Alaska Jan. 13, 2010) (emphasis added). That same reasoning applies with equal force to the *Stevens* case. Under Rule 608(b), the defense was free to impeach Allen with the substance of the Tyree false affidavit allegations—which the government disclosed in the September 9, 2008 letter—but would not have been permitted to prove those allegations with extrinsic evidence. And because the defense could not have actually used the Eckstein 302 at trial, the belated disclosure of that document

does not undermine confidence in the outcome of the trial—and did not violate *Brady* or *Giglio* as a result.[8]

* * *

The government disclosed the substance of the Tyree false affidavit allegations—along with other allegations surrounding Tyree's relationship with Bill Allen—to the defense well before the beginning of trial. Against that backdrop, the prosecution's belated disclosure of the Eckstein 302 did not violate *Brady* or *Giglio* because that document was not material. But even if the prosecution did somehow violate *Brady*, *Giglio*, or the court's orders, Mr. Bottini's persistent and good faith efforts to disclose the Tyree allegations preclude any finding that he acted willfully or with criminal recklessness.

B. Mr. Bottini Did Not Commit Any Misconduct In Connection With The Rocky Williams Interviews.

The trial team began scheduling interviews with witnesses once the *Stevens* case was indicted and, in August 2008, they met on multiple occasions with Rocky Williams, one of two VECO foremen who oversaw the renovation of Senator Stevens' house. During those meetings, Williams explained that he took bills prepared by subcontractor Augie Paone and Christensen

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[8] Nor did the prosecution's belated production of the Eckstein 302 violate Judge Sullivan's order that the government comply with *Brady* and its progeny. While Judge Sullivan favorably mentioned *United States v. Safavian*, 233 F.R.D. 12 (D.D.C. 2005)—which rejects *Brady*'s "materiality" standard in favor of broader pretrial disclosure requirements—he did so in passing and did not order the government to follow that standard. (*See* Trial Tr. 60:1-16, Sept. 10, 2008 (CRM BOTTINI 007375) (mentioning *Safavian* along with "other district court opinions" and "opinions from this Circuit" and *Brady* itself); *id.* 74:14-16 (CRM BOTTINI 007389) (court will "just issue an order as a general reminder to the government to remind it of its daily ongoing obligation to produce that [*Brady*] material").) And in any event, the approach endorsed by *Safavian* conflicts with governing Supreme Court and D.C. Circuit precedent, which makes clear that a prosecutor's *Brady* obligation is measured by a materiality standard, not the "favorable evidence" standard that *Safavian* endorses. *Kyles v. Whitley*, 514 U.S. 419, 437-78 (1995); *United States v. Oruche*, 484 F.3d 590, 596 (D.C. Cir. 2007); Christopher Deal, Note, Brady *Materiality Before Trial: The Scope of the Duty to Disclose and the Right to a Trial by Jury*, 82 N.Y.U. L. Rev. 1780, 1807-08 (2007) (*Safavian* approach directly contradicts *Kyles*, *Agurs*, and other Supreme Court precedent).

The prosecution's belated production of the Eckstein 302 also did not violate Judge Sullivan's October 2, 2008 order, which directed the government to produce unredacted 302s for "every witness in this case." (Trial Tr. 29:17-19, Oct. 2, 2008 (CRM BOTTINI 009686).) Because Tyree was not a "witness in this case," the government's belated production of her 2004 Form 302 did not violate Judge Sullivan's order.

Builders to Allen, assuming—because Allen was by then "under the microscope"—that Allen would add Williams' time and Dave Anderson's time to those bills in order to avoid drawing further scrutiny to VECO. Williams never saw the bills that Allen sent to Senator Stevens, did not convey his assumption to Senator Stevens or his wife, and had no idea whether his time actually was reflected in the bills or not. His subjective belief, while consistent with a theory the government anticipated that the defense would advance, had no basis in reality and was not *Brady* material at all. Yet even if *Brady* did require the disclosure of Williams' assumption, Mr. Bottini did not violate that obligation willfully or with criminal recklessness.

1. **Factual Background**

Like most witnesses the prosecution would ultimately call, Williams had had almost no contact with the trial team between his 2006 grand jury testimony and the July 2008 *Stevens* indictment. (Dep. 46:14-21.) In an effort to re-engage Williams and "begin the formulation of some . . . semblance of trial preparation" (*see id.* 79:18-22), the trial team scheduled multiple witness preparation sessions in August 2008. Responsibility for Williams, who would subsequently become Mr. Bottini's witness, was at this point still assigned to Mr. Marsh. (*See* Dep. Ex. 12 (Email from Bottini to Team (Aug. 22, 2008) (CRM036168).)

At an August 20, 2008 interview, Williams described how he first became involved in the remodel of Senator Stevens' home in 1999, when he, Stevens, and Allen discussed the possible project around the time of the Kenai River Classic event. (Dep. 84:1-5; *see also* Dep. Ex. 8 (CRM057292).) At that event, Williams told prosecutors, Stevens indicated that he wanted to "brighten up" his Girdwood home, potentially by lifting the house up to create a "daylight basement" (*see* Dep. Ex. 8 (CRM057290-93))—a relatively modest project compared to the renovations that the senator ultimately decided he wanted, nearly a year after the 1999 conversation. According to Williams, Senator Stevens also stated he wanted to pay for the

renovations himself. (*See id.* (CRM057293-94).) The discussion was a preliminary one, however; beyond Stevens' indication that he wanted to pay for the cost himself, the three men did not "hammer[] out any kind of an understanding as to . . . what VECO was going to do, and how it was going to be paid for." (Dep. 160:16-19.)

In addition to telling prosecutors what Stevens had said in 1999, Williams also described what he himself thought at the time: specifically, that because Allen was "under a microscope," Williams wanted to involve outside contractors such as Augie Paone and Christensen Builders in the project, in order to avoid drawing further attention to Allen and VECO. (Dep. 89:3-9; 91:4-11.) According to notes taken by Mr. Bottini, Mr. Goeke, and Special Agent Chad Joy, Williams also told prosecutors that he "normally got the bill from Augie," "would review Augie's bills," and would "take them to the main [VECO] office to review" before giving them to Allen's secretary. (*See, e.g.*, Dep. Ex. 8 (CRM057297).)[9]

Williams provided more details about his role in delivering the Christensen Builders bills in subsequent interviews. On August 22, 2008, for example, Williams stated that he took Paone's bills to the VECO front office and that he "assumed" that his time and Dave Anderson's would be added to those bills. According to Mr. Bottini's notes, Williams "assumed this based on what TS had said in 1999" (Dep. Ex. 13 (CRM057316))—presumably, that he wanted to pay for the entire cost of the renovation—and because Williams could not believe Allen would "do

[9] Williams' statement that he reviewed the Christensen Builders bills before delivering them to the VECO front office was consistent with what he told grand jurors on November 6, 2006. (Grand Jury Testimony of Robert B. Williams 45:25-46:4, Nov. 6, 2006 (CRM BOTTINI 007055-76).) But both his grand jury testimony and August 20, 2008 statement contradicted a statement he made to IRS agents on September 1, 2006 and which is memorialized in a Memorandum of Interview, that "Williams did not see or review the [billing] statements" prepared by Paone before they went to Stevens. (CRM BOTTINI 002193.) Because that prior inconsistent statement could be used to impeach Williams if he testified, the government disclosed it in its September 9, 2008 *Brady* letter. (Dep. Ex. 2, at 3.) While that letter did not specify that it was Williams' grand jury testimony that his earlier statement contradicted, the defense would have received his grand jury transcript 24 hours prior to his testimony under an agreement that the prosecution made for early disclosure of *Jencks* material. (*See* Email from Robert Cary to Brenda Morris (Aug. 12, 2008) (CRM BOTTINI 021795).) There was nothing unusual about this disclosure; indeed, the entire point of the *Brady* letter was to alert the defense to prior inconsistent statements.

something as stupid" as have VECO pay for the renovations (Dep. 172:1-3). While Williams "assumed" that Allen added his time to the Christensen Builders bills, he "never saw" the bills that Allen actually sent to Stevens, did not know whether Allen actually added his time to those bills, and never conveyed his assumption to Senator Stevens or his wife Catherine or talked to them about what their bills included. (*See* Dep. Ex. 13 (CRM057315-17).) Williams emphasized his lack of knowledge about the contents of the actual bills, yet again, on August 30, 2008, telling prosecutors that while he "assumed that my time [and] Dave's time [was] added to" the Christensen Builders bills, he "didn't know whether that happened or not" because he "never saw them after [he] turned them in." (Dep. Ex. 17 (CRM057327).)

Special Agent Joy memorialized the August 22, 2008 interview in a terse 302, writing only that "Williams advised he never had any conversations with Ted Stevens or Catherine Stevens in which Williams made any representations that VECO expenses were placed on Christianson [*sic*] Builders invoices," and that "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 Christianson [*sic*] bills." (Dep. Ex. 15 (CRM036413).) While accurate, Joy's 302 omitted other statements that Williams had made during the course of his interview, including his assumption that Allen added his time and Dave Anderson's into the Christensen Builders bills and his statements that he never saw the final bills and did not know whether Allen actually incorporated his time or not. Mr. Bottini does not know why Joy prepared such a short 302, and he played no role in dictating the form's contents. (*See*, *e.g.*, Dep. 209:15-16; 212:22-213:1; 213:13-15; 235:2-9 ("My personal practice has always been I've never told an agent, you know, 'Write something up,' or 'Don't write something up,' or 'Write only that up.' I don't do that. Either they do it because that's what they've been instructed to do by

their agency or not.").) And, while acknowledging that he received a copy of the 302 a day after the interview, Mr. Bottini does not recall reviewing the 302 or asking Joy why it omitted other statements that Williams—who was not yet Mr. Bottini's witness—made during the course of the August 22 session. (*Id.* 214:11-17.)

By the time Williams arrived in Washington in mid-September, his physical condition—which had already "changed dramatically" between his 2006 grand jury testimony and August, 2008 interviews (*id.* 46:11-47:2)—had deteriorated even further (*see id.* 331:20-21). His "obvious physical discomfort" impaired his ability to focus on questions and provide coherent answers during mock direct and cross examinations (*see* Declaration of Joseph W. Bottini ¶¶ 28, 29 ("Bottini Decl.") (Dep. Ex. 64) (CRM000046)), and Mr. Bottini worried that by the time Williams took the stand several days later, "I may have said, 'Mr. Williams . . . what are you presently doing for a job,' and he could have said, 'I will have fries with that.'" (Dep. 331:10-13.) The prosecution agreed to allow Williams to return to Alaska to see his own physician and to move him down in their lineup of witnesses. (*Id.* 80:5-14; 114:18-115:1.) Mr. Bottini emphasized to Williams that he was still under subpoena by both the government and the defense, and instructed him to call Williams & Connolly to inform them he had returned to Anchorage to receive medical treatment. (Bottini Decl. ¶¶ 32, 33 (Dep. Ex. 64) (CRM000047-48).) The declaration Mr. Bottini subsequently filed with the court made clear that "[t]he primary concern was Williams' physical condition at the time and how that appeared to be affecting his ability to concentrate and answer questions." (*Id.* ¶ 28, 29.)

2. **Mr. Bottini Did Not Commit Any Misconduct.**

To be sure, Williams' assumption that Allen added his time to Augie Paone's bills was consistent with a defense the trial team anticipated Senator Stevens would advance: that he and his wife assumed that VECO's time was reflected in the Christensen Builders invoices they paid.

(*See* Dep. Ex. 11 (Email from E. Sullivan to Team (Aug. 22, 2008) (CRM036198).) But Mr. Bottini did not suppress that assumption willfully or with criminal recklessness and indeed, for multiple reasons, Williams' assumption was not *Brady* material at all.

First, to the extent *Brady* required the prosecution to disclose Williams' assumption, Mr. Bottini did not violate that obligation willfully. He did not conclude that Williams' assumption was favorable, material evidence but make a deliberate decision to suppress it anyway. *See United States v. Roach*, 108 F.3d 1477, 1481 (D.C. Cir. 1997) (defendant who "act[s] with ***deliberate . . . disregard*** of the obligations created by the court order" acts willfully) (emphasis added), *vacated in part on other grounds by* 136 F.3d 794 (D.C. Cir. 1998). Nor did Mr. Bottini know that there was a "substantial risk" a *Brady* violation would occur if the prosecution did not disclose that assumption and, in so doing, act with criminal recklessness. *See Mottweiler*, 82 F.3d at 771. Instead, Mr. Bottini gave at most passing consideration to Williams' assumption, and did not, at any point, believe it was *Brady* material at all. (*See* Dep. 198:1-3 ("At the time I just didn't think of this, given that it's Williams assuming it, not knowing it . . . ."); 193:14-16 ("I don't remember sitting there and dwelling on it and thinking about it.").) And because he did not act willfully or with criminal recklessness, Mr. Bottini cannot be punished for criminal contempt.

Second, any argument that Williams' assumption was *Brady* material in the first instance rests on the fundamentally mistaken premise that *Brady* requires the production of all evidence that is consistent with a possible defense. It does not. "[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense," and the Supreme Court has "never held that the Constitution demands an open file policy." *Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995). Thus, evidence bolstering the defense's

argument—that Senator Stevens and his wife believed the Christensen Builders bills reflected VECO's time—would be *Brady* material only if the suppression of that evidence "undermine[d] confidence in the outcome of the trial." *Bagley*, 473 U.S. at 678. Williams' assumption, which as unfounded speculation would have been inadmissible, *see* Fed. R. Evid. 602, does not meet this standard. Because the prosecution anticipated that Catherine Stevens would "likely testify that ***Rocky told her*** the VECO costs were rolled into the large Christensen bills" (Dep. Ex. 11 (CRM036198) (emphasis added)), evidence that those bills ***actually*** included VECO's costs would likely meet the *Brady* standard. So would evidence that Williams ***told*** Senator or Catherine Stevens that he believed his time was reflected in the invoices they paid. But the mere fact he ***assumed*** that the Christensen Builders invoices included his time, while consistent with the anticipated defense, would not so corroborate that defense that its suppression would undermine confidence in the guilty verdict—particularly because Williams never saw the actual bills and never discussed them with Stevens.

Williams' assumption is not *Brady* material for another reason, too: the defense could have obtained that statement from Williams himself simply by asking him. It is well-settled that, "where the exculpatory information . . . lies in a source where a reasonable defendant would have looked," no *Brady* violation occurs. *See United States v. Bates*, No. 05-81027, 2007 WL 2156278, at *4 (E.D. Mich. July 26, 2007).[10] In *Bates*, for example, the defendant moved for a

[10] Courts in numerous other jurisdictions are in accord, holding that no *Brady* violation occurs when the government fails to disclose exculpatory evidence that the defendant could, through an exercise of reasonable diligence, obtain on his own. *See, e.g.*, *United States v. O'Hara*, 301 F.3d 563, 569 (7th Cir. 2002) (*Brady* violation occurs only where "the evidence was not otherwise available to the defendant through the exercise of reasonable diligence"); *Fullwood v. Lee*, 290 F.3d 663, 686 (4th Cir. 2000) ("The *Brady* rule does not compel the disclosure of evidence available to the defendant from other sources, including diligent investigation by the defense."); *United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990) ("[W]here the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine."); *United States v. Wilson*, 787 F.2d 375, 389 (8th Cir. 1986) (government had no obligation to disclose statement where defense was able to examine witnesses about their supposedly exculpatory statements); *United States v. McKenzie*, 768 F.2d 602, 608 (5th Cir. 1985) ("*Brady* does not oblige the government

new trial, arguing that because the government omitted an exculpatory statement from a witness's 302, "he elected not to interview [her] as a potential witness because he presumed . . . that she would not offer exculpatory evidence." *Id.* at *5. The court rejected that argument, emphasizing that the defendant was aware of "essential facts" that put him on notice that the witness might provide helpful testimony. Because the witness "was a source a reasonable defendant would have explored for exculpatory evidence," the government's failure to produce her exculpatory statement did not violate *Brady*. *Id.* Similarly, in *United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990), the court held that the government did not violate *Brady* by failing to disclose a witness's exculpatory statement, because the defendant "was free to question [the witness] in preparation for trial" and because, given the facts of the anticipated defense, "it would have been natural for [the defendant] to have interviewed [the witness] in preparation for trial to determine" if he could provide exculpatory evidence.

The same is true here. If the defense planned to argue that Catherine Stevens believed, based on her interactions with Williams, that Christensen Builders' invoices included VECO workers' time, "it would have been natural" for them to interview Williams himself to determine his understanding of the invoices. There is no suggestion that the defense attempted to do so but encountered difficulties locating or speaking with Williams. To the contrary, he arrived in Washington before the *Stevens* trial under a defense subpoena, and, after he returned to Alaska for medical treatment, was contacted in person by someone from Fairbanks who was affiliated with the defense. (*See* Affidavit of Robert Williams ¶¶ 2, 7 (Dec. 24, 2008) (CRM BOTTINI 000098-100.) Nor is there any indication that Williams would not have disclosed his assumption

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to provide the defendants with evidence that they could obtain from other sources by exercising reasonable diligence."); *United States v. Griggs*, 713 F.2d 672, 673-74 (11th Cir. 1983) (per curiam) (government did not violate *Brady* by failing to disclose exculpatory statements that defense counsel later elicited from government's witnesses at trial, because the defense had the government's witness list before trial).

to the defense if they asked; indeed, he spoke willingly to the defense, both before and after his return to Alaska. (*See id.* ¶¶ 3, 7.) Because the defense could have obtained his statement through an exercise of reasonable diligence, the government's failure to disclose it did not violate *Brady*.

C. The Failure To Disclose Bill Allen's Statement Regarding The Torricelli Note Was Inadvertent, Not Intentional.

Nowhere is the gulf between Mr. Bottini's actual conduct and the allegations of his misconduct wider than it is with the Torricelli note. In that handwritten note, Senator Stevens asked Allen for an invoice for VECO's work, urged him to "remember Torricelli," and told him that he had asked Bob Persons to discuss a bill with Allen. Allen explained—at a September 14, 2008 trial preparation session and again at trial—that Persons told him Stevens was "just covering his ass" and did not actually want a bill at all. That statement contradicted one that Allen made in an interview several months before Senator Stevens was even indicted, evidence of which was mistakenly not provided to the defense. As a result of that mistake, Mr. Bottini and the trial team have been accused of lying, maliciously eliciting "bombshell testimony that [they] must have known to be false," fabricating Allen's testimony, and suborning perjury. *See generally* Letter from Brendan Sullivan to Attorney General Michael Mukasey (Oct. 28, 2008); Letter from Brendan Sullivan to Attorney General Eric Holder (Apr. 28, 2009).

Allen's prior inconsistent statement was undoubtedly *Giglio* material, and the government should have produced it. But any fair assessment of Mr. Bottini's actions shows that, contrary to the misperceptions that shroud the government's conduct, he simply made a mistake—and did not act with the willful or criminally reckless intent needed to prosecute him for contempt.

1. Factual Background

From the outset, the government anticipated that Stevens' counsel would argue that the senator did not knowingly file false statements because he asked Allen, on multiple occasions, to send him invoices for VECO's work. The government also knew that this defense would cut both ways. On one hand, evidence that Stevens asked for invoices would permit the defense to argue that he wanted to pay VECO, and that the only reason he failed to do so was because Allen never sent him a bill. (*See* Dep. Ex. 29 (CRM016134) ("strengths and weaknesses" memo explains that Stevens would argue he "did not pay because he never received a bill").) On the other hand, it would require Stevens to acknowledge that he knew he had received benefits from VECO and still owed the company money. (*See id.* ("strengths and weaknesses" memo explains that if the defense points to requests for invoices it "will require TS to admit that he knew VECO did the work and that he knew he never paid for the work done . . . Also inconsistent with TS' continued use of VECO's services in 2002 and beyond—*i.e.*, if TS really wanted an invoice and couldn't get one, why continue to ask the same individuals to do more work?").) Far from being exculpatory, that acknowledgement directly supported the government's theory that Stevens knowingly failed to report a liability. (*See* Dep. 601:22-602:3.)

It was against that backdrop that the prosecution first obtained the Torricelli note, which the defense produced—along with a significant number of other documents—on April 8, 2008. Seven days later, the prosecution held a meeting with Allen that was intended, among other things, to review pertinent items from the April 8 production—with a focus on asking Allen about a potential theory of official acts, which the Criminal Division leadership was pressing the trial team to pursue. (*See* Dep. 398:19-399:6.)

The April 15 meeting took place in Anchorage, months before the case was ultimately indicted and long before Allen became Mr. Bottini's witness. (*See id.* at 805:11-806:9.) It was

attended in person by Mr. Bottini, Mr. Goeke, and Special Agent Mary Beth Kepner; Mr. Sullivan and Mr. Marsh, who led the meeting and asked Allen questions as Ms. Kepner showed him documents, participated by phone. (*Id.* 484:6-17.) Mr. Bottini was not a critical participant in the meeting and spent the majority of it taking notes. (*See id.* 483:12-484:19.)

Consistent with Mr. Bottini's understanding of the purpose of the April 15, 2008 meeting, the trial team spent the majority of time asking Allen about recently produced documents that could support a potential theory of official acts. (*See generally* Dep. Ex. 43 (CRM013688-710) (Mr. Bottini's handwritten notes reflect substantial discussion about official acts-related documents).) What Mr. Bottini did not recall until several months after the *Stevens* trial concluded was that the trial team also asked Allen about the Torricelli note at that meeting. That note was the 13th of 17 documents that the trial team showed Allen, and, in response to the first question Mr. Marsh asked—"do you recall talking to Bob Persons about this?"—Allen replied no. (*See id.* (CRM013705).) Immediately afterwards, and in response to Mr. Marsh asking whether Allen sent Senator Stevens a bill, Allen began complaining about how Williams and Dave Anderson were incompetent and drunk and "screwed up" the renovation, a topic that in turn caused Allen—who hated Dave Anderson—to go "into the stratosphere." (Dep. 487:22-488:9; 489:13-22.) Mr. Bottini explained: "It was getting progressively heated, to the point where he had raised his voice . . . he's about three turns into the overhead." (*Id.* 490:11-491:7.) Allen eventually became so angry that he "wasn't making much sense," and Mr. Bottini recalled that he "continue[d] to escalate on Dave and Rocky to the point where at some point I stopped writing. Put my pen down, and jumped in, and tried to help defuse him." (OPR Interview 279:3-15.) Allen returned from a break "sullen" and "engaged in . . . the adult version of pouting" (Dep. 493:2-5), and was unresponsive to Mr. Marsh's further questioning. While it was obvious

to Mr. Bottini that Allen no longer wanted to be at the meeting, Mr. Marsh—who could tell something was wrong based on Allen's verbal responses but could not see his body language in person—sent an email to the group asking, "am I pushing too hard?" (*Id.* 495:1-21.) Shortly afterwards, the prosecution concluded the meeting.

The prosecution met with Persons himself on May 8, 2008. Because the purpose of the May 8 meeting was to confront Persons with inconsistencies between his grand jury testimony and correspondence between Persons and Stevens that the defense had recently produced, Mr. Bottini gave no thought to showing Persons additional materials, such as the Torricelli note (which was correspondence between Stevens and Allen, not Stevens and Persons). (*Id.* 436:8-12; 437:8-438:4.) And he did not consider showing Persons the note after that meeting, during which Persons was "totally insincere . . . [and] full of crap," because it was clear to Mr. Bottini that "going back and talking to this guy about anything is not going to bear much fruit." (*Id.* 439:20-440:9.)

It was not until five months later that they asked Allen about the Torricelli note again. Mr. Bottini's notes of that September 14, 2008 trial preparation session show that Allen first told prosecutors that he recalled having seen the Torricelli note; Mr. Bottini memorialized that statement with emphasis, writing "BA SEEN THIS!!" above his description of the note. (Dep. Ex. 45 (CRM089242).) Allen then stated, as a matter of his own opinion, that "Ted is covering his ass here." (*Id.* 526:8-22; *see also* Dep. Ex. 45 (CRM089242).) When Allen was asked whether he spoke to Bob Persons about the note, Allen replied that "Bob never did push me on this" and that Persons didn't want Senator Stevens to have to put more money into the project. (*See id.*) Continuing to think about the note, Allen continued, "I think Persons said he was just covering his ass by sending this note." (Dep. 526:8-22.) Mr. Bottini understood that Persons'

"cover your ass" comment was significant, because, among other reasons, it helped explain why Allen never sent Senator Stevens a bill. (*Id.* 538:2-6.) It was also "very significant as to Bob Persons and his MO," which Mr. Bottini believed was to allow Allen to pay for things for Senator Stevens while "doing whatever he could" to prevent the senator from paying Allen back. (*Id.* 538:7-10.)

In hindsight, it was not unusual that Allen would have first made that statement on September 14, 2008 even though he previously discussed the Torricelli note with prosecutors. In fact, Allen's delayed ability to recall his conversation with Persons was entirely consistent with his behavior on previous occasions. Mr. Bottini explained that, based on his experience working with Allen during the *Kohring* case, he knew Allen would often look at a document for a prolonged period of time and only later remember details about that document that he had not initially recalled. (*Id.* 527:15-528:1.) Early in that investigation, for instance, Allen recalled making certain payments to Vic Kohring; later on, when the trial team was preparing the Pros Memo and indictment, Allen was asked about the payments he previously recalled—and, after further contemplation, provided details about an additional meeting. Allen explained that he gave Kohring a payment outside a Juneau McDonald's and that the two of them then ate hamburgers in a hotel suite that investigators had wiretapped. Prosecutors reviewed intercepts from that time period and confirmed that Allen was being truthful. (*Id.* 528:2-530:17.)

2. Mr. Bottini Cannot Be Prosecuted For His Inadvertent Failure To Recall Or Locate His April 15 Notes.

Allen's April 15, 2008 statement contradicted his September 14, 2008 statement and trial testimony, and it was *Giglio* material that the prosecution should have, but did not, disclose. But the crime of contempt demands more than a showing that *Brady* or *Giglio* was violated; indeed, accidental and even negligent *Brady* and *Giglio* violations do not support imposition of that

punitive sanction. *Mottweiler*, 82 F.3d at 772 ("negligence does not support a criminal conviction under § 401"). Taken together, Mr. Bottini's sworn testimony, actions, and handwritten notes point to only one possible conclusion: Mr. Bottini simply did not recall discussing the Torricelli note with Allen on April 15, 2008, and the subsequent failure to produce his notes was an inadvertent mistake that does not justify prosecuting him for contempt.

To begin, Mr. Bottini's description of the purpose and substance of the April 15, 2008 meeting—which was led by Mr. Marsh and occurred well before Allen became Mr. Bottini's witness—helps explain why he did not recall the Torricelli note discussion. He has consistently recalled two overriding features of that meeting: its intended focus on an official acts theory and Allen's paroxysm of anger. Mr. Bottini's notes themselves reflect the fact that, for a significant part of the April 15 interview, prosecutors questioned Allen about documents related to official acts—not the Torricelli note. (*See generally* Dep. Ex. 43 (CRM013688-710).) That questioning was intended to help the Criminal Division's process of vetting the case and, indeed, it took place well before the case was indicted. And when it came to the discussion initiated by the Torricelli note, Mr. Bottini's dominant recollection was Allen's diatribe about Williams and Dave Anderson "screwing it all up"—not the fact that prosecutors had shown the Torricelli note to Allen before that angry outburst. (OPR Interview 320:9-14 ("I didn't remember that this note was the catalyst for [Allen getting upset]. I remembered the meeting in April and that he had gone off on Dave and Rocky. But I didn't remember that the Torricelli note had been the spark that set that off.").)

The organization and placement of Mr. Bottini's notes likewise helps explain why he neither recalled discussing the Torricelli note on April 15 nor located his notes memorializing that discussion. He customarily creates a trial folder for each witness that will ultimately contain

handwritten notes, 302s, grand jury transcripts, and other materials related to that witness; as trial approaches, he reviews the contents of a witness's file both for the purpose of creating a trial outline and for the purpose of reviewing it for *Brady* material. (*See* Dep. 10-22.) Because Allen was such a significant witness, Mr. Bottini ultimately created multiple folders and organized them by topic, making sure to add handwritten notes from his interviews to those folders. (*Id.* 573:6-9.) But because the April 15, 2008 meeting occurred so long before the *Stevens* case was indicted—and indeed, at a time when Mr. Bottini was unsure if it would be indicted at all, or, even if it was indicted, whether he would be on the trial team—he had not yet created trial folders to prepare Allen's testimony. Mr. Bottini instead placed his notes from the April 15 meeting in the same file folder that contained the documents that the prosecution team had just shown to Allen during the meeting—labeled, appropriately enough, "Documents to Show BA on April 15." (*Id.* 571:10-22; *see also* Dep. Ex. 46 (CRM013686).) Had that folder been labeled "notes from BA interview on April 15," Mr. Bottini would in all likelihood have reviewed its contents once the case was indicted and trial preparation began. But because it was not, he did not recall that he had notes from April 15, did not review them before trial, and could not initially locate them even when asked by Paul O'Brien. (*See* Dep. 576:15-587:5.) The fact that the FBI did not prepare a 302 memorializing the April 15 meeting compounded the problem[11]; had a 302 been prepared, it would likely have prompted Mr. Bottini's recollection that the meeting occurred. (OPR Interview 228:12-229:16.)

[11] As a matter of practice, Mr. Bottini does not have any interactions with agents about the preparation of a 302: he does not tell agents when to draft a 302 or what to include in a 302, and he does not regularly review those documents for content or accuracy. *See supra* page 27. In fact, the *Stevens* prosecutors did not even receive 302s as a matter of course following witness interviews; the trial team would instead need to periodically ask the FBI and IRS for copies if they wished to review them. (Dep. 23:1-16; OPR Interview 141:4-143:1.) It is therefore unsurprising that Mr. Bottini was unaware that Special Agent Kepner did not create a 302 to memorialize the April 15 meeting—and, in fact, Mr. Bottini believes that, at the time, he assumed that one would have been created. (OPR Interview 228:12-18.)

Finally, Mr. Bottini's notes from the September 14, 2008 trial preparation session further underscore that, by the time prosecutors met with Allen prior to trial, Mr. Bottini had forgotten about the April 15, 2008 Torricelli note conversation entirely. Those notes contain short descriptions of documents that prosecutors planned to show Allen. Above the description of the Torricelli note, Mr. Bottini wrote "BA SEEN THIS!!" (Dep. Ex. 45 (CRM089242))—memorializing a statement that was significant because it meant Allen, who recalled seeing the note, could authenticate it at trial. The fact that Mr. Bottini attached such significance to Allen's statement on September 14 was a clear indication that he "did not recall [Allen] having seen this thing back in April" (Dep. 805:1-10; OPR Interview 335:21-336:20).

Together, Mr. Bottini's recollection of the April 15 meeting, the way he labeled his notes from that meeting, and his handwritten September 14 notes show how his failure to recall showing the Torricelli note to Allen in April—and the prosecution's failure to produce Allen's statement about not recalling speaking to Persons upon receiving the note—was an inadvertent mistake.

D. Mr. Bottini Was Not Obligated To Clarify Bill Allen's Torricelli Note Testimony Because It Was Confused, Not Knowingly False.

While cross-examining Allen, the defense—which had been surprised by Allen's statement that Persons told him, after Allen received the Torricelli note, that the note was just Ted "covering his ass"—suggested that he had just recently fabricated that statement. Allen first misinterpreted the line of questioning but eventually responded, "hell, I don't know. I don't know what day it was." (Trial Tr. 81:10, Oct. 6, 2008 (Dep. Ex. 61)). To suggest that Mr. Bottini should have stood up and informed the court that Allen first recounted this recollection to the government on September 14, 2008 is to advance an interpretation of *Napue* that is fundamentally incorrect. While that case compels a prosecutor to correct knowingly false

testimony, it does ***not*** require the prosecutor to clarify a witness's confusion or assist the defense by responding to a question whose answer the witness himself does not remember. For that reason, Mr. Bottini's conduct was not a *Napue* violation at all—let alone a willful or criminally reckless one.

1. **Factual Background**

Attempting to show that Allen had fabricated the Bob Persons "cover your ass" comment, the defense asked Allen when he first told the government that he had spoken to Persons about the Torricelli note and that Persons had told him that Stevens was simply "covering his ass." In particular, the defense attempted to elicit testimony that Allen first told the government about the "cover your ass" remark sometime after September 9, the date when the defense received the government's *Brady* letter. The responses Allen gave, however, make clear that he misunderstood the question—and believed that defense counsel was asking when he first discussed the Torricelli note with ***Persons***, not when he first discussed it with the government:

> Q [B. Sullivan]: Well, you came in here the other day on your direct examination, and you said, well, despite the fact that I saw this letter, I heard from Mr. Persons I shouldn't send a bill because this was just Ted covering his ass; do you remember that testimony?
>
> A [Allen]: That's exactly right.
>
> Q: When did you first tell that story? When did you first say those words? Was it in the last—since September 9th? Was it since September 9th?
>
> A: It's been so long that I can't tell you how many days before I talked to him, but I did, and I asked him, hey, I got to get something done. I've got to get some invoices. And he said, hell, don't worry about the invoices. Ted is just covering, his ass. That's exactly what he said.
>
> Q: My question to you, sir, is when did you first tell the government that because on September 9th, 2008, you were giving them three other reasons why you didn't send the bill.
>
> A: I don't know.

Q: When did it come to you, sir?

A: What?

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.

Q: On September 9th, you didn't tell them that, did you?

A: Hell, I don't know whatever—

Q: You gave them reasons why you didn't send a bill. You answered you simply wanted to do the work was one of them, and another was part of the reason. Was that the costs were higher than they needed to be. You didn't tell them then about Persons' conversation with you, did you?

A: You know what, I don't know when I talked to them, but I did talk to him, and it's been quite aback, quite a while back. Whether you like it or you don't.

Q: When did you first come up with this, sir?

A: When did I come up with it?

Q: When did you first tell somebody?

A: Huh?

Q: When did you first tell a government agent?

A: Hell, I don't know. I don't know what day it was.

(Trial Tr. 79:21-81:10, Oct. 6, 2008 (Dep. Ex. 61).) Immediately after that exchange, Brendan Sullivan asked to break for the evening (*id.* 81:11-12); when he resumed cross-examining Allen the following morning, Sullivan asked him about an unrelated expense report—not the "cover your ass" statement (*see* Trial Tr. 23:25-27:18, Oct. 7, 2008 (CRM BOTTINI 010053-57)).

It was apparent to Mr. Bottini that Allen, who had previously suffered a serious head injury and was often prone to confusion and difficulty communicating (Dep. 500:4-8), misunderstood what he was being asked with respect to the Torricelli note and was answering an entirely different question as a result (*id.* 635:1-4). He explained: "Allen's getting his back up,

which is always an interesting thing to see, because you never know where that's going. He's to me, I mean the way he's answering these questions, he's running together when he first talked about Persons about this, in response to [Brendan] Sullivan asking him when did you first tell these people about that. That's what I thought was going on here." (*Id.* 633:1-9; *see also* OPR Interview 341:3-18 ("I think that was clear . . . to anybody listening to that who had sat through this trial knew that he was talking about Bob Persons at that point").)

Allen's confused responses were "very characteristic of Allen" and the way Mr. Bottini knew that he processed questions—particularly "very aggressive," "compound" ones such as defense counsel's. (Dep. 632:11-17.) Those questions may have been particularly confusing because of defense counsel's repeated references to a conversation on September 9; because Allen spoke with the government several times a week in August and September, he would have had no reason to ascribe particular significance to the date of September 9. And because it was customary for Allen, once confused, to become even ***more*** flummoxed in response to additional questions, Mr. Bottini believed that any attempt to clarify his testimony would only lead to more confusion. (*Id.* 636:12-637:1 ("[M]y experience with Mr. Allen is when he gets confused about things, unless you have had some opportunity to sit down with him, which you never do before redirect, to explain to him what it is you're going to ask him, you're just begging for more confusion. I thought that he had adequately explained himself, albeit I wasn't quite sure whether he fully understood what Mr. Sullivan was asking, particularly since he kept jumping back and forth between referring to when he talked to Bob Persons.").)

2. **Mr. Bottini Had No Obligation To Correct Allen's Confusion.**

Any suggestion that Mr. Bottini was required to correct Allen's testimony depends on a tortured reading of that testimony and reflects a fundamental misunderstanding of *Napue*, which prohibits the knowing use of false testimony but imposes no obligation to correct mistaken

inaccuracies, clarify confusion, or provide an answer that the witness himself cannot remember—particularly when that confusion is created by the inartful questioning of defense counsel.

It is true that, midway through Allen's cross-examination, defense counsel asked him "[w]hen did you first tell the government that Persons told you Ted was covering his ass . . . it was just recently, wasn't it?"—and that Allen responded by insisting, "No. No." (Trial Tr. 80:16-19, Oct. 6, 2008 (Dep. Ex. 61).) But that single question and answer cannot be read in isolation. Instead, they must be viewed in the context of Allen's entire exchange with defense counsel, which shows unmistakably that he was describing when he first discussed the Torricelli note with *Persons*—not when he first discussed that conversation with the prosecution. Immediately prior to that single question and answer, for example, Allen was asked when he first "told that story" about Persons to the government; he responded, referring to Persons and not the government, that "[i]t's been so long that I can't tell you how many days ***before I talked to him***, but I did, and I asked him, hey, I got to get something done. I've got to get some invoices. And he said, hell, don't worry about the invoices. Ted is just covering his ass. That's exactly what he said." (*Id.* 80:5-9 (emphasis added).) And immediately after the "No. No." response, Allen—in response to the question, "[y]ou didn't tell them then about Persons' conversation with you, did you?"—replied, "[y]ou know what, I don't know when I talked to ***them***, but I did talk to ***him***, and it's been quite aback, quite awhile back. Whether you like it or you don't." (*Id.* 81:2-4 (emphasis added).) Thus, Allen's "No. No." statement, while not an accurate response to the question he was actually being asked, was the product of confusion—not a deliberately false statement.[12]

[12] While technically Brendan Sullivan asked Allen whether he recently ***told*** the government about the "cover your ass" statement, from the context, it was evident that he was accusing Allen of recently ***fabricating*** that

Any argument that Mr. Bottini was obligated to correct Allen's testimony rests on the mistaken assumption that *Napue* requires a prosecutor to clarify confused testimony, no matter what its cause. It does not. Instead, it is almost universally understood that "a prosecutor is not required to ensure that prosecution witnesses' testimony be free from all confusion, inconsistency, and uncertainty." *Hess v. Trombley*, No. 2:06-CV-14379, 2009 WL 1269631, at *6 (E.D. Mich. May 1, 2009). For that reason, courts considering a prosecutor's failure to correct inaccurate testimony resulting from confusion or the witness's faulty memory—rather than a deliberate intent to provide false testimony—routinely hold that no *Napue* violation occurred. *Id.*; *see also United States v. Crockett*, 435 F.3d 1305, 1317 (10th Cir. 2006).[13]

In *Crockett*, for example, the defendant argued that the prosecutor knowingly permitted a cooperating witness to falsely testify that she received no benefit in exchange for her plea agreement, which required her to testify against the defendant. *Id.* Among other things, the witness had mistakenly answered "no" when, during cross-examination, defense counsel asked her whether she agreed to testify against the defendant as part of her plea agreement. *Id.* After viewing that response in the context of her entire direct and cross-examinations, the court found that it was clear that the witness—who eventually acknowledged that she had agreed to testify against the defendant—was "confused about her obligation to testify against [the] Defendant," and "may have understood the inquiry to relate to benefits other than those she had already

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statement. (*See* Trial Tr. 80:2, Oct. 6, 2008 (Dep. Ex. 61) ("When did you first tell that story?"); *id.* 81:5 ("When did you first come up with this, sir?").) Read in that proper context, Allen's denial was not inaccurate at all.

[13] *See also United States v. Are*, 590 F.3d 499, 509 (7th Cir. 2009) ("*Napue* does not require the government to recall [a witness] in its rebuttal case to clear up any possible confusion when the witness's testimony was not perjurious."); *Overdear v. United States*, 212 Fed. App'x 930, 931 (11th Cir. 2006) (*Napue* prohibits only "willfully made" false testimony, not false testimony that results from confusion, mistake, or faulty memory); *United States v. Monteleone*, 257 F.3d 210, 219 (2d Cir. 2001) (*Napue* is not violated where the "incorrect testimony result[s] from confusion, mistake, or faulty memory"); *United States v. Manzano-Excelente*, Nos. 95-1459, 95-1626, 1996 WL 414465, at *2 (2d Cir. July 25, 1996) (*Napue* violation did not occur because the defendant did not "establish the threshold element of his claim: that [the witness] committed perjury . . . confusion and inability to remember do not constitute perjury."); *United States v. Russell*, 532 F.2d 1063, 1067 (6th Cir. 1976) (*Napue* does not require prosecution to recall witness during rebuttal to clarify confusion).

received." *See id.* Against that backdrop, the court reasoned that "[t]here has been no showing of deliberately false testimony." *Id.*

That reasoning applies with equal force here. As set forth above, Allen's "No. No." response, when viewed in its proper context, reflected his confusion about what question defense counsel was asking him and whether that inquiry related to Allen's conversations with Persons or with the government. Mr. Bottini was accordingly under no obligation to clarify Allen's response, or to otherwise provide a clearer answer to the defense's question when Allen, due to confusion and faulty memory, could not provide one himself.

Nor did Mr. Bottini's failure to clarify Allen's response prevent the defense from advancing an argument they otherwise would have. To the contrary, defense counsel could have continued pressing Allen about when he first told the government about the "cover your ass" statement; they simply chose not to. Instead, the defense abruptly ended that line of questioning when it suggested that the court break for the evening, and elected not to revisit it when cross-examination resumed the following morning. *See supra* page 41. Moreover, it is evident from their closing argument—which took Allen to task extensively for supposedly fabricating the "cover your ass" statement (*see* Trial Tr. 8:5-15:9, Oct. 21, 2008 (CRM BOTTINI 012738-45))—that the defense was satisfied with the responses they elicited during his cross-examination and was able to effectively make use of them.

Even if *Napue* and its progeny were read to obligate Mr. Bottini to correct Allen's testimony, his failure to do so was plainly not a willful effort to mislead the jury or defy the court's orders. He was motivated, instead, by his conclusion that Allen "had adequately explained himself, albeit I wasn't quite sure whether he fully understood what [the defense] was asking," and his belief, based on his familiarity with Allen, that attempting to clarify the

testimony would only sow more confusion. (Dep. 636:12-637:1.) That good-faith belief is fundamentally at odds with a willful or criminally reckless intent, *see In re Brown*, 454 F. 2d 999, 1007 (D.C. Cir. 1971) (good faith "is antithetical to contumacious intent"), and, as a result, it forecloses any conclusion that he committed criminal contempt.

III. CONCLUSION

Mr. Bottini and the *Stevens* prosecution undoubtedly made mistakes. Most relevant here, Mr. Bottini concededly erred when he failed to recall that Allen had been asked about the Torricelli note on April 15—and when he failed to locate and review the notes from that meeting. Throughout the course of the trial and the months that followed, however, those mistakes became shrouded in misperceptions and distortions and, in many cases, the prosecutors have been assailed for conduct that did not amount to *Brady* violations at all. But the question now is not whether Mr. Bottini made mistakes or even whether he violated *Brady*, *Giglio*, or *Napue*. Instead, the question is whether he willfully or with criminal recklessness violated the obligations imposed by those cases and the court's orders. The answer, with certainty, is no.

At most, Mr. Bottini made errors during the course of a difficult case, made more challenging by the prosecution's anomalous organization and the intrusive, sometimes counterproductive micromanagement of the Justice Department's Criminal Division. But the extent of those mistakes was amplified and in many cases distorted by defense attorneys who allege prosecutorial misconduct as a defense tactic. *See United States v. Forbes*, No. 3:02CR00264, 2006 WL 680562, at *1-2 (D. Conn. Mar. 16, 2006) (criticizing Brendan Sullivan and Robert Cary for a "pattern of unseemly tactics employed by counsel for defendant" and observing that "counsel for defendant Forbes had engaged in a pattern in this case of arguing, premised on speculation, that opposing counsel had engaged in improper conduct"). As a result, the prosecution was condemned each and every time it failed to disclose evidence that was

conceivably consistent with a possible defense, even though, in many cases, *Brady* did not require them to. And to the extent Mr. Bottini did make mistakes—for example, by failing to recall and disclose the fact that prosecutors discussed the Torricelli note with Allen on April 15, 2008—those mistakes were inadvertent, not the product of willful or criminally reckless conduct.

Mr. Bottini has cooperated with this investigation since its inception and through a two-day deposition with the Special Prosecutor and a one-and-a-half-day interview with the Justice Department's Office of Professional Responsibility. He is a dedicated public servant who is universally admired by the attorneys with whom he works most closely, has a reputation of "provid[ing] quiet leadership without any trace of self promotion or self interest" (Letter from Robert Bundy (Ex. C)), and has not been the subject of a single disciplinary complaint in his 25 years of practice, *see supra* pages 4-5. Against that backdrop, prosecuting Mr. Bottini for criminal contempt would be both legally insupportable and profoundly unfair. *See United States v. Jones*, 620 F. Supp. 2d 163, 181-83 (D. Mass. 2009) (declining to impose contempt sanctions despite "serious and repeated misconduct" because, among other things, attorney's affidavits and testimony "indicate that she is an earnest public servant . . . who does not have a 'win at any cost' or 'ends justify the means' mentality" and because "[s]he has never been subject to disciplinary action or, apparently, sanction").

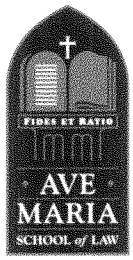
Nor would prosecuting Mr. Bottini serve the foremost objective of criminal contempt: deterring future misconduct. *See United States v. Barnett*, 376 U.S. 681 (1964) (Goldberg, J., dissenting) ("The sanction imposed for criminal contempt has always been 'regarded as punishment' designed to deter future defiances of the court's authority and to vindicate its dignity.") (citing 4 Blackstone, Commentaries, 283-285). That goal has already been achieved. The *Stevens* prosecution and its aftermath have already led the Justice Department to formalize

and strengthen discovery guidelines for all federal prosecutors, *see* Memorandum from David W. Ogden to Department Prosecutors, Guidance for Prosecutors Regarding Criminal Discovery (Jan. 4, 2010), *available at* http://www.justice.gov/dag/discovery-guidance.html, and the notoriety surrounding the case has without a doubt caused prosecutors to carefully consider their disclosure obligations. If anything, an unjustified prosecution of Mr. Bottini could result in *over*-deterrence, causing prosecutors to disclose evidence indiscriminately, including evidence about cooperating witnesses whose disclosure could put those witnesses in danger; it could also cause attorneys to think twice before becoming prosecutors at all. Those outcomes would be deeply damaging to the responsible prosecution of crime.

In sum, Mr. Bottini and the rest of the *Stevens* prosecution have, in many instances, come under attack for conduct that did not violate *Brady* at all. But even in those circumstances when Mr. Bottini concededly erred, his conduct was not remotely willful or criminally reckless. Under any fair analysis, he cannot be prosecuted for contempt.

INDEX OF REFERENCE LETTERS

Exhibit A



AVE MARIA
SCHOOL OF LAW

March 24, 2010

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

Re: Joseph W. Bottini

Dear Mr. Schuelke:

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

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

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

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

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

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

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

Sincerely,

Mark Healy Bonner (DC Bar #202036)
Associate Professor of Law
1025 Commons Circle
Naples, FL 34119

Exhibit B

DORSEY

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March 23, 2010

Mr. Henry F. Schuelke, III
Janis, Schuelke & Wechsler
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Re: Joseph Bottini

Dear Mr. Schuelke:

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

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

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

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

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

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

Very truly yours,

DORSEY & WHITNEY LLP

Robert C. Bundy
Of Counsel

cc: Paul Knight
Kenneth Wainstein

Exhibit C

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Robert G. Chadwell
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March 25, 2010

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

Re: AUSA Joe Bottini

Dear Mr. Schuelke,

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

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

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

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

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

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

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

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

To sum up, Joe Bottini is and has been for well over twenty years a hard working public servant serving the interests of justice. His reputation for fairness, honestly and hard work is well deserved. His history of treating defendants with respect and doing his job without personal agenda is well known. On a personal note, I would accept Joe's word and his hand shake on any matter knowing that it was more reliable than any document that could be drafted.

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

Very truly yours,

McKAY CHADWELL, PLLC

Robert G. Chadwell

Exhibit D

March 29, 2010

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

RE: Assistant U.S. Attorney Joe Bottini

Dear Mr. Schuelke:

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

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

One of my first undertakings after I was sworn in as U.S. Attorney in August 2006 was to meet individually with each member of the staff. That is when I met Mr. Bottini. For the following 30 months I had periodic but not daily contact with him. It was, however, through my conversations with others that I learned the most about Mr. Bottini. He is uniformly respected and considered one of the most ethical, professional, honest, knowledgeable, reliable and even tempered prosecutors in the office. It is not an exaggeration to refer to Joe as the backbone of the Criminal Division and the glue that held it together. In addition to his well deserved stature in the office, Mr. Bottini is known to all as a man of honesty. He is highly regarded for his integrity and sound judgement by the courts and the defense bar.

Joe Bottini's actions are not controlled by ego or the desire of media attention. Indeed, Mr. Bottini is unlikely to assert himself with his colleagues if he feels doing so would create hard feelings. For example, in the setting of a trial team deciding on a lead attorney for an upcoming trial (and this is not a reference to the Stevens case), if Mr. Bottini were the best choice for lead counsel by reason of ability and experience, but another team member less able made it known that he or she wanted to be lead, Mr. Bottini would most likely acquiesce. Similarly, he is reticent to supervise others preferring to interact as a peer rather than as a manager.

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

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

Thank you for your consideration of my views.

Very truly yours,

NELSON P. COHEN

NPC/dls

Exhibit E

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March 18, 2010

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

Dear Mr. Schuelke:

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

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

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

Sincerely,

Allen Dayan

Exhibit F

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March 17, 2010

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

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

Dear Mr. Schuelke:

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

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

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

I can state, without any reservation, that Mr. Bottini is a lawyer of exceptional skill and commitment, keen intelligence, and a man of high moral character. He is the kind of person for whom the expression "straight arrow" was invented. He takes public service seriously. It not only defines his career, it defines his life. It defines him, as a person.

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

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

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

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

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

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

Very truly yours,

FELDMAN ORLANSKY & SANDERS

Jeffrey M. Feldman

JMF:jaf

Exhibit G

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March 31, 2010

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

Re: Joe Bottini

Dear Mr. Schuelke:

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

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

I have long thought that Joe possessed all of the best qualities of a federal prosecutor. He is a very able lawyer: talented, self- disciplined and hard working. In addition, Joe has always demonstrated another quality that I think equally important. His advocacy is ever moderated by an innate sense of fairness, courtesy and justice.

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

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

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

Very truly yours,

James E. Torgerson

Exhibit H

LAW OFFICE OF MICHAEL WHITE

Michael N. White, Admitted in Washington and Alaska

March 17, 2010

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

Dear Mr. Schulke:

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

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

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

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

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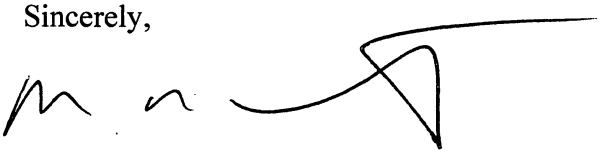
that were dismissed. On two separate occasions, based on complaints from me, Mr. Bottini took steps to make sure that it is clear in United State's computer systems that the criminal case was resolved with no adverse consequences for this woman.

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

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

Sincerely,



Michael N. White

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