IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, v. THEODORE F. STEVENS, Defendant.	Crim. No. 08-231 (EGS)

SENATOR STEVENS'S MOTION TO DISMISS THE INDICTMENT DUE TO THE GOVERNMENT'S INTENTIONAL AND REPEATED MISCONDUCT

Until today, defense counsel have refrained from alleging intentional misconduct by the government. We can no longer do so in good conscience. Defense counsel have now conducted an initial review of material produced for the first time on the evening of Thursday, October 2, on Friday, October 3, and on Saturday, October 4. Defense counsel have also now had the opportunity to review in greater detail the material produced late Wednesday night. The evidence is compelling that the government's misconduct was intentional. This case must be dismissed. No other remedy will deter future prosecution teams from engaging in the same tactics. No other remedy will prevent what has happened in this case from happening again.

Our review of the newly produced materials reveals three clear occurrences of shocking misconduct. First, it is now evident that the government intentionally withheld and concealed Bill Allen's exculpatory statements that Senator Stevens would have paid bills for VECO work if they had been provided to him. Indeed, instead of producing those exculpatory statements, the government shortly before trial intentionally procured from Allen a contradictory,

inculpatory statement and produced that statement to the defense. The government then concealed its actions and made affirmative misrepresentations to the Court and the defense.

Second, the newly produced grand jury transcripts show that the government knowingly withheld information that Dave Anderson was in Portland, Oregon during a months-long period in 2000 when VECO's accounting records show that he billed virtually full time to the Girdwood project. Knowing this, the government put into evidence false VECO accounting records to establish the untrue proposition that Anderson and others billed $188,000 to the renovations. At the same time, the government actively sought to prevent the defense from subpoenaing Dave Anderson.

Third, the government's new production of previously undisclosed interview memoranda and grand jury transcripts contains a wealth of new *Brady* information that cannot have been innocently withheld.

STATEMENT OF FACTS

A. Intentional Suppression of Bill Allen's Exculpatory Statements.

1. Bill Allen had for nearly two years told prosecutors that he believed Senator Stevens would have paid bills if they had been sent. Two separate 302 memoranda contain such statements from Allen:

> -- "If Rocky Williams or Dave Anderson had invoiced Ted or Catherine Stevens for VECO's work, BILL ALLEN believes they would have paid the bill." Dec. 11-12, 2006 Memorandum of Interview at 9 (emphasis added) (attached as Ex. A);
>
> -- "The source [Allen] did not invoice STEVENS for the work that Hess performed; however, the source believes that STEVENS would have paid an invoice if he had received one." March 1, 2007 302 Interview Memorandum at 2 (emphasis added) (attached as Ex. B).

2. Defense counsel first asked for production of all *Brady* material on August 1, 2008. While the government acknowledged awareness of its *Brady* obligations, Ltr. from B.

Morris to R. Cary, Aug. 21, 2008 (attached as Ex. C), the government's recalcitrance in confirming that it had disclosed all *Brady/Giglio* information necessitated a motion on September 2, 2008. Motion to Compel Discovery (Dkt. No. 60); *See also* Ltr from A. Romain to B. Morris, Aug. 27, 2008 (attached as Ex. D).[1]

3. On September 9, 2008, one day before the Court was to hear argument on on Defendant's *Brady* motion, the government re-interviewed Allen by telephone and procured a contrary statement that Senator Stevens would not have paid the VECO bill because it would have been too high. The government that same day, September 9, 2008, sent a *Brady* letter to defense counsel revealing only the new, inculpatory statement, and not the prior exculpatory ones.

> -- "Allen stated that he believed that defendant would not have paid the actual costs incurred by VECO, even if Allen had sent defendant an invoice, because defendant would not have wanted to pay that high of a bill. Allen stated that defendant probably would have paid a reduced invoice if he had received one from Allen or VECO." Letter from Ms. Morris of Sept. 9, 2008 at 3, ¶ 17(c) (attached as Ex. E).

Curiously, this letter included other exculpatory statements set forth in 302s already in existence, including some from the very 302 memoranda containing these undisclosed statements, and thus a specific decision must have been made not to disclose the exculpatory statements that the Senator would have paid VECO bills. Paragraph 17(c) was the only item in Ms. Morris's September 9 letter that came from the brand new September 9 interview. At the time of the September 9 letter, this new interview had not yet been reduced to a 302 memorandum.

4. One week later, on September 16, over the government's vehement objections, the Court ordered the government to produce all 302s containing exculpatory

[1] While this motion first appeared on the public docket on September 9, 2008, it was originally filed with the Court on September 2, 2008.

information by the next day, September 17. *See* Hr'g Tr. (Sept. 16, 2008) at 30:12-14 (attached as Ex. F). On the same day as the hearing, September 16, an FBI agent assigned to this case prepared a new 302 memorandum reporting on the Allen re-interview of September 9. The new 302 recited nearly verbatim the very inculpatory statement that had been disclosed to the defense one week earlier, in the government's letter of September 9:

> --"If the source had sent an invoice for the actual costs incurred by VECO, the source does not believe that STEVENS would have paid it because STEVENS would not have wanted to pay that high of a bill. The source thought that STEVENS would probably have paid a bill from VECO if it was a lesser amount than the actual costs." September 16, 2008 302 Memorandum (attached as Ex. G).

The 302 reflects that this was the only topic of the September 9 telephone interview. *Id.*

5. On September 17, in apparent compliance with the Court's order, the government produced 302s purporting to contain all of its *Brady* material. On the subject of whether Senator Stevens would have paid the bills, the government produced only the inculpatory statement in its brand new September 16 memorandum and not the two prior exculpatory statements that directly contradicted it. Indeed, one of those prior statements (the one relating to John Hess) was affirmatively redacted from the 302 that was provided to the defense, *compare* March 1, 2007 302 Interview Memorandum at 2 (unredacted) (attached as Ex. B) *with* March 1, 2007 302 Interview Memorandum at 2 (redacted) (attached as Ex. H); the interview memorandum containing the other statement was simply not provided to the defense at all.

6. The conclusion is unmistakable. The government intentionally chose to suppress the critical exculpatory information that Bill Allen believed Senator Stevens would have paid VECO bills if they had been sent. The government did so by procuring a new and inconsistent statement from Mr. Allen on the eve of producing *Brady* material, and then turning

over to the defense only the newly-created, inculpatory statement while affirmatively redacting and withholding the earlier, exculpatory statements. The government then called Bill Allen to the stand, on September 30 and October 1, and elicited dramatic testimony about why he did not send bills to Senator Stevens:

> Q. Mr. Allen, do you remember having a conversation with Mr. Persons after you got the [October 2, 2002] note from Senator Stevens?
>
> A. Yes.
>
> Q. What did Mr. Persons tell you?
>
> A. He said oh, Bill, don't worry about getting a bill. He said, Ted is just covering his ass. Maybe I shouldn't say ass, but that's ...

Hr'g Tr. (Oct. 1, 2008 AM), at 52:19-25 (attached as Ex. I).

Only afterwards – when the government had no choice – did the government provide the earlier 302s containing the information that it had concealed. On the night of October 1, just before it would have been required to turn over the unredacted 302s as Jencks material for two government agents it had told the Court it would be calling as witnesses, the government wrote to the defense and produced Allen's prior statements that he believed Senator Stevens would have paid VECO bills. E-mail from B. Morris to R. Cary, October 1, 2008 (11:29 p.m.) (and enclosed documents) (attached as Ex. J).

7. At the hearings on October 2, the government offered two excuses for its conduct. First, the government repeatedly claimed that the suppression of Mr. Allen's exculpatory statements had been a "mistake." *See* Hr'g Tr. (Oct. 2, 2008 AM) at 19:1-3 ("No. I really don't know how to fully explain it. It was just a mistake.") (attached as Ex. K); Hr'g Tr. (Oct. 2, 2008 PM) at 27:13, 27:16-19, 29:2 (attached as Ex. L). The above facts show that it

cannot have been a mistake. The government intentionally covered up those statements and procured a new one from Mr. Allen that it preferred.

Second, the government contended that the hidden exculpatory statements are "cumulative" of a disclosed exculpatory statement by Mr. Allen that "TED STEVENS wanted to pay for everything he got." Sept. 9, 2006 302 Memorandum at 4 (attached as Ex. M); *see* Hr'g Tr. (Oct. 2, 2008 PM) at 20 (attached as Ex. L). That argument is both wrong and highly disingenuous in light of the government's conduct. The disclosed statement is far more vague, and is certainly no substitute, for an affirmative statement that Senator Stevens would have paid the bills if they had been sent, particularly because the government's September 9 disclosure and September 17 302 directly contradicted that hidden information. Moreover, even the vague statement was not disclosed in the government's September 9 letter, which purported to summarize all of the *Brady* information the government located after it "completed its review of agent notes, formal memoranda, and grand jury transcripts for *Brady/Giglio* material." Letter from Ms. Morris of Sept. 9, 2008 at 1 (attached as Ex. E).

The defense's opening statement focused heavily on the theme that the Senator and Mrs. Stevens paid every bill they received. This information from Bill Allen would have contributed significantly to this theme had it been revealed prior to trial.

8. Also at the hearing on Thursday, October 2, the Court inquired about whether the government had prevailed upon Allen to change his story on the same day it sent the September 9 *Brady* letter. When asked the direct question whether Allen had been interviewed on September 9, Ms. Morris first expressly denied it, then equivocated and changed the subject.

> MS. MORRIS: . . . What I'd like to bring to your attention, Judge, is that information was in the September 9th, 2008 letter that I sent to Mr. Romain, but on September –

> THE COURT: Was Allen interviewed that day?
>
> MS. MORRIS: No. No. He was not interviewed that day.
>
> THE COURT: He was not interviewed.
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> MS. MORRIS: That was when we compiled the letter that had the -- it was the six-page -- five-page letter.
>
> THE COURT: Because a reader would look at that and say, well, Allen was just interviewed by the FBI agent, isn't that --
>
> MS. MORRIS: No, sir. It was in 2006 and beyond when those statements were made, but in -- September 17th of this year -- September 17, '08, pursuant to your order to provide them the redacted 302s, the government gave the defendant a 302, a redacted 302 --
>
> THE COURT: I'm sorry, but this 302, this 1023 or whatever it is, says the contact date was September 9th, 2008. It appears to be an interview with Allen by an FBI agent September the 9th of this year.
>
> MS. MORRIS: I'm not sure, but I'll double check, Judge, but if I could just explain to you what was provided to them.
>
> THE COURT: All right.

Hr'g Tr. (Oct. 2, 2008 PM) at 19:17 – 20:16 (emphasis added) (attached as Ex. L). To our knowledge, the government has not seen fit to correct the statement that Allen "was not interviewed that day," which goes to the heart of the intentional misconduct in this case. Of course, we now know the government did re-interview Bill Allen on September 9, and procured from him the brand new statement, inconsistent with the earlier statements the government intentionally hid.

9. Indeed, far from correcting any misimpression, Ms. Morris's declaration of Thursday afternoon further obfuscates the issue. The Court ordered the government to file a

"declaration under oath setting forth the source and/or sources for the summary information provided on page 3, paragraph 17(c) of the government's September 9, 2008 letter." Minute Order, October 2, 2008. Ms. Morris's declaration states that her September 9, 2008 *Brady* summary letter was "based on information set forth in five 302 interview reports prepared by federal agents with the Federal Bureau of Investigations." Decl. of Brenda K. Morris (Oct. 2, 2008) (attached as Ex. N). Despite Ms. Morris's focus on "five 302 interview reports," it is obvious that paragraph 17(c) of the letter – the paragraph as to which the Court required a declaration – is based entirely on only one interview of Bill Allen that took place on September 9, 2008 – the same day she wrote the letter. *See* language quoted *supra*, p. 3-4. As described above, moreover, the September 9 interview was not reduced to a 302 memorandum until a week after paragraph 17(c) was written and sent to the defense. While not literally false, in light of the facts set forth above, Ms. Morris's declaration can only be described as highly misleading.

When Ms. Morris responded to queries from the Court, mere minutes after submitting her declaration, she crossed the line from highly misleading to flatly false. At Thursday afternoon's hearing, the Court asked Ms. Morris whether Mr. Allen's statements summarized in paragraph 17(c) were in fact made very recently:

> THE COURT: But that statement was made very late by Allen, though, wasn't it; that statement?
>
> MS. MORRIS: No, Judge. It was, actually, Mr. Allen -- there were like five different 302s that we pulled f[ro]m to get the information that was in 17(c), and you asked that I submit an affidavit -- we were having some trouble, some difficulty getting it filed, our computer system kept crashing, but I think we have copies to pass up to the Court. What I'd like to bring to your attention, Judge, is that information was in the September 9th, 2008 letter that I sent to Mr. Romain, but on September –

Hr'g Tr. (Oct. 2, 2008) at 19:9-19 (emphasis added) (attached as Ex. L). This was simply not true. We now know that not one 302 in existence as of the date of that September 9 letter supported ¶ 17(c); it was only the single telephone interview that day, which had not yet even been formalized into a 302, that supported such a statement.

B. Intentional Suppression of *Brady* Material Regarding David Anderson, and Knowing Presentation of False Evidence at Trial.

The government produced for the first time on Friday the grand jury testimony of VECO employee Dave Anderson who, as the Court is aware, features prominently in the government's story of the Girdwood renovations. Had the Court not ordered production of grand jury transcripts on Thursday, the defense never would have seen this transcript, because the government would not have called Anderson as a witness and no Jencks production for him would have been required. The transcript demonstrates that the government once again withheld vital exculpatory information and knowingly put on false and misleading evidence in this trial.

1. The Court will recall that the government introduced evidence at trial, through Cheryl Boomershine, that VECO expended $188,000 in labor and expenses billed to its internal codes for the Girdwood project. Hr'g Tr. (Sept. 26, 2008 PM) at 6-7 (attached as Ex. O). Through Ms. Boomershine, the government admitted numerous Veco invoices and a job cost detail report generated from Veco's accounting software. *See* GX 177; GX 1058 - GX 1093; Hr'g Tr. (Sept. 26, 2008 PM) at 15 (attached as Ex. O). The $188,000 figure included timesheets for both Rocky Williams and Dave Anderson. Ms. Boomershine specifically testified about time invoiced by Williams and Anderson. She described Anderson as a former VECO employee, who is described on the accounting records as a "welder" and whom she recalled to be a welder. Hr'g Tr. (Sept. 26, 2008 PM) at 29-30 (attached as Ex. O). The government admitted these records as "business records" under the hearsay exception of Fed. R. Evid. 803(6), meaning that the source

of the information or the circumstances of its preparation must not "indicate lack of trustworthiness."

2. By happenstance, defense counsel heard from Rocky Williams on September 28, after government counsel had sent him away to Alaska on the day of opening statements. As detailed in a prior motion, Mr. Williams informed defense counsel that he did not spend nearly as much time working on the Girdwood renovations as his timesheets reflected – as the government well knew. *See* Senator Stevens's Motion to Dismiss Indictment Or For a Mistrial (Sept. 28, 2008) (Dkt. No. 103). As a consequence of this misconduct, the Court permitted the defense to recall Ms. Boomershine to the stand and elicit that she was not personally aware of how much time Rocky Williams spent on the Girdwood renovations.

At that time, the government did not disclose, and the defense was not aware, of critical exculpatory information regarding Dave Anderson's alleged time billed to the Girdwood project. This information first came to light this weekend, after the government produced Anderson's grand jury transcript to defense counsel pursuant to the Court's order.

3. Dave Anderson's grand jury testimony is even more damning to the government than the information from Rocky Williams. Anderson testified that he was in Portland, Oregon, 1,500 miles from Alaska, for a two-to-three-month period while the Girdwood renovations were taking place, from mid-to-late September 2000 until shortly before Christmas.

> Q: Did there come a time about the time when the garage was skinned in and finished, as you were trying to beat the snow there in that fall, that you left the Girdwood work site to go do something else for VECO?
>
> A: Yes. Uh-huh.
>
> * * * * * *
>
> Q: So you were down in Portland for quite awhile then?

> A: Yeah, a couple of months.
>
> * * * * * *
>
> Q: So, does it sound right, if you came back a little bit before Christmas, but after Thanksgiving from Portland, and you were gone down there for a couple of months, it sounds like you would have left Alaska sometime in late September to mid September?
>
> A: Yeah, that would be about right.

Grand Jury Testimony of David Anderson, December 6, 2006 at 82-83 (attached as Ex. P).

During that same period, VECO's accounting records, which the government offered into evidence at trial as supposedly reliable business records, reflect that Anderson billed virtually full time to the Girdwood project codes. *See* GX 1064 - GX1066. All of that time – a total of 566 hours for October through December 2000 – is included in the $188,000 figure that the government offered into evidence through Ms. Boomershine. *See* GX 177.

The government knew that this evidence was false. Three members of the prosecution team were present in the grand jury room when Dave Anderson testified. *See* Dec. 6, 2007 Grand Jury Transcript, Cover (attached as Ex. P). Yet the government never produced the transcript, or any summary of this information, as *Brady* material. It affirmatively put Ms. Boomershine's testimony, and the false accounting records, into evidence without qualification – and despite knowing that those records were inaccurate. Indeed, that information would have destroyed the reliability of the VECO accounting records and rendered them inadmissible as business records under Fed. R. Evid. 803(6) and Fed. R. Evid. 403.[2]

[2] It appears that the government also relied on these false accounting records in the grand jury, and thus procured the indictment based on inaccurate information. *See* Mary Beth Kepner Grand Jury Tr. (July 25, 2008) at 37 (witness agreeing "that an aggregate value of those things of value from 1999 to 2006 is an amount greater than $250,000") (attached as Ex. Q). Defendant is considering a separate motion based on this improper conduct in the grand jury.

4. Notably, although the government critically relied on these accounting records, it chose not to call the two witnesses whose timecards made up a substantial part of the billings reflected on those records. Rocky Williams and Dave Anderson each had provided the government with clear testimony that the accounting records were false. Yet, far from calling Williams and Anderson to the stand, the government actually sought to prevent the defense from doing so.

The Court is well aware of the government's role in sending Rocky Williams back to Alaska. The government similarly hid Dave Anderson's whereabouts from the defense. Prior to trial, defense counsel searched high and low for Mr. Anderson – a cooperating government witness – to serve him with a subpoena. When he could not be found, counsel emailed the government to ask for his contact information; government counsel refused to provide it. *See* Sept. 6, 2008 Email from Mr. Cary to Ms. Morris; Sept. 6, 2008 Email from Ms. Morris to Mr. Cary ("The government does not and cannot represent Mr. Anderson. We cannot accept service for him. Also, it is not appropriate for the government to provide addresses of private citizens to defendants. You should subpoena Mr. Anderson as you would any other witness you desire to appear at trial.") (attached as Ex. R). Only after the Rocky Williams caper drew a strong rebuke from the Court did the government make him available last week – <u>in Washington, D.C.</u> – to receive a defense subpoena. Sept. 29, 2008 Email from Mr. Edward Sullivan to Mr. Cary ("If defendant is interested in serving a trial subpoena on Dave Anderson, please let us know and we will set up a time when your process servers can provide him with a subpoena outside our office.") (attached as Ex. S). And only after the Court ordered production of grand jury transcripts did the government disclose the transcript that reveals the critical hidden *Brady* material that it had learned long ago from Mr. Anderson.

5. The government's intentional misconduct prevented the defense from learning, before trial, that the critical VECO accounting records were false. Defense counsel thus did not have this information when government counsel told the jury in opening statement that VECO had provided $188,000 in unpaid time and expenses on the renovations.

> Because the public couldn't know the senator wasn't paying his bills for its work during that same time frame, VECO kept track of most of the costs right down to the penny. You'll see VECO's internal billing system and accounting records for the chalet project, and you'll see that VECO's portion of the work during this period of time and VECO's cost totaled more than $188,000, again during this period of time. That figure, $188,000, could be possibly a little high because VECO built oil wells, not houses. They probably could have been a little more efficient at times, but, hey, the cost is always good when the price is free. So you'll always learn that the same figure -- you may also learn that the same figure is a little low because the architect, Hess' time was billed in there along with the electricians and some other stuff, but at the end of the day, whether it's $188,000 or whether it's $240,000 or whether it's $120,000, the defendant still got it for nothing. He had to disclose it, was obligated to disclose it, but instead he chose not to.

Hr'g Tr. (Sept. 25, 2008 AM) at 42:2-19 (emphasis added) (attached as Ex. T). It is too late to remedy the prejudice to the defense at this point, over a week after the jury heard the opening statements, and a week after the jury heard Ms. Boomershine's testimony and saw the false accounting records. The trial is fundamentally flawed and should not be allowed to continue.

C. Intentional Suppression of Additional Significant *Brady* Material.

The government was ordered to produce all of its 302s containing exculpatory information by September 17. Hr'g Tr. (Sept. 16, 2008) at 30:12-14 (attached as Ex. F). The government produced 17 redacted interview memos and 11 redacted grand jury transcripts on that due date[3] and claimed that its production was complete. Last Thursday, after the

[3] The government had previously produced two unredacted grand jury transcripts to the defense.

government's failure to disclose Bill Allen's statements had come to light, the Court ordered the government to produce all of its interview memoranda, unredacted. In response, the government produced over 300 memoranda and 83 grand jury transcripts. Their contents reveal many additional examples of *Brady* information that was improperly withheld. Some of the more significant examples are as follows:

- Electrician Roy Dettmer, who testified that he spent some four months on the Girdwood renovations as a VECO employee, told the government that, on one occasion, he "was installing light fixtures in the garage and CATHERINE STEVENS inquired as to the cost for the light fixtures that were going to be installed in the residence" – obviously indicating that she intended to pay the bill. August 5, 2008 302 Interview Memorandum at 2 (attached as Ex. U). The government did not reveal this information, and thus Senator Stevens was unable to cross-examine Mr. Dettmer with it.

- The government contended in its Rule 404(b) notice that in 2005, Bill Allen traded a new Jeep Cherokee to Lily Stevens for the 1999 Land Rover and a check for $13,000, in what the government characterizes as a secretive, sweetheart deal. Government's Rule 404(b) Notice (Dkt. No. 20) at 5-6. The government has listed VECO employee Michael Richeson, who helped Allen effectuate this transaction, *see id.*, as one of its remaining case-in-chief witnesses. The newly disclosed 302s reveal, in direct contrast to the government's theory, that Bill Allen told the government that "he thinks the transaction was legitimate and that TED STEVENS received no financial benefit as a result." Sept. 9, 2006 302 Interview Memorandum at 5 (attached as Ex. M).

- VECO architect John Hess told the government that Bob Persons told him that "his (PERSONS) job was to make STEVENS happy since he (STEVENS) does not have a

lot of time to be bothered with the details of the remodel." February 9, 2007 Interview Memorandum at 3 (attached as Ex. V). This of course directly supports the defense theme that Senator Stevens did not know the details of the renovations that were happening 3,300 miles away from Washington, D.C. Yet the defense did not have this information with which to cross-examine Mr. Hess.

- The government's Rule 404(b) Notice alleges that Senator Stevens asked Dick Ladd (referred to as "Lobbyist A" in the Notice) to ask Bill Allen to find employment in Phoenix for the Senator's son. Dkt. No. 20 at 6-7. Dick Ladd told the government that he "was not tasked by Senator STEVENS to help him find Walter a job but merely made the comment in passing." September 19, 2006 Interview Memorandum at 2 (attached as Ex. W).

- Chris Van Imhof told the government that Senator Stevens "asked VANIMHOF if [he] knew a company that could fix a problem he was having with a gutter on his house and the heat tape system" and that Senator Stevens "was adamant that he wanted to make sure that whoever did the work provided him a bill so he could pay for the repairs." June 1, 2007 Interview Memorandum at 1 (attached as Ex. X). This information was not provided to the defense, even though the government provided other information from the same 302 of Mr. Van Imhof in its September 9 letter, and specifically redacted the above statement when it produced the 302 on September 17.

All of these statements are classic *Brady* material that the government was ordered to produce before trial and did not. It is reasonable to infer, from the government's repeated and extensive pattern of gross *Brady* failures, and from the conclusive evidence of intentional misconduct detailed above, that these *Brady* violations too were intentional.

* * * * *

From a review of this evidence, there can be no doubt that the government has intentionally and affirmatively concealed from defense counsel significant exculpatory information necessary to defend this case, and has even gone so far as to knowingly present false evidence at trial. Defense counsel have suffered substantial prejudice as a result. Not least, counsel were deprived of the ability to use this information in opening statement, to prepare the defense fully before trial, and to cross examine government witnesses, including some (Dettmer, Hess, Boomershine) who have already testified. Regardless of prejudice, however, this trial cannot go on. Representatives of the Department of Justice have intentionally subverted the administration of justice in their zeal to obtain a conviction in this high-profile case. Our criminal justice system places enormous power and responsibility in the hands of federal prosecutors on the assumption that they will exercise their authority wisely and in the interest of justice. When that power is abused, it must be swiftly and sternly corrected. Only a dismissal can prevent this sort of misconduct from recurring.

ARGUMENT

The indictment in this case charges Senator Stevens with intentionally concealing material information that he was required to disclose to the government. Sadly and ironically, it is the government that has intentionally concealed material information that it was required to disclose to the defense. If the sanction for Senator Stevens's alleged concealment was indictment and trial, the minimum sanction for the government should be to dismiss that indictment and to end that trial.

There must be an end to this behavior. How many times can the government defy the orders of this Court and its constitutional obligations before dismissal ensues?

I. THE INDICTMENT SHOULD BE DISMISSED.

A. The Applicable Law.

Federal courts must "protect[] the judicial process from the stigma of illegal or unfair government conduct." *United States v. Linton*, 502 F. Supp. 861, 865-66 (D. Nev. 1980). Such misconduct can take several forms. The most serious illegal or unfair government conduct is "outrageous" misconduct that "shocks the conscience" and is so intolerable that it violates the defendant's due process rights under the Fifth Amendment. *See United States v. Chapman*, 524 F.3d 1073, 1084 (9th Cir. 2008) ("a district court may dismiss an indictment on the ground of outrageous government conduct if the conduct amounts to a due process violation"); *United States v. Boone*, 437 F.3d 829, 841 (8th Cir.), *cert. denied*, *Washington v. United States*, 127 S. Ct. 172 (2006); *United States v. Voigt*, 89 F.3d 1050, 1064-65 (3d Cir. 1996) (government conduct that "shocks the conscience" may violate defendant's due process rights). The existence of "outrageous" conduct is determined on a case-by-case basis according to the totality of the circumstances. *See United States v. Valencia-Vergara*, No. 8:06-CR-279-T-177TBM, 2007 WL 177790, at *2 (M.D. Fla. Jan. 19, 2007); *United States v. Koubriti*, 435 F. Supp. 2d 666, 678 (E.D. Mich. 2006) (*citing United States v. Tobias*, 662 F.2d 381, 387 (5th Cir. 1981)).

There are various available remedies for such conduct, up to and including dismissal of the indictment. *See United States v. Wang*, No. 98 CR 199(DAB), 1999 WL 138930, at *37 (S.D.N.Y. Mar. 15, 1999) (finding a due process violation and dismissing an indictment due to the government's failure to provide defense counsel with "material information" until the "eve of trial," and its delay in disclosing that its key witness was unavailable and would not be called to testify); *United States v. Sabri*, 973 F. Supp. 134, 147 (W.D.N.Y. 1996) (finding a due process violation and dismissing one count of an indictment based upon the government's outrageous conduct in engaging the defendant's civil attorney to

accumulate evidence for use against him in the criminal prosecution); *United States v. Marshank*, 777 F. Supp. 1507, 1524 (N.D. Cal. 1991) (finding a due process violation and dismissing an indictment because the government interfered in the defendant's attorney-client relationship by using his former attorney to obtain incriminating information upon which the indictment was based); *see also United States v. Lyons*, 352 F. Supp. 2d 1231, 1251-52 (M.D. Fla. 2004) (finding a due process violation, dismissing the remaining counts of the indictment, and refusing to order a new trial because of the government's multiple and flagrant *Brady* and *Giglio* violations).

Even where government misconduct is not sufficiently "outrageous" to violate due process, the Court under its supervisory powers may impose various sanctions, including dismissal. *United States v. Chapman*, 524 F.3d 1073, 1084 (9th Cir. 2008) (affirming dismissal pursuant to the court's supervisory powers due to government's violation of discovery obligations and flagrant misrepresentations to court); *Government of Virgin Islands v. Fahie*, 419 F.3d 249, 258 (3d Cir. 2005) ("A trial court need not rely on *Brady* to justify dismissal of an indictment as a remedy for improper prosecutorial conduct; it may also remedy Rule 16 discovery violations under its supervisory powers."); *United States v. Restrepo*, 930 F.2d 705, 712 (9th Cir. 1991) ("[D]ismissal of an indictment because of outrageous government conduct may be predicated on alternative grounds: a violation of due process [such as a *Brady* violation] or the court's supervisory powers."); *see also Sabri*, 973 F. Supp. at 148 (invoking supervisory powers to dismiss one count of indictment due to government's utilization of defendant's attorney, who was representing him in civil immigration proceedings, to gather evidence for use against defendant in criminal prosecution); *United States v. Breslin*, 916 F. Supp. 438, 446 (E.D. Pa. 1996) (invoking supervisory powers to dismiss indictment due to government's abrogation of

grand jury's independent function); *Marshank*, 777 F. Supp. at 1529-30 (invoking supervisory powers to dismiss indictment because government violated state ethics rules).

B. The Indictment Should Be Dismissed as a Sanction for the Government's Repeated and Flagrant Intentional Misconduct.

1. Presentation of false testimony and other conduct prejudicial to the administration of justice.

In *Giglio v. United States*, 405 U.S. 150 (1972), and *Napue v. Illinois*, 360 U.S. 264 (1959), the Supreme Court held that the Due Process Clause forbids the government from introducing or failing to correct testimony that it knows or reasonably should know to be false.

> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

Napue, 360 U.S. at 1177 (citations omitted) (emphasis added); *see also id.* ("It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair." (*quoting People v. Savvides*, 136 N.E.2d 853, 854-55 (N.Y. 1956)); *United States v. Anderson*, 509 F.2d 312, 326-27 (D.C. Cir. 1974) ("The knowing use of perjured testimony to secure a conviction is a denial of due process of law, necessitating, of course, a new trial. This is not to suggest that a new trial is in order only upon an occurrence of constitutional dimension. There is respectable authority for the proposition that a new-trial motion on the

ground of false testimony, even without a claim that the prosecutor knew of the falsity, should under some conditions be granted.").

Under the circumstances of this case, the appropriate remedy is dismissal. "Repeated instances of deliberate and flagrant misconduct justify dismissal of the indictment." *United States v. Omni Intern. Corp.*, 634 F. Supp. 1414, 1438 (D. Md. 1986) ("Court decisions emphasize the unifying premise in all of the supervisory power cases—that although the doctrine operates to vindicate a defendant's rights in an individual case, it is designed and invoked primarily to preserve the integrity of the judicial system. The Court has particularly stressed the need to use the supervisory power to prevent the federal courts 'from becoming accomplices to such misconduct.'" (citations omitted; emphasis added)).

In *Omni International Corp.*, the government altered documents before turning them over to the defendant. In this case, the government concealed exculpatory information and re-interviewed Bill Allen, its key witness, with the effect of changing a key aspect of his prior statements (the re-interview was conducted on September 9, 2008, in preparation for the government's *Brady* disclosures). This type of behavior received a strong rebuke in *Omni International*:

> When oral argument on the motion was held on June 25, 1985, the Government did concede that it was wrong to prepare memoranda as had been done. But the Government recommends almost a "harmless error" approach as a sanction for this egregious error, contending that no harsh remedy should follow because all underlying documents were finally produced to the defendants.
>
> The Court rejects this notion. Absolutely no justification exists for revising documents that are being turned over to an adversary in litigation once the issue has been raised, particularly without notice of revision to the opposition. The Government offers no excuse, other than to maintain that the changes were made for the sake of accuracy. However, the unrevised documents were apparently sufficient for review by the Department of Justice as it decided whether or not to approve the prosecution. The only possible

> conclusion that the Court can reach is that changes were made to strengthen the Government's position at the hearing, even though the effect of the alterations was minimal. Similarly, there is no justification for creating documents during this time period, without indicating so, no matter what the motive.

Omni Intern. Corp., 634 F. Supp. at 1439 (D. Md. 1986) (emphasis added).

As described above, in this case the government has engaged in *Omni International*-type gross violations—including: (1) introducing VECO accounting records that the government knew to be false and misleading; (2) re-interviewing its key witness to change a key aspect of his prior statements, and then disclosing only the new statement to the defense while concealing the prior ones; (3) removing Rocky Williams from the Court's jurisdiction, despite a defense subpoena and without disclosing Mr. Williams's exculpatory testimony and statements; (4) failing to disclose Dave Anderson's exculpatory grand jury testimony while denying the defense access to him; (5) affirmatively redacting exculpatory statements in Bill Allen-related disclosures; and (6) numerous other *Brady* violations detailed above. There is little distinction between the government's misconduct in this case and the "[r]epeated instances of deliberate and flagrant misconduct" found in *Omni*. The result should be the same: the government's misconduct "justif[ies] dismissal of the indictment." *Omni Intern. Corp.*, 634 F. Supp. at 1438.

2. Repeated and flagrant *Brady* violations more severe than the government's conduct in *United States v. Chapman*.

"Brady violations are just like other constitutional violations. Although the appropriate remedy will usually be a new trial, a district court may dismiss the indictment when the prosecution's actions rise . . . to the level of flagrant prosecutorial misconduct." *United States v. Chapman*, 524 F.3d 1073, 1086 (9th Cir. 2008).

In *Chapman*, as here, the government agreed to produce *Brady* material. At early stages of the trial, however, there were indications that the government had not fully complied with its *Brady* obligations.

> On January 23, 2006, one day before the trial was set to begin, the government announced that it would present its case agent, Michael Payne, to testify. Defendants objected that Payne was not on the witness list and that none of his statements, memoranda, or notes has been disclosed, as required by *Jencks*. The lead Assistant United States Attorney ("AUSA") disagreed and represented to the court that all materials relating to Payne had been turned over. Over the defense's continued protestations, the district judge stated that the AUSA "says that he's done it."

524 F.3d at 1078. Other hints of discovery violations later surfaced.

> On February 3, the AUSA elicited testimony from a prosecution witness, Lewis Eslick, about a prior conviction. Defendants objected that they had not received information from the government about that conviction and that this was the second time this had occurred (the day before, the AUSA had attempted to elicit information about a prior conviction from Doug Ansell on redirect examination, but the court sustained an objection that it was beyond the scope of the cross-examination). The district court struck the questioning as unduly prejudicial and reminded the AUSA of his obligation to disclose such material.

Id.

> On February 6, in the trial's third week, matters came to a head. While the government's twenty-fifth witness, Michael Haynes, was testifying for the prosecution, the AUSA inquired about a prior conviction. Defendants again objected, claiming they had not been provided with the relevant material under *Brady* and *Giglio*. The AUSA originally responded that he did not believe the defense objection was "accurate." However, when the district court asked for proof and proposed a brief recess so that the government could produce documentation showing that the relevant material had been disclosed, the AUSA abruptly changed course:
>
> > AUSA: Your Honor, if I could just advise the Court <u>in an abundance of caution</u>[4] rather than find the record of what we

[4] The Ninth Circuit took issue with this language. "When the district court finally asked the AUSA to produce verification of the required disclosures, he attempted to paper over his

> turned over, we'll make another copy of everything right now and provide it to the defense counsel immediately.
>
> COURT: Well, but it's supposed to be turned over. It's not a matter of doing it now.

The judge declared a brief recess and the court reconvened outside the presence of the jury. The following exchange took place:

> AUSA: Your Honor, we cannot find a record of making this information available to defense counsel. We believe, however, that we did or it was certainly our intention to do so.
>
> COURT: But your belief isn't good enough. This stuff has to be disclosed to them.
>
> AUSA: And we've disclosed it now, your Honor.
>
> COURT: Well, I understand, but that's late. I'm [not] going to say it's to[o] late, but it's late.
>
> AUSA: Your Honor, we apologize.

Id. at 1078-79. The next day, Chapman's counsel alerted the court to 650 pages of newly produced impeachment-type *Brady* material. The pages consisted of rap sheets, plea agreements, cooperation agreements, and other information relating to government witnesses, including at least three important witnesses whose testimony was already complete. *Id.* at 1079.

"Counsel argued that the defense had been prejudiced by this failure to timely disclose the *Brady* and *Giglio* material; that recalling the prior witnesses was impractical and would not cure the error; and that a mistrial would only reward the government by giving them a second chance to try their case; therefore, dismissal of the indictment was the only appropriate

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mistake, offering 'in an abundance of caution' to make new copies . . . ." *Chapman*, 524 F.3d 1085. The government has similarly "attempted to paper over [its] mistake" in this case. *See* Oct. 1, 2008, 11:29 p.m. Letter from B. Morris to R. Cary ("During the course of that re-review, we have located two memoranda that, out of an abundance of caution, we are providing to you in redacted form.") (attached as Ex. J).

remedy." *Id.* Counsel for Chapman's co-defendant argued that "these late disclosures made the trial 'nothing more than a colossal waste of everybody's time.'" *Id.*

In *Chapman*, the Ninth Circuit was offended by the government's attempts to minimize its misconduct.

> [T]hese attorneys have attempted to minimize the extent of the prosecutorial misconduct, completely disregarding the AUSA's repeated misrepresentations to the court . . . . Instead, they claim for the first time on appeal that *none* of the 650 pages were required disclosures under *Brady*/*Giglio*. When the district court first indicated that it was inclined to dismiss the indictment, it noted that it was 'concerned that any lesser sanction would be like endorsing the AUSA's conduct.' The government's tactics on appeal only reinforce our conclusion that it still has failed to grasp the severity of the prosecutorial misconduct involved here, as well as the importance of its constitutionally imposed discovery obligations. Accordingly, although dismissal of the indictment was the most severe sanction available to the district court, it was not an abuse of discretion.

Id. at 1088.

The District Court in *Chapman* dismissed the indictment (three weeks into trial). The Ninth Circuit affirmed. No lesser sanction is adequate here; any lesser sanction "would be like endorsing the [government's] conduct." *Id.* at 1088.

Senator Stevens now knows that the government's misconduct in this case is worse than that in *Chapman* because the *Brady* material that the government concealed and withheld in this case was exculpatory material, rather than impeachment material at issue in *Chapman*. The exculpatory material at issue here goes directly to the merits of the government's charges against Senator Stevens. In addition, the government's conduct in this case was intentional and includes false evidence and concealment in addition to *Brady* violations. If dismissal was appropriate in *Chapman*, it is more than appropriate here.

3. Intentional misconduct.

The evidence shows unmistakably that the government intentionally and affirmatively concealed crucial *Brady* material from Senator Stevens, and the government capitalized on its concealment by intentionally presenting fundamentally misleading evidence to the jury, while failing to disclose to defense counsel the very information needed to understand and rebut that evidence.

United States v. Morrison, 449 U.S. 361 (1981), teaches that the intentional nature of the government's misconduct affects the appropriate remedy. The Court noted, for example, that a "pattern of recurring violations by investigative officers . . . might warrant the imposition of a more extreme remedy in order to deter further lawlessness." *Id.* at 365 n.2. "This statement suggests that the Court was concerned with both prejudice and deterrence, and that when both of those factors call for a particularly harsh sanction, dismissal—the harshest available sanction for a *Brady* violation—may be proper." *Government of Virgin Islands v. Fahie*, 419 F.3d 249, 253 (3d Cir. 2005).

Courts have not hesitated to dismiss indictments when faced with similarly severe constitutional violations. For example, in *United States v. Wang*, No. 98 CR 199(DAB), 1999 WL 138930, at *37 (S.D.N.Y. Mar. 15, 1999), the court found a due process violation and dismissed an indictment due to the government's failure to provide defense counsel with "material information" until the "eve of trial," and its delay in disclosing that its key witness was unavailable and would not be called to testify. Similarly, in *United States v. Lyons*, 352 F. Supp. 2d 1231, 1251-52 (M.D. Fla. 2004), the court dismissed an indictment due to the government's multiple and flagrant *Brady* and *Giglio* violations. *See also United States v. Sabri*, 973 F. Supp. 134, 147 (W.D.N.Y. 1996) (finding due process violation and dismissing one count of indictment based on government's outrageous conduct in engaging defendant's civil attorney

to accumulate evidence for use against him in criminal prosecution); *United States v. Marshank*, 777 F. Supp. 1507, 1524 (N.D. Cal. 1991) (finding due process violation and dismissing indictment where government interfered in the defendant's attorney-client relationship by using his former attorney to obtain incriminating information upon which indictment was based).

Here, the government's repeated, flagrant, and intentional misconduct requires the sternest possible remedy of dismissal.

II. IN THE ALTERNATIVE, THE COURT SHOULD DECLARE AN IMMEDIATE MISTRIAL AND SHOULD ORDER AN EVIDENTIARY HEARING TO CONSIDER DISMISSAL AND OTHER SANCTIONS.

If the Court denies Senator Stevens's motion for dismissal, the Court should—at a minimum—grant a mistrial to remedy the government's flagrant and repeated misconduct, and order an evidentiary hearing to consider dismissal and other sanctions. This trial is broken; it cannot be repaired. Under these circumstances, a new trial is required. *Giglio v. United States*, 405 U.S. 150, 153 (1972) (noting that "*Brady v. Maryland*, 373 U.S. at 87, held that suppression of material evidence justifies a new trial irrespective of the good faith or bad faith of the prosecution." (internal quotations omitted)); *United States v. Andrews*, 532 F.3d 900, 905 (D.C. Cir. 2008) ("If the undisclosed evidence is material, a new trial is required.") (*citing Kyles v. Whitley*, 514 U.S. 419 (1995)); *Government of Virgin Islands v. Fahie*, 419 F.3d 249, 252 (3d Cir. 2005) ("[T]he Court has assumed that *Brady* violations that have affected the judgment of a jury normally will be remedied by a new trial . . . ."); *In re Sealed Case No. 99-3096*, 185 F.3d 887, 892 (D.C. Cir. 1999) ("If the undisclosed evidence is material, a new trial is required."); *United States v. Evans*, 888 F.2d 891, 897 n.5 (D.C. Cir. 1989) (appropriate relief for a *Brady* violation is a mistrial).

No remedy short of a mistrial can possibly cure the prejudice to the defense from the government's *Brady* failures and obfuscations. Had the government not repeatedly and

affirmatively concealed and withheld the *Brady* material, the critical material would have been a focus of the defense opening statement; would have altered the defense's preparation and investigation of the case; and would have deterred the government from searing into the jury's mind false and misleading testimony. Now that most of Mr. Allen's direct testimony is concluded, the defense is irremediably prejudiced in its cross-examination.

If the Court does not dismiss the indictment outright, therefore, it should first declare a mistrial and then order an evidentiary hearing to consider dismissal and other sanctions. In advance of any such hearing, the defense should be entitled to full discovery into all communications between the government and all witnesses.

CONCLUSION

For the foregoing reasons, the Court should dismiss the indictment.

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Respectfully submitted,

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