IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY IN SUPPORT OF SENATOR STEVENS'S MOTION TO DISMISS THE INDICTMENT DUE TO THE GOVERNMENT'S INTENTIONAL AND REPEATED MISCONDUCT

The government's Opposition brief is notable for its utter lack of contrition. Focusing on a lengthy legal discussion of the limits of the *Brady* doctrine – based on a standard which the Court already rejected when it ordered the government to comply with its *Brady* obligations as defined in *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005) – the Opposition barely tries to excuse the government's repeated intentional misconduct on the merits. Instead, the focus of the government's brief appears to be that it committed no wrongdoing at all, because the information that the government concealed from the defense supposedly was not required to be disclosed. This argument is as night from day to the government's repeated confessions of error on October 2. *See* Hr'g Tr. (Oct. 2, 2008 p.m.) at 27 (" It was a mistake. . . . Judge, it was a mistake. Again, if it was in any way intentional, we could have explained this away or rationalized it away as to why it didn't have to be turned over, and that's not—no, it was a mistake[.]"); *id*. at 29 (adding "It was bad judgment."); *id*. at 34.

We cannot tell which argument the government is running with – that its conduct was a mistake, or that it was intentional and justified – but neither squares with the evidence or the law.

1. The government cannot rebut the clear evidence that it intentionally disclosed only Bill Allen's inculpatory September 9 statement that Senator Stevens would not have paid a Veco bill, rather than Allen's earlier, exculpatory statements that Senator Stevens would have paid a bill. So it does not try. Instead, the government confusingly argues that the inculpatory September 9 statement was not a new statement at all, but was similar to statements Allen had made earlier. As an initial matter, this begs the question why the government chose to interview Allen about this one question on September 9, and why it disclosed the September 9 statement to the exclusion of all the others. Obviously this was intentional, and the government does not seriously argue otherwise.

In any event, the earlier statements the government points to are not equivalent to the September 9 statement. The February 28, 2007 statement that "Stevens told [Allen] that he needed to pay some of the source's invoices," Opp. at 12, is by no stretch of the imagination the same as the September 9 statement that "If [Allen] had sent an invoice for the actual costs incurred by VECO, [Allen] does not believe that STEVENS would have paid it because STEVENS would not have wanted to pay that high of a bill," Sept. 16, 2008 302, Mot. Ex. G (emphasis added). The September 9 statement is, however, directly contradictory to Allen's statements in the December 2006 and March 2007 memoranda that he believed the Senator would have paid a Veco bill if he had received one. *See* Motion at 2.

Nor is it remotely correct that the defense learned from the Girdwood search warrant affidavit that Allen believed Senator Stevens would have paid a Veco bill. The

referenced paragraph states only that Senator Stevens told Allen that he needed to reimburse him for some of Veco's expenses and asked for an invoice. It is not in dispute that Senator Stevens asked for invoices. Indeed, those requests were in writing. *See* GX 495, GX 509. But what Allen has placed in issue is whether Senator Stevens meant it when he asked for them. Allen testified at trial to his understanding that in making these requests, Senator Stevens was "just covering his ass." That is consistent with Allen's statement in the September 9 letter that Senator Stevens would not have paid a Veco bill, but directly inconsistent with the previous statements, which the government concealed, that Senator Stevens would have paid a Veco bill. Hard as the government may try, it cannot identify a disclosure that equates to what was concealed.

The chronology of events detailed in the Motion clearly shows that the government withheld this information intentionally and strategically. The convoluted rationalizations in the Opposition confirm the point.

2. The government cannot deny that it put on knowingly false evidence, in the form of Veco's accounting records that the government knew were grossly inaccurate. The Opposition argues (a) that the false evidence is somewhat less false than the defense makes it out to be, and (b) that defense counsel should have figured out on their own that the evidence was false. Again, the government's unfortunate response holds no water.

It is a non-starter for the government to argue that it offered the Veco accounting records, not to prove that Veco incurred $188,000 in labor and expenses but merely to "set forth what VECO's internal records reflected were costs charged to a particular cost code." Opp. at 15. This is wordplay. The government obviously introduced the records to suggest to the jury that they accurately portrayed Veco's costs. Otherwise, there was absolutely no reason to admit

them, and indeed they would have been inadmissible under Fed. R. Evid. 803(6), 403, and even 401 (since "what VECO's internal records reflected" is irrelevant unless it bears some relation to reality). The government does not deny that it knew the records were wildly inaccurate. It therefore indisputably proffered false testimony, and did so knowingly.

Notably, the government nowhere addresses the caselaw prohibiting such conduct by prosecutors. *See Napue v. Illinois*, 360 U.S. 264 (1959); cases cited Motion at 19-21.

Nor can the government deny that Dave Anderson's absence from Girdwood during a months-long period while he was billing substantial time to the project is highly exculpatory information that undermines the $188,000 figure. Instead, the government argues that the defense should have figured out that Anderson's time records were phony from various tidbits of information; but knowing, for example, that Dave Anderson was an alcoholic is not the same thing as knowing that he was not even in Alaska during much of the relevant period. *See* Opp. 16-17.[1] There is no excuse for not informing the defense of this, and there is no excuse for presenting the Veco accounting records as gospel when the government knows they are spurious.

Finally, it is hardly fair to claim that the defense should have sleuthed Dave Anderson's daily whereabouts when it could not locate him, despite extraordinary efforts, and when the government refused to make him available. The government nowhere denies that it prevented the defense from accessing Anderson, contending only that it was not required to disclose his whereabouts. Opp. at 19-20. The suggestion that, after all of its efforts to obscure Anderson's whereabouts, the government "[u]ltimately" produced him voluntarily – and not

[1] The suggestion that the defense supposedly should have learned this from a newspaper article, instead of from the government's obedience to its constitutional commands, Opp. 19, is meritless.

because of the Court's rebuke regarding Rocky Williams – is particularly insulting. *See* Opp. at 20.

3. The government arrogantly shrugs aside the other significant undisclosed *Brady* material in its 302s as "cumulative" or otherwise inconsequential. In fact, the information is highly significant, and its nondisclosure is inexcusable.

- Roy Dettmer's statement that Catherine Stevens asked him the cost of his work is highly significant to the defense theme that the Senator and his wife intended to pay all the costs of the renovations. Dettmer testified that he spent some four months on the renovations and the government has argued that the Senator and Mrs. Stevens did not pay for this. The undisclosed statement shows that any non payment was unintentional, i.e., not "knowing and willful." Defense counsel needed this critical information to cross-examine Dettmer.

- Bill Allen's statement in the 302 that the 2005 Land Rover-for-Jeep Cherokee transaction was legitimate is brand new to the defense. Certainly it is not cumulative of statements regarding the dollar value of the cars culled from various disparate documents. *See* Opp. 21-22. Again, the government expects defense counsel to deduce a straightforward piece of critical exculpatory information from multiple stray comments that, even when assembled, do not add up to the same thing as what was withheld.

Notably, the government until today had maintained that it planned to call Michael Richeson – the witness who effectuated the Land Rover-for-Jeep Cherokee transaction that is detailed publicly in the government's Rule 404(b) Notice. This afternoon, after the defense filed its motion pointing out that Mr. Allen claimed the transaction was legitimate, the government suddenly announced that it would not be calling Mr. Richeson after all.

- John Hess's statement that he was told Senator Stevens was too busy to deal with the details of the renovations is directly supportive of the defense theme, discussed in the opening statement, that the Senator was not immersed in those details and did not know that he was not billed for all the work. That defense counsel were aware of Senator Stevens's (and Bob Persons's) level of involvement in the project does not mean they knew what John Hess would say about that. The government's *Brady* violation prevented defense counsel from cross-examining Hess on this central theme of the defense.

- As for Dick Ladd's alleged intervention on behalf of Walter Stevens, the government argues that it did not have to turn over this *Brady* material because it is contradicted by other evidence. Opp. at 25-26. The government offers no support for this odd proposition of law, and for good reason: the purpose of the *Brady* doctrine is precisely so that the defense will have exculpatory evidence in the government's possession that may conflict with the government's version of the truth. This information is classic *Brady* material, and should have been disclosed.

- With regard to Chris Van Imhof, the government incredibly attempts to turn Senator Stevens's exculpatory statement – demanding a bill for all work done – into an inculpatory one merely because he was aware of the government's investigation when he made the statement. Opp. at 27-28. By this measure, every action that Senator Stevens takes after the public announcement of the investigation is somehow inculpatory. The government's explanation for its decision to affirmatively redact this statement from the 302 is pure nonsense. *See* Opp. at 28. That the government failed to provide required *Brady* material in its September 9, 2008 letter does not justify a decision, one week later, to affirmatively redact exculpatory material that should have been provided to Senator Stevens in the first place.

4. Much of the government's opposition brief is devoted to a highly slanted discussion of the "materiality" standard that applies on appeal from a criminal conviction. *See* Opp. at 3-11. It is this focus on "materiality" that animates the government's subsequent callous arguments that its willful failures to produce exculpatory information were justified or harmless. The clearest problem with this rationale is that the Court has expressly rejected it, and has specifically ordered the government to comply with a different standard, the one articulated by Judge Friedman in *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005). *See* Hr'g Tr. (Sept. 10, 2008 a.m.) at 67. *Safavian* holds that the duty to reveal exculpatory information exists regardless of whether the prosecution may believe it is "material," such that it could affect the result at trial:

> [T]he government must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed—with the benefit of hindsight—as affecting the outcome of the trial. The question before trial is not whether the government thinks that disclosure of the information or evidence . . . might change the outcome of the trial going forward, but whether the evidence is favorable and therefore must be disclosed. Because the definition of 'materiality' discussed in *Strickler* and other appellate cases is a standard articulated in the post-conviction process for appellate review, it is not the appropriate one for prosecutors to apply during the pretrial discovery phase. The only question before (and even during) trial is whether the evidence at issue may be 'favorable to the accused'; if so, it must be disclosed without regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial.

233 F.R.D. at 16.

5. In arguing that dismissal is an inappropriate remedy, the government ignores the authorities cited in the Motion, where courts have employed just that remedy to similarly egregious government misconduct. Perhaps most notably, the government fails to acknowledge *United States v. Chapman*, 524 F.3d 1073, 1086 (9th Cir. 2008), even though the

Court inquired about that case on October 2. In *Chapman*, the court was confronted with the government's *Brady* violations on three separate occasions. On the first two occasions, the court gave the government a chance to remedy its misconduct. Only on the third occasion did the court find the conduct so egregious as to warrant a mistrial and dismissal. 524 F.3d at 1078. The parallel to this case is obvious. As discussed in the opening brief, moreover, the government's conduct here is now even worse than in *Chapman*.

6. In the most telling sign that it is cornered, the government opens its brief by lashing out at defense counsel regarding an unrelated matter with which this prosecution team is completely unfamiliar. The government has no basis to impugn these defense counsel, whose integrity is well known to many federal judges on this Court, this Circuit and elsewhere. Indeed, these defense counsel are no strangers to government misconduct, as Mr. Sullivan was lead counsel in the *Omni International* case which ended in a dismissal.

The government's conduct in this case is highly prejudicial to the administration of justice and should not be tolerated. The indictment should be dismissed.

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Respectfully submitted,

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