ADDENDUM

Subject Attorneys' Comments and/or Objections to the Report Pursuant to the Court's Order, dated February 8, 2012

Exhibit 2

JAMES A. GOEKE

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

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

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Submission on Behalf of James A. Goeke

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

PRELIMINARY STATEMENT

As demonstrated below, and contrary to the findings in the Report of the Special Prosecutor (the "Schuelke Report" or "the Report"), Mr. Goeke did not intentionally fail to disclose exculpatory material under *Brady v. Maryland,* 373 U.S. 83 (1963), and its progeny. Rather, at all times, Mr. Goeke discharged his prosecutorial duties in good faith.'

It is beyond dispute that the Department of Justice's ("DOJ" or the "Department") prosecution of Senator Theodore Stevens was rushed and disorganized. After a lengthy, deliberate and wide-ranging public corruption investigation in Alaska dubbed Operation Polar Pen, the Government rushed to have Senator Stevens indicted before the case was anywhere near ready to be fried. Ostensibly, concerned about the imminent expiration of an agreement preserving applicable statute of limitations and possibly driven by exogenous political factors, some of the Department's then highest ranking officials made the decision regarding the timing as to when this indictment should be handed down. Mr. Goeke, then a line Assistant United States Attorney from the District of Alaska, was not consulted about the timing of this indictment nor was he consulted about what kind of impact rushing a case of this magnitude and complexity would have on the trial team's

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Although Mr. Goeke welcomes the opportunity to provide this submission in response to the Schuelke Report, he does so under great disadvantage. Mr. Schuelke and his team spent over two and a half years investigating this matter and in the process reviewed over 128,000 pages of documents and deposed numerous individuals. Mr. Goeke has never had access to the majority of these documents and has never been afforded the opportunity to review anyone's deposition taken in connection with this investigation, save his own. It is not without irony that in an investigation dealing with inadequate disclosure to the defense, Mr. Goeke is forced to respond and defend against the findings in the Schuelke Report without access to much of the underlying material that the Report relied on in reaching its conclusions. Mr. Goeke is nonetheless confident that any fair review of the record would demonstrate a complete lack of intentional misconduct on his part.

ability to not only adequately prepare for trial but to also faithfully discharge its discovery obligations.

The decision to rush the case to indictment and subsequently to rush it to trial having been made at the higher levels of the Department of Justice, it fell upon the line level prosecutors like Mr. Goeke to have to deal with the insurmountable burdens such decisions created. Unquestionably, significant and serious mistakes were made regarding the Government's discovery and *Brady* obligations. But the notion that the failure to disclose this material was an intentional act by Mr. Goeke is simply untrue and wholly unsupported by the evidence.

To make matters worse, merely days before the indictment was returned, the Assistant Attorney General's Office decreed that the Deputy Chief of the Public Integrity Section ("Public Integrity" or `TIN"), Brenda Morris, should lead the trial team. The Assistant Attorney General's Office simultaneously pulled Mr. Goeke and his colleague from PIN, Ed Sullivan, from the trial team. This change in the staffing of the trial team created additional problems. Although Ms. Morris was a highly experienced prosecutor, she was not steeped in the details of the Polar Pen investigation or specifically the Stevens case. As a result of this last minute change in the trial line-up, the team, already under severe time constraints, now had to devote significant resources to bring Ms. Morris up to speed on the case. And as the Schuelke Report found, compounding the problem further was the fact that Ms. Morris, although a supervisor in PIN, abdicated her supervisory role on the case. *See, e.g.,* Schuelke Report at 45-46.

Perhaps the higher-ups at the Department were betting on the fact that once indicted, Senator Stevens would waive his right to a speedy trial, thereby giving the

Government the much needed time to complete crucial pre-trial tasks. If so, the Department bet wrong. Senator Stevens' counsel pressed for a quick trial before the November 2008 elections. Ill-prepared but nonetheless determined not to oppose a speedy trial, the Department was therefore required to try the Stevens case in an extremely short time. As the Schuelke Report found, the prosecution team was not ready to disclose *Brady* information at the time of indictment. Indeed, the prosecutors' review of *Brady* material only *began* on or about the date of the indictment. Schuelke Report at 49. Coupled with these issues was a critical decision from management in the Department to not turn over the FBI Forms FD-302 ("302s") in their entirety to defense counsel as *Jencks Act* material. It was these many decisions combined with inadequate training by the Department on *Brady* that led to the discovery violations that occurred prior to and during the Stevens trial, and not any intentional misconduct on the part of Mr. Goeke.

Mr. Goeke did not have a leadership role on the Stevens trial team. At the direction of the Assistant Attorney General's Office, Mr. Goeke did not examine any witnesses at trial. The Assistant Attorney General's Office even instructed Mr. Goeke not to sit at counsel's table. As a result, Mr. Goeke attended the proceedings only erratically and from the courtroom's gallery. Having not been present for most of the Court's discussion regarding *Brady* disclosures, Mr. Goeke received his marching orders second-hand. As Mr. Sullivan observed during the trial, "Jim and I are totally in the dark re what's going on in court." Ex. A, CRM BOTTINI 033612. Mr. Goeke did not attend the testimony of most of the witnesses, including the testimony of Bill Allen. After

having spent many long days, nights, and weekends providing back-office support to the trial team, Mr. Goeke was on an airplane back to Alaska during closing arguments.

Mr. Goeke was not primarily responsible for the Brady review With respect to the *Brady* review, Mr. Goeke did not determine who was reviewing particular issues and witness testimony. Mr. Goeke did not decide either that the team would not turn over 302s *in toto* to the defense or that the prosecutors would not conduct or supervise the review for *Brady* materia1.[2] He did not have primary responsibility for drafting the *Brady* letters provided to the Stevens defense. Rather, consistent with his subordinate role, Mr. Goeke reviewed narrow issues and did his best, within the confines of his responsibilities (and subject to Public Integrity's direction), to be thorough and persistent. For example, Mr. Goeke made full disclosure regarding Augie Paone's and Robert Persons' grand jury testimony and, contrary to the findings in the Schuelke Report, repeatedly pressed for disclosure on Bambi Tyree's relationship with Bill Allen and a sworn statement she made in connection with that relationship.

Mr. Goeke had a supporting role on the Stevens team. Essentially, Mr. Goeke spent the trial away from the courtroom completing discrete, one-off tasks in an extremely demanding and disorganized environment. Before the trial, Mr. Goeke was largely focused on assembling the vast trial exhibits. During the trial, Mr. Goeke pitched in on whatever project required his attention depending on the trial team's needs and his superiors' requests. And though the Stevens prosecution was highly publicized, Mr.

[2] Mr. Goeke did inquire of Mr. Marsh whether the Department had considered turning over the 302s in their entirety given the time pressures of the case, but was told that upper level management had decided not to do so. Mr. Goeke did not have the authority to countermand this decision and was not consulted about the wisdom of this course of action.

Goeke did not derive any glory. Quite the opposite, Mr. Goeke worked grueling hours in a backroom, basically un-noticed and far from his family.

As demonstrated further below, the record reflects that Mr. Goeke at all times discharged his duties in good faith and did not in any way commit intentional misconduct. The findings against Mr. Goeke in the Schuelke Report are based on faulty assumptions and an incomplete consideration of all the evidence. In particular, regarding the two findings by the Special Prosecutor of intentional misconduct by Mr. Goeke, a fair and complete review of the record shows that Mr. Goeke acted as a dedicated (if imperfect) public servant and did not intentionally evade his responsibilities under *Brady:*

- Mr. Goeke did his best to cause the trial team to disclose fully Bambi Tyree's relationship with Bill Allen and Tyree's sworn statement regarding it. Mr. Goeke hounded the trial team to evaluate and re-evaluate the appropriate disclosures and demanded that issues be vetted with the Department's Professional Responsibility Advisory Office ("PRAO"). Mr. Goeke pressed this issue so often and so vociferously that an exasperated William Welch, who was the Chief of Public Integrity, eventually snapped, "Joe and Jim, per the recusal notice, you work for PIN, and so these are your marching orders [to do nothing further] until I talk to [the Alaska U.S. Attorney" (Ex. B, CRM089170, Goeke Ex. 21);
- Mr. Goeke did not try to obscure from the defense Robert ("Rocky") Williams' belief that Stevens intended to pay the Christensen Builders' invoices or Senator Stevens' statement that he wished to pay the bills. At the time of the August 2008 interviews of Mr. Williams (where Mr. Williams

made such statements), Mr. Goeke did not view such information as anything different than from what Williams had said before. Rather, Mr. Goeke believed that Mr. Williams had already made these statements before the Alaska grand jury and in various 2006 Government debriefings. Similarly, Mr. Goeke did not believe that he heard anything new when Mr. Williams "assumed" that Bill Allen was "adding VECO time to the Christensen Builders' invoices. Mr. Goeke also reasonably assumed that, to the extent Mr. Williams' views constituted *Brady* or *Giglio* material, the prosecution team member responsible for the Williams-specific *Brady* review would designate such statements for disclosure. Significantly, even after an investigation into the trial team's conduct regarding its discovery disclosures had been undertaken by the Department, Mr. Goeke saved his handwritten notes of the relevant interviews (an act wholly inconsistent with intentionally hiding this information), and when asked to locate his notes on this issue, Mr. Goeke promptly retrieved and shared them with the Department who later disclosed them to the Special Prosecutor.

Ultimately, as no one disputes, the Government's *Brady* disclosures in the Stevens case were grievously flawed and inadequate. In the case of Mr. Goeke, any oversights were not intentional. Faced with a lack of leadership, limited responsibility and time-driven chaos, Mr. Goeke did the best he could. He should not be made a scapegoat for *Brady* failures that were, in truth, caused by the prosecution team's overall lack of leadership, planning, unwise delegation of responsibilities and disorganization.

BACKGROUND

A. James Goeke's Education and Experience

At the time of the Stevens trial, Mr. Goeke was a relatively young prosecutor with limited courtroom experience. After graduating from U.C. Berkeley's Boalt Hall School of Law in 1997, Mr. Goeke clerked for a federal judge in the Eastern District of Washington and then practiced at the law firms of Washburn, Briscoe & McCarthy and Preston Gates & Ellis in San Francisco, California and Seattle, Washington, respectively from 1999 to 2003. In private practice, Mr. Goeke focused on commercial litigation, with an emphasis on environmental law. During that time, Mr. Goeke had almost no experience in criminal law, except for a six-week externship at the King County's District Attorney's Office in Seattle where he handled routine low level drug cases.

In 2003, Mr. Goeke joined the U.S. Attorney's Office in Anchorage. Alaska. In Mr. Goeke's years at the Alaska U.S. Attorney's Office prior to the Polar Pen-related trials, Mr. Goeke did not develop any complex trial experience. Of the cases he did have, only five progressed to trial. None involved any complex discovery issues, and all lasted no more than a few days.

Mr. Goeke is currently an Assistant United States Attorney in the Eastern District of Washington.

B. The Polar Pen Investigation

In late 2005, Mr. Goeke was assigned to the so-called Polar Pen Investigation, an investigation led by PIN into federal and state public corruption in Alaska. When Mr. Goeke joined the team, the Alaska U.S. Attorney's Office had been recused from the investigation, the two exceptions being Mr. Goeke and another Alaska Assistant U.S.

Attorney, Joseph Bottini. The two men reported directly to PIN from Alaska when it came to issues concerning this investigation.

When Mr. Goeke joined the Polar Pen team, the investigation was mid-stream and already far-flung, and the scope of the investigation only grew. By August 2006, search warrants had been issued for more than twenty locations in Alaska. Eventually, in the Senator Stevens investigation alone, at least sixty-five witnesses testified before grand juries in Alaska and the District of Columbia. Over the course of the Stevens investigation, the FBI wrote nearly three hundred 302s (most of which were completed before Senator Stevens' indictment); and the Internal Revenue Service, for its part, wrote over one hundred Memoranda of Interviews ("MOIs"). By September 2009, twelve persons had been convicted, pled guilty or were charged and awaiting trial or sentencing.

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

THE *BRADY* REVIEW

The Stevens prosecution team did not have sufficient resources, time, training, guidance or leadership to discharge its discovery obligations adequately. Although the Polar Pen Investigation had run for years, involved multiple grand juries, and a huge number of witnesses many of whom had been interviewed or testified on multiple occasions, the time between the indictment of Senator Stevens to commencement of his trial was remarkably short for an investigation of this size—just over two months. Moreover, the decision to indict Senator Stevens at the end of July 2008 came as a

surprise to Mr. Goeke. Though Mr. Goeke inquired periodically of his colleagues at PIN throughout 2007 and 2008 about whether the Department had made a decision to indict Senator Stevens, he repeatedly was informed that no decision had been made and was not given any timeframe for such a decision. Then, after routinely and repeatedly extending a tolling agreement with Senator Stevens for well over a year, the Department suddenly decided in July 2008—for reasons unknown to Mr. Goeke—that the tolling agreement would not be extended. In fact, Mr. Goeke was notified of this decision by the Depai fluent just two weeks before indictment.

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

At the time of the ***Brady*** review, Mr. Goeke was in Alaska and working on other matters in addition to the Stevens case. Mr. Goeke was not put in charge of the ***Brady*** review or the drafting of the *Brady* letters. In addition, Mr. Goeke had limited *Brady* training. When Mr. Goeke joined the Department, *Brady* training was spotty and

uncoordinated.[3] Mr. Goeke attended a segment on *Brady* during a more comprehensive prosecutor training program in 2005. But, as discussed above, Mr. Goeke had little real world experience in which to apply this training.

Mr. Goeke was assigned only two discrete witnesses to review for possible *Brady* disclosure: (i) the grand jury testimony of Augie Paone; and (ii) the grand jury testimony of Robert Persons. The record reflects that, not only did Mr. Goeke make a thorough *Brady* disclosure in connection with the witnesses to whom he was assigned, he pushed the team to disclose to the defense Bill Allen's relationship with Bambi Tyree and the fact that Mr. Allen may have suborned Tyree's perjury in another matter. Mr. Goeke pressed for this disclosure despite the fact that Bill Allen was *not a witness to whom Mr. Goeke was assigned* for the purpose of making a *Brady* disclosure.

A. The Augie Paone and Robert Persons Disclosures

Regarding the Paone and Persons discovery disclosures, the record demonstrates that Mr. Goeke conducted a scrupulous and thorough *Brady* review of these witnesses' grand jury testimony. In Mr. Goeke's proposed disclosures circulated to the trial team,

[3] Since the Stevens trial and other public discovery failures, the Department, under Attorney General Eric Holder, has stated a desire to ameliorate the Department's *Brady*-related training. The Department's recent guidance makes clear that paramount to any effective disclosure of exculpatory information is sufficient resources, training and guidance. *See* Ex. C, Memoranda from Deputy Attorney General David W. Ogden to all Dep't Prosecutors and United States Attorneys, Guidance for Prosecutors Regarding Criminal Discovery, Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group for Prosecutors Regarding Criminal Discovery, Requirement for Office Discovery Policies in Criminal Matters (Jan. 4, 2010). Notably, however, neither the Ogden Memoranda nor any other Department policy has required that in all cases 302s, MOIs, and interview notes should be disclosed as either part of pretrial discovery or at least as *Jencks Act* material—a policy that would have cured all of the violations detailed in the Schuelke Report. Additionally, neither the Ogden Memoranda nor any other Department of Justice policy requires that Department attorneys or law enforcement agents memorialize pretrial preparation interviews of witnesses if no new information is provided during those preparation sessions.

Mr. Goeke meticulously listed every potentially exculpatory or impeaching fact that was contained within the grand jury testimony of these witnesses. As he noted in an email accompanying his proposed disclosure, Mr. Goeke had been, if anything, "overly inclusive" or "overly expansive" to provide the defense with all potentially exculpatory information, even if the material did not fit within the strict confines of *Brady*. Ex. D, CRM GOEKE 087276-77, 087276; Ex. E, CRM GOEKE 087461-64, 087461. Indeed, Mr. Goeke's proposed *Brady* disclosures for Paone and Persons were so lengthy and so detailed—comprising approximately 4 of the 8-page September 9 draft *Brady* letter *(see* Ex. F, CRM BOTTINI 030581-90)—that it was decided it was simply easier to disclose Paone's and Persons' entire grand jury testimony to the defense. *See* Ex. G, Goeke Ex. 2 at ¶ 18. Mr. Goeke's conduct demonstrates that, contrary to any intentional misconduct when it came to his *Brady* obligations, Mr. Goeke took his responsibilities seriously and acted in good faith.

The Schuelke Report fails to adequately credit Mr. Goeke with these disclosures or to take them into account before finding that other less adequate disclosures were done so intentionally. In the entire 514 pages of the Report—which is often repetitive as to evidence that supposedly supports the Special Prosecutor's conclusions of misconduct—the Report spends a paltry two paragraphs regarding Mr. Goeke's Paone and Persons disclosures. Schuelke Report at 69, 86. The Schuelke Report in no way attempts to reconcile how Mr. Goeke's actions regarding these broad and over-inclusive disclosures are consistent with an individual who the Report finds *intentionally* kept *Brady* material from the defense.

B. The Bambi Tyree Disclosure

The Schuelke Report found that ¯Mr. Bottini and Mr. Goeke *intentionally* withheld significant impeachment information regarding Mr. Allen's subornation of perjury by Ms. Tyree." Schuelke Report at 28 (emphasis added). Nothing could be further from the truth. Indeed, the record compels the opposite conclusion. Like with the Paone and Persons disclosures, the record shows that Mr. Goeke pressed, on his own initiative, for disclosure regarding Bambi Tyree's relationship with and sworn statement related to Bill Allen. Indeed, Mr. Goeke's pursuit of having a disclosure made regarding the Tyree/Allen issue can be described in one word: persistent. His efforts spanned an 18-month period, involved multiple requests that PIN consult PRAO, and consistent follow-up with PIN thereafter. It was only because of Mr. Goeke's tenacity (along with Mr. Bottini's) that *any* disclosure was made at all. Mr. Goeke attempted to disclose the Tyree issue on at least four separate occasions during the Polar Pen Investigation and ensuing prosecutions even though he was repeatedly told and directed by PIN trial attorneys and PIN management that no disclosure was necessary.

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

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

In preparation for Boehm's sentencing which was to occur in the spring of 2005 before the Honorable John W. Sedwick in the District of Alaska, Ms. Tyree was debriefed by law enforcement, including Mr. Goeke. During that debriefing, Tyree admitted that she had previously made a false statement under oath—that she had *not* had

sex with Bill Allen when she was underage (when she had). Unprompted, Tyree stated that it was her idea alone to make this false statement. Prior to this debriefing, Ms. Tyree previously had been interviewed in July 2004 by AUSA Frank Russo and FBI Special John Eckstein, Importantly, Mr. Goeke was not present during this 2004 interview and was unaware what, if anything, Ms. Tyree had said at that interview about the false statement and whose idea it was to create it.

At the time Mr. Goeke was involved with Ms. Tyree's debriefing for Josef Boehm's sentencing, he was not involved in the Operation Polar Pen investigation; was not investigating either Bill Allen or Senator Stevens; and had never heard of Allen prior to the *Boehm* case. Mr. Goeke also did not participate in every debriefing of Tyree and was never assigned Tyree as a witness at trial or at any sentencing.

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

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

Mr. Goeke reviewed the search warrant application. In the course of that review, he remembered Tyree's statement that she had sex with Allen when she was underage. Mr. Goeke thought that this conduct might need to be disclosed in the search warrant application as the application was predicated, in part, on Allen's cooperation. Mr. Goeke was focused exclusively on the illicit underage sex, and not on Tyree's admitted false

statement because at this point in time he was unaware that Allen may have had any role in the creation of the false statement.

In an effort to refresh his memory for purposes of disclosing the underage sex that Mr. Allen may have had with Ms. Tyree, Mr. Goeke remembered that another AUSA had filed a sealed *in limine* motion in the *Boehm* case and decided he should read it. In that motion, the Government stated that Tyree had signed a false affidavit concerning her sexual relationship with Bill Allen ***at request.***[4] This was the first time that Mr. Goeke had been informed that Mr. Allen may have played a hand in the creation of this affidavit.

Recognizing that the assertions in this motion contradicted Tyree's account to Mr. Goeke and others at the 2005 pre-sentencing debriefing that Tyree lied in the affidavit on her own accord, Mr. Goeke immediately informed Public Integrity of the issue and emailed pertinent excerpts from the *Boehm* motion to PIN. *See* Ex. H, CRM GOEKE 030460-63. Mr. Goeke suggested that Public Integrity consult with PRAO as to whether further disclosure was necessary in the context of the search warrant. Subsequently, Mr. Sullivan at PIN informed Mr. Goeke that, after consultation with PIN supervisors, including Mr. Welch, the decision was made that no disclosure was necessary. Mr. Goeke repeatedly was told that because the *in limine* motion was just the argument of a lawyer and that the witness's actual statement was what controlled, there was no reason to make a disclosure based on the *in limine* motion. Based upon his suggestion that

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

PRAO be consulted, Mr. Goeke mistakenly and justifiably assumed that PRAO had been involved in that decision. Unbeknownst to Mr. Goeke, they had not.

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

During the Kott Trial

Within several months, the Tyree issue surfaced again. In summer 2007, Mr. Goeke, along with Mr. Marsh, were the trial attorneys prosecuting Alaska House Speaker Peter Kott in Alaska.

Because Allen was a key witness in the Kott prosecution, Mr. Goeke along with Mr. Bottini raised their concerns with Mr. Marsh again regarding the Tyree-Allen relationship and Tyree false affidavit. In response, Mr. Marsh was adamant that no disclosure was necessary and repeatedly assured Mr. Goeke that Mr. Marsh had discussed the matter with his supervisors and that the supervisors agreed that no disclosure was necessary. Nonetheless, Mr. Goeke recalls that after he pressed the issue with the entire prosecution team, the PIN attorneys reluctantly agreed that Mr. Goeke would try to alert the Court to Tyree's false affidavit in a hearing during the Kott trial which, like the *Boehm* case, was before Judge Sedwick. On September 13, 2007, Mr. Goeke attempted to raise the issue. However, shortly after Mr. Goeke raised the issue of Tyree, Judge Sedwick cut the discussion off, saying that he knew about Tyree and Allen and was not interested in delving into that matter again. No disclosure was made during the Kott trial, and, on September 25, 2007, Kott was convicted.

The Schuelke Report states that Mr. Goeke withheld this information from the Court and concludes that the transcript from the hearing "does not support Mr. Goeke's recollection that the Court thwarted his planned disclosure . . . ." Schuelke Report at 208.

While the cold record may not adequately reflect it, Mr. Goeke believed that Judge Sedwick was growing impatient regarding the Allen/Tyree issues and that he did not want to hear anything further on the matter. There is certainly some support for this belief. *See* Schuelke Report at 210 ("The Court: Excuse me. We've got a jury waiting. We don't need to get into this — side show at this point. . . ."). That said, Mr. Goeke now recognizes he should have pressed the issue further. Had he been a more experienced prosecutor who knew when to push back against an apparently impatient judge who did not want to keep a jury waiting, he might have done so. But his failing was a result of his inexperience and not out of any intentional decision to hide this issue from the defense or the Court. Indeed, had Mr. Goeke intended to keep this information hidden from the defense he never would have bothered to try and raise the issue with Mr. Marsh and the rest of the trial team in the first instance.

After the Kott Trial

Further evidence of Mr. Goeke's good faith intention to disclose the issue regarding the Tyree affidavit is shown by Mr. Goeke's conduct on October 4, 2007 — approximately a week after Mr. Kott was convicted. Mr. Goeke was sufficiently troubled by how the Tyree issue was addressed during the trial (notwithstanding that he had been told by PIN that no disclosure was necessary) that he took it upon himself (while he was on vacation) to pursue the matter further. Mr. Goeke telephoned FBI Special Agent Eckstein, the agent who had been involved in the Tyree interviews and debriefings, and asked him what his recollection was regarding what Tyree said as to whose idea it was to falsify her affidavit. Agent Eckstein responded that he did not have any specific memory. Mr. Goeke asked Agent Eckstein if he could locate any 302 report memorializing his

debriefings with Tyree. Later that day, Agent Eckstein called Mr. Goeke back and stated that he had a 302 report of the July 2004 interview that he and Assistant U.S. Attorney Russo had with Tyree (which Mr. Goeke did not attend). To Mr. Goeke's surprise, the July 2004 302 report was consistent with the *in limine* motion filed in the *Boehm* case in that Tyree said that Bill Allen directed her to lie in her sworn statement.

Concerned that additional disclosure would be necessary in the Kott matter or other pending Operation Polar Pen-related proceedings, Mr. Goeke immediately directed Agent Eckstein that same day to fax the 302 to Mr. Bottini at the Alaska U.S. Attorney's Office; called Mr. Bottini to discuss the 302 and its implications; and decided, with Mr. Bottini, that the 302 should be faxed immediately to Public Integrity for additional discussion.

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

pertinent sections for Mr. Marsh's review in a section called "False Swearing." The fax highlighted the following information:

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

Id. at CRM BOTTINI 059466 (emphasis in original). Mr. Gocke took the further initiative to retrieve Agent Eckstein's and Assistant U.S. Attorney Russo's handwritten notes from their Tyree interview and faxed those notes to PIN.

As a result of these communications, Mr. Goeke and Mr. Bottini were informed that Public Integrity would raise the Tyree disclosure issue with PRAO. Several days later, in October 2007, Mr. Marsh reported back that he had spoken to PRAO, and that PRAO had advised him that no disclosure was necessary. Mr. Goeke did not see any written opinion from PRAO regarding this call.' Mr. Goeke had no reason to believe that PIN had not fully and accurately disclosed the issue to PRAO, including providing PRAO with the underlying documents that he and Mr. Bottini had provided to PIN.

Again, After the Kott Trial

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

[5] Mr. Goeke does not recall being on this call with PRAO, and there is no documentary evidence to suggest otherwise. PRAO' s Inquiry Summary Sheet only lists Mr. Marsh as the caller on this October 12, 2007 inquiry.

determining whether disclosure of these benefits to Tyree and her family would be appropriate in the Kott case and other Polar Pen cases.

Thereafter, Mr. Goeke was informed that Mr. Sullivan and Mr. Marsh had again consulted with PRAO and had been told that no disclosure was necessary. Undeterred, Mr. Goeke continued to press this issue — much to the irritation of his colleagues at Public Integrity. Indeed, Mr. Goeke was so persistent that Public Integrity's Chief, William Welch, told Mr. Goeke and Mr. Bottini on December 20, 2007, in no uncertain terms that they should do nothing further regarding disclosure and that they should cease pushing it:

> *We've done all that we are going to do on the matter,"* Mr. Welch wrote, "I'm off for vacation starting tomorrow, but will try to talk to Nelson [the Alaska U.S. Attorney] sometime next week. In the meantime, nothing will be filed in our case. *Joe and Jim, per the recusal notice, you work for PIN, and so these are your marching orders . . ."*

(Ex. B) (emphasis added).

That same day, PRAO issued a written opinion on the matter, which Mr. Goeke did not see until some weeks later. By that time, having already been sternly rebuked, Mr. Goeke did not see the point in reviewing the opinion carefully and did not notice its inaccuracies. Mr. Goeke had no reason to believe that PIN would not provide PRAO all of the relevant underlying documentation (which Mr. Goeke and Mr. Bottini had meticulously retrieved and sent to PIN).[6] He assumed, again justifiably, that in order for PRAO to make an informed decision it would have been provided all the necessary

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

information. It turns out that once again PIN did not provide all the pertinent information to PRAO. But if Mr. Goeke was intentionally trying to hide this information from the defense or mislead PRAO why would he go through the effort and trouble of retrieving all this information in the first place and forwarding it on to his colleagues and superiors at PIN?

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

Though Public Integrity had squelched additional discussion of the Tyree issue in late 2007, Mr. Goeke continued to press the issue, again to the team's annoyance, when Senator Stevens was indicted six months later. As discussed above, once Senator Stevens was indicted, Mr. Goeke was assigned two witnesses' testimony (Paone and Persons) to review for possible *Brady* disclosure. Nonetheless, Mr. Goeke also continued to push the prosecution team as to whether issues related to Tyree should be disclosed.

On August 14, 2008, Mr. Goeke emailed the entire Stevens prosecution team to urge disclosure of the possibility that Allen had procured Tyree's false statement. *See* Ex. K, CRM030882-84, Goeke Ex. 22, 030882-83 ("I also vote to make some disclosure of the rumored procurement of a false statement from Bambi by Bill in our *Giglio* letter . .Simply put, Mr. Goeke was outvoted. For instance, Mr. Marsh again insisted that the only issue was a "mistake in a brief that's inconsistent with the brief writer's notes" and, therefore, "I don't think we have any disclosure to make, much less a disclosure obligation." *Id.* at CRM030882.

Several days later, in response to a draft of the Government's first *Brady* disclosure letter, Mr. Goeke inserted a paragraph that he hoped would both create consensus among the trial team and allow for *some type* of disclosure on the Tyree issue. *See* Ex. L, CRM GOEKE 079582-87, 079584. This disclosure, while far from perfect,

was still vehemently opposed by other trial team members. As shown in emails among Ms. Morris, Mr. Marsh, and Mr. Sullivan on August 22, 2008, the trial team rejected Mr. Goeke's suggested disclosure, and the paragraph was deleted altogether from the August 25, 2008 *Brady* letter. *See* Ex. M, CRM BOTTINI 027428 (Mr. Marsh wrote, strongly believe that the highlighted paragraph should be deleted. We should not revisit the Bambi non-subornation of perjury stuff. We have nothing to turn over, we have neither evidence nor an allegation that Allen directed her to lie, we have investigated this till the end of time, and we have been blessed by PRAO twice.").

Despite these multiple rejections (over an 18-month period), when the time came for another *Brady* letter just weeks later, in September 2008, Mr. Goeke again beat the Tyree drum. Taking a slightly different tact (given his many-month futile effort on the Tyree issue), in a September 7, 2008 email, Mr. Goeke pressed to disclose that Allen was being blackmailed as a result of his relationship with Tyree and that Tyree spoke to Allen's lawyer. *See* Ex. N, CRM GOEKE 087255. Mr. Goeke told the team, "I realize that we have beaten this topic to death, but please bear with me . . . I am keen to make sure our disclosure is as accurate as possible." Ex. J at CRM GOEKE 078273.

Amazingly, the Schuelke Report uses Mr. Goeke's email that he was "keen to make sure our disclosure is as accurate as possible" as an example of Mr. Goeke being disingenuous because he failed to recommend disclosure of Agent Eckstein's 302 or the Government's pleadings in *Boehm.* This is the height of irony. The only two members of the trial team who were in favor of making any type of disclosure *at all* in connection with the Tyree issue were Mr. Goeke and Mr. Bottini. And, because they were trying to compromise in an effort to make sure that at least some disclosure was in fact made, they

are found in the Report to have engaged in intentional misconduct—while the other members of the team who were provided the Eckstein 302, the *Boehm* pleadings, and all of the underlying notes by Mr. Goeke and Mr. Bottini and who opposed any disclosure at all, were found blameless. *See* Ex. L, CRM GOEKE 079582-87, 079584.

Because Mr. Goeke was still pushing for disclosure, the next day, on September 8, 2007, the prosecution team convened a conference call to discuss, among other things, the Tyree issue. Prior to the call, Mr. Goeke again emailed the *Boehm* briefing—which stated that Tyree had lied *at Allen's request—to* Ms. Morris, Mr. Marsh, Mr. Sullivan, Mr. Welch and Mr. Bottini. This September 8, 2008 email followed an email from FBI Special Agent Mary Beth Kepner on September 6, 2008 where she had circulated Agent Eckstein's 302 to the entire trial team. *See* Ex. **O,** CRM GOEKE 087439-43 (email exchanges "RE: Tyree"); Ex. **P,** CRM GOEKE 087294-98 (same); Ex. J at CRM Goeke 078273 (September 7, 2008 email to team, "After the Kott trial, we found out about the 302 that MBK [Mary Beth Kepner] just sent around yesterday regarding Bambi from a 7/22/04 interview in Seattle."). Mr. Goeke again questioned the lack of disclosure on the Tyree issue. **In** response, Ms. Morris, to whom Mr. Goeke reported, and who was now the head of the trial team, interrupted him and said that the necessary disclosure had occurred and that he was "covered." Mr. Goeke justifiably understood the term "covered" to mean that the issue was closed and, after being repeatedly rebuffed by

superiors on this disclosure issue, that any further airing of the issue might prove counterproductive.[7]

The Schuelke Report's criticism of Mr. Goeke—based on his sending a September 8, 2008 email to Mr. Bottini, Ms. Morris, Mr. Welch, Mr. Marsh and Mr. Sullivan describing the notes of Eckstein's meeting with Tyree as "ambiguous" on the topic of whether Allen requested Tyree to lie under oath—is unfounded. *See, e.g.*, Schuelke Report at 302. The Schuelke Report seems to suggest that, because Mr. Goeke conceded during his deposition that he no longer believed the notes to be ambiguous as to the subornation of perjury issue, his earlier characterization of ambiguity was somehow done to mislead the other trial team members and therefore prevent the notes' disclosure. If that is what the Report is trying to suggest, it makes no sense. If Mr. Goeke were trying to obscure the true nature of Agent Eckstein's notes, he would have simply summarized the notes in the email. Mr. Goeke did not do that. Consistent with all the other underlying material he disclosed to the other prosecution team member, Mr. Goeke attached the notes to the email so that everyone could review them. Why would Mr.

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[7] On September 9, 2008, the Department sent its second *Brady* letter. While it disclosed the issue of the Tyree/Allen liaison and the false affidavit, it did not discuss the Eckstein 302 or the Eckstein notes corroborating the 302. Although Mr. Goeke offered the prosecution team suggestions on earlier drafts of the Tyree-related information for this *Brady* letter, he did not review the final version of this letter which included Mr. Marsh's addition of the "suggestion," "no evidence," and "thorough investigation" language. The Eckstein 302, filling out the Tyree story, was not produced until later in the trial, on October 16, 2008, as part of a production of the Anchorage Police Department file. The defense never made use of that 302. Notably, Mr. Goeke and Mr. Bottini had advised supervisors at PIN and senior management of the Department about the existence of the Anchorage Police Department investigation concerning Allen and Tyree before the Stevens indictment was returned. However, Mr. Goeke never saw the Anchorage Police Department file until the instant post trial proceedings, because the Alaska U.S. Attorney's Office was recused from the new investigation. Mr. Goeke does not know the reason for the apparent delay in PIN's receipt and review of the Anchorage Police Department file until the Stevens trial was already was well underway.

Goeke do that if he was intentionally trying to mislead others as to what the notes conveyed?

The above-described timeline of events completely disproves the Schuelke Report's contention that Mr. Goeke *intentionally* withheld the Tyree/Allen subornation issue from the defense. On the contrary, it was Mr. Goeke, who along with Mr. Bottini, continued to press the other, more experienced and more senior team members to disclose the issue. He urged that the issue be vetted with PRAO, repeatedly raised the issue in the context of making a *Brady* disclosure (to the point of repeatedly annoying the other prosecutors), and, when he was overruled by other team members that such a disclosure should be made, appealed to PIN's section Chief, William Welch. At each turn, Mr. Goeke's efforts were thwarted. And, when the other prosecution team members refused to fully disclose this issue, he was told by his superiors that these were his "marching orders" or that he was "covered."

In finding Mr. Goeke responsible for intentionally committing a *Brady* violation, the Schuelke Report completely ignores the reality of Mr. Goeke's position as a junior member of the Stevens prosecution team. Mr. Goeke was not in a position to circumvent the rest of the team and make his own independent disclosure regarding the Tyree issue. To do so would have been an act of insubordination. When all was said and done, Mr. Goeke had two choices: to obey the orders of his superiors or resign from the case. Given his relative inexperience and lack of seniority as compared to other members of the prosecution team, it is at least understandable why he chose the former.

In sum, to hold Mr. Goeke *intentionally* responsible for violating *Brady* is in itself a miscarriage of justice. Indeed, the Schuelke Report does not even attempt to explain

how Mr. Goeke intentionally violated his *Brady* obligations while others with significantly more seniority and experience, such as Ms. Morris and Mr. Welch did not. Everything that Mr. Goeke had at his disposal—the Eckstein 302, the *Boehm in liming* motion, and Eckstein and Russo's handwritten notes—he provided to all the other members of the prosecution team in the context of pushing for a *Brady* disclosure. How does the Schuelke Report hold the other members of the team *less* responsible by finding their failings *unintentional,* while the man who led the charge for disclosure on this issue—Mr. Goeke—is found to have acted with the intent to conceal? Notably, the Report does not even attempt to explain the answer to this question. Nor can it.

C. Rocky Williams

Contrary to the findings in the Schuelke Report, Mr. Goeke did not intentionally conceal from the defense *Brady* material disclosed by Rocky Williams in several trial preparation sessions ("Trial Prep Sessions") that occurred in August 2008.[8]

First, Mr. Goeke reasonably believed that during the Trial Prep Sessions, Williams had merely rehashed prior grand jury testimony or statements he made during earlier investigative interviews where, in words or substance, Williams stated that Senator Stevens wanted to pay for the renovations to his chalet and wanted a contractor that he could pay. As such, Mr. Goeke believed that this information would be disclosed by the prosecutor assigned to review Williams' prior statements for *Brady* (which was not Mr. Goeke) or, at the very minimum, as part of Williams' *Jencks Act* disclosure.

[8] Mr. Goeke, along with Mr. Bottini and FBI Special Agent Chad Joy, participated in these Trial Prep Sessions on August 20, 2008, August 22, 2008, and August 31, 2008. Mr. Goeke was only present for part of the August 31 meeting.

Second, during the Trial Prep Sessions when Williams told the prosecutors and Agent Joy that he assumed Bill Allen was adding in VECO time to the Christensen Builders' invoices, Mr. Goeke did not believe this was substantively different from what Williams also had said in earlier interviews and as such also believed that this information would be disclosed in the ordinary course of disclosing *Jencks Act* material.

Third, that Mr. Goeke took notes of these statements in the Trial Prep Sessions in the first instance and then later retrieved and produced these notes in connection with an investigation regarding his own conduct, demonstrates that Mr. Goeke did not intend to hide what Williams had said in those sessions.

Fourth, Mr. Goeke was not responsible for reviewing the interview reports and notes of Williams' interviews for the purpose of making a *Brady* disclosure; he reasonably believed that the team member assigned such task would properly disclose exculpatory material; and did not intentionally aid in the omission of Williams' statements in the *Brady* letters. At the time the *Brady* letters were drafted, Mr. Goeke understood that Rocky Williams' grand jury testimony also would be disclosed to the defense pursuant to the *Jencks Act* and he therefore did not view the failure by the drafters of the *Brady* letters to include material in the letters that was also in the grand jury transcript as any sort of intentional omission.

1. *Prior to the Trial Prep Sessions, Rocky Williams Told the Government that Senator Stevens Wanted to Pay for the Improvements to his Chalet*

Prior to the Trial Prep Sessions, Mr. Goeke participated in investigative sessions with Rocky Williams, including several September 2006 debriefings and a November 7, 2006 grand jury appearance. The sum and substance of those sessions (documented in 302s or in Williams' grand jury testimony) as it relates to the issue here is that while

Williams did not know whether Senator Stevens ever reimbursed VECO and Christensen Builders for the work, Williams believed Stevens intended to pay for the improvements to his home and that Stevens himself had said as much in Williams' presence.

Prior to the Trial Prep Sessions, these statements had been memorialized on at least three occasions:

- During Williams' grand jury testimony (which Mr. Goeke attended and the transcript of which was widely circulated amongst the prosecution team including PIN supervisors), Williams testified that he picked up invoices from Augie Paone at Christensen Builders on a monthly basis and delivered those invoices to Bill Allen or Bill Allen's secretary at VECO to be passed on to Senator Stevens. *See* Ex. Q, CRM GOEKE 007011-87, 007055-56, 007084-85. Williams stated, "To the best of my knowledge, [the invoices] got sent down to Washington, to the Senator." *Id.* at CRM GOEKE 007057. In response to a question from one of the grand jurors, Williams said that Christensen Builders became involved in the process, in part, because Senator Stevens preferred paying Christensen Builders directly for the services. *See id.* at CRM GOEKE 007085.
- In a September 14, 2006 debriefing in Alaska, Williams described a meeting between Allen and Senator Stevens that occurred at the Kenai River Classic. He said that during this meeting, "Stevens decided that he wanted to get a contractor that Stevens could pay." *See* Ex. R, CRM GOEKE 001846-48, 001846.

- In a September 28, 2006 debriefing with Williams in Alaska, Williams described how Senator Stevens liked the idea of having to pay Christensen Builders directly because the amount was "over the limit," referring to the amount of gifts a public official can accept. *See* Ex. S, CRM GOEKE 001849-55, 001849.

Thus, when Williams mentioned these same points during the August 2008 Trial Prep Sessions, they were not new revelations to Mr. Goeke and were already well-documented.

Mr. Williams did, however, reveal what Mr. Goeke believed was a new disclosure during the August 22, 2008 debriefing: Williams stated that he never personally spoke with either Senator Stevens or Stevens' wife about whether VECO's expenses were, in fact, included in the Christensen Builders' invoices, and that neither the Senator nor his wife ever asked Williams about the invoices. Given that this was new information, Mr. Goeke instructed Agent Joy to prepare a 302 documenting these points. He did not instruct Agent Joy to exclude other parts of the debriefing, but only to make sure that these new statements were properly documented in accordance with FBI and Department policy.[9]

2. *Mr. Goeke Did Not Understand Rocky Williams to Say that the VECO Invoices Would Be Included in or Rolled into the Christensen Builders' Bills*

The Schuelke Report unjustly finds that Mr. Goeke intentionally withheld *Brady* information from the defense by not disclosing what the Report summarizes as Williams'

[9] It is typical for an FBI agent when writing a supplemental 302 report not to memorialize statements a witness has said previously and which has already been memorialized but simply to provide an account of the new information provided by the witness.

assumption that the costs for his and other VECO employees' time were to be added by Mr. Allen to the Christensen Builders' invoices. *See, e.g.,* Schuelke Report at 7, 111, 176, 500. This criticism is unfair.

As Mr. Goeke repeatedly testified during his sworn deposition in this investigation, he understood Williams to be saying during the Trial Prep Sessions that he thought Allen would prepare a *separate VECO invoice* and *add it* to the Christensen Builders' packet of invoices, not that VECO work would be rolled into the Christensen Builders' bill and submitted as a single invoice. Significantly, Mr. Goeke knew that the Christensen Builders' invoices were extremely detailed to the point of including time for specific Christensen Builders employees based on individual time sheets. Mr. Goeke also knew that those invoices did not include any time sheets or notations for the time of any VECO employee, including Williams. As such, Mr. Goeke did not believe there was any way to add VECO employee time and costs directly to the Christensen Builders' invoices. The only logical way for VECO to seek payment for its costs was therefore to generate a separate VECO invoice. This is what Mr. Goeke understood Williams to be saying, and when Mr. Goeke was repeatedly questioned on this topic he was adamant that Williams never said to him that the invoices would be combined:

BY MR. SHIELDS

Q: My — I'm sorry, I'm not following your answer. My question was when the foreman of the job who works for VECO states to you that he believed that the VECO time and expenses were being absorbed into the Christensen bills —

A: *That's not what he said*

Q: What did he say?

> A: ***He said,*** thought that they were gonna take – I thought --I dropped . . . those Christensen bills of at the main office. I thought – ***I had an impression that Allen was then going to add time to the Christensen Builders bills as a separate invoice or a separate bill...."***
>
> * * *
>
> BY MR. SHUELKE
>
> Q: But if, as you just said, it was his understanding that the VECO time was going to be added to the Christensen bills, then the Christensen bill would include the VECO time, right?
>
> A: I guess, but I always thought of it as it would be added to the total.You have the Christensen Builders bill for $10,000 and then VECO would then generate a separate statement that would include, ¯Here's our VECO time." I don't know how the mechanics were going to work, ***but I know that Rocky said at any time that I was present for it, Rocky said . . . some additional invoice was going to be generated.***

Deposition of James Goeke, January 8, 2010 at 100-101 (emphasis added). The Schuelke Report fails to include this testimony.[10]

Moreover, Mr. Goeke's notes from the Trial Prep Sessions do not address the mechanics of how Williams thought the VECO time would be added to the Christensen Builders' time, that is, whether two separate invoices would be generated or whether VECO's time would be rolled into the Christensen Builders' bill. Mr. Goeke's notes from the August 20, 2008 Trial Prep Session state:

> "RW supposed to go through Augies bills —>
> supposed to have RW's time
> and Dave's time applied to the billing."

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[10] The Report also fails to mention that Mr. Goeke thought that these statements were evidence of Senator Stevens' guilt, not innocence because they did not support the defense theory that Senator Stevens thought that the Christensen Builders' invoices, which had been paid, represented all of the work done.

See Schuelke Report at 114. Mr. Goeke's notes from the August 22, 2008 Trial Prep Session similarly do not address whether there would be one bill or two:

> "(3) then took [the Christensen bills] to VECO main ofc —>
> Left with Bill to add whatever
> VECO time etc. was left to add —>
> then sent down to TS"

See Schuelke Report at 145. Nothing in Mr. Goeke's notes is inconsistent with his understanding that Williams believed that two separate invoices, one for VECO and one for Christensen Builders, would be generated.

Importantly, even assuming arguendo that the Schuelke Report's interpretation of Mr. Goeke's and Mr. Bottini's notes from the Trial Prep Sessions is correct *(i.e.,* that Williams assumed the VECO time would be included in the Christensen Builders' invoices) the Report's assertion that these statements "constituted quintessential *Brady* information" *(see* Schuelke Report at 500) is far from clear. The suggestion that any musings, guesses, speculations or assumptions—no matter how untethered to a witnesses' personal knowledge or to any evidence in the case—necessarily constitutes *Brady* information is not the law. On the contrary, some courts have held that to constitute *Brady* material, the information must be admissible. *See, e.g., United States v. Oxman,* 740 F.2d 1298, 1311 (3d Cir. 1984) ("In order to be material, evidence suppressed must have been admissible at trial."); *United States v. Ranney,* 719 F.2d 1183, 1190 (1st Cir. 1983) ("Inadmissible evidence is by definition not material [for *Brady* purposes], because it never would have reached the jury and therefore could not have affected the outcome of the trial.") Other courts have held that information can constitute *Brady* material even where the information is not in itself admissible *so long as it leads directly to admissible*

evidence. See, e.g., United States v. Johnson, 502 F.3d 164, 171 (D.C. Cir. 2010) (emphasis added).

Regardless of which line of cases applies, and even assuming the Schuelke Report's conclusion that Williams clearly told Mr. Goeke and others that he "assumed" that the VECO time would be rolled into the Christensen Builders' invoice, that assumption without more is not discoverable under *Brady.* Clearly, Williams' assumptions have no probative value on what Senator Stevens believed. And the Schuelke Report fails to show how Williams' assumption would have led to admissible evidence that the Stevens defense team otherwise did not have.

Instead, the Schuelke Report refers to Williams' assumption as "quintessential *Brady"* simply because the Report's interpretation of what it found Williams assumed mirrored the defense being proffered by Senator Stevens namely, that Senator and Mrs. Stevens also assumed that the VECO time was incorporated into the Christensen Builders' invoice. But this mirroring of assumptions between Williams and the Stevens defense does not make Williams' conjecture somehow admissible and probative and similarly does not magically become *Brady* when it otherwise would not be. Put another way, Senator Stevens' belief that that the VECO time would be incorporated into the Christensen Builders invoice is certainly relevant and probative of the Senator's state of mind; Williams' similarly held belief is neither admissible if offered for Williams's state of mind (since Williams' state of mind is irrelevant), nor is it probative as to what Senator Stevens believed regarding what the Christensen Builders' invoices reflected. Therefore, it was reasonable, as Mr. Goeke testified, that at the time he did not consider

Williams' "assumptions"-regardless of what those assumptions were—to be discoverable under *Brady."*

3. *The Fact that Mr. Goeke Took Notes and Provided Them to the Department Demonstrates His Good Intentions*

Mr. Goeke's note-taking and his efforts to find and produce those notes in this proceeding also belie any intent to conceal Rocky Williams' statements. Though the FBI had never systemized the attorney notes (meaning there was no independent record of Mr. Goeke's note-taking), Mr. Goeke saved these notes. Had Mr. Goeke intended to hide Rocky Williams' statements (and participate in some conspiracy to obstruct lawful *Brady*

The more prudent approach would have been to disclose Williams' assumptions (and then move *in limine* to bar their admission at trial). In his deposition before the Special Prosecutor, Mr. Goeke candidly admitted that with the benefit of hindsight that is what he would have done:

Mr. Schuelke:	But you had some questions.
Mr. Menchel:	I did. I just want the record to be clear about this. At the time, and I'm talking about in August and September of 2008, did you consciously go through the exercise of thinking about whether or not there were portions of Mr. Williams' testimony that ought to be disclosed one way or the other?
Mr. Goeke:	No.
Mr. Menchel:	Okay, and so the discussion that we're having now wasn't one that you – about whether or not this is arguably Brady or not arguably Brady with respect to Mr. Williams' mental impression. Was that something that you undertook to think about at the time one way or the other?
Mr. Goeke:	No, absolutely not.
	***
Mr. Menchel:	Yeah. Just going through the same subject about your notes and the information regarding Mr. Williams' statements to you. Looking at these notes today, do you think you should have disclosed the areas that Mr. Schuelke and Mr. Shields have brought out to the defense?
Mr. Goeke:	Yes, I do.

Deposition of James Goeke, January 8, 2010 at 107-109.

and *Giglio* disclosures), it would not have been consistent with such bad intent to take, preserve, and produce those notes, especially where there was no independent record that these notes existed. Yet, after the Stevens trial when the Department was investigating the *Brady* violations that had occurred and when Mr. Goeke was fully aware that his conduct was under serious scrutiny, he faithfully searched for, retrieved and turned those notes over to the Department's team that was handling the investigation. This behavior cuts in favor of Mr. Goeke's good intentions and is conspicuously absent from the Schuelke Report.

4. *Mr. Goeke Did Not Review and was Not In Charge of Reviewing Williams' Grand Jury Transcripts and 302s for Brady Material*

In assessing whether Mr. Goeke intentionally withheld *Brady* material related to Williams' statements, the Schuelke Report completely ignores that Mr. Goeke was not the lawyer on the prosecution team assigned to review Williams' statements for the purpose of making a *Brady* disclosure.[12] While every prosecutor has an independent obligation to discharge his or her *Brady* obligations faithfully, the *Brady* review was divided up amongst the members of the prosecution team. Perhaps it would have been better practice to have every prosecutor on the team independently assess whether every witness's prior statements contained *Brady*. But that was not feasible: given the Department's decision to rush the case to indictment and trial, the team had just weeks to

[12] As discussed above, Mr. Goeke was tasked with doing such a review for the grand jury testimony of Mr. Paone and Mr. Persons. His draft disclosure was so comprehensive and overly inclusive that it was decided to simply produce the grand jury testimony of these witnesses in their entirety. This was the only instance in the Government's *Brady* production where the full testimony of witnesses were produced to the defense. This conduct evidences about Mr. Goeke's good faith intentions, yet the Schuelke Report seems not to have considered these disclosures at all in reaching its conclusion about Mr. Goeke's intent.

produce discovery and prepare for trial. That, combined with what even the Schuelke Report acknowledges was a hands-off management style by the lead trial counsel, made it unavoidable in a case of this magnitude that the team would resort to an *ad hoc* division of labor.

That reality does not excuse the failures to make these disclosures, but the Schuelke Report seems to suggest that even though Mr. Goeke was not tasked with Williams' *Brady* disclosures, he not only should have taken it upon himself to make such disclosure but that his failure to do so was *intentional.* The Report cites no evidence upon which to draw that conclusion. On the contrary, when one takes into account the full scope of Mr. Goeke's conduct when it came to making *Brady* disclosures, such a conclusion is unwarranted.

Moreover, when Mr. Goeke reviewed the draft *Brady* disclosure, he confirmed that it disclosed what he believed to be the most important revelation for the Stevens defense—that some witnesses (including Allen) believed Senator Stevens intended to pay for the work on Stevens' home. For instance, the letter disclosed that Allen was "aware that defendant took out a loan to pay a contractor in connection with the renovations" at his house. Ex. G at ¶ 17b. The letter also disclosed that "Allen stated that on at least two occasions defendant asked Allen for invoices for VECO's work at the Girdwood residence." *Id. at* ¶ 17c. That Mr. Goeke failed to catch the inadequacies in the *Brady* letter does not demonstrate any *intentional* violation of Mr. Goeke's *Brady* obligations.

CONCLUSION

While it was beyond the Special Prosecutor's mandate to fully examine the underlying reasons why the Stevens prosecution team failed to fulfill its *Brady* and *Giglio* obligations, the Report does make some observations on these issues. The Report observes: that the indictment was rushed and that the prosecutors review for *Brady* material only began around the date of indictment (Schuelke Report at 49); that the Department's upper management decided that it had to "play [its] cards close to the vest" and that the 302s would not be turned over in their entirety to the defense *(id.* at 98); that there was a lack of supervision and leadership in the *Brady* review *(see, e.g., id.* at 64-69, 74-77, 85) and; that the role of the ¯front office [of the Department of Justice] in the management of the prosecution contributed to the failures of effective supervision of the trial team by the leadership of the Public Integrity Section." *Id.* at 506. In evaluating whether someone should be held criminally responsible or even in evaluating whether someone's conduct was intentional regardless of criminality, the underlying facts and circumstances surrounding the Stevens prosecution cannot and should not be ignored; the context is essential to any evaluation. To not consider the enormous time pressures, the disorganization and chaos, and the lack of leadership under which Mr. Goeke and other prosecution team members labored under ignores the reality of why so many mistakes were made.

Had the upper management in the Department of Justice shown real concern for making sure this prosecution was handled correctly, instead of being driven by other exogenous and perhaps political factors, they never would have forced the prosecution team to rush the case to indictment and to trial. They would not have made the rash

decision to disrupt the trial team's leadership and composition by appointing another lawyer as lead trial counsel just days before the case was presented to the grand jury. And, they certainly would not have made the critical decision to not provide the FBI 302's in their entirety to defense counsel. Creating this environment was a recipe for disaster and virtually ensured that mistakes—of precisely the kind the Schuelke Report details—would be made.

Had the members of the Stevens prosecution team been given the appropriate amount of time to properly prepare and fulfill their professional, legal, and ethical obligations, it is doubtful that most, if not all, of these violations would have occurred. In the case of Mr. Goeke, this does not excuse any mistakes he may have made. But, it does explain that any mistakes made were borne of conditions placed upon him through no fault of his own and were a byproduct of being rushed and overworked rather than by design or intention.

Finally, in assessing Mr. Goeke's state of mind in connection with the disclosures made in this case, the Schuelke Report fails to acknowledge that Mr. Goeke worked tirelessly around the clock for weeks in a back room in Washington D.C. away from his family in Alaska. Without complaint, he accepted an unglamorous and subordinate role to serve the other members of the prosecution team who would be trying the case. He accepted his role knowing full well that by laboring in the back office instead of in the courtroom, he was certain to get none of the accolades or attention that come with trying a high profile case against a sitting United States Senator. This speaks volumes about Mr. Goeke's character and his view of what it means to be a public servant. When one

takes everything into account there is no question that under difficult circumstances, Mr. Goeke did his best and carried out his duties in good faith.

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