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Subverting *Brady v. Maryland* and Denying a Fair Trial: Studying the Schuelke Report

by Bennett L. Gershman*

The Schuelke Report¹ about the ill-fated federal prosecution of the late-Senator Ted Stevens is an extraordinary contribution to criminal procedure. No other official documentation or investigative study of a criminal prosecution, to my knowledge, has dissected and analyzed as carefully and thoroughly the sordid and clandestine actions of a team of prosecutors who zealously wanted to win a criminal conviction at all costs. In examining this Report, one gets the feeling that as the investigation and prosecution of Senator Stevens unfolded and the prosecution's theory of guilt unraveled, the prosecutors became indifferent to the defendant's guilt or innocence. They just wanted to convict him. Based on depositions of these prosecutors, their e-mails, notes, memos, conversations, court filings, transcripts of testimony, and oral arguments, the Schuelke Report methodically and exhaustively documents the way these prosecutors manipulated flimsy, ambiguous, and unfavorable evidence; systematically concealed exculpatory evidence from the defense and the jury; and thwarted defense attempts to locate that evidence in order to convict a United States Senator and destroy his career.

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1. Report to Hon. Emmett G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated Apr. 7, 2009, In re Special Proceedings, No. 1:09-mc-00198-EGS (D.D.C. Mar. 15, 2012), available at http://legaltimes.typepad.com/files/Stevens_report.pdf [hereinafter Schuelke Report].

I. OVERVIEW

Ted Stevens, a U.S. Senator from Alaska—and the longest-serving Republican in Senate history—was convicted on October 27, 2008, by a federal jury of making false statements on Senate financial disclosure forms.² Shortly after the conviction, serious irregularities in the prosecution of the case prompted the United States Department of Justice to assign a new team of prosecutors to review the evidence and the conduct of the trial prosecutors.³ This new team discovered quickly that exculpatory evidence had been concealed from the defense. The Justice Department then moved to set aside the verdict and dismiss the indictment. Federal District Judge Emmet G. Sullivan, who had presided at the trial and had previously held two of the trial prosecutors in contempt for failing to comply with his order to disclose exculpatory information to Stevens's attorneys, granted the motion. Judge Sullivan then appointed Henry F. Schuelke III to investigate and prosecute criminal contempt proceedings against the six prosecutors who conducted the Stevens investigation and trial.⁴

Schuelke's investigation lasted two years and was based on a review of over 128,000 pages of documents. His 514-page Report was released on March 15, 2012.⁵ In the Report he concluded that the investigation and prosecution of Senator Stevens were "permeated by the systematic concealment of significant exculpatory evidence which would have independently corroborated Senator Stevens's defense and his testimony, and seriously damaged the testimony and credibility of the government's key witness."⁶ The Report concluded, however, that no criminal contempt prosecutions should be initiated against any of the prosecutors under 18 U.S.C. § 401(3),⁷ because they did not violate a "clear, specific and unequivocal order" of the trial court that had commanded them to

2. See Neil A. Lewis, *Table Turned on Prosecution in Stevens Case*, N.Y. TIMES, Apr. 7, 2009, <http://www.nytimes.com/2009/04/08/us/politics/08stevens.html>; see also 18 U.S.C. § 1001 (2006).

3. Lewis, *supra* note 2.

4. *Id.*; Henry F. Schuelke III, Esq. was appointed by Federal District Judge Emmet G. Sullivan on April 7, 2009 as Special Counsel to investigate and prosecute criminal contempt proceedings as may be appropriate against the six prosecutors who conducted the Stevens investigation and trial. Mr. Schuelke was assisted by William Shields, Esq. *Id.*

5. Schuelke Report, *supra* note 1. The Report also contains an "Addendum" with comments and objections to the Report by the six prosecutors who were subjects of the investigation. *Id.* at ix.

6. *Id.* at 1.

7. 18 U.S.C. § 401(3) (2002).

disclose this information that would support a finding, beyond a reasonable doubt, of criminal contempt.⁸

The government's prosecution of Senator Stevens focused on the period between May 1999 and August 2007, when Stevens, as the indictment alleged, received more than \$250,000 worth of renovation and repair services on his part-time residence in Girdwood, Alaska. These services were given by VECO Corporation and its owner, Bill Allen, a friend of Senator Stevens and ultimately the chief witness against him.⁹ The seven-count indictment charged Stevens with concealing the receipt of free renovation and repair work by failing to disclose these benefits on the financial disclosure forms he filed annually with the Senate.¹⁰

The critical issue at the trial, and Senator Stevens's principal defense, was his intent. Stevens claimed that he did not intentionally file false financial disclosure forms because he and his wife, Catherine, believed that their payments of \$160,000 to the contractor they hired—Christensen Builders—covered the entire cost of the renovation, and that they did not believe they had received additional free services from VECO. As the Schuelke Report documents, however, Stevens's ability to prove his defense was thwarted by the actions of the prosecutors in concealing significant exculpatory evidence that would have corroborated his defense and their frustrating of repeated attempts by Stevens's lawyers to obtain this evidence.¹¹

8. Schuelke Report, *supra* note 1, at 513. Schuelke found that two of the prosecutors—Joseph Bottini and James Goeke—engaged in intentional misconduct by withholding from the defense significant exculpatory evidence. The Justice Department's Office of Professional Responsibility conducted its own post-Stevens investigation and concluded that Bottini and Goeke engaged in "reckless professional misconduct" but that their misconduct was not intentional. As a result of their misconduct, Bottini was suspended for forty days without pay, and Goeke was suspended for fifteen days without pay. See Letter from Ronald Welch, Asst. Atty. Gen., to Patrick J. Leahy, Chairman, Comm. on the Jud. U.S. Sen., and Lamar S. Smith, Chairman, Comm. on the Jud. U.S. House of Rep. (May 24, 2012) available at <http://www.documentcloud.org/documents/359786-5-24-12-doj-letter-to-chairmen-leahy-and-smith-2.html>.

9. Allen began cooperating with the Department of Justice in 2006 in the so-called "Polar Pen" investigation of official corruption in Alaska. He testified pursuant to a plea and cooperation agreement as the government's major witness against Alaska legislators Peter Kott and Victor Kohring in 2007, and against Senator Stevens in 2008. Schuelke Report, *supra* note 1, at 2. As a direct consequence of the dismissal of the indictment against Senator Stevens, the convictions of Kott and Kohring were reversed and new trials ordered. See *United States v. Kohring*, 637 F.3d 895, 913 (9th Cir. 2011); *United States v. Kott*, 423 F. App'x 736, 737 (9th Cir. 2011).

10. Schuelke Report, *supra* note 1, at 2.

11. *Id.* at 5.

II. SUMMARY OF CONCEALED EVIDENCE

A. *Rocky Williams Corroborates Stevens's Defense, but this Information is Concealed from the Defense*

Rocky Williams, a VECO employee and known as “Bill [Allen]’s eyes,” supervised the renovation work on Stevens’s home by Christensen Builders and VECO between 2000 and 2002.¹² Williams was slated to be a government witness to testify to the work done on the home by Christensen and VECO employees as well as to the value of that work.¹³ Williams was interviewed by the prosecutors four times in August and September of 2008 in preparation for trial. According to the prosecutors’ handwritten notes of these interviews, Williams repeatedly told them that after reviewing the Christensen Builders bills, he sent the bills to Bill Allen along with the additional charges for his time and the time of other VECO employees, and that it was his understanding that Allen would add these costs to the Christensen bills before sending the bills to Stevens.¹⁴ The prosecutors knew from early in the investigation that Williams’s belief that the VECO expenses were being rolled into the Christensen bills would corroborate Stevens’s defense—that he paid the Christensen bills in full, believing that the VECO expenses had been added to these bills and, therefore, did not knowingly and intentionally file false financial disclosure forms.¹⁵

The Report suggests that as the case neared trial, the prosecutors became convinced that Williams might be more of a liability as a government witness than an asset. Canceled checks and notes from Williams to Catherine, Stevens’s wife, supported Stevens’s claim that it was reasonable for him to believe that VECO expenses were included in the large Christensen bills.¹⁶ Moreover, from Williams’s account the prosecutors became alerted to questions concerning the accuracy of the VECO time sheets and cost reports, which were going to be used to prove the value of the benefits to Stevens. Williams acknowledged that he and other VECO employees did not work full-time on the Stevens renovation

12. *Id.* at 2 (alteration in original).

13. *Id.* The government introduced VECO records to prove the value of the renovation and repair work on Stevens’s residence, but the accuracy of these records, as noted below, was challenged and became a central issue in the case. *Id.* at 8.

14. *Id.* at 6.

15. *Id.* In an internal memorandum the prosecutors described this claim as Stevens’s “primary defense.” *Id.*

16. *Id.* at 175-76. The Report notes that it was unlikely that Stevens’s lawyers would learn about Williams’s exculpatory understanding on their own. *Id.* at 176.

and, therefore, the VECO records probably were inflated.¹⁷ Finally, a few days before the trial, Williams did poorly on a mock cross-examination. On the day of opening statements, Williams was sent back to Alaska, allegedly because of his poor health and need for medical attention in Alaska.¹⁸

The prosecutors never disclosed Williams's understanding to Stevens's attorneys—which Williams repeated in each of the four pre-trial interviews and which the prosecutors knew would be Senator Stevens's principal defense—that VECO costs were included in the Christensen bills.¹⁹ Indeed, the prosecutors frustrated attempts by the defense to locate this information. The prosecutors were assured by Williams that he would not to speak to Stevens's lawyers.²⁰ Williams's exculpatory statements in his interviews were not memorialized in any of the 302 reports and not disclosed to the defense.²¹ Instead of including his exculpatory statements, the only statements by Williams that were memorialized were two sentences that prosecutors dictated into a 302 report which gave the false impression that Williams's statements actually were helpful to the government. One sentence stated that Williams never had any conversations with Ted or Catherine Stevens in which he told them that VECO expenses were included in Christensen invoices. The second sentence stated that neither Ted nor Catherine Stevens ever asked Williams whether the VECO expenses were included in the Christensen bills.²²

17. *Id.* at 179-81. Indeed, when it became clear during the trial that the VECO records of the cost of the renovation were inflated and falsely described the work done, Judge Sullivan halted the trial, stating that “[i]t’s very troubling that the government would utilize records that the government knows were false,” and, as a sanction against the government, struck the records from the jury’s consideration. The judge denied a defense motion for a mistrial. *Id.* at 398-99.

18. *Id.* at 180-81. FBI Agent Chad Joy filed a written complaint with the FBI alleging misconduct by the prosecutors and FBI Agent Mary Beth Kepner in devising a “scheme” to send Williams back to Alaska after his poor performance in the mock cross-examination. *Id.* at 180-88.

19. *Id.* at 176. The Schuelke Report found that concealing this information materially prejudiced Stevens’s ability to prove his defense. *Id.* at 500; see *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

20. Schuelke Report, *supra* note 1, at 176.

21. *Id.* at 7-8. In a “*Brady* letter” to the defense dated August 25, 2008, the government did not disclose the information provided by Williams just a few days earlier, and referred to rumors of excessive alcohol use by Williams, when in fact the prosecutors knew that Williams was an alcoholic. *Id.* at 8.

22. *Id.* at 7.

B. *Bill Allen's Role*

Bill Allen was VECO's principal executive officer and principal owner. He became a cooperating witness with the Justice Department in 2006 in connection with the "Polar Pen" investigation into public corruption in Alaska.²³ In 2007, Allen entered a plea agreement and testified as the government's major witness against Alaskan state legislators Peter Kott and Victor Kohring, and, in 2008, against Stevens.²⁴ Allen's testimony was critical to Stevens's conviction. The government's concealment of significant *Brady* information concerning Allen's credibility was the principal basis for the Justice Department's decision to seek dismissal of the charges, as well as Judge Sullivan's decision to appoint Mr. Schuelke to investigate and prosecute criminal contempt charges against the Stevens prosecutors.²⁵

C. *Allen Suborns Perjury by Bambi Tyree, but This Information is Concealed from the Defense*

Bambi Tyree, a child prostitute, had a sexual relationship with Bill Allen when she was fifteen years old. In 2004, when she was twenty-three years old, she was indicted on drug conspiracy and child-sex trafficking charges by the U.S. Attorney's Office in Alaska.²⁶ Tyree became a cooperating witness against her co-defendant Josef Boehm. During a trial preparation interview conducted by Assistant U.S. Attorney Frank Russo and FBI case agent John Eckstein, the first subject Tyree was questioned about was her relationship with Allen. Agent Eckstein's 302 report of that interview states:

TYREE had sex with BILL ALLEN when she was 15 years old. TYREE previously signed a sworn affidavit claiming she did not have sex with ALLEN. TYREE was given the affidavit by ALLEN's attorney, and she signed it at ALLEN's request. TYREE provided false information on the affidavit because she cared for ALLEN and did not want him to get into trouble with the law.²⁷

Four days later, Russo filed a sealed motion in *United States v. Boehm*²⁸ to limit the cross-examination of Tyree.²⁹ Russo stated in his

23. *Id.* at 2; see also *supra* note 9 and accompanying text.

24. Schuelke Report, *supra* note 1, at 2.

25. *Id.* at 32-33.

26. *Id.* at 9.

27. *Id.*

28. The motion in limine in this case was a sealed motion. *Id.* at 10.

29. *Id.*

motion that Allen was being blackmailed with threatened public disclosure of his sexual relationship with Tyree, and that Allen had asked Tyree to sign an affidavit to falsely swear that she and Allen never had sex.³⁰ Russo in his sealed reply brief stated: "Allen convinced Tyree to give a false statement to his attorney to defend against any prospective criminal action."³¹ James Goeke, an Assistant U.S. Attorney who assisted Russo in the *Boehm* prosecution and was one of the six prosecutors in the *Stevens* trial, signed the government's sealed opposition to the defendant's motion for reconsideration, in which he explicitly referred to Tyree's agreement to make a statement under oath to Allen's lawyer falsely denying that she had sex with Allen.³² The Schuelke Report suggests that if FBI Agent Eckstein's 302 report and the government's sealed pleadings in *Boehm* had been disclosed to Stevens's lawyers, Allen's credibility would have been significantly impeached for having had sex with a fifteen-year-old girl and then suborning her perjury by getting her to sign an affidavit falsely denying their sexual relationship.³³

The Schuelke Report in over 150 pages describes how the *Stevens* prosecutors desperately sought to keep this information from Stevens's lawyers and the jury, and to orchestrate an elaborate scheme to insulate themselves from subsequent charges that they violated their disclosure obligations. Since all of the Tyree information was under seal, the prosecutors probably knew that it would be inaccessible to Stevens's lawyers.³⁴ The prosecutors, together with Mary Beth Kepner, the FBI case agent in the *Stevens* case, created a sham facade to conceal this evidence from the defense. Kepner "interviewed" Allen about the Tyree affidavit and prepared a one-sentence 302 report stating that Allen never made a false statement under oath and never encouraged others to do so.³⁵ Kepner also re-interviewed Tyree and prepared a 302 report stating that Tyree came up with the idea herself to sign a document to prevent Allen from being further extorted, and that the content of the document "was created solely by TYREE with the help of [an] attorney."³⁶

30. *Id.*

31. *Id.*

32. *Id.* at 9-10.

33. *Id.* at 16.

34. *Id.* at 10.

35. *Id.* at 11.

36. *Id.* at 11-12. That Tyree, a fifteen-year-old, would come up with the idea herself seemed unbelievable to Agent Eckstein and to AUSA Russo and Goeke. *Id.* at 200.

Armed with these denials, the prosecutors then consulted twice with the Justice Department's Professional Responsibility Advisory Office (PRAO) about whether they were required under *Brady* to disclose any of this information to the defense.³⁷ Interestingly, in seeking advice from the PRAO, the prosecutors framed the "Question Presented" as whether a "suggestion" or "recollection" that Allen had caused Tyree to lie needed to be disclosed under *Brady* when there was "no evidence" to back up the allegation.³⁸ To obtain the sought-after PRAO opinion that disclosure was not required—indeed, to be "blessed" with PRAO's imprimatur, as one of the prosecutors put it³⁹—the prosecutors provided PRAO with "incomplete, inaccurate[,] and misleading information."⁴⁰ The prosecutors did not provide the PRAO attorneys with Eckstein's 302 report or the court pleadings by Russo and Goeke which explicitly stated that Allen suborned perjury. Not surprisingly, the prosecutors received the PRAO opinion that disclosure was not called for, and the *Stevens* jury never learned that Allen had caused a fifteen-year-old girl to lie about having sex with him.⁴¹

The prosecutors lied to the defense. In the first of two *Brady* disclosure letters the prosecutors stated that a pending Alaska Police Department investigation disclosed that Allen gave some "benefits" to Tyree, but refused to provide the defense with any more information despite specific requests.⁴² In the second *Brady* letter, the prosecutors represented that they were aware of "no evidence" to support a "suggestion" that Allen asked Tyree to lie.⁴³ According to the Schuelke Report,

[t]hese astonishing misstatements concealed the existence of documents and information in [the prosecution's] possession and well known to them since at least October 2007, namely, Agent Eckstein's 302, his notes and AUSA Russo's *in limine* motion in *Boehm*, which unequivocally documented Ms. Tyree's admission that she lied under oath at Mr. Allen's request.⁴⁴

37. *Id.* at 12.

38. *Id.* at 227.

39. *Id.* at 324.

40. *Id.* at 13.

41. PRAO attorneys stated that their advice would have been different had they known the true facts. *Id.* at 228-29.

42. *Id.* at 290-91.

43. *Id.* at 300. Although he drafted the *Brady* letter, Goeke testified during Schuelke's investigation that the reference to "no evidence" was "inaccurate" and that Agent Eckstein's notes were "not ambiguous." *Id.* at 338.

44. *Id.* at 16.

D. Absence of Invoices for VECO Expenses Supports Stevens's Defense, but This Information is Manipulated by the Prosecution

Bill Allen's testimony was used by the government to prove that VECO made substantial improvements to Stevens's home, the value of those improvements, and Stevens's failure to disclose those benefits on his financial disclosure forms. Stevens's principal defense, as noted above, was that he did not intentionally make any false statements on his financial disclosure forms. In his opening statement, Stevens's attorney Brendan Sullivan told the jury that after renovation work had been completed on Stevens's Alaska residence, and after Allen arranged for further repairs, Stevens pressed Allen to send him bills for the work done, but no bills were ever sent. As Sullivan told the jury: "You cannot report what you don't know."⁴⁵

To support his argument that Stevens pressed Allen to send him bills, Sullivan drew the jury's attention to two notes Stevens sent to Allen in 2002. Referred to in the Schuelke Report as the "Torricelli note(s)," these notes were described by Sullivan as evidence that literally "jumps off the page and grabs you by the throat to show you what the intent of Ted Stevens was."⁴⁶ The two notes from Stevens were sent in October and November of 2002:

10/6/02

Dear Bill -

When I think of the many ways in which you make my life easier and more enjoyable, I lose count!

Thanks for all the work on the chalet. You owe me a bill - remember Torricelli, my friend. Friendship is one thing - compliance with these ethics rules entirely different. I asked Bob P[ersons] to talk to you about this so don't get P.O'd at him - it just has to be done right.⁴⁷

Hope to see you soon.

My best,
Ted

45. *Id.*

46. *Id.* at 16-17.

47. *Id.* at 17. Bob Persons was a mutual friend of Senator Stevens and Bill Allen and a neighbor who informally monitored the renovation work on Senator Stevens's house. *Id.* at 16.

11/8/02

Dear Bill:

Many thanks for all you've done to make our lives easier and our home more enjoyable. . . . (Don't forget we need a bill for what's been done out at the chalet) . . .

My best

Ted⁴⁸

Allen was interviewed during the course of the investigation at least fifty-five times by the prosecution, and Kepner prepared at least sixty-two FBI 302 reports of these interviews with Allen. Throughout the investigation, Allen conceded that he did not send bills to Stevens, and listed various reasons why he did not send them.⁴⁹ He told the prosecutors that he never sent an invoice because Stevens probably would have declined to pay such a high bill, but acknowledged that Stevens "probably would have paid a reduced invoice if he had received one."⁵⁰ Allen also said that he did not want to send Stevens a bill "because he felt that VECO's costs were [much] higher than they needed to be."⁵¹ Allen also stated that he "wasn't sure how to produce an invoice."⁵² Additionally, Allen said that he simply did not want Stevens to have to pay him.⁵³

The prosecutors obtained the Torricelli notes from Williams & Connolly, the firm representing Stevens, on April 8, 2008. According to the Scheulke Report, these notes "immediately became and remained objects of concern and attention" by the prosecutors.⁵⁴ However, this characterization may be an understatement. The prosecutors immediately realized how damaging these notes would be to getting a conviction. Indeed, Kepner believed these notes could prove "fatal" to the case and could give the Department of Justice "an out" for dismissing the case.⁵⁵ The prosecutors advised their superiors about the potential damage to their case by the notes, questioned the notes' authenticity, and immediately arranged to meet with Allen on April 15th in Alaska to interrogate him about the notes.⁵⁶

This two-hour meeting, which included almost the entire prosecution team, would become a pivotal event in the case. Twenty-five pages in

48. *Id.* at 17 (alteration in original).

49. *Id.* at 25.

50. *Id.*

51. *Id.*

52. *Id.* at 393.

53. *Id.* at 25; *see id.* at 393.

54. *Id.* at 351.

55. *Id.* at 358.

56. *Id.* at 351-52.

the Schuelke Report are devoted to this meeting. The prosecutors took copious notes of this interview. Allen told the prosecutors that he remembered receiving the notes, but that he did not remember speaking to Persons about the bills requested by Stevens.⁵⁷ During this session the prosecutors e-mailed each other back and forth about their concern and disappointment at Allen's answers.⁵⁸ E-mails reflect that Allen and Kepner "had a lot of arguments," and Allen at one point "bl[e]w[] up" at one of the prosecutors who he thought was "pushing too hard" and the group had to take a break.⁵⁹ Although Kepner had written at least sixty-two FBI 302 reports of meetings and interviews with Allen between August 2006 and September 2008, she did not write a 302 report of the April 15th meeting because "the debriefing of [] Allen did not go well."⁶⁰ Kepner told Allen after the meeting that the prosecutors "were upset" and "weren't very happy" with his answers and that "you need to think a little bit more what they really—what people—what they really done."⁶¹

E. Value of VECO Repairs Supports Stevens's Defense, but This Information is Concealed from the Defense

Allen was also questioned at the April 15th meeting about the value of VECO's work on the Stevens's residence. As noted above, the indictment alleged that the value was more than \$250,000—an issue that the prosecutors knew would be contested by the defense.⁶² However, at the April 15th meeting, Allen was "pretty vociferous" that the value of VECO's services was not \$250,000, and could not have been more than \$80,000.⁶³ According to Allen, the \$250,000 number was coming from Kepner, who "wanted the [\$]250,000 from VECO."⁶⁴ During this interview, Allen and Kepner "had a lot of arguments"

57. *Id.* at 364. The prosecutors interviewed Persons but did not question him about whether he met with Allen to discuss the bills. *Id.* at 25. Persons testified at the trial as a defense witness and denied ever meeting or talking to Allen about sending bills to Stevens. *Id.* at 20 n.6.

58. *Id.* at 372-74.

59. *Id.* at 368-72, 384.

60. *Id.* at 377-78. She failed to write 302s for other meetings and backdated other 302s. *Id.* at 378 n.50.

61. *Id.* at 379-80.

62. *Id.* at 2. AUSA Brenda Morris's opening statement declared that VECO kept track of the costs "down to the penny," although "whether it's \$188,000 or whether it's \$240,000 or whether it's \$120,000, the defendant still got it for nothing." *Id.* at 394.

63. *Id.* at 380-81. None of the FBI 302 reports, IRS reports, or grand jury testimony contained any of Allen's statements that the value of VECO's work was \$80,000. *Id.* at 386.

64. *Id.* at 383-84.

concerning the value of VECO's work.⁶⁵ Allen scoffed at the \$250,000 figure, telling Kepner "it couldn't be that much."⁶⁶ "Hell," Allen said, "the house is not worth that."⁶⁷ Although Kepner wrote at least sixty-two FBI 302 reports of meetings with Allen, she did not prepare a 302 report of the April 15th meeting containing Allen's estimate of VECO's expenses.⁶⁸ Kepner testified in the grand jury in 2007 concerning Allen's estimate of the VECO costs. She testified falsely that Allen's initial estimate of the value of VECO's work was "about \$100,000" but that Allen "did not contest" the "substantially higher" value of \$250,000 reflected in VECO time sheets.⁶⁹ Although the prosecutors knew that one of Stevens's "strongest defenses" would be that the value of VECO's work was "over-inflated," the prosecutors never disclosed to the defense Allen's statements that the value of VECO's work was not more than \$80,000.⁷⁰

F. Allen Gives False Testimony, but the Prosecution Fails to Correct It

As the prosecutors were preparing for trial, their theory of the case was that VECO had provided Stevens with more than \$250,000 of repair work on his home, and that Stevens intentionally omitted this substantial benefit from his Senate disclosure forms. A significant problem for the prosecutors, as noted above, were the statements of Allen, memorialized by the two Torricelli notes, that Stevens pressed Allen for invoices for the repair work on his home. The prosecution's second *Brady* letter on September 9, 2008, summarized Allen's statements, described above, about the reasons Allen did not send Stevens any bills.⁷¹

Then, just before trial, as Allen was about to leave for Washington, D.C., Kepner said to him "you better figure out or remember what you done with this Torricelli note from Ted *You got to figure out what you done and when did you talk to Bob Persons.*"⁷² Allen arrived in Washington on Friday, September 12, 2008, and he and his attorney met with several of the prosecutors, including Kepner, on September 13 and 14 for trial preparation. It was during the meeting on September 14 that Allen "remembered" a new reason for not sending bills to Stevens:

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 386.

69. *Id.* at 386-87.

70. *Id.* at 388-89.

71. *Id.* at 420.

72. *Id.* at 430-33 (emphasis in original).

Allen stated that after receiving the Torricelli note, he spoke with Bob Persons and that Persons told him “don’t worry about getting a bill Ted is just covering his ass.”⁷³ The prosecutors immediately recognized the significance of this statement—one of the prosecutors became “giddy” over this new revelation.⁷⁴ Allen’s “recovered memory” fit perfectly the prosecution’s theory that the Torricelli notes were “pretext[s]” to explain Stevens’s failure to disclose the VECO benefits.⁷⁵ The prosecutors never disclosed to the defense this new revelation by Allen, and as noted above, the defense opened the case on September 25 and proceeded at trial on the theory that the Torricelli notes were critical evidence that proved Stevens’s innocent intent.

At trial, Allen testified that he recalled speaking with Bob Persons concerning the Torricelli notes and, specifically, that Persons told him “don’t worry about getting a bill Ted is just covering his ass.”⁷⁶ “[S]hocked” by this “bombshell,” the defense interrupted the trial and sought a mistrial.⁷⁷ Judge Sullivan denied the motion but ordered the prosecutors to immediately provide the defense with un-redacted copies of all FBI 302 reports, IRS reports, and grand jury testimony for all witnesses.⁷⁸

When the trial resumed several days later, the defense cross-examined Allen in an effort to demonstrate that his story about his conversation with Persons was a “recent fabrication” that Allen had concocted shortly before the trial.⁷⁹ However, Allen steadfastly denied that his reference to the CYA conversation was a “recent” recollection, and suggested that he had told the prosecutors about his conversation with Persons much earlier in the investigation.⁸⁰ Allen’s denial, however, was false. He had never mentioned this conversation before, as the prosecutors knew, and in fact had told the prosecutors at the April 15 meeting that he did not recall ever speaking to Persons about the Torricelli notes.⁸¹

73. *Id.* at 424, 465. The Schuelke Report refers to this evidence as the CYA (“Cover Your Ass”) statement. *Id.* at 424.

74. *Id.* at 453.

75. *Id.* at 453-54.

76. *Id.* at 465.

77. *Id.* at 458, 469, 478.

78. *Id.* at 469. As noted, none of the fifty-five FBI 302s of interviews of Allen contained any reference to Allen’s CYA statement.

79. *Id.* at 470-73.

80. *Id.* at 469-70.

81. Persons testified for the defense and denied ever making the CYA statement. *Id.* at 20 n.6.

However, Allen's false denial was never corrected by the prosecutors.⁸² Every prosecutor claimed to have forgotten Allen's April 15 statement.⁸³

III. SUBVERTING *BRADY* AND DENYING STEVENS A FAIR TRIAL

A. *The Prosecutors*

The *Stevens* prosecutors were not amateurs; they were mostly veterans with considerable prosecutorial experience. Indeed, they were among the most experienced and accomplished prosecutors in the Justice Department. Their excuses for neglecting their constitutional and ethical duties, as noted below, appear startling in light of their backgrounds and experience. Brenda Morris, the lead prosecutor in the *Stevens* trial, was the Deputy Chief of the Public Integrity Section with more than twenty years experience as a prosecutor.⁸⁴ William Welch was an Assistant U.S. Attorney in Massachusetts for twelve years and served for two years as a prosecutor in the Justice Department's Tax Division before being named Chief of the Justice Department's Public Integrity Section.⁸⁵ Joseph Bottini worked in the Alaska U.S. Attorney's Office where he held several senior management positions, including Chief of the Criminal Division, and was assigned as a Professional Responsibility Officer reviewing agent misconduct and advising prosecutors about their disclosure obligations.⁸⁶ Nicholas Marsh clerked for a federal judge and was a junior partner in a prestigious New York law firm before joining the Justice Department's Public Integrity Section, in which he served for five years.⁸⁷ Edward Sullivan clerked for a federal judge and worked at a commercial litigation firm before joining the Justice Department's Public Integrity Section, where he served for over two years.⁸⁸ James

82. *Id.* at 496. Such correction is mandated under due process. *See Napue v. Illinois*, 360 U.S. 264 (1959).

83. Schuelke Report, *supra* note 1, at 507.

84. *Id.* at 39. Before joining the Public Integrity Section, Morris served as an Assistant District Attorney in the New York County District Attorney's Office from 1986 to 1991. In 2004, she became PIN's Deputy Chief for Litigation and, in 2007, its Principal Deputy Chief. *Id.*

85. *Id.*

86. *Id.* at 40-41. Bottini also served as an "anti-terrorism coordinator," the project safe neighborhoods coordinator, and the "Henthorne coordinator" dealing with agent misconduct issues. As the Professional Responsibility Officer, Bottini addressed questions raised by AUSAs, including questions about *Brady/Giglio* disclosure obligations. *Id.*

87. *Id.* at 41. Nicholas Marsh committed suicide during the Schuelke investigation. *See Paul Duggan, Justice Department Lawyer Kills Self*, WASH. POST, Sept. 28, 2010, at A2.

88. Schuelke Report, *supra* note 1, at 41. Sullivan was the most inexperienced prosecutor of the group. He lacked previous training and experience dealing with a

Goeke clerked for a federal judge and was in private practice before joining the Alaska U.S. Attorney's Office, where he served for over six years, becoming Acting First Assistant in 2006.⁸⁹ Mary Beth Kepner, who joined the FBI in 1991, was the case agent in the Polar Pen investigation and in *Stevens*. She assisted in a federal criminal trial in Philadelphia in 1998 in which the defendant was granted a new trial on account of a *Brady* violation.⁹⁰

B. *Excuses for Brady Violations*

A fair reading of the the Schuelke Report demonstrates that the *Stevens* prosecutors abandoned their role as ministers of justice and instead behaved with a reckless and even shocking disregard for their constitutional and ethical obligations. The Report states: "The investigation and prosecution of U.S. Senator Ted Stevens were permeated by the systematic concealment of significant exculpatory evidence."⁹¹ In reviewing the evidentiary materials in the case to determine whether to disclose information pursuant to *Brady*, the prosecutors analyzed the information not with a responsible and professional approach to their *Brady* obligations but with a warped and restrictive conception of their *Brady* duties. The *Stevens* prosecutors offered numerous excuses for their failure to comply with *Brady*.⁹² They claimed that they were unaware of the existence of the *Brady* information, denied that some of the information was exculpatory, and claimed that they forgot that the information even existed. They claimed they had neglected to record important information, overlooked the need to scrutinize important source documents, were forced by time pressures to conduct a rushed and unsupervised *Brady* review, and given these pressures were forced to delegate the *Brady* review to FBI agents and other prosecutors who were unfamiliar with the case. The prosecutors tried to justify their conduct by pointing to a compressed trial schedule, a failure of adequate supervision, micro-management by superiors in the Justice Department, inexperience, and lack of adequate *Brady* training.⁹³ Notwithstanding the U.S. Supreme Court's frequent admonition to prosecutors to err on

prosecutor's *Brady* obligations. Despite his lack of *Brady* experience, he was given significant *Brady* disclosure responsibilities. *Id.*

89. *Id.* at 42.

90. *Id.*; see *United States v. Patrick*, 985 F. Supp. 543, 561-64 (E.D. Pa. 1997).

91. Schuelke Report, *supra* note 1, at 1.

92. *Id.* at 36.

93. *Id.*

the side of disclosure,⁹⁴ the Schuelke Report shows that the *Stevens* prosecutors did just the opposite.⁹⁵

C. *Dysfunctional Review for Brady Information*

The *Brady* rule presupposes that prosecutors in preparing for a trial will closely review all of the materials in the case, including notes, reports, and testimony of police investigators and witnesses, to determine whether any favorable information exists which should be disclosed to the defense. It would be unusual—even startling—for a prosecutor to delegate this *Brady* review to persons who are unqualified to undertake that responsibility, either because they lack a clear understanding of the *Brady* rule itself or do not have a thorough enough knowledge of the case, including knowledge of all of the relevant information and documents in the case.

But as the Schuelke Report shows, this is exactly the kind of *Brady* review that was undertaken in *Stevens*. As one of the prosecutors candidly acknowledged, “it was not a procedure calculated to be successful.”⁹⁶ For example, Agent Kepner stated that she and other IRS agents were instructed by the prosecutors to review their reports and notes for *Brady* information, specifically for materials that would be “helpful” to the *Stevens* defense team.⁹⁷ However, Kepner never received any instructions as to what the term “helpful” meant. Having some rough knowledge of the *Giglio* rule, Kepner understood that she should be looking for information that “reflect[ed] badly on a witness.”⁹⁸ Because of this flawed and confusing instruction, she did not look for inconsistencies between a witness’s statements in an interview and a witness’s testimony in the grand jury, or inconsistencies between information provided by different witnesses.⁹⁹

Making this dysfunctional process of *Brady* review even worse, none of the *Stevens* prosecutors supervised the review of *Brady* information, and even employed other prosecutors in the Public Integrity Section who were not assigned to the *Stevens* case to conduct the *Brady* review.¹⁰⁰

94. See *Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009) (“[P]rudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure.”); *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) (“[A] prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence.”); *United States v. Agurs*, 427 U.S. 97, 108 (1976) (“[P]rudent prosecutor will resolve doubtful questions in favor of disclosure.”).

95. See Schuelke Report, *supra* note 1, at 1.

96. *Id.* at 82 (“[I]n hindsight, it wasn’t the best way to do it.”).

97. *Id.* at 64.

98. *Id.* at 64-65 (alteration in original).

99. *Id.* at 65.

100. *Id.* at 74-98.

Morris, the lead prosecutor in *Stevens*, did not know who was in charge of the *Brady* review.¹⁰¹ She believed that agents' notes of witness interviews were not reviewed for *Brady* information. Morris made numerous representations to the court that the government was aware of its *Brady* obligations and had met them.¹⁰² However, these representations were false and dishonest. She based these representations on her unfounded and unexplained belief that everybody on the trial team was doing his or her job.¹⁰³ Nobody on the trial team took responsibility for the *Brady* review. Indeed, it appears that the least experienced prosecutor on the *Stevens* trial team was responsible for the *Brady* review by "default[]," and other more experienced prosecutors looked to him as "a clearing house or a focal point for [the *Brady* review]."¹⁰⁴ But as the Schuelke Report shows, this prosecutor had neither the knowledge nor the experience to accomplish this task successfully.¹⁰⁵

D. Failure to Prepare Investigative Reports

The FBI Manual states unequivocally that whenever a person being interviewed could be called upon to testify at a future trial or other proceeding, the interview shall be reported on FD-302.¹⁰⁶ As the Schuelke Report shows, there were many occasions when prosecutors along with FBI agents interviewed witnesses and no 302 reports were prepared. As examples, Kepner prepared no 302 report after the critical April 15 interview with Bill Allen in which the Torricelli notes were discussed.¹⁰⁷ No 302 report was prepared after the April 15 interview of Allen in which Allen repeatedly stated that the cost of renovations was about \$80,000, and not \$250,000.¹⁰⁸ A key interview of Stevens's legislative assistant, Barbara Flanders, disclosed that Stevens expected to receive VECO bills but this interview, which was unhelpful to the government, was not memorialized in a 302 report.¹⁰⁹ During the trial preparation session on September 14 when Allen suddenly remembered the "cover your ass" statement, Kepner did not write a 302 even though

101. *Id.* at 77.

102. *Id.* at 81.

103. *Id.* at 81-82 ("I thoroughly believed that [Agent Kepner] was as smart as most lawyers, and I thoroughly believed that the team knew most of this evidence, again, because this wasn't the first trial.")

104. *Id.* at 85.

105. *See id.* at 87.

106. FBI MANUAL OF ADMINISTRATIVE OPERATIONS AND PROCEDURES, pt. II, § 10-13.3.

107. Schuelke Report, *supra* note 1, at 352.

108. *Id.*

109. *Id.* One of the prosecutors commented that this information is "not good." *Id.*

every prosecutor at the meeting immediately realized the significance of this new information.¹¹⁰

The Schuelke Report suggests that one of the reasons the officials did not prepare 302 reports was that these reports, which would have to be disclosed to the defense, might damage the government's case. At the April 15 interview of Allen, for example, Allen's assertion that he did not send any invoices to Stevens suggested to the prosecutors that Allen "was trying to set things up with Stevens so that Stevens wouldn't have to pay it back."¹¹¹ The prosecutors were noticeably disturbed by Allen's statements because his statements implied that Stevens was always intending to pay invoices for work done but that Allen did not send him any invoices. Kepner stated that "no FD-302 was ever prepared [of the April 15 interview of Allen] because it was her recollection that the debriefing of Bill Allen did not go well."¹¹² Needless to say, the failure to prepare a 302 report memorializing a key witness's prior discrediting statements denies the defendant the opportunity to confront the witness with relevant ammunition to attack that witness's credibility and damage the prosecution's case.

E. Manipulating Content of Investigative Reports

In addition to the government's failure to prepare investigative reports, the Schuelke Report also reveals how the prosecutors and agents manipulated the content of the investigative reports they did prepare to provide a dishonest and misleading version of the event. As noted above, Rocky Williams, who was in charge of the renovation and repair work on Stevens's house, repeatedly told investigators that he believed that the VECO expenses were included in the invoices submitted by Christensen Builders, which Stevens paid in full.¹¹³ But this assertion was omitted in the 302 report of the interview of Williams. Instead, the 302, which was dictated by prosecutors to Agent Joy, stated that Williams never specifically told Stevens that the VECO expenses were added to the Christensen bills, and neither Ted nor Catherine Stevens ever asked Williams whether the VECO expenses were included.¹¹⁴ The prosecutors, when confronted by this misleading report, could not explain the reason for recording only the part of the interview that

110. *Id.* at 353.

111. *Id.* at 369.

112. *Id.* at 378.

113. *Id.* at 130.

114. *Id.* at 150-51.

avored the government's case, or for omitting the part of the interview that disfavored the government's case.¹¹⁵

Similarly, when the government was preparing a search warrant for Stevens's home, relying in large part on information supplied by Allen, the prosecutors were aware that Allen had suborned Tyree's perjury and recognized that this information might have to be disclosed to the judge who would issue the warrant. The prosecutors had recalled interviewing Tyree a few years earlier, and she stated that her false affidavit was her idea. Agent Kepner, who signed the affidavit for the search warrant, interviewed Allen before making her warrant application. She prepared a 302 report of her interview containing one sentence: "[Mr. Allen] has never made a statement under oath that he [] knew was false or misleading nor has [Mr. Allen] encouraged others to make a false statement under oath."¹¹⁶ Kepner did not disclose the information about Allen's subornation of perjury in her application for the search warrant.¹¹⁷

F. Redacted Investigative Reports

As noted above, one of the central issues in the trial was whether Stevens intended to conceal benefits from VECO on his financial disclosure forms. During a critical interview about Allen's failure to send Stevens invoices of VECO work, Allen informed the government that he believed that if he had sent Stevens a bill for repair and renovation work on his home, Stevens would have paid the bill.¹¹⁸ This statement was documented in an FBI 302 Report, but was blacked out of the report when the report was provided to the defense pursuant to the court's pre-trial discovery order.¹¹⁹ In the middle of Allen's testimony, the prosecution provided the defense with a less-redacted copy of the report and another redacted IRS report that had not been previously provided to the defense that contained the above statement—that if Allen had invoiced Stevens, Allen believed that Stevens would have paid the bills.¹²⁰ The prosecution claimed that the excul-

115. *Id.* at 156-57, 161. One of the prosecutors speculated that perhaps he thought this information was "new information" and the omitted information was something he had heard before. *Id.* at 157.

116. *Id.* at 204 (alteration in original).

117. *Id.*

118. *Id.* at 395-96.

119. *Id.* at 395. The redacted 302 report (referred to in the Schuelke Report as the "Pluta 320") was provided to Stevens's lawyers pursuant to the Court's pre-trial discovery order. *Id.*

120. *Id.* at 396.

patory information in these reports was “inadvertently redacted.”¹²¹ Judge Sullivan, clearly disturbed by the government’s conduct, ordered the prosecution to immediately provide the defense with un-redacted copies of all FBI 302 reports, IRS reports, and grand jury testimony for all witnesses.¹²²

G. Failure to Take Notes

Federal prosecutors and their agents typically document their interviews with witnesses by writing notes and preparing investigative reports. However, the Schuelke Report indicates that the prosecution and law enforcement agents understood it to be the “standard practice” not to take notes of trial preparation interviews of witnesses to protect against having to memorialize statements that may be damaging to the government’s case.¹²³

Needless to say, the absence of notes prevents the defense from learning about information from a witness that may be favorable to the defense in revealing false and inconsistent statements in a witness’s account, and denies the defense the ability to confront the witness’s testimony with relevant impeachment material. As one court observed, such a practice is a “risky business” and “demeans” the primary duty of prosecutors to see that justice is done.¹²⁴

H. Failure to Review Notes for Brady Information

The government is required to disclose *Brady* information contained in rough notes of witness interviews taken by prosecutors and their agents.¹²⁵ Disclosure, of course, requires the prosecution to carefully review their notes for any *Brady* information. It appears that some of

121. *Id.*

122. *Id.* However, Allen’s statements that the value of VECO’s work was about \$80,000 was not reflected in any FBI 302, IRS, or grand jury testimony, and was never provided to Stevens’s lawyers. *Id.*

123. *Id.* at 112-13. It should also be noted that prosecutors during pre-trial witness preparation allowed witnesses to read transcripts of their grand jury testimony. *Id.* at 112. It should be further noted that Bill Allen did not testify in the grand jury; Kepner summarized his information, thereby avoiding memorializing testimony from Allen that could be used at trial to impeach him. *Id.* at 70.

124. *United States v. Houlihan*, 92 F.3d 1271, 1289 (1st Cir. 1996); *see also United States v. Rodriguez*, 496 F.3d 221, 225 n.3 (2d Cir. 2007) (suggesting that although government has no duty to take written notes for defendant’s benefit, government may be violating its disclosure duty by instructing agents not to follow customary practice of taking notes of witness interviews).

125. *See United States v. Andrews*, 532 F.3d 900, 906 (D.C. Cir. 2008); *United States v. Harrison*, 524 F.2d 421, 427 (D.C. Cir. 1975).

the *Stevens* prosecutors recognized that their notes could contain *Brady* information.¹²⁶ Nevertheless, none of the prosecutors reviewed their notes for *Brady* material or were even aware of their obligation to do so.¹²⁷ The lead prosecutor, Brenda Morris, did not review her notes and was not aware that any prosecutors' notes were reviewed.¹²⁸ Even though she was familiar with the review requirement, she testified in the Schuelke investigation that reviewing prosecutors' notes for *Brady* purposes "would never even cross my mind."¹²⁹ Another prosecutor did not review his notes because "I didn't have time to and I wasn't asked to."¹³⁰ Another prosecutor stated that he did not receive any formal training on taking and reviewing notes, and "nobody asked me to go back and look at my notes."¹³¹ Another prosecutor claimed that although he did review his notes, he did not review his notes of the critical April 15 interview of Bill Allen because he forgot about the meeting and his folder containing the notes was mislabeled.¹³²

I. Summary Disclosure of *Brady* Information

The government's production of *Brady* material was in the form of a summary description of evidence that identified in a general manner potentially favorable information.¹³³ The government argued that its *Brady* obligation was satisfied by summarizing a prior statement of a witness that might constitute a basis for impeachment, and insisted that it was not legally obligated to produce FBI 302 reports except when required by the Jencks Act.¹³⁴ The defense contended that a summary of the evidence was meaningless and needed to be disclosed in a "useable format," the specific term used by the trial court in ordering *Brady* disclosures.¹³⁵

One glaring instance of the misuse of this summary format is the reference in the *Brady* letter to the "suggestion" that Allen had suborned Tyree's perjury.¹³⁶ Instead of providing the defense with the critical

126. Schuelke Report, *supra* note 1, at 440.

127. *Id.* at 451.

128. *Id.* at 460.

129. *Id.*

130. *Id.* at 448.

131. *Id.* at 446.

132. *Id.* at 440.

133. *Id.* at 53-55.

134. Transcripts of the grand jury testimony of two witnesses were the only source material provided by the prosecutors to the defense. All other *Brady* information was summarized. *Id.* at 86.

135. *Id.* at 53-54, 58.

136. *Id.* at 300.

source documents—statements made by Agent Eckstein, and Assistant U.S. Attorneys Russo and Goeke—the letter stated, dishonestly, that the government had conducted a “*thorough investigation*” and was “*unable to find any evidence to support it.*”¹³⁷ The letter concluded: “*Because the government is aware of no evidence to support any suggestion that Allen asked [Tyree] to make a false statement under oath, neither Brady nor Giglio apply.*”¹³⁸

J. Manipulation of E-Discovery

The prosecution initially provided the defense with electronic documents. The production was voluminous. It was prepared by a litigation technologist-manager in the Alaska U.S. Attorney’s Office who assembled and organized the material in the hard drive into sub-folders for each source.¹³⁹ One of the trial prosecutors instructed this official “to dump all the documents into one directory with single-page [TIFs] because he didn’t want to make it easy for them.”¹⁴⁰ This official stated that this prosecutor’s view was that “producing the documents in single-page [TIFs] would make document review more difficult for [the defense team].”¹⁴¹ When the lead prosecutor in Stevens was interrogated by the Justice Department’s Office of Professional Responsibility, she stated that after she learned that the TIF format made document review more difficult, she concluded that her colleague “had played games with the TIF stuff . . . thinking it was cute.”¹⁴²

K. Lack of Supervision over Brady Disclosures

Shortly before the Stevens indictment was filed, the head of the Justice Department’s Criminal Division changed the trial team and designated Brenda Morris to be the lead prosecutor.¹⁴³ This decision appears to have had profound consequences for the prosecution’s morale, cohesiveness, and effectiveness.¹⁴⁴ It also had important consequences for the prosecution’s compliance with *Brady*. Morris remembered this as the “beginning of a horrible experience.”¹⁴⁵ The superseded prosecu-

137. *Id.* at 300 (emphasis in original).

138. *Id.* (emphasis in original).

139. *Id.* at 104.

140. *Id.*

141. *Id.*

142. *Id.* at 104-05. Hard copies were subsequently provided to Williams & Connolly at their expense. *Id.* at 104.

143. *Id.* at 44.

144. *See id.* at 44-46.

145. *Id.* at 45, 321.

tors considered this decision a “slap in the face” and considered quitting.¹⁴⁶ William Welch, a member of the prosecution team and chief of the Justice Department’s Public Integrity Section, believed that this decision “would have a very detrimental and explosive impact on the team, and in fact that’s exactly what happened.”¹⁴⁷

Appointing Morris as the lead prosecutor necessarily had *Brady* consequences.¹⁴⁸ Morris had virtually no knowledge about the *Stevens* case, nor the Alaskan “Polar Pen” investigation. She did not feel comfortable with witnesses, felt considerable pressure to focus on the case, and did not have the knowledge to write the *Brady* letter.¹⁴⁹

In addition, tension and disunity among the displaced prosecutors may explain in part the failure in some instances to comply with *Brady*.¹⁵⁰ For example, Dave Anderson, one of the VECO employees, testified in the grand jury that he did not work on the renovation of Stevens’s home for several months in 2000. This testimony contradicted the VECO cost report, which was introduced into evidence at the trial. However, Anderson’s grand jury testimony was not disclosed to the defense. The prosecutor who was responsible for disclosing the first *Brady* disclosure letter did not disclose Anderson’s testimony because he did not know the details of that part of the case. In addition, the prosecutor who introduced into evidence the VECO cost report did not know that Anderson’s testimony contradicted information in the report and should have been disclosed.¹⁵¹

L. Manipulating Ethical Advice

One of the most cynical events in the Stevens prosecution was the way the prosecutors finessed the issue of Allen’s subornation of Bambi Tyree’s perjury by obtaining two ethics opinions from the Justice Department’s Professional Responsibility Advisory Office (PRAO) that enabled the prosecutors to suppress information that would have severely undermined Allen’s credibility.¹⁵² The prosecutors knew that information existed that clearly showed that Allen caused Tyree to swear to a false affidavit.¹⁵³ The prosecutors were also in possession of information that appeared to show that the false affidavit was Tyree’s

146. *Id.* at 44.

147. *Id.* at 45-46.

148. *See id.* at 321.

149. *Id.*

150. *See id.* at 71-74.

151. *Id.*

152. *See id.* at 225-27.

153. *Id.* at 226.

idea and notes that appeared to corroborate that view.¹⁵⁴ However, in seeking ethical advice from PRAO on whether the prosecution needed to disclose the information documenting Allen's subornation of perjury, the prosecution provided PRAO with a skewed and misleading version of the record in order to obtain the sought-after opinion.¹⁵⁵

Thus, in presenting the question to PRAO—whether disclosure was required when an Assistant U.S. Attorney “thought” that a key witness once had asked someone to lie and when there was “no evidence” to corroborate that information and “all the evidence they can find rebuts that information”—the prosecutors omitted all of the information that documented the subornation and gave the PRAO officer only information that supported the opinion that no disclosure was required.¹⁵⁶ The prosecution informed PRAO of the following: that the AUSA “thought” that Tyree told him that Allen asked her to lie; that another AUSA remembers that Tyree told him it was her idea, not Allen's; that the FBI agent recalls that Tyree said it was her idea; that Tyree says it was her idea; that Allen never asked her to lie; that the FBI Agent's 302 report is not clear; and that the AUSA's notes show that Tyree denied that Allen asked her to lie.¹⁵⁷

However, this description of the factual basis for the opinion is dishonest. And the prosecution's claim to the Schuelke investigators that “[w]e had disclosed everything we had to PRAO” is obviously false.¹⁵⁸ FBI Agent Eckstein's notes, which were not disclosed to PRAO, are not “unclear”; they clearly state that Allen solicited Tyree's false statement. There is no evidence that Tyree “denied” that Allen asked her to lie. Nor did the prosecutors disclose to PRAO the Assistant U.S. Attorney Russo's unequivocal representation to the court in its motion *in limine* in *Boehm* that Allen asked Tyree to lie. Clearly, had PRAO been given a complete recounting of the facts, it could not have issued its opinion.

IV. AFTERTHOUGHTS—SOME LESSONS FROM THE SCHUELKE REPORT

In reading the Schuelke Report, one is struck by the parallel between a post-conviction post-mortem into a massive breakdown in the federal criminal justice system—which is essentially the purpose of the Schuelke investigation—and the post-mortem of a massive breakdown in a commercial facility, or an instrumentality of commerce. An investigation

154. *Id.* at 225.

155. *See id.* at 226-28.

156. *Id.* at 227-28.

157. *Id.* at 225.

158. *Id.* at 241.

into a commercial or transportation breakdown is legally mandated and fairly routine. But an investigation into a breakdown in a federal criminal trial is anything but routine; it is virtually unheard of. Although other countries employ commissions or fact-finding bodies to inquire into controversial or high-profile cases that appear to have miscarried,¹⁵⁹ the American legal system typically does not review aberrations in its own justice system.¹⁶⁰ There is no institutional mechanism in the United States to review after-the-fact a breakdown in the justice system to try to learn why it happened and suggest recommendations to prevent its recurrence.¹⁶¹ By probing carefully and thoroughly into a colossal and tragic breakdown in federal criminal justice, the Schuelke Report opens a window into how several prosecutors behaved and raises troubling questions on whether the legal system is capable of protecting persons accused of crimes when prosecutors break the rules.

Moreover, given the fact that the *Stevens* prosecutors engaged in such flagrant and pervasive misconduct in such a public case, one wonders what kinds of misconduct are committed in less publicized prosecutions that do not invite the kind of public scrutiny and after-the-fact investigation as *Stevens*. Indeed, it appears that it was only because of the voluntary post-conviction review by a new team of prosecutors that violations were discovered that caused the Justice Department to dismiss the case. But this type of post-conviction review rarely happens, and violations, especially *Brady* violations, often remain unexposed and unknown.¹⁶²

The Schuelke Report also reminds us that no matter how focused and aggressive defense lawyers may be in seeking to obtain discovery material—and the attorneys for Senator Stevens were among the best in the nation—their efforts will often be futile if a prosecutor is bent on

159. Lissa Griffin, *Correcting Injustice: Studying How the United Kingdom and the United States Review Claims of Innocence*, 41 U. TOL. L. REV. 107 (2009).

160. *But see id.* at 109 n.27.

161. One idea that seems to be gaining traction is the establishment of post-conviction review bureaus within prosecutor offices to investigate whether certain defendants have been wrongfully convicted. *See Establishing Conviction Integrity Programs in Prosecutors' Offices*, Center on the Administration of Criminal Law (2012).

162. *Brady* violations by definition are unknown and unlikely to be discovered. *See United States v. Alvarez*, 86 F.3d 901, 905 (9th Cir. 1996) (*Brady* information “unlikely to be discovered”); *United States v. Oxman*, 740 F.2d 1298, 1310 (3d Cir. 1984) (*Brady* evidence “may never emerge from secret government files”). This suggests that some institutional mechanism similar to the U.K.’s Innocence Commission should be developed to provide for post-conviction review after appeals and habeas petitions have been exhausted, especially in cases in which there are colorable claims of innocence.

concealing this evidence. By the same token, notwithstanding a trial judge's diligent supervision of discovery and energetic actions to enforce a prosecutor's disclosure obligations—and Federal Judge Sullivan repeatedly admonished the prosecutors to comply with their discovery obligations—such actions also may be futile if a prosecutor is bent on concealing information.

The Schuelke Report did not answer the most difficult question of all. Why did the prosecutors do it? What motivated them to break the law? It is worth speculating whether the flagrant and pervasive misconduct by the prosecution team reflected a “gang” mentality. With so many prosecutors involved in the prosecution, each prosecutor might have believed that he or she would be able to deflect responsibility for his or her actions and the consequences of those actions on to the other prosecutors. With responsibility thus shared, the prosecutors might be emboldened to violate rules with impunity. Moreover, with a collective prosecutorial mindset bent on winning a conviction, there was no one to bring professional training and ethical oversight to bear. With one exception, these were veteran prosecutors. Professional training may have had a perverse consequence in providing insights on how to game the system and get away with it. By the same token, investigative and courtroom experience—which virtually all of these prosecutors possessed—may have made it easier for them to subvert *Brady*. Given the colossal breakdown in *Stevens* by such experienced people, it may be that no institutional mechanism is capable of enforcing the *Brady* rule. It may be that a prosecutor's own personal integrity and sense of fair play are the only effective checks on a prosecutor's crossing the ethical line.

The Schuelke Report did not offer specific recommendations to improve the discovery process in federal prosecutions. But several suggestions were implicit in the Report. First, it appears that to enforce full and timely discovery, a judge may need to make a specific order to prosecutors, preferably in writing, to require prosecutors to comply with their discovery obligations, and specifically their *Brady* obligations. Second, there should be one prosecutor assigned as the “disclosure officer” with the responsibility to review the file and make appropriate *Brady* disclosures.¹⁶³ The disclosure officer should use a checklist outlining all of the possible items that could be disclosed under *Brady*, and indicate which categories of information are included in the disclosure and which are not included. *Brady* disclosures by means of a summary letter should be used only if the materials that form the basis for the

163. Such a disclosure officer is employed in the United Kingdom to review police files and make disclosures. See Lissa Griffin, *Pretrial Procedures for Innocent People: Reforming Brady*, 56 N.Y.L. SCH. L. REV. 969, 993 (2012).

summary are included. And finally, *Brady* legislation should be enacted—either as an amendment to Rule 16 of the Federal Rules of Criminal Procedure or as an independent *Brady* statute¹⁶⁴—explicitly defining the prosecutor’s disclosure responsibility, specifying the kinds of information that must be disclosed and the timing of such disclosure, and providing sanctions for non-compliance. This legislation should specifically provide that prosecutors must disclose potentially exculpatory or otherwise favorable evidence without regard to whether the failure to disclose may likely affect the outcome of the trial.

164. In the aftermath of the *Stevens* case, a *Brady* statute has been proposed to provide for disclosure of favorable information in federal criminal prosecutions. See Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong. (2d Sess. 2012).