

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	CR. NO. 2:10cr186-MHT
)	
MILTON E. McGREGOR,)	
)	
Defendant.)	

**MOTION FOR ORDER REQUIRING DISCLOSURE
OF ALL *BRADY* AND/OR *GIGLIO* INFORMATION**

Milton McGregor respectfully moves for an order that clearly and unequivocally commands the Government and each of its counsel in this case to turn over all *Brady* and *Giglio* information (whether it exists in documentary form or otherwise), including all information of any sort that is exculpatory or that would be useful in impeachment of any Government witness.¹

While such an order may be inherent in the local rules² and standing order³ of the Court, it does not appear that the Court has issued a specific order to this effect in this particular litigation. The Court appears to have deemed it unnecessary to make a specific order requiring the Government and its prosecutors to obey the law in this regard in this

¹ As one particular aspect, *Giglio* impeachment material would include any information in the Government’s possession that tends to show that any witness’s testimony at the first trial was incorrect in any respect.

² Local Criminal Rule 16.1 regarding criminal discovery, “Initial Disclosures” Section 1(B) and (C), and “Supplementation”

³ Standing Order #534, regarding criminal discovery, “Initial Disclosures” Section 1(B) and (C), and “Supplementation”

case, given the Government's written representation that it was aware of its legal obligations under *Brady* and other discovery principles, and that it was complying with such obligations. *See, e.g.*, Doc. 1964 (Magistrate Judge Capel's November 17, 2011, order, denying defendant Walker's *Brady*-related motion, and quoting Government's representation that the Government remains aware of its continuing disclosure obligation.").⁴

A recent order of the United States District Court for the District of Columbia demonstrates the importance and wisdom of entering a specific order, rather than relying on Government promises that the Government understands and will comply with its obligations. *See* Order, Doc. 22, in *In re Special Proceedings*, Misc. No. 09-0198 (D.D.C. November 21, 2011), attached hereto. In that order, which concerned prosecutorial conduct in the prosecution of the late Senator Ted Stevens, the Court noted that the Court-appointed special prosecutor had "concluded that the investigation and prosecution of Senator Stevens were 'permeated by the systematic concealment of significant exculpatory evidence which would have independently corroborated his defense and his testimony, and seriously damaged the testimony and credibility of the government's key witness.'" Order, p. 3. The special prosecutor further concluded that "at least some of the concealment was willful and intentional," *id.*, p. 4. Nonetheless, the special prosecutor concluded and the Court apparently agreed that no criminal contempt charges could be pursued, because the Court had relied on the Government's representations that

⁴ Other filings, which are sealed, also contain discussion that is relevant to the assertion made in the text above. We do not quote or specifically describe the pertinent contents of those other filings, because the filings are sealed. *See* Doc. 373, p. 8; Doc. 351, pp. 2, 3.

it understood and would comply with its legal obligations; the Court had therefore not entered a clear order (requiring the Government and its attorneys to obey the law) that could be the premise for a criminal contempt charge. *See* Order, pp. 4-5.

The Order in *In re Special Proceedings* should lead to the realization that, in order to fully assure compliance with *Brady/Giglio* obligations, a clear order is appropriate. Such an order would be especially appropriate in this case, because this case is being prosecuted by the same body (Public Integrity) that was most involved in the *Stevens* misconduct, and indeed this case has been prosecuted by at least one prosecutor (Ms. Morris) whose conduct is also at issue in the *Stevens* matter.

There is no legitimate interest of the Government in opposing this request for a clear and unequivocal order.

Respectfully submitted,

s/ Joe Espy, III
Joe Espy, III (ASB-6591-S82J)
One of the Attorneys for Milton E. McGregor

OF COUNSEL:

Benjamin J. Espy (ASB-0699-A64E)
William M. Espy (ASB-0707-A41E)
MELTON, ESPY & WILLIAMS, P.C.
P.O. Drawer 5130
Montgomery, AL 36103
Telephone: 334-263-6621
Facsimile: 334-263-7252
jespy@mewlegal.com
bespy@mewlegal.com
wespy@mewlegal.com

Fred D. Gray (ASB-1727-R63F)
Walter E. McGowan (ASB-8611-N27W)
GRAY, LANGFORD, SAPP
McGOWAN, GRAY, GRAY

& NATHANSON, P.C.
P.O. Box 830239
Tuskegee, AL 36083-0239
Telephone: 334-727-4830
Fax: 334-727-5877
fgray@glsmgn.com
wem@glsmgn.com

Robert D. Segall (ASB-7354-E68R)
David Martin (ASB-7387-A54J)
Shannon Holliday (ASB-5440-Y77S)
Ashley Penhale (ASB-1771-A50P)
Clayton Tartt (ASB-9981-C57T)
COPELAND, FRANCO, SCREWS & GILL, P.A.
P.O. Box 347
Montgomery, Alabama 36101-0347
Telephone: 334-834-1180
Fax: 334-834-3172
segall@copelandfranco.com
martin@copelandfranco.com
holliday@copelandfranco.com
Tartt@copelandfranco.com

Sam Heldman (ASB 3794 N60S)
THE GARDNER FIRM, P.C.
2805 31st Street NW
Washington, DC 20008
Telephone: (202) 965-8884
Fax: (202) 318-2445
sam@heldman.net

Ruth H. Whitney
Attorney at Law
One Financial Centre, Suite 305
650 S. Shackleford Road
Little Rock, AR 72212
Telephone: (501) 954-7878
rwhitney@inveritasinfo.com

CERTIFICATE OF SERVICE

I hereby certify that on December 2nd, 2011, I filed the foregoing with the Clerk of the Court using the CM/ECF filing system, and that a copy of same will be served on the below listed counsel of record via such system:

Justin V. Shur
Eric Olshan
Barak Cohen
Brenda K. Morris
Emily Rae Woods
John L. Smith
Edward T. Kang
M. Kendall Day
US Department of Justice
1400 New York Avenue
Washington, DC 20005
justin.shur@usdoj.gov
eric.olshan@usdoj.gov
barak.cohen@usdoj.gov
brenda.morris@usdoj.gov
rae.woods@usdoj.gov
edward.kang3@usdoj.gov
m.Kendall.day@usdoj.gov

David McKnight
William J. Baxley
Joel E. Dillard
Stewart D. McKnight, III
Baxley, Dillard, Dauphin, McKnight & James
2008 Third Avenue South
Birmingham, AL 35233
bbaxley@bddmc.com
jdillard@bddmc.com
dmcknight@baxleydillard.com

William N. Clark
William H. Mills
Stephen W. Shaw
Glory R. McLaughlin
Redden Mills & Clark
505 North 20th Street, Suite 940
Birmingham, AL 35203
wnc@rmclaw.com
whm@rmclaw.com
sws@rmclaw.com
grm@rmclaw.com

Ron W. Wise
Attorney at Law
200 Interstate Park Drive, Suite 105

Montgomery, AL 36109
ronwwise@aol.com

J. W. Parkman, III
Richard M. Adams
Joshua L. McKeown
William C. White, II
Parkman, Adams & White
505 20th Street North, Suite 825
Birmingham, AL 35203
parkman@parkmanlawfirm.com
adams@parkmanlawfirm.com
jmckeown@parkmanlawfirm.com
wwhite@parkmanlawfirm.com

Susan G. James
Denise A. Simmons
Attorney at Law
600 South McDonough Street
Montgomery, AL 36104
sgjamesandassoc@aol.com
dsimlaw@aol.com

Thomas M. Goggans
Attorney at Law
2030 East Second Street
Montgomery, AL 36106
tgoggans@tgoggans.com

Jeffrey C. Duffey
Law Office of Jeffrey C. Duffey
600 South McDonough Street
Montgomery, AL 36104
jcduffey@aol.com

s/ Joe Espy, III
Of Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) CR. NO. 2:10cr186-MHT
)
 MILTON E. McGREGOR,)
)
 Defendant.)

**MOTION FOR ORDER REQUIRING DISCLOSURE
OF ALL *BRADY* AND/OR *GIGLIO* INFORMATION**

ATTACHMENT

Order, Doc. 22, in *In re Special Proceedings*,
Misc. No. 09-0198 (D.D.C. November 21, 2011))

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In Re SPECIAL PROCEEDINGS : Misc. No. 09-0198 (EGS)
: :
: :
: :

ORDER

In the fall of 2008 in highly-publicized proceedings before this Court, then-U.S. Senator Theodore F. Stevens was indicted, tried and found guilty of making false statements, by failing to disclose gifts he received on his Senate Financial Disclosure Forms, in violation of 18 U.S.C. § 1001(a)(1) and (2). During the course of the five-week jury trial and for several months following the trial, there were serious allegations and confirmed instances of prosecutorial misconduct that called into question the integrity of the criminal proceedings against Senator Stevens. On April 1, 2009, after acknowledging some of the misconduct and specifically admitting two instances in which the prosecution team had failed to produce exculpatory information to the defense in violation of the government's constitutional obligations,¹ the Department of Justice moved to set aside the verdict and dismiss the indictment of Senator Stevens with prejudice.

¹ See, e.g., *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972).

On April 7, 2009, after granting the government's motion, and in recognition of (1) the significance of the government's decision to dismiss the indictment and not to seek a retrial; (2) the government's admission that it committed *Brady* violations and made misrepresentations to the Court during the prosecution of Senator Stevens; (3) the prosecutorial misconduct that permeated the proceedings before this Court to a degree and extent that this Court had not seen in twenty-five years on the bench; and (4) the likelihood based on events during and after the trial, including the information revealed by the Department of Justice in support of its motion to vacate the verdict and dismiss the indictment, that the prosecution team may have committed additional constitutional and procedural violations during the *Stevens* prosecution that had yet to be discovered or addressed, the Court appointed Henry F. Schuelke, III to investigate and prosecute such criminal contempt proceedings as may be appropriate against the six Department of Justice attorneys responsible for the prosecution of Senator Stevens. See Order Appointing Henry F. Schuelke, *United States v. Stevens*, No. 08-cr-231 (Apr. 7, 2009).

Mr. Schuelke has informed the Court that he has concluded his investigation, and he has submitted to the Court *in camera* a five-hundred page report detailing the findings of his investigation. In order to discharge his obligations and fully

investigate the prosecutors' conduct during the Stevens prosecution, Mr. Schuelke and his esteemed colleague, William B. Shields, reviewed more than 150,000 pages of documents, interviewed numerous witnesses, conducted twelve depositions, and, by necessity, acquired a comprehensive understanding of the government's investigation, charges, pre-trial and trial proceedings not only in the Stevens matter, but also in relevant aspects of at least two other federal prosecutions brought by the Department of Justice's Public Integrity Section against Alaskan state officials, including *United States v. Kott*, No. 07-30496, 2011 U.S. App. LEXIS 6058 (9th Cir. Mar. 24, 2011), and *United States v. Kohring*, 637 F.3d 895 (9th Cir. 2011). Mr. Schuelke informs the Court that pursuant to this Court's directive, officials at the Department of Justice have cooperated fully with his investigation.

Based on their exhaustive investigation, Mr. Schuelke and Mr. Shields concluded that the investigation and prosecution of Senator Stevens were "permeated by the systematic concealment of significant exculpatory evidence which would have independently corroborated his defense and his testimony, and seriously damaged the testimony and credibility of the government's key witness." See Report to the Honorable Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's April 7, 2009 Order ("Mr. Schuelke's Report" or "Report") at 1 (currently on

file under seal and *in camera*). Mr. Schuelke and Mr. Shields found that at least some of the concealment was willful and intentional, and related to many of the issues raised by the defense during the course of the *Stevens* trial. Further, Mr. Schuelke and Mr. Shields found evidence of concealment and serious misconduct that was previously unknown and almost certainly would never have been revealed - at least to the Court and to the public - but for their exhaustive investigation.

Despite his findings of significant, widespread, and at times intentional misconduct, Mr. Schuelke is not recommending any prosecution for criminal contempt.² Mr. Schuelke bases his conclusion not to recommend contempt proceedings on the requirement that, in order to prove criminal contempt beyond a reasonable doubt under 18 U.S.C. § 401(3), the contemnor must disobey an order that is sufficiently "clear and unequivocal at the time it is issued." *See, e.g., Traub v. United States*, 232 F.2d 43, 47 (D.C. Cir. 1955). Upon review of the docket and proceedings in the *Stevens* case, Mr. Schuelke concludes no such Order existed in this case. Rather, the Court accepted the repeated representations of the subject prosecutors that they

² Mr. Schuelke "offer[s] no opinion as to whether a prosecution for Obstruction of Justice under 18 U.S.C. § 1503 might lie against one or more of the subject attorneys and might meet the standard enunciated in 9-27.220 of the Principles of Federal Prosecution." *See Mr. Schuelke's Report* at 514 n.76 (citing Indictment, *United States v. Convertino, et al.*, No. 2:06-cr-20173 (E.D. Mich. Mar. 29, 2006)).

were familiar with their discovery obligations, were complying with those obligations, and were proceeding in good faith. See, e.g., Transcript of Motions Hearing, P.M., at 14-15, Stevens, No. 08-cr-231 (Sept. 10, 2008) ("THE COURT: I'm not going to write an order that says 'follow the law.' We all know what the law is. The government - I'm convinced that the government in its team of prosecutors is thoroughly familiar with the decisions from our Circuit and from my colleagues on this Court, and that they, in good faith, know that they have an obligation, on an ongoing basis to provide the relevant, appropriate information to defense counsel to be utilized in a useable format as that information becomes known or in the possession of the government, and I accept that.").³ Because the Court accepted the prosecutors' repeated assertions that they were complying with their obligations and proceeding in good faith, the Court did not issue a "clear and unequivocal" order directing the attorneys to follow the law.

This Court has always recognized the public's interest in these proceedings and has maintained from the outset that the Court intends to make public the results of Mr. Schuelke's

³ Mr. Schuelke also notes that "[i]t should go without saying that neither Judge Sullivan, nor any District Judge, should have to order the Government to comply with its constitutional obligations, let alone that he should feel compelled to craft such an order with a view toward a criminal contempt prosecution, anticipating its willful violation." Mr. Schuelke's Report at 513.

investigation. See, e.g., Transcript of Hearing 46:7-11, *Stevens*, (April 7, 2009) (“[T]he events and allegations in this case are too serious and too numerous to be left to an internal investigation that has no outside accountability. This court has an independent obligation to ensure that any misconduct is fully investigated and addressed in an appropriate public forum.”). The public’s interest in the results of this investigation, which reveal failures of supervision and/or misconduct by attorneys in the Department of Justice’s Public Integrity Section in the prosecution of a sitting United States Senator, is as compelling today as it was on April 7, 2009. In fact, as recently as November 8, 2011, Attorney General Eric Holder was questioned by members of the United States Senate during a hearing before the Senate’s Judiciary Committee about the Department of Justice’s investigation into the *Stevens* prosecution, and the Attorney General acknowledged the public’s important interest in these matters. See Sean Cockerham, *Review of Stevens Prosecution Nears Completion, Holder Says*, Anchorage Daily News, Nov. 9, 2011 (“What I have indicated was that I want to share as much of [the Office of Professional Responsibility report] as we possibly can given the very public nature of that matter and the very public decision I made to dismiss the case.”).

While providing the public with the full results of Mr. Schuelke's investigation has been and remains the Court's intent, in view of the Amended Protective Order entered in these proceedings on December 13, 2009, and this Circuit's holding in *In re North*, 16 F.3d 1234 (D.C. Cir. 1994), the Court has determined that Mr. Schuelke's complete report should not be made public at least until the Department of Justice has had the opportunity to review the report. The Court has further determined that it is appropriate to afford the subject attorneys and Senator Stevens's attorneys the opportunity to review the report, under the terms and conditions set forth below. The Court will then consider any objections to making Mr. Schuelke's Report public; any such objections shall be filed in accordance with this Order, as set forth below. Regrettably, and contrary to this Court's commitment to the public's right of access, these interim proceedings may need to be conducted under seal until the Court has considered any objections raised by either the Department of Justice or the subject attorneys. The Court will schedule any further proceedings, sealed or otherwise, at the appropriate time. Accordingly, it is hereby

ORDERED that the Department of Justice shall forthwith move to unseal the relevant pleadings in *United States v. Boehm*, Case 04-cr-003 (D. Alaska) and *United States v. Stevens*, and transcripts in *United States v. Kott*, No. 07-cr-056 (D. Alaska)

and *United States v. Kohring*, No. 07-cr-0055 (D. Alaska), or, by no later than December 5, 2011, shall inform this Court why the Department of Justice objects to such unsealing.⁴ It is further

ORDERED that the Report shall not be disclosed during the pendency of these proceedings except as follows:

1. Mr. Schuelke shall provide five copies of the Report to the Department of Justice, and two copies to each of the subjects of the Report and to Senator Stevens's attorneys. Initially, the Department will receive unredacted copies of the Report; the copies provided to the subject attorneys and Senator Stevens's attorneys will be redacted to protect the contents of

⁴ The relevant sealed materials are as follows: In *Boehm*, (1) Gov't Mot. in Limine to Limit Cross Examination of B. Tyree, filed July 26, 2004. (Note that this motion was filed publicly as an exhibit to the government's opposition to defendant's motion to dismiss in *Kott*, Sept. 26, 2011.) (2) Gov't Reply in Supp. of Mot. in Limine, filed Aug. 17, 2004. (Note this was filed publicly (with redactions) in *Boehm* on Nov. 4, 2009.) (3) Judge Sedwick's Decision on Mot. in Limine, Order, Sept. 14, 2004. (4) Gov't Opp'n to Def.'s Motion for Recons. of Decision re: Mot. in Limine, Oct. 6, 2004. (Note this was filed publicly (with redactions) in *Boehm* on Nov. 4, 2009.) In *Kott*, (1) Tr. of Sealed Hr.'g, Sept. 13, 2007. In *Kohring*, (1) Tr. of Sealed Hr.'g Oct. 25, 2007. In *Stevens*, (1) Gov't Mot. in Limine to Exclude Inflammatory, Impermissible Cross Examination under Rule 608(b), filed Aug. 14, 2008. (Note this motion was withdrawn during a hearing on Sept. 5, 2008.) (2) Def.'s Opp'n to Gov't Rule 608(b) Motion, filed Aug. 25, 2008. (3) Def.'s Opp'n to Gov't Mot. to Seal, filed Aug. 25, 2008. (4) Gov't Reply in Supp. of Mot. to Seal and Request to Strike Def.'s Opp'n to Mot. in Limine to Exclude Inflammatory, Impermissible Cross, filed Sept. 2, 2008. Note that this Court unsealed all hearings in *Stevens* with the consent of the parties. See Order, Feb. 24, 2009 (Doc. No. 323); see also Hr.'g Tr. 44:16 - 45:10 (Apr. 7, 2009).

the still-sealed materials in *Boehm, Kott, Kohring, and Stevens*. Following the unsealing of some or all of those materials, Mr. Schuelke shall provide unredacted copies of the Report to the subject attorneys and Senator Stevens's attorneys.

2. Disclosure of the Report shall be limited to five individuals at the Department of Justice to be selected by the Department, two for each of the subjects of the Report to be selected by the subject, and two of Senator Stevens's attorneys to be selected by his attorneys. Prior to disclosure of the Report to him or her, each individual who will have access to the Report shall sign a Confidentiality Agreement agreeing, *inter alia*, not to disclose or discuss the Report, or its contents, except as provided in the Confidentiality Agreement. The individuals to whom the Report shall be disclosed shall contact Mr. Schuelke to make arrangements to execute the Confidentiality Agreement and receive the Report. It is further

ORDERED that pursuant to the Amended Protective Order, if the Department of Justice believes that any of the Material(s) or sealed pleadings or transcripts identified by Mr. Schuelke in his report should be withheld from the public, the Department of Justice shall file a motion under seal by no later than January 6, 2012, specifically identifying the Material(s) and/or sealed pleadings and/or transcripts it believes should be withheld and the precise legal basis for the proposed withholding (*i.e.*, the

basis for any privilege, whether the material is covered by Federal Rule of Criminal Procedure 6(e), etc.).⁵ In considering whether to file such a motion, the Court strongly encourages the Department of Justice to consider the very significant public interest in these proceedings, the fact that much of the information in the Material(s) and pleadings may already be known to the public and/or subject to future disclosure, the fact that the investigations and prosecutions related to these matters are now concluded, and the benefit of promptly bringing these regrettable events to closure, not just for the benefit of the public and the late Senator's family, but for the Department of Justice, as well. It is further

ORDERED that any other individual seeking to withhold from the public information contained in Mr. Schuelke's Report shall file a motion under seal, and, if appropriate, any comments or

⁵ The Amended Protective Order simply provides that if "any Materials [provided by the Department of Justice] are to be included in applications or submissions filed with or submitted to the Court, or disclosed during court proceedings, other than under seal, Mr. Schuelke will advise the Department of Justice five business days in advance of such submission or proposed disclosure so that, if deemed necessary, the Department of Justice has the opportunity to present its position on the public disclosure of such Materials to the Court for consideration." Amended Protective Order at 2, *In re Special Proceedings*, No. 09-mc-198, (Dec. 13, 2009). The Court, however, has determined that it is appropriate to afford the Department of Justice the opportunity to review Mr. Schuelke's Report in its entirety, rather than just be notified of Materials relied on in the report, and to give the Department of Justice substantially more time than the five days contemplated in the Amended Protective Order.

factual information regarding the Report, by no later than January 6, 2012, and shall provide the basis and nature of the relief sought. Any such person shall be mindful, however, that (1) the Court has already expressed its intent to make the results of Mr. Schuelke's Report public to the greatest extent possible; (2) in response to previous efforts by the Stevens prosecution team to withhold from the public information related to allegations of prosecutorial misconduct in the Stevens case, the Court has already addressed the significant constitutional protections providing public access to court proceedings under these or similar circumstances, see, e.g., Memorandum Opinion & Order 16-17, *Stevens*, No. 08-cr-231, (Dec. 19, 2008) at 16-17 ("Under [the *Globe Newspaper*] test, the first amendment protects public access to an aspect of court proceedings if such access has historically been available, and serves an important function of monitoring prosecutorial or judicial misconduct." (emphasis added) (quoting *Washington Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991))); (3) the identities of the subjects of this investigation have already been disclosed and therefore this situation is not analogous to a grand jury investigation in which the subject of the investigation is not identified to the public and the subject may be prejudiced if her identity is revealed - in fact, under these circumstances, some or all of the subjects may be prejudiced by withholding the results of Mr.

Schuelke's Report from the public; (4) the matters Mr. Schuelke investigated stem from allegations and events that occurred in a highly-publicized trial of a sitting United States Senator and therefore the public interest in this matter is well-documented and not a matter of mere speculation; and (5) the public availability of the results of Mr. Schuelke's Report will facilitate the public's understanding of the Court's rulings in the *Stevens* case and the constitutional and procedural requirements inherent in our criminal justice system, and will better enable the public to follow and place in context the developments in the *Stevens* case, all of which, again, were widely publicized at the time. *See, e.g., In re North*, 16 F.3d at 1240 (discussing factors to be weighed in determining whether to publicly release special prosecutor's report). Accordingly, while the Court will give appropriate consideration to any legal argument to withhold Mr. Schuelke's Report from the public, the Court notes that the "presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984).

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
November 21, 2011