The Honorable John W. Sedwick

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. PETER KOTT, Defendant - Appellant.	No. 3:07-cr-00056 (JWS) MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR DISCOVERY

I. INTRODUCTION

In closing argument, the government used a single word to describe the key issue in this case: "Credibility." TR14:85.

Certainly there were recordings. But the witnesses differed as to the meaning of those recordings. The government's witnesses – testifying pursuant to plea agreements – testified that those recordings showed bribery and extortion, that is, payments in

exchange for favors. The defense argued that the interpretations provided by those witnesses lacked credibility. *Id*., TR14:71-72.

Bill Allen's credibility was especially critical to the government's case. As this Court acknowledged, at the hearing in this case on whether Mr. Kott's lawyer should be able to cross-examine Bill Allen on certain matters that the government considered sensitive: "what I want to be able to do is to allow Mr. Kott the opportunity to cause the jury to think long and hard about whether they should believe Mr. Allen. I mean, Mr. Allen's testimony, like that of Mr. Smith, is critical here, and he deserves a right to – to probe that." TR7:15. This Court understood that "Allen may have more incentive now [at the time of trial, as opposed to when he made his deal] that he knows he is tangled up in something beyond just Mr. Kott and Mr. Kohring." *Id*., TR7:16. *See also id*., TR7:30 (this Court states: ""the fact I think that they're – that they're involved in these major investigations shows them – they have incentive to cooperate with the Government. … one's incentive to cooperate is affected by the exposure that one has. So the more you admit, the more incentive you have to cooperate, I suppose.").

Against this backdrop, Bill Allen testified that he always told the government the truth. "Yes, I've – I've told them the – the truth. Sometimes they thought it was something different, and I'd tell them, no that's not true. And they might not have liked it, but I told them the truth." *Id.*, TR7: 11. "I – when I made the deal with you guys, I – I said I'm not going to – I'm not going to – it's got to be the truth. And I have – I – I done exactly the truth in – and I don't think anybody could dispute that." TR8:19.

The government also argued that Bill Allen testified truthfully in closing, even appealing to Pete Kott's assessment of Allen as generally a straight shooter: "when you

consider the testimony of Bill Allen consider that testimony in light of what the defendant Pete Kott told you about Bill Allen and his credibility and his truthfulness." TR14:25. The government made this argument about Allen's truthfulness while stressing the importance of credibility in this case where Allen and Smith testified that the exchanges of value were bribes and extortion and Kott testified they were not: "in another way this case is also about the garden variety trust, credibility …." *Id.*, TR14:79. "Credibility." *Id.*, TR14:85.

Prior inconsistent statements, however, are one of the most powerful indicia of lack of credibility. The government is therefore obligated to disclose such statements to the defense. The duty arises from the due process clause;[1] it covers impeachment as well as substantive evidence;[2] it has roots in the Sixth Amendment right to fully confront and cross-examine witnesses;[3] and it is protected by the Jencks Act and rules of professional responsibility.

The government broke all those rules in Pete Kott's case. It suppressed prior inconsistent statements of its two key witnesses, Smith and Allen, on the most important issues facing the jury. This table summarizes the inconsistency between the most important evidence that the government presented at trial, and the evidence that it suppressed:

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

[2] *Giglio v. United States*, 405 U.S. 150 (1972).

[3] *See Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

TOPIC	TRIAL TESTIMONY AND GOVERNMENT ARGUMENT	SUPPRESSED EVIDENCE
DID ALLEN GIVE KOTT $5000 FOR A TRUCK AS BRIBERY OR EXTORTION	Government ridiculed Kott's claim that Allen's $5,000 down payment was a loan and said Kott's claim that it was a loan undermined Kott's credibility on everything else: "Kott admitted that there was no paperwork for that, he didn't have an interest rate, they didn't really talk about repayment … Mr. Kott [hasn't] paid back a dime of the money. TR14:85-86.	Allen really said: "Pete never reimbursed BA for the 5K. Considered loan, but didn't push him for it." BRADY 42. Agent Kadera really said: "Roger … told BA that he couldn't give him the truck, … Pete was [too] proud …" BRADY 44
DID SMITH/ALLEN PROVIDE KOTT WITH A POLL IN EXHANGE FOR POLITICAL FAVORS	Smith: VECO paid for the poll for Kott and would do "anything else that you might need to – for Pete Kott's campaign." TR8:93-96.	Smith really said: he "routinely purchased polls for candidates … or polls on political issues for which the source's company had an interest." BRADY 100. Survey research business owner really said: It was common practice for VECO to conduct polls concerning public opinion and candidates for itself, and politicians often "piggyback" on at drastically reduced cost to save money. BRADY 3823.
DID SMITH/ALLEN PROMISE KOTT A JOB WITH VECO IN EXCHANGE FOR POLITICAL FAVORS	Smith: "You've got a … job. Get us a pipeline," was a "serious" reference to a promise for a future VECO job. TR8:57-58. Allen: He would give Kott a job if Kott got them the pipeline. TR6:49, 60.	Allen really said: Kott would have voted the same way on the PPT 20/20 legislation even "if source did not pay him any money." BRADY 27. Allen really said: He would "help" Kott become a lobbyist. BRADY 43.

DID SMITH/ALLEN PAY KOTT EXTRA FOR HARDWOOD FLOOR REFINISHING, OR IN EXCHANGE FOR POLITICAL FAVORS	Allen testified that he paid Kott an additional $7,993 above the value of his flooring refinishing work to funnel money to him for his campaign, TR7:121-25, and that Kott did not do flooring work for this money. TR7:6. Smith said the same thing. TR8:13-27.	Allen really said: He gave Kott substantially more than the $12,000 invoice for flooring refinishing work as a "bonus" because Kott "worked hard," "worked their butt off," "did more than that"; and that extra money was "for the flooring work." BRADY 25, 28, 58.
DID SMITH/ALLEN REIMBURSE KOTT FOR $1,000 MURKOWSKI CONTRIBUTION AS BRIBE OR EXTORTION	$1000 payment to Kott was a "benefit[ ] solicited and received by Kott." Government Brief, pp. 42-43.	Allen really said: "1000 for Murkowski – BA never told PK what it was for, or to make a contrib." BRADY 42.
SMITH'S CREDIBILTY	Government relies on Rick Smith testimony.	1. Pre-trial, "SMITH was having significant psychological troubles," BRADY 4630; "SMITH was possibly even suicidal," *id*.; "RS had a drinking problem," BRADY 1039; Smith admitted regularly "getting sloshed after hours," Smith Tape, 16:25-17:11. 2. Smith's admission regarding the period around Kott's trial: "My memory's terrible." "I mean that's the truth." Smith Tape, 8:00.
ALLEN'S CREDIBLIITY REGARDING EXTORTION ALLEGATIONS	Allen: "because of the … financial support that we'd given Pete that – that he should – we should be able to influence Pete's work in the legislature." TR8:70.	Allen really said: Regarding Kott, "he never extorted me." BRADY 4670. Allen really said: Kott

		would have voted the same way even "if source did not pay him any money." BRADY 27. Smith really said: "KOTT supported source's company and it's [sic] ideas related to oil and gas." BRADY 105.
ALLEN'S CREDIBILITY CONSIDERING OTHER CRIMINAL EXPOSURE, INCLUDING FEDERAL EXPOSURE	Regarding 2004 APD investigation: "The Government would posit that [CHILD VICTIM 1] has no relevance whatsoever to this case." 9/13/07 hearing.	In 2000, Allen flew CHILD VICTIM 2 to Anchorage for prostitution. APD 9. CHILD VICTIM 3 was part of a "threesome" with Allen around the same time. APD 18, 21. CHILD VICTIMS 4 and 5 had sex with Allen around 1994-95. APD 39. FBI Agent Erickson and A.U.S.A. Russo participated in 2/10/04 interview with CHILD VICTIM 5 and received corroborating plane tickets, travelers checks, and other documents from her in February of 2004. APD 44, 46. Other government agents were present for a Feb. 19, 2004, interview of yet another female victim. BRADY 4659. A.U.S.A. Russo told APD Det. Vandergrift "to not actively investigate this

		case as it might interfere" with a federal investigation "*involving Allen*." APD 47 (emphasis added). CHILD VICTIM 1 signed a false affidavit, denying she had sex with Allen, "at Allen's request." APD 65; BRADY 4666.
BENEFITS PROMISED TO ALLEN	"I didn't care what happens to me. I thought about those people [VECO employees] and I thought about my kids." TR7:139.	There was also a government promise, a "holdback," to give Allen "millions of dollars." *United States v. Stevens,* 4/7/08 TR:25.

We summarize the suppressed but newly released documents, and their materiality, below. We also summarize the documents and information that are apparently still missing. We begin, however, by reviewing the basic evidence at trial to put the newly discovered evidence into context.

II. BACKGROUND: THE GOVERNMENT'S CASE AGAINST MR. KOTT WAS BASED ON THE EXCHANGE OF FIVE SPECIFIC ITEMS SUPPOSEDLY FOR FAVORS, PLUS THE CREDIBILITY OF RICK SMITH AND BILL ALLEN

The government's case against Mr. Kott was based on the transfer of five items of value: a payment of approximately $7,000 "extra" to Kott as a bribe, disguised as a floor refinishing payment; the $1,000 for Murkowski; the promise of a job; the poll; and the $5,000 truck down-payment. To support its case about these five items, the government relied on audio and videotapes, and the testimony of Bill Allen and Rick Smith about the supposed bribes and their "interpretations" of those tapes. The credibility of Rick Smith

and Bill Allen – who testified that those items were given as bribes and extortion in exchange for valuable actions on Mr. Kott's part – was therefore critical. We summarize the basis of the government's case in this section. We summarize the newly disclosed evidence that undermines each portion of that case in the following sections.

A. The Five Items of Value Upon Which The Government's Case was Based

Pete Kott was charged with conspiracy, extortion, bribery, and false statements. As this Court is aware, he was acquitted of the false statements count and convicted on the others. The extortion, bribery, and conspiracy to commit extortion, bribery, and/or false statements, counts were all based on essentially the same allegations.

Count 1 charged conspiracy to commit extortion under color of official right, bribery, and honest services wire fraud in violation of 18 U.S.C. §371. It stated that Kott conspired with Weyhrauch, "COMPANY CEO, COMPANY VP, State Senator A, and others both known and unknown to the grand jury" to pass the 20/20 PPT legislation in 2006. CR:2. There were three objects of the conspiracy: extortion, bribery, and wire fraud. *Id.*

Extortion was then charged in Count 2. It alleged interference with commerce by extortion induced under color of official right in violation of §1951(a). It claimed that Kott obtained the following items via extortion: "$8,993 in monetary payments, $2,750 in polling expenses, and a future contract as a lobbyist for [VECO]." CR:2.

Count 4 charged bribery in violation of § 666(a)(1)(B) based on essentially the same acts. CR:2.

All of those counts were based on the same items of value as those listed in Count 2, that is: the supposed payment of $7,993 as a bribe to Kott, disguised as additional payment for wood floor refinishing that Kott originally billed Allen for at $12,000; the supposed payment of $1,000 by Allen to Kott to reimburse him for a donation of that amount to the Murkowski campaign; Smith's supposed payment of $2,700 for a poll for Kott concerning his reelection; and Bill Allen's supposed promise of a lucrative job with VECO to Kott after Kott's legislative career was over.[4]

This Court, however, did not limit the evidence or the basis of conviction to those four listed transactions from the indictment. Instead, this Court listed the following elements that the government had to prove to obtain a conviction of bribery – and it includes an exchange of any "property," not just specified or charged property:

> First, the defendant was a public official;
>
> Second, the defendant obtained *property which he knew he was not entitled to, with all of you agreeing on what that property was;*
>
> Third, the defendant knew that the property was given in return for his agreement or understanding whether explicit or implicit, for taking some official action; and
>
> Fourth, commerce or the movement of an article or commodity in commerce from one state to another was affected in some way.

CR:268 (Instruction No. 15) (emphasis added).

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[4] The government seems to agree that these transfers formed the basis for all of Kott's convictions. That is what the government argued in closing. TR 14:4. It is also what they told the Ninth Circuit: "In exchange, Kott received $8,993 in monetary payments, $2,750 in polling expenses, and the promise of a future job with VECO. This proof at trial conformed to the crimes charged in the indictment." Government's Brief on Appeal, p. 3. *Id.*, p. 45 ("The four benefits charged in Count 2 were the core of the government's case at trial.").

That meant that not just the transactions listed in the indictment, but all exchanges of value presented during the trial, could be considered by the jury as forming the factual basis for this count. As this Court is aware, the government offered and this Court admitted evidence of one other critical item of value – a supposed $5,000 bribe given by Bill Allen in the form of a down payment to help Kott buy a truck. That was the final critical bit of evidence against Mr. Kott at trial.

B. The Critical Testimony of Bill Allen and Rick Smith About How These Five Items of Value Were Given to Pete Kott in Exchange for His Support

The evidence supports this characterization of the critical transactions listed in the indictment. It shows that the government based its case on the bribery, extortion, and conspiracy counts – the only counts on which Mr. Kott was convicted – on a $7,993 payment, a $1,000 payment, a supposed poll payment, the promise of a lucrative job with VECO, and the $5,000 down payment on the truck, and that this case was presented primarily through the testimony of informant-witnesses Bill Allen and Rick Smith. We summarize that testimony here.

Smith pled guilty in exchange for a plea agreement. He testified that the discussions he had with Allen and Kott showed more than just a meeting of the minds on their common legislative goals, but showed that Smith and Allen were bribing Kott. Smith testified that, in general, "…Bill Allen … and I agreed – that because of the relationships and the – and the financial support that we'd given Pete that – that he should – we should be able to influence Pete's work in the legislature." TR8:70. He continued, with respect to the 20/20 PPT, that "we knew we would have his help." *Id.*

Smith then testified about specific exchanges of property with Kott. He stated that after Kott announced that he would run for re-election again, VECO paid for a poll to help him. Smith continued that he had conversations with Kott about the poll, and that Smith told Mackie, who was conducting the polling and doing the report on the polling, that VECO would support that poll. Smith continued that he also told Mackie that they would do "anything else that you might need to – for Pete Kott's campaign." TR8:93-96.

There was also evidence introduced that Kott donated $1,000 to the Murkowski campaign, and that Bill Allen reimbursed him for that amount within a few days. TR6:62-63.

In addition, evidence showed that when Pete Kott wanted a new truck, Bill Allen gave Kott money towards the purchase price – $5,000. TR12:96-97, 113-14.

Smith then testified about the supposed promise of a job. He discussed the tape of a 9/25/06 telephone conversation with Kott, and stated that Kott asked him, Smith, for a job, and Smith replied, "You've got a … job. Get us a gas pipeline." "I was making light of it … at that time. … he'd reminded me … that he needed a job, and I was – you know, 'Well, we still need to get a pipeline.' And I was serious about that part." TR8:57. Smith continued that he and Allen had made a commitment to a job for Kott after his legislative tenure – "some type of work." He said it could have been many things – contract, lobbyist, direct-hire – but that they had agreed to give Kott work. TR8:57-58.[5]

[5] Smith explained that they had never promised Kott a job as a warden at the prison he was involved in building in Barbados – the recurring references to the job in Barbados were more of a standing joke. TR8:59-60 ("he knew he wasn't going to be a warden in Barbados"). It was a reminder, though, that they were going to provide Kott with some

Bill Allen's testimony was similar. He had also pled guilty in exchange for leniency. TR7:6-11. He testified about additional instances of transfers to Kott.

He testified that Kott put in his hardwood floors in 2001, and that they were time consuming in part because of their detailed inlay; he continued that Kott refinished the work in 2006, at Allen's request. Allen stated that he insisted that Kott take money for the refinishing work, and that he gave Kott a check for $12,000. He continued that he, Allen, came up with the amount – he thought it was half of what he had paid Kott before, for the installation. Allen continued that he did not remember Kott throwing in hardwood flooring to use on another project to offset the overpayment. TR7:115-20.

Allen then stated that Kott also redid Smith's floors, and that Allen then paid Kott an additional $7,933 – to help Kott's son Pete, Jr., so that he could take time to work on Kott's campaign. Allen denied that this amount constituted an advance payment for more refinishing work. TR7:121-25.

C. <u>The Testimony of Bill Allen and Rick Smith About How These Five Items of Value Were Given to Pete Kott in Exchange for His Support Was the Most Important Government Evidence Presented at Trial</u>

The convictions on both of the substantive counts, and the conspiracy stemming from those counts, could therefore have been based on Allen's or Smith's testimony and the government's arguments that Allen and Smith gave Kott $7,993 in monetary payments for flooring that was not really for flooring; that they gave him $1000 to reimburse him for a Murkowski donation; that VECO paid $2,750 in polling expenses; that they made Kott a job promise; and/or that Allen gave Kott $5,000 towards a truck.

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job. TR8:66-67.

The newly released documents undermine the Smith and Allen testimony concerning each supposed bribe.

III. THE NEWLY RELEASED DOCUMENTS CONTRADICT THE GOVERNMENT'S EVIDENCE AND ARGUMENT AT TRIAL THAT ALLEN'S PAYMENT TO KOTT, EARMARKED FOR WOOD FLOORING, WAS REALLY BRIBERY AND EXTORTION

A. The Evidence and Argument at Trial About the Refinishing Payment

At trial, the government argued that on July 31, 2006, Smith and Allen discussed how they could funnel additional money to Pete Kott. The government presented evidence "that Allen, at Kott's request, provided an additional $7,993 to Kott's son to give Kott's son the extra money necessary to leave his hardwood flooring job and help his father with the upcoming election campaign." Government's Brief on Appeal, p. 52 (citations to record omitted). The government characterized this money as a fraudulent payment not for work but to get additional funds to Kott to help him with his reelection. As the government summarized in its appellate brief, "Allen and Smith both testified the $7,993 was intended to be a financial benefit to Kott." Government's Brief on Appeal, p. 10 (citing to trial record at TR6:69, 70-2; TR7:123-5; TR8:110-12, 116-27).

In fact, Bill Allen explicitly testified that the amount was around $7,000; that Pete Kott did not do any actual work on flooring for this money; and that the purpose was solely to get Pete Kott money for his campaign. TR7:6.

The government offered this evidence not just as a basis for the convictions, but also as a basis for enhancing Pete Kott's sentence. In fact, this Court did add two levels to Kott's base offense level for Kott's supposed perjury at trial. It was based on Kott's

testimony about the approximately $8,000 payment to his flooring company, which Kott denied was a bribe. This Court explained:

> … I find it easy to conclude that the defendant committed perjury in his testimony about the seven thousand nine hundred and ninety-three dollars [$7,993]. I wouldn't have been surprised if Mr. Goeke asserted that a contention otherwise was close to being frivolous. But as I said with regard to the Government's argument, I don't think Mr. Wendt made a frivolous argument. I think it was made in good faith and he had some support for it, but having listened to that testimony, I am utterly convinced that at the trial with respect to this payment, Mr. Kott gave false testimony under oath.
>
> The testimony was material, it was central to one of the charges brought against him, and I believe the testimony was made willfully with a full understanding of the consequences. The testimony appeared to me to have been carefully crafted to deceive the jury. It was not a mere mistake, confused, or a bad memory.

STR:44-45.[6]

B. The Newly Released Documents Show That the Payment Was Really for Refinishing Work, Not for Bribery or Extortion

The newly released documents, however, show for the first time that Bill Allen and a "source" – it is not clear who – actually stated, and believed, that the additional multi-thousand dollar payment to Kott was not a bribe. It was paid to Kott in exchange for the refinishing work he did throughout Allen's house, and that Allen thought that Kott did such an exceptional job that he deserved a substantial additional payment for the work – and not for anything else.

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[6] "STR:xx" refers to the specified page of the Sentencing Transcript.

For example, BRADY 24[7] is an FBI 302 on "a source" interview by Agents Kepner and Kadera. It is dated September 27, 2006, almost a year before Pete Kott's trial (and inexplicably not transcribed until March 30, 2007). It shows that the source – in context, probably Bill Allen – told FBI Agents Kepner and Kadera that Bill Allen's multi-thousand dollar extra payment to Kott was for hardwood flooring and not for a bribe. It begins on this topic: "When source [we assume Allen] was building his/her house, Kott put in the floors. Source estimates this cost around $24,000 to $25,000." BRADY 24. The 302 continues that the source explained all the work that Kott put into later flooring work: "Kott later did more work on the floors near the residence entrance including the steps into the kitchen area and refinishing the floors. Kott refinished the floors on the entire first level of the house, the upstairs steps and downstairs steps. Kott did not do the floors upstairs. The floors upstairs are lighter than the downstairs floors.

[7] The government has released 3 different stacks of documents to the defense. One "stack" – which consists of approximately 4,000 documents – was provided directly to undersigned counsel, pursuant to an agreed protective order. It is Bates stamped, and the numbers cited herein as "BRADY #" are based on those Bates stamps. The government also has another stack of documents bearing "APD" numbers and a third stack bearing "JOY" numbers. The government has declined to provide copies of those APD and JOY documents to the defense; instead, we reviewed them at the U.S. Attorney's office. They are also cited by Bates stamp numbers. Finally, this Court should be aware that the government has agreed with undersigned counsel that this motion shall be filed in open court and that undersigned counsel may cite and refer to all of the documents referenced in this report with the descriptions and quotations contained herein. In fact, to accomplish this agreement, the descriptions and quotations contained herein were provided in advance to the government. A copy of our letter to government counsel containing these descriptions and quotations will be filed with this Court as Appendix B. The BRADY documents cited herein will be filed as Appendix C. The government has not given us the APD and JOY documents, so we cannot file them at all. We will initially file these appendices under seal, at the government's request. This is to provide the government with time to move this Court for permission to maintain those documents completely sealed, or to unseal with the government's proposed redactions. If the government does file such a motion, we reserve the right to oppose any attempt to keep information under seal at that time.

Source advised that *'they [Kott and his partner] worked their butt off.'*" BRADY 25 (emphasis added).

Then, critically, it continues that the payment in question was for refinishing not for a bribe: "Source stated that he/she thinks he/she paid approximately $17,000 for the aforementioned refinishing work. The initial invoice was for $12,000. Source advised that Kott told source it was just $12,000, but source said that Kott did more than that, so the rest was a bonus." BRADY 25. "Kott did not want to give source an invoice, but source told Kott, 'bullshit, you worked hard.'" *Id*.

So Bill Allen told Agent Mary Beth Kepner that the $17,000 or so payment included the large bonus in exchange for Kott "work[ing] hard" on the "refinishing" work because "they worked their butt [sic] off"; the government later characterized that as a bribe without telling the defense that its key witness actually characterized it completely differently. In fact, the government never told the defense – or this Court – that Bill Allen explicitly told them that "he/she never gave Kott cash during 2004 to compensate for flooring income." BRADY 28 (same FBI 302 as quoted immediately above).

Nor did the government disclose that Allen told them that, although the initial invoice was for $12,000, "BA told him he did more than that, so it was a bonus." BRADY 41 (same 302 as quoted immediately above). In fact the government did not reveal that Bill Allen stated, in an interview concerning his background with Kott, that "he gave PETE KOTT two different checks for approximately $17,000 and $5,000 *for the flooring work*." BRADY 52, at 58 (emphasis added).

One newly disclosed FBI 302 of an 8/31/06 interview of Bill Allen's VECO employee Jack Billings (not dictated until 9/8/06) even contains evidence that Allen

determined the value of Kott's refinishing services on his own, because Kott was such a good friend that he had volunteered to do the project for free. That 302 states: "BILLINGS further recalled that in June 2006, BILLINGS helped Rep. PETE KOTT move furniture in BILL ALLEN's home, prior to KOTT performing refinishing services to ALLEN's floors. BILLINGS learned from ALLEN that KOTT wanted to provide the refinishing services for free, but ALLEN insisted on paying KOTT for those services." BRADY 3531. Handwritten notes of B.W. Bodee, dated August 31, 2006, apparently part of the same interview, say the same thing: "Bill said Pete wanted to do it for free. Bill: No way. I'm going to pay him for it." BRADY 1816. The context suggests that this is a June 12, 2006, conversation to which reference is made.

Other suppressed documents contradict Rick Smith's testimony on this same point. On September 14, 2007, at Pete Kott's trial, on direct examination by Mr. Marsh, Rick Smith testified before this Court that he strategized to get Kott money and gave him a check for around $8,000 in late July of 2006 that was not really for flooring work. 9/14/07 TR8:13-27. In a pre-trial interview with the government, however, Smith stated that he did not remember Bill Allen "helping Pete out w/down payment [sic] for a truck. RS doesn't recall other instances of giving him cash, but not saying it couldn't have happen [sic]. RS says they were all really close." BRADY 113.

Interestingly, in her Memo of Interview with Bill Allen and counsel, referring to an interview in which Agent Kadera noted other Bill Allen admissions, Agent Kepner omits several things. One of the things she omits is the information that it was Bill Allen's idea to give Kott this bonus, and that it was given as a bonus for hard work well done. BRADY 59.

IV. THE NEWLY RELEASED DOCUMENTS CONTRADICT THE GOVERNMENT'S EVIDENCE AND ARGUMENT AT TRIAL THAT THE $1,000 GIVEN TO PETE KOTT AFTER HIS MURKOWSKI DONATION WAS REALLY BRIBERY AND EXTORTION

A. <u>The Evidence and Argument at Trial About the Murkowski Payment</u>

At trial, the government characterized the payment of $1,000 to Pete Kott, after Kott's donation of $1,000 to the Murkowski campaign, as a "benefit[] solicited and received by Kott." Government's Brief on Appeal, pp. 42-43. The government argued to the jury that Bill Allen connected this $1,000 payment to Kott up with the donation to Murkowski and knew that it was wrong: "And what did Bill Allen say on the stand about that? He said it was wrong." TR14:17-18.

B. <u>The Newly Released Documents Show That the Payment Was Never Treated as a Repayment for a Murkowski Donation, and Hence Not as Bribery or Extortion</u>

The newly released documents contradict the government's assertion that this was a benefit solicited and received by Kott. In handwritten notes entitled Allen Debrief, dated September 27, 2006, approximately one year before Kott's trial, the following summary of what really happened with this $1,000 appears: "2006: gave him $1000 cash. Didn't tell PK why he was giving him the $. Didn't say it was to reimburse PK for the Murkowski campaign contribution. Only knew PK made the contribution through Rick." BRADY 248. It is not even clear whose notes these are, but they certainly contradict the government's theory that the $1000 was bribery and extortion. Similarly, in an FBI 302 apparently authored by Kepner and Kadera, the following summary

appears: 1000 for Murkowski – BA never told PK what it was for, or to make the contrib." BRADY 42.

As discussed in Section II above, in her Memo of Interview with Bill Allen and counsel, referring to an interview in which Agent Kadera noted other admissions, Agent Kepner omits several things. One of the things she omits is this information that Kott was never told that the $1,000 was for the Murkowski donation or even that he should make a donation. BRADY 59.

V. THE NEWLY RELEASED DOCUMENTS CONTRADICT THE GOVERNMENT'S EVIDENCE AND ARGUMENT AT TRIAL THAT THE OPINION POLL PAYMENT WAS REALLY BRIBERY AND EXTORTION

A. The Evidence and Argument at Trial About the Poll

At trial, Rick Smith testified about specific exchanges of property with Kott. He stated that after Kott announced that he would run for re-election again, VECO paid for a poll to help him. Smith continued that he had conversations with Kott about the poll, and that Smith told Mackie, who was conducting the polling and doing the report, that VECO would support that poll. Smith continued that he also told Mackie that they would do "anything else that you might need to – for Pete Kott's campaign." TR8:93-96.

B. The Newly Released Documents Show That the Poll was Not a Quid Pro Quo to Kott, But Was Done as Part of VECO's Work to Understand Public Opinion

The suppressed documents undermine the claim that the payment for the poll was a bribe. They reveal that it was a common practice for VECO to commission a poll itself, because such polls concerning public opinion and candidates have value to VECO – and other candidates often benefit from what VECO learns in the polls, indirectly.

For example, a 9/10/06 FBI 302 transcription of 9/1/06 interview with Marc Hellenthal, who runs a survey research business conducting polls for business or government clients, contains Hellenthal's statement that there were numerous times when VECO would conduct polls for its own information, and pay for them; it continues that other candidates might "piggyback" onto the polls for a far lesser sum. Hellenthal described what he meant with an example of one such poll: "VECO paid $3,250.00 for their part of the poll to HELLENTHAL by corporate check. ROKEBERG and the other candidate's [sic] share depends on the number of questions they place on the poll. The candidates do not necessarily share the results of their poll questions with the other candidates riding the same poll. Once a poll is begun, others can save money by riding on another's poll. For example, VECO paid HELLENTHAL approximately $3,000 to $4,000 to create a poll. Three candidates then piggybacked that poll. MATT MON and BOB ROSES paid approximately $250 each. EARL MAYO paid approximately $500." BRADY 3823.

Other newly released documents also undermine the notion that there was any quid pro quo for the poll. In an FBI 302 concerning a September 12, 2006, interview, which is inexplicably left untranscribed until April 19, 2007, an unnamed source – it appears to be Rick Smith – is quoted as stating the following, which tends to show that there was no quid pro quo with Kott for the poll: "The source routinely purchased polls for candidates running for political office or polls on political issues for which the source's company had an interest." BRADY 100.[8] In fact, one newly released document

[8] Interestingly, the illegality that the government eventually attributed to the poll at trial was not that obvious to them, either. When Agent Kepner testified before the grand jury,

even undermines the notion that VECO paid for this poll at all; it memorializes Rick Smith's statement that this might be the poll "where the pollster was not paid." BRADY 915. If VECO, Smith and Allen did not even pay the pollster, then they certainly did not bribe Kott with such nonpayment.

VI. THE NEWLY RELEASED DOCUMENTS CONTRADICT THE GOVERNMENT'S EVIDENCE AND ARGUMENT AT TRIAL THAT A SUPPOSED JOB PROMISE TO KOTT WAS REALLY BRIBERY AND EXTORTION

A. The Evidence and Argument at Trial About the Job

At trial, Bill Allen testified that he said he would give Pete Kott a job with VECO if Pete Kott got them the pipeline. TR6:49, 60. The government argued that the references to getting Kott a job as a warden at a prison VECO built in Barbados was essentially a shorthand way of saying that they were promising Kott a job with VECO. TR14:6-7, 93-94.

B. The Newly Released Documents Show That All Allen Promised Was to Help Kott With a Good Word

The newly released documents contradict this testimony, and provide support, instead, for the defense assertion that Bill Allen helped Pete Kott because of their long-term friendship, and Allen's greater resources, rather than any kind of quid pro quo for favors. An FBI 302 summarizing an interview with an unnamed source, likely Allen, states that Kott would have worked on the PPT legislation as he did even "if source did not pay him any money." BRADY 27. This newly disclosed document certainly

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she was asked what was wrong with VECO paying for that poll. Her answer was that a company cannot pay for a poll and that this company had exceeded its payment limit. She did not say anything about extortion or bribery; apparently it was not obvious from these interviews. BRADY 769.

undermines the notion that Kott cast his votes because of bribes or extortion – since it states that he cast them based on conscience.

This 302 continues that the reference to Barbados was a "joke." *Id.* In fact, it asserts that rather than Bill Allen promising Pete Kott a job with VECO, "Kott told source the best thing to be would be a lobbyist and source told Kott that he/she would help him." BRADY 27. "Help" with getting a separate job as "a lobbyist" is very different from a promise for a full time company job.

Other documents reveal the same thing – that Allen offered Kott "help" to be a lobbyist, but did not promise him a job with VECO. *E.g.*, BRADY 43 (Allen offered "help" for Kott to be a lobbyist; Kott stated that Allen offered to put in a good word with oil company for him).

VII. THE NEWLY RELEASED DOCUMENTS CONTRADICT THE GOVERNMENT'S EVIDENCE AND ARGUMENT AT TRIAL THAT BILL ALLEN'S $5,000 DOWNPAYMENT ON A TRUCK FOR KOTT WAS REALLY BRIBERY AND EXTORTION – ALLEN HIMSELF CALLED IT A LOAN

A. The Evidence and Argument at Trial About the $5,000 Down Payment

As discussed above, at trial the government elicited testimony that Bill Allen's $5,000 down payment on a truck for Pete Kott amounted to bribery, extortion, an exchange of a "gift" of value for Kott's support. The government even argued in closing that it could not possibly have been considered a loan, as Kott characterized it: "since I'm on the topic of credibility, I'd like to draw your attention to Mr. Kott's explanation of the $5,000 he received from Bill Allen in 2004. You heard Mr. Kott mention that, he said it was a loan for a truck." TR14:85. The government ridiculed Kott's testimony that

this was a loan: "he admitted that there was no paperwork for that, he didn't have any interest rate, they didn't really talk about repayment other than that he would give him back the money whenever that was done, whenever he had been able to pay off the truck. And from the time that that was made in summer of 2004 to the time that the FBI executed their search warrant on Mr. Kott's place on August 31st, 2006, Mr. Kott hadn't paid back a dime of that money." *Id.*, TR14: 85-6.

The government concluded that Kott must be lying when he characterized the $5,000 down payment as a loan: "Does that make sense that this was a loan? Does his explanation of that make any sense to you whatsoever?" *Id.*, TR14:86.

B. <u>The Newly Released Documents Show That $5000 Really Was a Loan, According to Allen, But He Ended Up Not Pushing Kott, Who Was Strapped for Cash, for Repayment</u>

As it turns out, however, Bill Allen had told the government exactly the same thing that Pete Kott told the jury: that the $5,000 down payment was a loan. In fact, that is exactly what an FBI 302 apparently authored by Agent Kadera, states. It says that Bill Allen helped Pete Kott with $5,000 for financing, that it was considered a loan not a gift, and there is no mention of quid pro quo: "Pete never reimbursed BA for the 5K. Considered loan, but didn't push him for it." BRADY 42.

Interestingly, in her Memo of Interview with Bill Allen and counsel, apparently referring to the interview above, Agent Kepner omits several things. One of the things she omits is the information that the $5,000 for the truck was a loan. BRADY 59.

Another note, this one authored by Agent Kadera, even states that according to Roger [Chan?] Pete Kott was too proud to accept such a gift of cash from Bill Allen for the truck: "Roger … told BA that he couldn't give him the truck, BA would probably

have given the truck if Roger didn't say anything. Pete was proud, is good friend, having[?] for 15 years." BRADY 44. This is certainly inconsistent with the government's theory that Pete Kott accepted a bribe for the truck. It is consistent only with Kott's testimony that it was a loan.

Other newly released documents showing that Allen often tried to help out his friends monetarily – just to help them because he had the resources and not for any quid pro quo – are also inconsistent with that government theory. *See* BRADY 103 (FBI 302 shows that source advised that Allen gave money if people needed help, simply to help out: "Source advised that ALLEN was the kind of person who gave money to people who were in need, such as PETE KOTT and BEVERLY MASEK."); BRADY 109 (Kadera rough notes, state: "Bill is like that – where he'll give people cash. Like Pete Kott and Bev Masek."); BRADY 111 ("Bill also helped her (Ramona) out financially after she got out of politics."); BRADY 1107 ("BA was going to Juneau & saw Walter on plane heading to Phoenix. BA loaned Walker $1,000 after asking how his $ was. Walker contacted & offered to repay later, but Bill declined". *See also* BRADY 825 (Kepner grand jury testimony; Allen described his relationship with Kott as very close and "he had dual motivations" for the money he gave him, first "to help Pete Kott out" and he also knew it would "solidify" Kott's support).

The government failed to disclose this information to the defense. The government failed to disclose it to this Court, or to the jury. Instead, the government elicited contrary testimony from Bill Allen on the witness stand and argued that contrary testimony in closing.

The government even used this supposed lie by Pete Kott on the witness stand about the money for the down payment on the truck being a loan (rather than a bribe or extortion) – an assertion that we now know from the newly released documents was completely consistent with Bill Allen's information given to the government – to undermine all the rest of Kott's testimony: "And if you can't believe Mr. Kott on what he told you … [about certain votes] and you can't believe him in how he describes the financial transactions he has with Bill Allen, ladies and gentlemen, what do you think you can believe Mr. Kott about?" TR14:86.

The fact that the government withheld the documents showing that Pete Kott was telling the truth therefore undermines not just the evidence of this single supposed bribe, but anything else that conflicted with Kott's testimony – because it tainted Kott's credibility so much.

VIII. THE NEWLY RELEASED DOCUMENTS COMPLETELY UNDERMINE THE CREDIBILITY OF RICK SMITH; THEY SHOW THAT HE WAS MENTALLY UNSTABLE, POSSIBLY SUICIDAL, HAD AN ALCOHOL PROBLEM AND WAS REGULALRY "GETTING SLOSHED" RIGHT BEFORE KOTT'S TRIAL, AND THAT THE GOVERNMENT CHANGED HIS TESTIMONY TO MAKE IT MORE INCRIMINATING

A. Rick Smith's Previously Undisclosed Mental Health Problems, Including Suicidal Tendencies, Around the Time of Kott's Trial

Rick Smith was undergoing tremendous pressure in the months leading up to Pete Kott's trial. It led to heavy drinking, mental instability, and even suicidal tendencies. The newly released documents reveal that Agent Kepner stated in a recent interview Rick Smith was becoming psychologically unglued during the summer preceding Kott's August and September 2007 trial: "KEPNER is aware of allegation … in the JOY

complaint concerning her golfing with the source SMITH. … KEPNER went golfing with SMITH because she was extremely concerned about his mental condition. KEPNER advised SMITH was having significant psychological troubles because of the pending Federal criminal case against him. KEPNER was concerned SMITH was possibly even suicidal because of this situation." BRADY 4630.

Smith himself admitted the same thing. In a recent recording prompted by the Chad Joy complaint and follow up government interviews, Rick Smith responded to the government agents' questions regarding his mental health and whether he was suicidal at that time. Obviously following up on Agent Kepner's assertion that she socialized with Smith during the summer before the Kott trial because she was worried about his mental health and thought he might be suicidal, Smith responded that yes, Kepner was concerned about him and his mental health; she tried to have discussions with him about that but he did not open up to her. Tape, 14:46 et seq. He also stated that he did say things like "you may not have me to kick around any more." Smith's attorney confirmed that she and Smith's wife were also concerned about this. Smith Tape, 18:01.

Smith explicitly confirmed that Agent Kepner's concerns on this point were legitimate. Tape, 18:59.

B. Rick Smith's Previously Undisclosed Major Alcoholism Problem Causing him to "Get[] Sloshed" Regularly Around the Time of Kott's Trial

Rick Smith had a drinking problem, and it was extremely serious leading up to Pete Kott's trial. The newly disclosed documents show this. BRADY 1039 (handwritten notes, unclear from who, dated February 19, 2007, state "RS had drinking problem"); BRADY 3869 (302 of 9/1/06 with Dolores Walker who works at VECO. RS would

arrive at work "whenever 'the booze wore off.'"); BRADY 3935 (302 of 9/12/06 interview with Bill Stoltze, stating Smith drinks a lot); BRADY 4140 (302 of 10/12/07 interview with Stoltze, he talks about a conversation he began with Smith, but Smith was too drunk to talk) .

In fact, he acknowledged that during the summer months preceding Pete Kott's August to September, 2007, trial, he was so unstable and potentially suicidal that he was "getting sloshed after hours," but Agent Kepner did not see that. Tape of Smith, 16:25-17:11.

C. Rick Smith's Previously Undisclosed Admission that "My Memory is Terrible" Without Government Prompting

However, the CD containing a recording of a 2009 interview with Smith about this period of his life during the summer preceding Kott's trial states, at 8:00, "When trying to establish dates for when RS had his contacts with MBK for the golf tournament that she joined him at (socialized with him at) and at which he paid sponsorship fees, he tries several times and cannot remember, explaining: "My memory is terrible." "I mean that's the truth." Neither Smith nor the government told the defense or this Court that even though he was testifying about events occurring at the exact same time as this golf tournament, his memory was "terrible" and "that's the truth."

This tape further reveals that Smith could come up with the date after the government prompted him enough; they determined that the date of the golf tournament they were talking about was in 2007, with Smith explaining: "We kick this stuff around long enough I actually remember something." Tape, at 8:11.

D. <u>Rick Smith's Previously Undisclosed Admission that Pete Kott Would Have Supported Their PPT Legislation No Matter What, Because It Was in Line With Kott's Views About What Was Best for the People of Alaska</u>

At trial, the government argued that the payments described above were done to procure Pete Kott's votes on legislation favorable to VECO. In closing, the government similarly argued that these transactions were done to procure Pete Kott's support and official action: "when the member of the State legislature is asking for those benefits, soliciting those benefits, accepting those benefits knowing that the benefits *relate to the official actions.* That's what we're talking about here in this case and that's what the government submits the evidence has shown." TR:14-92 (emphasis added). *Accord* TR:14-4 ("Kott took numerous official actions in his capacity as a member of the Alaska State Legislature to benefit VECO and Bill Allen from September 2005 through August 2006, and he did this in exchange for several specific benefits [listing them] …").

It is now clear, however, that the government withheld evidence showing that Bill Allen and Rick Smith both knew that Pete Kott supported VECO's position on several issues relating to oil and gas development not because of their gifts, but because it was in accord with his views about what was best for the people of Alaska. An FBI 302 summarizing an interview with an unnamed source, likely Allen, states that Kott would have worked on the PPT legislation as he did even "if source did not pay him any money." BRADY 27.

D. <u>The Government Told Rick Smith What to Say</u>

The newly disclosed documents also reveal that the government told Rick Smith what to say. They contain a summary of notes concerning trial preparation for Vic

Kohring's trial. Those handwritten notes, entitled "Rick Smith," state, under the title "Cash Payments": "doesn't know what VK thought the cash payments represented – whether he viewed them as bribes or gifts." Then they say, "need to strengthen RS's response re: bribes v. gifts. RS says he doesn't know what VK though [sic] the payments represented. – then RS can't speculate as to what VK though the payments represented. – RS needs to bring it back to what RS/BA thought the payments represented." BRADY 243. This shows that the government sculpted Smith's testimony about whether cash payments were "bribes v. gifts" when preparing for Kohring's trial.

We found no notes concerning trial preparation of Rick Smith in advance of Pete Kott's trial. If he allowed the government to tell him to characterize payments as bribes rather than gifts at Kohring's trial, then this certainly increases the probability that he allowed the government to tell him to characterize payments as bribes rather than gifts at Kott's trial. This manner of government sculpting of a key witness's testimony on such a critical point was never disclosed before.

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IX. THE NEWLY RELEASED DOCUMENTS UNDERMINE ALLEN'S CREDIBILITY: HE HAD FAR MORE CRIMINAL EXPOSURE THAN HE ADMITTED; HE HAD FAR MORE EMBARRASSING CONDUCT TO HIDE THAN HE ADMITTED; HE SOLICITED LIES FROM HIS VICTIMS TO COVERUP HIS ACTS; AND THE GOVERNMENT CHANGED HIS TESTIMONY FROM KOTT DID *NOT* EXTORT HIM, TO KOTT *DID* EXTORT HIM

A. Bill Allen's Previously Undisclosed Criminal Exposure for Sexual Exploitation of the CHILD Victim Whose Case Was Supposedly Completely Unconnected to this Case

At trial, the government briefly – and obliquely – referred to a "_____ _____ [CHILD VICTIM 1]"[9] issue. The government raised this at a hearing that was closed to the public, at the government's request, and held in a closed courtroom on September 13, 2007, at 9:52 a.m. At the end of that hour-long hearing, the government for the first time raised the name of CHILD VICTIM 1, which obviously came as a surprise to the defense. It raised CHILD VICTIM 1's name in one sentence, raised no other young

[9] We are not identifying child victims by name in this document. The Local Administrative Policies and Procedures concerning ECF filing states on this point:

> In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers specified above [including "names of minor children"] may:
>
> (a) file a redacted document in the public record and file a reference list under seal. The reference list shall contain the complete personal data identifier(s) and the redacted identifier(s) used in its (their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifier. The reference list must be filed under seal and may be amended as of right, …

Appendix F, to be filed separately under seal, will contain a table cross-referencing the victims identified by number in this public document with victims' actual names.

women's names, and concluded that same sentence with, "the Government would posit that has no relevance whatsoever to this case."

The defense was obviously caught unaware. The government's introduction of this name, defensive posture, and argument, along with the defense response, are as follows:

> MR. GOEKE: That there is one other matter, Your Honor, that – it's become apparent to the Government through moving papers of previous co-defendant Wehyrauch's counsel, and there was also some suggest – there was some reference to this individual on the recordings provided to Mr. Wendt, there may be a line of inquiry concerning Mr. Allen's relationship with CHILD VICTIM 1, and the Government would posit that has no relevance whatsoever in this case.
>
> THE COURT: Will, mis—I don't think Mr. Wendt's done anything or Ms. Simonian's done anything on that, but let me just ask. Did you – were you going to ask him about CHILD VICTIM 1?
>
> * * *
>
> THE COURT: I – I don't see how it's relevant –
>
> MR. WENDT: Oh, I'm sorry. I don't specifically know Ms. Tyree. I know – I -- it's hard – the name CHILD VICTIM 1 does not ring a bell, but I have heard of other potential involvements involving Mr. Smith with women, both through this case, and through other means that – I don't know their names . I don't know –
>
> THE COURT: Well, that's – I mean, that's – all right. But that's not something you would inquire into.
>
> MR. WENDT: I did – well, I – I can just tell the Court that I've – I've –
>
> THE COURT: The fact that he's a philanderer isn't something one usually gets into on cross-examination in a criminal felony trial unless for some reason that's relevant.
>
> MR. WENDT: I don't know who CHILD VICTIM 1 is.

9/13/07 TR:48-9 (filed under seal).

Since the defense had no independent information about CHILD VICTIM 1 or anything even vaguely related to her, the defense did not have any basis to argue that her name or any other young woman's name, or any other investigation, was relevant. This Court understandably ruled:

> THE COURT: The fact that he's a philanderer isn't something one usually gets into on cross-examination in a criminal felony trial unless for some reason that's relevant.

9/13/07 TR:49 (filed under seal).

Thereafter, the defense once again made clear that this was all new information to them: "The only think I can think of is maybe CHILD VICTIM 1 was over there [at Boehm's house]. I don't know where CHILD VICTIM 1 is or who she was." 9/13/07 TR:50.

The government never brought up any other allegations or accusations of prior criminal or wrongful acts, even those that had previously generated Anchorage and federal attention, prior to trial.

B. Bill Allen's Previously Undisclosed Criminal Exposure for Sexual Exploitation of and Prostitution With Women and Minor Girls, Mann Act Violations, and Other Crimes

The government, however, was fully aware that such evidence existed and must have know of its importance in two different areas: it showed prior acts of criminality, and it showed Bill Allen's desperate attempts to convince his victims to lie to protect him. Its newly released documents contain allegations and evidence that Bill Allen committed a multitude of primarily sex crimes against children, and that he sought to have them swear that he never committed such acts.

Those documents begin with descriptions of Mann Act violations by Bill Allen with CHILD VICTIM 2 in 2000. APD 1-17. They contain an interview with that woman, who was a child of 16 in the year 2000, in which she states that at that time, Allen he flew her up from Seattle to Anchorage, apparently for sex. APD 9. She continues that there were gifts waiting for her in the hotel room when she arrived. When asked about any distinguishing physical features of Bill Allen, so that they could confirm her descriptions, the woman gave specific and detailed information about a physical characteristic of Bill Allen that would be considered extremely embarrassing, and that most men would seek to shield from public knowledge. APD 11. She continued, during this police interview, with graphic description of their typical sex sessions when she was a minor. *Id.*

If this interview left any question about this girl's age at the time of these crimes, that was answered in other documents confirming that she was 16 years old at that time. APD 26 (continuing narrative interview of CHILD VICTIM 2 beginning on APD 25). If this interview left any doubt about the nature of the acts between this child and Bill Allen, and whether other children were ever involved, that was also answered. Other children were involved. *E.g.*, APD 18 et seq. (CHILD VICTIM 3 was part of a threesome with Allen and CHILD VICTIM 2 at age 16). Other interviews, with the mother and the boyfriend of the mother of CHILD VICTIM 2, corroborate this information. APD 21.

In fact, those reports identify two other child victims of underage sex with Bill Allen: CHILD VICTIM 4, who was 14 or 15 years old at the time that she had sex with Bill Allen around 1994-95, and VICTIM 5, who also had sex with Bill Allen. APD 39.

It is true that some of the information discussed above came from Anchorage Police Department files and from recent interviews. But the newly released documents show that the federal government was actually aware of this conduct by Bill Allen well in advance of the Pete Kott trial – in fact, the federal government was aware as far back as 2004, if not earlier. In the February, 2004, APD Police Report on "Pending Investigation" by Det. Vandergriff, APD 43 et seq., of a 2/10/04 interview with VICTIM 5, the report states that the interview actually occurred at the U.S. Attorney's Office. FBI Agent John Eckstein and A.U.S.A. Frank Russo were present. VICTIM 5 told them that around 7 years earlier, she was Bill Allen's mistress when she was 19 years old. At the same time, he was having sex with 15 year olds. She described the sex, along with who else knew about it. She explained that she had her journal from that period of her life about these liaisons, and that she had copies of plane tickets and travelers checks and other documents proving it. In fact, this report states, "She said she would be willing to turn those over to us." APD 44, 46; same material in BRADY 4657.

Another APD report, this one dated February 19, 2004, shows additional federal involvement in this sex investigation concerning Bill Allen. This report also commented on the February 10th interview. It states that the investigation concerned Mr. Boehm, and that SA Eckstein, Det. Boltz, and an A.U.S.A. were all present during the interview of VICTIM. She stated that when she was 19 and prostituting with Bill Allen, that CHILD VICTIM 1, then age 14, lived with Joe Boehm. She, VICTIM 5, described her "arrangement with BA, she exchanged sex (no dope) for gifts of value (car, condo, money). She described the crack cocaine and pornography at Boehm's house. "She said that she also watched CHILD VICTIM 1 [perform a particular sex act with] BILL

ALLEN … in his car. She said CHILD VICTIM 1 was only 15 at the time" and she described Bill Allen's physical reaction to CHILD VICTIM 1. BRADY 4658. Thus, federal agents were present when all of this information was given by Bill Allen's female victims. She stated that Allen even "went to CHILD VICTIM 1's mother and asked her if it was okay for her 15-year old daughter to date him. CHILD VICTIM 1's mother said yes. In return BILL took care of CHILD VICTIM 1's mom financially and still does. She said during that time he showered them with gift certificates for shopping." BRADY 4659.

Then, critically, we have a document typed by Anchorage Police Department Det. Vandergriff, about this VICTIM 5, dated November 4, 2004. APD 47. It memorializes the advisement that he was given, in his words, in "March 2004." *Id.* That advisement was: "In March 2004 I was advised by AUSA Frank Russo to not actively investigate this case as it might interfere with a federal investigation *involving Allen* and Josef Boehm." *Id.* Thus, according to this document, the U.S. government stopped the APD investigation of Bill Allen in March 2004 "as it might interfere" with an investigation "involving Allen." This certainly stands in sharp contrast to government assurances in the sealed hearing that the two investigations had absolutely nothing to do with each other.

Other newly released documents confirm this. There is a January 2, 2008, interview with VICTIM 5. She references her own prior contact with an Assistant U.S. Attorney, and two visits to the U.S. Attorney's office from 2004, along with documents that she gave to the government during those visits. APD 52-53 (Vandergriff interview APD Incident Report). She even stated, during this interview, that when she was having

sex with Bill Allen, there was a time that he sent her on a trip to Bakersfield, California, in order to make her unavailable to give testimony in a different trial that might prove damaging or embarrassing to Allen. APD 54; BRADY 4659 (containing details and stating "that BILL was afraid that his name would come up and flew her and her family out of state"); BRADY 4663 (contains additional details about why Allen paid for them to go to Bakersfield to avoid testifying in a separate trial because her testimony could have referenced her relationship with Allen).

There is other corroborating evidence in these new documents, also. One report, dated Oct. 6, 2008 – an APD Incident Report authored by Det. Vandergriff – shows that Vandergriff called and asked SA Eckstein to go through documents from the federal Boehm investigation to try to find the ones that VICTIM 5 said that she had given to the U.S. Attorney's office in 2004. APD 60. What Vandergriff found was that not just Agent Eckstein, but that also an Assistant U.S. Attorney (then A.U.S.A., now Magistrate Judge, Smith) who was involved with the interview of VICTIM 5 in 2004, both remembered that they had participated in an interview of that victim and that she had given them the documents she said she did. *See also* BRADY 4665 (seems to contain same information). This once again confirms the federal government's involvement with the Anchorage Police Department investigation and interview regarding Bill Allen from 2004. Additional corroboration comes from the recently served search warrant for evidence of prior crimes of sexual abuse of a minor, promoting prostitution, 18 U.S.C. § 2422 coercion and enticement. APD 71. *See also* APD 284-492 (materials from recent APD investigation, seems to be from 2008, including affidavits with graphic descriptions of Bill Allen's sex with underage prostitutes from as early as 1999); BRADY 4661 (APD

report dated 1/2/08, interview with VICTIM 5 at APD; she described her earlier, 2004, interviews at the U.S. Attorney's Office about Bill Allen and the documents that she provided to the attorneys on her second visit there); BRADY 4662 (those documents included photos of her and CHILD VICTIM 1 with fits "that BILL had purchased for them at the gold diamond store. She said that many of the plane tickets she provided had been purchased with BILL's VECO credit card …."; she never received those materials back).

Then there are Bill Allen's prior inconsistent statements concerning an apparent attempt to cover-up his past transgressions. One document shows that on July 22, 2004, there was an APD interview, and on October 28, 2004, a transcription, of a law enforcement interview with CHILD VICTIM 1 at the SeaTac Correctional Facility in SeaTac, Washington. CHILD VICTIM 1's attorney was present, as was A.U.S.A. Frank Russo. In fact, the document is not from the APD; it is an FBI 302. APD 65. That FBI 302 form contains a summary of a detailed interview with CHILD VICTIM 1: "CHILD VICTIM 1 had sex with BILL ALLEN when she was 15 years old. CHILD VICTIM 1 previously signed a sworn affidavit claiming she did not have sex with ALLEN. CHILD VICTIM 1 was given the affidavit by ALLEN's attorney, *and she signed it at ALLEN's request.* CHILD VICTIM 1 provided false information on the affidavit because she cared for ALLEN and did not want him to get into trouble with the law." APD 65; same material contained in BRADY 4666. This is evidence that Allen was aware that his prior acts were criminal and that he manipulated his victim into signing a false statement to protect himself.

There is a strikingly similar allegation concerning an affidavit made by another victim, that is, VICTIM 5. She was Allen's prostitute around the same time as CHILD VICTIM 1. This victim stated, in her February 2004 interview with Det. Vandergriff and in the presence of SA Eckstein, and A.U.S.A. Russo, that "after they broke up her and her mom had to meet with BILL's attorney. She said that he recorder [sic] their conversation. He wanted her to sign a piece of paper swearing that she had never had a relationship with BILL and to never disclose to anyone that she had a relationship in exchange for $5000. She said she did not sign the form and did not take the money thinking she could probably get more." BRADY 4659.

The government was apparently pretty worried about this old FBI 302 showing not just Allen's past sex crimes, but also his awareness of these crimes, his attempts to obstruct the investigation of these crimes, and hence his clear interest in keeping all that information confidential. There is a 2-sentence long FBI FD 302, which says that the date of typing was March 10, 2007, and that the date of transcription was March 28, 2007. It is unclear if these were the only 2 sentences ever on this page, or if the rest of the page was deleted. APD 64. It is unclear from the document whose statement this is, since the person is identified only as a "source," but government counsel has informed undersigned counsel that the statement is that of Bill Allen. It states that this "source," Bill Allen, says that he never lied under oath. Government counsel further informed undersigned counsel that this statement was made by Bill Allen when he was confronted with the allegation that he got CHILD VICTIM 1 to sign a declaration denying that Bill Allen every did anything wrong. *Id.*

So the government was aware of this problem with Bill Allen's past allegations of criminal conduct, his denials, and the allegations that he covered up, by at least March of 2007. Pete Kott's trial was in August and September of 2007.

How important was it to Bill Allen that this information remain concealed? In an interview with Agent Kepner, following disclosure of the Chad Joy (whistleblower) complaint accusing Agent Kepner of improprieties in the public corruption investigations, Kepner explained that this was so important to Allen that he would "become unglued" each time he learned of the possibility of any of it becoming public. Kepner explained in this interview that she would occasionally receive a "heads up" from a reporter, Hopfinger, about articles that would be run in the newspaper; "KEPNER advised this was very helpful, because it allowed her to do some investigative things before an item was going to be made public. It was also helpful because, if for example HOPFINGER was going to run a story on ALLEN, she would contact KEPNER. This allowed KEPNER time to prepare ALLEN. *ALLEN would become unglued whenever an article would appear involving allegations related to the APD sexual investigation."* BRADY 4629 (emphasis added). Clearly, it was very important to Allen to keep that material quiet, and limited; it therefore would have provided an enormous incentive to cooperate in the first place.

C. **A.U.S.A. Frank Russo's Previously Undisclosed Direction to the Anchorage Police Department, in March 2004, to Stop Investigating Bill Allen Because it Could Interfere with a Pending Federal Investigation**

As discussed in the Section immediately above, Anchorage Police Department Det. Vandergriff wrote, on November 4, 2004, that, "In March 2004 I was advised by

AUSA Frank Russo to not actively investigate this case as it might interfere with a federal investigation *involving Allen* and Josef Boehm." APD 47. Thus, according to this document, the U.S. government stopped the APD investigation of Bill Allen in March 2004 "as it might interfere" with an investigation "involving Allen." This conflicts with the government assurances in the sealed hearing that the two investigations had absolutely nothing to do with each other.

The fact that there was an investigation "involving Allen" as early as March 2004 is also corroborated by FBI Agent Kepner's newly disclosed affidavit of February 20, 2009, showing that the Polar Pen Investigation – of which the investigation of Allen was a part – started in 2003 and that by January 2004 it had expanded significantly and so Agent Joy was also assigned to it. JOY 15-20. It is corroborated by a variety of other newly released documents, also. *E.g.*, BRADY 2643 (May 20, 2004, letter to Alaska Public Corruption Offices Commission re Complaint Alleging Violations of Campaign Finance Disclosure Laws Beverly Masek, showing early 2004 activity on corruption investigation); BRADY 1111 (original interview notes of Frank Prewitt Public Corruption Matter dated 4/19/04, by SA B.W. Goodee, from right around the time of the February, 2004, interview with VICTIM 5 and the March, 2004, request from A.U.S.A. Russo that the APD stop its investigation); BRADY 1218 (Part of a series of 302's on corruption issues from 2004; this one is dated 10/14/04, with contact info for Smith, Allen, Lethard, and Chan); BRADY 4594 (Chad Joy arrived in Anchorage in January 2004; "Soon after arriving in Anchorage, I was made co-case agent on a sensitive public corruption case, POLAR PEN 194A-AN-13620. …"); BRADY 4604 ("KEPNER

advised the Operation Polar Pen (OPP) investigation was officially opened in July of 2003"; original focus was on public corruption in private prison system.).

D. Other Previously Undisclosed Matters Showing Bill Allen's Motives to Curry Favor with the Government

At trial, Bill Allen testified that when the government first approached him on August 30, 2006, and asked him to cooperate, they said that if he did cooperate then they would not indict his children and they would refrain from charging VECO. TR4:6-7; TR7: 8-10. In fact, Allen claimed: "I didn't care what happens to me. I thought about those people [VECO employees] and I thought about my kids." *Id.*, TR7:139. The next day, Allen further stated that the plea agreement he entered said that he could get a reduction in his jail term by he does not expect it; he reiterated that he signed the agreement so that VECO and his family would not be charged.

It turns out that there was some other consideration, also. Apparently, there was a government promise to give back millions of dollars, characterized in Mr. Brendan Sullivan's post-trial argument in the Stevens case as a "holdback" worth "of his next tranche of millions of dollars." Transcript of April 7, 2008, from post-trial argument in *United States v. Stevens*, at p. 25 (copy of portion of transcript containing argument by Mr. Sullivan contained in Appendix A).

And it turns out that there was also additional prior criminal exposure. Bill Allen had relationships with adult prostitutes, also. The newly disclosed documents go into detail about one such relationship, with VICTIM 5, "an adult prostitute at the time." The report does not specify the dates of the liaisons. But it states that Allen helped VICTIM 5 move to Spokane. It continues, however, that she then "tried to extort $25,000 from the

source [apparently, Allen] by threatening to expose his relationship with her and an under aged female, CHILD VICTIM 1. Source refused to pay and hired atty Gilmore." VICTIM 5 tried again after Boehm was arrested; Allen told this to CHILD VICTIM 1; and CHILD VICTIM 1 said that she would stop VICTIM 5. CHILD VICTIM 1 then asked to speak to Allen's attorney and Allen claims that he does not know what happened from there. "The source did not ask CHILD VICTIM 1 to make a false statement. The source denied ever offering to pay anyone money to make a false statement." BRADY 947-48. According to this report, Mr. Boehm's lawyer then asked Allen to say that CHILD VICTIM 1 was extorting him but Allen declined, saying that this was not true. BRADY 947-48.

This report suggests that Allen was conscious of his own guilt, and told CHILD VICTIM 1 to make a false statement to protect him. That information should have been disclosed for use on cross-examination. It could have led defense counsel to Mr. Boehm's lawyer, who may have been useful to show that Allen lied to the FBI about these matters.

The government seems to have been concerned about this. It apparently prompted them to ask Allen to make the affirmation memorialized at BRADY 974, on March 28, 2007, before the Kott trial: "The source [apparently Allen] has never made a statement under oath that he/she knew was false or misleading nor has the source encouraged others to make a false statement under oath." Unfortunately for the government, this affirmation contradicts the suggestion that Allen told CHILD VICTIM 1 to make a false statement and that she then carried out his wishes. The contradiction is certainly material. In addition, Allen's assertion that he never made a misleading

statement under oath makes any other falsehood he made, in any official report, relevant and admissible.

E. Bill Allen's Previously Undisclosed Admission That Kott Would Have Supported The PPT Legislation No Matter What, Because of Kott's Views About What Was Best for the People of Alaska

At trial, the government argued that Pete Kott's support for the legislation VECO supported, especially the PPT 20/20 legislation, was dependent upon VECO's gifts to Kott. *See, e.g.*, TR6:59 (Allen testifies about the point when Kott made a commitment to him, Allen to support PPT 20/20 legislation). As the government wrote in its appellate brief, "… Allen and Smith testified that this future position [for Kott] with VECO was tied to Kott's agreement to perform official acts with respect to the gas pipeline and PPT legislation. ... In several recorded conversations, Kott explicitly linked his support of the gas pipeline and PPT legislation with his receipt of a VECO job." Government's Brief on Appeal, p. 7 (footnote and record citations omitted).

Newly disclosed documents now reveal exactly what the defense theorized at trial, that is, that Kott voted as he did because of his "ideas related to oil and gas," not for bribes. BRADY 105 (FBI 302 from before trial states: "Source's [apparently Smith's] relationship with PETE KOTT began when KOTT was a legislator. They met through their relationship with Barnes. KOTT supported source's company and it's [sic] ideas related to oil and gas. Source and ALLEN supported KOTT's campaigns.").

F. The Government Told Bill Allen What to Say

The newly disclosed documents also reveal that the government told Bill Allen what to say at trial. In particular, there is a pretrial email (BRADY 4670) from Nick Marsh to "Bill/Brenda" stating: "(1) Allen is a horrible witness. No shock there, but he's

been backsliding significantly on us over the past day or two. *He has now taken to volunteering, even when not asked, things like 'Pete Kott was my friend' and 'he never extorted me.'"* BRADY 4670 (emphasis added). This email also suggests how to deal with this problem. The suggestion was not to disclose Bill Allen's statements, which would prove to be completely inconsistent with his trial testimony and which are certainly exculpatory of Pete Kott, but to change them. A.U.S.A. Mr. Marsh laid out in the balance of this email how this strategy was working: "We finally had a heart-to-heart with him tonight where we went through the tapes again and talked to him about his own statements, on the tapes, where he linked the VECO job to gaining Pete's official support. He seemed to get it by the end. I think he's in a good place right now, but the guy is like mercury on a plate glass window. We won't know what we'll get until he takes the stand." BRADY 4670. This Assistant U.S. Attorney never disclosed the inconsistent statements, but instead manipulated Bill Allen so that he said just the opposite at trial.

X. THE NEWLY RELEASED DOCUMENTS SUGGEST THAT THERE IS FAR MORE *BRADY* INFORMATION STILL BEING WITHHELD

The newly released documents also suggest that there is far more material evidence that is still being suppressed. They do this by referencing other investigations, other documents, and other files, or by referring to other interviews. The government has asked that we keep these references to other matters confidential, by filing the list of documents and information that we believe is still being withheld under seal. We accede to the government's request, at this time, by filing the list of materials still needed as Appendix G, filed separately under seal at the government's request. We do not agree that those documents fall within the category of materials that can be sealed from public

filing. We file them under seal at this time solely to accommodate the government's request, to permit the government the opportunity to move this Court for an order allowing those documents to remain under seal or to be properly redacted to be unsealed. We reserve the right to oppose such a motion.

For this Court's information, the list of documents that still need to be released is the same as the list of additional documents that we asked the government to provide to us in a letter dated September 16, 2009. The government has informed us that they are not yet able to respond to our request for those additional documents. We therefore attach that complete letter request as Appendix B, filed separately under seal, since none of those additionally requested documents have been provided.

XI. THE NEWLY RELEASED DOCUMENTS SHOW THAT THE GOVERNMENT VIOLATED ITS CONSTITUTIONAL AND ETHICAL DUTIES TO DISCLOSE EVIDENCE FAVORABLE TO THE DEFENSE

A. The Government Had a Constitutional Obligation to Disclose Each of the New Documents Identified Above

The government had a constitutional obligation to disclose the documents identified above. Those documents fell into each of the following categories of *Brady/Giglio* material that must be disclosed

1. Prior Acts of Wrongdoing: The government must disclose prior criminal conduct of its witnesses, whether or not that criminal conduct resulted in a conviction, and the government has an affirmative duty to seek this information out.[10] The fact that the

[10] *United States v. Perdomo*, 929 F.2d 967, 980 (3d Cir. 1991) (government failure to disclose prior arrest and conviction record of main witness was *Brady* violation requiring reversal; prosecution team with duty to disclose includes both investigative and prosecution personnel); *United States v. Osorio*, 929 F.2d 753, 760 (1st Cir. 1991) (government erred in

witness's acts created only a suspicion of wrongdoing, and resulted in no adverse government action, is irrelevant; disclosure is still required.[11] The government was therefore obligated to disclose all of the information discussed above, in Section IX, concerning allegations that Bill Allen committed prostitution, exploitation of minors, Mann Act violations, and obstruction of justice, given the allegations arising in the Anchorage Police Department Investigation and in the federal government investigation related to A.U.S.A. Russo and others. The government was also obligated to disclose the full extent of Mr. Allen's federal criminal exposure, given that he was clearly investigated by the government for matters over and above the VECO-related crimes – as shown by the federal investigation of his activities with the underage girls also discussed in Section IX, above.

2. Opportunities for Leniency: The government must disclose its witnesses' upcoming *opportunities* to seek leniency from the government, even where the government has made no explicit promise of leniency.[12] Once again, the government was obligated to disclose all of the information discussed above, in Section IX, concerning allegations that Bill Allen committed prostitution, exploitation of minors, and the other crimes related to his

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failing to disclose that its witness had been involved with trafficking drugs for 18 months prior to trial, even though a different A.U.S.A., not the one trying the case, was the one with knowledge of that criminal background).

[11] *United States v. Phibbs*, 999 F.2d 1053, 1089 (6th Cir. 1993), *cert. denied*, 510 U.S. 1119 (1994) (*Brady* material includes evidence of "suggested wrongdoing" by witnesses; "The Supreme Court, in construing the government's obligation under *Brady v. Maryland* and its offspring, has drawn no distinction between such evidence, and that pertaining to proven or admitted criminal behavior.").

[12] *Reutter v. Solem*, 888 F.2d 578, 578-82 (8th Cir. 1989) (government's failure to disclose witness's upcoming appearance before Board of Pardons and Paroles a few days after testimony at defendant's trial was error).

sex with children, given the allegations arising in the Anchorage Police Department Investigation and in the federal government investigation related to A.U.S.A. Russo and others. It was also obligated to disclose the full extent of Mr. Allen's federal criminal exposure, given that he was clearly investigated by the government for matters in addition to the VECO-related crimes to which he pled guilty – as shown by the federal investigation of his activities with the underage girls discussed in Section IX, above. Finally, it was obligated to disclose the fact that the APD shut down its criminal investigation of Bill Allen at the request of A.U.S.A. Russo, in 2004, to that it would not "interfere" with the government investigation.

3. Other Government Files: The government has a duty to search police and investigative agency files, Internal Affairs investigative files, government employment records, and other government agency files for information about past cooperation and past criminal acts. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).[13] Thus, the government had a duty to search for the information about Mr. Allen discussed above, even if was not immediately apparent from Ms. Kepner's reports. The duty to search for the information in the files of the U.S. government itself is a given. *Id*.

[13] *United States v. Wood*, 57 F.3d 733, 737 (9th Cir. 1995) (FDA must, in criminal trial, disclose contents of Investigational New Drug applications that bear on safety of drug defendant is charged with dispensing unlawfully); *United States v. Brooks*, 966 F.2d 1500, 1502-03 (D.C. Cir. 1992) (government duty to search other agencies includes duty to search police department and Internal Affairs file); *United States v. Perdomo*, 929 F.2d 967, 980 (prosecution team with duty to disclose includes both investigative and prosecution personnel); *United States v. Osorio*, 929 F.2d 753, 760; *United States v. Deutsch*, 475 F.2d 55, *overruled on other grounds, United States v. Henry,* 749 F.2d 203, 206 (5th Cir. 1984) (government duty to search personnel file of Postal employee who testified against defendants).

Furthermore, the duty extends to even information and material in the control of other agencies who are working with the government, such as the APD in this case. The reason is that the government must disclose criminal or sanctionable conduct of its witnesses, whether or not that conduct resulted in a criminal conviction, *and the government has an affirmative duty to seek this information out.* *United States v. Perdomo*, 929 F.2d 967, 980 (government failure to disclose prior arrest and conviction record of main witness was *Brady* violation requiring reversal; prosecution team with duty to disclose includes both investigative and prosecution personnel); *United States v. Osorio*, 929 F.2d 753, 760 (government erred in failing to disclose that its witness had been involved with trafficking drugs for 18 months prior to trial, even though a different A.U.S.A., not the one trying the case, was the one with knowledge of that criminal background).

Even the APD must be considered part of the prosecution "team" in this case, for *Brady/Kyles* disclosure obligation purposes, because of the joint interviews between APD and the government; the joint work of the APD and the government; and the joint decision for APD to acquiesce in the wishes of the government to stop their investigation of Mr. Allen. The disclosure obligation applies to information held even by agencies that are wholly independent of the prosecutor's office. *United States v. Bin Laden*, 397 F. Supp.2d 465, 481 (S.D.N.Y. 2005), *aff'd*, 552 F.3d 93 (2d Cir. 2008) (prosecutor has constructive knowledge, for *Brady* disclosure purposes, of any information held by those whose actions can be fairly imputed to him; WitSec, a separate, independent, government agency for witness protection, falls into that category in this case). *A fortiori*, it should apply to the APD, since it was not acting independently of the government prosecution. *See Kyles v. Whitley*, 514 U.S. 419, 437 (prosecution duty to learn of favorable evidence known to the

others working on the government's behalf in the case, including the police).[14]

There is no requirement that the prosecutor on the case have actual knowledge of the impeachment evidence. In *United States v. Bagley*, 473 U.S. 667 (1985), for instance, the Supreme Court held that the prosecutor's failure to disclose evidence that might have been helpful to the defendant for impeachment during cross-examination amounted to constitutional error, despite the fact that the prosecutor did not even know it existed. *See also United States v. Perdomo*, 929 F.2d 967, 969-70 ("It is well accepted that a prosecutor's lack of knowledge does not render information unknown for *Brady* purposes"); *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir.), *cert. denied*, 493 U.S. 858 (1989) ("The prosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant"); *United States ex rel. Smith v. Fairman*, 769 F.2d 386, 391-92 (7th Cir. 1985) (prosecutor's ignorance of a police worksheet did not justify State's failure to provide information); *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980) (prosecutor chose not to run NCIC (National Crime Information Center) check on witness due to shortness of time; prosecutor's lack of knowledge not an excuse for a *Brady* violation: "In the interests of inherent fairness," prosecution is obligated to produce evidence actually or constructively in its possession or accessible to it); *United States v. Antone*, 603 F.2d 566, 569 (5th Cir.

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[14] *United States v. Wood*, 57 F.3d 733, 737 (FDA must, in criminal trial, disclose contents of Investigational New Drug applications that bear on safety of drug defendant is charged with dispensing unlawfully); *United States v. Brooks*, 966 F.2d 1500, 1502-03 (government duty to search other agencies includes duty to search police department and Internal Affairs file); *United States v. Perdomo*, 929 F.2d 967, 980 (prosecution team with duty to disclose includes both investigative and prosecution personnel); *United States v. Osorio*, 929 F.2d 753, 760; *United States v. Deutsch*, 475 F.2d 55 (government duty to search personnel file of Postal employee who testified against defendants).

1979) (for purposes of *Brady* rule, prosecutor's office and investigators in case are treated as "prosecution team").[15]

This means that the government attorneys had an affirmative duty to scour the prosecution team for any potentially exculpatory evidence.[16]

4. Prior Inconsistent Statements: The government has a duty to disclose prior inconsistent statements of its witnesses, even if those statements are also on file with a court and, theoretically, available to the defense through other means.[17] Thus, the government was also constitutionally obligated to disclose each of the prior statements of Bill Allen and Rick Smith that contradicted their testimony about the $7,993 payment, the $1,000 payment, the poll payment, the job promise, and the truck down payment. These are the statements identified in Sections III-VII, above. They were also constitutionally obligated to disclose

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[15] *United States v. Butler*, 567 F.2d 885, 891 (9th Cir. 1978) ("The prosecution is responsible for the nondisclosure of assurances made to his principal witnesses *even if such promises by other government agents were unknown to the prosecutor*. Since the investigative officers are part of the prosecution, the taint on the trial is no less if they, rather than the prosecutor, were guilty of nondisclosure.") (emphasis added).

[16] *See United States v. Wood*, 57 F.3d 733, 737 (FDA must, in criminal trial, disclose contents of Investigational New Drug applications that bear on safety of drug defendant is charged with dispensing unlawfully); *United States v. Brooks*, 966 F.2d 1500, 1502-03 (government duty to search other agency files includes duty to search police department and Internal Affairs file; new trial ordered because government failed to check Internal Affairs Division files regarding police officer's credibility); *United States v. Perdomo*, 929 F.2d 967, 980 (prosecution team with duty to disclose includes both investigative and prosecution personnel); *United States v. Osorio*, 929 F.2d 753, 760; *United States v. Deutsch*, 475 F.2d 55 (prosecutor has duty to search personnel file of Postal employee who testified against defendants and disclose adverse information found there).

[17] *United States v. Payne*, 63 F.3d 1200, 1208-09 (2d Cir. 1995), *cert. denied,* 516 U.S. 1165 (1996) (government duty to disclose favorable evidence includes duty to disclose witness's prior affidavit containing material that conflicts with witness's trial testimony, even though on file with court in a different case).

the documents showing that CHILD VICTIM 1 signed a false affidavit, apparently at the behest of Bill Allen or his lawyer, and that Bill Allen himself claimed that he never lied to the government. That latter statement was clearly untrue in light of the lies these documents show that he admitted. *E.g.*, JOY 341, 355 (Nicholas Marsh Declaration of 2/24/09 stating Kepner called Bottini to tell him Allen was lying about not making a payment to a former member of the Alaska House); JOY 355 (¶52 – same Marsh Declaration – states, "The following day, the government was contacted by Mr. Allen's attorney concerning the debriefing session. We subsequently learned that, in fact, Mr. Allen had lied to Agent Kepner concerning the former state Representative.").

Even if this evidence is characterized as bearing solely on credibility, it still should have been disclosed. Impeachment evidence falls within the disclosure mandate of *Brady*.[18]

5. Government Agent Rough Notes: Government agent rough notes must be disclosed if they contain inconsistent statements or exculpatory material.[19] The newly

[18] *United States v. Bagley*, 473 U.S. 667, 676 ("Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule."); *Benn v. Lambert*, 283 F.3d 1040 (9th Cir.), *cert. denied*, 537 U.S. 942 (2002) (granting writ of habeas corpus after defendant learned that state withheld material facts affecting credibility of police informant who implicated defendant); *United States v. Brumel-Alvarez*, 991 F.2d 1452 (9th Cir. 1993) ("The jury, not the prosecutor, has the duty to sift through the inconsistencies of testimony, to weigh the credibility of witnesses and to resolve any ambiguities in the evidence"; reversing, because there was reasonable probability that had memorandum been disclosed, "the result of the proceeding would have been different such that our confidence in the outcome is undermined"); *United States v. Endicott*, 869 F.2d 452 (9th Cir. 1989) ("the obligation under *Brady* to produce evidence material to a defendant's guilt or punishment includes production of impeachment evidence"); *Hart v. United States*, 565 F.2d 360, 362 (5th Cir. 1978) (remanding for hearing on 28 U.S.C. § 2255 motion alleging that key government witness and informant lied about not facing federal charges; "arrests may be admissible to show that an informer might falsely testify favorably to the government in order to put his own cases in the best light possible.

[19] *United States v. Alvarez*, 86 F.3d 901, 904 n.2 (9th Cir. 1996) (although officer's rough

disclosed materials contain not just FBI 302's but also government agent rough notes upon which those 302's are based, and sometimes, from which the 302's vary. Those rough notes are the source of many of the inconsistent statements of Bill Allen and Rick Smith that contradicted their testimony about the $7,993 payment, the $1,000 payment, the poll payment, the job promise, and the truck down payment. Once again, these cover statements identified in Sections III-VII, above.

6. <u>Information Concerning Witness's Psychological Problems and Inability to Remember</u>: The government must also disclose any mental health problems suffered by its witnesses bearing on their ability to accurately remember, and accurately relate, events. *United States v. Smith*, 77 F.3d 511, 512 (D.C. Cir. 1996) (reversing denial of motion to vacate due to government's failure to disclose psychiatric history of its witness, Mr. M); *United States v. Pryce*, 938 F.2d 1343, 1345 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 941 (1992) (violation of confrontation clause to prohibit inquiry about witness's hallucinations 3 months before charged event; they "are obviously relevant to a witness's ability to discern reality" later). Cross-examination concerning a key witness' deteriorated mental state is also a proper subject for impeachment. *United States v. Mohawk*, 20 F.3d 1480, 1486 (9th Cir. 1994) (cross-examination as to "mental instability" provided "significant[] impeach[ment]").[20] The suppressed information in

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notes need not be disclosed as witness statements, "they must be disclosed pursuant to *Brady* if they contain material and exculpatory information").

[20] *See United States v. Pryce*, 938 F.2d 1343, 1345; *United States v. Johnson*, 820 F.2d 1065 (9th Cir. 1987) (referring to cross-examination of bank tellers about "agitated mental state" to discredit identifications); *Colley v. Sumner* 784 F.2d 984, 990 (9th Cir.), *cert. denied*, 479 U.S. 839 (1986) (referring to defense cross-examination that appropriately elicited "damaging testimony regarding her drug use and past emotional problems"); *United States v. Brown*, 770 F.2d 768, 770 (9th Cir. 1985), *cert. denied*, 474

Section VIII about Rick Smith's mental health issues, suicidal tendencies, drinking to the point of getting "sloshed" at night, and inability to "remember anything," is clearly material under this standard.

In sum, the government violated its constitutional duty to disclose exculpatory evidence, including impeachment evidence, by withholding evidence in each of the categories listed above. It is worth noting just how broad the government's constitutional disclosure obligation really is. This point was made fairly recently in the letter written by Hon. Emmit G. Sullivan, who presided at the trial in *United States v. Ted Stevens*, to the Judicial Conference Advisory Committee on the Rules of Criminal Procedure. He recommends changes to Rule 16, Fed.R.Crim.P., to further the constitutional imperative that all exculpatory evidence be disclosed to the defense. A copy of Judge Sullivan's letter is attached as Appendix D.

B. <u>The Government Attorneys Had an Even Broader Ethical Obligation to Disclose Each of the New Documents Identified Above</u>

The government had an even broader ethical obligation to disclose each of the new documents identified above. ABA Model Rule of Professional Conduct 3.8(d) (2008) provides: "The prosecutor in a criminal case shall" "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose

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U.S. 1036 (1986) (witnesses appropriately and extensively cross-examined about mental problems, and jury properly instructed to consider mental problems in evaluating credibility); *United States v. Heath*, 528 F.2d 191, 193 (9th Cir. 1975) ("fact of insanity or mental abnormality ... may be provable, on cross-examination or by extrinsic evidence, as bearing on credibility").

to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor …." *See also Cone v. Bell*, __ U.S. __, 129 S.Ct. 1869 (2009) (quoting ABA standard with approval).[21]

ABA Standing Committee on Ethics & Professional Responsibility's Formal Opinion 09-454 – Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense (July 8, 2009) (copy attached as Appendix E), describes the prosecution's duty under this rule in detail. It provides that prosecutors have an ethical duty to disclose any information to the defense that tends to negate guilt or mitigate an offense. This duty is in addition to statutory, constitutional, and other rules, and is broader than those rules. In particular, it is broader than the *Brady* obligation because it is not limited to "material" information, that is, information that could tend to change the outcome of the trial. Instead, the government attorney must "disclose favorable evidence so that the defense can decide on its utility."

This obligation, according to the Opinion, "is more demanding than the constitutional case law, in that it requires the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial's outcome." "The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution." This means that the prosecutor has a duty to disclose even inadmissible evidence that "may lead a defendant's lawyer to

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[21] This rule binds the government attorneys in federal court. Alaska Rules of Professional Conduct Rule 38(d) is identical to ABA Model Rule 3.8(a). The Citizen's Protection Act, 28 U.S.C. § 530B(a), then provides: "An attorney for the Government shall be subject to the State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."

admissible testimony or other evidence or assist him in other ways, such as in plea negotiations."

Further, under this ethical rule, there exists no "de minimus exception to the prosecution's disclosure duty where, for example, the prosecutor believes that the information has only a minimal tendency to negate the defendant's guilt, or that the favorable evidence is highly unreliable." It must still be disclosed. The duty to disclose applies not just to the line prosecutors, but extends also to supervisors.

It is therefore crystal clear that the government had not just a constitutional, but also an ethical, duty to disclose all of the documents summarized above, which tend to impeach the credibility of the key witnesses and undermine the evidence concerning each of the five transactions presented at trial.

C. The *Brady*, *Giglio* and *Napue*[22] Errors Were Material, Even if They Related to Only a Single Transaction – But Here They Related to All Five Transactions

The government's constitutional duty to disclose arises if the evidence is material. Evidence is material if "there is a reasonable probability" that "the result of the proceeding would have been different" had disclosure occurred. *Carriger v. Lewis*, 132 F.3d 463, 479 (9th Cir. 1997), *cert. denied*, 523 U.S. 1133 (1998).

A "reasonable probability" does not require proof by a preponderance of evidence. *Singh v. Prunty*, 142 F.3d 1157, 1161 (9th Cir. 1998), *cert. denied*, 525 U.S. 956 (1998); *Carriger v. Lewis*, 132 F.3d 463, 479. It requires only proof of a probability. *See Kyles*, 514 U.S. 419, 507 & n.9.

[22] *Napue v. Illinois*, 360 U.S. 265 (1959).

The sufficiency of other, admitted, evidence, has no bearing on the prejudice inquiry when a *Brady* violation is at issue. The test for materiality "is *not a sufficiency of evidence test*. ... One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. 419, 506.

The undisclosed substantive and impeachment evidence was material under this test.[23]

The jury was provided with evidence that Allen would hire Kott as a lobbyist, and that VECO paid lobbyists $6,000 to $12,000 per month. TR6:57-63. The jury was provided with evidence that Allen paid Kott $1,000 to reimburse him for a donation to Governor Murkowski. *Id*. The jury was provided with evidence that Allen provided an additional $7,993 to Pete Kott's son, to give him the extra money necessary to leave his hardwood flooring job and help his father with the upcoming election campaign. TR7:124.

But there was also evidence admitted of uncharged extortionate or bribing conduct, such as the $5,000 advance payment to Kott for a car loan with no written

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[23] Withholding this evidence also deprived Pete Kott of his right to confront and cross-examine witnesses. "The sixth amendment guarantees criminal defendants the right to cross-examine adverse witnesses to uncover possible bias and to expose the witness's motivation in testifying." *Reiger v. Christensen*, 789 F.2d 1425, 1433 (9th Cir. 1986). Cross-examination about adverse witness' motives for testifying falls within that guaranteed confrontation right. *Maryland v. Craig,* 497 U.S. 836, 851-52 (1990) (being able to determine whether child witness in sex case had been coached is part of Confrontation Clause right); *Coy v. Iowa*, 487 U.S. 1012 (1988); *United States v. Turning Bear*, 357 F.3d 730, 736 (8th Cir. 2004) (same); *State v. Vincent*, 159 Ariz. 418, 429-30, 768 P.2d 150 (1989) (same).

documentation and no repayments as of 2½ years later, 9/20/07 TR12:156-57, and $12,000 for flooring, TR6:71-72.

The jury returned general verdicts of guilty. They were never asked whether they believed the testimony about the $7,993, or whether they convicted based on one of the several other charged or uncharged allegations. *See also* 9/24/07 TR14:85-86 (government argues that Kott's explanation for receipt of $5,000 for truck makes no sense).

Thus, the *Brady, Giglio* and *Napue* errors were material even if they related to only a single transaction forming the basis for the government's case – because we cannot identify the specific transaction(s) upon which the jury relied. In this case, however, the errors did not undermine just a single transaction. As discussed above, the withheld evidence related to all five of the transactions upon which the government's case was based.

D. The *Brady, Giglio* and *Napue* Errors concerning the Credibility of Allen and Smith Were Material, Because the Key Issue in this Case Was "Credibility"

In closing argument, the government used a single word to describe the key issue in this case: "Credibility." TR14:85. As discussed in the Introduction, the government, this court, and the defense all agreed that this accurately captured the critical issue here.

XII. THIS COURT SHOULD VACATE AND DISMISS ALL CONVICTIONS OR, ALTERNATIVELY, ORDER DISCLOSURE OF ADDITIONAL *BRADY* INFORMATION AND DEPOSITIONS, PER § X

The remedy for a *Brady* violation is often to reverse the conviction and hold a new trial. *Kyles .v Whitley*, 514 U.S. 419.

Where the errors are significant, deliberate, and evidence a pattern of government misconduct, however, then the district court can exercise its supervisory power to vacate the convictions and dismiss the indictment as a sanction for the prosecutorial misconduct. *United States v. Kojayan*, 8 F.3d 1315, 1324-25 (9th Cir. 1993), *amended by* 1993 U.S. App. LEXIS 23921 (Nov. 1, 1993). This is certainly a case of extreme prosecutorial misconduct in withholding material information and thereby undermining the fairness of the trial and prejudicing Mr. Kott. Not just reversal, but dismissal of the indictment, is therefore appropriate in this rare case.

Finally, if this Court believes that the standard for reversal and dismissal is not yet met in this case, then we would move, in the alternative, for an order compelling disclosure of the items listed in the letter attached as Appendix B, filed separately under seal. We would also move this Court for an order permitting the depositions of the government witnesses with material information about the matters described in this motion; those witnesses are also listed in the letter attached as Appendix B.

DATED THIS 24th day of September, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I caused to be electronically filed the foregoing with the Clerk of the Court of the United States District Court for Alaska by using the CM/ECF system on September 24, 2009.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the district court CM/ECF system.

DATED this 24th day of September, 2009.

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