ADDENDUM

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

Exhibit 5

EDWARD P. SULLIVAN

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

RESPONSE TO REPORT

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On behalf of Edward P. Sullivan, an attorney with the Department of Justice, Criminal Division, Public Integrity Section ("PIN"), we hereby submit this response to the report prepared by Henry F. Schuelke III (the "Report"), pursuant to the Court's February 8, 2012 order.

I. INTRODUCTION

After a nearly three year investigation, Mr. Schuelke has declined to recommend further proceedings in this matter.[1] Nonetheless, contrary to law and normal practice and procedure, Mr. Schuelke submitted a lengthy, unauthorized report to the Court under seal containing so-called "investigative findings." The Report exonerates Mr. Sullivan by rightfully concluding that he made no independent decisions and that, as the junior most prosecutor who assisted the government in a non-trial, "back office" role, he deferred to the judgment of the Criminal Division front office, his veteran supervisors, and the experienced senior members of the prosecution team. This correct determination is consistent with the conclusion of the Department's Office of Professional Responsibility ("OPR"), which notified Mr. Sullivan in writing, following a comprehensive investigation, that he did not engage in any professional misconduct or exercise poor judgment, fully clearing him under OPR's standards of review. Mr. Sullivan, in fact, acted appropriately, ethically, and without mistake under extremely difficult circumstances caused by others before, during, and after the trial.

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[1] This response does not address the unfair administration of justice in this matter, including the propriety and scope of the investigation or the Court's use of this case to advance personal views on criminal discovery (with which, ironically, Mr. Sullivan generally concurs). *See United States v. Stevens*, No. 08-cr-231 (D.D.C.) (EGS) (Dkt. Nos. 414, 415, 417, 418, 419, 420) (posting to the docket in the underlying case a series of letters from the Court and defense counsel to the Criminal and Local Rules Committees regarding the possible amendment of Rule 16). Nor does this response seek to counter, point by point, the substantive errors or misstatements of fact within the Report. Because of his status as a federal employee, Mr. Sullivan is also necessarily constrained as to what he can permissibly address in this submission regarding the conduct of others inside and outside the Department.

Although the Report rightfully contains no adverse findings against Mr. Sullivan, it frequently levels criticism, using generalized and imprecise terminology, at the "government" or the "prosecutors." In so doing, the Report criticizes the government in a collective manner without sufficiently segregating Mr. Sullivan or fully explaining his appropriate and ethical conduct in his limited role. Mr. Sullivan therefore submits this response to address briefly the underlying record, which establishes unequivocally that Mr. Sullivan is a conscientious and diligent prosecutor who endeavored in good faith during the case to comply with his ethical and professional duties and, in fact, did comply with those duties.

Indeed, Mr. Sullivan should not have been included in the Court's April 7, 2009 order in the first place, particularly when considering his marginal role and the fact that the Court's order did not include several managers in the Criminal Division front office and PIN who, unlike Mr. Sullivan, wielded actual decision-making authority and made or condoned the government's strategic decisions in the case and who participated substantially before, during, and/or after the trial. Among other things, Mr. Sullivan was not on the trial team, did not meaningfully participate in the decisions and actions under review, and merely assisted his superiors and the trial team by playing a supporting role primarily outside the courtroom. *See, e.g.,* Report at 3 (noting that Mr. Sullivan was "removed from the in-court trial team and performed back office work during the trial."). Given his greatly diminished role, Mr. Sullivan did not take independent action during the trial but rather spotted issues and ensured that they were vetted by the trial team, PIN supervisors, and in some cases attorneys in the front office and appellate section of the Criminal Division. In so doing, Mr. Sullivan acted responsibly, conscientiously, and ethically at all times. Indeed, to his credit, on the few occasions when thorny and difficult disclosure issues were brought to his attention, Mr. Sullivan consistently informed his

supervisors and the trial team so that they could address the issues, often while simultaneously suggesting to these senior attorneys that the information should be disclosed to the defense.[2]

In summary, any alleged mistakes that occurred during this case on the part of the government are not attributable to Mr. Sullivan. *First*, because he was a new prosecutor at the time without prior criminal experience, Mr. Sullivan routinely deferred to the expertise and experience of his supervisors, the front office, and the veteran prosecutors with whom he worked. Because PIN and, in large part, the Criminal Division, inexplicably had no formal policies or procedures regarding most core investigative and prosecutorial functions, Mr. Sullivan necessarily received much of his professional guidance from supervisors and seasoned prosecutors, most of whom had 20 years or more of criminal experience and had collectively prosecuted hundreds of cases.

Second, many of the problems that led to this investigation resulted from poor management decisions by senior officials before, during, and after the trial.[3] Among other things, the front office abruptly reorganized the trial team, required the government to agree to an expedited trial date to which the defense was not entitled, and directed or endorsed aggressive discovery procedures even though the trial team was severely understaffed, operating under intense time pressures, and suffering from a void in leadership. Although he was not a part of

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[2] For instance, on one particular occasion, Mr. Sullivan learned that the trial team was in favor of non-disclosure of certain information, contrary to Mr. Sullivan's position. When it was apparent he was outnumbered and had a marginal vote (since he was not on the trial team), and because it was an important issue that was not his "bailiwick," Mr. Sullivan sought out PIN Chief Welch to ensure that Mr. Welch weighed in on the decision. Mr. Sullivan specifically told Mr. Welch he was in favor of disclosure and, consequently, asked Mr. Welch to argue his position on his behalf. Thereafter, Mr. Welch called an "all hands" meeting that resulted in the disclosure of the information.

[3] This submission does not address several poor management decisions made during post-trial litigation that, among other things, culminated in certain senior officials in the Department being held in contempt of court.

the trial team, Mr. Sullivan raised several objections in real time regarding these issues. Mr. Sullivan's objections were largely ignored.

Third, Mr. Sullivan played a limited role in the discovery review and disclosure process in this case, which was logical given his then-inexperience in criminal matters, his lack of involvement in witness preparation, and the fact that he was primarily tasked on an *ad hoc* basis to work on legal briefs. In addition, because he was not on the trial team, Mr. Sullivan was asked to focus on other ongoing investigations and appellate matters.

Finally, Mr. Sullivan was not responsible for any alleged disclosure violations relating to the three principal "investigative findings" addressed in the Report: (1) the alleged undisclosed information elicited from Rocky Williams; (2) the government's disclosures relating to Bill Allen's involvement with Bambi Tyree; and (3) the alleged undisclosed information relating to Mr. Allen and the "Torricelli note."

The Report does not implicate Mr. Sullivan in the first two issues in any respect. Unfortunately, however, with respect to the "Torricelli note," Mr. Schuelke criticized the government's collective failure to recall certain information elicited during an interview of Mr. Allen on April 15, 2008. The information, which was innocuous at the time it was elicited, was subsequently inconsistent with Mr. Allen's trial testimony approximately six months later.

Given his limited, non-trial role and complete lack of involvement in preparing Mr. Allen to testify at trial, there is absolutely no basis for Mr. Schuelke's statements as to Mr. Sullivan. Placed in proper context, given Mr. Sullivan's many other responsibilities, his dramatically curtailed role during the nearly six months between the April 15, 2008 interview and Mr. Allen's inconsistent trial testimony, and his complete lack of involvement in preparing Mr. Allen to testify at trial, Mr. Sullivan's failure to recall the April 15, 2008 interview is completely

understandable and not surprising at all. Mr. Sullivan, in short, is not responsible for the government's alleged disclosure violation related to the Torricelli note for the following reasons, among others:

- Mr. Sullivan, who only attended telephonically for a portion of the April 15, 2008 interview conducted by others, was unaware that an FBI 302 had not been created.[4]
- Mr. Sullivan was never tasked with reviewing the numerous reports of interviews in the case to ensure that the agents had prepared and finalized all of their reports of interviews.
- The interview, and a follow-up interview on April 18, 2008, was not mentioned on any law enforcement logs or discovery indices.
- Because the interview was never formally memorialized in an FBI 302 or circulated to PIN supervisors or others, Mr. Sullivan had no occasion, reason, or obligation to revisit this issue at any point thereafter.
- There was nothing remarkable or memorable about either the April 15th interview or Mr. Allen's statements regarding the Torricelli note, which was not the focus of the interview. Mr. Allen's statements were also not inconsistent when made.
- Because of his limited role in the case, Mr. Sullivan did not participate in the follow-up interview with Mr. Allen on April 18, 2008, thereby demonstrating that the discussions with Mr. Allen were not of particular importance to Mr. Sullivan, and the discussion about the Torricelli note even less so.
- Mr. Sullivan did not attend any of Mr. Allen's trial preparation sessions or the vast majority of Mr. Allen's trial testimony.
- Mr. Sullivan was unaware on a contemporaneous basis that any inconsistent statements had apparently been elicited during Mr. Allen's trial preparation sessions.
- After he was removed from the case, Mr. Sullivan turned over the vast majority of his files and notes to the trial team members, including his immediate supervisor. Mr. Sullivan was never asked thereafter by his supervisors or the trial team for any additional material in connection with the trial team's disclosure review, nor was Mr. Sullivan personally asked to conduct such a review.

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[4] The FBI's failure to memorialize the April 15th interview likely explains why those responsible for the disclosure review did not identify Mr. Allen's inconsistent statement.

- Mr. Allen's attorney, a well-respected former U.S. Attorney for the District of Alaska who was present during his client's trial preparation sessions, also failed to recall that Mr. Allen was interviewed on April 15, 2008, as did Mr. Sullivan's supervisors.

II. BACKGROUND INFORMATION

Throughout his tenure in the Department, Mr. Sullivan has been repeatedly commended by his supervisors as an outstanding attorney who possesses strong moral character and integrity, sound and mature judgment, and exceptional professional and personal skills. He joined the Department in June 1999, as an attorney in the Civil Division, Commercial Litigation Branch, where he served with distinction for nearly seven years. Mr. Sullivan consistently received outstanding performance evaluations during his tenure in the Civil Division, he received numerous promotions and performance-based awards, and he was nominated for the John Marshall Award, the highest award the Department of Justice gives to attorneys.

In March 2006, Mr. Sullivan left the Civil Division and joined PIN as a trial attorney, where he continued to receive outstanding evaluations and numerous performance-based awards. When he first arrived in PIN, Mr. Sullivan's supervisors decided that he should learn about prosecuting criminal cases by pairing him with veteran prosecutors and supervisors in the office rather than having him gain criminal experience by detailing him to the U.S. Attorney's Office for the District of Columbia. Tr. 12-13.[5] Because he was not assigned a mentor and was told to learn by "riding the coattails" of others, Mr. Sullivan specifically asked that his supervisors assign him to the most experienced prosecutors in the section. Mr. Sullivan was then immediately assigned to work on a large-scale investigation as a junior prosecutor to three experienced line attorneys. This large scale investigation was closely supervised by several

[5] All citations to "Tr." are to the transcript of Mr. Schuelke's deposition of Mr. Sullivan on January 6, 2010.

members of the Criminal Division's front office and numerous PIN supervisors, all of whom had approximately 20 years prosecuting criminal matters.

Because he was instructed to learn criminal practice by watching his managers and experienced colleagues, Mr. Sullivan's supervisors did not provide Mr. Sullivan (and several other new prosecutors) with any formal training in criminal procedure or discovery after his arrival in PIN. Tr. 20-21. Consequently, prior to the trial in this case, Mr. Sullivan had never been asked by his supervisors or experienced colleagues to complete a disclosure review in any criminal case and had never performed a comprehensive review in any criminal case. Nor had his supervisors ever provided him with any formal or informal, "hands-on" training concerning how to perform such a comprehensive review. Indeed, as discussed below, the front office removed Mr. Sullivan from this case on the eve of the grand jury's indictment because, at the time, he was deemed too inexperienced in criminal matters, having served as trial counsel in only one criminal case—a matter in which Mr. Sullivan was the junior prosecutor and second chair to an experienced senior prosecutor.

Given his limited experience in criminal matters and the fact that he was the last prosecutor to join the investigation as its most junior member, Mr. Sullivan relied heavily upon his supervisors and experienced colleagues for much of his professional guidance. At the time, Mr. Sullivan took great comfort in the fact that decisions concerning the *Stevens* prosecution were being made by the Criminal Division's leadership—the front office, managers in PIN, and the Appellate Section—all of whom appeared to have extensive experience in criminal matters.

Mr. Sullivan's reliance upon his veteran supervisors and experienced colleagues was also borne out of necessity because PIN and, in large part, the Criminal Division inexplicably had no formal policies or standardized procedures governing most core investigative and prosecutorial

functions. Mr. Sullivan also did not fully appreciate at the time that the Criminal Division management failed in many respects to adhere to the same best practices, policies, and procedures that the Department is now seeking to publicize widely (at least in part due to recommendations made by Mr. Sullivan and concerns that he raised internally) and that certain managers had a fundamentally flawed understanding of the government's discovery obligations.

With the benefit of hindsight, Mr. Sullivan recognizes that the Department did not provide proper professional guidance and advice to him (and many other new prosecutors) that would have given him a better vantage point with which to evaluate the prudence of decisions made by his superiors. Mr. Sullivan has therefore advocated internally in favor of remedial measures, including the implementation of formal policies and best practices, which would address certain of the Department's systemic problems and policy lapses; would promote greater transparency and more expansive discovery in criminal matters; and would create greater certainty and consistency in the application of prosecutorial discretion through mandatory procedures. In short, Mr. Sullivan has sought to effect positive and constructive reform from within the Department not only because it is the right thing to do but also so that other new prosecutors do not have to experience anything remotely similar to the unfair treatment that Mr. Sullivan has had to endure in silence over the past four years, which he did with dignity and professionalism.

III. THE DEPARTMENT OF JUSTICE'S MISMANAGEMENT OF THE CASE LED TO MANY OF THE EVENTS UNDER REVIEW

The Criminal Division's leadership closely managed and supervised the investigation and prosecution of the *Stevens* case and was significantly involved in the government's key strategic decisions. Several poor management decisions help explain the events that gave rise to Mr. Schuelke's investigation.

First, the front office's decision to remove Mr. Sullivan from the trial team on the eve of indictment—because he was deemed too inexperienced in criminal matters at the time to participate as trial counsel—explains why Mr. Sullivan was not involved in the vast majority of issues under review. The front office's simultaneous decision to insert then-PIN Principal Deputy Chief Brenda Morris as the trial team leader required other members of the trial team to take time away from their pressing responsibilities, including the preparation of discovery, to educate Ms. Morris. The front office's decision also caused confusion among team members about their roles and responsibilities, a problem that persisted throughout the case. According to their testimony in this investigation, the decision also led then-PIN Chief William Welch and Ms. Morris to abdicate their supervisory responsibilities over the case.

Second, the front office's decision to indict the case and then agree to a trial date that was significantly earlier than the defendant asked for or was entitled to contributed enormously to the problems in the case, particularly because the vast majority of the witnesses and discovery materials were located in Alaska.

Third, these logistical problems, which the front office and PIN management knew about, were compounded by later management decisions to implement a labor intensive discovery plan that had a small margin for error even though the trial team was operating under severe time pressures. Specifically, the front office decided to play discovery "close to the vest" and to not produce interview reports as *Jencks* statements. The front office also condoned the decision not to produce the underlying source materials as *Brady* but rather to rely on summary letters. These decisions led directly or indirectly to the majority of the disclosure violations alleged in the Report.

Fourth, the front office exacerbated the logistical and other problems by not adequately staffing the case and providing insufficient resources and strong leadership to ensure that the labor intensive discovery plan and other aspects of the case were properly executed.

A. The Front Office Reorganized The Trial Team On The Eve Of Indictment

The front office's decision to reorganize the trial team just one day before the indictment had significant consequences for Mr. Sullivan. That decision resulted in Mr. Sullivan playing a dramatically limited role in the case. Mr. Sullivan therefore did not participate in most key decision-making or strategy sessions and received his information about what was happening in court and how strategic issues were resolved largely secondhand from members of the trial team. In addition, the last-minute change to the trial team resulted in confusion over roles and responsibilities among the supervisors and the trial team and some "getting up to speed" that was difficult to accomplish in the limited time available before trial.

On July 28, 2008, the day before the grand jury returned the indictment, Mr. Sullivan learned that then-Acting Assistant Attorney General Matthew Friedrich and then-Principal Deputy Assistant Attorney General Rita Glavin had decided Mr. Sullivan and another attorney were "off the trial team period." Tr. 32. Another PIN Trial Attorney was demoted from lead counsel to third chair. And the front office assigned Ms. Morris as lead counsel, apparently after Mr. Friedrich pressed Ms. Morris to accept this position. *See* Report at 44; 051671. Mr. Welch and Ms. Morris both reportedly disagreed with the front office's decision to re-organize the trial team but were overruled by AAG Friedrich and PDAAG Glavin. Report at 45-46.

Mr. Sullivan was "specifically told [he] did not have the experience level [at that time] to be on the trial team." Tr. 120. Mr. Sullivan's understanding of this decision was that he had been removed from the case entirely. *Id.* at 32. The front office even debated whether

Mr. Sullivan could remain on the pleadings. *Id.* at 33. Although managers ultimately decided to leave Mr. Sullivan on the pleadings, Mr. Sullivan was told that Mr. Friedrich and Ms. Glavin were upset that Mr. Sullivan sat at counsel's table during the arraignment. *See id.* at 36; 020438-40. Thereafter, the front office had to grant Mr. Sullivan permission to sit inside the well of the Court on the few occasions in which he attended the trial. *See* 053868; 070015.

After the front office removed him from the trial team, Mr. Sullivan had "no clearly defined role" on the case. Tr. 34. But despite being abruptly removed from the case altogether in a demoralizing and unprofessional manner, Mr. Sullivan still offered his assistance to Mr. Welch and Ms. Morris, which they accepted. *Id.* at 34.

Mr. Sullivan worked tirelessly for three straight months out of both loyalty to his colleagues and devotion to the Department's mission. He also volunteered to help his colleagues in a supporting, non-trial role because he realized that the trial team was severely understaffed and needed the resources. During this period, Mr. Sullivan worked seven days a week, often logging 16 to 18 hours per day, and often being the last person to leave the office at night. Tr. 381-82.[6] Because he agreed to handle these numerous *ad hoc* requests, Mr. Sullivan did not attend 75-90 percent of the trial.[7] *Id.* at 309. Consequently, Mr. Sullivan did not participate in

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[6] Mr. Sullivan, in his supporting role, assisted the trial team by writing briefs and performing a variety of other *ad hoc* tasks. Because he was not on the trial team, Mr. Sullivan did not: address the jury; present any witnesses at trial; manage witnesses; participate in virtually all of the witness preparation sessions; participate in bench conferences or side bars; and, as a general practice, file pleadings with the court or send correspondence to defense counsel without supervisor and/or trial team review. Mr. Sullivan likewise was not assigned to handle the discovery in this matter; was not asked to be a repository or organizer for any correspondence, pleadings, or case-related discovery; was not tasked to supervise paralegals, other support staff, or law enforcement agents; and did not participate in the vast majority of meetings involving PIN supervisors, the Criminal Division front office, and/or the trial team.

[7] As is borne out by the contemporaneous record, Mr. Sullivan personally performed a substantial amount of high caliber and outstanding work in this matter in an extraordinarily short amount of time, with little resources, support, and leadership, and under incredibly difficult and

most of the decision-making or strategy sessions regarding the trial, including witness preparation and order of proof, and he typically received his information about what was happening during the trial, including even the reading of the verdict, secondhand.

As a result of the front office's reorganization of the trial team, neither Mr. Sullivan nor other staff members were given clearly defined roles or assignments, instead being tasked with performing "triage" or assignments on an *ad hoc* basis. As we briefly explain below, this confusion about roles and responsibilities on the case affected the trial team's discovery review and production.

According to their testimony in this investigation, the front office's reorganization of the trial team also led Mr. Welch and Ms. Morris to abdicate their supervisory responsibilities. Ms. Morris claimed that she "tr[ied] to make herself as little as possible" following the re-assignment because other line attorneys on the trial team resented her appointment.[8] Report at 74. Thus, even though she was lead prosecutor and a senior PIN supervisor, and this was a high-profile case brought by PIN, Ms. Morris testified that she "did not supervise the prosecution" and "played no role in the *Brady* review or the composition of the *Brady* disclosure letters." *Id.* Mr. Welch testified that because the front office was providing "input on discovery issues," and Ms. Morris had a direct reporting chain to AAG Friedrich and PDAAG Glavin, he stepped back

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often chaotic working conditions. For instance, Mr. Sullivan routinely was requested to research and draft multiple briefs in a day, which he accomplished by frequently working until the early hours of the morning.

[8] Mr. Sullivan, who was not on the trial team, did not resent Ms. Morris's appointment. In fact, he strongly urged her on several occasions to assume a greater leadership role and be more proactive in managing the case, particularly since Ms. Morris was aggressively lobbying Mr. Welch and Mr. Sullivan to support her request to handle the key witnesses, arguments, and assignments. In addition, when Mr. Sullivan discovered that Ms. Morris was still working on other matters, Mr. Sullivan approached Mr. Welch and asked him to re-assign her cases so that she could focus exclusively on the *Stevens* prosecution and get fully engaged.

from supervising the case and assumed Ms. Morris's duties and responsibilities in other matters. *Id.* at 100. However, when it became apparent that the case was being mismanaged and that there was a severe void in leadership, Mr. Sullivan, as briefly noted below, implored Mr. Welch to do the opposite.

In sum, the front office's last-minute shuffling of the trial team left Mr. Sullivan "out of the loop" and had very negative consequences for the management of the case.

B. The Front Office Required The Trial Team To Agree To An Expedited Trial Schedule

The Criminal Division closely supervised this matter before, during, and after the trial. Among other things, beginning in or around mid-June 2008, the front office asked PIN to obtain an additional one month tolling agreement on the statute of limitations, requested a memorandum outlining the official acts performed by the defendant, questioned whether the government could charge a gratuities or honest services fraud case, obtained the charging documents and plea allocutions of the cooperating witnesses in Alaska, met in-person with defense counsel, discussed the matter with certain individuals who were investigating the case, and met with PIN supervisors on a weekly and sometimes daily basis. Mr. Friedrich and Ms. Glavin also heavily edited the draft indictment. In one of the few meetings with the front office in which Mr. Sullivan participated, PIN supervisors informed Mr. Friedrich and Ms. Glavin that the government's case-in-chief would involve extensive documentary evidence and approximately 40 witnesses, with the vast majority of the evidence located in Alaska.

Notwithstanding the known logistical issues, shortly before the arraignment, Ms. Morris informed Mr. Sullivan and others for the first time that the front office had decided that the trial team must agree to an expedited trial schedule in the event that the defense requested one. Tr. 37. Mr. Sullivan was very surprised to hear of that decision because he knew it was "going

to be very, very difficult, just given the amount of material that was in Alaska; the logistics, [and] the staffing." Tr. 37.

At the arraignment, Ms. Morris agreed not only to an expedited trial date, but she also *requested an earlier trial date* than the defense asked for or was entitled to under the Speedy Trial Act. Defense counsel asked during the arraignment for an October trial date so that the defendant "could clear his name before the general election" and requested that the government expedite discovery. *See* 007126 (7/31/08 Tr. 3-4). In response, Ms. Morris stated that the government could be ready "on September 22nd." *Id.* at 7. Ultimately, the Court granted Ms. Morris' request for the earlier trial date, leaving the trial team and the support staff with only seven weeks to prepare for trial (as opposed to the 10 weeks requested by the defense and to which the government was entitled under the Speedy Trial Act). Of course, if the government had requested more than 10 weeks to prepare for trial, such a request likely would have been granted because the defendant, having filed numerous pretrial motions, was not entitled to a trial in 10 weeks. *See* 18 U.S.C. 3161(h)(1)(D) (2006); *United States v. Van Smith*, 530 F.3d 967, 969 (D.C. Cir. 2008). This decision led to a highly-compressed schedule and placed significant burdens on the government to complete tasks in far less time than usual under a normal trial schedule.

C. The Front Office Decided To Play Discovery "Close To The Vest" By Not Producing Interview Reports And Condoned The Use Of Summary Letters

While it was already going to be difficult for the government to transport and assemble all of the discovery materials located in Alaska and Washington, produce them to the defense, respond to and prepare dozens of pretrial motions, and prepare witnesses and exhibits for trial within the expedited time frame directed by the front office, the problem was exacerbated by the front office's decision to play discovery "close to the vest" by, among other things, not producing

interview reports as *Jencks* statements. The front office also took aggressive positions on *Brady* issues and condoned the decision to not produce underlying source materials as *Brady* but rather to rely on summary letters. These discovery procedures were labor intensive and, particularly with respect to the decision to not produce the underlying source materials as *Brady,* they allowed for only a small margin of error. Had the front office directed the trial team and PIN supervisors to be open with discovery and produce interview reports as *Jencks* material, most of the problems alleged in the Report would not have occurred.

On August 1, 2008, during a discussion about how discovery would be conducted in this case between AAG Friedrich, PDAAG Glavin, Mr. Welch, and Ms. Morris, Ms. Glavin told the group that "we have to play our cards close to the vest on this one." Report at 98 (quoting Mr. Welch's testimony). Ms. Morris said the trial team would not disclose FBI 302s as *Jencks* material, an aggressive position that AAG Friedrich and PDAAG Glavin endorsed. *Id.* at 99 (when Ms. Morris articulated this position, AAG Friedrich said "good"). Mr. Welch was "stunned" by this position, which Ms. Morris had not shared with him before the meeting, but he did not express his disagreement to AAG Friedrich. *Id.* at 100. Other PIN managers supervising the prosecution and senior attorneys in the section were aware of and condoned this approach as well.

The front office also took an aggressive approach to *Brady* decisions, as demonstrated by the decision by AAG Friedrich and PDAAG Glavin on September 5, 2008, to overrule a decision by Messrs. Welch, Sullivan, and another PIN attorney to obtain a readily-available Anchorage Police Department ("APD") file related to a local investigation of Mr. Allen in order to avoid having to turn it over to the defense. Report at 100; 297-98. The APD file included a copy of the FBI 302 of Ms. Tyree's July 22, 2004 interview—which the Report alleges contained information that should have been disclosed to the defense—a document that neither Mr. Welch

nor Mr. Sullivan was aware of at the time. When PIN managers later received the APD file, apparently unsolicited, near the end of the trial on October 14, 2008, it was promptly produced to the defense, including the FBI 302 of the July 22, 2004 Tyree interview. Report at 344-45. The defense used none of this information during the trial.

The Report does not make clear who decided that *Brady* information would be disclosed to the defense by way of a summary letter without providing underlying source documents. Mr. Sullivan certainly did not make this important decision and, in fact, was unaware prior to trial that his superiors and the trial team would not be producing the underlying source material for *Brady* information at any point going forward. Mr. Welch testified that he learned that the trial team planned to do so on September 8, 2008, the day before a summary disclosure letter was sent to the defense. *See* Report at 326. Ms. Morris testified that summary letters had been "the practice" in prior cases and she did not "buck the practice." *Id.* at 76. PDAAG Glavin reviewed a draft brief in opposition to a defense motion to compel, which stated that "The parties . . . have expressly agreed that the government is only obligated to provide defendant with a summary letter or a redacted transcript describing the exculpatory information to which the witness testified." *See* 098144-47. Given the extensive involvement of the front office in other discovery and disclosure decisions, and the fact that Ms. Morris analyzed the issue with prosecutors in the U.S. Attorney's Office for the District of Columbia, it is difficult to believe that the front office also did not affirmatively endorse the use of summary letters to make *Brady* disclosures in discussions with Mr. Welch and Ms. Morris. At a minimum, however, the front office and PIN's supervisors condoned the use of this practice by not objecting to it or directing Ms. Morris and the other two trial team members to produce underlying source materials, even

though they learned of it more than two weeks prior to opening statements and before the principal *Brady* disclosures.

These decisions, combined with the highly compressed schedule mandated by the front office, led directly to the failure to produce Mr. Allen's prior statements from the April 15, 2008 interview and to the misstatements in the disclosure letter regarding Ms. Tyree, two of the principal disclosure violations alleged in the Report. Specifically, had the front office directed the trial team to disclose FBI 302s as *Jencks* material instead of playing "close to the vest," or had PIN managers pushed back on the decision not to disclose FBI 302s as *Jencks* material, there is a strong likelihood that in cataloguing the FBI 302s to produce them to the defense, the government would have realized that no FBI 302 had been created of the April 15, 2008 interview. Such a discovery would have prompted a search for notes of the interview and either the belated preparation of the missing FBI 302 or production of the notes.

Likewise, had the Tyree report of interview been disclosed to the defense as *Jencks* or *Brady* material, there would have been no need to describe Mr. Allen's alleged procurement of a false declaration from Ms. Tyree in the summary disclosure letter and therefore no misstatement made by others. And if the front office had not overruled the decision of Messrs. Welch, Sullivan, and another PIN attorney to obtain Mr. Allen's APD investigation file on September 5, 2008, the July 22, 2004 Tyree FBI 302 likely would have received greater attention from Mr. Welch, Ms. Morris, and the trial team members, and the entire Tyree disclosure issue would have been avoided.

D. The Front Office Failed To Provide Adequate Staffing And Resources

Management also failed to adequately staff the case to ensure that the labor intensive discovery plan was properly executed. After the indictment, Mr. Sullivan voiced his concerns

about the inadequate staffing with his supervisors, particularly in light of the front office's decision to litigate the case on an expedited, 50-day schedule and the fact that defense counsel would likely staff the case with far more attorneys than the government (which, in fact, they did). Tr. 39. As the case got closer to trial, Mr. Sullivan grew increasingly frustrated with the lack of available resources, the inadequate staffing, and the void in leadership, even going so far as to call Mr. Welch at his home late at night on at least two occasions to address the situation, and to go even further outside the chain of command by seeking a private meeting with Mr. Friedrich.

Mr. Sullivan's concerns regarding staffing were ignored, ostensibly because the front office wanted to give the appearance to the public and the jury that it was prosecuting the case with a "bare bones" trial team. *See* Tr. 37. The front office thus decided to try a complex, high-profile, document-intensive case, on an earlier trial date than the defense either requested or was entitled to, and with only three trial attorneys and two additional attorneys providing litigation support, while simultaneously deciding to employ aggressive, "close to the vest" discovery tactics with a very limited margin for error. These management decisions resulted in a virtually unprecedented, extremely compressed timetable with insufficient resources to handle the many tasks required in this aggressively defended case. This important context created a "perfect storm" that explains many of the discovery-related issues that led to this investigation.

IV. MR. SULLIVAN PLAYED A LIMITED ROLE IN THE GOVERNMENT'S DISCLOSURE REVIEW

Because he was not on the trial team, Mr. Sullivan played a limited role in determining what information constituted *Brady* material and how it would be disclosed to the defense. Instead, senior prosecutors and PIN supervisors decided whether to disclose certain materials to the defense (and the substance and form of the disclosures). Mr. Sullivan had no authority to make these disclosure decisions, and as the junior prosecutor who was removed from the trial

team, he reasonably relied on his veteran supervisors and senior colleagues and complied fully with his ethical and professional duties.

Mr. Sullivan was not tasked to conduct the *Brady* review. Nor would it have made sense for Mr. Sullivan to have done so. Mr. Sullivan did not prepare witnesses for trial and therefore had no way to identify inconsistencies between information disclosed in trial preparation sessions and in earlier testimony or interviews. Moreover, having never been asked to conduct such a review in any case prior to then, Mr. Sullivan had neither the experience nor the training to conduct such a review. Ms. Morris confirmed in her testimony that Mr. Sullivan was "not in charge" of the *Brady* review because he "was the least experienced." Report at 77.

Mr. Sullivan was asked on an *ad hoc* basis to prepare the initial drafts of the summary disclosure letter sent to the defense on September 9, 2008. Mr. Sullivan was deliberately over-inclusive with the potential *Brady* information he included in the draft letter,[9] and circulated his first draft on September 7, 2008. *See* 030185-90.[10] Mr. Sullivan included all of the information that had been provided to him by others so the entire team and management could evaluate the potential, initial disclosures, even though Mr. Sullivan was not sure that all of the information was covered by *Brady* or *Giglio* (*id.*), and even though Mr. Sullivan thought the trial team members would eventually be producing in full or in large part the underlying source material as they proceeded towards trial.

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[9] For example, on September 4, 2009, Mr. Sullivan mentioned to agents: "Just a reminder that we should err on the side of caution and, to the extent information [] is potentially *Giglio* or *Brady*, we should produce it." *See* 052440.

[10] This and all other drafts of the September 9, 2008 letter that Mr. Sullivan prepared for his managers and the trial team did not contain paragraph 17(c) regarding Mr. Allen's views on whether the defendant would have paid an invoice had one been sent to him. Nor did Mr. Sullivan's drafts of the September 9, 2008 letter contain disclosures about Mr. Allen and Ms. Tyree's alleged relationship. Mr. Sullivan's early drafts were therefore accurately stated.

Mr. Sullivan handed off the September 9 letter for completion by the trial team because he needed to attend to preparations for an appellate argument in another matter.[11] Tr. 175. As a result, Mr. Sullivan did not draft or otherwise participate in the decision-making process regarding certain portions of the disclosure letter that were scrutinized in the Report.

In sum, Mr. Sullivan played a very limited substantive role in the government's *Brady/Giglio* review. Mr. Sullivan served as a scrivener while leaving the substantive decisions to the trial team and his experienced supervisors, a role that made sense given Mr. Sullivan's then-inexperience regarding criminal discovery and his lack of involvement in any witness preparation, which rendered him unable to perform a meaningful *Giglio* review in any event.

V. MR. SULLIVAN WAS NOT RESPONSIBLE FOR ANY OF THE GOVERNMENT'S ALLEGED MISTAKES

The Report clears Mr. Sullivan of any wrongdoing, noting that as the most junior attorney who assisted the government in a non-trial, "back office," supporting role, "he deferred to the judgment of his seniors" and "made no independent decisions." Report at 3, 507. The Report contains so-called "investigative findings" relating to three categories of information: (1) certain statements by witness Rocky Williams during government interviews, (2) information regarding whether Mr. Allen asked Ms. Tyree to sign a false declaration, and (3) information elicited during an April 15, 2008 government interview of Mr. Allen regarding the "Torricelli note" that, although innocuous when made, was subsequently inconsistent with Mr. Allen's trial testimony

[11] Because Mr. Sullivan did not handle the appellate matter at trial or draft the appellate briefs and was asked only to assist with the appellate oral argument for that matter, he had to spend considerable time familiarizing himself with the underlying record, briefs, and arguments. Moreover, because Mr. Sullivan was not on the *Stevens* trial team, PIN management expected him to continue to work on several other matters. Thus, Mr. Sullivan had to travel in early August 2008 on another matter for purposes of witness interviews, he had to respond to motions, filings, and appellate briefs in other matters, he had to participate in status conferences in another case, and he had to handle numerous conference calls regarding another matter under indictment.

some six months later. Mr. Sullivan was not responsible for disclosure decisions regarding any of these issues.

A. The Rocky Williams Issue Does Not Pertain To Mr. Sullivan

The Report alleges that other government attorneys and agents elicited information from Rocky Williams during trial preparation sessions on August 22, August 31, and September 20, 2008, which indicated, in substance, that Mr. Williams believed his and the other VECO employees' time would be added to the general contractor's bills—information consistent with an anticipated defense. *See generally* Report at 130-80. Mr. Sullivan did not even recall (prior to the deposition) that Mr. Williams had been interviewed on August 22, 2008, Tr. 398-401, and knew nothing about the allegedly undisclosed information until it was proffered to him by Mr. Schuelke in a hypothetical. Tr. 407-10; *id.* at 410 ("Q: This whole episode is news to you? A: It's news to me."). In short, the allegations relating to Mr. Williams have nothing to do with Mr. Sullivan.

B. Mr. Sullivan Was Not Responsible For Any Alleged Misstatements By The Government Regarding The Tyree Issue

The Report makes clear that Mr. Sullivan was not privy to the complete evidentiary record relating to the allegation that Mr. Allen asked Ms. Tyree to sign a false declaration denying that they had a sexual relationship. Mr. Sullivan believed the issue related to an Alaska prosecutor mistakenly representing in government briefs in another matter that Mr. Allen asked Ms. Tyree to sign a false declaration when in fact Ms. Tyree maintained the declaration was her idea. Report at 249-50 & 341-43; *see also* Tr. 99 ("I was aware of this brief and what was written in this brief and that the brief was mistaken. *I thought that's what the issue was, the brief.*") (emphasis added). PIN Chief Welch had the same understanding of this issue. *See*

Report at 322. Based on that incorrect understanding, Mr. Sullivan, just like Mr. Welch, had no reason to question the accuracy of the Department's disclosure on the issue. *Compare id.* at 327 (Welch's understanding) *with id.* at 342 (Sullivan's understanding).

Moreover, Mr. Sullivan's supervisors and the other senior prosecutors on the trial team decided the form and substance of the disclosure to the defense about Mr. Allen and Ms. Tyree with little or no input from Mr. Sullivan. Mr. Sullivan did not focus on the Tyree disclosure issue or the related underlying documents at the time because he knew the disclosure decision was being handled by his veteran supervisors and experienced colleagues, and Mr. Sullivan was busy preparing for an appellate argument in another matter the same week. *Id.* at 342. In sum, the Tyree issue also has nothing to do with Mr. Sullivan.

C. Mr. Sullivan Bears No Responsibility For Any Failure By The Government To Disclose Information Elicited From Mr. Allen Regarding The "Torricelli Note"

Even though Mr. Schuelke has recommended no further proceedings in this matter, he offers a disparaging opinion about the government—with no evidentiary basis—regarding the failure to disclose information elicited from Mr. Allen in April 2008, regarding the "Torricelli note." Mr. Allen's statements, although innocuous and unremarkable when made, were inconsistent with his subsequent trial testimony. The Report concludes that the government's collective failure to recall Mr. Allen's statements regarding the Torricelli note "is difficult to believe." Report at 28.

In light of Mr. Sullivan's marginal, supporting role and his complete lack of involvement in preparing Mr. Allen to testify at trial, there is no basis for Mr. Schuelke's personal opinion based on hindsight. Indeed, there is no "evidence" whatsoever to support these statements with respect to Mr. Sullivan. As noted on pages 4-6, *supra*, Mr. Sullivan's failure to recall the

April 15 interview is completely understandable and not surprising at all. In reality, Mr. Sullivan bears no responsibility for any failure to disclose information relating to this issue.

1. Mr. Sullivan Understandably Did Not Recall That Mr. Allen Had Made A Prior Statement Approximately Six Months Earlier That Subsequently Became Inconsistent With His Trial Testimony

At trial, Mr. Allen testified that he recalled speaking with Bob Persons about the "Torricelli note," and that Mr. Persons told him that Senator Stevens had written the letter to "cover his ass." Mr. Sullivan believes he learned that Mr. Allen testified in this manner "at or near the time [Mr. Allen] actually testified." Tr. 307; *id.* at 309 ("Q: And you may have heard it for the first time from the witness stand? A: Or right before then.").[12] Mr. Sullivan, in fact, was not even in the courtroom for the majority of Mr. Allen's trial testimony, and was not aware of the content of Mr. Allen's trial preparation sessions. For a host of persuasive reasons, Mr. Sullivan understandably did not recall that approximately six months earlier Mr. Allen had said he did not remember whether he spoke with Mr. Persons about the Torricelli note.[13]

First, Mr. Sullivan was unaware that an FBI 302 had not been created of the April 15, 2008 interview, and he was never tasked with reviewing the numerous reports of interviews in

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[12] The Report alleges that the "entire team" was told about Mr. Allen's "covering his ass" statement shortly after a September 14, 2008 trial preparation session. Report at 426. But Agent Kepner testified that she did not recall whether she told the whole team "or a subset of the entire team," *id.* at 427, and she did not share this information with Mr. Sullivan.

[13] PIN supervisors were aware of the April 15, 2008 interview of Mr. Allen in real time. In fact, as noted below, the interview of Mr. Allen occurred because the front office directed PIN supervisors to review the official acts documents with Mr. Allen when they were produced by the defense. It is Mr. Sullivan's understanding (based on a review of the contemporaneous documents) that the purpose of the interview was to review official acts documents with Mr. Allen, because the front office and PIN supervisors were evaluating whether the charge the defendant with substantive bribery counts and a potential honest services fraud scheme.

this case to ensure that the agents had prepared and finalized all of their reports of interviews. Nor was the interview mentioned on any law enforcement logs or discovery indices.

In addition, Mr. Sullivan had never (1) participated in an investigative interview like the April 15th interview without an agent being present to take notes and prepare a memorandum of the interview, or (2) instructed, or overheard any of his colleagues instruct, an agent not to take notes or prepare a 302 of an investigative interview. Tr. 28-30. For reasons unknown to Mr. Sullivan, however, the FBI did not prepare an FBI 302 of the interview. Because the April 15th interview was never formally memorialized in an FBI 302 or circulated to the group, Mr. Sullivan had no occasion, reason, or obligation to revisit this issue at any point thereafter.

Second, there was nothing remarkable or memorable about either the April 15th interview or Mr. Allen's statements regarding the Torricelli note, which were not inconsistent when made. The notes of the participants in the interview indicate that the interview was not focused on the Torricelli note. Rather, Mr. Allen was asked about a number of documents that the defense had recently produced to the government; the Torricelli note among them. The fact that only a minor portion of the interview was devoted to asking Mr. Allen about the Torricelli note confirms Mr. Sullivan's refreshed recollection that the primary purpose of the April 15th interview was to show Mr. Allen a number of documents that had been recently produced by defense counsel suggesting that Senator Stevens had taken official acts on behalf of Mr. Allen or his company. At the time, the front office was weighing whether to charge Senator Stevens with a gratuities or bribery case and/or an honest services fraud scheme, in addition to several false statements on his financial disclosure forms. Tr. 329.

That the interview did not focus more heavily on the Torricelli note on April 15th is consistent with Mr. Sullivan's view that the document had potential value to both the defendant

and the government. Mr. Sullivan does not remember when he first read the Torricelli note but he recalls thinking at the time that the note was both potentially exculpatory and potentially inculpatory. Tr. 327-28. Mr. Welch testified that he shared the same view and believed the Torricelli letters "were quite helpful" to the government. Report at 455.

The Torricelli note was potentially inculpatory because it made it difficult for Senator Stevens to contend that he did not know he had an obligation to pay for later work done on the Girdwood home (at a time well after he had paid invoices for the initial work done on the house). The note was potentially exculpatory because it suggested that Senator Stevens wanted to pay for the work by asking for an invoice. *Id.* Because the Torricelli note cut both ways, Mr. Sullivan never saw it as having great exculpatory value.[14] Tr. 331; 000785.

Moreover, when he was eventually asked about the Torricelli note on April 15, 2008, well into the interview, Mr. Allen stated merely that he "did not recall" speaking with Mr. Persons about the Torricelli note, although he was "not saying it didn't happen." 000785. On the day of the interview, this information was entirely neutral and therefore not memorable to Mr. Sullivan because "it didn't make the notes more helpful or less helpful." Tr. 331-32. Put differently, Mr. Allen's statement that he could have spoken with Mr. Persons about the note but did not remember doing so did not alter Mr. Sullivan's view of the Torricelli note as being both potentially exculpatory and potentially inculpatory. Mr. Allen's statement on April 15th had no

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[14] Numerous contemporaneous documents reflect that the government collectively viewed the notes the same way. For instance, Mr. Sullivan's view was apparently shared by Mr. Welch. *See* CRM 067322 ("Bill Welch did not seem to be too upset about the notes that were found related to Stevens asking Bill for invoices."). The prosecution memorandum in this case similarly stated that the Torricelli note was "both helpful and harmful to STEVENS." 017209; *see also id.* ("the notes will make it difficult for STEVENS to claim that he believed the fall 2002 work was incorporated into Christensen Builders' spring 2001 bills" and "the notes will likely also preclude STEVENS from arguing that he simply forgot to pay ALLEN for the work.").

significance whatsoever to the case until months later when Mr. Allen recollected, apparently during a trial preparation session not attended by Mr. Sullivan, that he had in fact talked to Mr. Persons. It is completely understandable that during the intervening six month period, Mr. Sullivan forgot about Mr. Allen's innocuous statement, particularly in light of the additional factors discussed below.

Third, and significantly, Mr. Allen's attorney, Robert Bundy, a well-respected former U.S. Attorney for the District of Alaska, also failed to recall that Mr. Allen was interviewed on April 15 regarding the Torricelli note. Report at 436. Unlike Mr. Sullivan, Mr. Bundy was present during the trial preparation session on September 14, 2008, when Mr. Allen reportedly made the "covering his ass" statement, and had notes of both the April 15 and September 14 meetings, but did not recall that Mr. Allen's original recollection was inconsistent with his trial testimony on the issue. Likewise, Mr. Sullivan's supervisors failed to recall that this interview had taken place even though they were aware of it in real time.

Fourth, Mr. Sullivan only attended a portion of the April 15th interview (by telephone), and did not participate in Mr. Allen's follow-up interview on April 18, 2008. These facts demonstrate that this discussion with Mr. Allen was not of particular importance to Mr. Sullivan, and the discussion about the Torricelli note even less so. By April 2008, it had been determined informally that Mr. Sullivan would a take a secondary, minor role in the *Stevens* matter, with other line attorneys assuming the primary role and the responsibilities of day-to-day management of the case. Mr. Sullivan, in the meantime, spent the bulk of his time between January 1, 2008 and late-July 2008, focusing heavily upon the investigation of other pending matters and handling appellate cases. Mr. Sullivan's supervisors were aware of this informal division of assignments.

Finally, there is no evidence whatsoever that anyone in the government recalled Mr. Allen's earlier innocuous statement, even those directly involved in Mr. Allen's trial preparation sessions. There is simply no contemporaneous evidence that the April 15th statement of Mr. Allen was discussed by anyone in the government before, during, or after the trial until March 2009, when the attorneys were asked to search for notes of the interview, which they promptly located and produced.

2. Mr. Sullivan Understandably Did Not Recall The April 15th Interview Because He (a) Was Not On The Trial Team, (b) Did Not Conduct The *Giglio* Review, (c) Did Not Prepare Mr. Allen For Trial, And (d) Did Not Receive Any Request From His Managers Or The Trial Team To Locate Any Additional Material

As indicated in Section IV, *supra*, Mr. Sullivan did not conduct the *Giglio* review for Mr. Allen or anyone else in the case. Nor should he have. Because Mr. Sullivan did not participate in *any* of the pre-trial witness preparation sessions for Mr. Allen, Tr. 332, or put Mr. Allen on as a witness at trial, he would not have been able to identify inconsistencies between Mr. Allen's witness preparation or anticipated trial testimony and earlier interviews or testimony. Furthermore, Mr. Sullivan's supervisors and the trial team members did not ask Mr. Sullivan for any further material from the few files that remained in his possession after he was removed from the case. While this is probably explained by the fact that there were no 302s created of the April 2008 interviews and, in any event, the trial team members already had their own set of notes, Mr. Sullivan certainly would have given the remainder of his files to any of his managers or anyone on the trial team who requested them to perform the *Giglio* review.

Finally, neither Mr. Sullivan's supervisors nor the members of the trial team directed Mr. Sullivan to review any notes for *Giglio* material. Tr. at 157-58. In fact, Ms. Morris, who was Mr. Sullivan's immediate supervisor at the time and the lead prosecutor in the case from

whom he obtained professional guidance, testified that she did not review her notes for *Brady*, did not instruct anyone else to do so, and "would have never asked another trial attorney or junior trial attorney" to do so. As Ms. Morris put it, reviewing prosecutor notes for *Brady* "would never even cross my mind." Report at 460.

Mr. Sullivan understands that these and certain other practices employed by the Department's senior officials may have their detractors and, with the benefit of hindsight, Mr. Sullivan agrees with them. However, as noted previously, because Mr. Sullivan was a new prosecutor at the time and the most junior attorney assisting the case in a marginal non-trial role, he relied on his veteran supervisors and experienced colleagues for professional guidance and deferred to their judgment and expertise. By following their advice and guidance, Mr. Sullivan not only discharged his professional responsibilities, he acted appropriately and ethically under the circumstances, without mistake, and while exercising good judgment throughout. Mr. Sullivan, in short, bears no responsibility for this issue or any other.

VI. CONCLUSION

Mr. Sullivan should not have been included in the Court's April 7, 2009 order, which has caused harm to his professional reputation that is wholly unjustified. Mr. Sullivan sought to appeal the unauthorized procedures employed in this matter for principled legal reasons, not to avoid public accountability. Indeed, Mr. Sullivan has done nothing wrong for which he deserves to be held accountable, and his conduct has always comported with the Department's highest ethical standards. Mr. Sullivan, in fact, was fully cleared by OPR and his vindication is evidenced by the fact that he continues to prosecute cases in PIN on behalf of the United States.

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Pursuant to the Court's February 8, 2012 Order, Mr. Sullivan respectfully requests that this response be included as an addendum to the Report before it is publicly released.

Respectfully submitted,

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