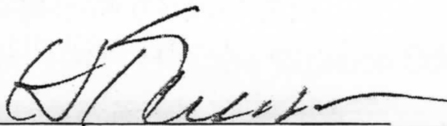
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

	)	
	)	
IN RE SPECIAL PROCEEDINGS	)	Misc. No. 09-0198 (EGS)
	)	
	)	

NOTICE OF FILING OF REPORT TO HON. EMMET G. SULLIVAN

Pursuant to the Court's Order, dated February 8, 2012, the undersigned hereby files the Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated April 7, 2009, and an Addendum containing comments and objections to the Report which were provided to the undersigned by the subjects of the investigation, Joseph W. Bottini, James A. Goeke, Nicholas A. Marsh, Brenda K. Morris, Edward P. Sullivan and William W. Welch III, on March 8, 2012.

Respectfully submitted,



Henry F. Schuelke III (D.C. Bar no. 91579)
Special Counsel

William Shields (D.C. Bar no. 451036)
Janis, Schuelke & Wechsler

Washington, D.C.
Dated: March 15, 2012

United States v. Bagley, 473 U.S. 667, 682-683 (1985), the Supreme Court *and the Government* identified the danger to the defense when prosecutors make an incomplete response to a specific request for *Brady* material:

> *The Government notes that an incomplete response to a specific [Brady] request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist.* In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued.
> We agree that the prosecutor's failure to respond fully to a *Brady* request may impair the adversary process in this manner. And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption.
>
> (emphasis added; citation omitted).

one of Cox's prosecutors

The *Brady* disclosure in *Stevens* was not just incomplete. Mr. Bottini, Mr. Goeke and Mr. Marsh falsely represented that there was "no evidence" that Mr. Allen asked Ms. Tyree to lie.

b. *Napue*

In *Napue v. Illinois*, 360 U.S. 264, 269 (1959), the Supreme Court held that a prosecutor may not knowingly use false testimony, including testimony that relates only to the credibility of the witness, to obtain a conviction, or allow such testimony to go uncorrected:

> it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment . . . The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.
>
> The principle that a State may not knowingly use false evidence, including

> false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.
>
> (citations omitted).

See also United States v. Freeman, 650 F.3d 673, 680 (7th Cir. 2011)("*Napue* does not require that the witness could be successfully prosecuted for perjury. *United States v. Boyd*, 55 F.3d 239, 243 (7th Cir. 1995). In this area of the law, the governing principle is simply that the prosecutor may not knowingly use false testimony. This includes 'half-truths' and vague statements that could be true in a limited, literal sense but give a false impression to the jury. *Id.* ('It is enough that the jury was likely to understand the witness to have said something that was, as the prosecution knew, false.').").

Though "[t]he rule of *Brady* arguably applies" to *Napue* violations (*United States v. Agurs*, 427 U.S. 97, at 103 (1976)), the standard of review under *Napue* is stricter than the *Brady* standard: a *Napue* violation is a "hair trigger" for reversal. *United States v. Gale*, 314 F.3d 1, 4 (D.C. Cir.), reh'g denied, 326 F.3d 228 (D.C. Cir. 2003)("Whereas the prosecution's knowing use of false testimony entails a veritable hair trigger for setting aside the conviction ('any reasonable likelihood that the false testimony could have affected the judgment of the jury,' *see Agurs*, 427 U.S. at 103), non-disclosure of exculpatory evidence (including impeachment evidence) is governed by a more general standard: 'Favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'").

Mr. Allen's eve-of-trial recollection of his CYA conversation with Mr. Persons in 2002 contradicted his statement on April 15, 2008 to Mr. Bottini, Mr. Goeke, Mr. Marsh, Mr. E. Sullivan and Agent Kepner that he did not remember speaking to Mr. Persons about the Torricelli note. Those inconsistent statements were *Brady/Giglio* information which were required to be disclosed to Williams & Connolly, but were not. The prosecutors and Agent Kepner testified in this