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NANCY MAYER WHITTINGTON, CLERK  
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA )  
)  
v. )  
)  
THEODORE F. STEVENS, )  
)  
Defendant. )  
\_\_\_\_\_ )

Crim No. 08-231 (EGS)

FILED UNDER SEAL

SEALED MEMORANDUM

The United States of America, by and through its undersigned attorneys, hereby respectfully files this Memorandum and a redacted copy of a self-styled whistleblower complaint, authored by Special Agent Chad Joy (hereinafter "the Joy complaint") with the Court. A copy of the redacted complaint and this accompanying memorandum have been provided to defense counsel.

As explained herein, the government does not believe that any of the allegations contained in the Joy complaint do not affect the integrity of the trial proceedings or the verdicts in this case. One of the case agents in the *Stevens* prosecution has filed a self-styled whistleblower complaint against another case agent. Neither case agent testified as a witness in the *Stevens* trial. Given the fact that neither one of these individuals testified as witnesses in the *Stevens* trial, as well as other reasons mentioned herein, the Joy complaint – even if all allegations set forth therein are assumed to be true – does not affect the integrity of the trial proceedings or the verdicts. Nevertheless, out of an abundance of caution, a redacted copy of the Joy complaint is being shared with the Court and defense counsel.

**I. Background**

The Public Integrity Section (hereinafter “the Section”) first became aware of the Joy complaint on the afternoon of December 2, 2008. Over the next several days, the Section received additional information, guidance and advice to satisfy itself that any possible statutory and regulatory confidentiality concerns surrounding a request for whistleblower protection had been fully explored and addressed, and would not prohibit a disclosure to the Court at a minimum. Accordingly, the Section notified the Court by email on December 5, 2008 of the likelihood of this filing.

The allegations contained herein are currently under Department of Justice, Office of Professional Responsibility (hereinafter “OPR”) investigation. The undersigned is sensitive to the need for OPR to conduct a thorough and untainted investigation, but also recognizes its obligations in the instant litigation. For example, out of deference to the OPR investigation, the prosecution team has not yet alerted or provided a copy of the Joy complaint to Special Agent Mary Beth Kepner, and does not believe that she knows of the specific allegations in the complaint.

**II. The Joy Complaint**

The Joy complaint makes a series of allegations concerning Special Agent Mary Beth Kepner and her management of evidence and confidential sources. Special Agent Kepner was the primary case agent on the *Stevens* investigation and prosecution as well as other Alaska public corruption matters. Special Agent Joy was the co-case agent on the *Stevens* investigation and prosecution and some of the other Alaska public corruption matters. It is important to note

that Special Agent Kepner and Special Agent Joy *never* testified as witnesses at trial in the *Stevens* prosecution.

**A. Redacted Allegations**

A number of Special Agent Joy's allegations relate to sources, events, or materials that bear no relationship whatsoever to the *Stevens* prosecution. For that reason, those allegations have been redacted from the copy of the Joy complaint that has been provided to defense counsel.

Paragraph 1.a.

Paragraph 1.a. is an overall summary of the allegations, some of which have no relationship to the *Stevens* prosecution. Those allegations that have some bearing on the *Stevens* prosecution have been provided in unredacted form to defense counsel as described in further detail below.

Paragraphs 1.b.i.-iv.

Paragraphs 1.b.i.-iv. identify sources who have no relationship to the *Stevens* prosecution, and certainly were never witnesses in the *Stevens* prosecution. To the best of the undersigned's belief, two of the sources remain confidential sources. Although Rick Smith also was not a witness in the *Stevens* prosecution, his name has not been redacted out of an abundance of caution given his employment as the Vice President of VECO, his close association with Allen, and the fact that his plea and cooperation agreement has been publicly filed in the District of Alaska.

Paragraphs 1.c.-f.

Paragraphs 1.c.-f. describe the alleged mismanagement of the four sources whose names have been redacted and who have no relationship to the *Stevens* prosecution.

Paragraph 2

Paragraph 2 describes an allegation, including conjecture, concerning Special Agent Kepner. Special Agent Kepner never testified as a witness at trial in the *Stevens* prosecution. Therefore, even if proven to be true, the allegation pertains solely to the credibility of Special Agent Kepner, a non-witness, and has no effect on the integrity of the trial proceedings or the verdicts in the instant matter.

Paragraph 4

Paragraph 4 describes a non-specific allegation that makes no reference to the *Stevens* case.

Paragraph 6

Paragraph 6 describes a series of allegations that bear no relationship to the *Stevens* case.

Paragraph 10

Paragraph 10 describes an allegation that bears no relationship to the *Stevens* case.

Concerns for Myself

What concerns Special Agent Joy may have had are not relevant to the issues in the present litigation. These allegations relate solely to whether or not Special Agent Joy should be entitled to whistleblower protection and no other issue in the present litigation.

Actions I Have Taken

The actions taken by Special Agent Joy to file a whistleblower complaint are not relevant to the issues in the present litigation.

People Who Could Provide Further Information

The individuals identified by Special Agent Joy are not relevant to the issues in the present litigation, particularly where the allegations, even if proven to be true, have no effect on the integrity of the trial proceedings or the verdicts in the instant matter.

**B. Unredacted Allegations**

Paragraph 1.g.

Paragraph 1.g describes an allegation concerning Smith. There is no allegation that Smith paid for Special Agent Kepner or her husband's round of golf. Smith did *not* testify in the *Stevens* trial. Therefore, even if proven to be true, the allegation has no effect on the integrity of the trial proceedings or the verdicts in the instant matter. Although Smith was not a witness in the *Stevens* prosecution, this allegation has not been redacted out of an abundance of caution given his employment as the Vice President of VECO, his close association with Allen, and the publicly filed plea and cooperation agreement.

Paragraph 1.h.

Paragraph 1.h. makes a series of allegations concerning Special Agent Kepner and Allen. None of the allegations raise any specific improprieties.<sup>1</sup> Indeed, the last allegation appears to be entirely speculative on Special Agent Joy's part.<sup>2</sup> The bulk of the allegations by

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Special Agent Joy seem to be disagreements over the exercise of Special Agent Kepner's judgment. Therefore, even if proven to be true, the allegations have no effect on the integrity of the trial proceedings or the verdicts in the instant matter.

Paragraph 3

Paragraph 3 describes an allegation concerning Special Agent Kepner. Once again, this appears to be conjecture by Special Agent Joy. As previously stated, Special Agent Kepner never testified as a witness at trial in the *Stevens* prosecution. Therefore, even if proven to be true, the allegation pertains solely to the credibility of Special Agent Kepner, a non-witness, and has no effect on the integrity of the trial proceedings or the verdicts in the instant matter. Because the allegation mentions Allen, this allegation has been disclosed out of an abundance of caution.

Paragraph 5

Paragraph 5 describes an allegation concerning a Title III affidavit. It is unclear what Title III affidavit Special Agent Joy is referring to or the relevance of the search warrant mentioned by Special Agent Joy. Nonetheless, out of an abundance of caution, this allegation has been disclosed.

Paragraphs 7 and 8

Paragraphs 7 and 8 describe allegations concerning Special Agent Kepner. As previously stated, Special Agent Kepner never testified as a witness in the *Stevens* trial. Therefore, even if proven to be true, the allegations pertain solely to the credibility of Special Agent Kepner, a non-witness, and have no effect on the integrity of the trial proceedings or the  

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questioning.

verdicts in the instant matter. Because the allegations mention Allen, this allegation has been disclosed out of an abundance of caution.

Paragraph 9.

Paragraph 9.a. makes an allegation that has already been litigated in open court. Prior to trial, the Court had ordered the United States to provide redacted FBI 302s underlying the information disclosed in the United States' *Brady/Giglio* letter, which the United States believed to be a full and complete disclosure at the time. The United States believed that it had complied with that order. The United States subsequently discovered that it had inadequately redacted a FBI 302 in its review, the Pluta FBI 302 referenced in Paragraph 12, and eventually that FBI 302 was produced in its entirety. The Court ultimately concluded that the United States had redacted information that qualified as possible *Brady* and/or *Giglio*, and ordered the United States to turn over every interview report and grand jury transcript relating to a witness in the *Stevens* investigation. The United States complied with that order, and the defendant and his defense counsel had all of those reports and the then-transcribed transcripts several days prior the conclusion of Allen's cross-examination and a number of days before the start of the defendant's case-in-chief. Therefore, this allegation already has been litigated in open court, and the Court applied a remedy for a perceived discovery violation. This allegation has no effect on the integrity of the trial proceedings or the verdicts in the instant matter.

Paragraph 9.b. makes an allegation that has already been litigated in open court. As the court will recall, the United States acknowledged to the Court that it had in its possession of a copy of the \$44,000 check, had decided not to use the check in its case-in-chief, and for that reason had not produced that check pursuant to Rule 16. The United States ultimately used the

check on the re-direct examination of Allen and admitted the check into evidence. This Court ultimately ruled that the United States committed a discovery violation and struck the check and any evidence relating to the Mustang transaction from the evidence. Therefore, this allegation already has been litigated in open court, and the Court already applied a remedy to address the discovery violation.

Paragraph 11

Paragraph 11 seems to suggest that although Special Agent Joy believed that Mr. Williams' health became very poor, and that Mr. Williams might die while in Washington, D.C., the United States nonetheless acted improperly when Mr. Williams had been sent home for health reasons. This matter has already been extensively litigated in open court, and the United States did not send Mr. Williams back to Alaska for any improper reason.<sup>3</sup>

The United States – at the time and in retrospect, absolutely correctly – observed Mr. Williams' rapidly-deteriorating medical condition. This fact, in conjunction with information provided by Mr. Williams to both Special Agent Joy and to prosecutors that Mr. Williams had missed secondary testing in Alaska because of his presence in D.C., and that his doctors had called Mr. Williams about the missed appointments several times, caused the United States to schedule Mr. Williams to return to Alaska to engage in the testing and seek prompt medical treatment. Special Agent Joy had been told repeatedly that he needed to inform Mr Williams that he remained subject to a defense subpoena, and that Mr. Williams should call defense counsel to

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<sup>3</sup> As the Court may recall, Mr. Williams was under defense subpoena, which did not require his appearance back in D.C. until October 6<sup>th</sup>. The United States and the Court offered the defendant numerous opportunities to present Mr. Williams' testimony to the jury, including his return pursuant to the subpoena, a Rule 15 deposition, and two-way video conferencing. The defendant ultimately elected not to present any evidence from Mr. Williams.



schedule his return. Indeed, Mr. Williams already had called defense counsel at least once while in Washington, D.C., leaving in a message to defense counsel both his hotel phone number in Washington, D.C. and his cellular phone number. Mr. Williams and defense counsel ultimately had approximately two weeks to schedule his return to Washington, D.C. to appear as a defense witness. The United States learned that the secondary testing revealed that Mr. Williams had acute cirrhosis of the liver, with a liver function of approximately 30 percent, and that Mr. Williams needed an urgent procedure to remove fluid from his chest cavity to prevent his lungs from stopping functioning.

It is important to note that Special Agent Joy provided an affidavit to this Court concerning Mr. Williams. A copy of that affidavit can be found at Docket 105. In Special Agent Joy's affidavit, he averred under oath that Mr. Williams' health condition had deteriorated rapidly, and that the reason Mr. Williams had been sent to Alaska was because of his medical condition.

Special Agent Joy further suggests, but does not specifically state, that the decision to send Mr. Williams home had been made or created by Mr. Marsh. This, however, is not accurate. The decision to send Mr. Williams home was discussed by members of the prosecution team, including Mr. Marsh. Mr. Marsh also did not make the final decision to return Mr. Williams to Alaska due to his health considerations. That decision was made by the Chief of the Public Integrity Section. *See* Dkt. 105. Mr. Marsh also had no involvement in the preparation or signing of Special Agent Joy's affidavit.

Paragraph 12

Paragraph 12 makes an allegation that Mr. Marsh attempted to conceal a FBI 302 from defense counsel during the trial. As Special Agent Joy notes, the United States produced this FBI 302. This allegation already has been litigated in open court, and the Court already applied a remedy, which was its order requiring the United States to produce all interview reports and grand jury testimony of witnesses in the *Stevens* investigation.

As an initial matter, Special Agent Joy inaccurately states that at the time of the event, “[t]he judge had previously required prosecutors to turn over all FD-302s and this was one that was not provided.” That is not correct. At the time, the Court had required the prosecution to turn over redacted 302s that contained *Brady/Giglio* information. The Pluta 302 had been turned over in a redacted form, but in what the United States soon learned was in an inadvertent, improperly-redacted form.

This allegation by Special Agent Joy also grossly misunderstands the chain of events, and in particular Mr. Marsh’s involvement in them, concerning the Pluta 302. It was in fact Mr. Marsh who, just prior to Pluta’s testimony, conducted a review of the Pluta 302 and became concerned that portions of the Pluta 302 had been improperly redacted. Mr. Marsh then notified (both directly and indirectly) the prosecution team, including Public Integrity Section Chief William M. Welch, that there appeared to be some problems relating to the prior production of the Pluta 302, and requested an all-hands meeting to determine what, if any, the government’s disclosure obligations should be with respect to the Pluta 302.

Special Agent Joy’s account of the meeting is also inaccurate, and in particular his allegations regarding Mr. Marsh. During the meeting, Mr. Marsh stated on more than one

occasion that if *Brady* or the Court's order applied to the Pluta 302, then the United States should produce the appropriate portions of the Pluta 302. If Special Agent Joy had left the meeting by that point in time, then he missed those statements. At the conclusion of the meeting, there was a group decision to turn over the appropriate portions of the Pluta 302, and Mr. Marsh agreed with that decision. As Special Agent Joy alleges, that is in fact what happened. In sum, the United States eventually produced the Pluta 302 in its entirety, and the allegation has no effect on the integrity of the trial proceedings or the verdicts in the instant matter.

Paragraph 13

Paragraph 13 relates to thirty boxes<sup>4</sup> of bates-stamped discovery received from defense counsel prior to trial. Special Agent Joy seems to suggest that Public Integrity prosecutors erred in not providing certain documents to the FBI for processing. The documents in question were not grand jury materials, but rather were documents obtained through a voluntary production by defense counsel. All of the documents had been bates stamped prior to production by defense counsel. Upon receipt of those documents, Public Integrity had the documents scanned and coded into an electronic database in Washington D.C. Even if proven true that these documents should have been processed into a FBI database pursuant to a FBI regulation, the internal management of voluntarily-produced documents has no bearing on the *Stevens* trial.

Paragraph 14

Paragraph 14 alleges that Public Integrity prosecutors "accepted original evidence" from a witness, which the prosecutors then lost after receiving it. This, too, is

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<sup>4/</sup> Defense counsel actually produced approximately forty-five boxes of materials.

incorrect. On May 3, 2007, [REDACTED] appeared before [REDACTED]. In connection with [REDACTED] also brought with [REDACTED] to [REDACTED] two physical exhibits: a note card from Senator Stevens and a gold keychain. Physically before the [REDACTED], those two items were taken from [REDACTED], placed in a cellophane envelope and marked as [REDACTED].

On May 11, 2007, Special Agent Kepner appeared before [REDACTED] and summarized the [REDACTED] had provided eight days earlier before the [REDACTED]. During that [REDACTED] the government introduced [REDACTED] – the keychain and the note card – to [REDACTED] and marked the cellophane envelope containing those items as [REDACTED]. Because the keychain and note card were now [REDACTED], they were then sealed and placed in a secure cabinet within Public Integrity.

At a subsequent time, the sealed envelope containing those exhibits was initially overlooked by prosecutors during a search of that cabinet. A subsequent search of the same cabinet was successful, and the [REDACTED] exhibit was found. At no time were the materials “lost” as the allegation states. Finally, [REDACTED] authenticated at trial the same keychain and note card, and those exhibits were admitted into evidence.


#### Motivation to Report

Special Agent Joy’s motivations for filing the complaint are not relevant to the issues in the present litigation. This is particularly true where this section does not set forth any

other allegations. However, because Special Agent Joy listed the *Stevens* trial as one factor, this section has been produced out of an abundance of caution.

Respectfully submitted,

WILLIAM M. WELCH II  
Chief, Public Integrity Section

  
BRENDA K. MORRIS  
Principal Deputy Chief

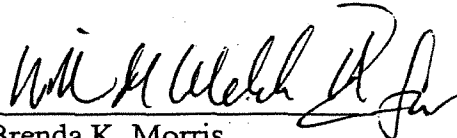
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 11 day of December, 2008, I hand delivered a copy of the foregoing sealed memorandum with redacted attachment to the following:

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